Arbitration CAS 2015/A/4333 MKS Cracovia SSA v. Bojan Puzigaca & Féderation Internationale de Football Association (FIFA), award of 10 April 2017

Panel: Mr Patrick Lafranchi (Switzerland), President; Prof. Petros Mavroidis (Greece); Mr Mark Hovell (United Kingdom)

Football
Termination of an employment contract without just cause by the club
Exception to FIFA DRC's competence to deal with employment-related dispute of an international dimension
Interpretation of contractual clauses
Rate and starting date of interest

1. **Art. 22 lit. b) of the FIFA Regulations on the Status and Transfer of Players (RSTP) sets forth that its DRC is competent to deal with employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement. Accordingly, and as confirmed by the CAS' constant jurisprudence, this means that if an independent arbitration tribunal guaranteeing fair proceedings exists at national level, a dispute may be referred to the national body, even if it has an international dimension, provided that the parties have explicitly chosen the national body by means of an agreement acknowledging its jurisdiction. An arbitration clause therefore has to designate a particular arbitral tribunal, or at least an arbitral tribunal that is determinable by contractual interpretation.**

2. **FIFA regulations do not foresee how contractual clauses are to be interpreted. After Swiss law, while interpreting a contractual clause, one primarily has to seek for the effective will of the parties on a factual basis. Only if the latter cannot be established the relevant contractual clause has to be interpreted legally after the principle of confidence. Pursuant to the principle of confidence, the relevant declaration has to be interpreted as it could and had to be understood by the addressee of the declaration, while considering the wording and all the relevant circumstances. In continuation, based on the principle *in contra stipulatorem*, a possible unclear formulation has to be interpreted against the stipulator's position.**

3. **According to articles 104.1 and 339.1 of the Swiss Code of Obligations, respectively, a debtor in default on payment of a pecuniary debt must pay a default interest of 5% per annum even where a lower rate of interest was stipulated by contract and, when the employment relationship ends, all claims arising therefrom fall due.**

I. FACTUAL BACKGROUND

A. The parties

1. MKS Cracovia SSA ("MKS Cracovia SSA" or "the Club") is a Polish Football Club with seat in Kraków, Poland. It is affiliated with the Polish Football Association which in turn is affiliated with the Fédération Internationale de Football Association.

2. Mr Bojan Puzigaca ("Bojan Puzigaca" or "the Player") is a Bosnian professional football player, born on 10 May 1985.

3. The Fédération Internationale de Football Association ("FIFA") is the world governing body of football headquartered in Zurich, Switzerland.

B. Factual background

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.

a) The original agreement between the Club and the Player

5. On 10 February 2011, the Player and the Club concluded an "Agreement on Professional Football Playing. Civil Law Contract" (the "Agreement"). Amongst others, the Agreement defined its duration as between 24 February 2011 and 30 June 2014 (§ 2.1). The gross remuneration owed to the Player was determined at EUR 7,100 per month (§ 5.1).

6. On 21 June 2012, the parties agreed on the conclusion of an annexe 1 (the "Annex"). Therein the parties stipulated the following (§ 1.1):

> *"The Parties agree that existing wording of § 5.1 of the Contract shall be deleted and shall be replaced by a new wording, as follows:*
>
> *1. On the basis of this Agreement the Player shall receive the base remuneration as follows:*
>
> *1) in the Tournament season 2012/2013, i.e. from 1 July 2012 to 30 June 2013 in the amount of 6.100,00 (say: six thousands one hundred) EURO gross for each month".*

And in its § 2.3:

> *"This Annex shall enter into force on 1 July 2012".*

b) Subsequent Development

7. On 30 June 2013, the Club sent the Player a letter with the following wording:

> *"Acting on behalf of MKS Cracovia SSA we kindly inform You that contract on professional football playing – civil law agreement, dated on 10 February 2011, concluded between You and MKS Cracovia SSA, should be considered invalid with effect from 1 July 2013.*
>
> *Starting from 1 July 2013 contract does not specify a basic remuneration for its implementation and according to Art. 5 section 1 point 2) Resolutions II/12 of the Polish Football Association Management Board: "Under pain of invalidity, a contract: (…) specifies the basic player's remuneration for the whole period which contract stays in force".*
>
> *Therefore, it should be deemed, that from 1 July 2013 You are no longer the MKS Cracovia SSA football player and due to this fact you should leave the MKS Cracovia SSA training camp and cease performance of the contractual obligations. Otherwise, MKS Cracovia SSA will charge You with the costs of organization of the camp, in part attributable to your person.*
>
> *Notwithstanding the foregoing we inform You that MKS Cracovia SSA file an application for declaring a contract invalidity to Dispute Resolution Chamber of Polish Football Association. Please find enclosed a copy of this application".*

8. On 30 June 2013, the Club filed an application to the Dispute Resolution Chamber of Polish Football Association ("PZPN DRC") to declare the Agreement as invalid. This due to the fact that from 1 July 2013 the Agreement did not define the salary owed to the Player.

9. On 5 July 2013, the Player's representative wrote a letter to the Club with the following content:

> *"Dear Sirs,*
>
> *I am addressing to you on behalf of the football player, Mr. Bojan Puzigaca, and with his Power of Attorney regarding his contract situation with your club.*
>
> *On 30 June 2013 the club terminated valid agreement with a player unilaterally and without just cause. I remind you that the player has valid contract till 30 June 2014. Your explanation that the contract 'is invalid' is unacceptable for the player and according to the agreement and Annex No. 1.*
>
> *The Annex No. 1 was binding only for the season 2012/13 till 30 June 2013 and after that club is obliged to fulfil its obligations to the player according to the agreement from the date 10 February 2011.*
>
> *Player has a desire to remain at the club and continues cooperation and we hope that you will inform me IMMEDIATELY (no later than Monday 8 July 2013) to withdraw your unilaterally termination without just cause.*
>
> *For all of the above mentioned reasons, if you do not with draw your unilaterally termination without just cause in the above mentioned period, we will be forced to send a complaint on DRC FIFA and you will have*

to take the responsibility for the consequences, according to the FIFA Regulations for Status and Transfers of Players, Art. 17.

In a case of a dispute DRC FIFA is authorized, since The Football Federation of Poland does not meet the conditions provided by the Regulations on the Status and Transfer of Players 22b. We do not recognize the jurisdiction of the PZPN and we will not be a part of such complain.

FIFA Regulations on the Status and Transfer of players regulate the mutual rights and obligations. We hope that the problem can be resolved without interventions by third parties.

We thank you in advance for your kind attention and look forward to your soon reply. For further information I stay at your disposal at the above mentioned numbers.

Yours sincerely

Mirko Poledica, PFA president of Serbia, (legal representative by Power of Attorney)".

10. On 16 July 2013, the Player's representative wrote the following to the PZPN DRC:

"Dear Sir and Madame,

We refer to your correspondence, dated 10 July 2013 and received on 15 July 2013, and state the following within the granted term:

Since we intend to lodge a claim before the DRC of FIFA, we are not able to claim before your NDRC or any other court in Poland parallel.

For the sake of good order and with big respect to you and your authority we have to inform you that we cannot follow your instructions and that we will not be present at any hearings and in the further proceedings.

Consequently, due to our intention to lodge a claim before the DRC of FIFA we are kindly asking you to set aside the claim by the mentioned club, in accordance to the FIFA Regulations on the Status and Transfer of Players, VIII. Art. 22. B), Art. 24. and FIFA circular no. 1010, and to await the decision by the DRC of FIFA.

Therefore, due to the afore-said reasons we cannot defend our rights before your authority and hope for your kind understandings. We thank you in advance for your kind attention. For future question we stay at your disposal.

Mirko Poledica, President of the Players union SPFN (on behalf of the Player)".

11. On 19 July 2013, the Club wrote the Player's representative the following letter:

"Dear Sir,

Acting on behalf of MKS Cracovia SSA, in response to your letter dated on 5 July 2013 regarding the Player Bojan Puzigaca, we kindly inform you that until final decision of the competent football authorities Bojan Puzigaca are obliged to perform contractual obligations resulting from Agreement on professional football playing – civil law contract, dated on 10 February 2011, concluded between You and MKS Cracovia SSA.

Additionally we would like to emphasize that letter dated 30 June 2013 was not a unilateral termination of the contract, and it was only information about Bojan Puzigaca current situation. We inform the Player that:

1) MKS Cracovia SSA file to the Dispute Resolution Chamber of Polish Football Association an application for declaring a contract invalidity,

2) MKS Cracovia SSA release Bojan Puzigaca from the performance of contractual obligations.

However, in the event that despite this fact Bojan Puzigaca would like to perform the contractual obligations, MKS Cracovia SSA declares that until final decision of appropriate authorities all obligations of MKS Cracovia SSA resulting from the contract shall be respected and performed by the Club, therefore MKS Cracovia SSA will provide the Player a proper training conditions.

Additionally we indicate, that Bojan Puzigaca should stay in Krakow and appear at the headquarters of MKS Cracovia SSA to carry out the instructions of the MKS Cracovia SSA Management Board until the appropriate football authorities adjudicate the case of validity of the contract".

12. On 17 December 2013, the PZPN DRC issued a decision with the following content:

"[The PZPN DRC] decided

1. *to be competent for hearing the application of MKS Cracovia SSA with its registered seat in Krakow for declaring invalidity of the contract on professional football playing dated 10 February 2011, concluded between MKS Cracovia SSA and Bojan Puzigaca, with the effect from 1 July 2013.*

2. *to find the contract on professional football playing dated 10 February 2011, concluded between MKS Cracovia SSA and Bojan Puzigaca invalid with the effect from 1 July 2013".*

C. Proceedings before the FIFA Dispute Resolution Chamber

13. On 16 July 2013, the Player lodged a claim against the Club in front of the FIFA Dispute Resolution Chamber (hereafter referred to as "FIFA DRC") requesting an amount of EUR 91,300 plus 5% interest as of the due dates as follows:

- EUR 6,100 as outstanding salary of June 2013;
- EUR 85,200 as *"compensation after termination (from 01/07/13 – 30/06/14)"*.

14. With its decision taken on 13 August 2015 and issued on 18 November 2015 (hereafter referred to as the "Appealed Decision") the FIFA DRC decided the following:

> 1. *"The claim of the Claimant, Bojan Puzigaca, is admissible.*
>
> 2. *The claim of the Claimant is partially accepted.*
>
> 3. *The Respondent, MKS Cracovia, is ordered to pay to the Claimant, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 62,830 plus 5% interest p.a. as of 16 July 2013 until the date of effective payment.*
>
> 4. *In the event that the amount plus interest due to the Claimant in accordance with the above-mentioned number 3 is not paid by the Respondent within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> 5. *Any further claim lodged by the Claimant is rejected.*
>
> 6. *The Claimant is directed to inform the Respondent, immediately and directly, of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".*

15. The FIFA DRC motivated the Appealed Decision summarized as follows:

As to its competence to hear the dispute:

> *"(…) the Chamber acknowledged that the Respondent contested the competence of FIFA's deciding bodies as, according to the Respondent, the present matter shall be adjudicated by the decision-making bodies of the PZPN.*
>
> *In this regard, the Chamber took note that, according to the Respondent, the decision-making bodies of the PZPN comply with the requirements of art. 22 lit. b) of the Regulations.*
>
> *(…)*
>
> *In relation to the above, the Chamber (…) deemed it vital to outline that one of the basic conditions that needs to be met in order to establish that another organ than the DRC can settle an employment-related dispute between a club and a player of an international dimension, is that the competence of the relevant arbitration tribunal derives from a clear reference in the employment contract.*
>
> *Therefore, while analysing whether it was competent to hear the present matter, the Dispute Resolution Chamber considered that it should, first and foremost, analyse whether the employment contract at the basis of the present dispute actually contained a clear and exclusive arbitration clause in favour of the PZPN DRC.*

With the above-mentioned considerations in mind and after a thorough analysis of the contract at the basis of the present dispute, the members of the Chamber concluded that said contract did not contain an arbitration clause in favour of the PZPN DRC or any other national body. Therefore, the members of the Chamber came to the unanimous conclusion that, in the present matter, one of the indispensable requirements in order to determine that another body than the DRC is competent to deal with an international employment-related dispute is not met.

On account of all the above, the Chamber established that the Respondent's objection towards the competence of FIFA to deal with the present matter has to be rejected and that thus the Dispute Resolution Chamber is competent, on the basis of art. 22 lit. b) of the Regulations on the Status and Transfer of Players, to entertain the Claimant's claim as to the substance. In this regard and as a consequence of the above, the DRC wished to emphasise that it is not bound by the decision issued by the PZPN DRC".

As to the substance of the dispute:

"First of all, the DRC acknowledged that on 10 February 2011, the parties concluded an employment contract valid as of 24 February 2011 until 30 June 2014 and according to which, the Claimant was entitled to receive a monthly salary of EUR 7,100.

Furthermore, the members of the Chamber took note that on 21 June 2012, the parties entered into an annex to the contract whereby it was agreed "(…) that existing wording of [clause 5.1 of the contract] shall be deleted and shall be replaced by a new wording as follows: 1. On the basis of this agreement the player shall receive the base remuneration as follows: in the tournament season 2012/2013, i.e. from 1. July 2012 to 30 June 2013 in the amount of [EUR 6,100] gross for each month". Moreover, the Chamber observed that art. 2 par. 2 of the annex stipulated that "Other provisions of the contract remains unchanged".

(…)

"Along these lines, the Chamber wished to highlight the content of art. 2 par. 2 of the annex which provides that "Other provisions of the contract remains unchanged". Indeed, in the Chamber's view, the aforementioned article is clear and leaves no room for interpretation when it established that, with the exception of clause 5.1, all other provisions contained in the employment contract, including its period of validity, where not to be changed.

In view of the above, the DRC unanimously decided that the duration of the contract was not amended by the annex and the contract was thus valid until 30 June 2014. In fact, the Chamber stressed that by means of the signing of the annex, the only element of the contract that was amended was the Claimant's salary for the 2012/2013 season, all other provisions remaining unchanged. As such, the signing of the contract in conjunction with the subsequent signing of the annex should not be construed in the way that there is no salary payable to the Claimant in the season 2013/2014, but rather that the salary of the Claimant in the aforementioned period of time returned to its original amount, i.e. EUR 7,100.

After having been established that the employment contract concluded between the parties was valid until 30 June 2014 and that it did provide for a salary payable to the Claimant for the season 2013/2014, the members of the Chamber went to analyse the Respondent's letter of 30 June 2013 in order to establish

whether it was indeed, as claimed by the Claimant, an unilateral termination of the employment contract by the Respondent".

(…)

"In this regard and after a thorough analysis of the relevant letter, the members of the Chamber unanimously decided that by means thereof, the Respondent actually terminated the employment contract between the parties. Indeed, in the Chamber's view, the Respondent's statement "(…) it should be deemed that from 1 July 2013, you are no longer [a Respondent's] player and due to this fact you should leave [the Respondent's] training camp and cease performance of the contractual obligations" clearly indicates that the Respondent decided to unilaterally terminate the employment contract in view of its alleged invalidity. In this respect, the members of the Chamber could not find any other bona fide interpretation that the Claimant could have given to the content of the aforementioned letter.

Furthermore and as to whether the employment contract had been terminated by the Respondent with or without just cause, the Chamber underlined that the only reason given by the Respondent to terminate the employment contract was its alleged invalidity which, for the reasons explained above, cannot be upheld.

On account of all the above, the members of the Chamber came to the unanimous conclusion that on 30 June 2013, the Respondent had terminated the employment contract without just cause and shall therefore be held liable for the consequences thereof.

In relation to the above, the Chamber decided that, taking into consideration art. 17 par. 1 of the Regulations, the Claimant is entitled to receive from the Respondent compensation for breach of contract".

(…)

"Having recalled the aforementioned, and in order to evaluate the compensation to be paid by the Respondent, the members of the Chamber took into account the remuneration due to the Claimant in accordance with the employment contract as well as the time remaining on the same contract, along with the professional situation of the player after the early termination occurred. In this respect, the Chamber pointed out that at the time of its termination, the employment contract would run for another twelve months. Taking into account the foregoing, the Chamber decided that the amount of EUR 85,200 shall serve as the basis for the final determination of the amount of compensation for breach of contract.

In continuation, the Chamber recalled that the player had entered into a new employment contract with the Bosnian club, FK Sarajevo valid as of 16 July 2013 until 30 June 2015 and according to which he was entitled to receive a total remuneration of "BAM 43,752.5 which amounts [to] EUR 22,370" for the period between 16 July 2013 and 30 June 2014. Consequently, in accordance with the constant practice of the Dispute Resolution Chamber and the general obligation of the player to mitigate his damages, the above-mentioned amounts shall be taken into account in the calculation of the amount of compensation for breach of contract.

In view of all of the above, the Chamber decided that the Respondent must pay the amount of EUR 62,830 to the Claimant as compensation for breach of contract, which is considered by the Chamber to be a reasonable

and justified amount. Moreover, in accordance with both the long-standing jurisprudence of the DRC and the claim of the Claimant, the members of the Chamber decided to grant 5% interest on said amount as of 16 July 2013 until the date of effective payment".

D. Proceedings before the Court of Arbitration for Sport ("CAS")

16. On 8 December 2015, the Club in accordance with Article R47 of the Code of Sports-related Arbitration ("the CAS Code"), filed its statement of appeal against Mr. Bojan Puzigaca and FIFA with respect to the Appealed Decision. In its statement of appeal the Club nominated Mr Petros C. Mavroidis, Professor, Commugny, Switzerland, as arbitrator.

17. With its letter issued on 18 December 2015, the Club informed CAS that its statement of appeal should be considered as the appeal brief and that the Club would sustain all the facts and allegations set out in the statement of appeal.

18. On 22 December 2015, Zoran Rasic, as the representative of Mr. Bojan Puzigaca, informed CAS that it would like to appoint Mr. Mark Hovell, solicitor in Manchester, United Kingdom, as arbitrator.

19. On 23 December 2015, FIFA informed CAS that it would agree with the appointment of Mr Mark Hovell as arbitrator for both Respondents.

20. With letter issued on 1 February 2016 the parties were informed by CAS that Patrick Lafranchi, attorney at law in Bern, Switzerland, was appointed as President of the arbitration Panel.

21. On 29 February 2016, CAS acknowledged receipt of the First Respondent's answer filed on 23 February 2016 and the Second Respondent's answer filed on 18 February 2016, both in accordance with Article R55 of the CAS Code.

22. On 7 March 2016, all the parties notified the CAS Court Office that they did not deem it necessary to hold a hearing and that the case could be decided solely on the basis of the written submissions.

23. In the same letter the Club submitted a statement of the Polish Football Association not contained in its statement of appeal/appeal brief.

24. In their letters issued on 11 March 2016 both Respondents filed its objections to the admission of the additional document.

25. On 17 March 2016, the Club was invited by the CAS Court office to state reasons why the additional document should be deemed admissible. The Club did not take any position in this regard.

26. On 27 April 2016, CAS informed the parties that the Panel has decided not to hold a hearing as it deemed itself sufficiently well informed.

27. The parties signed the order of procedure on 6 May 2016 (the Player) and on 9 May 2016 (FIFA and the Club) respectively.

E. Submissions of the parties

28. The following outline only includes the decision-relevant arguments of the parties. Nevertheless, the Panel has carefully considered all the submissions made by the parties, even if subsequently there is no specific reference to those submissions.

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

As to the competence of FIFA DRC to hear the dispute

The FIFA DRC was not competent to hear the dispute. Until April 2015, Art. 22 lit. b) of the FIFA Regulations on the Status and Transfer of Players, in order to exclude FIFA DRC jurisdiction, would deem it sufficiently that an independent arbitration tribunal (*i.e.* the PZPN DRC) had been established at national level within the framework of the association (*i.e.* PZPN). The requirement of an arbitration clause was introduced to Art. 22 lit. b) of the FIFA Regulations on the Status and Transfer of Players only in April 2015, *i.e.* almost two years after the Player lodged his claim to FIFA DRC. Therefore, FIFA DRC was obliged to comply with the Club's request made in its official letters sent to FIFA, and should have transferred the case to PZPN DRC.

As to the substance of the dispute

The parties agreed in the Annex that the remuneration shall be determined solely for the tournament season 2012/2013. Therefore the Agreement does not specify the basic remuneration of the Player for tournament season 2013/2014. The parties mutually decided to leave an appropriate settlement in this matter for the future. At the end of the tournament season 2012/2013 MKS Cracovia SSA and Bojan Puzigaca entered into negotiations concerning the determination of the basic remuneration of the Player for next tournament season, *i.e.* 2013/2014. The Player did not accept the proposal of the MKS Cracovia SSA Management Board, therefore it was impossible to make an appropriate contractual arrangement for the season 2013/2014.

Art 5 Para. 1 point 2) of the Resolution II/12 of the Polish Football Association Management Board states the following:

"In order to be valid, a contract: (…) specifies the basic player's remuneration for the entire period of its validity".

Due to the fact that the Agreement does not specify the Player's remuneration for the tournament season 2013/2014, starting from 1 July 2013, the Agreement should be considered as invalid. In respect of the literal wording of the abovementioned provision of the Polish Football Association, and the fact that the Agreement defines solely the Player's

remuneration due to the Player until 30 June 2013, it should be assumed that the Agreement is valid only to that day and due to this fact it should be declared invalid from 1 July 2013.

The letter sent to the Player on 30 June 2013 was not a statement of unilateral termination of the Agreement by the Club.

30. As to the Player's and FIFA's submissions, it may be referred in essence to the above reproduced argumentation of FIFA DRC in the challenged decision.

31. FIFA amongst others brings forward that a dispute with international dimension only may be referred to an national independent arbitration tribunal (a tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs) if the parties have explicitly and clearly chosen to submit such dispute to the pertinent national body by means of a respective agreement on jurisdiction.

32. Further, FIFA represents the opinion that there were no reasons why the Player should have interpreted the Appellant's letter issued on 30 June 2013 any different from the unilateral termination of his employment contract concluded with the Appellant when it explicitly indicated by the Appellant that the contract is invalid and that the first Respondent has to *"cease performances"*.

33. Also, FIFA is of the opinion that in accordance with art. 1 Para. 1 of the Annex only the Player's salary for the 2012/2013 season was amended. Hence, the FIFA DRC was perfectly right in concluding that the Appellant was liable to pay to the first Respondent the relevant compensation for breach of contract.

34. The Player, in his submission points out that the FIFA DRC has proven that the *"PZPN DRC and the PZPN Football Arbitration Court"* did not fulfil the minimum procedural standards as laid down in VIII. Art. 22 b) of the FIFA Regulations on the Status and Transfers of Players and in accordance with the FIFA Circular no. 1010 and since the First Respondent contested its competence, the PZPN DRC and the PZPN Football Arbitration Court are acting in lack of jurisdiction for disputes with foreign players. Therefore, the DRC FIFA had jurisdiction to adjudicate on this dispute.

35. As to the substance the Player opines that the intention of both parties was strictly to reduce the salary for the season 2012/2013 wherein the Appellant's club was relegated to a lower division. This is akin in football due to less TV-rights and other incomes for the clubs. However, the First Respondent has shown good will, although he was not obliged to accept any deduction of his salary, since usually such situations can be foreseen and agreed in the contract before signing. Due to the wording that all other provisions remain force, it is clear and evident that it was only meant for the season 2012/2013, wherein the Appellant's club was playing in the lower division.

F. The parties' request for relief

36. In its Appeal the Club requests the following:

> 1. *"to reverse a Decision of FIFA DRC*
>
> 2. *to find that Appellant is not obliged to pay Bojan Puzigaca ("Respondent", "the Player") an amount said in the Decision".*

37. The Player requests the Panel the following:

> 1. *"To upheld the decision of FIFA, Ref. no. 13-02963, dated 18 November 2015, and to declare that the Appellant is obliged to pay towards to the First Respondent the amount as follows:*
>
> *i) The compensation of EUR 62'830, according to the award by FIFA;*
>
> *ii) 5% interest rate p.a. is applicable for the compensation of EUR 62'830 since 16 July 2013 until the day of effective payment, according to the award by FIFA, resp. according to art. 104 and art. 339 para. 1 Swiss CO;*
>
> *iii) To bear all costs by the Appellant relating to the arbitration proceeding, according to the CAS Code 64.5 and Swiss law CO, art. 106;*
>
> *iv) To consider an appropriate contribution towards to the legal and other costs in this arbitration of the First Respondent, which shall be borne by the Appellant".*

38. FIFA requests the Panel the following:

> 1. *"To reject the present appeal against the decision of the Dispute Resolution Chamber dated 13 August 2015 and to confirm the relevant decision in its entirety.*
>
> 2. *To order the Appellant to cover all the costs incurred with the present procedure.*
>
> 3. *To order the Appellant to bear all legal expenses of the second Respondent related to the procedure at hand".*

II. LEGAL DISCUSSION

A. Applicable Lex Arbitri

39. Art. 176 of the Swiss Private International Law (hereafter referred to as "PILA") states what follows:

1. *"The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland".*

2. *"The parties may exclude the application of this chapter by an explicit declaration in the arbitration agreement or by an agreement at a later date and agree on the application of the third part of the CPC".*

3. *"The seat of the arbitral tribunal shall be determined by the parties, or the arbitral institution designated by them, or, failing both, by the arbitrators".*

40. CAS is an international arbitral tribunal with its seat in Switzerland. Of the parties, only FIFA has its seat in Switzerland. Therefore, based on Art. 176 Para. 1 PILA chapter 12 (Art. 176 to 194), PILA is applicable to the present arbitration.

B. Jurisdiction of CAS

41. According to Art. 186 Para. 1 PILA, the arbitral tribunal shall rule on its own jurisdiction.

42. Art. R27 of the CAS Code provides the following:

> *"These Procedural Rules apply whenever the parties have agreed to refer a sports related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) (…) Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport. (…)".* The ordinary arbitration proceedings are regulated in detail by Art. R38 *et seq.* of the CAS Code.

43. Presently, none of the parties rejects the jurisdiction of CAS. Rather, they agree that CAS - based on Art. 67 Para. 1 FIFA Statutes version 2015 in connection with Art. R47 of the CAS Code - has jurisdiction to rule over the presently challenged FIFA DRC decision. Such conclusion not only results out of the parties' submissions but also by the signed order of procedure. Cipher 1 of the order of procedure states the following:

> *"The Appellant relies on article 67.1 of the FIFA Statutes as conferring jurisdiction on the CAS. The jurisdiction of the CAS is not contested by the Respondents and is confirmed by the signature of the present order".*

44. Consequently, CAS has jurisdiction to rule over the present case.

C. Preliminary remark to the principle of burden of proof

45. As will be seen in the subsequent considerations the Panel will have to determine which of the parties bears the burden of proof for a certain fact. Out of this reason, the doctrinal basis of the principle of burden of proof is treated already here.

46. Except by agreement to the contrary, the arbitral tribunal shall allocate the burden of proof in accordance with the rules of law governing the merits of the dispute (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2015, N 1316).

47. As will be seen later on, the presently applicable rules of law are primarily the FIFA Regulations and additionally Swiss law (Art. 66 Para. 2 of the FIFA Statutes version April 2015). The presently applicable FIFA regulations do not contain a rule on the burden of proof for the present case. In particular Art. 12 Para. 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber according to which *"Any party claiming a right on the basis of an alleged fact shall carry the burden of proof"* does *in casu* not apply because, pursuant to Art. 1 Para. 1 of the said regulation, it only applies to procedures in front of the Players' Status Committee and the DRC, however not before CAS.

48. Therefore and based on Art. 66 Para. 2 of the FIFA Statutes, Swiss law shall apply. In Swiss law, Art. 8 of the Swiss Civil Code states that unless a provision provides otherwise, the burden of proving the existence of an alleged fact shall rest on the party who derives rights from that fact.

49. The burden of proof in the Swiss-law-terminology determines the consequences of lack of evidence: if a relevant fact remains unproven and the law does not provide otherwise, the case must be decided against the party who seeks to derive its rights from the existence of that fact. The burden of proof thereby has only significance if the Panel has doubt on the existence of a fact. It has no significance if the Panel concludes that a relevant allegation of fact is proven or successfully rebutted (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2015, N 1316).

D. Admissibility of the statement of the Polish Football Association

50. In a first procedural step the Panel has to decide on the admissibility of the statement of the Polish Football Association submitted by the Club after the (first and only) round of submissions with letter issued on 7 March 2016. In their letters issued on 17 March 2016, both Respondents, with reference to Art. R56 para. 1 of the CAS Code, objected to the admissibility of such statement.

51. Art. R56 Para. 1 of the CAS Code states what follows:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".*

52. Presently, the parties did not agree on the admissibility of the statement of the Polish Football Association. Thus, the Panel has to examine if there are existing exceptional circumstances allowing the admissibility of the statement of the Polish Football Association.

53. Based on the principle of burden of proof it is for the party that produces new exhibits after the formal termination of submissions to proof existing exceptional circumstances that would allow the admissibility of such exhibits.

54. Presently, based on the facts presented by the parties, the Panel did not see any exceptional circumstances that would allow the admissibility of the statement of the Polish Football Association. Nor did the Club itself – on request of the Panel – demonstrate such circumstances.

55. Consequently, the Panel has to assume that no such circumstances do exist. The admissibility of the statement of the Polish Football Association is hence denied.

E. Applicable Law on the merits

56. Art. 187 Para. 1 PILA provides: *"the arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection"*.

57. According to Art. R58 of the CAS Code, *"[t]he 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

58. The parties did not make a choice of law, neither in the Agreement nor in the Annex. Rather, in §8 cipher 1 of the Agreement they formulated that to all matters not regulated in the Agreement the relevant provisions of law shall be applied. In §8 cipher 2 of the Agreement the parties excluded the applicability of the Polish Labour Code.

59. All of the parties signed the order of procedure. Therein, under the title *"Law applicable to the merits"* in cipher 7 of the order of procedure, the parties explicitly agreed on the applicability of the above mentioned Art. R58 of the CAS Code.

60. In consequence, the applicable law in the merits is determined based on Art. R58 of the CAS Code in connection with Art. 187 Para. 1 PILA. Presently, the parties, neither in the Agreement nor in the Annex, did take a choice of law. Thus, the applicable law in the merits is to be determined by the applicable regulations of FIFA.

61. The Club filed its statement of appeal with CAS on 8 December 2015. At this moment the FIFA Statutes version April 2015 were in force (cf. Art. 87 Para. 1 FIFA Statutes version April 2015 in connection with Art. 75 Para. 1 FIFA Statutes version April 2016). Pursuant to Art. 66 Para. 2 of the FIFA Statutes version April 2015 (hereafter referred to as "the FIFA Statutes") CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

62. Summing up, in the merits of the present case, primarily the various regulations of FIFA apply and, additionally, Swiss law.

F. Jurisdiction of the FIFA DRC as the previous instance of CAS

63. As seen, the Club submits that the DRC FIFA had no competence to deal with the present matter. The Club argues that the PZPN DRC, based on Art. 22 lit. b) of the Regulation on the Status and Transfer of Players, was the competent body to exclusively and finally treat the present case. The Panel has to examine if such argumentation is founded.

64. In a first step, it has to be examined if Art. 22 lit. b) of the Regulation on the Status and Transfer of Players contains an independent arbitration clause that is able to confer jurisdiction to a national arbitration tribunal.

65. In the sense of a preliminary question the Panel has to analyze which edition of the Regulations on the Status and Transfer of Players is relevant. According to Art. 26 Para. 1 of the Regulations on the Status and Transfer of Players (versions 2015 and 2012) *"Any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations"*. Presently, the Player lodged its claim on 16 July 2013 to the FIFA DRC. The version 2015 of the Regulations on the Status and Transfer of Players entered into force on 1 April 2015 (cf. Art. 29 of the Regulations on the Status and Transfer of Players version 2015), the version 2012 of the Regulations on the Status and Transfer of Players on 1 December 2012. Hence, the present dispute was brought to FIFA during the validity of the version 2012 of the Regulations on the Status and Transfer of Players.

66. Therefore, for the present case, Art. 22 lit. b) of the Regulations on the Status and Transfer of Players version 2012 (hereafter referred to as "RSTP") is applicable and relevant to evaluate if it provides for a valuable arbitration clause, an arbitration clause that would exclude the jurisdiction of FIFA DRC.

67. Art. 22 lit. b) RSTP states what follows:

> *"b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement"*.

68. As a consequence and as confirmed by the CAS constant jurisprudence, the FIFA DRC is, under certain circumstances, competent to deal with employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level. This means that if an independent arbitration tribunal guaranteeing fair proceedings exists at national level, a dispute may be referred to the national body, even if it has an international dimension, provided that the parties have explicitly chosen the national body by means of an agreement acknowledging its jurisdiction (see CAS 2014/A/3864, para. 68 and CAS 2013/A/3172, para. 54).

69. An arbitration clause therefore has to designate a particular arbitral tribunal or at least an arbitral tribunal that is determinable by contractual interpretation (cf. amongst others BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2015, N 290).

70. In the present case, the parties did not agree to confer jurisdiction to any national arbitration tribunal and the Appellant did not establish that the PZPN DRC was competent to examine the present dispute to the exclusion of the competence of the FIFA DRC.

71. Out of these reasons, Art. 22 lit. b) RSTP cannot be regarded as a valid arbitration clause conferring jurisdiction to the PZPN DRC. Consequently, FIFA DRC had jurisdiction to rule the present dispute based on Art. 22 lit. b) RSTP in connection with Art. 24 Para. 1 RSTP. PZPN DRC in contrast was not empowered to rule the present case.

72. Summing up, the argumentation of the Club has to be rejected.

G. As to the contractual relationship between the Club and the Player

73. The CAS Panel next has to evaluate

(i) if the letter sent by the Club to the Player on 30 June 2013 was an unilateral termination of the Agreement;

(ii) if so, if such termination was with or without just cause; and

(iii) if without just cause, the consequences that would result out of such termination without just cause.

a) Unjustified, unilateral termination of the Agreement

74. As seen, the Club submits that with the signing of the Annex, the parties not only designated a new remuneration for the season 2012/2013, but from 1 July 2013 onwards the Agreement was purposely silent with regards to the remuneration owed to the Player until the end of the Agreement's term. This was because the Annex "deleted" the original remuneration-clause in the Agreement. Therefore, unless the parties negotiated a salary from 1 July 2013 onwards, the Agreement would lack of an *essentialia negotii* from that date and would be invalid.

75. The parties, while concluding the Annex, formulated what follows:

§ 1.1: *"The parties agree that existing wording of § 5.1 of the Contract shall be deleted and shall be replaced by a new wording, as follows:*

"1. On the basis of this Agreement the Player shall receive the base remuneration as follows:

1) in the Tournament season 2012/2013, i.e. from 1 July 2012 to 30 June 2013 in the amount of 6,100,00 EUR gross for each month".

(…)

§ 2.2: *"Other provisions of the Contract remains unchanged".*

76. The Panel has to interpret the Annex in combination with the Agreement in order to evaluate if the Club's argumentation is valid.

77. FIFA regulations do not foresee how contractual clauses are to be interpreted. After Swiss law, while interpreting a contractual clause, one primarily has to seek for the effective will of the parties on a factual basis. Only if the latter cannot be established the relevant contractual clause has to be interpreted legally after the principle of confidence (cf. amongst other BGE 133 III 406, consideration 2.2). Pursuant to the principle of confidence, the relevant declaration has to be interpreted as it could and had to be understood by the addressee of the declaration, while considering the wording and all the relevant circumstances (cf. amongst others BUCHER E., OR Allgemeiner Teil, p. 112 f.).

78. The Panel thus will interpret the wording and the circumstances of the Annex and the Agreement according to the mentioned principles in order to evaluate the soundness of the Club's argumentation.

79. In the wording of § 2.1 of the Annex the parties explicitly referred to the tournament season 2012/2013. Therefore, according to the explicit wording, the addressee of this clause would not have to understand that this clause would alter something at the remuneration foreseen in the Agreement for the season 2013/2014.

80. This position is confirmed by § 2.2 of the Annex. Thereafter, all other provisions of the Agreement shall remain in force. An addressee of such clause consequently has to understand that – with the conclusion of the Annex – only the remuneration for the season 2012/2013 was changed. All other conditions of the Agreement would remain untouched. Consequently, from 1 July 2013 on (that is after the temporal application of the Annex) the Agreement would again enfold its full force in its original formulation.

81. Besides, if it would have been the parties' will not only to change the remuneration for the 2012/2013 season but also to alter the validity of the Agreement from 1 July 2013 onwards this would have had to be formulated in a clear enough manner in order that an addressee would understand such clause this way. As seen, the wording of the Annex does not give indices for such interpretation.

82. The Annex was formulated by the Club. It would hence have been in the hands of the Club to formulate it in a clear enough manner. Based on the principle *in contra stipulatorem*, a possible unclear formulation has to be interpreted against the stipulator's position. Hence, even if one

should assume an unclear wording of the Annex, one would have to interpret the Annex *in contra stipulatorem*, that is against the Club's position.

83. Last but not least, there are no circumstances established that would speak for the position of the Club, circumstances that would alter something at the before mentioned interpretation of the Agreement and its Annex. From a very technical and formalistic point of view the Panel can understand the argumentation of the Appellant. Pursuant to the position of the Appellant the word "deleted", as used in the Annex, should not only temporally but finally have extinguished the parties agreement on the remuneration owed to the Player.

84. However, the Panel is of the opinion that such approach of interpretation would not reflect the realistic realities of the contractual relationship between the Player and the Club. A Player that – due to the Club's relegation - renounces voluntary on his remuneration for the upcoming season could certainly not expect that, with such a voluntary renouncement, he would also agree to shorten the term of the original Agreement.

85. Out of these reasons the Panel holds the point of view that the Annex respectively its § 1.1 did only replace/"delete" the clause § 5.1 of the Agreement for the season 2012/2013. The temporal validity of the Annex ended on 30 June 2013. Afterwards, clause § 5.1 of the Agreement would have again enfolded its full effect until the end of the Agreement.

86. The next step to be examined is if the Club, with its letter sent to the Player on 30 June 2013, terminated the contractual relationship with the Player. To answer this question the Panel has to interpret the said letter.

87. In the mentioned letter the Club, amongst others, declared the following to the Player:

> *"Therefore, it should be deemed, that from 1 July 2013 You are no longer the MKS Cracovia SSA football player and due to this fact you should leave the MKS Cracovia SSA training camp and cease performance of the contractual obligations. Otherwise, MKS Cracovia SSA will charge You with the costs of organization of the camp, in part attributable to your person".*

88. The FIFA Regulations do not define the notion of a termination of an employment relationship. According to Swiss law a termination of an employment agreement is considered as an unilateral declaration which declares that the employment relationship is terminated (cf. amongst others GEISER/MÜLLER, Arbeitsrecht in der Schweiz, N 533).

89. The Club, with the above mentioned letter to the Player, declared that the latter should leave the MKS Cracovia SSA training camp and cease performance of his contractual obligations. The wording chosen by the Club is crystal clear. It expresses that the Player would have no contractual obligations anymore and shall therefore no longer be considered as the employee of the Club.

90. The Panel has no other choice than to interpret this declaration as a notice of termination from the Club towards the Player.

91. Consequently, with the letter sent to the Player by the Club on 30 June 2013, the Club unilaterally terminated the Agreement with the Player.

92. The Panel cannot find any just cause that would justify the unilateral termination by the Club. It would in any case be for the Club, based on the principle of burden of proof, to prove the facts that would justify the unilateral termination. The Club however did not present any such facts.

93. Summing up, there is no just cause that would justify the unilateral termination by the Club. Rather, the Panel qualifies it as unjustified.

b) Consequences of the unjustified, unilateral termination of the Agreement

94. In a next and last step, the Panel has to examine the legal consequences of such unjustified, unilateral termination of the Agreement.

95. Art. 17 Para. 1 RSTP states what follows:

> *"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".*

96. In this respect, the Panel deems the argumentation of the FIFA DRC in the challenged award as plausible and associates with it. Due to the fact that the parties, in the Agreement, did not formulate a compensation clause for the eventuality of a breach of contract the compensation owed to the Player should be calculated as follows:

> *[The amount that the Player would have earned during in the season 2013/2014 if the Club would not have terminated the Agreement] minus [The amount the Player effectively earned elsewhere during the season 2013/2014].*

97. For the season 2013/2014 (1 July 2013 to 30 June 2014), according to the Agreement, the Player would have earned EUR 85,200 in total (EUR 7,100 each month). During the season 2013/2014 (1 July 2013 to 30 June 2014) the Player totally earned EUR 22,370 while playing for FK Sarajevo.

98. Consequently, as rightly calculated by the FIFA DRC and based on Art. 17 Para. 1 RSTP the Club owes the Player a sum of totally EUR 62,830 (EUR 85,200 minus EUR 22,370).

99. Last but not least, the Panel has to determine if and how much interest (and at what rate) the Club has to pay the Player on the amount of EUR 62,830.

100. Art. 104.1 of the Swiss Code of Obligations (hereafter referred to as "CO") reads as follows:

> *"1) debtor in default on payment of a pecuniary debt must pay a default interest of 5% per annum even where a lower rate of interest was stipulated by contract".*

101. Furthermore, Article 339.1 of the CO reads as follows:

> *"When the employment relationship ends, all claims arising therefrom fall due".*

102. The Panel believes that the 5% interest on the compensation should have accrued as of 1 July 2013 considering that the Agreement was terminated without just cause by the Appellant on 30 June 2013. However, the Appealed Decision orders that such interest accrued as of 16 July 2013 and the First Respondent did not appeal this decision. Therefore, the Panel can only confirm that such interest accrued as of 16 July 2013, as to rule otherwise would be *ultra petita*.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by MKS Cracovia SSA against the decision rendered on 13 August 2015 by the Dispute Resolution Chamber of FIFA is rejected.

2. The decision rendered on 13 August 2015 by the Dispute Resolution Chamber of FIFA is confirmed.

3. (…).

4. (…).

5. All other or further requests are dismissed.