Arbitration CAS 2020/A/7276 Suphanburi FC v. Michael Seroshtan, award of 9 June 2021

Panel: Mrs Anna Bordiugova (Ukraine), Sole Arbitrator

Football
Contractual dispute
Immediate termination of a contract as a result of the occurrence of an event that is not certain to happen
Validity of a reciprocal and not potestative "relegation clause"
Method provided by Swiss law for the interpretation of contracts
Conditional contract depending on the occurrence of an event

1. **According to art. 154 of the Swiss Code of Obligations ("Swiss CO")** ***"[a] contract whose termination is made dependent on the occurrence of an event that is not certain to happen lapses as soon as that condition is fulfilled. As a rule, there is no retroactive effect".***

2. **The insertion into an employment contract of a "relegation clause" is a tool widely used in football by both clubs and players. It aims to protect: a) the club to suffer, as a result of relegation, from wage burdens which would supersede its financial capability. Generally, there is a justifiable interest to adapt the wage structure to the changing sporting and financial environment in the second division, which also ensures that players would receive their salary; b) the players' sports career, in that they would not be obliged, in case of relegation of their actual club, to play in lower-level competitions. These clauses can be deemed as a valid way to protect the mutual interests of both parties. There are two different types of relegation clauses. There are relegation clauses stating that the contractual relationship of the parties automatically ends in the case of relegation of the club, or otherwise provide both parties with the right to terminate the employment contract in case of relegation. Such type of reciprocal and not potestative clause is valid. On the other hand, there exists relegation clauses which do not automatically lead to the termination of the contractual relationship in case of relegation, but only provide one party with the opportunity to terminate the employment contract without any regulation of the compensation, if any, for the other party. This kind of clauses bears the risk of providing an unbalanced right to the discretion of one party only, without having any interest of any kind for the other party.**

3. **According to art. 18(1) of the Swiss CO,** ***"[w]hen assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement".***

4. **In accordance with art. 151 of the Swiss CO,** ***"[a] contract is conditional if its binding nature is made dependent on the occurrence of an event that is not certain to happen.***

The contract takes effect as soon as this condition precedent occurs, unless the parties clearly intended otherwise".

I. PARTIES

1. Suphanburi FC (the "Appellant" or the "Club") is a professional football club with its registered office in Suphanburi, Thailand. The Club is registered with the Football Association of Thailand (the "FAT"), which in turn is affiliated to the *Fédération Internationale de Football Association* (the "FIFA").

2. Mr Michael Seroshtan (the "Respondent" or the "Player") is a professional football player of Israeli nationality.

II. FACTUAL BACKGROUND

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

A. Background facts

4. On 30 June 2019, the Player and the Club entered into an Employment Contract Agreement ("Employment Contract") valid as of 1 July 2019 until 30 November 2019. The financial conditions of the contract were as follows:

> *"**3. Remuneration***
>
> *The Club shall pay the Employee the following remuneration:*
>
> *3.1. Guarantee total **USD 126,000 (US Dollars One Hundred Twenty-Six Thousand)** net after tax annual income for the year 2019 at the exchange rate of USD 1 to Baht 31.*
>
> *3.2. The Club shall pay one lump sum amount that is **USD 26,000 (US Dollars Twenty-Six Thousand)** as a settlement fee to be paid on 31st July 2019.*
>
> *3.3. The remaining value of **USD 100,000 (US Dollars One Hundred Thousand)** will be paid in monthly installments by way of salary, adding up to **5 (Five)** monthly salaries of USD 20,000 **(US Dollars Twenty Thousand)** due each month on the last business day and to be paid in Thai Baht using the exchange rate at USD 1 to Baht 31.*

3.4. Bonus Scheme will be mutually agreed by the Club and the Player based on the achievement of the Club and the Club's policies. The Player is permitted to receive bonus payments from the Club in accordance with its policies.

3.5. The Club will provide one lump sum amount that is Baht 400,000 (Baht Four Hundred Thousand) to be use [sic] *for car, accommodation expenses and air ticket to be paid on 31st July 2019".*

5. The Employment Contract included the following clause regarding its extension:

"4. Contract Extension

4.1. The Club agreed that contract extension clause starting from 1st December 2019 and ending on 30th November 2020 will automatically extend should the Club remain competing in the Thai League 1 for the Season 2020. Terms and conditions shall be as follows:

a) Guarantee total ***USD 325,000 (US Dollars Three Hundred Twenty-Five Thousand)*** *net after tax annual income for the year 2020 at the exchange rate of USD 1 to Baht 31.*

b) The Club shall pay one lump sum amount that is ***USD 25,000 (US Dollars Twenty-Five Thousand)*** *as a settlement fee to be paid on 31st January 2020.*

c) The remaining value of ***USD 300,000 (US Dollars Three Hundred Thousand)*** *will be paid in monthly instalments by way of salary, adding up to* ***12 (Twelve)*** *monthly salaries of* ***USD 25,000 (US Dollars Twenty-Five Thousand)*** *due each month on the last business day and to be paid in Thai Baht using the exchange rate at USD 1 to Baht 31.*

d) Bonus Scheme will be mutually agreed by the Club and the Player based on the achievement of the Club and the Club's policies. The Player is permitted to receive bonus payments from the Club in accordance with its policies.

e) The Club will provide one lump sum amount that is ***Baht 600,000 (Baht Six Hundred Thousand)*** *to be use* [sic] *for car, accommodation expenses and air ticket to be paid on 31st January 2020".*

6. The Employment Contract also contained the following clause regarding relegation:

"15. Termination on relegation of the Club from Thai Professional Football League

This Contract will terminate without liability for either party if the Club's senior men's first team is relegated from the Thai League 1 for ordinary sporting reasons. On such relegation, this Contract will terminate with effect from the end of the month in which the Club's senior men's played its last match".

7. The Employment Contract further contained a clause, applicable in the event of a unilateral termination:

14. Termination without Sporting Just Cause:

"14.1. In the event that the club wants to unilaterally terminate the contract extension clause starting from 1st December 2019 and ending on 30th November 2020 with the Employee without just cause before the expiration, the Club shall pay 3 (Three) months worth of salary to the Player.

14.2. The Employee shall not be entitled to resign from the Club and/or terminate this Agreement unless a prior written approval the Club is obtained".

8. On 28 October 2019, one day after the last match of the season, which left the Club in fourteenth position in the Thai League 1 (one of three positions to be relegated to the League 2, namely the clubs which remained in 14th – 16th place), the Club triggered the *"relegation clause"* and sent a letter (dated 27 October 2019) to the attention of the Player *via* email, informing him about the automatic termination of the Employment Contract pursuant to Article 15 of the Employment Contract by virtue of the Club's relegation for sporting reasons ("the Termination Letter").

9. On 25 November 2019, the Thai League, organizer of football competitions in Thailand, issued an official statement explaining that the Thai club PTT Rayong had withdrawn from the Thai League 1 competition for the 2020 season and that therefore the Thai League had decided to allow Suphanburi FC, the Appellant, to participate in the Thai League 1 season 2020 competition.

10. On 2 December 2019, the Club started its preparation for the new football season with daily training sessions.

11. On 9 December 2019, the Player, who had left the country at some stage after the last match, arrived back to Thailand.

12. On 16 December 2019, the Player's representative sent a letter to the Club, requesting the Club to issue a statement to the Player that the Employment Contract is still in force until 30 November 2020 and that the Termination Letter of the Club dated 27 October 2019 was delivered by *"a bona fide mistake"*.

13. On 6 January 2020, the Club, in response, sustained that the employment relationship had been terminated pursuant to Article 15 of the Employment Contract and that there was *"no reason to question the validity of this clear wording"*. The Club further pointed out that *"any decision by the national football association concerning the relegation of our client is of **administrative** nature and does not impact the working of article 15 of the contract (which has a **sporting nature)**"*. In this context, the Club held that *"the official decision by the national football association only confirms the sportive relegation from the club as it once again states that Suphanburi finished 14th in the 2019 Thai League"*.

14. On 7 January 2020, the Player signed an employment contract with Hapoel Haifa FC, valid as of 7 January 2020 and until 31 May 2020. The value of this contract amounted to USD 68,092.00.

15. On 9 January 2020, the Club received an email from Hapoel Haifa FC requesting a TPO-declaration and proof of the end of the Employment Contract for the Player.

B. Proceedings before the FIFA Dispute Resolution Chamber

16. On 3 March 2020, the Player lodged a claim in front of the FIFA Dispute Resolution Chamber ("FIFA DRC") regarding compensation for breach of contract against the Club and claimed the amount of USD 325,000 plus interest as of the date of the claim, *i.e.* 3 March 2020. The Player also requested the imposition of legal expenses, lawyer's fees and any VAT required by law on the Club.

17. On 8 May 2020, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part (only part relevant to the present proceeding quoted):

> *"1. The claim of the Claimant, Michael Seroshtan, is partially accepted.*
>
> *2. The Respondent, Suphanburi FC, has to pay to the Claimant compensation for breach of contract in the amount of USD 256,908.*
>
> *3. Any further claims of the Claimant are rejected".*

18. On 19 June 2020, the grounds of the Appealed Decision were communicated to the Parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 9 July 2020, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2020 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Club requested the appointment of the Sole Arbitrator.

20. On 20 July 2020, the CAS Court Office acknowledged receipt of the Club's Statement of Appeal and, amongst others, requested the Player to inform the CAS Court Office if he agreed with the appointment of a Sole Arbitrator. The Player was informed that, if he would fail to answer or disagree with the appointment of a Sole Arbitrator, the President of the CAS Appeals Arbitration Division, or her Deputy, would decide the issue. In case of submission of the present dispute to a Sole Arbitrator, the latter would be appointed in accordance with Article R54 of the CAS Code.

21. On the same day FIFA was invited by the CAS Court Office to express its position regarding its right to request its possible intervention in the present arbitration proceedings and to provide an unmarked copy of the decision under appeal.

22. On 24 July 2020, FIFA renounced its right to request its possible intervention in the present arbitration proceedings and provided the CAS Court Office with a clean copy of the Appealed Decision.

23. On 25 July 2020, the Player informed the CAS Court Office that he disagreed with the appointment of a Sole Arbitrator and requested that the case be submitted to a Panel of three arbitrators.

24. On 10 August 2020, the Club filed its Appeal Brief.

25. On 14 October 2020, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the case to a Sole Arbitrator.

26. On 18 November 2020, in accordance with Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the arbitral panel appointed to decide the present matter was constituted as follows: Sole Arbitrator, Mrs Anna Bordiugova, Attorney-at-Law in Kyiv, Ukraine.

27. On 30 November 2020, in accordance with Article R55 of the CAS Code, the Player filed his Answer.

28. On 11 December 2020, upon being invited to express their opinion in this respect, the Club indicated its preference for a hearing to be held, whereas the Player informed the CAS Court Office that his preference was for the award to be issued based on the Parties' written submissions.

29. On 14 December 2020, after having consulted the Parties, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to convene a hearing in this case.

30. On 5 January 2021, and having consulted the Parties on a convenient hearing date, the CAS Court Office informed the Parties that the hearing will be convened on 20 January 2021, by videoconference.

31. On 6 January 2021, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the Club on 7 January 2021 and by the Player on 11 January 2021.

32. On 20 January 2021, a hearing was held by videoconference. At the outset of the hearing, both Parties confirmed that they had no objection as to the constitution and composition of the arbitral tribunal.

33. In addition to the Sole Arbitrator and Mrs Carolin Fischer, Counsel to the CAS, the following persons attended the hearing:

- For the Club: Mr Menno Teunissen and Mr Thomas Spee, Counsels.

- For the Player: Mr Michael Seroshtan; Mr Idan Casif, Counsel.

34. The Sole Arbitrator heard personal testimony from Mr Michael Seroshtan, who confirmed the facts regarding the signature of the Employment Contract, its termination and further events, which took place after the last match of the Club in the season 2019 and before his application to the FIFA DRC.

35. Both Parties were given full opportunity to present their cases, submit their arguments and to answer the questions posed by the Sole Arbitrator.

36. Before the hearing was concluded, both Parties expressly stated that they had no objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

37. The Sole Arbitrator confirms that she carefully heard and took into account in her decision all of the submissions, evidence and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

38. The Club, in summary, submitted the following in its Appeal:

- *During contract negotiations it was the Player who demanded flexible conditions in view of the fact that it was his first international dimension employment. During this process the Player was assisted by his agent;*

- *The Contract contained an unambiguous provision for the employment relationship termination - the "relegation clause", which has been explicitly negotiated and freely agreed upon by the Parties;*

- *It is well known that the players themselves find it desirable to include relegation clauses into their employment contracts in order to protect their sports career, in that they would not be obliged to play in lower-level competitions. In this perspective, the validity of a clause providing for termination by either party in case of relegation, meaning that such termination is not depending on the club's or player's discretion, has been recognized and accepted by both FIFA DRC and CAS in their respective jurisprudence;*

- *The wording of the relegation clause is reciprocal and its validity cannot be questioned;*

- *The Contractual option for an extention for an additional year upon the condition that the Club did not relegate from Thai League 1 was not automatic;*

- *After its last match of the season 2019 on 26 October 2019, the Club ended on a fourteenth (14th) place, and, based on the Thai League 1 Regulations, was one of the three relegated teams after the season 2019;*

- *On 27 October 2019, the Club sent the Termination Letter to the Player based on the Club's sportive relegation from the Thai League 1. The Termination Letter referred to article 15 of the Contract, which clearly states that upon relegation for "ordinary sporting reasons" the Contract terminates with effect from the end of the month in which the senior team of the Club played its last match;*

- *The Player tacitly accepted the termination – the Club has never received any response to the Termination Letter or a formal contestation of the termination from the Player;*

- *The acceptance of termination by the Player is further confirmed by the fact that only after the administrative decision of the Thai League to admit the Club as competition participant due to the withdrawal of PTT Rayong and as late as on 16 December 2019, the Player started claiming contract prolongation;*

- *In response to the Player's letter of 16 December 2019, the Club maintained its position with regard to Contract termination in its letter dated 6 January 2020, to which the Player also never responded;*

- *Notably, already on 9 January 2020, a request from Hapoel Haifa FC for production of a TPO declaration was received by the Club, which in view of the Club confirms that the Player was not interested in the extension of his contract with the Club;*

- *FIFA was wrong in analyzing "the underlying intention of the parties when concluding the contract" – there was no such intention of the parties to the Contract;*

- *The relegation clause has been legally triggered upon sporting relegation and any revocation of the termination in a later phase in time is legally impossible;*

- *In a case identical to the present case involving another former player of the Club, player Guilherme Dellatorre (case ref. nr 20-00135/eam-ifa), the FIFA DRC, in its decision rendered on 23 April 2020, i.e., prior to the Appealed Decision, entirely followed the reasons of the Club and held that the employment contract of Mr. Dellatorre was validly terminated upon the Club's relegation.*

39. On this basis, the Appellant submits the following prayers for relief:

"1. Declare this Appeal admissible;

2. Annul the Decision under Appeal rendered by the FIFA Dispute Resolution Chamber on 8 May 2020;

3. Declare that Article 15 of the Contract (the termination upon sporting relegation) was valid under the FIFA regulations and the Swiss law;

4. *Declare that Article 15 has been triggered due to the team's relegation for sporting reasons, and that the contract was terminated with just cause;*

5. *Declare that the Contract was terminated without any further financial liability or consequence for either party;*

6. *Declare that any decision to reinstate Appellant back into the Thai League 1 was a decision of administrative nature, which, in any case, took place after the termination of the Contract".*

B. The Respondent

40. The Player, in essence, submitted the following in his Answer:

- *Initially, the Parties agreed to sign a 2-seasons employment contract (for 2019 and 2020);*

- *The Employment Contract expressly provided for its automatic extension for the year 2020 if the Club remains competing in the Thai League 1;*

- *The decision of Thai FA to reinstate the Club into Thai League 1 rendered the relegation clause null and void, triggering the extension of the Employment Contract according to the conditions foreseen by its Article 4*;

- *In accordance with the Employment Contract and pursuant to the Thai League decision to reinstate the Club, the Player took all the necessary steps in order to join the Club's pre-season training, returning to Thailand on 9 December 2019, however the Player was prevented by the Club from joining pre-season preparations;*

- *The Player tried to negotiate with the Club's owner and the Club's president's wife in order to keep playing for the Club;*

- *With the purpose of minimising as much as possible the damages as a result of the Club's breach, the Player signed an employment contract with FC Hapoel Haifa playing in the Israeli Premier League valid from 7 January 2020 until 31 May 2020 for the total amount of USD 68,092.00;*

- *The case of the player Mr. Dellatorre is essentially different – specifically, the extension clause of Mr. Dellatorre's contract was formulated as follows: "The Club agreed that contract extension clause starting from 1st December 2019 ending on 30th November 2020 can be trigger* [sic] *should the club remain competing in the Thai League 1 for the season 2020". Therefore, in that case the extension clause could be triggered, however, in the present case, the extension clause is automatically triggered should the Club remain competing in the Thai League 1.*

41. On this basis, the Player submits the following prayers for relief:

"2.1. ***Dismiss and reject*** *the Appellant's Appeal;*

2.2. Determine that ***the Appellant, has prematurely terminated the contract*** *with the Respondent* ***without Just Cause****, in a severe and unacceptable manner;*

2.3. Determine that the ***Appellant must pay the Respondent compensation for breach of contract in the amount of USD 256,908 and more****;*

2.4. Order the Appellant to (i) ***pay the arbitration costs in full****, and (ii) pay in full or pay a reasonable* ***contribution towards the legal fees and other expenses*** *incurred by the CAS in connection with these proceedings".*

V. JURISDICTION

42. The jurisdiction of CAS derives from Article 58(1) FIFA Statutes, which determines that *"[a]ppeals 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"* and Article R47 of the CAS Code.

43. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by both Parties.

44. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

45. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

46. It follows that the appeal is admissible.

VII. APPLICABLE LAW

47. Article R58 of the CAS Code provides as follows:

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

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

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

49. In view of the choice of the Parties to refer their dispute to the FIFA DRC, the Sole Arbitrator finds that the Parties accepted the applicability of Article 57(2) of the FIFA Statutes. In accordance with this provision, the regulations of FIFA are primarily applicable and, if necessary, additionally, Swiss law.

VIII. MERITS

A. Preliminary issue: the extent of the Sole Arbitrator's power of review

50. Before assessing the merits of the dispute and taking into account the submissions and requests for relief filed, the Sole Arbitrator considers necessary to clarify, for the avoidance of doubt, that in this instance, the Sole Arbitrator cannot entertain any new claim the Respondent may have filed - if any - against the Appealed Decision and can only consider mere statements of defence. The reason for this is that, as is well-established, it follows from Article R55 of the CAS Code that the Respondent to an appeal procedure is not entitled to file any counterclaim to challenge any or all of the rulings of the Appealed Decision, since in order to file any claims itself, the Respondent would have to file an independent appeal against the decision in question, within the legal term established. This has been established by consistent CAS jurisprudence (see CAS 2017/A/5481, CAS 2016/A/4852 and CAS 2016/A/4623 & 4624) and later endorsed by the Swiss Federal Tribunal (ATF 4A_10/2010).

51. In this context the Sole Arbitrator refers to requests for relief 2.2 and 2.3 submitted by the Respondent, which read as follows:

> *"2.2. Determine that* ***the Appellant, has prematurely terminated the contract*** *with the Respondent* ***without Just Cause****, in a severe and unacceptable manner;*
>
> *2.3. Determine that the* ***Appellant must pay the Respondent compensation for breach of contract in the amount of USD 256,908 and more****".*

52. On its face, the above quoted requests could be read as if the Respondent were introducing "new" claims. However, having carefully analysed and interpreted the respective requests, in the Sole Arbitrator's opinion, requests for relief 2.2. and 2.3., while somehow delicately phrased, in essence, the Respondent requests for the appeal to be dismissed, respectively for the Appealed Decision to be confirmed in its relevant parts. In the Sole Arbitrator's view this is also confirmed when considering the remainder of the Respondent's submission, as in another section of his Answer, the Respondent stipulated as follows:

> *"112. The above requires that all the Appellant's grounds for appeal should be* ***rejected.***

113. The Honorable CAS is hereby requested to dismiss and reject the Appellant's Appeal by means of fully concurring with the FIFA DRC Decision (i.e. the amount of USD 256,908 to be paid by the Appellant to the Respondent).

114. Without derogating from the above, the Honorable CAS is further requested to determine that the Appellant must compensate the Player in respect of all its expenses incurred as a result of this procedure, inter alia, fees, legal expenses etc.".

53. Having said this, and again for the avoidance of doubt, any request for relief by the Respondent which goes beyond a confirmation of the Appealed Decision, if any, is dismissed *a limine*, not because the Respondent did not clearly include it in his claims for relief, but rather because such relief is not admissible under Article R55 of the CAS Code.

B. The main issues

54. The dispute to be decided by the Sole Arbitrator concerns essentially the legality of the Employment Contract termination by the Club. The dispute, therefore, focuses on the satisfaction of the conditions established by the *"relegation clause"* for such termination to be made.

55. Initially, the Sole Arbitrator notes that most of the factual circumstances pertaining to the Employment Contract between the Appellant and the Respondent are essentially undisputed by the Parties. In rendering this Award, the Sole Arbitrator has, therefore, taken into account the following non-exhaustive list of uncontested facts and considerations:

- The Employment Contract entered into force on 1 July 2019 and was supposed to last until 30 November 2019;

- The Employment Contract was freely negotiated by the Parties, the Player was assisted in the negotiation by his agent, who made amendments to the text before it was signed by the Player;

- On 26 October 2019, the Club played its last match in the season 2019 and, according to the number of points accumulated during the season, it could achieve only the 14th position out of 16 in the standing table. Accordingly, the Club was one of the three teams which were relegated to the Thai League 2 for sporting reasons at the end of the season as per Article 15.1 of the Competition Regulations Toyota Thai League 2019;

- On 28 October 2019, in accordance with Article 15 of the Employment Contract, the Club sent to the Player *via* email the Termination Letter dated 27 October 2019, confirming in writing the termination of the Employment Contract;

- On 25 November 2019, the Thai League announced its decision to allow the Club to participate in the competition of the Thai League 1 for the 2020 season in order to replace

another club, which had withdrawn from the competition – PTT Rayong, which had obtained the 11th position in the standing table season 2019;

- On 16 December 2019, the Player, *via* his legal representative, sent an official letter to the Club demanding to revoke the Termination Letter and to issue a statement that his Employment Contract was still in force until 30 November 2020 due to the fact that the Club remained competing in the Thai League 1 (thus, referring to the extension clause of the Employment Contract, cf. Article 4);

- On 6 January 2020, the Club informed the Player that the Employment Contract was definitively terminated based on the relegation clause and that the Club had no intention to revoke its decision;

- On 7 January 2020, the Player signed an employment contract with Hapoel Haifa FC valid as of 7 January 2020.

56. However, the Parties do not agree on the following:

1. The Appellant insists that:

- The Club was relegated at the end of the Thai League 1 Competition season 2019, having finished on 14th place in the standing table, *i.e.* by *"ordinary sporting principle"* and based on the number of points accumulated; this stands as a fact nowadays;

- The fact that almost one month after the valid termination of the Employment Contract, the Thai League, by means of an administrative decision and due to the occasional withdrawal of another higher ranked club, the Appellant was admitted to participate in the Thai League 1 does not amount to constitute a legal basis for a backdated prolongation of the Employment Contract for the season 2020. The amount of points earned by the Club during the 2019 season had remained unchanged and the position of the Club in the standing table due to sporting reasons did not change – the Club was still, as a matter of fact, relegated on sporting reasons; by the time of Club's reinstatement the Employment Contract was already validly terminated with just cause.

2. The Respondent, in turn, insists that:

- Since the Club, *de facto*, was not relegated and remained in the Thai League 1, this served as legal basis for prolongation of the Employment Contract for the season 2020 as foreseen by Article 4 of the Employment Contract – *i.e.*, the extension clause;

- His Employment Contract was terminated prematurely without just cause, the Club did not want to continue the labour relationship with him without substantiating its position and, therefore, compensation is due to the Player;

- The FIFA DRC rightly awarded him compensation for breach of his Employment Contract by the Club because the *"extension clause"* prevails over the *"relegation clause"*.

57. Therefore, the main issues to be resolved by the Sole Arbitrator are:

a. Did the Employment Contract come to an end immediately after the last match of the 2019 season and based on the relegation clause due to ordinary sporting reasons as the Club had been relegated?

b. If (i) is answered in the negative, what are the consequences thereof?

These issues will be considered in turn.

a. Did the Employment Contract come to an end based on relegation clause due to ordinary sporting reasons immediately after the last match of the 2019 season due to the Club's relegation?

58. The Sole Arbitrator shall start the assessment of the *quaestio litis* by analysing Article 15 of the Employment Contract, which stipulates as follows:

> *"This Contract will terminate without liability for either party if the Club's senior men's first team is relegated from the Thai League 1 for ordinary sporting reasons. On such relegation, this Contract will terminate with effect from the end of the month in which the Club's senior men's played its last match"* [emphasis added].

59. The Sole Arbitrator notes that the wording of this clause is very clear – as soon as the team is relegated at the end of the season for ordinary sporting reasons - the Employment Contract is terminated without any liability for either party. This provision is drafted strictly in line with the provision of Article 154 Swiss Code of Obligations ("Swiss CO"), according to which: *"A contract whose termination is made dependent on the occurrence of an event that is not certain to happen lapses as soon as that condition is fulfilled. As a rule, there is no retroactive effect"* [emphasis added].

60. To start with, the Sole Arbitrator observes that insertion into a contract of a *"relegation clause"* is a popular tool widely used in football by both - clubs and players - with the aim to protect: a) the club to suffer, as a result of relegation, from wage burdens which would supersede its financial capability. Generally, there is a justifiable interest to adapt the wage structure to the changing sporting and financial environment in the second division, which also ensures that players would receive their salary; b) the players' sports career, in that they would not be obliged, in case of relegation of their actual club, to play in lower-level competitions. Therefore, these clauses can be deemed as a valid way to protect the mutual interests of both parties of the contract.

61. It shall be recalled that there are two different types of relegation clauses:

1) relegation clauses stating that the contractual relationship of the parties automatically ends in the case of relegation of the club, or otherwise provide both parties with the right to terminate the employment contract in case of relegation. Not only clubs, but also the

players benefit from these kinds of relegation clauses. That is to say, players themselves could also find it desirable to include such a clause in their employment contracts. This view is supported by CAS 2008/A/1447, para. 38, stating that *"relegations clauses are mainly a way protecting the players' careers, as their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers"*.

2) on the other hand, relegation clauses which do not automatically lead to the termination of the contractual relationship in case of relegation, but only provide one party with the opportunity to terminate the employment contract without any regulation of the compensation, if any, for the other party. This kind of clauses bears the risk of providing an unbalanced right to the discretion of one party only, without having any interest of any kind for the other party.

62. Therefore, the Sole Arbitrator needs to analyze the balance of interest in the clause agreed upon between the Parties, taking into account the specific circumstances of the present case. Thus, in the present case, Article 15 of the Employment Contract foresaw termination of the Employment Contract as soon as the Club was relegated for ordinary sporting reasons, without liability for either party. The above-mentioned stipulated condition is an expression of party autonomy and based on a condition that is not under the control of the Parties or a third party – it is depending on other circumstances than the will of a party to the employment contract. In fact, it has to be presumed that the will of clubs and players is always to avoid relegation. The fulfillment of the condition of relegation is thus solely depending on sporting circumstances. In other words, the condition of relegation is a casual condition, not a potestative condition. Thus, this clause belongs to the type 1) as outlined above – it is not potestative and reciprocal, and therefore, valid.

63. Both Parties confirmed at the hearing that the relegation clause was inserted by default to the employment contracts of all foreign players hired by the Club and was equally triggered by the Club in other numerous instances.

64. Moreover, the Parties do not disagree in that the conclusion of the Employment Contract, such as the negotiation and exchange of comments was performed freely by both Parties, the Player was assisted by his agent and the Employment Contract was not unilaterally imposed by one party on the other; in addition, the Employment Contract is signed by both Parties on each of its pages, including on the last page. The Player did not claim any misunderstanding of the said provision at the time of negotiating and signing his Employment Contract. He also did not do so after the Employment Contract was terminated by the Club on 28 October 2019, with effect as of 31 October 2019. It is only on 16 December 2019 that the Player contacted the Club regarding the termination.

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

66. Thus, in the case at hand, the Employment Contract contains a provision, under which the contract will terminate if the team is relegated for ordinary sporting reasons. It is further clarified that the *"Contract will terminate with effect from the end of the month in which the Club's senior men's team played its last match"* [emphasis added].

67. In accordance with this provision, the Sole Arbitrator notes that indeed, the application of Article 15 of the Employment Contract was clearly very limited in time – it would only be triggered - after the last match of the season played by the team (*i.e.*, 26 October 2019) and before the end of the respective month, *i.e.*, October 2019. The effective termination date according to this provision is, therefore, 31 October 2019.

68. In terms of facts, it is undisputed between the Parties that, given the situation as it existed at the time of the last match of the season, the Club was relegated to the lower league for sporting reasons. Thus, the Employment Contract was validly and with just cause terminated as of 1 November 2019, last working day being 31 October 2019, and this was confirmed by the Club in its letter to the Player of 27 October 2019.

69. This was the common intention of the Parties at the moment of the signing of the Employment Contract, and this is how things stood at the moment in time when the relegation clause could possibly be triggered, and in the absence of any contrary evidence, this clause has the binding force of the Parties' agreement.

70. Now the Sole Arbitrator turns to the analysis of the *"extension clause"* laid down in Article 4 of the Employment Contract, stipulating: *"The Club agreed that contract extension clause starting from 1st December 2019 and ending on 30th November 2020 will automatically extend should the Club remain competing in the Thai League 1 for the Season 2020"* [emphasis added].

71. In accordance with Article 151 of the Swiss CO, *"A contract is conditional if its binding nature is made dependent on the occurrence of an event that is not certain to happen. The contract takes effect as soon as this condition precedent occurs, unless the parties clearly intended otherwise"*.

72. In the opinion of the Sole Arbitrator, the text of Article 4 of the Employment Contract is unambiguous – the extension of the Employment Contract is conditional upon whether the Club remained or not in the competition of Thai League 1, it is not automatic. What, in the Sole Arbitrator's view, was meant as "automatic" is that there was no necessity for the Parties to sign any additional document in order to prolong the Employment Contract for the second season in case the Club, immediately following the last match of the season, remained in the Thai League 1 based on its results.

73. As a matter of fact, the Club did remain in the Thai League 1, but only as of 25 November 2019 and as a result of reinstatement, not for the sporting reasons. Furthermore, as not disputed by either of the Parties, it remained in the Thai League 1 because occasionally it replaced another club which had withdrawn from the Thai League 1 and after the Employment Contract of the Player had already been validly terminated, as of 31 October 2019, in accordance with Article 15 of the Employment Contract. Therefore, the extension clause, under these circumstances,

could not be triggered anymore. In terms of timing, the application of the relegation clause superseded the application of the extension clause of the Employment Contract, and, in accordance with Article 151 Swiss CO, such termination has no retroactive effect.

74. As regards the case of the player Mr Dellatorre, which both Parties referred to in their respective submissions, to start with the Sole Arbitrator notes that the dispute between Mr Dellatorre and the Club resulted from the same factual background as in the present case, *i.e.*, the Club had been relegated at the end of the 2019 season for sporting reasons and was later on reinstated into the Thai League 1 due to the withdrawal from the Thai League 1 by another club. Furthermore, what is in common between the present case and the case of Mr Dellatorre is the relegation clause contained in the employment contract of both the Appellant and Mr Dellatorre with the Club. In the view of the Sole Arbitrator, however, the wording of the extension clause in the respective employment contract of the two players is irrelevant, since it did not come into play in either of the two cases. This is due to the fact that – the application of the relegation clause, chronologically, came first, validly bringing an end to the respective employment contract. Put differently, the application of the relegation clause superseded any potential application of the extension clause (irrespective of its exact wording). In this context the Sole Arbitrator notes, without, for the avoidance of doubt, however, feeling in any way bound by this, that also the FIFA DRC, in the case of Mr Dellatorre, came to the conclusion that, following the relegation of the Club at the end of the 2019 season, the employment contract with Mr Dellatorre had been terminated due to the relegation clause, and that therefore, when looking at the *"chronology of the events in the present matter"*, *"logically the contract could not be extended"*.

75. Furthermore, the Sole Arbitrator finds it more likely than not that the Player had genuinely considered his Employment Contract as validly terminated because he was – at the relevant moment in time – of the understanding that this was indeed what was foreseen under Article 15 of the Employment Contract. Indeed, on 26 October 2019, the Club played its last match and based on the points obtained, and therefore for sporting reasons, finished in a position which did not allow it to remain in the Thai League 1. Accordingly, Article 15 of the Employment Contract was automatically triggered, and the Club had timely confirmed this in its letter to the Player of 28 October 2019. For the avoidance of doubt, in fact, it shall be deemed that the Employment Contract came to a natural expiry at the end of the season 2019, without the Respondent being in need to formally proceed to the termination.

76. The Player did not provide any evidence to establish that the real, common understanding of both Parties, at the time of the negotiation regarding the relegation clause, was that it was not limited timewise in the sense of its application and that *"ordinary sporting reasons"* did indeed mean any kind of circumstances *e.g.*, if the Club remained to play in the Thai League 1, for example, like in this case, because it replaced another club due to latter's withdrawal at a later stage.

77. The relegation clause foresaw that the Employment Contract only ended after the last match of the season and before the end of the respective month, *i.e.*, 31 October 2019. On the contrary, the Sole Arbitrator is of the opinion that by issuing, on 28 October 2019, its Termination Letter to the Player with the very clear wording regarding the basis for the Employment Contract

termination, the Appellant, in due time and in good faith, confirmed its understanding regarding the applicability of Article 15 of the Employment Contract.

78. Besides this, the Sole Arbitrator finds that also the subsequent behaviour of the Parties (*i.e.*, absence of any correspondence by the Player until 16 December 2019) points in the direction of concluding that the Player, in good faith, had understood that his Employment Contract was lawfully terminated and indeed, by that time was already seeking for new employment. Therefore, any further claims of the Player, more than one month after the Employment Contract termination, are considered being made against the principle of good faith.

79. This is also confirmed by the text messages, provided by the Player himself, allegedly exchanged between the Player and various Club representatives, that the Player was seeking to continue his labour relationship with the Club since the beginning of November 2019, thus being clearly of the understanding that his contract was already terminated.

80. The Sole Arbitrator feels necessary to outline, that as it appears from the evidence on the record - there was no written contact between the Club and the Player - until when on 25 November 2019, the Thai League announced its decision to replace PTT Rayong, due to the latter's withdrawal. The Player could not effectively explain how and when he got to know about this official statement of the Thai League.

81. The Player, as evidenced by a stamp in his passport, returned back to Thailand on 9 December 2019. However, he did not produce any evidence to prove that he had informed the Club about his arrival and its purpose, he did not explain why he returned to Thailand on 9 December 2019 only, whether he intended to continue with his performance under the Employment Contract for the 2020 season, performance which, in case the Employment Contract would have been extended, *quod non*, should have started running from 1 December 2019. From the Player's messages allegedly exchanged with the Club's secretary, the Sole Arbitrator understands that the real purpose of the Player's return was to collect his salary for October 2019, which was paid to him in cash, and to free the house he had rented.

82. Only on 16 December 2019, when the Employment Contract was already validly and effectively terminated as of 31 October 2019, the Player officially contacted the Club and started insisting on the contract's prolongation in view of the fact that the Club had "remained" in the Thai League 1. Already in that letter the Player informed the Club that he was going to start legal proceedings in case the Club would not revoke its Termination Letter.

83. While claiming in his letter of 16 December 2019 that he had not directly received the Termination Letter, sent to him by email (to the Player's email address, which is indicated in all official documents on the record), at the hearing the Player remembered that he had retrieved the letter from his spam folder some weeks after it had been sent, which means, in any case, not later than at the end of November 2019. This also does not explain why his official letter to the Club regarding the prolongation of the Employment Contract was sent only two weeks later, *i.e.*, on 16 December 2019.

84. The Player, during the hearing, was not able produce evidence of when he left Thailand following the termination of his Employment Contract and could not remember the circumstances and the date on which he had actually left Thailand in November 2019. He could have provided such information at the time when he produced a copy of his passport pages showing a stamp for entry to Thailand on 9 December 2019.

85. Notably, the Player submitted screenshots of his alleged chats with the Club's secretary, and apparently, already on 13 December 2019 he was discussing his situation regarding his upcoming future employment in Israel. However, to the Sole Arbitrator the screenshots provided appear to be selective – no messages exchanged before 5 December 2019 were produced by the Player.

86. Therefore, the submissions and arguments presented by the Player in an attempt to support the Appealed Decision, namely that the Employment Contract was terminated by the Club without just cause cannot be taken into account, as it is clear to the Sole Arbitrator that the relegation clause with its clear wording and a limited period of time of application was lawfully triggered by the Club's relegation for sporting reasons, the Employment Contract was terminated as agreed by the Parties, which the Player accepted at the relevant time.

C. Conclusion

87. Therefore, the Sole Arbitrator concludes that the Club had validly relied on the relegation clause, having confirmed this to the Player shortly after it became clear that it would be relegated, and based on the circumstances and facts as they stood at the relevant point in time. It was not possible for the Employment Contract, which had already validly terminated as of 31 October 2019, to be "renewed" after 25 November 2019.

88. Finally, the conclusion above regarding the failure of the Player to himself file an appeal to CAS against the Appealed Decision as well as the fact that, as outlined above, the Club had validly confirmed the termination of the Employment Contract based on the relegation clause, makes it unnecessary for the Sole Arbitrator to consider any other requests submitted by the Parties.

89. Any other and further claims or requests for relief are therefore dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 July 2020 by Suphanburi FC against the decision issued on 8 May 2020 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is upheld.

2. The decision issued on 8 May 2020 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is set aside.

3. The Employment Contract between Suphanburi FC and Mr Michael Seroshtan is deemed validly terminated on 31 October 2019.

4. (…).

5. (…).

6. Any other and further claims or requests for relief are dismissed.