Arbitration CAS 2022/A/9165 BGPU-BG Pathum United v. Daniel Garcia Rodriguez & Fédération Internationale de Football Association (FIFA), award of 5 September 2023

Panel: Mrs Anna Bordiugova (Ukraine), President; Mr Lars Hilliger (Denmark); Mr José Juan Pintó (Spain)

Football
Termination of contract without just cause
Interpretation of the parties' real intentions
FIFA's "default" competence
Mutual expressions of intent
Just cause
Liquidated damages clause
Positive interest
Respondent in appeal proceedings prevented to file counterclaim

1. **Article 18 (1) of the Swiss Code of Obligations (SCO) states that when assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.**

2. **FIFA always maintains "default" competence to hear disputes of an international dimension between clubs and players, unless the competence to resolve such disputes is assigned by the parties to an employment contract to an independent national arbitration tribunal or national courts.**

3. **In accordance with Article 1 of the SCO: *"The conclusion of a contract requires a mutual expression of intent by the parties"*. Further, *"an agreement is a bilateral juridical act which implies the exchange of at least two expresssions of intent, being it neccessary that each party lets the other know, with all the precision required, that it wants to provoke a certain legal effect. An offer is not enough to provoke the legal effect described by the offeror, as the contract is only considered concluded if three supplementary pre-requisites are met: acceptance, reciprocity and concordance"*. The execution of a contract requires two concurrent declarations of intent, i.e. an offer by one party and an acceptance by the other party. Furthermore, the declarations of intent must be corresponding in order for there to be a valid contract. In that regard, an offer is no longer to be considered valid and binding if it has been rejected or has been accepted in a manner which does not constitute a full and unconditional acceptance of the terms offered.**

4. **Under Swiss law, just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship (Article 337 (2) SCO). The**

definition of "just cause", as well as the question and whether just cause in fact existed, shall be established in accordance with the merits of each particular case. In other words, 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.

5. The parties to a contract of employment are free to agree to an option to unilaterally terminate the said contract without any just cause. This agreement is commonly referred to as a "liquidated damages clause": in such clause the amount to be paid by the breaching party in the event of a breach and/or of a unilateral, premature termination of the employment contract is established. However, the principle of contractual freedom and stability is not absolute. In order for a liquidated damages clause to be valid, essentially three cumulative requirements shall be met: (i) the clause shall be written in a clear and unequivocal manner; (ii) there shall be no evidence of coercion or duress in conclusion of the clause; and (iii) the clause shall not demonstrate excessive commitment by one party that grants the other party undue control. Intervening with the parties' free will enshrined in a liquidated damages clause should be confined to exceptional cases. This would, in principle, apply in the case of excessive disproportionality i.e., a liquidated damages clause may be incompatible with the general principles of contractual stability and considered null and void if the reciprocal obligations it sets forth actually disproportionately favour one of the parties and gives it an undue control over the other party.

6. Whilst establishing the amount due as compensation, the parties to a contract are normally focusing on the principle of "positive interest" which shall put the injured party in the position it would have had if the contract had been performed properly. This principle is not entirely equal, but is similar to the praetorian concept of *in integrum restitutio*, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.

7. It follows from Article R55 of the CAS Code that the respondent to an appeal procedure is not entitled to file any counterclaim to challenge any or all the rulings of an appealed decision. Instead, to file any claims itself, the respondent would have had to file an independent appeal against the decision in question, within the applicable deadline.

I. PARTIES

1. BGPU-BG Pathum United ("BGPU" or the "Appellant", or the "Club") is a Thai professional football club with its registered office in Pathumthani, Thailand. It is a member of the Football Association of Thailand ("FAT"), which in turn is affiliated to the Fédération Internationale de Football Association.

2. Mr. Daniel Garcia Rodriguez, "Toti" (the "Player" or the "First Respondent") is a professional football player of Spanish nationality.

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

4. The Appellant and the Respondents are together referred to as the "Parties".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established based on the written submissions of the Parties, the hearing and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

A. Background Facts

6. On 27 July 2015, the Player and the Club ("the parties") concluded an employment contract (the "First Employment Contract"), valid from 1 August 2015 until 31 December 2017. This employment contract did not contain any provision referring to dispute resolution, i.e. the choice of court /choice of law clause.

7. On 23 June 2017, the Player and the Club concluded a new employment contract (the "Second Employment Contract"), valid from 1 January 2018 until 31 December 2019. This Second Employment Contract contained the following, relevant to these proceedings, provision:

   "13. Due to the international nature of the present contract, any disputes related to the Contract should be submitted in first instance to the Player Status Committee of FIFA and in appeal to the Court of Arbitration for Sports (CAS), both proceedings will follow the Swiss legislation and the FIFA regulations for the merits of the case as well as its own rules about the procedure enforce at the time of any possible dispute. Both parties expressly renounce the submission of any dispute to any other body different form FIFA and the CAS. Additionally, and for the avoidance of doubt, any dispute shall be resolved in English".

8. Additionally, the "Signing Fee on professional Football Player Agreement" was signed which foresaw, among others, the following:

   "…The Player shall be entitled to the signing fee at THB 2,000,000 (Baht Two Million Only) net. … [The Signing Fee shall be payable to the Player as follows]:

   ('THB') 1,000,000 (Baht: One million Only) net shall be payable to the Player on 31st January 2020.

('THB') 1,000,000 (Baht: One million Only) net shall be payable to the Player on 31st January 2021".

9. On 28 October 2019, the Player and the Club signed the third employment contract (the "Third Employment Contract") valid from 1 January 2020 until 30 November 2021. This Third Employment Contract contains the following, relevant to these proceedings, provisions:

"5. Termination

5.1. This agreement may be terminated before its expiry by a mutual agreement between the Parties.

[…]

5.3. From 1st July 2020, BGPU shall be entitled to terminate this Agreement prematurely with compensation of 3 (three) month salary. The Player agrees that the above net indemnity is just and fair and compensate the damage caused by the Club.

[…]

7. *The agreement shall be governed and construed in accordance with the laws of Thailand and the Parties agree to submit to the Thai Courts".*

10. On 9 December 2020, a meeting between the Player and the Club's management took place in order to discuss possible extension of their employment relationship. Between 11 and 21 December 2020, the Player and Mr. Samai Seeyango, also referred to as Mr. K, the Club's coordinator and assistant to the CEO, had extensive discussions over a messenger called "Line" regarding the possible extension of the Player's employment with the Club.

11. On 15 December 2020, Mr. Samai Seeyango ("Mr. K"), via Line, provided to the Player an electronic document called "Attachment to Extend Contract season 2021-2023_Toti_final.pdf" (the "Extension") for his signature, which the Player initially did not sign. The reason why the Player initially did not sign the Extension apparently was because the conditions of the air tickets granted to him and his family for two seasons and paid by the Club were unclear to him and because no Sign-on fee was foreseen for the period of contract extension, i.e. for the 2021/2022 and 2022/2023 seasons. He requested the same sign-on fee as for the seasons 2019/2020 and 2020/2021 to be included into the Extension, namely Thai Baht (THB) 1.000.000 for each season, which is approximately EUR 27.400 per season considering the exchange rate in December 2020.

12. However, on 18 December 2020, the Player wrote to Mr. K that, after *"discussing agreement with family and advisors"*, he had finally decided that he was ready to sign the Extension as initially drafted by the Club.

13. On the same day, Mr. K replied via an emoji holding a sign stating *"Okay!"*.

14. On 19 December 2020, the Player wrote to Mr. K requesting him to organize a meeting with the Club's president and CEO *"to finalise everything and make everything clear of misunderstanding"*, to which Mr. K replied that he would *"tell [his] boss"*.

15. On 20 December 2020 Mr. K informed the Player that the Club's president told him, Mr. K, that the meeting with the president and CEO would take place after the Player's return from loan to Samutprakarn club. Later, on the same day, the Player returned the signed Extension via messenger Line to Mr. K. However, the Extension was never returned countersigned by the Club to the Player.

16. On 21 December 2020, the Player received from Mr. K the loan form, which had to be signed in order for the Player to be temporarily transferred to Samutprakarn club until 30 April 2021. He requested the Extension to be sent to him, countersigned by the Club, to which Mr. K responded that *"… we will talk on your extension in April as soon as you finish loan from Samutprakarn. Is this OK? If you don't want to go to Samutprakarn, let me know and I will inform the President"*. To this the Player responded: *"I am OK with going ok loan but we had an agreement on contract extension"*, to what Mr. K replied: *"Boss told me that you have to go to Samutprakarn and he will decide on your extension later"*. The Player responded: *"Find enclosed loan agreement signed in the understanding that, as agreed with President in our personal Meeting and later sent by you, I will have extension agreement signed back"*.

17. On 16 April the Player wrote to Mr. K, informing him that the translator of the Club informed him that he had to join the team's training, however he was still on loan and would need a permission from Samutprakarn to join BGPU. On the same day Mr. K replied that the Player did not have to come for a training and had to wait for further instructions from BGPU.

18. According to the Player, on this same day he was informed by Mr. Manuel Seisdedos ("Mr. Manny"), an agent of Spanish origin, based in Thailand, who acted as intermediary between him and the Club since when he joined the Club in 2015 and was the person who assisted him in signing all his contracts with the Club, that the Club was not interested in his services any longer.

19. On 20 April 2021, on request of the Player and drafted by his legal team, the Club and the Player signed a written document named *ASSEMBLED* ("Authorisation") as follows:

    "1. […] BGPU has expressly and irrevocably authorized its employee, Mr. Daniel García Rodríguez, to seek and negotiate new employment opportunities with football clubs across the globe […]. This authorization shall be valid until 30 June 2021.

    2. BGPU hereby expressly and irrevocably declares that, in doing so, Mr. García shall not be incurring in any breach whatsoever of the [FIFA RSTP] (or any other FIFA, AFC or FA of Thailand Regulations, especially, but not limited to, article 17 and article 18.3 therein.

    Mr. García hereby expressly and irrevocably declares that, by doing so, BGPU shall not be incurring in any breach whatsoever of the [FIFA RSTP] (or any other FIFA, AFC or FA of Thailand Regulations) and Mr. García shall not file any form of a claim or complaint against BGPU regarding to this ASSEMBLED […].

3. *In the event that Mr. García presents to BGPU an employment offers from any other football club in the world, BGPU hereby expressly and irrevocably pledges to immediately release Mr. Daniel García Rodríguez from his employment contract with BGPU, so he can freely accept any of the received employment offers from other football clubs.*

4. *To enable the above, BGPU and Mr. García shall sign the appropriate agreement of mutual termination of the employment contract between [them], and hereby irrevocably commits to pay Mr. García the amount equal to three (3) monthly salaries, and Mr. García commit to release and fully discharges any and all claims against BGPU following the singing of the abovementioned termination agreement".*

20. On 27 April 2021, the Player wrote to Mr. K requesting further orders for him returning training with the Club because his loan was coming to an end and he had to re-join the Club as of 1 May 2021. On the same day Mr. K sent him a document entitled "BGPU HOME PROGRAM TRAINING". However, the Player noted that this document did not contain any timeframe for home training, i.e. it was not mentioned for how long he would have to train on his own. Thus he requested this information from Mr. K, who responded *"3-4 week then will change another program from Dr. Big"*, to which the Player responded as follows: *"I need an official document where the club show I must training at home until we finish out relationship otherwise I have to show myself Monday"*.

21. On the same day Mr. K. responded: *"Due to Covid, you are required to train at your house until 1 June. Our Fitness and coaching staff will send you an instruction for self training. We will monitor Covid situation and will let you know once your training program changed"*.

22. On 25 May 2021, the legal counsels of the Club sent a letter to the Player and his agent, among others, rejecting the statements allegedly made by the Player in social media regarding the existence of any extension of the parties' employment relationship until April 2023 and attaching the draft of a mutual termination agreement, dated 21 May 2021, foreseeing no further payments to the Player to be made by the Club as result of the termination, to be signed by the Player. The letter stated that the employment relationships between the Player and the Club came to a natural end. To this letter a Power of Attorney, dated 17 May 2020 was attached, empowering the attorneys, mentioned therein, to represent the Club *"before FIFA judicial bodies, Court of Arbitration for Sports or other judicial institution and / or any other form of settlement negotiations in relation to the dispute against professional football player Mr. Daniel Garcia Rodriguez"*.

23. On 1 June 2021, the Player replied via his legal counsels, reiterating, in general, that the employment relationship was to be considered as extended notwithstanding the lack of signature of the Extension by the Club, just as it was denied that the Player did not have an interest in extension of the employment relationship, because it was the Club who gave the Player an opportunity to search for a new employment, to what, the Player, in principle, agreed.

24. On 10 June 2021, the Player allegedly requested the Club to issue a letter, stating until when he was employed and what was his remuneration.

25. On 16 June 2021, the Club, via its counsels, sent the second letter to the Player and reiterated its position, arguing that the employment relationship came to a natural end by May 2021 because none of the parties was interested in its continuation; the Player was requested to return

to the Club the car he was provided with. To this letter the Club attached an undated letter signed by the Club's Assistant Managing Director, which stated, as requested by the Player, as follows: *"This is to certify that Mr. Daniel Garcia Rodriguez was employed by [the Club] until 25th May 2021. His position was Football Player. The Company paid to [the Player] at Baht 526,316 (Five Hundred Twenty-Six Thousand and Three Hundred Sixteen Baht Only) net per month salary […]"*.

26. Sometime in the end of June 2021 the Player returned the car and left Thailand.

27. On 6 July 2021, the Player, via his counsels, replied that although the Extension was not signed by the Club, it was valid and binding and that the Club behaved in bad faith refusing to respect the agreement. The Club was informed that the Player was about to commence the proceedings in front of the FIFA Dispute Resolution Chamber (the "FIFA DRC" or the "Chamber")).

28. On 27 July 2021, the Club replied stating that the parties have mutually and tacitly terminated their employment relationship by the end of May 2021. The Club warned the Player that according to the Employment Contract FIFA was not competent to solve any dispute between them.

29. On 30 July 2021, the Player signed an employment contract with the Spanish club CD Guijuelo, valid from the date of signature until 30 May 2022 with a monthly salary of EUR 1,700. According to publicly available information, this contract was subsequently extended until 30 June 2023.

30. On 3 September 2021, the FAT rejected the issuance of the International Transfer Certificate (ITC) because according to its records the employment contract was due to expire on 30 November 2021.

B. Proceedings before the FIFA Dispute Resolution Chamber

31. On 14 March 2022, the Player lodged a claim before FIFA DRC against the Club claiming that in December 2020 the Club demonstrated to the Player its interest in renewing their employment relationship until 30 April 2023 and to release him on loan for four months to Samutprakarn club. The parties met on 9 December 2020 to discuss these two issues. The draft extension was sent to him by the Club manager, and he returned it signed.

32. The Player claimed that it was usual abusive practice for the Club to procrastinate and return to him all the documents signed by the Club late and it was the case with the Extension as well. The Player further stated that the extension of the employment relationship was the reason why he accepted to be loaned out to Samutprakarn. He concluded that the Extension, therefore, was to be considered as signed and valid because all the essential elements were present in the document and the Club had intentionally created legitimate expectations in him that both parties wished to extend their relationships.

33. In his view the Club's consent to extend the contract was *"pre-granted with the sending of the employment contract, the request to come and sign, and by virtue of the club's own acts"*. The Player claimed that *"the doctrine of culpa in contrahendo as applied to the present dispute necessarily leads us to conclude that*

BGFC is inescapably liable for those damages caused to the [Player] by breaching the terms and conditions of the agreed documents". The Player claimed that the compensation foreseen by Article 5.3 of the Third Employment Contract was not applicable because it was not a penalty clause but a buy-out clause and requested FIFA to award him the compensation from the Club for unilateral breach of contract without just cause in the amount of THB 11.500.00, equal to his expected salary until 30 April 2023 and further compensation for damages in the amount of THB 8.000.000 and award an interest of 5% p.a. on any amount awarded as of 25 May 2021.

34. Regarding the competence of FIFA to deal with his claim, the Player sustained that due to the risk and legal uncertainty that would be represented by going to the Thai courts, in a case that is ambiguous as to the submission to Thai law and in which, precisely, the club's basis for termination is a FIFA pronouncement and not a Thai precept, FIFA had jurisdiction over the dispute between the parties.

35. The Club rejected all the claims of the Player, stating that no agreement to extend the Contract was reached and that only the loan was agreed between the parties, after the end of the loan the parties decided to terminate their relations and for this purpose the ASSEMBLED was issued on 20 April 2021, by way of which both parties renounced any claims toward each other. The Club maintained that the employment contract was tacitly terminated by the parties. The Club also disputed the competence of FIFA based on Article 7 of the Third Employment Contract.

36. On 4 August 2022, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

"1. The claim of the [Player] is accepted.

2. The [Club] has to pay to the [Player], the following amount(s):

- THB 10,874,181 as compensation for breach of contract without just cause plus 5% interest p.a. as from 14 March 2022 until the date of effective payment.

3. The [Club] is ordered to provide the [Player] with the relevant certificate attesting the payment of taxes to the competent authorities in the amounts under point 2 above.

4. Any further claims of the [Player] are rejected. […]".

37. On 5 September 2022, the grounds of the Appealed Decision were communicated to the Parties determining, *inter alia*, the following:

- The Chamber emphasized that in accordance with art. 22(1) of the Regulations, FIFA is competent to hear employment-related disputes between a player and a club with an international dimension *"without prejudice to the right of any player* (...) *or club to seek redress before a civil court for employment related disputes"*;

- In the present matter, the Chamber duly noted that the Player and the Club had decided that any dispute that would arise from the contract would be submitted to the Thai courts.

The Chamber recalled that parties may freely agree to give jurisdiction to a civil court, and that such choice shall always prevail. However, the Chamber, recalling its jurisprudence as well as the CAS jurisprudence in this regard, highlighted that for a choice of law to be valid, it must be specific as to which local courts the parties agree to submit their disputes to. Based on that the Chamber concluded that it was competent to hear the dispute between the Player and the Club, and consequently declared the claim admissible;

- After analysing the documentation on file, the Chamber concluded that the *essentialia negotii* were included in the Extension which consisted of the amendment of the contractual term of the employment relationship, maintaining the remaining contractual provisions unchanged;

- The Chamber deliberated that by sending the Extension drafted by the Club itself, and taking into account that the Player returned the signed copy of the said Extension on 21 December 2020, which is not in dispute, the consent and intention of the parties to extend their employment relationship can be established. The intention of the Club and the Player to expand their employment relationship was deemed to be clear by the DRC;

- The Chamber emphasized that if the Club had withdrawn its interest in extending the contractual relationship, it did so after its consent to the extension had been validly given and therefore after binding agreement between the parties had been perfected. Bearing in mind the aforementioned considerations, the Contract was due to expire on 30 April 2023. Subsequently, the Chamber proceeded to determine whether any of the parties had terminated the Contract and if such termination was with or without just cause;

- In this regard, the Chamber referred to the Club's correspondence of 25 May 2021. In the said correspondence the Respondent stated that the Player was no longer employed and was enclosing the draft of the *"mutual termination agreement"* to be signed by the Player yet sent unsigned by the Club;

- The Chamber deemed that, based on the said correspondence, the Club terminated the Contract. Moreover, the DRC observed that the said correspondence did not include any justification for the termination of the employment. On account of the aforementioned, the Chamber decided that the Club had unlawfully terminated the Contract with the Player and should be held liable for such breach;

- With regard to the consequences of such unjustified breach of contract committed, the Chamber observed that there was no outstanding remuneration at the time of termination;

- The Chamber then turned to the calculation of the amount of compensation payable to the Player by the Club in the case at stake, recalling first the applicable principles.

- The Chamber first examined whether the parties had beforehand agreed upon an amount of compensation payable in the event of breach of contract. In this regard, the Chamber

took note of the wording of clause 5.3 of the Contract, which established that: *"From 1 July 2020, BGPU shall be entitled to terminate this Agreement prematurely compensation of 3 (three) month salary. The Player agrees that the above net indemnity is just and fair and compensate the damage caused by the Club"*;

- After analysing the content of the aforementioned clause, the Chamber concluded that it did not fulfil the criteria of reciprocity and proportionality, in line with the Chamber's longstanding jurisprudence, and therefore could not be taken into account for establishing the amount of compensation payable to the Player. In particular, the Chamber noted that the said clause was not reciprocal, since it solely allowed the Club to terminate the contract. Moreover, the Chamber found that the amount of compensation to be paid to the Player was not proportionate vis-a-vis the residual value of the Contract;

- As a consequence, the Chamber determined that the amount of compensation payable by the Club to the Player had to be assessed in application of the other parameters set out in art. 17(1) of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"). The Chamber recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable;

- The Chamber then proceeded with the calculation of the monies payable to the Player under the terms of the Contract from the date of its unilateral termination until its end date on 30 April 2023. Consequently, the Chamber concluded that the amount of THB 11.500.000 (i.e. the THB 500.000 * 23 months) should serve as the basis for the determination of the amount of compensation for breach of contract;

- In continuation, the Chamber verified as to whether the Player had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. Indeed, the Player found employment with Guijuelo. In accordance with the pertinent employment contract, the Player was entitled to the total remuneration of EUR 17.000. Therefore, the Chamber concluded that the Player mitigated his damages in the total amount of THB 625.819, considering the currency conversion at the date of the decision;

- On account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the Club must pay the amount of THB 10.874.181 to the Player (i.e. THB 11.500.000 minus THB 625.819), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter;

- Taking into consideration the Player's request as well as the constant practice of the Chamber in this regard, the latter decided to award the Player interest on said compensation at the rate of 5% p.a. as of the date of claim until the date of effective payment;

- The Chamber finally determined that the Club shall be ordered to provide the Player with the relevant certificate attesting the payment of taxes to the competent authorities in the amounts awarded in this decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

38. On 26 September 2022, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Player and FIFA, with respect to the Appealed Decision, in accordance with Articles R47 and R48 of the 2021 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission the Club nominated Mr. Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark, as an arbitrator.

39. On 17 October 2022, the Respondents jointly nominated Mr. José Juan Pintó Sala, Attorney-at-Law in Barcelona, Spain, as arbitrator.

40. On 21 November 2022, after an agreed extension, the Appellant submitted its Appeal Brief.

41. On 28 November 2022, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the arbitral panel appointed to decide the present matter was constituted as follows:

President: Ms. Anna Bordiugova, Attorney-at-Law, Kyiv, Ukraine

Arbitrators: Mr. Lars Hilliger, Attorney-at-Law, Copenhagen, Denmark

Mr. José Juan Pintó Sala, Attorney-at-Law, Barcelona, Spain

42. On 23 January 2023, the Player, and on 27 January 2023, FIFA, based on agreed upon extensions, filed their respective Answers in accordance with Article R55 of the CAS Code.

43. On 30 January 2023, upon being invited to express its opinion in this respect, FIFA indicated its preference for the case to be solved based on the Parties' written submissions.

44. On 6 February 2023, the Appellant and the First Respondent informed the CAS Court Office that their preference was for a hearing to be held.

45. On 8 February 2023, the CAS Court Office, on behalf of the Panel, informed the Parties that, pursuant to Article R57 of the CAS Code, the Panel had determined that a hearing would be held in this matter.

46. On 14 February 2023, the Parties were requested to provide, by 28 February 2023, the following:

- The Appellant - to confirm that the content of the witness' statements of Mr. Piyasak and Mr. Seeyango, dated 12 April 2022, as submitted to FIFA and to this Panel, remained

valid and to produce a translation into English of Exhibits G.1 and H.1 to the Appeal Brief;

- The First Respondent - to produce his employment contract(s) with CD Guijuelo duly translated into English and the translation into English of Exhibit 5 to his Answer, namely the message exchange with Mr. Manuel Seisdedos;

- The Second Respondent – to produce the translation into English of Exhibits 11 and 13 to its Answer, namely the submissions of the First Respondent addressed to the FIFA DRC.

47. On 21 February 2023, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by FIFA on the same day, by the Player on 27 and by the Club on 28 February 2023.

48. On 28 February 2023, the Appellant and the First Respondent provided the documents requested by the Panel. The Second Respondent, based on upon agreed extension, provided the requested documents on 10 March 2022.

49. On 12 April 2023, the Appellant sent to the CAS Court Office new pieces of evidence requesting their admission into the case file.

50. On 18 April 2023, the First Respondent objected to the admissibility of both documents, whereas the Second Respondent remained silent.

51. On 19 April 2023, the CAS Court Office informed the Parties that the Panel had decided to admit both documents with the grounds for such decision to follow in the final award.

52. On 26 April 2023, a hearing was held. At the outset of the hearing, all Parties confirmed that they had no objection as to the constitution and composition of the arbitral tribunal.

53. In addition to the Panel and Ms. Delphine Deschenaux-Rochat, Counsel to the CAS, the following persons attended the hearing:

1) For the Club:

- Mr. Menno Teunissen and Mr. Gauthier Bouchat, Counsels, in person;

- Mr. Samai Seeyango, Mr Piyasak Bhumichitra and Prof. Geert van Calster by video-conference;

2) For the Player:

- the Player himself, in person;

- Mr. Jesús Manuel Ortega Calderón, Mr. Marc Cavaliero and Mr. Jaime Cambreleng, Counsels, in person;

- Ms Pilar Pérez, interpreter, in person;

3) For FIFA:

- Mr. Roberto Nájera Reyes and Mr. Alexander Jacobs, Senior Legal Counsels of the FIFA Litigation Department, in person.

54. During the hearing the Parties had the opportunity to present their case, to submit their arguments and to answer the questions posed by the Panel. After the Parties' opening statements, Mr. Samai Seeyango, Club's coordinator, Mr. Piyasak Bhumichitra, Club's former CEO, Professor Geert van Calster, an expert in International Private Law were heard as witnesses; Mr. Daniel Garcia Rodriguez was heard as a party. All persons heard were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss Criminal law. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses and the expert-witness.

55. Afterwards, the Parties submitted their oral closing statements. At the end of the hearing, the Parties confirmed that they had no objections as to the way in which the arbitration proceedings had been conducted, confirming that their right to be heard had been fully respected.

56. The Panel confirms that it carefully heard and considered in its decision all the submissions, evidence and arguments, presented by the Parties, even if they have not been specifically summarized or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

57. The Club submitted the following in its Appeal:

a. Generally, as to the facts of the case

- The terms of the First Employment Contract valid from 1 August 2015 until 31 December 2017 were negotiated on behalf of the Player by Mr. Pelayo Garcia, professional football intermediary connected to You First Sports Agency, by which the Player is represented since 2015, including in previous litigation in front of FIFA and currently before CAS. This contract contained no specifications concerning applicable law or competence;

- In 2017, the Player and the Club concluded the Second Employment Contract valid from 1 January 2018 until 31 December 2019. In the negotiations the Player was successfully represented by You First Sports Agency. This contract contained a jurisdiction clause in favor of FIFA;

- On 28 October 2019, the Player and the Club signed the Third Employment Contract valid from 1 January 2020 until 30 November 2021. Considering the Player's previous experience as well as the fact that the Player has lived in Thailand with his family for 5 years and was connected to the country as his family-home, the Parties negotiated amongst others, new terms: i) Article 7 which provided that: *"This Agreement shall be governed and construed in accordance with the laws of Thailand and the Parties agree to submit to the Thai Courts"*; ii) Article 5.3: *"From 1 July 2020, BGPU shall be entitled to terminate this Agreement prematurely compensation of 3 (three) month salary. The Player agrees that the above net indemnity is just and fair and compensate the damage caused by the Club"*. Appendix 1 to the Contract 3 provided for a net monthly salary of THB 500,000;

- By the end of 2020, the Player and the Club started negotiating a loan to Samutprakarn until April 2021 and a possible extension of contract until April 2023. Whereas an agreement was reached regarding the loan, the Player and the Club could not come to an agreement concerning any extension. The Player expressly rejected the Club's offer as it did not comply with his wish in terms of signing fee and number of air tickets. Therefore, the contractual negotiations were terminated and postponed to April 2021, i.e. after the loan. However, on 20 December 2020, whereas the offer had been rejected and was thus no longer in force, the Player changed his mind and sent back to the Club a signed version of the Draft Extension in complete bad faith;

- As it was clear that the negotiations were over, the Club refused to countersign the offer and – as agreed – informed the Player that the negotiations would resume in April. However, at the end of the loan in April 2021, both parties changed their mind regarding a possible extension as the Player expressed his willingness to find a new challenge. On 20 April 2021, the Player and the Club concluded an agreement, authorizing the Player *"to seek and negotiate new employment opportunities"*;

- By requesting Mr. K. to provide him with an authorisation to be absent until the end of the contractual relationship, the Player clearly and unambiguously admitted that the contractual relationship had not been extended until 30 April 2023, and was due to expire on 30 November 2021. Indeed, it would be absurd for the Player to request an authorisation to train home for 2 years;

- The Parties then completely and spontaneously interrupted the communication between them for several weeks. However, surprisingly, in the fourth week of May 2021, the Player recontacted the Club, arguing that the contractual relationship was still in force and would remain in force until 30 April 2023. However, at no time the Player put himself at disposal of the Club;

b. As to the jurisdiction of FIFA DRC

- The analysis of the Brussels Ia Regulation, the Lugano Convention and the 2005 Hague Choice of Court Convention, although not directly applicable to this case, demonstrate a clear consensus in the international community regarding the validity of a choice-of-court

agreements which would merely refer to the courts of a determined country. The Appealed Decision is in contradiction with the global approach to choice-of-court agreements; reference is made to a judgement of the Thai Supreme Court rendered in 2003 - where the latter court underlined that based on international general principle of law, a choice-of-court agreement merely designating the court of a country – *in casu*, the courts of Singapore - is valid under Thai law. The choice-of-court agreement contained in the Third Employment Contract should be considered valid under Thai law. This is all true considering the fact that the agreement designates the Thai courts and is thus in accordance with the position followed by the Thai legal system that Thai cases must be litigated before Thai courts. The application of Thai law leads therefore to the inadmissibility of the Player's claim;

- The choice-of-court agreements are allowed under Swiss law and are presumed to be exclusive. The SFT clearly and unambiguously considered that in order to be valid a choice-of-court agreement must refer to a location and that a location may be a determined country. In doing so, the SFT confirmed that under Swiss law there was no obligation to refer to a local court as the FIFA Football Tribunal wrongly found;

- In a situation where the choice-of-court agreement refers to a country, the local courts territorially and materially competent will be determined by the rules of civil procedure of the designated country. In the present case, the competent court in Thailand will be the labor court within the territorial jurisdiction of which the cause of action arose (this is the place of work of the employees), or of which the plaintiff or the defendant has domicile. In view of the above, the choice-of-court agreement referring to Thai courts contained in Article 7 of the Third Employment Contract is valid under Swiss law. The parties specifically and clearly intended to exclude their potential disputes from being settled by arbitration, whether by FIFA, CAS or any other arbitral body, and to have them exclusively submitted to ordinary state courts;

- It is crucial to recall that the First Employment Contract and the Second Employment Contract did not contain a similar clause in favour of the Thai Courts, the Second Employment Contract even contained a clause in favour of FIFA and CAS. This demonstrates that the reference to Thai courts in the Third Employment Contract was a deliberate choice and reflects the true and common intention of the parties;

- In accordance with FIFA and CAS jurisprudence, a mere reference to the courts of a country is sufficient (see FIFA Commentary to RSTP p.358, CAS 2019/A/6569, CAS 2018/A/5624, CAS 2015A/3896). Pursuant to CAS jurisprudence, there is no need to be specific as to the type of courts, e.g. labour, civil or commercial courts. This was confirmed in the award CAS 2018/A/5624 where a clause referring to *"courts of the Emirate of Abu Dhabi"* was deemed as perfectly valid;

- Before the FIFA Football Tribunal the Player argued that by referring to FIFA's jurisprudence in its correspondence of 25 May 2021, 16 June 2021 and 27 July 2021, the Club would have renounced to the application of the choice-of-court agreement in favour

of Thai courts. The references were made in connection with questions of merits, and not procedural issues;

- The parties' decision to submit their disputes to Thai courts does not exempt them from the obligations contained in the FIFA Regulations. Indeed, by their adhesion to the "football world", the Player and the Club adhered to the FIFA Regulations and must comply with the rules contained therein;

- This means that when dealing with a dispute, the state courts will have to apply the FIFA Regulations (probably in combination with national law). In doing so, the state courts will certainly be guided by the interpretation given to the FIFA Regulations by other deciding-bodies, including FIFA, CAS or even other national courts.

c. As to the dispute between the Club and the Player regarding their employment relationship

- The Football Tribunal did not correctly apply the relevant provision of Swiss law regarding the formation of contracts, and thus erroneously found that the contractual relationship had been extended. Article 1(1) of the Swiss Code of Obligations (SCO) provides that *"The conclusion of a contract requires a mutual expression of intent by the parties"*. The offer is the first manifestation of the intent, which must contain all the essential elements and the intention to be bound. The acceptance is the second manifestation of intent. However, if the "acceptance" is not identical or largely identical in content to the offer, then it is not an acceptance but a new offer: the counter-offer (or counter-proposal) to which the rules governing the offer apply. The fact for the initial addressee of an offer to make a counter-offer entails *per se* a rejection of the initial offer. Accordingly, this initial offer becomes invalid and is replaced by the counter-offer. In such a situation, a contract will only enter into force if the counter-offer is accepted by the original offeror;

- The Appellant does not challenge that the sending of this draft – as the instruction was given by the Club's Board of Directors – must be interpreted as an offer in line with the above-mentioned principles. Had the Player unconditionally accepted it, the Extension would have entered into force. However, the Player made a counter-offer to the Club, thereby rejecting the initial offer of the Club. Accordingly, the Club's initial offer became invalid and was replaced by the Player's counter-offer. When the Player said to Mr. K on 18 December 2020 that he had changed his mind and was ready to sign, the initial offer was no longer in force. His alleged acceptance could therefore have no (legal) effect.

- The Player's new offer has never been validly accepted by the Club. No person having power to legally represent the Club has ever accepted this "new" offer. Mr. K has no such a power, but he also has never expressed any clear and unambiguous acceptance of the Player's new offer; even if Mr. K had expressed an acceptance of the Player's new offer (*quod non*), this acceptance would not have bound the Club;

- At the end of his loan with Samutprakarn, the Player expressed his willingness to leave the Club and requested the possibility to look for another club, which resulted in the Authorization being agreed that the Player would train alone during the period of the Authorization, i.e. until 30 June 2021; however, a few days later, the Player requested to the Club that his authorization to train on his own be extended until the end of the contractual relationship – there it became clear for the Club that the Player no longer wanted to execute his contractual obligations; from that moment, the communication between the parties was completely and spontaneously interrupted for several weeks; the Player surprisingly recontacted the Club in the fourth week of May 2021, arguing that the contractual relationship was still in force and would remain in force until 30 April 2023.

- The Panel will observe that from May 2021 until the end of July 2021, the Player never put himself at disposal of the Club. On 10 June 2021, the Player requested the Club's HR Department to be provided with a proof of employment until 25 May 2021; finally, at the end of June 2021, the Player returned his car without any further comments and then left Thailand. Insofar as the contract has been tacitly terminated by the parties' actions or omissions, the Panel shall set aside the Appealed Decision and conclude that no compensation is due by either of the parties;

- In the unlikely event that the Panel considered that the contractual relationship was terminated without just cause by the Club, it shall establish the amount of compensation in accordance with the content of Article 5.3 of the Third Employment Contract, i.e. 1.500.000 THB;

- In the event that the Panel disregards the content of the penalty clause contained in Article 5.3 of the Third Employment Contract the Panel shall determine the compensation based on the residual value of the said contract until 30 November 2021, after mitigation with the contract with CD Guijuelo;

- If, *per impossibile*, the Panel considers that the contractual relationship was extended until 30 April 2023, the Panel shall determine the compensation based on the residual value of the Third Employment Contract until 30 April 2023, after mitigation with the contract with CD Guijuelo valid until 30 June 2023 (according to the open information on the date of the submission of the Appeal).

58. On this basis, the Club submitted the following prayers for relief:

"1. Declare this Appeal admissible;

2. Set aside the Decision under Appeal rendered by the FIFA Football Tribunal in its entirety;

3. Declare that the FIFA Football Tribunal had no jurisdiction to decide on the Player's claim;

4. Declare that the claim of the First Respondent is inadmissible;

Or in the alternative to points 3 and 4:

5. Reject the claim of the First Respondent;

Or in the alternative to points 2, 3, 4 and 5.

6. Partially set aside the Decision under Appeal rendered by the FIFA Football Tribunal;

7. Order the Appellant to pay the Respondent a maximum of 3-months' worth of salary compensation pursuant to Article 5.3 of the Contract 3;

And in any event, to order the Respondent to:

8. Bear the costs of the proceedings before the Court of Arbitration for Sport including the CHF 1,000 paid by the Appellant as CAS Court Office Fee;

9. Award to the Appellant a contribution to cover the legal fees and expenses of the Appellant in the amount of CHF 20,000".

B. The First Respondent

59. The Player, in summary, submitted the following in his Answer:

a. As to the jurisdiction of FIFA DRC

- The Player was not advised by neither an agent nor any advisor or lawyer when completing the renewal. The Appellant failed to submit any material evidence proving that the Player was assisted by anyone;

- After four years, considering the gross difficulties to get an agent other than Mr. Manny (placed by the Club) involved in the negotiations, the Player gave in to the request to negotiate his salary improvement in view of the great relationship and the trust existing between the parties. This is why he conducted on his own the renewal of the Third Employment Contract;

- When drafting the Third Employment Contract, the Club included all the same general provisions that were already in the previous contract, with one exception: the Club replaced the existing jurisdiction clause, disguised under another name, with a completely different one without having discussed or explained it to the Player, but rather the contrary: Mr. Manny reassured the Player that everything was OK for him, making it appear that the said contract was the same as the previous ones and that no major issues were changed;

- The Player does not have legal knowledge, this being the reason why he only focused on checking the personal and practical matters such as his salary and the airline tickets for his family, as these were mainly the only conditions that were (supposed to be) negotiated by the parties for the contract renewal. It is therefore clear that the full and actual scope

of the sentence inserted by the Club was completely unknown to the Player, even in the unlikely scenario that he would have realized a secret replacement of such nature;

- Is essential for the parties to understand the particularities of their relationship according to the law governing the agreement. In this case, there is no mention whatsoever if any collective bargaining agreement would apply, or rather the provisions of the relevant labor law would be the exclusive ones to be considered;

- Even if the Player had realised that the choice-of-court clause had been amended, the Club knew that the Player would have never understood the real scope and consequences of such substitution. Moreover, such change was purposely disguised given that the contracts appeared to be exactly the same from a legal standpoint;

- The sentence in clause 7 does not have the elements sufficient to operate as an opposable exception to the general rule laid down in article 58 of the FIFA Statutes. The general rule shall apply without objection unless an exception is expressly provided for;

- According to Swiss law any exception to a general rule must be interpreted in a restrictive manner. The prohibition contained in article 58 FIFA Statutes could therefore only be disregarded if there is a clear, comprehensive, conscious, and specific agreement to submit any dispute to a particular ordinary court. The sentence in clause 7 is superficially included by the Club at the end of a clause titled *"Governing law"* without meeting the technical, material, and semantic requirements to prove the real parties' consent to limit themselves to submit any eventual dispute exclusively to a specific court of Thailand;

- The Third Employment Contract does not make it clear if the relationship is one of labor nature (subordination) or a civil one (services provision) according to Thai law, so there is no certainty as to which type of courts a claim should be brought before. Nothing in the said contract mentions any specific applicable Thai law to find out where to file an eventual claim; it does not establish the term "exclusive";

- For a jurisdiction clause to be enforced in the present case it would be utterly necessary to undoubtedly mention its exclusive nature as well as the waiver mentioned above, even more considering the circumstances of the case: previous contracts clearly subject to FIFA jurisdiction, contract renewal appearing to be the same as the previous one, dominant position of the Club towards the Player, or the Player's lack of legal assistance;

- Even if the FIFA competence cannot be clearly inferred from a contract, some references to the FIFA regulations in the contract or further statements of the parties showing that they genuinely believe to be bound by them are considered relevant enough for FIFA's judicial bodies to hear the dispute in view of the parties' willingness to operate under FIFA's umbrella and, consequently, its own jurisdiction. The communications exchanged between the Club (through its law firm) and the Player between May and July 2021 are relevant in this regard;

- If all of the above was not enough, the agreement concluded on 20 April 2021 by the parties, in which the Club authorized the Player to seek a new job opportunity signed one month before the contract's wrongful termination, holds the parties harmless against an eventual breach of FIFA regulations, which would only be sanctioned in the framework of a FIFA procedure;

- The *"contra proferentem" / "contra stipulatorem"* principle shall be applied in this case: the Club drafted the contract renewal; despite salary, duration and the option to terminate were the only terms that the parties intended to negotiate, the Club intentionally replaced the existing FIFA jurisdiction clause with another disguised and invalid one, without explaining anything to the Player. The Player does not have any legal knowledge, much less so specific. The Club had the power to make the meaning of any jurisdiction clause plain and clear (even more considering the comprehensive and clarity of the previous jurisdiction clause removed by the Club). However, the Club inserted such a vague sentence in a clause titled "Governing law", with the deficiencies mentioned above, that it has rendered it impracticable and invalid;

- The provision related to jurisdiction is shoehorned and does not meet the technical, material, and semantic requirements to overcome the default competence of the FIFA DRC in international employment-related disputes: it does not specify the term "jurisdiction" of Thai Courts; it does not specify which issues or disputes (if any) are "submitted" to Thai Courts; it does not specify which type of court would be the competent according to the nature of the relationship; it does not specify the exclusivity of a relevant court, thus preventing other courts from accepting jurisdiction.

b. As to the dispute between the Club and the Player

- The Player was not assisted neither commercially nor legally in the negotiations and signing of his employment contracts. He was prevented from involving any agent;

- The Club used certain individuals such asMr. Manny and Mr. K. to deal with the Player through messaging services as WhatsApp and Line and yet the Appellant now argues that these individuals were not acting on behalf of the Club in doing so;

- The Third Employment Contract was sent on 29 October 2019 to the Player by Mr. Manny via WhatsApp;

- The Player immediately focused on the "personal matters" such as salary and airline tickets for his family in the understanding that the remaining provisions of the contract should not differ from those of previous contracts, as this was a mere renewal of salary and duration. He finally signed the proposed contract in the Club's office. But he did not receive any contract duly countersigned by the Club;

- The Player was requested to sign in person at the Club's offices a contract he had not even seen, with the Club's intermediary Mr. Manny. The Player was requested to sign the

loan agreement on the same day without having explained to him previously the conditions of the concerned loan. The Club enjoyed a dominant position towards the Player, the latter having to accept the Club's behavior as he had no other choice;

- Mr. Manny, far from representing the Player, has a strong position within the Club either as a football intermediary and/or key business person;

- The Club uses the figure of Mr. K towards the Player at its sole convenience - for some issues he is representing the Club and acting on its behalf. For others, it should be up to the Player to carry out a "due diligence" process to verify whether Mr. K represents and binds the Club or not; it is absurd to demand that a Player requires people in the Club to provide him with the relevant Power of Attorney, and more precisely in his particular case in which the relationship has been conducted in the same way during almost five years;

- The contract renewal clearly meets the *"essentialia negotii"* in order to bind the parties and have full effects. The above was also the approach of the FIFA DRC in first instance (see paragraphs 66, 67 of the Appealed Decision);

- In accordance with the Article 2 SCO, *"Where the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding any reservation on secondary terms. In the event of failure to reach agreement on such secondary terms, the court must determine them with due regard to the nature of the transaction";*

- Taking a look at the "overall picture" and particularly to the Club's behavior and its own acts in the five years of the employment relationship, it can be clearly inferred that the sending of the employment contract to the Player constitutes, to all intents and purposes, the clear manifestation of the Club's consent to be bound to the Player under the terms indicated therein;

- The Club has never expressed its decision to cancel the contract offer until after the Player sent the contract extension duly signed; the Player has never rejected the offer, he only tried to clarify two issues. It is well proven that it was a matter of formalism (a very simple annex) due to the rush to close the renewal and the Player's loan; the Player finally decided leaving such a minor issue for the future and communicated his acceptance to the whole agreement: the contract renewal and his loan to Samutprakarn . Only when the Player requested the contract extension duly signed by the Club (to no avail), then Mr. K informed the Player – in extreme bad faith – about the Club's apparent intention to discuss some terms of the already executed contract renewal at the end of the season;

- The two declarations of intent effectively concur in the present case, the Appellant had ample opportunity to withdraw from the negotiations before the parties' mutual consent was conferred. However, given that it did not happen, the contract was extended until 30 April 2023 as FIFA stated in first instance (paragraphs 71-73 of the Appealed Decision);

- In the event the Panel considers the contract extension was not duly executed, then it must apply the principles of *estoppel* and *culpa in contrahendo* and order the Club to pay compensation for the damages caused as a result of a blatant breach of the obligation to negotiate in good faith;

- The Appellant's submission stating that the Player was not interested in completing his obligations within the Club is contested. Once the Player's loan was about to expire (16 April 2021) the Player expressed to Mr. K his availability to attend the training sessions as long as he gets the relevant permit from Samutprakarn given that his loan period would formally expire on 30 April 2021;

- The Club informed the Player that he should not go to training sessions. Afterwards, the parties held a face-to-face meeting in which the Club asked the Player to find a club interested in him. If any option suited both parties, they would formalize it. The Player obviously asked the Club for an authorization to do so, given the well-known rule that a Player under contract cannot negotiate and/or conclude agreements with third clubs;

- Upon expiry of the loan, i.e., 30 April 2021, the Player again requested instructions from BGPU to train with his teammates. The Club, however, decided not to count on the Player any longer, the latter being verbally informed about the Club's intention for him to leave the Club soon. Three days later the Club sent the Player a specific program to train at home, thus preventing him from training with his teammates. The Player understood that some negotiations would take place in order to solve the situation and therefore asked for a formal letter containing the details of his training program in order to be safe until the parties came to an understanding, if any;

- Requesting an authorization to train at home for eight months (as the Appellant indicates) would be equally absurd. The situation was quite clear: given that (i) the Club did not want the Player's services any longer and (ii) sent him to train alone at home during a couple of months, the Player understood that both parties would come to an agreement to resolve the situation during that period. Nevertheless, through letter dated 25 May 2021, the Club wrongfully terminated the employment relationship instead of reaching out to the Player to assess the situation;

- As to the compensation for the termination without just cause – the amount provided for in Clause 5.3 cannot be applied to the present case because it is a buy-out clause, and not a "liquidated damages" clause – it does not penalize the Appellant. No formal letter communicating the exercise of this right was sent by the Club to the Player, no payment whatsoever was made to the Player; considering the Club did not exercise its contractual right it is now prevented from invoking such an amount in order to compensate the Player for the wrongful termination. Considering the wrongful contract termination carried out by the Club, the compensation to be paid to the Player should be calculated according to the objective criteria laid down in art. 17 FIFA RSTP;

- The Player requests the Panel to confirm the FIFA DRC decision;

- The Contract does not provide for any interest rate in case of premature termination of the Contract without just cause. Therefore, five per cent (5%) per annum should automatically be applied to the compensation owed by the Appellant to the Player, counting as of 25 May 2021, when BGPU terminated the employment relationship.

60. On this basis, the Player submitted the following prayers for relief:

"1) To dismiss the present appeal and uphold the Decision of Dispute Resolution Chamber passed on 01 August 2022.

2) The Appellant shall be ordered to bear the costs of the arbitration and to contribute substantially to the legal fees incurred by Mr. Garcia".

C. The Second Respondent

61. FIFA submitted the following in its Answer:

a. As to the FIFA DRC jurisdiction over the dispute between the Player and the Club

- The Panel shall confirm that FIFA was able to hear and decide the dispute between the parties, since the parties' intention (or, at least, what they should have understood in good faith) was to resort to FIFA's jurisdiction (or, at the very least, not exclude it);

- The Club consistently told the Player that the Contract was duly terminated in accordance with the FIFA regulations and jurisprudence and it repeated twice that it left *"all possibilities open to start the proceedings"* against the Player. Now, in this CAS procedure, it claims that the Contract was exclusively subjected to Thai laws and jurisdiction. Based on the principle of *"venire contra factum proprium"* the Panel shall reject the Appellant's arguments in this respect;

- The Player and the Club did not specifically state to which local courts (either state, arbitral or federative) their potential disputes should be submitted;

- FIFA considers that the following elements prove that the parties intended to submit their disputes to FIFA's jurisdiction or, at the very least, they left the door open to resort to this possibility:

  - *The previous contracts granted FIFA's jurisdiction;*

  - *The jurisdiction clause in the Contract is ambiguous;*

  - *The Authorization dated 20 April 2021 refers to FIFA Rules;*

  - *The Club's letter of 25 May 2021 referred to FIFA regulations and jurisprudence;*

- *The Player's letter of 1 June 2021 referred to FIFA regulations and jurisprudence and warned to file a claim before FIFA;*

- *The Club's letter of 16 June 2021 referred to DRC and CAS jurisprudence;*

- *The Player's letter of 6 July 2021 warned about initiating proceedings before the DRC;*

- *The Club's letter of 27 July 2021 contradicts its previous stance*;

- *The Player's position before FIFA was based on FIFA's regulations and jurisprudence;*

- *The Club's position before FIFA was based on FIFA's regulations and jurisprudence;*

- *The lack of mentioning any Thai legal provision in period of the employment relationship with the Player 2015 - 2021.*

- On two occasions and after citing FIFA's jurisprudence the Club stated that it reserves *"ALL rights"* and *"leaves ALL possibilities open to start proceedings against the Player if necessary"*. It never used the word "competent courts" or "Thailand";

- The Appellant never mentioned a single legal provision from Thai law in its answer or duplica before FIFA, but only FIFA regulations and CAS jurisprudence. For FIFA it is contradictory (to say the least) that, on the one hand, the Club states that the Contract was ruled and subject to Thai laws and courts but, on the other hand, its position before FIFA was that the Player breached the Contract under FIFA regulations and CAS jurisprudence; the Panel must note that it was not until its appeal brief where the Appellant cited Thai law;

- Since it is not possible to establish the common intention of the parties solely based on Clause 7 of the Contract, which was drafted vaguely for the reasons explained above, it is necessary to identify their intention based on, *inter alia*, their mutual declaration of intention and their behaviour;

- FIFA considers that based on the aforementioned elements, the parties' common intention was to resort to FIFA jurisdiction or, at the very least, to not exclude it altogether in case of a dispute;

- Under all the listed circumstances, especially when on the one hand the Club said that it *"leaves all possibilities open to start proceedings against the Player if necessary"* and the Player warned twice that he would file a claim before FIFA (without an objection of the Club), it was evident that according to the Third Employment Contract the Parties could resort to FIFA's jurisdiction or at least this option was not excluded;

- If the Panel believes that all these factors do not reveal the parties' common intention, it must apply the principle of reliance (what the parties could and should have understood in good faith) taking into account all the aforementioned context and circumstances;

- In this scenario, the same conclusion must be reached since an objective person can observe that the parties several times left open the possibility to submit their claim before FIFA when they resorted to FIFA's Regulations and jurisprudence and not a single legal provision of Thailand was cited. Therefore, the parties could and should have understood that FIFA's jurisdiction was not waived by them;

- If at this point the Panel still has doubts about the interpretation of the Third Employment Contract it must apply the principle of *"in dubio contra stipulatorem"* against the party who drafted the document, i.e., the Club;

- Given all the above, the Panel shall reach the conclusion that the FIFA DRC was competent to hear and decide the dispute between the parties;

- Alternatively, FIFA considers that, in the unlikely event that the Panel were to consider that the Contract excluded FIFA jurisdiction (*quod non*), it must apply in any case the principle *"venire contra factum proprium"*, according to which *"where the conduct of one party has led to the legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party"*;

- In particular, in contradiction to its version of facts (where Thai law and courts would be exclusive), the Appellant sent to the Player at least two letters where it cited DRC jurisprudence and FIFA regulations and clearly stated that it left all possibilities open to start proceedings against the Appellant. As it is shown from the Player's responses, the Club's conduct led him to believe that the FIFA Regulations were applicable to the case and that FIFA had jurisdiction. However, on a further stage, the Club decided to change its course of action in detriment of the Player, when it denied the application of FIFA's jurisdiction, rules and jurisprudence;

- Obviously, this kind of behavior does not deserve any legal protection from CAS, since it goes against the principles of good faith and *venire contra factum proprium*. Therefore, the Panel shall confirm the jurisdiction of FIFA based on the Appellant's contradictory conduct;

b. Regarding the merits of the case

- FIFA's involvement as a respondent in these proceedings is exclusively due to the Appellant's attempt to annul FIFA's competence to decide the case;

- Once that FIFA has demonstrated that it had jurisdiction to solve the matter, the dispute ceases to have a "vertical" component and becomes strictly "horizontal" in nature, insofar as no reliefs are sought against FIFA with respect to the contractual dispute between the Appellant and the Player;

- Hence, irrespective of whether it can be considered to have standing to be sued or not within the horizontal dispute, FIFA respectfully refrains to comment on the merits of the

contractual dispute and simply refers to the content of the DRC Decision in what we consider as sound and well-grounded.

62. On this basis, FIFA submits the following prayers for relief:

"(a) rejecting the reliefs sought by the Appellant and dismissing the appeal in full;

(b) confirming the Appealed Decision;

(c) ordering the Appellant to bear the full costs of these arbitration proceedings".

V. JURISDICTION

63. Article R47 of the CAS Code provides as follows:

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

64. Article 57 (1) of the FIFA Statutes provides:

"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".

65. None of the Parties objected to CAS jurisdiction. The jurisdiction of CAS is further confirmed by the Order of Procedure, duly signed by the Parties without any reservation. Although the Parties do not dispute the jurisdiction of CAS to decide on appeals against decisions passed by the FIFA's legal bodies, the Appellant disputes that the FIFA DRC had jurisdiction to decide the dispute between the Club and the Player, because the Third Employment Contract established the exclusive competence of the Thai Courts. The issue regarding the FIFA jurisdiction to hear the present matter, however, shall be addressed in the merits section below, because it does not concern the CAS jurisdiction to hear the present Appeal.

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

67. Under Article R57 of the Code and in line with the consistent jurisprudence of the CAS, the Panel has full power to review the facts and the law. The Panel, therefore, deals with the case *de novo*, evaluating all facts and legal issues involved in the dispute.

VI. ADMISSIBILITY

68. 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".

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

70. FIFA notified the grounds of the Appealed Decision on 5 September 2022. The Appellant lodged the Statement of Appeal with CAS on 26 September 2022, i.e., within the 21 days allotted under Article 57 (1) of the FIFA Statutes. The Statement of Appeal also complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

71. The admissibility of this appeal is further not contested by any of the Parties. It follows that the appeal is admissible.

VII. APPLICABLE LAW

72. A distinction between the *lex arbitri* (the arbitration law at the seat of arbitration) and the *lex causae* (the law applicable to the merits) has to be made first: *"[w]hereas procedural issues are governed by the law of the seat of the arbitration, i.e. Switzerland, the law applicable to the merits of the dispute depends on the applicable conflict of law rules"* (CAS 2017/A/5465, paragraph 69).

73. CAS has its seat in Lausanne, Switzerland and, as such, the Swiss Private International Law Act ("PILA") is applicable to the present case as *lex arbitri*. In addition to this, according to Article 176 (1) of the PILA, the provisions of Chapter 12 apply since this is an international arbitration and only FIFA is based in Switzerland.

74. The *lex arbitri's* conflict of laws provisions are then used to determine the law applicable to the merits. As such, according to Article 187 (1) of the PILA, *"[t]he arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection".*

75. There is no doubt that by submitting themselves to the CAS, not contesting directly its jurisdiction and by signing the Order of Procedure, the Parties have made an implicit agreement as to the applicable procedural rules, accepting the CAS Code. However, by doing this, the Parties also accept the conflict of laws rules contained in the CAS Code, in particular its Article R58.

76. Article R58 CAS Code provides as follows:

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

77. With regards to the interpretation of the above-mentioned provisions, the Panel concurs with the standing jurisprudence of the CAS as evidenced in CAS 2017/A/5374; CAS 2018/A/5624; CAS 2017/A/5465 and others: *"Like Art. 187 (1) of the PILA, Art. R58 of the CAS Code also distinguishes between whether or not the parties have made a choice of law. In the absence of a choice of law, Art. R58 of the CAS Code stipulates that the Panel shall apply 'the law of the country in which the federation, association or sport-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate'. This approach is basically no different from the closest connection test provided for in the second alternative of Art. 187 (1) of the PILA. To this extent the two provisions are almost identical. In the event that the parties have made a choice of law, however, the question of law is different, since in this regard Art. R58 of the CAS Code stipulates that this choice of law is relevant only 'subsidiarily'. Consequently Art. R58 of the CAS Code serves to restrict the autonomy of the parties, since even where a choice of law has been made, the 'applicable regulations' are primarily applied, irrespective of the will of the parties. These are the (autonomous) rules of the association that made the first-instance decision that is being contested in the appeals arbitration procedure. Since in football-related disputes this is the FIFA, under Art. R58 of the CAS Code – regardless of the parties' choice of law – the rules and regulations of FIFA apply accordingly"* (HAAS U., Applicable law in football-related disputes: The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, in CAS Bulletin 2015/2, p. 11).

78. Considering that Article R58 of the CAS Code clearly intends to curtail the Parties' autonomy with regard to the choice of law in appeal arbitration proceedings, the Panel is of the opinion that *"[t]he correct view is that the CAS case law is to be followed, whereby the implicit reference to Art. R58 of the CAS Code takes precedence over an explicit choice of law by the parties"* (*Idem*, page 12).

79. As a result, it is clear that *"(...) any choice of law made by the parties does not prevail over Art. R58 of the CAS Code, but is to be considered only within the framework of Art. R58 of the CAS Code and consequently affects only the subsidiarily applicable law"* (*Idem,* page 13).

80. Article 57(2) FIFA Statutes provides the following:

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

81. The Panel also adheres to the findings of the panel in CAS 2017/A/5111 (para 85):

"Article R58 provides that the dispute shall be decided first and foremost according to the 'applicable regulations'. These 'regulations' shall be applied irrespectively of the will of the parties. The term 'applicable regulations' within the meaning of Article R58 CAS Code refers to the rules of the association that made the first-instance decision which is being contested in the appeals arbitration procedure (CAS 2014/A/3626, no. 76: '… in the present case the 'applicable regulations' for the purpose of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA …')".

82. Therefore, the Panel finds that Article 57(2) FIFA Statutes applies. In accordance with this provision, the regulations of FIFA are primarily applicable and, if necessary, additionally, Swiss law.

83. However, the Appellant also requests that, in accordance with Article 7 of the Third Employment Contract, additionally to FIFA Regulations and Swiss Law, in matters not addressed in the FIFA Regulations, the Thai Law shall be applied.

84. Indeed, the Panel observes that in its statements before FIFA DRC and before CAS, the Appellant relied on FIFA Regulations on Status and Transfer of Players, on Thai and Swiss laws.

85. Therefore, and in view of the specific circumstances of this case, respective legislative acts will be referred to by the Panel, where relevant for the merits of this case, as follows from the below discussion on the merits, additionally to FIFA Regulations and Swiss law.

86. The Panel cannot ignore the Parties' choice made in Clause 7 of the Third Employment Contract and, as a result, must limit the applicability of Swiss Law prescribed by the FIFA Statutes to the interpretation of the relevant provisions of relevant FIFA regulations (such as the RSTP). This conclusion is in line with the aforementioned jurisprudence of CAS Panels (see, among other, CAS 2018/A/5624 par. 58, 59, CAS 2017/A/5465 par. 73-81):

"(...) the reference to the 'additionally' applicable Swiss law is merely intended to clarify that the RSTP are based on a normatively shaped preconception, which derives from having a look at Swiss law. Consequently, the purpose of the reference to Swiss law in Art. 66 (2) of the FIFA Statutes is to ensure the uniform interpretation of the standards of the industry. Under Art. 66 (2) of the FIFA Statutes, however, issues that are not governed by the RSTP should not be subject to Swiss law. Swiss law does govern, for example, the question of methodology as to FIFA rules and regulations (including the RSTP) should be interpreted or how, in event of a conflict, one should proceed when faced with a choice between a subordinate set of an association's rules and regulations (e.g. the RSTP) and a superordinate one (e.g. the FIFA Statutes). (HAAS U., Applicable law in football-related disputes: The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, in CAS Bulletin 2015/2, p. 15)".

87. In summary, the Panel shall primarily apply all the relevant FIFA regulations, combined with Swiss Law wherever interpretation of such provisions is needed; subsidiarily, the Panel has to apply the relevant provisions envisaged by the Parties in Clause 7 of the Third Employment Contract considering the matter at stake.

88. As to the question of which version/edition of the RSTP is applicable, the Panel notes that the facts at the heart of the dispute occurred in May 2021 (the termination date) and, as such, the January 2021 RSTP edition is the one applicable.

VIII. MERITS

A. Preliminary issues

a. Admissibility of the documents submitted by the Appellant on 12 April 2023

89. As mentioned in paragraph 49 above, on 12 April 2023, the Appellant sent to the CAS Court Office new pieces of evidence requesting their admission into the case file, namely *CAS & Football Annual Report* published by FIFA on 22 February 2023 on its website and the CAS Award rendered in the case CAS 2020/A/7382, to which the said Report referred, which award was published by FIFA on its website on 28 September 2022.

90. The Panel invited both Respondents to comment on such a request – the First Respondent objected to this request, stating that it was filed late considering that the Report was available since 22 February 2023 and that, in addition, CAS jurisprudence does not need to be admitted to the case file. The Second Respondent remained silent on the issue.

91. On 19 April 2023, the Parties were informed that the Panel has decided to admit both documents. In deciding so, the Panel has considered (a) that both documents are publicly available, (b) that they both are not belonging to the factual materials of the case and (c) that the CAS award is in line with the Appellant's argumentation in its Appeal Brief. Obviously, the Appellant should have been more scrupulous and could have reasonably discovered the CAS Award well before submitting its Appeal Brief, however FIFA did not object to the admission of the said documents (content of which is well known to it) and the Player stated that the CAS award anyways could be referred to by the Appellant without the need to be admitted to the file.

92. Therefore, the Panel concluded that admission of these two documents to the file would not take any of the Parties by surprise and, thus, would not violate their right to be heard.

b. Appellant's objection to the FIFA DRC jurisdiction

93. The Panel, initially, notes, that the Appellant during FIFA DRC proceedings and in its appeal to CAS maintains that FIFA DRC was not competent to rule on the dispute between the parties to the Third Employment Contract, the Club and the Player. This is a threshold matter to be resolved by the Panel in these proceedings. If the Panel decides that FIFA had no jurisdiction over the dispute – the Appealed Decision shall be cancelled, and the claim of the Player pronounced inadmissible.

94. The Panel initially notes that it is not disputed by the parties to these proceedings that a new clause: "Governing Law" was inserted into Article 7 of the Player's Third Employment Contract (quoted in para 7 of this award), which, according to the Club, conferred jurisdiction over any disputes between the Club and the Player to Thai courts with applicability to the relevant proceedings of Thai law.

95. However, the Player argues that the said clause allegedly in favour of Thai courts and Thai law was inserted into his Third Employment contract without his knowledge in abuse of the Club's powers, that it has never been discussed with him. He argues that he was not assisted by anybody (an agent or a lawyer) during the negotiations and signing of his Third Employment Contract and did not pay attention to this clause because he has no legal knowledge and his main concern were personal conditions, namely the financial remuneration and airline tickets for his family; his understanding was that the remaining provisions of the draft were without change as this was the mere renewal of his second employment contract, moreover visibly the draft was exactly the same as the second employment contract.

96. During the hearing Mr. Piyasak Bhumichitra, former Club's CEO, who is a lawyer, practicing in Thailand, clarified that when he was hired by the Club in September 2018, his task was to amend and improve the Club's legal documents, including employment contracts. He stated that it was him who included the choice of court/choice of law clause in favour of Thai courts, as in the Third Employment Contract of the Player, to the employment contracts of all players hired by the Club as a new standard clause. He could not recall having spoken with the Player regarding this clause explaining him its meaning, however stated that all players had accepted it because their main concern were "the numbers".

97. The Panel, having heard Mr. Bhumichitra, understands that such a clause was inserted without distinction to all employment contracts, i. e. of players-nationals and players-foreigners, including the Player.

98. Having considered the arguments put forward by the Player as to the circumstances around him signing the Third Employment Contract, the Panel concludes that the Player did not prove by any means that he was somehow prevented from being assisted by an agent and/or a legal adviser – during the hearing he stated that he at all times had and has the possibility to ask for assistance from his (now former) football agents, namely "You First Sport Agency", even in absence of any agency contract signed with them; there is nothing on the file suggesting that he was somehow prevented from reading the draft of the Third Employment Contract before signing it.

99. The Player, as it appears from the documents, available to the Panel on the file, was satisfied with being locally assisted by Mr. Manny, a Thailand-based football agent of Spanish origin, who was the person initially bringing the Player to the attention of the Club in 2015. There is nothing on the file suggesting that the Player ever complained to the Club regarding Mr. Manny's behaviour or required Mr. Manny to change the way he was assisting the Player in his needs. Only after the dispute arose the Player started complaining about Mr. Manny being in reality the representative of the Club who was acting in its favor.

100. Further, the Panel notes, there is nothing on the file demonstrating that the Player, who complains in his written submissions about alleged constant abusive behaviour of the Club since 2015 (namely not returning timely his contracts and their attachments signed, keeping contact only via messengers), has ever tried to offer to the Club to have another channel of communication beside messengers (e.g. email, official mail etc.) if he felt, as he complains, uncomfortable and unprotected in communicating with the Club's representatives via different

messengers only. He has never complained to the Club in writing that he was unsatisfied with the way he was treated, especially so while signing vital documents (three employment contracts, their attachments and the Extension of the last employment contract).

101. Having considered the above, the Panel emphasizes that a party signing a contract, as a general rule, does so on its own responsibility. The Player is not a newcomer to the world of football, he was 33 years old at the time of the relevant events, he had all the possibilities to ask for assistance from his agents and lawyers, but did not do so before signing his Third Employment Contract as he, for example, did when decided to sign this same contract extension – he had "consulted his advisers".

102. Thus, all reproaches of the Player regarding his unfavourable position based on lack of understanding of the meaning of the clause in Article 7 of the Third Employment Contract are without grounds.

103. The Panel further notes that the Club and the Player have devoted significant parts of their respective written submissions to the question of the validity of the choice of court clause inserted into Article 7 of the Third Employment Contract.

104. The Panel, however, is of the opinion that this issue can be left open and it will therefore not analyse relevant ample arguments put forward by the Club and the Player in their respective written submissions and during the hearing for the following reasons.

105. First and foremost, the Panel considers Article 7 of the Third Employment Contract to be a combined choice-of-court/choice of law clause and furthermore observes that there is abundant CAS jurisprudence on the validity of similar choice-of-court/choice of law clauses. However, this case is a very particular one and stands on its own. In this case the Club and the Player, having agreed on a choice-of-court /choice of law clause, afterwards acted in a contradictory manner and their dispute, as result of this contradictory behaviour, was brought before FIFA. That is why an interpretation of the parties' real intention is needed.

106. In this regard the Panel wishes to quote another CAS award, where it is stated: *"Even in case the terms used in a contract have a clear literal (i.e. unambiguous) meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used. The view held here is also backed by legal literature (BK-OR I/WIEGAND, Art. 18 N. 25). Article 18 SCO prohibits an 'interpretation by means of letters' (Verbot der reinen 'Buchstabenauslegung', cf. SFT 131 III 287, see also SFT (14.12.2011) 5A_677/2011, E. 3.2; (31.5.2011) 4A_370/2010, E. 5.3; SFT BGE 128 III 212; SFT (24.10.2002) 5C.87/2002, E. 2.2; KuKo-OR/WIEGAND/HURNI, Art. 18 N. 30; BK-OR I/WIEGAND, Art. 18 N. 25 and 37 with further references). Only in the very limited circumstances in which there are no objective grounds to think that the plain text does not reflect the parties' will, there is no reason to depart from it (SFT 136 III 188 E. 3.2.1; BK-OR I/WIEGAND, Art. 18 N. 25). Doubts that the wording used by the parties in the contract truly reflects their will may arise from a multitude of different circumstances, such as the drafting history of the agreement, its purpose or the overall content of the contract"* (see CAS 2017/A/5172).

107. It is not in dispute among the Club and the Player that their relationship is of contractual nature. Therefore, Article 7 of the Third Employment Contract is to be interpreted according to the general rules of interpretation of contracts under Swiss law, applicable to the merits of the case.

108. Article 18 (1) of the SCO, states as follows: *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement"*.

109. Whether the choice of court clause of the Third Employment contract has been agreed must be determined objectively on the impression given by the parties' words and actions. According to CAS 2017/A/5339, para 87:

"In order to establish whether a contract has been entered into, …, the judge must interpret the parties' declarations of intent. At first, he must seek to discover the true and mutually agreed upon intention of the parties, if necessary empirically, on the basis of circumstantial evidence (Decision of the Swiss Federal Tribunal, 4A_155/2017, 12 October 2017, consid. 2.3; ATF 132 III 268 consid. 2.3.2, 131 III 606 consid. 4.1). To be taken into account are the content of the statements made – whether they are written or oral - and also the general context, i.e. all the circumstances, which could give an indication as to the real intention of the parties. Also relevant are the statements made prior to the conclusion of the contract as well as the subsequent events and conduct of the parties (ATF 118 II 365 consid. 1, 112 II 337 consid. 4a). The judge must assess the situation according to his general experience of life (ATF 118 II 365 consid. 1 and references).

When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422). The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood its declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422)".

110. In interpreting the true intention of the parties to the Third Employment Contract, the Panel, in this particular case, has the possibility to analyse two previous employment contracts, concluded between the same parties in 2015 and 2017 and, what is more important, the behaviour of the Club and the Player after signing the Third Employment Contract i.e. the drafting history of the agreement, its purpose or the overall content of the contract.

111. Thus, the Panel observes that the First Employment Contract of the Player did not contain any choice of court or choice of law clause. This is not disputed by the Parties as well as that in case any dispute would have arisen between the Club and the Player, Article 22 (b) of the FIFA RSTP would have been applicable by default, it states as follows:

"22. Competence of FIFA

Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

a) […]

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

112. Therefore, FIFA always maintains "default" competence to hear disputes of an international dimension (like in this case) between clubs and players, unless the competence to resolve such disputes is assigned by the parties to an employment contract to an independent national arbitration tribunal or national courts.

113. The Second Employment Contract of the Player contained choice of court and choice of law clause in Article 13 (quoted in para 6 of this award), and it exclusively provided for FIFA jurisdiction and applicability of FIFA Regulations, and subsidiary Swiss law, in case of any disputes between the Club and the Player. CAS was nominated as only appeal instance, English language was chosen as the language of the proceedings.

114. Therefore, there is no doubt that also in this second contract, FIFA was nominated as the forum for dispute resolution and its regulations would have been applicable.

115. Regarding the Third Employment Contract the Panel initially observes that beside Article 7, there is no mention of any Thai law provisions (as well as there is none in the two previous contracts), which normally would be the case in an employment contract – regarding e.g. vacation, termination (and any compensation in case is unlawful), rights and obligations of the parties etc.

116. The Parties had no opportunity to test the applicability of the choice of court/choice of law clause until 20 April 2021, when an authorisation for the Player to look for another Club was signed by the Player and the Club. Even if they both admit that this document was drafted by the Player's team of lawyers and agents and referred to FIFA, AFC or FA of Thailand Regulations only, the Panel notes that there is no evidence that the Club was prevented from amending it, adding relevant provisions of Thai law or re-drafting the document entirely, cancelling any reference to FIFA Regulations. Nevertheless, it did not do so and just signed the document without reservations. Already at this stage it appeared that neither the Player nor the Club was relying on Thai law. It strikes the Panel that on behalf of the Club this Authorisation was signed by Mr. Bhumichitra.

117. The Panel further notes that when the dispute regarding the Third Employment Contract Extension arose, on 17 May 2021 *[the Panel understands that there is a typo on the Power of Attorney, mentioning 17 May 2020, because on that date there was no dispute between the Club and the Player]* the Club hired a law firm specialized in sports law and dispute resolution within sport jurisdiction (namely FIFA and CAS), based in Europe, and authorised such a law firm to represent it, first and foremost, *"before FIFA judicial bodies, Court of Arbitration for Sports […] or other judicial*

institution and/or any other form of settlement negotiations in relation to the dispute" with the Player. Again, neither Thai courts nor Thai law were mentioned.

118. It appears self-speaking to the Panel that no Thai law firm was hired either alone or together with the other one, and that there is no mention of Thai courts and/or Thai law in the Power of Attorney issued by the Club and signed on its behalf, again, by Mr. Bhumichitra, who was the author of and the person who inserted the choice of court/choice of law clause into the Third Employment contract of the Player.

119. Further, the Panel concurs with the Respondents as to the following indicators of the real intention of the Club and the Player:

120. Indeed, it appears entirely implausible that the Player would consciously opt out of FIFA dispute resolution system in favour of Thai courts and Thai law – he is Spanish, does not speak Thai language, had no lawyers or agents from Thailand who could have potentially helped him had any problem occurred, to proceed in accordance with Thai law in local courts. Beside unsubstantiated statements of the Appellant made in its written submission, nothing on the file suggests that the Player had any other ties with Thailand beside his, obviously temporary, work in the Club.

121. The hired law firm, on behalf of the Club, made the first step by addressing an official letter to the Player dated 25 May 2021, where with regard the dispute between the parties it referred only to FIFA and CAS jurisprudence (obviously based on FIFA regulations and Swiss law) and FIFA Procedural Rules (Article 12) regarding the burden of proof. Neither Thai courts, nor Thai law were mentioned at least *en passant*. Further, the draft Mutual Termination Agreement, attached to this letter, to be signed by the Player, did not contain any reference to Thai law either.

122. In his response dated 1 June 2021, the Player and his legal team also referred to FIFA regulations (Article 18 RSTP), FIFA and CAS jurisprudence, alerting the Club that they would bring the dispute to the attention of the relevant FIFA judicial body. At this point in time it appears that the only conclusion any reasonable man could have made is that both parties had renounced to apply Article 7 of the Third Employment Contract.

123. Further on, in its second letter to the Player dated 16 June 2021, the Club again referred to FIFA DRC and CAS jurisprudence, and the FIFA Procedural Rules (Article 12) regarding the burden of proof. Thai Law was finally mentioned in two instances as follows: *"8. […] We hereby request you to return the car to the Club within the next 5 days as the employment relationship ended. Please note that the car is not your property, and any intention to keep the car under your possession will be considered a breach of Thai law. […] 10. In case you remain of the opinion that our client did not act in accordance with applicable laws of Thailand, […] we will be notified with a copy of your claims before the competent court"*. The last paragraph of the letter stated: *"This letter is sent to you without prejudice and under reservation of all rights and our client leaves all possibilities open to start proceedings against the Player if necessary"* – again, without mentioning any specific provision of Thai law or the court where the Club would possibly bring its claim, nothing pertinent to the employment relationships.

124. In his reply to this letter, dated 6 July 2021, the Player maintained that initially it was the Club who referred to FIFA and CAS jurisprudence and that he was going to bring his claim to FIFA DRC, which would be competent to resolve the dispute between the parties.

125. In its last letter to the Player dated 27 July 2021, before the proceedings in FIFA DRC were commenced by the Player, the Club stated, inter alia, as follows: *"[…] we are quite surprised by your sudden reference to involving FIFA DRC in this matter. As per explicit player contract, we strongly suggest you to follow the exclusive grievance procedures as stipulated under Article 7 of the employment contract to assure that the dispute will be looked at by the competent bodies under the competent laws to find a solution suitable for all involved".*

126. The Panel again notes that even in this letter no specific provision of Thai law was mentioned, no specific Thai court was referred to either. And it is only in this letter that the Club, in total contradiction to its initial position, changed its stance as to the applicable law and the forum, competent to adjudicate the dispute between the parties. The Panel considers this behaviour of the Club as acting in bad faith.

127. The letters of the Club must be interpreted as giving a legitimate understanding to the Player that their relationships are governed by FIFA Regulations and, therefore, the disputes between them shall be resolved by FIFA. No other interpretation to the Club's letters was possible, their language was clear and explicit. Should it be deemed unclear, the principle of *"in dubio contra stipulatorem"* applies, it requires any ambiguity to be resolved against the stipulator, the author of the clause, who was the one who had the power and the duty to proceed in accordance with its prescription.

128. Relying on the Club's behaviour, the Player in good faith understood that he could have brought the dispute between the parties to the FIFA DRC and did so, relying on FIFA Regulations. Only in its reply to the Player's claim to FIFA the Club started claiming applicability of Article 7 of the Third Employment Contract, denying its own previous behaviour. However, it still did not rely on provisions of Thai law in that reply to the Player's claim, it still relied on FIFA Regulations and FIFA/CAS jurisprudence, claiming that the clause inserted in Article 7 of the Third Employment Contract was valid and that it was the Player, the party who breached the contract.

129. The statements of the Club, justifying it referencing FIFA Regulations and FIFA/CAS jurisprudence as those regulations and jurisprudence which could have allegedly been applied by Thai courts, are not proven by any legal provision taken from any Thai law – for example, the Appellant could have referred to a law, regulating sport movement and sport relationship in Thailand, as *lex specialis*, where it is stated, that the local courts must apply or, at least, consider, the regulations adopted by international sport federations together or instead of the national law. This alleged possibility was not explored properly not only by the lawyers hired by the Appellant, but also by the legal expert, who was called to make analysis only of the choice of court clause of the Third Employment Contract based, inter alia, on Thai law. Moreover, during the hearing Mr. Bhumichitra stated that Thai courts would never apply FIFA Regulations, because such a possibility is not conferred by any national law, but would apply national laws

only. Therefore, the Panel finds such statements ungrounded and concludes that reliance on FIFA regulations by the Club also speaks in favour of its intention to retain FIFA jurisdiction.

130. Finally, when the Club appealed the FIFA DRC decision to CAS, in its Appeal Brief it relied on Thai Law only with regard to (i) the validity of the choice of court clause, referring to the Expert opinion, (ii) the duty of a club and a player to conclude employment contracts in writing and the consequences applicable for not doing so - two provisions from Professional Sports Promotion Act B.E. 2556 (2013) were quoted, and further two provisions of Thai Civil and Commercial Code, regulating agency relationship, were additionally quoted.

131. The Panel, however, observes that none of those legal provisions are pertinent to the employment dispute between the Player and the Club. The Appeal Brief principally refers to FIFA Regulations, CAS jurisprudence and Swiss law, especially so with regards to the conclusion of contracts, when the Appellant objects to the validity of the Extension and pertinent negotiations process outcome.

132. Further, the Panel finds it self-speaking that no Thai legal expert was involved in this case, but an expert in International Private Law, again, from Europe, who relied on legal instruments, not applicable in Thailand, by analogy.

133. The Panel found the Expert opinion on validity of the choice of court provisions inconclusive, because no provision of Thai law on validity of the choice of court provisions was actually analysed since the relevant article of the Thai civil procedure rules was abolished in 1991; the Thai Supreme Court decision which was analysed by the expert dated 2003, however, was not pertinent to the employment relationships; the Expert's opinion was narrowed only to the analysis of the choice of court provision, it did not analyse at all the behaviour of the parties subsequent to the Third Employment Contract conclusion and two previous employment contracts concluded between the Player and the Club, scrutinised under Thai law.

134. Notably, the legal expert, called by the Club, did not argue the validity of the choice-of-forum clause inserted into the Second Employment Contract of the Player in favor of FIFA and CAS. Thus, the Panel concludes that both clauses would be equally valid according to his opinion, because they were inserted into different contracts based on the same applicable Thai legal framework, analysed by the expert.

135. Having listed all the above elements, that the Panel considers important, it concludes that by their, subsequent to the signature of the Third Employment Contract behaviour, the Parties opted out of their agreement regarding their previous choice of court. By their express behaviour, which prompted the Panel to the interpretation of the contractual clause, the Club (who, the Panel observes, was the drafter of the Third Employment Contract and after was the first party who started the correspondence exchange regarding the dispute as to the contract extension and its premature termination), and afterwards the Player, have demonstrated that their subjective will, their real intention, at the time when the dispute arose, was to submit their dispute to the sport adjudicating bodies, namely FIFA and CAS, notwithstanding the wording of Article 7 of the Third Employment Contract.

136. Therefore, the Panel concludes that FIFA has rightfully accepted the jurisdiction over the dispute between the Club and the Player.

B. The Main Issues

137. Having concluded that FIFA had jurisdiction over the dispute, the Panel now turns its attention to the merits of this dispute. In this regard, the Panel observes that the main issues it is called to resolve by the Player and the Club in this case are:

    i. Was the Third Employment Contract concluded on 28 October 2019 extended in December 2020 for another two seasons?

    ii. Which party to the Third Employment Contract concluded on 28 October 2019 terminated it and was there a just cause to do so?

    iii. What are the consequences of the Third Employment Contract termination, if any?

i. Was the Third Employment Contract concluded on 28 October 2019 extended in December 2020 for another two seasons?

138. The Player and the Club are in disagreement as to the Player's Third Employment Contract Extension. While the Club argues that it was not extended because the parties to it did not agree on its essential conditions and it was not signed by the Club, the Player argues that his employment contract was validly extended because he signed the Extension offered and drafted by the Club.

139. In order to answer this question, the Panel starts its analysis by explaining its understanding of how the communication flow between the Club and the Player was functioning since the Player joined the Club in 2015.

140. Thus, it is established by the Panel based on written submissions and personal testimonies during the hearing, given by the Club representatives and the Player, that the Player throughout his employment in the Club was in constant contact with at least four persons, representing the Club, in order to organise his daily life in Thailand and smooth performance of his employment duties: (i) Mr. Manny – a Thai based football agent of Spanish origin, who was in contact with the Player for the purpose of signing and extending his employment contracts, acting as an intermediary between the Club's management and the Player in their negotiation process, as of 2015; (ii) Mr. Kevin, a translator, hired by the Club, to facilitate daily communication with the foreign players and Thai staff of the Club, e.g. regarding the training process; (iii) Ms. Noi, who was responsible for visa questions and tax payments' documentation for foreign players, (iv) Mr. Samai Seeyango or Mr. K – assistant of Mr. Bhumichitra, CEO of the Club at the time of the relevant events, who was responsible for daily logistic inside the team, responsible for communication flow between the players, team staff, including coaches and doctors, and the management of the Club, namely Mr. Bhumichitra and the president of the Club, Mr. Pavin Bhiromhakdi.

141. Notably, in their messages sent to the Player, Mr. Manny and Mr. Seeyango constantly referred to *"them"*, while discussing contracts' conclusion and any discussion of their conditions, the Player also asked these two persons to speak or pass his request *"to them"*, to clarify with *"them"* etc. – which brings the Panel to the conclusion that Mr. Manny and Mr. Seeyango were not the persons making any binding decisions on behalf of the Club, but mere intermediaries between the Player and the Club's CEO and president. From these exchanges it appears that the Player had clear understanding of how the hierarchy worked.

142. While analysing the way the communication and decision-making process was organised in the Club, the Panel observes that it is not disputed by the Player and the Club that there were no direct contacts between the Player and the management of the Club unless they met for signing employment contracts or their extensions.

143. Having explained the communication flow, the Panel now turns to analyse the sequence of events which took place in December 2020, pertinent to the alleged Third Employment Contract extension. It is not disputed by the Player and the Club that some time in December 2020 they started discussing possible extension of the Player's Third Employment Contract for another two seasons, until 30 April 2023.

144. On 9 December 2020, a meeting between the Player, Mr. Manny, Mr. Seeyango, the president and the CEO of the Club took place, during which the possible extension of the employment relationship was discussed in more details.

145. On 15 December 2020, Mr. Seeyango, via messenger Line, wrote to the Player inviting him to come for a second meeting in the afternoon of the same day in order to sign the Extension. He mentioned that Mr. Manny would be present too. However, since the Player was informed about the meeting gathering only at the last minute and did not have time to familiarize himself with the text of the Extension that he was called to sign yet, the Player refused to come for the meeting and sign the Extension. One hour later, Mr. Seeyango forwarded to the Player via Line a document named "Attachment to Extend Contract season 2021-2023_Toti_final".

146. Four hours later, the Player requested Mr. K to *"Add some Sign Fee in 2022 and make clear airfare (5 tickets each year. 2021/2022/2023). With this I could sign"*.

147. On 16 December 2020, Mr. Seeyango sent a reply to the Player as an emoji – a man giving a military salute, which the Panel understands meant *"Yes, sir"*.

148. On Friday 18 December 2020, however, the Player, after having consulted his family and advisers, informed Mr. Seeyango that he was ready to sign the Extension as drafted by the Club, to what Mr. Seeyango responded with an "OKAY" emoji.

149. It is this "OKAY" response which is disputed by the Club and the Player – whereas the Club insists that Mr. Seeyango has no power to bind the Club and this informal "Ok" meant only that he would have passed the Player's decision on to the management of the Club, the Player insists that by this response Mr. Seeyango, on behalf of the Club, confirmed that the Extension was validly concluded.

150. On Saturday 19 December 2020, the Player wrote to Mr. Seeyango asking to organise a meeting with the Club's CEO and Club's president in order to *"finalise everything and make everything clear of misunderstanding and my communication"*.

151. On Sunday 20 December 2020, Mr. Seeyango informed the Player that the president of the Club told him that the negotiations regarding the extension would resume at his return from loan, in April 2021. Later on the same day, the Player returned the duly signed Extension to Mr. Seeyango.

152. The Club argues that, by requesting addition of Signing Fee the Player refused the initial offer made by the Club and made to the Club a counter-offer, thus automatically invalidating the Club's initial offer, which was not re-validated by the change of stance of the Player and his subsequent signature of the Extension in its original, drafted by the Club, version. To support this position, the Club relies on Article 1(1) of the SCO, which provides as follows: *"The conclusion of a contract requires a mutual expression of intent by the parties"*.

153. Regarding the "OKAY" emoji sent by Mr. Seeyango to the Player when the latter informed him that he was ready to sign the Extension, the Panel concludes that the Line Messages amounted to informal exchanges which held no clearly identifiable expressions of intentions, and did not bind the Club in any way. Moreover, Mr. Seeyango did not indeed have any legal capacity to bind the Club. Accordingly, his emoji message does not have any legal binding effect, i.e. it is not a confirmation that the Club had accepted to sign the Extension at that moment of time. That message was a mere confirmation that the Player's decision would be communicated to the Club's management. It appears from the Player's next message, requesting another meeting with the Club's management, that he had the same understanding that Mr. Seeyango was not the person making any binding decisions on behalf of the Club – the Player had the intention to have further discussions with the Club's CEO and president, not with Mr. Seeyango.

154. Moreover, the Panel understands from the message exchange between Mr. Seeyango and the Player, subsequent to the Player's decision to sign the Extension, that the Player required further discussion on the conditions of the Extension with the President and CEO of the Club because he realized that the agreement was not in fact concluded, and he was informed by Mr. Seeyango three times that the president of the Club had decided to continue negotiations regarding the Extension after the Player's return from loan, i.e. at the end of April 2021.

155. The Panel further observes that the Player went on loan in December 2020 and that, until the dispute between him and the Club which arose in the end of May 2021 as to the validity of the Extension and premature termination of his Third Employment Contract, he never came back to Mr. Seeyango requesting him to arrange a meeting regarding the Extension (as agreed in December 2020) or requested that the document signed by the Club be returned to him. They only discussed the organization of the training process after his return from loan.

156. Having analysed the communication flow established in the Club and the sequence of events and communication between Mr. Seeyango and the Player in December 2020, which all point

to a non-conclusion of the Extension *de-facto*, the Panel now turns its attention to the legal framework, i.e. to analysis of the same facts *de-jure*.

157. The Panel observes that the Appellant and the First Respondent in their written submissions referred to Swiss law, as applicable law, analysing the validity of an offer and of its acceptance, in order to substantiate their respective contradictory positions. Therefore, the Panel proceeds with its analysis based on Swiss Law applicable to the matter.

158. Thus, in accordance with Article 1 of the SCO: *"The conclusion of a contract requires a mutual expression of intent by the parties"*.

159. Further, the Panel observes, that *"An agreement is a bilateral juridical act which implies the exchange of at least two expresssions of intent, being it neccessary that each party lets the other know, with all the precision required, that it wants to provoke a certain legal effect. An offer is not enough to provoke the legal effect described by the offeror, as the contract is only considered concluded if three supplementary pre-requisites are met: acceptance, reciprocity and concordance"* (see CAS 2020/A/6867, paragraph 72, referring to THEVENOZ/WERRO, *Code des obligations I, Art 1-529 CO,* 2nd ed., Basle 2017, Art. 1 N 78 & 84).

160. The execution of a contract requires two concurrent declarations of intent, i.e. an offer by one party and an acceptance by the other party. Furthermore, the declarations of intent must be corresponding in order for there to be a valid contract (see CAS 2016/A/4697, paragraph 84).

161. Having studied the Extension document drafted by the Club, the Panel observes that it contained a valid offer, with all essential elements present. Had the Player signed it upon receipt and without any further comments/requests to the Club, this would have counted as unconditional acceptance.

162. However, it is not in dispute by the Player and the Club that, on the same day that the Club sent the draft Extension to the Player to sign, i.e. 15 December 2020, he, rather than saying that the offer had been accepted, decided not to sign it and requested a sign-on fee for the 2022 season.

163. Article 2 of the SCO states as follows: *"Where the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding any reservation on secondary terms"*. Based on this Article, the Player argues that his demand was a pure clarification request, i. e. was a secondary term, which could have not been perceived by the Club as refusal to sign the Extension.

164. The Panel, however, disagrees. The sign-on fee belongs to the essential terms of the agreement as it forms part of the remuneration under the employment contract. Therefore, the Panel concurs with the Appellant that the Player actually made a counter-offer, invalidating the initial offer made by the Club, as to one of the essential terms of the future contract.

165. The Panel observes that an offer is no longer to be considered valid and binding if it has been rejected or has been accepted in a manner which does not constitute a full and unconditional accept of the terms offered. Based on the Player's conduct the offer had lapsed and was no

longer valid and binding. The signing of the Extension by the Player on 20 December 2020 was of no legal effect, as that offer has lapsed as soon as it was refused by the Player.

166. The fact that the initial offer to extend the contract was no longer valid and binding was communicated by Mr. Seeyango, acting at all times as mere intermediary between the Player and the Club's CEO and the President in passing essential information, in his message to the Player of 20 December 2020, sent hours before the Player had signed and returned to him the Extension. The same was repeated to the Player twice via Line messages. And in fact, the Club did not counter-sign the Extension document.

167. Therefore, the Panel concludes that the Extension was never duly agreed upon by the Player and the Club due to initial refusal by the Player and before his final agreement to accept the primary offer, such offer has lapsed before it was accepted. The Player's subsequent forwarding of the signed Extension is to be considered a new offer which was never accepted by the Club.

ii. Which party to the Third Employment Contract concluded on 28 October 2019 terminated it and was there a just cause to do so?

168. Having concluded that the Third Employment Contract was not extended, the Panel now turns its attention to determining which party to the Third Employment Contract was at the origin of its premature termination, the original expiration date being 30 November 2021.

169. While the Club argues that the contract was terminated by mutual agreement of the parties, i.e. that it came to the end prematurely because both parties had lost interest in the continuation of their relationship, the Player argues that it was the Club which terminated his employment contract prematurely without just cause.

170. As initial note, the Panel observes that Article 13 of the FIFA RSTP defends the principle of contractual stability by expressly stating that:

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

171. At the same time, the principle of contractual stability is not absolute as Article 14 of the FIFA RSTP provides that:

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

172. In this respect, the Panel considers that the FIFA Commentary on the RSTP (the "FIFA Commentary"), namely to its Article 14, provides further guidance as to when an employment contract is terminated with just cause:

"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 […] Whether there is just cause for the early termination of a contract signed between a professional player and a club must be assessed in consideration of all the specific circumstances of the

individual case. […] A contract may only be terminated prior to the expiry of the agreed term where there is a valid reason to do so. In several awards, CAS has drawn a parallel between the concept of 'just cause' as defined in article 14 of the Regulations and the concept of 'good cause' in article 337(2) of the Swiss Code of Obligations (SCO). Good cause (and thus just cause) to lawfully terminate an employment contract exists when the fundamental terms and conditions which formed the basis of the contractual arrangement are no longer respected by one of the parties. 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)".

173. The Panel also refers to the relevant provisions of Swiss law, applicable to the interpretation of the FIFA Regulations (CAS 2014/A/3643, paragraph 78; CAS 2008/A/1518, paragraph 59). As such, Article 337 (1) SCO *ab initio* which applies complementarily, provides that *"Both employer and employee may terminate the employment relationship with immediate effect at any time for just cause"*.

174. Under Swiss law, such a just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship (Article 337 (2) SCO). The definition of "just cause", as well as the question and whether just cause in fact existed, shall be established in accordance with the merits of each particular case (ATF 127 III 153 consid. 1 a). In other words, 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 (ATF 130 III 28; ATF 116 II 145; ATF 116 II 142; ATF 112 II 41).

175. According to CAS jurisprudence, only material breaches of a contract can possibly be considered as "just cause" for the termination of the latter (CAS 2013/A/3091, 3092 & 3093, paragraph 191; CAS 2006/A/1062).

176. Having carefully studied and analysed the arguments put forward by the Club and the Player, and the documents available on the file, including Line message exchange between the Player and Mr. Seeyango, the Panel finds that the Third Employment Contract was not mutually terminated by its parties because of alleged lack of interest in continuation of their employment relationship.

177. Thus, in December 2020 the Player went on loan to Samutprakarn until the end of April 2021. Two weeks before he was about to return to the Club and to continue performing his obligations under the Third Employment Contract, on 16 April 2021, he was contacted by Kevin, translator of the Club, inviting him to join the training session. The Player, in response, contacted Mr. Seeyango the same day, assuring him that he would be happy to return and train, however mentioning that he was still on loan and would have needed a permission from Samutprakarn to join BGPU.

178. However, in response he was informed by Mr. Seeyango that, according to the *"last update from the team"* he did not need to show up and had to wait for further instructions.

179. According to the personal testimony given by the Player, on the same day he was informed by Mr. Manny that the Club did not want him any longer and that he had to look for another employment. There is no hard evidence on the file proving this statement (which is also mentioned in the Player's Answer to the appeal), however during the hearing it was not negated by the Appellant. The Player argues that he immediately asked to be provided with an official authorization to look for another Club.

180. As a matter of fact, on 21 April 2021, the Player signed and forwarded via Line to Mr. Seeyango the Authorisation for him to look for a new employment, requesting it to be sent back to him signed by the Club. The Panel understands that by doing so the Player agreed to continue his career in another Club if he had found one.

181. On 27 April 2021, the Player wrote to Mr. Seeyango via Line again, informing him that he would have to re-join the BGPU team as of 1 May 2021 because his loan was to end on 30 April 2021 and asked him for instructions and a training plan. A pdf file named "BGPU HOME PROGRAM TRAINING" was sent to the Player by Mr. Seeyango on 30 April 2021.

182. On the same day the Player insisted, by sending another message to Mr. Seeyango, that he needed an official document where the Club authorised him to train at home *"until we finish out relationship otherwise I have to show myself on Monday [3 May 2021]"*. The Player also complained that the said plan did not mention for how many weeks it was to be followed. Mr. Seeyango responded that the plan should be followed for 3 - 4 weeks.

183. Still on the same day, 27 April 2021, Mr. Seeyango came back to the Player again, informing him that due to Covid the Player was required to train at home until 1 June 2021.

184. It is based on this message in conjunction with the Authorisation signed by the Club, valid until 30 June 2021, that the Panel considers that at that moment the Parties indeed were in agreement to mutually terminate the contract had the Player found a new employment by 30 June 2021, failing which the Player intended to perform his employment duties until the end of contract, i.e. until 30 November 2021, and by doing so he demonstrated that he was ready to follow any instructions given by the Club to him.

185. It does not appear from any document on the file that the Player was not content to continue working for the Club or that it was him who wanted to look for a new club or that he refused to train on his own as instructed by the Club. It was the Club who instructed him to train on his own after his return from loan.

186. However, as it comes from further written exchange between the Parties, all of a sudden, while the Player was authorised to be out of the Club's sphere of control for searching a new employment until 30 June 2021 and additionally, he was officially required by the Club to train alone at home until 1 June 2021, on 25 May 2021 the Club has informed the Player that *"[…] Given your actual stance requesting the explicit possibility to look for another employment in*

combination with your behaviour during the last months while not providing any services, we understand that you have no interest in pursuing any further employment with [the Club] […] We consider the contractual relationship as (to be considered) tacitly terminated by the parties' actions and therefore conclude that the employment came to a natural end".

187. The Panel fails to follow the logic of this letter because there was no *"behaviour during the last months"* that could possibly count as a misbehaviour by the Player because he was on loan until 30 April 2021 and was actually prevented from returning to the Club by the Club itself, being requested to train alone until 1 June 2021. The Player, instead, with his messages to Mr. Seeyango sent in April 2021, was at all times insisting on performing his contractual obligations.

188. By its next letter dated 16 June 2021 the Club informed the Player that his contract was tacitly terminated allegedly by mutual loss of interest of the Club and the Player and attached a letter from its HR Department where 25 May 2021 was indicated as the date of termination.

189. It is obvious to the Panel that under these circumstances, after having received two official letters from the Club, informing him that his contract was terminated, the Player had no other option than to give back the car (as requested by the Club) and leave Thailand by the end of June 2021. It was obvious to him that the Club would not change its mind and reinstate their employment relationship.

190. The Club even did not bother to inform its national association that the contract of the player was terminated, as the result of which the Thai FA refused an ITC request on 3 September 2021 because according to its knowledge the Player was still under the contract with the Club until 30 November 2021.

191. Therefore, the Panel concludes that the Club terminated the Third Employment Contract of the Player without invoking any just cause.

iii. What are the consequences of the Third Employment Contract termination, if any?

Legal framework

192. The Panel notes that Article 17 (1) of the 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. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

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

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

ii. in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the 'Mitigated Compensation'). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the 'Additional Compensation'). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract.

[…]".

193. The Panel observes that the Player and the Club appear to have deviated from the application of Article 17(1) of the RSTP. Indeed, the parties to a contract of employment are free to agree to an option to unilaterally terminate the said contract without any just cause. This agreement is commonly referred to as a "liquidated damages clause": in such clause the amount to be paid by the breaching party in the event of a breach and/or of a unilateral, premature termination of the employment contract is established.

194. The so-called liquidated damages clause is inserted in Article 5.3. of the Third Employment Contract. This Article states as follows: *"From 1st July 2020, BGPU shall be entitled to terminate this Agreement prematurely with compensation of 3 (three) month salary. The Player agrees that the above net indemnity is just and fair and compensate the damage caused by the Club"*.

195. However, the principle of contractual freedom and stability is not absolute. In order for a liquidated damages clause to be valid, essentially three cumulative requirements shall be met: (i) the clause shall be written in a clear and unequivocal manner; (ii) there shall be no evidence of coercion or duress in conclusion of the clause; and (iii) the clause shall not demonstrate excessive commitment by one party that grants the other party undue control. Intervening with the parties' free will enshrined in a liquidated damages clause should be confined to exceptional cases. This would, in principle, apply in the case of excessive disproportionality i.e., a liquidated damages clause may be incompatible with the general principles of contractual stability and considered null and void if the reciprocal obligations it sets forth actually disproportionately favour one of the parties and gives it an undue control over the other party (see CAS 2019/A/6514).

196. The Panel notes that in the case at hand the amount foreseen by the clause 5.3 of the Third Employment Contract is clearly disproportionate and presents a clear case of an excessive commitment by the Player. The Panel is of the opinion that the clause is excessively favourable towards the Club which in case of breach of the Contract would only be obliged to pay three

monthly salaries to the Player, whereas in case of breach by the Player, the Club would be entitled to the total amount of the contract as per FIFA RSTP, because no reciprocal clause was inserted into the Contract, giving a right to the Player to terminate the Contract prematurely.

197. The Panel agrees with another CAS Panel, who rightfully stated that *"A liquidated damages clause that puts the Player entirely at the mercy of the club, because in practice it entitles the club to terminate the employment contract at any moment in time without any valid reasons having to be invoked for the relatively low amount of two monthly salaries cannot be condoned, because the relevant clause is practically in violation of what is determined in Article 14 of the FIFA Regulations on the Status and Transfer of Players (RSTP) and the concept of contractual stability"* (see CAS 2016/A/ 4852, CAS 2016/A/ 4875, CAS 2018/A/5771 & 5772).

198. Based on the above, the Panel concludes that Article 5.3 of the Third Employment contract is invalid. Therefore, the compensation for breach of contract to be paid to the Player by the Club is, therefore, to be determined in accordance with Article 17 (1) of the RSTP.

199. Whilst establishing the amount due as compensation, the parties to a contract are normally focusing on the principle of *"positive interest"* which shall put the injured party in the position it would have had if the contract was performed properly. This principle is not entirely equal, but is similar to the praetorian concept of *in integrum restitution*, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred (CAS 2012/A/2698, CAS 2008/A/1519 & 1520 and CAS 2010/A/2145, 2146 & 2147, CAS 2014/A/3555).

200. The Panel finds that the legal framework set out above and the principle of positive interest are applicable to the present case. Against this background, the Panel will proceed to assess the Player's objective damages, before applying its discretion in adjusting this total amount of objective damages to an appropriate amount, if deemed necessary.

201. The Third Employment Contract was terminated on 25 May 2021 and set to expire on 30 November 2021. The remaining remuneration due to the Player was THB 526,316 x 6 as salary for June - November 2021, i.e. THB 3,157,896 gross – this is the total amount of compensation equal to the residual value of the Third Employment Contract, which, in principle, is due to be awarded to the Player as compensation for breach of contract, as this is the salary he would have been entitled to should the Club not have breached the Third Employment Contract.

202. However, as argued by the Club, the Panel notes that it is not in dispute between the Parties that the Player found new employment before the expiry of the Player's Third Employment Contract with the Club, namely with the Spanish C.D. Guijuelo. The Player's new employment contract with C.D. Guijuelo is valid from 30 July 2021 until 30 June 2023 (as known to the Panel from open sources). The remuneration due under this contract for the same period as the terminated contract with the Appellant amounts to EUR 1,700 net x 4 (salary for August - November 2021) = EUR 6,800 net.

203. The Panel finds that the Player thereby mitigated his damages and that these earnings should be deducted from the amount of compensation to be awarded by the Panel.

204. The net amount, according to the Third Employment Contract with the Club, due to the Player as its residual value, would be THB 500,000 x 6 = THB 3,000,000, which is equal approximately to EUR 80,077.

205. In the light of the above, the amount to be paid to the Player as compensation for the premature termination of his Third Employment Contract is EUR 73,277 net (EUR 80,077 net – EUR 6,800 net). All amounts in EUR are calculated considering the currency conversion at the date of the decision.

206. Finally, the FIFA DRC awarded interest of 5% p.a. as from 14 March 2022 until the effective date of payment. Before confirming FIFA decision as regards to the date on which the interest shall start running, the Panel has considered the First Respondent's request, put forward in his Answer to the Appeal Brief, where he requested this interest to be awarded as of the date of the Third Employment Contract termination, namely 25 May 2021 (paragraphs 297 – 299 of the Answer). However, in essence, the Respondent requests for the appeal to be dismissed, respectively for the Appealed Decision to be confirmed in its relevant parts in his final requests for relief on the last page of the Answer.

207. For the sake of clarity and avoidance of any doubt, the Panel cannot entertain the request, put forward in the Answer. The reason for this is that, as is well-established, it follows from Article R55 of the CAS Code that the respondent to an appeal procedure is not entitled to file any counterclaim to challenge any or all the rulings of the Appealed Decision. Instead, to file any claims himself, the respondent would have had to file an independent appeal against the decision in question, within the applicable deadline. This has been established by consistent CAS jurisprudence (see CAS 2017/A/5481, CAS 2016/A/4852 and CAS 2016/A/4623 & 4624) and endorsed by the Swiss Federal Tribunal (Judgment 4A_10/2010).

208. Therefore, the First Respondent's request goes beyond a mere confirmation of the Appealed Decision. The First Respondent did not file an appeal against the Appealed Decision. As a consequence, the Panel holds that the First Respondent's request is inadmissible.

209. Therefore, based on Articles 102 and 104 of the SCO, the Panel confirms the Appealed Decision and finds that an interest rate of 5% *p.a.* shall be awarded on the amount of EUR 73,277 as from 14 March 2022 until the effective date of payment.

C. Conclusion

210. Based on the foregoing, the Panel finds that:

i) FIFA rightfully retained jurisdiction over the dispute between the Player and the Club;

ii) The Third Employment Contract was not extended and was due to expire on 30 November 2021.

iii) The Club terminated the Third Employment Contract without just cause on 25 May 2021;

iv) The liquidated damages clause inserted into the Third Employment Contract is invalid. The Club shall pay to the Player EUR 73,277 as compensation for breach of contract without just cause plus 5% interest p.a. as from 14 March 2022 until the effective date of payment.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 26 September 2022 by BGPU-BG Pathum United against the decision issued on 4 August 2022 by the Dispute Resolution Chamber of the Football Tribunal of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision issued on 4 August 2022 by the Dispute Resolution Chamber of the Football Tribunal of the *Fédération Internationale de Football Association* is confirmed, save for paragraph 2 of the operative part, which shall provide as follows:

   "2. The Respondent, BGPU, has to pay to the Claimant EUR 73,277.00 as compensation for breach of contract without just cause plus 5% interest p.a. as from 14 March 2022 until the effective date of payment".

3. (…).

4. (…).

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