Arbitration CAS 2020/A/6798 Galatasaray Sportif Sinai ve Ticari Yatirimlar A.S. v. Igor Tudor, award of 10 May 2021

Panel: Mr Bernhard Welten (Switzerland), President; Mr Efraim Barak (Israel); Mr Mark Hovell (United Kingdom)

Football
Termination of the employment contract of a coach without just cause
Termination of fixed-term contracts
Admissibility of immediate termination with just cause
Validity of giving subsequent reasons for immediate termination
Poor results as just cause of termination
Validity of a waiver of claim for compensation
Principle of the "positive interest"
Duty to mitigate the damage

1. **Fixed-term contracts cannot be terminated by the parties before the fixed term expires, unless there is just cause for an immediate termination or the parties reach a mutual agreement on the termination of the contract.**

2. **The immediate termination of an employment contract with just cause is an exceptional measure and, therefore, must be admitted on a restrictive basis. Only a breach which is of a certain severity may justify the immediate termination without prior warning. In principle, the breach is considered to be of a certain severity when there are objective criterions which do not reasonably permit an expectation that the employment relationship between the parties be continued. An objective criterion for an immediate termination can be an incident which the parties could not and did not anticipate.**

3. **In principle, giving subsequent reasons for an immediate termination is valid under the condition that the party terminating had no awareness or possibility of awareness of the reasons at the time of its termination.**

4. **Unless the poor results of the team is specifically agreed between a club and a coach as *"just cause"* for the termination of the employment agreement, such circumstances do not reach the level of gravity required to justify the early termination of an employment contract with a coach. Moreover, even if the club and the coach in a given case had agreed on such possibility, still the *"poor results"* will have to be clearly defined in the employment agreement in order to reach the needed required certainty to consider *"poor results"* as just cause for the termination of the employment agreement. The clear definition will serve two goals: (a) to avoid the arbitrary attempt to unilaterally terminate the employment agreement; and (b) to save such scenario from being considered unilateral (and therefore excessive and not balanced) to be a legitimate agreed**

mechanism for the termination of the agreement.

5. **Based on Article 362 para. 1 of the Swiss Code of Obligations (CO), Article 337c para. 1 CO (consequences of termination without just cause) is binding and mandatory and, therefore, it is not permissible to derogate to the detriment of the employee by an individual agreement as e.g. an employment contract. The mandatory character given to Article 337c para. 1 CO means that an employee cannot validly waive his claim of compensation in case an employer terminates the employment contract without just cause as far as the compensation agreed on in the employment contract is lower than the residual value of such contract.**

6. **According to Article 337c para. 1 CO, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the expiry of the agreed duration. The employee shall be put in the same position as if there was no immediate termination of the employment relationship ("positive interest"). The damages the employee is entitled to, contain the lost salary as well as all the other payments granted by the employer. Included in this "positive interest" are amongst others e.g. gratifications. No specific personal performance of a football player is needed to get the bonus for the win of a championship, even if the employment contract is terminated by the club without just cause before the win of the championship.**

7. **Pursuant to Article 337c para. 2 CO, the employee has a duty to mitigate the damages. This means that such damages are reduced by the amounts the employee saved as a result of the termination of the employment relationship or he earned by performing other work or would have earned had he not intentionally foregone such work.**

I. PARTIES

1. Galatasaray Sportif Sinai ve Ticari Yatirimlar A.S. (the "Appellant" or the "Club") is a football club with its registered office in Istanbul, Turkey. The Club plays in the Turkish Süper Lig (the "League"), the top league in Turkey. It is a member of the Turkish Football Federation ("TFF") which in turn is affiliated to the Union of European Football Association ("UEFA") and the Fédération Internationale de Football Association ("FIFA").

2. Mr Igor Tudor (the "Respondent" or the "Coach"), born on 16 April 1978, is a football coach of Croatian nationality and the former coach of the Club. Currently, he is the head coach of Hajduk Split, Croatia.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established by the Panel on the basis of the Parties' written and oral submissions and, the exhibits produced during these proceedings and

the statements made during the hearing. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered carefully 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. Facts

4. On 15 February 2017, the Coach and the Club signed an employment contract (the "Employment Contract") for the seasons 2016/17 and 2017/18, starting on 15 February 2017 and ending on 31 May 2018.

5. Based on Article 3.1 of the Employment Contract, the Club was obliged to make the following payments to the Coach:

   - 2016/17 season: EUR 400,000 paid in four installments of EUR 100,000 each, from 28 February until 31 May 2017;
   - 2017/18 season: EUR 1,000,000 paid in ten equal installments of EUR 100,000 each, from 31 August 2017 until 31 May 2018.

6. In addition, the Coach was entitled to bonus payments and other benefits as stated in Articles 3.2 and 3.3 of the Employment Contract:

   - 2016/17 season: EUR 200,000 for winning the League, respectively EUR 100,000 for finishing the League in second place;
   - 2017/18 season: EUR 200,000 for winning the League, respectively EUR 100,000 for finishing the League in second place;
   - 2017/18 season: EUR 50,000 for winning the Turkish Cup;
   - maximum of EUR 4,000 as monthly allowance for the house (total of 14 payments);
   - two (season 2016/17) respectively four (season 2017/18) business class round-trip flight tickets between Turkey and Croatia;
   - a car from the Club's sponsor.

7. On 21 December 2017, the Club sent a notice of termination to the Coach. It stated that the Employment Contract is considered to be terminated as of 18 December 2017 for just cause as the *"A Level Professional Football Team has lost four of the last seven official league matches. Especially the very low performance of the team in big matches is unacceptable. As being the "Head Coach of the A Level Professional Team" unfortunately you could not comply with your contractual obligation of preparing and training the team and the players in the best manner technically, tactically and physiologically"*.

8. On 24 April 2018, the Coach signed an employment contract with Udinese Calcio S.p.A. valid from the date of signing until 30 June 2018. In accordance with this contract, the Coach was paid EUR 50,000 for the period of 24 April until 30 June 2018.

B. Proceedings before the FIFA Players' Status Committee (PSC)

9. On 3 January 2018, the Coach filed a claim before the competent FIFA authority and asked for the payment of a total amount of EUR 1,391,935 plus interests.

10. On 8 March 2018, the Club filed its response to the Coach's claim filed on 3 January 2018.

11. On 19 April 2018, the Coach filed his replica to the Club's statement of 8 March 2018.

12. On 21 May 2018, the Club filed its duplica to the statement filed by the Coach on 19 April 2018.

13. On 22 May 2018, the PSC informed the Parties that the investigation phase of the present matter was closed and a decision would be taken.

14. On 22 May 2018 as well, the Coach filed an additional brief based on the final standings in the League, showing that the Club was winning the League 2017/18.

15. On 18 October 2019, the Coach informed FIFA based on its request of 15 October 2019 that he signed a contract with Udinese Calcio for the period of 24 April 2018 until 30 June 2018, earning a net remuneration of EUR 50,000.

16. On 31 October 2019, the PSC informed the Parties that its Single Judge decided to send the case back for further investigation. The Club was invited to send its comments on the letter received from the Coach on 22 May 2018.

17. On 15 November 2019, the Club filed its statement requested by the PSC.

18. On 21 November 2019, the PSC informed the Parties that the present matter was to be submitted to its Single Judge for a formal decision within the next few days.

19. On 29 November 2019, the PSC sent the Parties the decision dated 27 November 2019.

20. On 9 December 2019, the Club requested the grounds of the decision and paid the requested amount of CHF 15,000 to FIFA.

21. On 7 February 2020, the PSC sent the reasoned decision (the "Appealed Decision") by email to the Parties:

    "1. The claim of the Claimant, Igor Tudor, is partially accepted.

    2. The Respondent, Club Galatasaray Sportif Sinai ve Ticari Yatirimlar A.S. has to pay the Claimant within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of EUR 200,000.

3. *The Respondent has to pay the Claimant, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 514,730 plus 5% interest p.a. as from 3 January 2018 until the date of effective payment.*

4. *Any further claim lodged by the Claimant is rejected.*

5. *In the event that the amounts due to the Claimant in accordance with the above-mentioned numbers 2. and 3. are not paid by the Respondent within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

6. *Final costs of the proceedings in the amount of CHF 20,000 are to be paid by the parties, within 30 days as from the date of notification of the present decision, as follows:*

   6.1 The amount of CHF 15,000 has to be paid to FIFA by the Respondent to the following bank account […].

   6.2 The amount of CHF 5,000 has to be paid by the Claimant directly to FIFA. Considering that the Claimant has already paid the amount of CHF 5,000 as advance of costs at the start of the present proceedings, the Claimant is exempted from paying the aforementioned amount as costs of the proceeding.

7. *The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance under points 2. and 3. above are to be made and to notify, the Players' Status Committee of every payment received".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 26 February 2020, the Club filed its Statement of Appeal with the Court of Arbitration for Sport ("CAS") pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"), with a request that the matter be assigned to a Sole Arbitrator.

23. On 4 March 2020, the CAS Court Office informed the Parties that the Respondent does not agree to a Sole Arbitrator being appointed to hear this Appeal.

24. On 6 March 2020, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division has decided to submit this matter to a three-member Panel, pursuant to Article R50 of the Code.

25. On 9 March 2020, the Club filed its Appeal Brief pursuant to Article R51 of the Code.

26. On 10 March 2020, the CAS Court Office acknowledged receipt of the Appeal Brief and set the Respondent a deadline of 20 days to file his Answer, pursuant to Article R55 of the Code.

27. On 12 March 2020, FIFA informed the CAS Court Office that it renounces to its right to intervene in this matter and it provided a clean copy of the Appealed Decision.

28. On 17 March 2020, the CAS Court Office informed the Parties that the Respondent will not pay his share of the advance of costs.

29. On 14 April 2020, the Respondent uploaded on the CAS e-filing platform his Answer pursuant to Article R55 of the Code.

30. On 22 April 2020, the CAS Court Office confirmed that the Appellant as well as the Respondent prefer a hearing to be held in this matter.

31. On 28 April 2020, pursuant to Article R54 of the Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

- Mr. Bernhard Welten, Attorney-at-law in Bern, Switzerland as President;
- Mr. Efraim Barak, Attorney-at-law in Tel Aviv, Israel; and
- Mr. Mark Hovell, Solicitor in Manchester, United Kingdom, as Arbitrators.

32. On 13 July 2020, FIFA sent the complete PSC case file related to this Appeal to CAS Court Office.

33. On 20 July 2020, the CAS Court Office confirmed to the Parties that the hearing would be held on 12 October 2020.

34. On 14 September 2020, the Appellant confirmed on the Panel's request that the additional legal representative, Mr. Ludovic Deléchat, former Deputy Head of FIFA Players' Status (until 30 June 2020) was not directly involved in the FIFA procedure in this matter.

35. On 6 October 2020, the Club as well as the Coach signed the Order of Procedure.

36. On 12 October 2020, the hearing was held by videoconference. The Appellant was represented by Mr. Ludovic Deléchat, Attorney-at-Law. The Respondent was represented by Mr. Sami Dinç, Attorney-at-Law. The Panel was assisted by Mrs. Sophie Roud, CAS Counsel. No witness was called by either Party.

37. At the beginning of the hearing, the Parties confirmed that they had no objection to the Panel proceeding to decide the dispute. At the conclusion of the hearing, both Parties confirmed that their right to be heard had been fully and fairly respected.

38. On 12 October 2020, the CAS Court Office granted the Parties a deadline of 10 days to advise it whether they were able to find an amicable solution.

39. On 6 January 2021, the CAS Court Office informed the Parties that they did not advise it whether they had found an amicable solution and, therefore, the Panel started to draft the award.

IV. SUBMISSIONS OF THE PARTIES

40. In the following summaries, the Panel will not include every argument put forward to support the Parties' prayers for relief. Nevertheless, the Panel has carefully considered and taken into

account all of the evidence and arguments submitted by the Parties and brought forward in the hearing, but limits its explicit references to those arguments that are necessary in order to justify its decision.

A. Appellant's Submissions and Requests for Relief

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

- The Employment Contract was terminated with just cause in accordance with Article 337 of the Swiss Code of Obligations (the "CO") and, therefore, the Respondent shall not be entitled to any compensation.
- The continuation of the employment relationship with the Respondent was unconscionable as the team performance, for which the Respondent was responsible, was very poor. The team lost 4 of the last 7 matches and dropped from 1st to 3rd place in the League. Especially the losses of the derbies against Besiktas and Basaksehir caused huge disappointment amongst fans and the Appellant's community. Furthermore, the team got eliminated from the UEFA Europe League at the second qualifying round.
- The Respondent showed reckless attitude with a hand gesture towards the fans which means "ok" to the resignation request of the fans after a loss. Questions of media reporters were answered in an inappropriate manner by the Respondent. Therefore, Article 5.2 of the Employment Contract shall not be applicable as the Appellant terminated the Employment Contract with just cause.
- If the termination is to be determined to be without cause, Article 5.2 of the Employment Contract shall be applicable and, therefore, the financial consequences are limited to a maximum of 5 monthly salaries, i.e. EUR 500,000. The Respondent accepted Article 5.2 of the Employment Contract with his free will; alleging the invalidity of this Article is against the principles of good faith and *"pacta sunt servanda"*.
- As the Respondent started to work as head coach for Udinese Calcio S.p.A. as of 24 April 2018, compensations from this club should be deducted from the compensation due by the Appellant.
- The Appealed Decision, granting the Respondent the bonus for the club winning the League in the amount of EUR 200,000, is contrary to the rule of *"lex sportiva"*; the clause shall be interpreted with the true intent of the Parties, to incentivize the Respondent's performance in order to win the League. However, the Employment Contract was terminated because of the Respondent's poor performances.
- In the case that the bonus would be granted, the amount shall be reduced on a pro rata basis, because the Respondent had managed the team for only 16 out of 34 matches in the relevant 2017/18 season of the League.

42. In its prayers for relief, the Appellant requests as follows:

"• to accept our appeal against the decision of FIFA PSC dated 27 November 2019,

- *to overturn and set aside the abovementioned decision with all its consequences,*
- *to condemn the Respondent to pay the legal fees and other expenses of the Appellant in connection with the proceedings".*

B. Respondent's Submissions and Requests for Relief

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

- The Appellant's termination came with a surprise to the Respondent. The Club had overdue salaries of the Coach in the amount of EUR 450,902 which were only paid later on.
- The sportive performance of a professional cannot be a just cause to early terminate the Employment Contract, as FIFA and CAS jurisprudence confirm.
- The team's performance was good; on the day before the termination of the Employment Contract, the team was third, but only one point away from the League's leader. During 14 out of 16 weeks, the team was even the leader of the League.
- Other reasons raised by the Appellant shall not be considered, as e.g. the Respondent's gesture to the fans and answers to the reporters, as they were not stated in the termination notice dated 21 December 2017. Hence, the threshold in Article 337 CO for termination with just cause is not met. The Respondent did not breach any of his contractual obligations.
- Article 5.2 of the Employment Contract favors the Appellant in a potestative way. The said clause shall be considered to be potestative, because the limitation on the amount of the compensation in case of an early termination is a unilateral option and for the benefit of the Appellant only. Referring to the jurisprudence of FIFA and CAS, said provision shall be deemed invalid and inapplicable as it is not proportional and does not treat the Parties equally.
- Based on Article 337c CO, the Appellant has to pay the Respondent the residual value of the contract including all the benefits that would have been due until the end of the contractual period, including bonus and the additional compensation. In addition, a compensation of up to six months' salary shall be paid; this indemnification was rejected in the Appealed Decision. Nevertheless, the Appealed Decision is not disproportionate, unfair or unjustified. The result is within the clear wording of Article 337c CO. It was the Appellant preventing the Respondent from winning the League by early terminating the Employment Contract without just cause.
- Contrary to the Appellant's allegations, the Employment Contract between the Respondent and Udinese Calcio S.p.A. was submitted to the PSC on 18 October 2018. Therefore, the PSC Single Judge considered the reduction of the amount of the compensation based on this new employment. However, the PSC Single Judge did only consider a part of this financial benefits as the employment with Udinese Calcio S.p.A. lasted longer than 31 May 2018.

44. In his prayers for relief, the Respondent request as follows:

"i) To reject the allegations of the Appellant,

ii) To ratify the decision of the Single Judge of FIFA Players' Status Committee dated 27 November 2019,

iii) To state that the Appellant is responsible for the payment of the whole CAS administration costs and the Arbitrators fees,

iv) To condemn the Appellant to pay the legal fees in the amount of CHF 30,000 and other expenses of the Respondent in connection with proceedings".

V. JURISDICTION

45. Article R47 of the Code states:

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

46. The jurisdiction of the CAS, which was not disputed by the Parties, derives from Article 58 para. 1 FIFA Statutes which states: *"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"*. The Appealed Decision referred in its *"Note related to the appeal procedure"* to this Article as well.

47. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both Parties.

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

VI. ADMISSIBILITY

49. The Statement of Appeal was filed on 26 February 2020 and it complied with the requirements of Articles R47, R48 and R64.1 of the Code, including the payment of the CAS Court Office fee. As the Appealed Decision was notified to the Parties by email of 7 February 2020, the Statement of Appeal was filed within the 21-day time limit required by Article 58 para. 1 FIFA Statutes respectively Article R49 of the Code.

50. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

51. Article R58 of the Code provides as follows:

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

52. Article 57 para. 2 FIFA Statutes states as follows: *"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

53. The Parties, in their written submissions, concurred that primarily the various regulations of FIFA should be applied and, subsidiarily, Swiss law. Article 8.1 of the Employment Contract states that it is exclusively governed by and interpreted in accordance with the FIFA regulations.

54. In conclusion, the Panel confirms that in the present case primarily the FIFA regulations and, subsidiarily, Swiss law shall be applicable.

VIII. MERITS

55. In the light of the Parties' submissions and statements made during the hearing, the Panel has to examine the following main issues:

1. Did the Club terminate the Employment Contract with or without just cause?

2. Is Article 5.2 of the Employment Contract a valid and enforceable provision?

3. What are the financial consequences of the termination of the Employment Contract?

1. Did the Club terminate the Employment Contract with or without just cause?

56. The Employment Contract between the Club and the Coach fulfills the requirements for an employment relationship under Swiss law, i.e. Article 319 para. 1 CO. In the present case, the Employment Contract was not disputed as being binding on the Parties; on the contrary, both Parties refer in their submissions to the relevant provisions of the Employment Contract and the CO. Therefore, the Panel finds that the Employment Contract is a valid employment contract under Swiss law.

57. Article 2 of the Employment Contract, states that the Employment Contract started on 15 February 2017 and should have ended on 31 May 2018.

58. According to Article 334 para. 1 CO, a fixed-term employment contract ends without the requirement of a notice by any of the parties. Fixed-term contracts cannot be terminated by the parties before the fixed term expires, unless there is just cause for an immediate termination or the parties reach a mutual agreement on the termination of the contract (Swiss Federal Tribunal ("SFT") 4A_89/2007 of 29 June 2007, para. 3.2).

59. The Panel notes that in the present matter, the Parties did not reach a mutual agreement for the early termination of the Employment Contract. Therefore, the only legal possibility to early terminate the Employment Contract without financial consequences is for just cause.

60. The termination with just cause and immediate effect is defined in Article 337 CO:

> *"[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".*

This Article is mandatory and cannot be changed by the parties' agreement based on Article 361 CO.

61. As can be seen by the wording of Article 337 CO, the immediate termination of an employment contract with just cause is an exceptional measure and, therefore, must be admitted on a restrictive basis (SFT 129 III 380, p. 382, para. 2.1; SFT 127 III 351, p. 353, para. 4a).

62. Only a breach which is of a certain severity may justify the immediate termination without prior warning (SFT 127 III 351, p. 353, para. 4a; SFT 121 III 467, p. 472, para. 4d; SFT 117 II 560, p. 562, para. 3b and 4; SFT 116 II 145, p. 150, para. 6a; SFT 108 II 444, p. 446, para. 2). In principle, the breach is considered to be of a certain severity when there are objective criterions which do not reasonably permit an expectation that the employment relationship between the parties be continued (SFT 129 III 380, p. 382, para. 2.1; SFT 4C.240/2000 of 2 February 2001). An objective criterion for an immediate termination can be an incident which the parties could not and did not anticipate (SFT 129 III 380, p. 383, para. 2.2).

63. The Panel noted that the Club informed the Coach about the immediate termination of the Employment Contract with its letter of 21 December 2017 and referred to the 18 December 2017 as the last day of the employment. For the reasons for this immediate termination, the Club referred to the poor performances of its team, for which the Respondent was responsible as head coach. The Club further stated that the team has lost four of the last seven official league matches with low performances in the big matches.

64. In the Appealed Decision, the PSC Single Judge considered, that these reasons invoked by the Club do not justify the immediate termination of the Employment Contract. Even though, the Coach was responsible for the results of the Appellant's team, the failure of the team to win a certain number of matches cannot be considered a valid reason to terminate the Employment Contract without notice.

65. Before the Panel, the Club maintained that the immediate termination of the Employment Contract was with just cause. In addition to the reasons stated in the notice of termination, the

Club repeated further reasons given already before the PSC Single Judge, i.e. that the Coach showed improper behaviour when making a hand gesture that means "ok" to the resignation request of the fans after two consecutive defeats and that he improperly answered a question of a media reporter respectively that the team was eliminated from the UEFA Europe League at second qualifying round.

66. The Coach replied that any additional reasons brought forward by the Club, not stated in the respective notice of termination of 21 December 2017, shall not be considered. Further, the Coach is of the opinion that poor sports performances cannot be considered as just cause to early terminate the Employment Contract with immediate effect.

67. In looking at the Swiss jurisprudence, the Panel notes that in principle, giving subsequent reasons for an immediate termination is valid under the condition that the party terminating had no awareness or possibility of awareness of the reasons at the time of its termination (SFT 121 III 467, p. 472 et seq. para. 5a). However, the Panel is of the opinion that in the present matter, the Club terminating the Employment Contract with immediate effect had at least the possibility of awareness of the Coach's hand gesture made in front of TV cameras and medias and giving his "okay" regarding the fan's request of his resignation as well as the alleged improper answers to the reporter. Further, the Club obviously was aware of the elimination of the UEFA Europe League. Based on these facts, the Panel disallows these additional reasons invoked by the Club for justifying the early termination of the Employment Contract with immediate effect.

68. The next question to solve is if the alleged poor performances of the Coach can be considered as just cause to early terminate the Employment Contract with immediate effect. As stated before, the Swiss jurisprudence requires as a condition to terminate a contract with immediate effect for just cause that there is a breach of a certain severity given for which the party receiving the termination is responsible.

69. According to the CAS jurisprudence, unless the poor results of the team is specifically agreed between a club and a coach as *"just cause"* for the termination of the employment agreement, such circumstances do not reach the level of gravity required to justify the early termination of an employment contract with a coach (CAS 2017/A/5402, p. 19, para. 121-123). This Panel finds it also important to add and clarify that even if the club and the coach in a given case had agreed on such possibility, still the *"poor results"* will have to be clearly defined in the employment agreement in order to reach the needed required certainty to consider *"poor results"* as just cause for the termination of the employment agreement. The clear definition will serve two goals: (a) to avoid the arbitrary attempt to unilaterally terminate the employment agreement; and (b) it will save such scenario from being considered unilateral (and therefore may be found excessive and not balanced) to be a legitimate agreed mechanism for the termination of the agreement. The Panel finds that in the case at hand the alleged poor performances of the Coach, therefore, does not meet these requirements and do not represent a breach of the required severity for the early termination of the Employment Contract with just cause. The Club did not bring any evidence and did not even allege that it sent the Coach a formal warning to early terminate the Employment Contract, should the team`s performances not become better respectively more successful.

70. Further, the Club did not bring any proof that the reason of the Coach's poor performances rendered the continuation of the Employment Contract in good faith unconscionable and, therefore, the Club had just cause to early terminate the Employment Contract. As a consequence, the Panel is of the clear opinion that the Club terminated the Employment Contract without just cause.

2. Is Article 5.2 of the Employment Contract a Valid and Enforceable Provision?

71. Article 5.2 of the Employment Contract states:

"In case Galatasaray terminates this Contract for any reason before its expiry date, the compensation which may be requested by the Head Coach shall be maximum his 5 months' net base salary. Head Coach accepts and agrees that he shall not request any amount from the Club except for his 5 months' net base salary in such case".

72. This provision limits the damages to be paid by the Club to a maximum amount of five months' net base salary of the Coach, in case the Club early terminates the Employment Contract for whatever reasons. The subsidiarily applicable Swiss law states in Article 337c CO in relation to the termination without just cause:

"[1] Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration.

[2] Such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally forgone such work.

[3] The court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstance; however, compensation may not exceed the equivalent of six months' salary for the employee".

73. Before assessing if Article 5.2 of the Employment Contract fits within the legal framework of Article 337c CO, the Panel notes that based on Article 362 para. 1 CO this Article 337c para. 1 CO (consequences of termination without just cause) is binding and mandatory and, therefore, it is not permissible to derogate to the detriment of the employee by an individual agreement as e.g. an employment contract.

74. The mandatory character given to Article 337c para. 1 CO, as stated before, means that the Coach as employee in our case cannot validly waive his claim of compensation defined in Article 337c para. 1 CO in case the Club as employer terminates the Employment Contract without just cause as far as the compensation agreed on in the Employment Contract is lower than the residual value of such contract.

75. The Club sent the termination notice on 21 December 2017 with the remark that the Employment Contract shall be considered as terminated by 18 December 2017. The Employment Contract was signed for a fixed duration until 31 May 2018. Therefore, in the moment of the termination on 21 December 2017, the rest duration was still five months and

10 days. Based on Article 337c para. 1 CO, this is the duration for which the Coach is entitled to receive the compensation. On the other hand, the agreed maximum compensation of five months' salary in Article 5.2 of the Employment Contract is somewhat lower (10 days).

76. Even if the difference between the rest duration of the Employment Contract (until 31 May 2018) and the limitation of the compensation based on Article 5.2 of the Employment Contract is only 10 days, it is first of all a derogation to the detriment of the Coach as employee and, second, corresponds still to an amount of ca. EUR 33,350.

77. Therefore, the Panel is of the opinion that Article 5.2 of the Employment Contract which derogates to the detriment of the Coach and limits the compensation to five months' salary, is to be considered as invalid. As a consequence, the PSC correctly calculated the residual value of the Employment Contract from 19 December 2017 until 31 May 2018 with an amount of EUR 541,935.

3. What are the Financial Consequences of the Termination of the Employment Contract?

78. Based on Article 337c CO, the Coach is entitled – as stated before – to damages in the amount of what he would have earned until the expiry of the Employment Contract. This amount was correctly calculated by the PSC, being EUR 541,935 for the period of 19 December 2017 until 31 May 2018.

79. The Panel will assess in the following if additional amounts are due to the Coach as compensation or deductions will have to be made in accordance with Article 337c CO.

a) Bonus pursuant to Article 3.2.1 of the Employment Contract (Article 337c para. 1 CO)

80. The Club maintains in its Appeal and its statements during the hearing that the bonus pursuant to Article 3.2.1 of the Employment Contract in the amount of EUR 200,000 for winning the League in the season 2017/18 is not due, because the Coach was employed by Udinese Calcio S.p.A. at the time the conditions for the bonus were fulfilled.

81. The PSC granted the Coach this bonus of EUR 200,000 in pointing out that it was the Club preventing the Coach from reaching the occurrence of the bonus due to its illegitimate decision to early terminate the Employment Contract and it cannot be excluded that, had the Coach not been unjustly fired, he would have won the title with the Club's team in the 2017/18 season. The PSC Single Judge referred to CAS 2012/A/2874, para. 151 to 167.

82. The Coach filed his claim, including the request for the bonus, before the PSC on 3 January 2018, when the 2017/18 season of the League was only half way played and, therefore, it was not clear yet that the Club's team would win the championship. However, on 22 May 2018, the Coach filed an additional brief before the PSC based on the final standings in the League, showing that the Club had won the 2017/18 championship. It is uncontested that due on the Club's termination of the Employment Contract with the Coach on 21 December 2017, the Respondent was obviously not the coach of the Club's team anymore when it won the 2017/18 championship.

83. As stated before, according to Article 337c para. 1 CO, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the expiry of the agreed duration. The employee shall be put in the same position as if there was no immediate termination of the employment relationship ("positive interest"; SFT 125 III 14, p. 16/17, para. 2b). According to the SFT, the damages the employee is entitled to, contain the lost salary as well as all the other payments granted by the employer (SFT 4C.406/2005 of 2 August 2006, para. 2.1). Included in this "positive interest" are amongst others e.g. gratifications (SFT 4C.321/2005 of 27 February 2006, para. 8.3; SFT 4C.127/2002 of 3 September 2002, para. 4.1; PORTMANN/RUDOLPH, BSK I, Article 337c, N 2). The PSC referred to CAS 2012/A/2874, para. 159-163 where the Panel decided, that no specific personal performance of a football player is needed to get the bonus for the win of the championship, even though the employment contract was terminated by the club without just cause before the win of the championship.

84. The Panel notes that it is further undisputed that the Club's team won the League in the season 2017/18 and, based on Article 3.2.1 of the Employment Contract, the Coach would have been entitled to a bonus payment of EUR 200,000. As the PSC correctly stated, it was the Club's early termination of the Employment Contract without just cause depriving the Coach from the potentiality of reaching the occurrence of the bonus. The majority of the Panel is of the opinion that the entitlement to claim the bonus payment rightly relies on Article 337c para. 1 CO as was decided by the PSC, while one of the members of the Panel is of the opinion that considering the overall circumstances of the case, this bonus could have been claimed pursuant to Article 337c para. 3 CO and not pursuant to Article 337c para. 1 CO. However, the same arbitrator in minority is satisfied based on the finding under paras. 90-92 *infra* to join the majority, and thus, the Panel, based on the CAS and the SFT jurisprudence, unanimously finds that the Coach is, therefore, entitled to receive the bonus payment of EUR 200,000 based on Article 3.2.1 of the Employment Contract. It is the Club's liability to pay the Coach the "positive interest" as it breached the Employment Contract.

b) Mitigation of Damages (Article 337c para. 2 CO)

85. Pursuant to Article 337c para. 2 CO, the employee has a duty to mitigate the damages. This means that such damages are reduced by the amounts the employee saved as a result of the termination of the employment relationship or he earned by performing other work or would have earned had he not intentionally foregone such work.

86. The Coach informed the PSC on 18 October 2018 that he concluded a new employment contract with Udinese Calcio S.p.A. for the time period of 24 April until 30 June 2018 with an agreed remuneration in the net amount of EUR 50,000. The PSC informed the Club accordingly.

87. As the fixed-term Employment Contract ended on 31 May 2018, the net amount earned pro rata from Udinese Calcio S.p.A. from 24 April until 31 May 2018 has, therefore, to be deducted from the damages of EUR 541,935. The PSC calculated and deducted this amount and, as a consequence, reduced the compensation due to the Coach to an amount of EUR 514,730.

88. In its Appeal Brief and the oral statements during the hearing, the Club requested eventually a reduction of the compensation in the amount the Coach earned with Udinese Calcio S.p.A.. The Coach replied in his Answer that such deduction of his salary earned with Udinese Calcio S.p.A. from the compensation due was already made by the PSC.

89. Looking at the Appealed Decision, the Panel notes that the PSC deducted a pro rata amount of the Coach's salary earned with Udinese Calcio S.p.A. from the residual value of the Employment Contract of EUR 541,935 and reached an amount of EUR 514,730 due to the Coach. Therefore, the Panel confirms that based on Article 337c para. 2 CO, the PSC correctly deducted from the residual value the pro rata amount the Coach earned in the time period from 24 April 2018 until 31 May 2018 with Udinese Calcio S.p.A.. Based on this deduction, the Panel, therefore, rejects the Appellant's claim in this respect as the amount the Coach earned with Udinese Calcio S.p.A. in the time period of 24 April until 31 May 2018 was already deducted accordingly in the Appealed Decision.

c) Additional Compensation (Article 337c para. 3 CO)

90. Pursuant to Article 337c para. 3 CO, a court may order the employer to pay to the employee an additional compensation at the court's discretion in the maximum amount of six months' salary.

91. The Coach requested in front of the PSC such an additional compensation of six months' salary, corresponding to an amount of EUR 600,000. The PSC rejected this request, stating that for such indemnity pursuant to Article 337c para. 3 CO no contractual basis was given.

92. The Panel is of the opinion that the Coach would have had the right to such additional compensation of up to a maximum amount of EUR 600,000 based on Article 337c para. 3 CO. However, as the Coach did not appeal the Appealed Decision, the Panel is bound by the Club's Appeal and the Coach's Answer and it cannot go *"ultra petita"*.

4. Summary

93. Summing up, the Panel fully agrees with the damages calculated and granted to the Coach in the Appealed Decision. The residual value of the Employment Contract (until 31 May 2018) corresponds to an amount of EUR 541,935. This amount was reduced by the pro rata salary the Coach earned from 24 April until 31 May 2018 with Udinese Calcio S.p.A. which reduced the compensation due to an amount of EUR 514,730. Further, based on Article 337c para. 1 CO, the Coach is entitled to an additional remuneration for lost bonus in the amount of EUR 200,000.

94. As the Coach filed his claim before the PSC on 3 January 2018, the requested compensation became overdue and based on the FIFA jurisprudence, the Club being the debtor was considered in default. Article 104 CO states that a debtor in default has to pay default interest of 5% p.a. on the due amount. The Panel confirms that on the compensation of EUR 514,730, the Club has, therefore, to pay a default interest of at the rate of 5% p.a. starting from 3 January 2018 as the Appealed Decision stated.

95. Therefore, the Panel fully confirms the Appealed Decision and rejects the Appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Galatasaray Sportif Sinai ve Ticari Yatirimlar A.S. against Igor Tudor in relation to the decision of the Single Judge of the FIFA Players' Status Committee of 27 November 2019 is dismissed.

2. The decision issued on 7 February 2020 by the Single Judge of the FIFA Players' Status Committee of 27 November 2019 is upheld.

3. (…).

4. (…).

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