Arbitration CAS 2022/A/9301 Galatasaray Sportif A.S. v. Jordi Guerrero Costa, award of 30 May 2023

Panel: Ms Leanne O'Leary (New Zealand), Sole Arbitrator

Football
Termination of employment contract without just cause
Ne ultra petita
Just cause of termination
Poor performance of a coach
Subsequent reasons for the termination of a contract
Primacy of a compensation clause included in a coach's employment contract
Liquidated damages clause
Inequality of bargaining power

1. **Pursuant to the general principle of *ne ultra petita*, an arbitral panel is bound to observe the limits of the parties' motions and may not grant more than is requested by the parties in their prayers for relief.**

2. **Annexe 2 of the FIFA Regulations on the Status and Transfer of Players (RSTP) lays down the rules regarding the employment of coaches, including rules regarding contract termination. The rules have the purpose of fostering contractual stability and respect for contracts and apply to both club and coach in equal measure. The FIFA RSTP do not define "just cause" of termination; however, it is generally considered that just cause exists when the breach of contract and/or the circumstances of the case are so serious that the injured party cannot in good faith be expected to continue the contractual relationship. A breach is considered sufficiently serious to justify the immediate termination of a contract for just cause when there are objective criteria that would render it unreasonable to expect the employment relationship between the parties to continue e.g. a serious breach of trust.**

3. **Unsubstantiated allegations of a team's poor results are not sufficient, and do not justify, the termination of a coach's contract for just cause without notice. A coach and club are at liberty to agree that poor team results may justify the premature termination of a coach's contract for just cause, but the coach and the club must expressly agree that the contract may be terminated for that reason, and the term "poor results" must be clearly defined to provide certainty to the parties of the threshold at which the contract may be terminated.**

4. **Article 337(1) of the Swiss Code of Obligations requires the party terminating for just cause to provide reasons for the termination at the other party's request. In principle, and in exceptional circumstances, a party may rely on facts existing prior to the contract**

termination but of which the party terminating was not aware, or could not have known about, at the time of the termination, as evidence of the breakdown of the relationship of trust between the parties.

5. **Article 6 of Annexe 2 of the FIFA RSTP – in common with Article 17 of the FIFA RSTP – permits the parties to include a clause in an employment contract that provides for the calculation of compensation in the event of a breach. CAS case authorities under Article 17 of the FIFA RSTP on this issue are relevant also to a consideration of Article 6 of Annexe 2 of the FIFA RSTP because both provisions recognise that the parties may agree their own compensation clause. A compensation clause for breach of contract which is included in a coach's employment contract has primacy over Article 6 of Annexe 2 of the FIFA RSTP, which applies subsidiarily. The wording of the compensation clause should leave no room for interpretation and should clearly reflect the intention of the parties. A compensation clause may go by various names; however, such clauses are generally recognised as a liquidated damages clause.**

6. **In practice, a liquidated damages clause is likened to a contractual penalty clause. Such clause is the product of the parties' autonomy and freedom to contract, and does not have to be necessarily reciprocal to be considered as valid since the consequences of a breach of contract for a club and player are generally different. The test regarding the validity of a liquidated damages clause is whether one of the parties has entered into an excessive commitment that disproportionately favours the other party to the contract and provides that other party with undue control. The validity of these type of clauses are to be analysed on a case-by-case basis, subject to the particular circumstances of the case and since the disparity in a liquidated damages clause may in some cases be compensated by other provisions of the contract, a consideration of the entire contract may be necessary.**

7. **Determining the degree to which a party may wield superior power in a contractual situation can be difficult, although it is generally accepted that an imbalance of power exists in the negotiation for, and during an employment relationship, which usually favours the employer. The bargaining power of a party in an employment contract negotiation will depend on a number of factors, including the level of interest in the employee's services, the desirability of substitutes, time pressure, negotiating skill and the counterparty's identity.**

I. PARTIES

1. Galatasaray Sportif A.S. (the "Appellant" or the "Club") is a professional football club situated in Istanbul, Turkey. It is affiliated to the Turkish Football Federation ("TFF") which, in turn, is a member of the Fédération Internationale de Football Association ("FIFA"). The Appellant plays in the Turkish Süper Lig, which is the top professional league in Turkey.

2. Mr Jordi Guerrero Costa (the "Respondent" or the "First Assistant Coach") is a professional football coach of Spanish nationality.

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

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, and documents on the file. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the parties in the present proceedings, she refers in her Award only to the submissions and evidence she considers necessary to explain her reasoning.

5. On 14 January 2022, the Club and the Respondent entered into an employment contract (the "Contract") whereby the Respondent agreed to provide services as the First Assistant Coach to the First Team on the following terms and conditions, *inter alia*:

> *"**2. SPECIAL PROVISIONS***
>
> *1. In exchange of the services rendered by the First Assistant Coach throughout his engagement, the club shall pay the following net remuneration to the First Assistant Coach.*
>
> ***For 2021 – 2022 Season***
>
> ***i.** The Club shall pay the First Assistant Coach a net salary of **100.000 Euros** for the remainder of 2021-2022 Season in accordance with the following payment schedule:*

Due Date	*Amount (EUR)*
31.01.2022	*EUR 20.000*
28.02.2022	*EUR 20.000*
05.04.2022	*EUR 20.000*
30.04.2022	*EUR 20.000*
31.05.2022	*EUR 20.000*

> …

For 2022 – 2023 Season

i. *The Club shall pay the First Assistant Coach a net salary of* ***200.000 Euros*** *for 2022-2023 Season in accordance with the following payment schedule:*

Due Date	*Amount (EUR)*
31.08.2022	*EUR 20.000*
01.10.2022	*EUR 20.000*
31.10.2022	*EUR 20.000*
30.11.2022	*EUR 20.000*
05.01.2023	*EUR 20.000*
31.01.2023	*EUR 20.000*
28.02.2023	*EUR 20.000*
05.04.2023	*EUR 20.000*
30.04.2023	*EUR 20.000*
31.05.2023	*EUR 20.000*

…

2. *The contract starts on 14.01.2022 and expires on 31.05.2023. However, this contract shall be automatically renewed until 31.05.2024, unless one party notifies the other of his intention of not renewing it…*

…

7. *During the term of this contract, the Club shall provide the First Assistant Coach with a monthly housing allowance of up to* ***1.500 Euros****. However, if the First Assistant Coach decides to stay in the Florya Metkin Oktay Facilities of the Club, the Club will not be responsible for providing the First Assistant Coach with housing allowance during that period.*

8. *The First Assistant Coach shall devote his full time, skill, and attention to the performance of his duties as the First Assistant coach of the Club's professional football team.*

…

20. The First Assistant Coach shall use his best endeavours to follow the recent technological developments in the football industry and report to the Club on these matters.

21. The First Assistant Coach shall attend the meetings with the Club's executives to discuss the team's performance when he is invited.

…

26. The First Assistant Coach agrees and undertakes to comply with the Internal Disciplinary Regulations of the Club, a copy of which is given to him, and the decisions to be rendered by the Club's board.

…

4. SPECIAL PROVISIONS REGARDING THE TERMINATION

If the Contract is prematurely terminated by the Club without just cause or by the First Assistant Coach for just cause, the Parties agree that the compensation shall be equal to the residual value of the Contract regardless of whether the First Assistant Coach signs any new contract following the termination. The Club accepts and undertakes in advance that it will not demand a reduction from this compensation amount.

In the event that the employment contract signed between Domenec Torrent Font and the Club on 14 January 2022 is prematurely terminated by the Club without just cause or by Domenec Torrent Font for just cause, the Parties agree that the First Assistant Coach shall have the right to terminate this present contract with just cause.

For the sake of clarity, the Parties have agreed that the season of 2023/2024, which is subject to the option as per Article 1 of the Special Provisions, will not be subject to the calculation of the compensation to be paid to the First Assistant Coach if the Contract is not extended as per the relevant article of this contract. In other words, the First Assistant Coach agrees in advance that he shall not claim any compensation whatsoever for the residual value of the season of 2023/2024 in case this contract is not extended for this season.

In addition to the above, the Parties explicitly agree that the First Assistant Coach shall receive the residual value of the Contract (the rental fees are excluded and cannot be claimed under this provision) in accordance with the payment schedule designated in Article 1 of the Special Provisions of this contract, which means that the payments regarding the compensation will not be made in one lump sum. If the due amounts are not paid on time, an annual interest of 5% is applied to the outstanding amount.

Further to the above, the Parties acknowledge that they have been represented by their qualified lawyers throughout the pre-negotiations of this contract. The Parties hereby agree, declare, and undertake that the conditions set forth in this provision is not extortionate, is set by the free will of the Parties. The Parties agree that this provision is the indispensable provision (sine qua non) of this Agreement and this Agreement has been signed taking into consideration of this provision.

…

6. DISPUTES

It is the Parties' will to expressly submit any disputes related to the present Contract to the competent judicial bodies of FIFA in first instance and in appeal to the Court of Arbitration for Sport (CAS). Both proceedings will follow FIFA regulations and additionally, Swiss law for the merits of the case, as well as its own rules about the procedure enforce at the time of any possible dispute. The language of all disputes and communications between the parties shall be English" (sic).

6. Also on 14 January 2022, the Club entered into an employment contract with Mr Domenec Torrent Font and Mr Jordi Gris Vila to provide coaching services for the Club's first team.

7. On 20 May 2022, the Club played the last match of the 2021/2022 season, following which the First Assistant Coach allegedly left the country without prior authorisation.

8. On 11 June 2022, the Club convened an extraordinary general assembly and elected a new chairman and board of management.

9. On 20 June 2022 and during a meeting between the Club and the First Assistant Coach's agent, negotiations commenced to terminate the Contract and the contracts of other members of the coaching team and to agree compensation.

10. By email dated 20 June 2022 and sent after the meeting, the First Assistant Coach's agent confirmed a counteroffer of compensation on behalf of the First Assistant Coach, and other members of the coaching team, to terminate the Contract.

11. By letter dated 21 June 2022, the Club served notice on the First Assistant Coach that it had terminated the Contract for just cause (the "Dismissal Letter"). On the same day, it also terminated the contracts of the head coach and three other coaches.

B. Proceedings before the Players Status Chamber of the FIFA Tribunal

12. On 25 July 2022, the First Assistant Coach filed a claim against the Club before the Players Status Chamber of the FIFA Tribunal (the "PSC"), alleging breach of contract and requesting payment of the following amounts together with interest:

- EUR 1,500 as outstanding housing allowance for June 2022, plus 5% interest p.a. as of 30 June 2022; and

- EUR 200,000 as compensation being the residual value of the Contract, plus 5% interest p.a. from the actual due dates of the salary payments between 31 August 2022 until 31 May 2023.

13. Before the PSC, the First Assistant Coach submitted that:

- The Club had no just cause to terminate the Contract.

- After a new management was installed and during an online meeting on 20 June 2022, the Club expressed its intention to terminate the contracts of the coaching staff, including that of the First Assistant Coach, and that the coaches did not agree to a proposal to reduce the residual value of the compensation by 50%.

- After the online meeting, he put the Club in default for outstanding remuneration and the Club then terminated the Contract without warning.

- He left Turkey after the last match of the previous season and was not absent from his employment without authorisation. Furthermore, the Club never requested him to return during the alleged unauthorised absence. In his view, the Club's new management no longer wished to retain his services, and the Club's reasons for terminating the Contract were *"false"* and did not *"reach the level of gravity"* to justify termination with just cause.

14. Before the PSC, the Club submitted that:

- It had just cause to terminate the Contract and it rejected the First Assistant Coach's claim.

- The First Assistant Coach had breached Article 2.8 of the Contract because he immediately left the Club after the last match of the season and was absent from 20 May 2022. The Club's Disciplinary Regulations permitted it to terminate the Contract for just cause if the First Assistant Coach was absent without authorisation.

- During an online meeting, the Club had pointed out the unauthorised absence to the First Assistant Coach and the fact that he had failed to deliver certain reports.

- The default notice sent by the First Assistant Coach *"while a mutual contract termination was being negotiated"*, was the *"last straw that completely ended the trust between the parties"*. Also, the team had not performed well during the last season.

- In the event that the PSC held that the Club had no just cause to terminate the Contract, the PSC should take into consideration the First Assistant Coach's bad faith and not award any compensation.

15. By its decision dated 29 September 2022 (the "Appealed Decision"), the PSC partially accepted the First Assistant Coach's claim as follows:

"1. The claim of the Claimant, Jordi Guerrero Costa, is partially accepted.

2. The Respondent, Galatasaray AS, has to pay to the Claimant, the following amount(s):

- EUR 1,500 as outstanding remuneration plus 5% interest p.a. as from 22 June 2022 until the date of effective payment;

- EUR 200,000 as compensation for breach of contract outstanding plus 5% interest p.a. as from 25 July 2022 until the date of effective payment.

3. Any further claims of the Claimant are rejected.

*4. Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.*

*5. Pursuant to art. 8 of Annexe 2 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made **within 45 days** of notification of this decision, the following **consequence**s shall apply:*

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

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

*6. The consequences **shall only be enforced at the request of the Claimant** in accordance with art. 8 par. 7 and 8 of Annexe 2 and art. 25 of the Regulations on the Status and Transfer of Players.*

7. This decision is rendered without costs".

16. The reasons for the Appealed Decision were as follows:

- Regarding the competence, applicable legal framework and burden of proof, the Single Judge of the PSC (the "Single Judge") accepted that he was competent to deal with the matter at hand pursuant to Art. 23 par. 2 and Art. 22 lit. c) of the Regulations on the Status and Transfer of Players (the "RSTP") (July 2022 edition) and on the basis that the matter concerned an employment-related dispute with an international dimension between a coach and a club.

- The applicable law was the FIFA RSTP (July 2022 edition) because the claim was lodged on 25 July 2022 and pursuant to Art. 26 par.1 and 2 of the FIFA RSTP (July 2022 edition) those regulations applied. The burden of proving an alleged fact rested on the party claiming a particular right from the alleged fact pursuant to Art.13 par.5 of the June 2022 edition of the Procedural Rules Governing the Football Tribunal (the "Procedural Rules"), which were applicable to the present dispute.

- Regarding the merits of the dispute, the Single Judge acknowledged that his task was to determine i) whether the contract was terminated by the Respondent with or without just cause, and ii) to determine any consequences that arose.

- As to i) the Single Judge noted that the Club terminated the Contract, without prior warning, due to the First Assistant Coach's alleged unauthorised absence, alleged failure to deliver certain reports, the team's poor performance and an alleged breach of trust brought about by the default notice served during negotiations to terminate the Contract

by mutual agreement. The Single Judge noted that the First Assistant Coach denied being absent without authorisation and claimed that he was on leave after the season ended on 20 May 2022, that the Club owed outstanding remuneration, and that the First Assistant Coach did not agree to the Club's proposal to reduce the compensation owed under the Contract for an early termination.

- The Single Judge recalled the Football Tribunal's long-standing practice that only severe misconduct or a breach justifies termination of a contract without prior warning and only if there are objective criteria which do not reasonably permit the continuation of the parties' employment relationship. The premature termination of an employment contract is an *ultima ratio,* and if other more lenient measures can be taken to enable the employee to fulfil their contractual duties, then those measures must be taken before terminating an employment contract.

- The Single Judge concluded that the Club had no just cause to terminate the Contract on 21 June 2022. It had failed to submit any document corroborating its allegations that the First Assistant Coach was absent without authorisation, no return to work request had been made, and the First Assistant Coach's submission that he was on end of season leave was plausible. The Club had confirmed that it wished to terminate the Contract by mutual agreement, thereby confirming the First Assistant Coach's view that the Club no longer wished to retain his services. There was no evidence that the First Assistant Coach failed to deliver certain reports, poor performance was not a valid reason to terminate a contract, and the First Assistant Coach's request for payment of outstanding monies could not be interpreted as bad faith.

- As to ii), and in accordance with the general principle of *pacta sunt servanda*, the Single Judge determined that the Club was liable to pay the First Assistant Coach the amount of EUR 1,500, which was the outstanding housing allowance for June 2022 owed to the First Assistant Coach at the time the Contract was terminated, together with interest on the amount at the rate of 5% *p.a.* from its respective due date until the date of effective payment.

- Applying the compensation clause in Article 4 of the Contract, the Single Judge also determined that the Club was liable to pay the First Assistant Coach a lumpsum compensation of EUR 200,000, which was the residual value of the Contract, together with interest payable at the rate of 5% p.a. from the date of the claim, i.e. 25 July 2022, until the date of payment.

- The Single Judge also decided in favour of implementing a registration ban in the event that the Club did not pay the relevant amounts in due time and also determined that no costs were to be imposed on the parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 30 November 2022, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code") against the Respondent and regarding the Appealed Decision. The Appellant requested that the matter be decided by a sole arbitrator.

18. On 2 December 2022, the CAS Court Office notified the Parties of the appeal proceedings, reminded the Appellant that it had to file its Appeal Brief within the time limit prescribed in Article R51 of the Code, invited the Respondent to confirm whether it agreed to the matter being decided by a sole arbitrator, and noting that the Appellant had filed four other appeals which related to the same issue, requested that the Parties confirm whether all appeal proceedings were to be decided by the same panel.

19. On 6 December 2022, the Respondent informed the CAS Court Office that he agreed to the appointment of a sole arbitrator and that the sole arbitrator should hear all related procedures: the present proceedings, CAS 2022/A/9299 Galatasaray Sportif A.S. v. Domenec Torrent Font, CAS 2022/A/9300 Galatasaray Sportif A.S. v. Jordi Gris Vila, CAS 2022/A/9302 Galatasaray Sportif A.S. v. Julian Jimenez Serrano, and CAS 2022/A/9303 Galatasaray Sportif A.S. v. Ricardo Segarra Aragay.

20. On 6 January 2023, in accordance with Article R51 of the Code and within a previously granted extension of time, the Appellant filed its Appeal Brief.

21. On 27 January 2023, in accordance with Article R55 of the Code, the Respondent filed his Answer.

22. On 30 January 2023, the CAS Court Office informed the parties that unless the Parties agreed or the Sole Arbitrator ordered otherwise on the basis of exceptional circumstances, pursuant to Article R56 of the Code, the Parties were not authorised to supplement or amend their requests or their argument or otherwise to produce new evidence. The CAS Court Office also invited the Parties to confirm whether they preferred a hearing to be held or for the matter to be determined by the Sole Arbitrator solely on the basis of the Parties' written submissions, and pursuant to Article R56 of the Code, whether the Parties requested a case management conference.

23. On 31 January 2023, the CAS Court Office informed the parties that pursuant to Article R54 of the Code, the Panel had been appointed as follows: Dr Leanne O'Leary, Senior Lecturer in Law and Solicitor in Liverpool, United Kingdom sitting as Sole Arbitrator.

24. On 3 February 2023 and 6 February 2023, the Respondent and the Appellant respectively, informed the CAS Court Office of their preference for the matter to be decided without a hearing.

25. On 15 March 2023 and in light of the Parties' agreement, the CAS Court Office informed the Parties that the Sole Arbitrator had considered the Parties' positions with respect to a hearing,

and pursuant to R57 of the Code, it advised that the Sole Arbitrator would decide the case solely on the Parties' written submissions.

26. On 16 March 2023 and 20 March 2023, respectively, the Parties signed and returned the Order of Procedure. By signing the Order of Procedure, the Parties confirmed their agreement that the Sole Arbitrator would decide this matter based on the Parties' written submissions. The Parties also confirmed that their right to be heard had been respected thereby.

27. With regard to Article R57 of the Code, the Sole Arbitrator considers herself sufficiently well informed to decide this matter without the need to hold a hearing.

IV. SUBMISSIONS OF THE PARTIES

28. The following outline is a summary of the Parties' arguments and submissions which the Sole Arbitrator considers relevant to decide the present dispute and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator has nonetheless carefully considered all the submissions made by the Parties, even if no explicit reference has been made in the following summary. The Parties' written submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

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

- The CAS is competent to decide the dispute in accordance with Article 57.1 of the FIFA Statutes.

- Pursuant to Article R58 of the Code, Article 57 of the FIFA Statutes and Article 6 of the Contract, CAS shall primarily apply the regulations of FIFA and Swiss law to the merits of the appeal.

- As a preliminary matter, the Single Judge violated due process and the principle of *ne ultra petita* when he awarded the Respondent compensation payable by a lump sum. The Respondent claimed compensation for breach of contract by instalments in the PSC, yet the Single Judge awarded a lump sum of EUR 200,000 as compensation for breach of contract plus 5% interest *p.a.* The principle of *ne ultra petita* that is recognized in CAS jurisprudence (CAS 2014/A/3664 and CAS 2017/A/5481) obliges a tribunal to decide no more than it has been asked. The Parties also agreed in Article 4 of the Contract that any compensation would be paid in accordance with an agreed schedule. The Appealed Decision should be set aside because of a breach of the principle *ne ultra petita*.

- Following several incidents, the relationship of trust between the Appellant and the Respondent *"irrevocably vanished"* and since an employment relationship is based on trust and mutual respect, the Club had no other option but to terminate the Contract due to the Respondent's fault and negligence.

- The reasons for the Contract termination with just cause were:

- The Club's team performed poorly under the coaching team, of which the Respondent was a member, achieving its lowest ranking ever in its entire sporting history by finishing the Turkish Süper Lig as the 13th team.

- The Respondent breached Article 2.8 of the Contract when he was absent without authorization from 5 June 2022 until 21 June 2022. By doing so, the Respondent demonstrated that he had no intention of fulfilling and continuing his duty to devote his full time, skill, and attention to his job as the First Assistant Coach of the Club's first team. The Respondent's unauthorized absence was also a breach of the Appellant's Internal Disciplinary Regulations, which are incorporated in Article 2.26 of the Contract and provides the Appellant with the right to unilaterally terminate the Contract in case of absence lasting more than three days.

- The Respondent never submitted reports to the Club's executives or new management as required under Article 2.20 of the Contract.

- The termination of the head coach's contract also made the Respondent's continued employment *"unbearable"*.

- The Appellant met with the Respondent's agent and informed that the Respondent had breached his duty to be fully committed to the team's success, was absent during a critical time of change and restructuring at the Club, and that the Respondent had not reported to the board regarding the team's performance. The Appellant then commenced a negotiation for the mutual termination of the Contract on 20 June 2022, but the Respondent's counsel sent a notice of payment and the Respondent demonstrated he had no intention of reaching an agreement for the mutual termination of the Contract. The Appellant then terminated the Contract for just cause, for the reasons explained in detail in the Dismissal Letter and of which the Respondent was aware.

- Article 4 of Annexe 2 of the FIFA RSTP provides that termination for just cause is assumed in certain situations, including, *"any abusive conduct of a party aimed at forcing the counterparty to terminate or change the terms of the contract…"*. According to the FIFA Commentary, Article 4 of Annexe 2 of the RSTP is identical to Article 14 of the RSTP therefore the jurisprudence on Article 14 of the RSTP and Swiss law is relevant to the dispute at hand.

- There is no definition of "just cause" in the FIFA RSTP. Established CAS and FIFA jurisprudence confirms that when considering the validity of a unilateral termination: only a sufficiently serious breach of contractual obligations qualifies as just cause; in principle, the breach is considered sufficiently serious when there are objective circumstances that would render it unreasonable to expect the employment relationship to continue; and contract termination should always be a measure of last resort or an *ultima ratio* action (FIFA Commentary on the RSTP, p.107-108; CAS 2019/A/6171; CAS 2019/A/6175; and CAS 2018/A/6029).

- In the absence of a definition of "just cause" in the FIFA RSTP, Articles 337 and 337b of the Swiss Code of Obligations ("SCO") are relevant and have been referenced in CAS

jurisprudence (CAS 2013/A/3216 and CAS 2016/A/4884). CAS jurisprudence establishes that a material breach of an employment contract constitutes just cause for termination, or if the breaches are not material, the sum of these breaches may constitute "just cause" for unilateral termination of the contract (CAS 2009/A/1956). Even though the incidents which formed the basis of the termination may not be sufficient to constitute a material breach, cumulatively they may constitute just cause in accordance with CAS jurisprudence and Swiss law.

- Before taking formal action, the employer must raise the issue with the employee (CAS 2017/A/5402), which the Appellant did in this case. The existence of just cause must be evaluated on a case-by-case basis (CAS 2014/A/3740).

- The First Assistant Coach was a "high level employee" and therefore his duty of care to the Club was greater than other employees. Article 321a of the SCO provides that, *"the employee must carry out the work assigned to him with due care and loyally safeguard the employer's legitimate interests"* and Article 321e states that the extent of the duty of care owed by the employee is determined by the individual employment contract, *"taking due account of the occupational risk, level of training and technical knowledge associated with the work as well as the employee's aptitudes and skills of which the employer was or should have been aware"*.

- The Appellant was required to terminate the Contract since the Respondent had no intention of continuing the employment relationship in good faith. The Dismissal Letter was *de facto* in line with the concept of *ultima ratio* and the Appellant was left with no choice but to terminate the Contract unilaterally with just cause.

- If the Sole Arbitrator were to find that the Contract was terminated without just cause, the compensation outlined in the Appealed Decision should be reduced.

- Article 4 of the Contract recorded the Parties' agreement to payment of the residual value in accordance with the payment schedule outlined in Article 1 of the Contract and not to payment by way of a lump sum, which the Single Judge ordered the Appellant to pay. Nevertheless, Article 4 is invalid because it is a "liquidated damages" clause and is disproportionate, not reciprocal, and null and void. DRC and CAS jurisprudence has repeatedly confirmed that the amount of compensation stipulated in a compensation clause must be proportionate. Proportionality must be assessed individually and within the context of the specific circumstances of the case (CAS 2019/A/6533 & 6539 and CAS 2019/A/6626).

- In CAS 2016/A/4826, the CAS Panel confirmed that unequal bargaining power was a justification to discard a liquidated damages clause. At the time the Contract was signed, the Respondent was the more powerful party in the negotiation because it was mid-season, and the Appellant was obliged to sign a First Assistant Coach who held a specific licence. The head coach also refused to sign his contract unless the Club signed the Respondent. As a consequence of the imbalance in bargaining power, the Club was required to agree to Article 4 of the Contract.

- It is not fair that the Respondent is entitled to compensation of a full-year salary in return for four months of work. The Sole Arbitrator should find the liquidated damages clause disproportionate and one-sided and therefore null and void, and instead determine a fair compensation that also takes into consideration the Respondent's contributory actions (CAS 2019/A/6452) and his lack of aspiration to maintain the employment relationship (CAS 2017/A/5312).

- If the Sole Arbitrator considers that the compensation provided under Article 4 of the Contract is not disproportionate and one-sided, then the compensation awarded by the Single Judge must be reduced because it is *excessive* (Article 163(3) of the SCO). The Contract termination occurred within the first six months of a two-year contract, and the Respondent had a long period of time to find another club. A penalty clause that seeks to award the entire contract balance, without any mitigation, for an early breach, is excessive (CAS 2015/A/3999).

- It is not disputed that the Respondent was absent from work during May 2022 and June 2022, and according to the principle of *inadimplenti non est adimplendum* the Appellant does not have an obligation to pay the Respondent the outstanding housing allowance for June 2022.

- The Appellant submitted the following requests for relief:

> *"In light of the above matters of fact and law, considering all the foregoing reasoning and arguments, the Appellant requests the Sole Arbitrator to accept and allow its appeal against the decision rendered by the FIFA PSC on 29 September 2022 in the case FPSD-6821 and, subsequently, to issue an award declaring:*
>
> *1. That the Appellant terminated the Employment Contract with just cause;*
>
> *2. That the Appellant shall not pay any compensation to the Respondent*
>
> *3. Alternatively, for the sake of argumentation, in the case the Sole Arbitrator understands that the Appellant terminated the Employment Contract without just cause, to issue a decision determining:*
>
> *3.1 That the Single Judge in the FIFA PSC rendered the decision in violation of the principle of ne ultra petita and decided beyond the Respondent's claim. Therefore, the Single Judge violated due process and his obligation to never decide ultra petita, and the Appealed Decision is annulled; or if not,*
>
> *3.2 Alternatively, for the sake of argumentation, in case the Sole Arbitrator understands that the Single Judge in the FIFA PSC did not violate the principle of ne ultra petita, issue a decision determining;*
>
> *a. That the provision regarding the compensation for the termination in the Employment Contract is excessive, disproportionate and not reciprocal, thus, it is null and void, and therefore, it is not applicable for the calculation of the compensation. Subsequently, the Appealed Decision is annulled, and the amount of the compensation must be calculated by the Sole Arbitrator in view of the overall context and mitigating factors exposed above; or if not,*

b. That the provision regarding the compensation for the termination in the Employment Contract is not null and void, nevertheless it is still excessively high, therefore, it must be reduced. Thus, the Appealed Decision is annulled, and the Sole Arbitrator should be calculated the compensation in view of the overall context and mitigating factors exposed above, besides in respect of justice and fairness; or if not;

c. That the Single Judge in the FIFA PSC partially disregarded the clause regarding the compensation in case of termination in the Employment Contract, rendered a decision to contrary to the Parties' intentions and did not assert any argument regarding the disregarding. Therefore, the Single Judge violated due process and the Appealed Decision is annulled, furthermore, since the installments for the compensation set in the Employment Contract were not due at the time of the claim before the FIFA PSC, these amounts could not be decided; or if not,

3.3 Alternatively, for the sake of argumentation, in case the Sole Arbitrator understands that the Single Judge in the FIFA PSC did not violate due process through deciding on payment in lump sum of the compensation the undue installments, issue a decision determining;

a. That the Appealed Decision is annulled and the compensation for the unilateral termination must be paid in accordance with Clause 4 in the Employment Contract, not in a lump sum, but in installments, as determined in the Employment Contract by the Parties.

4. That, the Respondent was absent from the Appellant's activities during May 2022 and June 2022, therefore, in accordance with according to the principle of inadimplenti non est adimplendum the Appellant does not hold any obligation to pay salary and housing allowances to the Respondent for these months.

5. Independently of the type of the decision to be issued, the Appellant requests the Panel to fix a sum of 10,000 CHF to be paid by the Respondents to the Appellant to contribute to the payment of his legal fees and costs.

6. Order the Respondent to pay the entirety of the administration costs and fees" (sic).

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

- Pursuant to Articles 56.1 and 57.1 of the FIFA Statutes, the CAS has jurisdiction to determine the appeal and the Respondent does not challenge its jurisdiction.

- Pursuant to Article R58 of the Code and the Parties' choice of law in Article 6 of the Contract, the FIFA Regulations and Swiss law apply to the merits of the present case.

- The Club admits that the termination of the head coach's contract rendered the continuation of the Respondent's contract *"unbearable"*. The Contract was terminated simultaneously with the head coach's contract thereby demonstrating the true purpose of the Appellant. The termination of the head coach's contract does not constitute a violation or misconduct on the Respondent's part.

- In response to the Appellant's specific allegations, the First Assistant Coach submitted that:

  - He did not breach the Club's Internal Disciplinary Regulations. The Club relied on an onsite inspection report of the Club's training facilities which stated that the First Assistant Coach was not present between 10am and 11am on the morning of 21 June 2022, to justify the unilateral termination of the Contract later that day. It provided no explanation as to why the First Assistant Coach should have been at the training facilities at that time and the Club's headquarters is approximately 30kms away from its training facilities. The Club did not establish the First Assistant Coach's absence in this manner across the remaining days between 5 June 2022 to 21 June 2022 so it may be assumed that the First Assistant Coach was only absent between 10am and 11am on the morning of 21 June 2022.

  - The Club alleges that the First Assistant Coach's absence violates the Club's Internal Disciplinary Regulations, however, the infringements relied upon in the Internal Disciplinary Regulations are binding and applicable to Technical Managers and Medical Staff, and the sanction is a fine imposed by the Club. There is no definition of Technical Manager and it is not clear whether the First Assistant Coach is included in the definition.

  - The First Assistant Coach denied that he breached a duty of care as a "high-level employee" and in any event pointed out that the Club had offered no evidence to support its position of such a breach. In the First Assistant Coach's view, the Appellant's new management was not interested in the First Assistant Coach's services because they wanted to sign someone else. The Appellant tried first to negotiate a reduced compensation amount and when that did not succeed, it *"fabricated some justifications"*.

  - The Club did not make any request or issue any warning regarding the delivery of the reports during the period of the First Assistant Coach's employment from 14 January 2022 to 21 June 2022.

  - At the time the Respondent took up employment with the Club on 14 January 2022, the first 20 matches of the season had already been played, the Club was in 12th position, and the First Assistant Coach participated in the team's 21st match on 16 January 2022. The Respondent bears no responsibility for the team's performance prior to his employment commencing and considering that the team eventually finished in 13th position, the team's performance *"cannot be presented as an objectively determinable and measurable sporting failure of the Respondent"*.

- Pursuant to Article 3 of Annexe 2 RSTP, a contract can only be terminated when its term expires or by mutual agreement. Only a breach of contract or misconduct which is of a certain severity justifies termination without notice. If there are more lenient

measures which can be taken in order for an employer to ensure the fulfilment of the employee's contractual duties, such measures must be taken; a premature termination of an employment contract can only ever be an *ultima ratio* measure (CAS 2017/A/5402).

- Article 3 par 5 of the Procedural Rules and Article 8 of the Swiss Civil Code provide that the burden of proving the existence of a fact rests on the party who derives rights from that fact. The Club provided no evidence that the First Assistant Coach's professional performance was poor or that he acted in bad faith during the period in which he was employed by the Club. To the contrary, the Club never raised any objection to the performance of the First Assistant Coach nor did it conduct an internal disciplinary proceeding and the First Assistant Coach never received any prior notice of the allegations outlined in the Dismissal Letter.

- The fact the Club now alleges that the Contract termination was with just cause, is a clear breach of the principle of good faith and the prohibition of *venire contra factum proprium*. The doctrine is recognised in Swiss law and establishes that where one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party (CAS 2008/O/1455; CAS 2015/A/4327; and CAS 2015/A/4195, amongst others). Having recognised the early termination of the employment contract without just cause, the Club cannot adopt a position contrary to the one previously taken. The claims made by the Club in the Appeal Brief are contrary to the principles of good faith and legitimate expectation and constitute a breach of the doctrine of *venire contra factum proprium*.

- The First Assistant Coach is entitled to compensation for breach of contract under Article 6 of Annexe 2 of the RSTP. Article 4 of the Contract provides that the First Assistant Coach shall receive the residual value of the Contract which amounts to EUR 200,000. Even if the compensation clause did not exist, Article 6.2 of Annexe 2 of the RSTP provides the same result. The amount of compensation agreed upon in the termination clause satisfies the criteria of reciprocity and proportionality, although the element of the termination clause that states compensation is payable in instalments is detrimental to the First Assistant Coach and should be disregarded in line with well-established jurisprudence. After the contract termination the Parties are no longer obliged to fulfil their obligations and the party in breach should pay compensation according to the relevant FIFA regulations. A competent judicial body determines the form and extent of the compensation with due regard to the circumstances.

- Article 6 of Annexe 2 of the RSTP is a semi-mandatory provision from which the parties cannot derogate by means of an employment contract to the employee's detriment. The compensation provided in Article 6 of Annexe 2 of the RSTP may be extended but in no case can it be reduced.

- The Appellant does not provide any argument in response to its claim that the compensation is excessive. It simply states in the Appeal Brief that the compensation is disproportionate and excessively high without giving any reason to support it.

- The Sole Arbitrator should reject the Appellant's claim that the compensation should be reduced. The Appellant relies on three CAS decisions that have nothing to do with the matter at hand. In CAS 2019/A/6452, the CAS Panel agreed to reduce the compensation for early termination without just cause because of the player's unprofessional behaviour, which consisted of misconduct towards a club's officials, participation in nightclub brawls, incidents with the national team etc. In the present case, the Club has not provided any evidence of any wrongdoing on the part of the First Assistant Coach. In CAS 2017/A/5312 the validity of an automatic renewal of an employment contract was considered. The compensation was reduced because the coach in that case remained silent for seven months before he filed a claim, which the Sole Arbitrator considered provided the club with the impression that the coach had no objection to the early termination. This case also has no connection to the matter at hand; the First Assistant Coach objected to the early termination, claimed all outstanding salary and when the Club refused to pay, the First Assistant Coach filed a claim with the FIFA PSC without delay. In CAS 2015/A/3999, the CAS Panel reduced the compensation because the player had earned alternative salaries during the employment period. This also has no relevance to the present case because the First Assistant Coach has not signed any new contract and has not received alternative salary amounts.

- When determining the compensation payable, *"it is as simple as looking at the stipulations of the employment contract, which establishes that the Coach is entitled to the remainder of his salary"*, and this is consistent with the FIFA Regulations. There need by no further consideration of the matter when it is *"crystal clear"* that the Club's primary and sole objective was to terminate the Contract immediately to register the new head coach and coaching staff.

- The claim that the Respondent whose annual salary was EUR 200,000 was in a stronger negotiating position than the Appellant, which was one of the top four clubs in Turkey at the time the Contract was signed, is *"unfounded"* and *"absurd"*, and the submission that the head coach coerced the Club to execute the Contract is untrue. The termination clause does not favour the First Assistant Coach and the final part of Article 4 of the Contract states that *"the Parties acknowledge that they have been represented by their qualified lawyers throughout the pre-negotiations of this contract […]"*. The Appellant has not demonstrated an alleged bargaining disparity between the Parties or that the amount of compensation to be paid was disproportionate and not reciprocal.

- The Club is liable to pay the housing allowance of EUR 1,500 for June 2022 which was outstanding at the point the contract terminated. The Club does not deny that the amount is overdue and is obliged to fulfil its obligations under the Contract up until the date of termination in accordance with the principle of *pacta sunt servanda,* which is consistent with Article 102(2) of the SCO.

- The Respondent submitted the following requests for relief:

"For the reasons set out in this Answer, the Respondent respectfully requests the Court of Arbitration for Sport to rule as follows:

- *Dismiss the present appeal and confirm the decision rendered by the FIFA Players Status Committee on 29 September 2022 in the case FPSD-6821, in totum,*

- *Order the Appellant Club to bear any and all CAS administrative and procedural costs, which have already been incurred or may eventually be incurred in connection with this arbitration; and*

- *Grant the Respondent a contribution towards its legal fees and other expenses incurred in connection with these proceedings, pursuant to Article R64.5 of the CAS Code, in an amount to be fixed by the Sole Arbitrator".*

V. JURISDICTION

31. Article R47 of the Code provides that:

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

32. Pursuant to Article 57.1 of the FIFA Statutes:

"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".

33. The Appellant relies on Article 57.1 as conferring jurisdiction on the CAS. The Respondent raised no objections to the jurisdiction of the CAS in his Answer and the jurisdiction is further confirmed by the Parties' signatures on the Order of Procedure.

34. Accordingly, on the basis of the above, the Sole Arbitrator is satisfied that she has jurisdiction to adjudicate the present dispute.

VI. ADMISSIBILITY

35. Article R49 of the Code provides that:

"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".

36. Pursuant to Article 57 of the FIFA Statutes:

> *"1. 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.*
>
> *2. Recourse may only be made to CAS after all other internal channels have been exhausted".*

37. The Sole Arbitrator observes that the FIFA PSC rendered the Appealed Decision on 29 September 2022 and, following the Appellant's request, notified the grounds of the Appealed Decision by email to the Parties on 17 November 2022.

38. The Appellant made no submissions regarding the admissibility of the appeal except to state that CAS is competent to resolve the present matter. The Respondent does not contest the admissibility of the appeal.

39. The Sole Arbitrator notes that the Appellant filed its Statement of Appeal on 30 November 2022, within the deadline of 21 days prescribed in the FIFA Statutes and the Code and that all channels for appeal internal to FIFA had been exhausted. The Statement of Appeal also complies with the requirements of Article R48 of the Code.

40. Accordingly, on the basis of the above, the Sole Arbitrator is satisfied that the appeal was filed in time and is admissible.

VII. APPLICABLE LAW

41. Pursuant to Article R58 of the Code, the Sole Arbitrator is required to decide the dispute:

> *"[According] to the applicable regulations and 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

42. Furthermore, Article 56.2 of the FIFA Statutes provides that:

> *"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".*

43. The Appellant and Respondent agree that the Sole Arbitrator should primarily apply the regulations of FIFA and Swiss law to the merits of the present appeal. They refer also to Article 6 of the Contract which confirms that disputes regarding the Contract shall be submitted to CAS and decided in accordance with FIFA regulations and Swiss law.

44. The Sole Arbitrator notes that the dispute touches on matters pertaining to the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), and that at the time the dispute arose, the March 2022 edition of the FIFA RSTP was in effect.

45. Accordingly, on the basis of the above, the Sole Arbitrator determines that the FIFA RSTP (March 2022 edition) and other relevant FIFA regulations constitute the applicable law to the matter at hand. Swiss law applies subsidiarily.

VIII. MERITS

46. As a preliminary matter, the Sole Arbitrator observes that the Appellant challenges the Appealed Decision on the basis that the Single Judge's decision is *ne ultra petita* because in the FIFA PSC the First Assistant Coach claimed compensation payable in instalments whereas the Single Judge awarded compensation payable as a lump sum. The Sole Arbitrator recalls the well-established principle of *ne ultra petita*, according to which, an arbitral panel is bound to observe the limits of the parties' motions and may not grant more than is requested by the parties in their prayers for relief (CAS 2020/A/6959, para 81, CAS 2017/A/5086, para 121, and CAS 2008/A/1644, para 22). The principle is applied by looking at the parties' requests for relief.

47. The Sole Arbitrator observes that her duty pursuant to Article R57 of the Code is to decide the present case *de novo,* which means that any denial of due process at the lower-level proceedings (if any) is cured by the CAS proceedings, a principle that is well-established in CAS jurisprudence (CAS 2016/A/4648, para 74; CAS 2012/A/2913, para 87; CAS 2009/A/1880-1881 paras 142-146 CAS 98/208, para 10; TAS 2009/A/1879, para 71; CAS 2008/A/1394, para 21; TAS 2008/A/1582, para 54; and CAS 2008/A/1594, para 109; CAS 2006/A/1153, para 53; CAS 2003/O/486, para 50; and CAS/98/208, para 10). The Sole Arbitrator considers that the Appellant has had the full opportunity in these proceedings, including in its request for relief to put its case on the issue of liability for compensation and the mode of payment, if liability is found, and that she is in the position, therefore, to consider and determine the present dispute, *de novo*, and any flaw that may have arisen during the PSC proceedings will be cured by this decision. Accordingly, the Appellant's argument of *ne ultra petita* as a ground for setting aside the Appealed Decision is rejected.

48. In light of the Parties' respective submissions, the Sole Arbitrator considers that the issues for determination are:

a) Did the Appellant terminate the Contract for just cause;

and,

b) What are the consequences of the Contract termination?

49. In dealing with each of these issues, the Sole Arbitrator recalls that:

"[I]n CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (see also article 8 of the Swiss Civil Code, ATF 123 III 60, ATF 130 III 417). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party

wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence" (e.g. CAS 2009/A/1810 & 1811, para 18 and CAS 2020/A/6796, para 98).

50. Bearing this in mind, the Sole Arbitrator turns to the first issue.

A. Did the Appellant Terminate the Contract For Just Cause?

51. The Appellant submits that it terminated the Contract with just cause following various contract breaches which caused a breakdown in trust between the Club and the First Assistant Coach. The Club outlined the reasons for the termination in the Dismissal Letter as: absence without authorisation despite a contractual commitment and general duty, pursuant to Article 2.8 of the Contract, to devote his *"full time, skill and attention"* to the role of First Assistant Coach which, in turn, constituted a serious breach of the Club's Internal Disciplinary Regulations; the failure to report to the Club on recent technological developments in the football industry under Article 2.20 of the Contract; and the team's poor performance, all of which rendered the continuation of the employment relationship, in good faith, intolerable for the Club.

52. In the Appeal Brief, the Appellant also submitted that the termination of the head coach's contract with just cause made the continuation of the Contract *"unbearable"*.

53. The Respondent rejects the Appellant's submission that the Contract was terminated for just cause. The Respondent submitted that he did not commit any breach of contract that would justify dismissal and that the real reason for his dismissal was that the Club had terminated the head coach's contract and the new management was not interested in retaining the First Assistant Coach's services because it wanted to sign someone else.

54. Annexe 2 of the FIFA RSTP lays down the rules regarding the employment of coaches, including rules regarding contract termination. The rules have the purpose of fostering contractual stability and respect for contracts and apply to both club and coach in equal measure. Article 3 of Annexe 2 provides that:

"A contract may only be terminated upon expiry of its term or by mutual agreement".

55. Article 4 of Annexe 2 of the FIFA RSTP provides:

> *"1. A contract may be terminated by either party without payment of compensation where there is just cause.*
>
> *2. Any abusive conduct of a party aimed at forcing the counterparty to terminate or change the terms of the contract shall entitle the counterparty to terminate the contract with just cause"*.

56. The FIFA RSTP do not define "just cause", however, CAS jurisprudence has consistently established that whether a party has *just cause* to terminate a contract depends on the circumstances of the case (CAS 2020/A/7175, para 74, with reference to ATF 127 III 153 consid. 1 a)). It is generally considered that *just cause* exists when the breach of contract and/or

the circumstances of the case are so serious that the injured party cannot in good faith be expected to continue the contractual relationship (CAS 2020/A/7175, para 74). This is consistent with Article 337 of the SCO which provides that:

> *"1. Both employer and employee may terminate the employment relationship with immediate effect at any time for good cause; the party doing so must give his reasons in writing at the other party's request.*
>
> *2. In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice.*
>
> *3. The court determines at its discretion whether there is good cause, However, under no circumstances may the court hold that good cause is constituted by an employee being prevented from working through no fault of his own"* (emphasis added).

57. A breach is considered sufficiently serious to justify the immediate termination of a contract for just cause when there are objective criteria that would render it unreasonable to expect the employment relationship between the parties to continue e.g. a serious breach of trust (CAS 2020/A/6798, para 62, citing SFT 129 III 380, p. 382, para. 2.1 and SFT 4C.240/2000 of 2 February 2001). As explained in CAS 2020/A/7175 at para 74:

> *"As it is an exceptional measure, the immediate termination of a contract for just cause must be accepted only under a narrow set of circumstances. Thus, only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter. In the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after being warned (ATF 129 III 380 consid. 2.2). The judging body determines at its discretion whether there is just cause (Article 337 (3) CO). Furthermore, and still in reference to Swiss law, pursuant to CAS jurisprudence 'a termination of contract with immediate effect is to be applied as ultima ratio' (CAS 2009/A/1956)".*

58. The burden of proving the factual allegations upon which the Club seeks to establish "just cause" rests with the Club.

59. The Sole Arbitrator now considers each of the allegations raised against the First Assistant Coach in turn.

a) Absence Without Authorisation: Breach of Article 2.8 of the Contract and the Internal Disciplinary Regulations

60. The Appellant submits that the Respondent was absent without authorisation between 5 June 2022 and 21 June 2022 and that he was in breach of his obligation to devote his full time, skill and attention to the performance of his duties as First Assistant Coach, as required under Article 2.8 of the Contract. It also alleges that the unauthorised absence breaches the Club's Internal Disciplinary Regulations and entitled it to unilaterally terminate the Contract after three days. The Respondent rejects the submission that he was absent without authorisation and further submits that the Club's Internal Disciplinary Regulations do not apply to him.

61. The Sole Arbitrator notes that the Respondent does not deny that he was absent during the period 5 June 2022 and 21 June 2022, which was a period that followed the last game of the season until the Respondent's dismissal on 21 June 2022. The Sole Arbitrator also observes that the only evidence submitted by the Club to show the First Assistant Coach's absence is an on-site inspection report dated 21 June 2022 which confirms that the First Assistant Coach did not arrive at the Club's training ground between 7.23am and 10.47am on 21 June 2022. Such evidence is insufficient to establish the *unauthorised absence* of the First Assistant Coach for over two weeks. There is no other evidence that he was absent for the entire period as alleged. There is also no evidence that the Club requested the First Assistant Coach to return and that the First Assistant Coach failed to comply with such a request, and no evidence that disciplinary proceedings were commenced in relation to the alleged unauthorised absence.

62. Since there is no evidence that supports the Club's contention that the First Assistant Coach was absent between 5 June 2022 until his dismissal on 21 June 2022 and that the absence was unauthorised, the Sole Arbitrator rejects the Appellant's submission that the First Assistant Coach was absent without authorisation. There is also no other evidence before the Sole Arbitrator to support the contention that the First Assistant Coach was in breach of his obligation under Article 2.8 of the Contract to devote his *"full time, skill and attention to the performance of his duties"*. Accordingly, the Sole Arbitrator determines that the First Assistant Coach was not in breach of Article 2.8 of the Contract.

63. Having found that the First Assistant Coach was not absent without authorisation and not otherwise in breach of Article 2.8 of the Contract, the Sole Arbitrator considers that it is unnecessary to determine the Respondent's submission regarding the scope of the Club's Internal Disciplinary Regulations.

b) Obligation to Report on Recent Technological Developments in the Football Industry: Breach of Article 2.20

64. The Appellant submits that the First Assistant Coach failed to submit reports on recent technological developments to the Club as required under Article 2.20 of the Contract. The Respondent submits that the Club never requested or issued any warning regarding the delivery of the reports during the period of his employment.

65. The Sole Arbitrator observes that the First Assistant Coach was obliged throughout the term of the Contract to *"use his best endeavors to follow the recent technological developments in the football industry and report to the Club"* but there is no indication in the Contract or in any other evidence put before the Sole Arbitrator as to when the First Assistant Coach was required to report and how these reports were to be received. Furthermore, there is no evidence that the Club requested the First Assistant Coach to report to the Club and that the First Assistant Coach failed to comply with such a request, or that the Club commenced disciplinary proceedings against the First Assistant Coach for an alleged breach. If the Club was concerned by the absence of a report, it is reasonable to expect that it would inform the First Assistant Coach of its concerns and set out its expectation as to when and how the report should be received but there is no evidence that the Club was concerned during the five-month period that the

First Assistant Coach was in the Club's employment, except in the Dismissal Letter, which came too late for the First Assistant Coach to rectify the situation.

66. Accordingly, the Sole Arbitrator determines that the First Assistant Coach did not breach Article 2.20 of the Contract.

c) The Team's Poor Performance Under the First Assistant Coach's Supervision

67. The Appellant submits that the first team performed poorly under the coaching team of which the Respondent was a member and that it had its lowest ranking ever in its entire sporting history by finishing the Turkish Süper Lig in 13th place. The Respondent submits that at the time he took up employment with the Club on 14 January 2022, the first 20 matches of the season had already been played, and the Club was in 12th position. The Respondent asserts that he bears no responsibility for the team's performance prior to his employment commencing and considering that the team he took over finished in 13th position, only one spot behind, the team's performance *"cannot be presented as an objectively determinable and measurable sporting failure of the Respondent"*.

68. The Sole Arbitrator accepts that a coach plays an important role in a football team's performance but attributing a team's poor performance or poor results to a single coach or a coaching team collectively is difficult because there are many factors, both on-field and off-field, that affect team performance e.g. player availability through injury, player recruitment decisions, amongst others. The Sole Arbitrator was not provided with any evidence from which she could objectively determine whether the Respondent was the cause of, or contributed to the team's poor performance. There was, for example, no evidence that the First Assistant Coach was unable to maintain positive relationships with the team players which affected team performance, or, that an absence of professionalism on the First Assistant Coach's part exacerbated an already poor team performance bearing in mind that at the time the First Assistant Coach joined the Club, the Club's team was in 12th position in the league.

69. The Sole Arbitrator recalls CAS jurisprudence which establishes that unsubstantiated allegations of a team's poor performance do not justify termination of a coach's contract for just cause without notice (CAS 2017/A/5402, paras 121 – 123). She notes that a coach and club are at liberty to agree that poor team results may justify the premature termination of a coach's contract for just cause, but that the coach and the club must expressly agree that the contract may be terminated for that reason, and that the term *"poor results"* must be clearly defined to provide certainty of the threshold at which the contract may be terminated because of poor team performance (CAS 2020/A/6798, paras 69 - 70). The Sole Arbitrator notes that there is no express clause in the Contract that provides the Club with the right to terminate the First Assistant Coach's contract prematurely in the event of "poor team results".

70. Accordingly, for all of the foregoing reasons, and in the circumstances of this case, the Sole Arbitrator determines that the Appellant's allegation that its first team performed poorly under the First Assistant Coach is not proved; the team's poor performance did not justify termination of the Contract for just cause.

d) Conclusion

71. For all of the above reasons, the Sole Arbitrator finds that the Appellant has not proved that the First Assistant Coach breached the Contract during his employment. It follows, therefore, that none of the above allegations destroyed the relationship of trust, which is essential to an employment relationship, or at least shattered it so profoundly, that the immediate dismissal of the First Assistant Coach was the only option available to the Club.

72. The Sole Arbitrator also rejects as irrelevant the Appellant's submission regarding Article 321a and Article 321e of the SCO and the level of the duty of care that the Respondent owed. The Appellant has not proved that the Respondent breached the duty of care and loyalty to which Article 321a of the SCO may apply and neither is there an allegation that the Respondent caused damage to the Appellant either wilfully or through negligence to which Article 321e may be relevant. Furthermore, on the basis of all the analysis and findings above, the Sole Arbitrator does not consider it necessary to examine the Respondent's alternative argument regarding the doctrine of *venire contra factum proprium* and dismisses the Respondent's claim on that issue.

73. Additionally, the Appellant submits in the Appeal Brief that the termination of the head coach's contract made continuation of the Contract *"unbearable"*. The Sole Arbitrator observes that the Appellant provides no explanation in the Appeal Brief as to why the Respondent's employment was *"unbearable"* in light of the head coach's contract termination. She accepts that all members of a coaching team may be dismissed to make way for a new team. Conversely, a club may retain the services of an assistant or goalkeeping coach in the event that the head coach is dismissed mid-season, in order to preserve the continuity of staff and minimise disruption in the work environment. In either situation a club must still terminate the contract lawfully or face the consequences. Insofar as the Appellant seeks to rely on the contract termination of the head coach to support the termination of the Contract for just cause, the Sole Arbitrator notes that there was no contractual provision that entitled the Appellant to terminate the Contract in the event the head coach's contract was terminated and she finds no evidence to support the contention that termination of the head coach's contract made continuation of the Contract *"unbearable"* or untenable, and rejects the Appellant's submission in that regard.

74. Accordingly, the Sole Arbitrator determines that the Club did not have just cause to terminate the Contract, and finds that in the absence of a just cause, the Club breached the Contract when it prematurely terminated it without just cause.

B. What are the Consequences of the Contract Termination?

75. Article 6 of Annexe 2 of the FIFA RSTP provides for the consequences of terminating a coach's contract without just cause as follows:

"1.

In all cases, the party in breach shall pay compensation.

2.

Unless otherwise provided for in the contract, compensation for the breach shall be calculated as follows:

Compensation due to a coach

a) In case the coach did not sign any new contract following the termination of their previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated.

b) In case the coach 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 coach will be entitled to an amount corresponding to three monthly salaries (the "Additional Compensation"). In case of egregious circumstances, the Additional Compensation may be increased by up to a maximum of six monthly salaries. The overall compensation may never exceed the residual value of the prematurely terminated contract.

c) Collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law may deviate from the principles stipulated above. The terms of such an agreement shall prevail.

[…]" (emphasis added).

76. Article 6 of Annexe 2 of the FIFA RSTP – in common with Article 17 of the FIFA RSTP – permits the parties to include a clause in an employment contract that provides for the calculation of compensation in the event of a breach. The Sole Arbitrator considers that CAS case authorities under Article 17 of the FIFA RSTP on this issue are relevant also to a consideration of Article 6 of Annexe 2 of the FIFA RSTP because both provisions recognise that the parties may agree their own compensation clause.

77. A compensation clause included in a coach's employment contract has primacy over Article 6 of Annexe 2 of the FIFA RSTP, with that Article applying subsidiarily. CAS jurisprudence establishes that the wording of a compensation clause should leave no room for interpretation and should clearly reflect the intention of the parties (CAS 2016/A/4826, para 100 and CAS 2020/A/7187, para 90 and cases cited therein). A compensation clause may go by various names; however, such clauses are generally recognised as a liquidated damages clause (CAS 2020/A/7187, para 90).

78. The Sole Arbitrator notes that Article 4 of the Contract, which is titled Special Provisions Regarding the Termination, provides for the compensation to be paid in the event of the Contract being terminated prematurely by the Club or the First Assistant Coach. Accordingly, the Sole Arbitrator agrees with the Parties that compensation falls to be determined in the first instance under Article 4 of the Contract, while also noting that the Appellant challenges

the validity of Article 4 of the Contract and the Respondent challenges the validity of part of Article 4 of the Contract.

79. Article 4 of the Contract provides:

"If this Contract is prematurely terminated by the Club without just cause or by the First Assistant Coach for just cause, the Parties agree that the compensation shall be equal to the residual value of the Contract regardless of whether the First Assistant Coach signs any new contract following the termination. The Club accepts and undertakes in advance that it will not demand a reduction from this compensation amount.

In the event that the employment contract signed between Domenec Torrent Font and the Club on 14 January 2022 is prematurely terminated by the Club without just cause or by Domenec Torrent Font for just cause, the Parties agree that the First Assistant Coach shall have the right to terminate this present contract with just cause.

For the sake of clarity, the Parties have agreed that the season of 2023/2024, which is subject to the option as per Article 1 of the Special Provisions, will not be subject to the calculation of the compensation to be paid to the First Assistant Coach if the Contract is not extended as per the relevant article of this contract. In other words, the First Assistant Coach agrees in advance that he shall not claim any compensation whatsoever for the residual value of the season of 2023/2024 in case this contract is not extended for this season.

In addition to the above, the Parties explicitly agree that the First Assistant Coach shall receive the residual value of the Contract (the rental fees are excluded and cannot be claimed under this provision) in accordance with the payment schedule designated in Article 1 of the Special Provisions of this contract, which means that the payments regarding the compensation will not be made in one lump sum. If the due amounts are not paid on time, an annual interest of 5% is applied to the outstanding amount.

Further to the above, the Parties acknowledge that they have been represented by the qualified lawyers throughout the pre-negotiations of this contract. The Parties hereby agree, declare, and undertake that the conditions set forth in this provision is not extortionate, is set by the free will of the Parties. The Parties agree that this provision is the indispensable provision (sine qua non) of this Agreement and this Agreement has been signed taking into consideration of this provision" (sic).

80. The Appellant submits that Article 4 is invalid because it is disproportionate, not reciprocal and excessive. It relies primarily on the argument that because of the timing of the negotiation as falling mid-season, the requirement for the Club to hire a coach that had a UEFA pro coaching licence, and the head coach's stipulation that the Respondent was to be hired, there was an inequality of bargaining power between the Club and the First Assistant Coach, which favoured the First Assistant Coach.

81. The Appellant relies on CAS 2016/A/4826, in which the Panel in the context of considering the validity of a liquidated damages clause, examined whether the autonomy of the parties to reach an agreement was impaired because one of the parties had superior bargaining power or exercised undue influence or power on the other party, although the Sole Arbitrator recalls that in CAS 2016/A/4826 the Panel found no evidence that the autonomy of the parties was

so impaired and therefore no reason to invalidate the clause on that basis (CAS 2016/A/4826, paras 106 - 107).

82. The Respondent rejects the Appellant's claims and submits instead that the factors on which the Appellant relies do not demonstrate a power disparity between the Club and the First Assistant Coach and that the Appellant has not otherwise substantiated its claim that the compensation payable under Article 4 was disproportionate and not reciprocal. He submits that Article 4 is detrimental to his interests because it provides for payment by instalment and that this part of Article 4 should not apply.

83. The Sole Arbitrator recalls that a liquidated damages clause has been equated to a contractual penalty clause and therefore, in principle, may be subject to judicial control within the limits of Article 163 (2) and (3) of the SCO (CAS 2016/A/4826, para 103). A liquidated damages clause is the product of the parties' autonomy and freedom to contract, and does not necessarily have to be reciprocal in order to be valid (CAS 2018/A/5771, para 162 and CAS 2015/A/3999 & 4000, paras 158 - 160) since the consequences of a breach of contract for a club and player are generally different (CAS 2016/A/4826, paras 104 – 105). The test established in CAS jurisprudence regarding the validity of a liquidated damages clause is whether one of the parties has entered into an excessive commitment that disproportionately favours the other party to the contract and provides that other party with undue control (CAS 2020/A/7011, para 99; CAS 2018/A/5771, para 162; and CAS 2015/A/3999 & 4000, paras 158-160). The validity of such a clause falls to be assessed on a case-by-case basis, taking into consideration the specific circumstances of the case (CAS 2019/A/6626, para 152), and since the disparity in a liquidated damages clause may in some cases be compensated by other provisions of the contract, a consideration of the entire contract may be necessary (CAS 2016/A/4826, para 106).

84. By way of example, in CAS 2018/A/5771, the relevant compensation clause required the player to pay the total amount of the contract in the event of a breach whereas a breach by the club required the club to pay two months' salary to the player. The CAS Panel determined that the compensation clause was, therefore, *"excessively favourable towards the club"* (CAS 2018/A/5771, para 163). CAS 2018/A/5771 is to be contrasted with CAS 2019/A/6533 in which the relevant compensation clause was considered to fairly entitle the player to the remaining salary owed under the employment contract and was not an excessive commitment (CAS 2019/A/6533, para 126).

85. The Sole Arbitrator considers that Article 4 of the Contract is clearly drafted and that there is no ambiguity in its interpretation. She observes that the Appellant's primary argument regarding the validity of Article 4 of the Contract relies on the submission that Article 4 should be declared null and void because of an inequality of bargaining power between the Appellant and the Respondent. Determining the degree to which a party may wield superior power in a contractual situation is difficult, although it is generally accepted that an imbalance of power exists in the negotiation for, and during an employment relationship, which usually favours the employer. The bargaining power of a party in an employment contract negotiation will depend on a number of factors, including the level of interest in the employee's services, the desirability of substitutes, time pressure, negotiating skill and the counterparty's identity.

86. Based on the available evidence, the Sole Arbitrator finds it difficult to make a determination about the degree of bargaining power wielded by the Club as against that held by the First Assistant Coach, and does not accept the Appellant's contention that there was a power disparity in favour of the First Assistant Coach at the time the Contract was agreed. There is no evidence before the Sole Arbitrator that the head coach required the Club to hire the Respondent, and while the evidence does not clearly show who conducted the negotiations on the part of the Club, Article 4 contains an acknowledgment that both parties were *"represented by their qualified lawyers throughout the pre-negotiations of this Contract"*. On that basis, the Sole Arbitrator considers that the Parties were fairly represented during the Contract negotiation, and determines that Article 4 is not invalid for reason of an imbalance of power during the Contract negotiation.

87. The Sole Arbitrator also rejects the Appellant's claims that the clause is disproportionate, not reciprocal or excessive. The Sole Arbitrator observes that Article 4 requires both Parties in the event of a breach to pay the residual value of the Contract. It permits the Club to pay the compensation by instalment thereby entitling the Club to stagger the full compensation payment across a period of time and denying the First Assistant Coach the immediate benefit of a lump sum. It is silent as to the mode of payment of compensation by the First Assistant Coach. The Sole Arbitrator also notes that the Parties agreed that no deductions would be made from the compensation as mitigation for sums that the First Assistant Coach might earn from new employment and that Article 4 records the Parties' agreement that *"the conditions set forth in this provision [are] not extortionate"*.

88. The Sole Arbitrator accepts that the obligations under Article 4 are arguably not reciprocal, however, the absence of reciprocal obligations does not invalidate Article 4. The question is whether the Club entered into an excessive commitment that disproportionately favours the First Assistant Coach and provides the First Assistant Coach with undue control. The Sole Arbitrator considers that the Appellant has provided no convincing arguments as to whether that test is met in this case nor has it persuaded the Sole Arbitrator that it is not offset by other provisions in the Contract.

89. Furthermore, the Sole Arbitrator considers that the Appellant as a longstanding professional football club and undoubtedly with considerable experience of contract negotiations in professional football, was in control of the circumstances and timing of the Contract termination. It initiated discussions to terminate the Contract and agree a mutually acceptable termination, was likely aware of the financial consequences of doing so and presumably also aware of the risk that it would be unable to agree a mutually acceptable termination with the First Assistant Coach, and yet it chose to terminate the Contract when it did. The Sole Arbitrator considers that in the absence of any evidence regarding coaching salaries generally, she is unable to objectively evaluate whether the freely negotiated salary amounts for the First Assistant Coach were fair or not and ought to be reduced.

90. Accordingly, in the circumstances of this particular case, the Sole Arbitrator does not consider the compensation agreed under Article 4 to be disproportionate, excessive or unfair, and determines that Article 4 is valid.

91. The Appellant submits that the compensation amount due under Article 4 should be reduced because the Respondent's conduct, while not sufficient to constitute a material breach for just cause, still violated his obligations under the Contract. The Sole Arbitrator has previously found in paragraph 71 that the Respondent did not commit any breach of contract or misconduct and therefore rejects the Respondent's submissions for a reduction to the compensation amount on this basis.

92. Finally, and specifically in relation to the monthly housing allowance of EUR 1,500 for June 2022, the Appellant submits that it is not liable for this outstanding payment owing to the principle of *inadimplenti non est adimplendum*. Informally translated the phrase means that "there is no need to perform for one who has not performed"; in other words, the Appellant alleges that it is not liable for payment of the monthly housing allowance in June 2022 because the Respondent was absent without authorisation and not performing the Contract. The Sole Arbitrator rejects this argument; the First Assistant Coach was employed under the terms of the Contract until it was terminated without just cause on 21 June 2022. The Sole Arbitrator finds that the First Assistant Coach is entitled, as the party not in breach, to any housing allowance payment that was outstanding under the Contract up to and including 21 June 2022, and thereafter entitled to compensation in accordance with Article 4 of the Contract.

93. The Sole Arbitrator rejects the Respondent's argument that the payment mode should be set aside as invalid because it is detrimental to the Respondent's interests, and accepts the Appellant's argument that the residual value should be paid in accordance with Article 4 of the Contract, namely by instalment, and not in one lump sum as the FIFA PSC directed. As noted in paragraph 86 above, the Parties have confirmed in the Contract that they were legally represented in the Contract negotiations. Moreover, the Sole Arbitrator observes that, from an objective point of view, Article 4 provides for compensation without mitigation for any sums earned since the Contract was terminated, which appears to offset any disadvantage of payment by instalment. The Respondent has also not referred the Sole Arbitrator to any other legal principle which might in the circumstances of the present dispute make the payment by instalment of compensation invalid. Accordingly, the Sole Arbitrator partially upholds the Appellant's appeal in relation to the mode of payment of compensation under Article 4.

94. The residual value of the Contract under Article 4 of the Contract is the salary that the First Assistant Coach would have received had he remained employed until the end of the 2022/2023 season of EUR 200,000 and which is payable by instalment as agreed by the Parties and outlined in the schedule in Article 2.1 of the Contract as follows:

Due Date	*Amount (EUR)*
31.08.2022	*EUR 20.000*
01.10.2022	*EUR 20.000*
31.10.2022	*EUR 20.000*

30.11.2022	*EUR 20.000*
05.01.2023	*EUR 20.000*
31.01.2023	*EUR 20.000*
28.02.2023	*EUR 20.000*
05.04.2023	*EUR 20.000*
30.04.2023	*EUR 20.000*
31.05.2023	*EUR 20.000*

95. The Sole Arbitrator also determines that pursuant to Article 4 of the Contract, the Respondent is entitled to interest of 5% p.a. on any outstanding salary payment highlighted in paragraph 94 above from the day after the respective salary payment was due.

C. Conclusion

96. For the reasons set out above, the Sole Arbitrator partially upholds the Appellant's appeal regarding the mode of compensation payment only and, consequently, the *dies a quo* for the calculation of interests. All of the Appellant's other claims are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by *Galatasaray Sportif A.S* on 30 November 2022 against the decision issued by the Players Status Chamber of the Fédération Internationale de Football Association on 20 September 2022 is partially upheld.

2. The decision rendered by the Players Status Chamber of the Fédération Internationale de Football Association on 29 September 2022 is confirmed, save for item 2 which is amended as follows:

   2. The Respondent, Galatasaray AS, has to pay the Claimant, the following amounts(s):

- *EUR 1,500 as outstanding remuneration plus 5% interest p.a. as from 22 June 2022 until the date of effective payment;*

- *EUR 200,000 as compensation for breach of contract in accordance with this payment schedule plus 5% interest p.a. on any outstanding amounts to be calculated from the day after the payment due date:*

Due Date	*Amount (EUR)*
31.08.2022	*EUR 20,000*
01.10.2022	*EUR 20,000*
31.10.2022	*EUR 20,000*
30.11.2022	*EUR 20,000*
05.01.2023	*EUR 20,000*
31.01.2023	*EUR 20,000*
28.02.2023	*EUR 20,000*
05.04.2023	*EUR 20,000*
30.04.2023	*EUR 20,000*
31.05.2023	*EUR 20,000*

3. (…).

4. (…).

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