Arbitration CAS 2018/A/6064 Alekos Alekou v. FK Poprad, award of 13 August 2019

Panel: Mr Alexis Schoeb (Switzerland), Sole Arbitrator

Football
Termination of the employment contract with just cause by the player
Interpretation of an arbitration clause
Determination of the arbitrability of a dispute
Application of mandatory provisions of foreign law concerning the arbitrability of a dispute
Pre-eminence of the applicable regulations as applicable law
Just cause to terminate a contract
Purpose of art. 17 FIFA RSTP
Principle of "positive interest"
Rate and starting date for the calculation of interests

1. **An arbitration clause must be interpreted in a way that respects the fundamental intent of the parties to submit their contractual disputes to the CAS as an arbitral institution.**

2. **Arbitral tribunals shall review the issue of the arbitrability of a dispute under the *lex arbitri*, *i.e.* the law governing the arbitration. The arbitrability of a dispute is not affected by the law applicable to the merits. A dispute may be arbitrable under the *lex arbitri* and not under the law applicable to the merits.**

3. **Mandatory rules of foreign law concerning the arbitrability of a dispute may be taken into account in an international arbitration conducted in Switzerland if the legitimate and manifestly preponderant interests of a party so require, but the arbitral tribunal is not bound by said rules.**

4. **Art. R58 of the CAS Code constitutes an indirect choice of law provision and the hierarchy of norms it imposes implies for CAS panels the obligation to resolve a dispute first and foremost pursuant to the applicable regulations.**

5. **The facts relied on in support of an immediate termination must have resulted in the loss of the relationship of trust which forms the basis of the employment contract. As general rule, only a serious breach may constitute *"just cause"* for a termination but other incidents may also justify such a termination. In case of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after having been warned. Panels have discretion to decide whether there is just cause for termination, in accordance with the principles of justice and equity.**

6. **Art. 17 FIFA Regulations on the Status and Transfer of Players (RSTP) aims at strengthening the principle of *pacta sunt servanda* by acting as a deterrent against**

unilateral contractual breaches and terminations committed by a club or a player. The party at the origin of the unjustified termination of an employment contract shall be liable to pay compensation for damages suffered by the other party.

7. **Under the principle of "positive interest", the compensation payable to the party injured by the breach of contract must be aimed at reinstating it to the position it would have been in had the contract been performed until its expiry. The compensation due to a player has to be calculated – at minimum – on the basis of the salary payable to him under the relevant contract and for the time remaining of the relationship at stake. Other objective criteria, as foreseen in art. 17 FIFA RSTP, may also be taken into account.**

8. **Where the parties' lack of submissions do not permit an arbitrator to rule on the issues of the rate and of the starting date for the calculation of interests, art. 16 of the Swiss Private International Law Act, which applies by analogy in arbitration proceedings in Switzerland, reads that Swiss law shall apply instead of the foreign law at stake. In this respect, art. 104 para. 1 of the Swiss Code of Obligations (SCO) provides that a debtor in default on payment of a pecuniary debt must pay a default interest of 5% *p.a.*, even where a lower rate of interest was stipulated by contract. Furthermore, and according to art. 339 para. 1 of the SCO, all claims arising from an employment relationship fall due when such relationship ends.**

I. PARTIES

1. Mr Alekos Alekou (the "Appellant" or the "Player") is a football player of Cypriot citizenship, born on 13 December 1983.

2. FK Poprad (the "Respondent" or the "Club") is a Slovak football club with its registered office in Poprad, Slovakia. The Club is affiliated with the Slovak Football Association.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' submissions and evidence filed. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, only the submissions and evidence necessary to explain the reasoning of the Award will be referred to in the following paragraphs.

A. The contract between the Parties

4. On 18 July 2016, the Player and the Club signed an employment agreement (the "Agreement") valid as from 1 August 2016 until 31 May 2017.

5. In accordance with Art. VI para. 1 of the Agreement, the Player was entitled to a monthly salary of EUR 1,700. In addition, as per Art. VI para. 2 of the Agreement, the Player was entitled to a monthly allowance of an amount of EUR 120 for his accommodation. Both his salary and his accommodation allowance were payable on the last day of the month subsequent to that which they referred.

6. Art. VI para. 9 of the Agreement provides that the Respondent *"is entitled to make the following deductions from the salary and the accommodation allowance:*

   a) Wage advance the [Player] *is obliged to refund in case the conditions for paying out the salary are not met,*

   b) Any sums extracted from the [Player] *under an enforceable court injunction or other relevant authority's decision,*

   c) Pecuniary penalties and fines and sanctions [the Player] *is charged with under an enforceable decision of relevant authorities,*

   d) Unlawfully received social security benefits, pension or pension advances, means-tested benefits, pecuniary allowance for compensation of adverse social impacts of severe disability provided the Athlete is ordered to refund any of those in an enforceable decision issued under special provisions,

   e) Unsettled travel expense advances,

   f) [Player's] *sickness benefits or a part thereof the* [Player] *ceased to be entitled to or has never been entitled to,*

   g) Vacation pay the [Player] *ceased to be entitled to or has never been entitled to,*

   h) Severance pay or a part thereof the [Player] *is obliged to refund"* (sic).

7. In addition, in accordance with Art. VI para. 10 of the Agreement, the Club is entitled to impose *"deductions fines, sanctions or other disciplinary punishments pursuant to the Club's internal regulations"*.

8. Furthermore, Art. XII para. 4 of the Agreement stipulates that:

   "by signing this contract, [the Player] *acknowledges that pursuant to the Club's internal disciplinary regulations,* [the Club] *may proceed as follows, without limitation:*

   (…)

   b) Demote the player temporarily or permanently so that he plays for the junior team in the event his athletic performance declines (FC Poprad B team), and sanction him with a fine worth 50% of the [Player's] *monthly salary under the Art. VI sec. 1 as of the month in which* [the Club] *decides on the* [Player's] *demotion until termination of his employment under this contract and the salary paid out to the* [Player] *shall be reduced by the sum of the above fine"*.

B. The dispute between the Parties

9. On 22 November 2016, after the last official match of the year 2016, the Player left Slovakia in order to spend his holidays in Cyprus during the season's winter break.

10. By letter, dated 1 November 2016, but received by the Player on 19 December 2016, the Club informed the Player that he was temporarily transferred to *"Poprad B team"* because his *"performance has been declining"* and furthermore that he was fined by a 50% reduction of his monthly salary as of November 2016 until the end of the Agreement.

11. By letter dated 22 December 2016, the Player contested his demotion to the Club's second team as well as the 50% salary reduction. In addition, the Player requested to be informed of the starting date of the team's trainings after the winter break. Finally, the Player alleged that he received only a partial payment of his *"net"* salary for the months of August through October 2016 and requested that the Club pay the missing amounts. The Player added that in the absence of payment and of an answer within seven days, he would assume that the Club was not interested in his services anymore and would have no other option than unilaterally terminating the Agreement.

12. By letter dated 5 January 2017, the Player sent a second letter to the Club by which he reiterated the content of his letter of 22 December 2016 and granted the Club a deadline of 5 days in which it was to inform him of the starting date of the team's trainings, failing which he would unilaterally terminate the Agreement.

13. By letter dated 9 January 2017, the Club responded to the Player alleging, *inter alia,* that i) he arbitrarily left the Club on 21 November 2016 and ii) he had been informed that the start date of the trainings was scheduled on 5 January 2017 and that he failed to attend the trainings and thus committed a gross violation of his contractual obligations that entitled the Club to immediately terminate their contractual relationship. The Club also confirmed its position concerning the Player's *"downgrading to Team B"* and the salary reduction which had been imposed, and further informed the Player that, pursuant to Slovak law, the withholding tax had to be applied on the Player's salary.

14. By letter dated 10 January 2017, the Player rejected the Club's allegations and reiterated his requests to receive his full salary for the months of August through November 2016 and to revoke the salary reduction imposed on him. The Player further informed the Club that he was *"preparing for his immediate return to Slovakia and the club's training sessions"*.

15. On 14 January 2017, the Appellant was informed by text messages from the Club's team manager that the Appellant's accommodation was no longer available to him, because the Club was *"not able to pay"* for an apartment for the Appellant.

16. By letter dated 14 January 2017, the Player informed the Club of his decision to unilaterally terminate the Agreement, in particular because *"he has now lost every confidence he had in* [the] *club"*.

17. By letter dated 24 January 2017, the Club contested the Player's termination of the Agreement and proposed to amicably terminate the Agreement as of 5 January 2017.

18. By letter dated 20 April 2017, the Club informed the Player that it was terminating the Agreement as the Player did not render his services *"since the beginning of the year 2017"*.

19. On the same day, the Club sent the Player a notice of sanction according to which the Club imposed on the Player a sanction of EUR 970 per month for the period between January and April 2017, due to his alleged breach of the Agreement.

C. The proceedings before the FIFA Dispute Resolution Chamber and the appealed decision

20. On 2 May 2017, the Player lodged a claim before the FIFA Dispute Resolution Chamber (hereinafter the "FIFA DRC") and requested the payment of EUR 1,934, plus 5% *p.a.* interest as of the due date as outstanding salaries, EUR 8,500 as compensation for breach of contract, an additional compensation up to six months of salaries plus interest, additional compensation based on objective criteria and the specificity of sports as well as the imposition of sporting sanctions on the Club.

21. By a decision passed on 24 August 2018 (hereinafter the "Appealed Decision"), the FIFA DRC partially accepted the Player's claim as follows:

> *"29. In view of all aforementioned circumstances, the Chamber was of the unanimous opinion that, at the time of the unilateral termination of the contract by the player, there were no objective circumstances which would have prevented, in good faith, the continuation of the employment relationship. As such, the DRC held that the Claimant terminated the contract without just cause on 14 January 2017.*
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> *30. Notwithstanding the above, the Chamber observed that it remained uncontested that the Claimant did not receive part of the salary for the period between August and November 2016. Consequently, in accordance with the general legal principle of pacta sunt servanda, the Chamber decided that the Respondent has to pay the Claimant the corresponding claimed amount of EUR 1,934.*
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> *31. In addition, taking into consideration the player's request as well as the constant practice of the Dispute Resolution Chamber in this regard, the members of the Chamber decided to award the Claimant interest at the rate of 5% p.a. on the outstanding amount of EUR 1'934, as follows:*
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> - *as of 1 October 2016, on the amount of EUR 313.40;*
> - *as of 1 November 2016, on the amount of EUR 329.60;*
> - *as of 1 December 2016, on the amount of EUR 256.70;*
> - *as of 1 January 2017, on the amount of EUR 1'034.30;*
>
> *32. Finally, the members of the Chamber, in view of the fact that the Claimant terminated the contract without just cause on 14 January 2017, decided that the player is not entitled to receive compensation for breach of contract.*

(…)

III. Decision of the Dispute Resolution Chamber

1. *The claim of the Claimant, Alekos Alekou, is admissible.*

2. *The claim of the Claimant is partially accepted.*

3. *The Respondent, FK Poprad, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, outstanding remuneration in the amount of EUR 1,934, plus 5% interest p.a. until the date of effective payment, as follows:*

   a. *as of 1 October 2016, on the amount of EUR 313.40;*
   b. *as of 1 November 2016, on the amount of EUR 329.60,*
   c. *as of 1 December 2016, on the amount of EUR 256.70;*
   d. *as of 1 January 2017, on the amount of EUR 1,034.30.*

4. *In the event that the aforementioned amount plus interest is not paid by the Respondent within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

5. *Any further claim lodged by the Claimant is rejected".*

22. The Appealed Decision was notified to the Parties on 21 November 2018.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 12 December 2018, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Respondent with respect to the Appealed Decision, pursuant to Art. R47 *et seq*. of the Code of Sports-related Arbitration (the "Code"). The Appellant requested that a sole arbitrator be appointed by the President of the Appeals Arbitration Division pursuant to Art. R50 of the Code.

24. By letter of 18 December 2018, the CAS Court Office provided the Respondent with a copy of the Statement of Appeal together with its enclosure and invited the Respondent to comment on the various procedural issues.

25. By letter of 21 December 2018, the Respondent informed the CAS Court Office that, among others points, it did not agree to the appointment of a sole arbitrator.

26. Following two subsequent time limit extensions accorded by the CAS Court Office, the Appellant filed its Appeal Brief on 7 January 2019.

27. On 22 January 2019, the CAS Court Office informed the Parties that, pursuant to Art. 50 of the Code, in view of the circumstances of the case, especially the low amounts in dispute, the

President of the CAS Appeals Arbitration Division had decided to submit the present case to a sole arbitrator.

28. On 29 January 2019, upon request of the Respondent, the CAS Court Office informed the Parties that a new time-limit for the filing of the Respondent's Answer would be fixed upon receipt of the Appellant's payment of his share of the advance of costs or the issuance of a decision that would grant him legal aid for the CAS arbitration costs.

29. By email of 29 January 2019, FIFA provided the CAS Court Office with a copy of the Appealed Decision and renounced to its right to intervene in the present proceedings.

30. On 5 March 2019, the CAS Court Office informed the Respondent that the Appellant had been granted legal aid in the present matter and invited the Respondent to submit its Answer within 20 days.

31. On 6 March 2019, the CAS Court Office informed the Parties that Mr Alexis Schoeb, Attorney-at-law in Geneva, Switzerland, had been appointed as Sole Arbitrator to decide the matter at hand.

32. On 25 March 2019, the Respondent submitted its Answer and challenged CAS' jurisdiction over the present dispute.

33. On 8 April 2019, the Appellant submitted its reply to the Respondent's plea of lack of jurisdiction.

34. On 17 April 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing via Skype in the present dispute.

35. By letter dated 17 April 2019, the Respondent requested the termination of the present procedure by submitting that, *inter alia*, *"we did not pay our share of the advance of costs and the Appellant did not substitute us, the appeal shall be deemed withdrawn and (…) the CAS shall terminate the arbitration"*.

36. By email of 17 April 2019, the CAS Court Office informed the Parties that the Sole Arbitrator dismissed the Respondent's request for termination of the procedure since, in essence, advances of costs cannot (at all) be requested from any party which has been granted legal aid.

37. On 16 May 2019, the Appellant returned a signed copy of the Order of Procedure issued on 14 May 2019. On the same day, the Respondent informed the CAS Court Office that it refused to sign the Order of Procedure.

38. On 17 May 2019, a hearing was held via Skype. The Sole Arbitrator was assisted at the hearing by Mrs Pauline Pellaux, Counsel to CAS. The following persons were in attendance:

For the Appellant: Mr Alekos Alekou, Appellant
Mr Loizos Hadjidemetriou, Counsel for Mr Alekou
Mr Plumb Jusufi, witness

For the Respondent: Mrs Veronika Barková, Counsel for FK Poprad
Mrs Tereza Buzikova, translator

39. At the conclusion of the hearing, the Parties indicated that they were satisfied that their right to be heard had been duly respected and that they had been treated fairly and equally during the arbitration proceedings. The Sole arbitrator therefore informed the Parties that the proceedings were closed.

40. Along with a letter dated 28 May 2019, the Appellant submitted an additional CAS award which, in his view, was relevant for the present procedure. By letter of 31 May 2019, the Respondent did not agree with the admission of the Appellant's letter and additional exhibit of 28 May 2019. By letter dated 7 June 2019, in application of Article R56 of the Code and in view of the Respondent's objection, the Sole Arbitrator decided that the Appellant's letter of 28 May 2019, together with its exhibit, could not be accepted in the CAS file.

IV. POSITION OF THE PARTIES

41. The Sole Arbitrator has carefully considered and taken into account all of the evidence and arguments submitted by the Parties, but will limit his explicit references in the following summaries to those arguments that are relevant for this Award.

A. The Appellant's position and requests for relief

42. The Appellant's position, in essence, may be summarized as follows:

- The Appellant submits that it was a mutual understanding of the Parties that, during the winter break, the Appellant would travel for holidays to his home country, for the time period from the day of the last official game until the beginning of pre-season trainings after the winter break.

- Concerning the sanction imposed by the Respondent, the Appellant submits that the Respondent's decision was potestative in nature and breached the Appellant's right to be heard. In particular, the Respondent was not contractually allowed to send the Appellant to the B team and such decision breached the Appellant's personal rights.

- After the winter break, the starting dates for the A team (*i.e.* 5 January 2017) and the B team (*i.e.* 16 January 2017) were not the same. Hence, the Appellant claims that he did not fail to attend the team's training since he was expected to train with the B team.

- The Appellant maintains that he could not be expected to return to a foreign country, in order to play with a team he did not agree to play with and for a remuneration reduced by 50 %, while having to support additional expenses for his accommodation and medical treatments, although the Respondent had to cover such expenses as per the Agreement.

- In the view of the Appellant, it was reasonable for him *"to feel that the employment relationship could no longer be continued"* and to lose confidence in the future execution of the Agreement, given that:

  i. The Respondent failed to pay the Appellant's full salary;

  ii. The Appellant had to return to a club which had no interest in his services;

  iii. The Respondent demoted the Appellant to the B team without valid reason;

  iv. The Respondent cut the Appellant's salary by half until the end of the Agreement;

  v. The Respondent allegedly lied to the Appellant about the Appellant's holiday dates and forced him to look for rental accommodation upon his return to Slovakia.

- According to the Appellant, his decision to unilaterally terminate the Agreement *"was not reached instantaneously"*. Indeed, the Appellant invited the Respondent to comply with its contractual obligation in three different letters (*i.e.* on 22 December 2016, 5 January 2017 and 10 January 2017), which were all rejected by the Respondent and which were a continual breach of the Agreement.

- The Appellant submits that the Respondent created this situation in order *"to drive the Appellant out of the team"*, which is allegedly proven by the fact that the Respondent did not protest against the Appellant's unilateral termination.

43. The Appellant's request for relief as contained in its Appeal Brief is as follows:

"As such, CAS is asked to:

A. Set aside the decision of the FIFA DRC that the Appellant's unilateral termination of his employment contract was without just cause.

B. Decide that the Appellant's unilateral termination of his employment contract was with just cause.

C. Award the Appellant with €8,500 as compensation equal to the residual value of his employment contract, plus interest as from the termination date.

D. Order the Respondent to pay all procedural and other costs arising out of the present proceedings and to reimburse the Appellant with the CAS Court Office Fee.

E. Order the Respondent to pay a contribution towards the Appellant's legal and other expenses incurred in connection with the present proceedings".

B. Respondent's position and requests for relief

44. The Respondent's position, in essence, may be summarized as follows:

- The Respondent firstly submits that CAS does not have jurisdiction over the present dispute (*NB*: Respondent's plea of lack of jurisdiction is specifically addressed under section IV below).

- The Respondent alleges that the Appellant had been informed during the negotiation of the Agreement that the salary *"is always stated as the gross salary in contracts of employment in Slovakia"* and that certain amounts would be *"withheld in conformity with the Slovak law"*.

- According to the Respondent, pursuant to statutory regulations of the Slovak Republic, the salary also includes the obligation to withhold tax and social security and health insurance contributions, and that due to the mandatory nature of the statutory regulations the parties were *"not allowed to change, modify or exclude its application"*. In particular, the Respondent claims that it had *"the obligations to deduct such withholdings in conformity with the law, otherwise* [the Respondent] *would commit a criminal offence"*.

- In the view of the Respondent, it was entitled to demote the Appellant to the B team because of his declining level of performance, in accordance with its internal regulations and Art. XII para. 4 of the Agreement. In particular, the Respondent submits that the Appellant was no longer able to play with the A team and it cannot be expected that a player whose performance declines substantially, without having any health problems, stays in the A team.

- The Respondent submits that the Appellant left Slovakia after the last match in November 2016, did not communicate his departure and did not return to attend the trainings. In particular, according to the Respondent, the Appellant could not unilaterally decide to take more holidays than what was contractually agreed and in the case at hand did not receive the approval of the Respondent. The Appellant did not come back to Slovakia to perform his contractual obligations and thus allegedly *"committed a gross violation of his obligations under the Contract of Employment"*.

- According to the Respondent, the fact that the Appellant had been downgraded to the B team is not relevant for the assessment of whether or not the Player complied with its obligation to attend the team's trainings after the winter break. Indeed, the Respondent further maintains that the Appellant had to comply with the Respondent's instruction *"pursuant to the notice"*.

- The Respondent decided to stop providing accommodation to the Appellant because the costs for his accommodation exceeded the contractually agreed amount of the accommodation costs to be reimbursed. Furthermore, the Respondent submits that it did not have the obligation to arrange accommodation for the Appellant and that *"due to the Appellant's conduct we were not interested in providing the accommodation benefit to the Appellant"*.

- The Respondent finally claims that the unilateral termination by the Appellant was not compliant with the Agreement nor with Slovak laws, in essence because the Respondent allegedly did not breach any of its obligation.

45. During the hearing, the Respondent indicated that it intentionally refrained from filing an appeal against the Appealed Decision having carefully analysed the *cost-benefit* of such appeal.

46. In response to the Appellant's Appeal, the Respondent's conclusion is as follows:

> *"We did not accept the unilateral termination of the Contract of Employment by the Appellant, as there were neither any contractual nor any statutory reasons for termination of the contractual relationship by the Appellant without any notice period. We did not commit any breach of any obligation under the Contract of Employment, we have been duly complying with our obligations. We deem the unilateral termination of the Contract of Employment null and void in conformity with the Slovak law.*
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> *We did not agree and we do not agree with DRC's decision on our obligation to pay the outstanding remuneration to the Appellant, however, it was not cost effective for us to lodge an appeal on this part, due to the expenses and time it would take us in the case of an appeal procedure.*
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> *On the contrary, we do not agree with DRC's decision on the obligation to pay the compensation to the Appellant, however, we do agree with DRC's decision on the unilateral termination of the Contract without just cause".*

V. JURISDICTION

A. The Respondent's plea of lack of jurisdiction

47. In its Answer, the Respondent challenged the jurisdiction of CAS, *inter alia*, as follows:

i. Art. XV para. 2 of the Agreement provides that: *"The Arbitration Court jurisdiction is limited to disputes allowing for arbitration under the Slovak law"*. Thus, the Respondent submits that the jurisdiction of the *"Arbitration Court"* has been acknowledged *"only at the assumption that the case at issue allows for arbitration under the Slovak law"* and that *"jurisdiction shall be determined in conformity with regulations in force and effect in the territory of the Slovak Republic governing disputes with an international element"*.

ii. The Respondent further submits that *"Slovak laws exclude the jurisdiction of an arbitration court in employment matters"*. In particular, the Respondent alleges that the Slovak Labour Code intends *"to ensure that employment disputes are comprehensively heard by a unified system of independent bodies"* and that the *"Arbitration Procedure cannot be applied to disputes concerning such claims"*.

iii. Given that the present dispute concerns an employment relationship between the Respondent and the Appellant, the Respondent therefore submits that neither FIFA nor CAS does not have jurisdiction over such dispute and that jurisdiction shall be with the general courts of the Slovak Republic.

B. The position of the Appellant on jurisdiction

48. The Appellant replied to the Respondent's plea of lack of jurisdiction, *inter alia*, as follows:

i. In reference to CAS 2016/A/4846, the Appellant submits that *"it is obvious that irrespective of what the parties agreed, the CAS is duly competent to examine and decide the present appeal and in doing so it shall apply the FIFA regulations and, subsidiarily, Swiss law"*.

ii. The Appellant further rejects all the Respondent's references to Slovakian legislation *"since no evidence at all had been submitted in proof of the existence of the said legislation"*.

C. Findings of the Sole Arbitrator

49. As Switzerland is the seat of the arbitration (see Art. R28 of the Code) and neither of the Parties is domiciled in Switzerland, the provisions of the Swiss Private International Law (PILA) on international arbitration apply (see Art. 176 para. 1 PILA). In accordance with Art. 186 of the PILA, CAS has the power to decide upon its own jurisdiction.

50. Art. R27 of the Code provides that:

> *"These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)"*.

51. Art. R47 of the Code provides that:

> *"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"*.

52. It follows that in order for CAS to have jurisdiction to hear an appeal, it is necessary that either the statutes or regulations of the sports federation to which the parties have submitted expressly provide for an arbitration clause referring the matter in dispute to CAS, or the parties entered into a specific arbitration agreement referring the matter in dispute to CAS.

53. In the present matter, the Appealed Decision was issued by the FIFA DRC. As provided for in Art. 58 para. 1 of the FIFA Statutes, the decisions of the FIFA DRC can be appealed before CAS.

54. Furthermore, under the title *"Jurisdiction of an Arbitration Court"*, Art. XV of the Agreement stipulates that:

> *"1. With respect to settling disputes, the Contracting Parties declare they acknowledge the jurisdiction of the SFZ chamber, the SFZ Appeal Committee, Arbitration Court, FIFA Arbitration bodies and Court of Arbitration in Sports in (CAS) Lausanne.*

2. The Arbitration Court's jurisdiction is limited to disputes allowing for arbitration under the Slovak law".

55. It follows from the foregoing clause XV para. 1 of the Agreement that the Parties agreed to submit their disputes arising in relation to the Agreement to several alternative dispute resolution bodies, which included the FIFA bodies and CAS, and thus excluded the jurisdiction of state courts. Indeed, the Agreement does not provide for the jurisdiction of any state court.

56. As alleged by the Respondent, clause XV para. 2 of the Agreement limits the scope of the *"Arbitration Court's jurisdiction"* to disputes which would be arbitrable under Slovak law and such limitation would exclude CAS jurisdiction given that: i) the present matter is an employment-related dispute, and ii) Slovak laws exclude the jurisdiction of an arbitration court in employment matters.

57. Following the reasoning of the Respondent, and provided that *"Arbitration Court"* also refers to CAS, the arbitration clause would lead to a jurisdictional loophole as neither the state courts nor CAS would be competent to deal with the present dispute. As a result, the language of the arbitration clause would be contradictory and thus, pathological.

58. In the case at hand, however, considering that an arbitration agreement must be interpreted in a way that respects the fundamental intent of the Parties to submit their contractual disputes to CAS as an arbitral institution (SFT 4A_246/2011 at para. 2.2.3), the Sole Arbitrator finds that such pathology does not affect the Parties' intent to arbitrate rather than to litigate before state courts.

59. In other words, the arbitration agreement concluded between the Parties under the Agreement, although affected by a pathology, does not prevent the Parties from having their dispute decided by CAS.

60. Consequently, CAS may be competent to hear the present dispute.

61. The Sole Arbitrator also notes that the plea of lack of jurisdiction submitted by the Respondent revolves around the issue of the alleged non-arbitrability of employment related disputes under Slovak law.

62. In that respect, it is recalled that arbitral tribunals shall review the issue of arbitrability under the *lex arbitri*, *i.e.* the law governing the arbitration. This means that the arbitrability of the dispute is not affected by the law applicable to the merits: a dispute may be arbitrable under the *lex arbitri* and not under the law applicable to the merits (KAUFMANN-KOHLER/RIGOZZI, *International Arbitration, Law and Practice in Switzerland*, 2015, para. 3.40 and 3.50).

63. Having said that, it is noted that under Art. 177 para. 1 of the PILA, *"[a]ll pecuniary claims may be submitted to arbitration"*.

64. Furthermore, the Swiss Federal Tribunal held that mandatory rules of foreign law concerning the arbitrability of a dispute may be taken into account in an international arbitration conducted

in Switzerland but the arbitral tribunal is not bound by them (SFT 4A_388/2012, para. 3.3). In accordance with Art. 19 para. 1 of the PILA, mandatory provisions of a foreign law may in particular be taken into account if *"the legitimate and manifestly preponderant interests of a party so require"*.

65. In the case at hand, the Sole Arbitrator finds that the claim submitted by the Appellant involves a financial interest and is thus indisputably a pecuniary claim within the meaning of Art. 177 para. 1 of the PILA. However, the Respondent has not demonstrated that its *"preponderant interests"* require taking into account mandatory provisions of Slovak law which would, as alleged by the Respondent, have a narrower concept of arbitrability compared to Swiss law.

66. In light of the foregoing, the Sole Arbitrator, therefore, finds that CAS has jurisdiction to hear this appeal.

VI. ADMISSIBILITY

67. The Appealed Decision was passed on 24 August 2018 and the grounds of the Appealed Decision were subsequently notified to the Parties on 21 November 2018. The Appellant then filed his Statement of Appeal on 12 December 2018, thus being within the 21-day deadline established by Art. 58 para. 1 of the FIFA Statutes.

68. Furthermore, the Appeal complied with all other requirements of Art. R48 of the Code.

69. Consequently, the Appeal is admissible.

VII. APPLICABLE LAW

70. The law applicable in the present arbitration is defined by the Sole Arbitrator in accordance with Art. R58 of the Code, which provides the following:

> *"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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

71. Art. R58 of the Code imposes the pre-eminence of the *"applicable regulations"* to the *"rules of law chosen by the parties"*, which are only applicable *"subsidiarily"*. As such, Art. R58 of the Code does not admit any derogation and imposes a hierarchy of norms, which implies for the Sole Arbitrator the obligation to resolve the dispute first and foremost pursuant to the applicable regulations (see CAS 2015/A/4105, para. 35). Indeed, Art. R58 of the Code constitutes an indirect choice of law provision in favour of the applicable regulations and *"CAS panels are bound by this choice"* (RIGOZZI/HASLER, in ARROYO M. (ed.), Arbitration in Switzerland, The Practitioner's Guide, Art. R58 of the Code, N7).

72. In case of an appeal against decisions issued by FIFA, it is widely recognized that there is a tacit and indirect choice of law in accordance with Art. 57 para. 2 *in fine* of the FIFA Statutes, which provides that *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"* (see MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, 2015, p. 544, para. 99; see also RIGOZZI/HASLER, in ARROYO M. (ed.), Arbitration in Switzerland, The Practitioner's Guide, Art. R58 CAS Code, N10 and HAAS U., *Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law* -, CAS Bulletin 2015-2, p. 13).

73. In the case at hand, the Appealed Decision was issued by the FIFA DRC. Therefore, the applicable regulations (within the meaning of Art. R58 of the Code) correspond to the FIFA Statutes and regulations.

74. In addition, according to its Art. XVIII para. 8, the Agreement *"is governed by Slovak law"*.

75. As a result, in accordance with Art. R58 of the Code in conjunction with Art. 57 para. 2 *in fine* of the FIFA Statutes, the Sole Arbitrator will decide the present dispute in accordance with the various regulations of FIFA, in particular the FIFA Regulations on the Status and Transfer of Players (Edition 2016; hereinafter the "FIFA RSTP") and, additionally, Swiss law.

76. Subsidiarily, to deal with specific points not regulated by the FIFA Statutes or regulations, the Sole Arbitrator shall refer to Slovak law (see HAAS U., *Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law* -, CAS Bulletin 2015-2, p. 15).

VIII. MERITS

77. It is firstly underlined that, as the Respondent did not file an appeal against the Appealed Decision, all the decisions rendered by the FIFA DRC not subject to the appeal shall be deemed definitive.

78. As a result, the only remaining question to be decided by the Sole Arbitrator is whether the Appellant's unilateral termination of the Agreement was justified and if so, what are the consequences of such termination.

A. The Appellant's unilateral termination of the Agreement

79. In order for the Sole Arbitrator to determine whether the early termination of the Agreement by the Appellant was justified or not, the Sole Arbitrator refers to Art. 14 of the FIFA RSTP, which states that *"[a] contract may be terminated unilaterally by either party without consequences (…) where there is just cause"*.

80. The FIFA RSTP does not define what constitutes *"just cause"*. According to the FIFA RSTP Commentary (No 2 to Art. 14), *"[t]he definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an*

employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally".

81. The definition of "*just cause*" and whether just cause exists shall thus be established on a case-by-case basis and the Sole Arbitrator shall also rely on the case law developed by CAS on this question, as well as on relevant provisions of the applicable law.

82. The Sole Arbitrator firstly refers to the long-standing jurisprudence of the CAS concerning just cause to terminate an employment contract, in particular CAS 2006/A/1180, where the Panel held that: *"[t]he only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract"* (para. 26).

83. Secondly, because of the subsidiary application of Swiss law in view of interpreting the FIFA RSTP, the Sole Arbitrator also refers to Art. 337 para. 2 of the Swiss Code of Obligations ("SCO"), which provides that: *"good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice".*

84. According to the jurisprudence of the Swiss Federal Tribunal, the facts relied on in support of an immediate termination must have resulted in the loss of the relationship of trust which forms the basis of the employment contract. As general rule, only a serious breach may constitute *"just cause"* for a termination but other incidents may also justify such a termination (see SFT 137 III 303, para. 2.1.1). In the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after having been warned (SFT 129 III 380, para 2.2). The judge determines at its discretion whether there is good cause (Art. 337 para. 3 SCO), in accordance with the principles of justice and equity (Art. 4 of the Swiss Civil Code).

85. In the present case, the Appellant claims that his unilateral immediate termination of the Agreement was justified because the Respondent was not fulfilling its contractual obligations, in particular because the Respondent (i) failed to pay the Appellant's full salary, (ii) unilaterally reduced the Appellant's salary by half until the end of the Agreement and demoted the Appellant to the Respondent's B team without a valid reason and, (iii) forced the Appellant to look for rental accommodation upon his return to Slovakia after the winter break.

86. It is noted that the Appellant notified the Respondent by letter, dated 14 January 2017, of his decision to unilaterally terminate the Agreement because, *inter alia*, it was practically impossible for the Appellant to return to Slovakia without a place to live and with such a low income.

87. It is also noted that the Appellant sent three warning notices to the Respondent (dated 22 December 2016, 5 January 2017 and 10 January 2017), in which he expressly (i) contested the

measures which had been imposed on him, (ii) requested the payment of his full salary and (iii) requested to be informed of the exact dates on which trainings would resume after the winter break. The Appellant also noted that the behaviour of the Respondent demonstrated that it was not interested in his services, and if that was the case, invited the Respondent to mutually settle the employment relationship, or he would have no other choice but to unilaterally terminate the Agreement.

88. The Sole Arbitrator further observes that the unpaid salary at the time of the Agreement's termination corresponded to a total amount of EUR 1'934, as awarded by the FIFA DRC. In addition, and for the same reasons as found by the FIFA DRC, the unpaid salary for the month of January 2017 (*i.e.* until 14.01.17; EUR 793.30) is also due by the Respondent.

89. As regards the Respondent's unilateral decision to demote the Appellant to the Respondent's B team and to reduce his salary by 50%, the Sole Arbitrator notes that these sanctions were permanent and that the file contains no evidence demonstrating that the Respondent gave an opportunity to the Appellant to defend himself. Consequently, in the case at hand, these sanctions could not have been validly applied due to their arbitrary character, as rightly found by the FIFA DRC.

90. Furthermore, concerning the issue of the Appellant's accommodation, the Sole Arbitrator notes that, under Art. VI para. 2 of the Agreement, the Respondent had the obligation to provide the Appellant with a monthly allowance of EUR 120 for his accommodation in Slovakia. Nevertheless, it appears that, such allowance has never been paid by the Respondent and the Parties implicitly agreed that the Respondent would provide the Appellant with accommodation instead of paying him a monthly allowance.

91. It is however undisputed that on 14 January 2017, after having prepared his travel arrangements in order to return to Slovakia, the Appellant was abruptly informed through text messages from the Respondent's team manager that his accommodation was no longer available to him because the Respondent would not pay for it, without giving any further explanation.

92. In this context, the fact that the Respondent cancelled the Appellant's accommodation and *de facto* forced the Appellant to look for accommodation to be rented himself upon his return to Slovakia, suggests that the Respondent created a "fait accompli" which also appears to be a vexatious measure taken against the Appellant.

93. In light of the foregoing and considering that: (a) each month the Respondent failed to pay the Appellant's full salary, (b) the Appellant had been permanently demoted to the Respondent's second team and that his salary was reduced by 50 % until the end of the Agreement, (c) the evidence on file indicates that the Respondent informed the Appellant only on 9 January 2017 that the trainings had restarted on 5 January 2017 and did not request his return to Slovakia beforehand and (d) the abrupt cancellation of the Appellant's accommodation, the Sole Arbitrator holds that the Appellant had good reasons to believe that the Respondent had no interest in the continuation of the employment relationship.

94. Bearing in mind the Respondent's criticism and attitude towards the Appellant, the Sole Arbitrator finds that the latter has demonstrated that, having suffered constant, repeated and forceful contractual violations by the Respondent, he could not reasonably be expected to carry on with the employment relationship.

95. Consequently, the Respondent's conduct went beyond the threshold of a material breach in the present case and the Appellant therefore unilaterally terminated the Agreement with *"just cause"*.

B. The financial consequences of the Appellant's termination of the Agreement with just cause

96. Turning now to the question of the consequences of the Appellant's termination of the Agreement with just cause, the Sole Arbitrator observes that the Agreement does not contain a liquidated damages clause.

97. The Sole Arbitrator thus refers to Art. 17 of the FIFA RSTP, the heading of which reads: *"Consequences of terminating a contract without just cause"* (emphasis added) while in the present case Appellant terminated the Agreement with *"just cause"*.

98. However, the Sole Arbitrator notes that the purpose of Article 17 of the FIFA RSTP is to reinforce contractual stability between professionals and clubs (see Art. 13 of the FIFA RSTP), *i.e.* to strengthen the principle of *pacta sunt servanda* by acting as a deterrent against unilateral contractual breaches and terminations committed by a club or by a player (see CAS 2005/A/876, page 17; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92; CAS 2008/A/1568, para. 6.37; CAS 2017/A/5111, para. 132).

99. Furthermore, according to the FIFA RSTP Commentary (No 6 to Article 14), a party *"responsible for and at the origin of the termination of the contract is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed"*.

100. Thus, in line with the previous jurisprudence of the CAS, the party at the origin of the termination of the employment agreement shall be liable to pay compensation for damages suffered by the other party (see CAS 2017/A/5111 para. 134 and CAS 2012/A/3033, para. 72). In this sense, Art. 17 RSTP closely follows Art. 337b SCO, which also provides the party not being in breach of the contract with a right to seek full compensation for the damage suffered (see CAS 2013/A/3398, para. 67).

101. In the present case, although the Appellant was the one who terminated the Agreement, it was the Respondent who caused and provoked such termination by breaching its contractual obligations and breaking the relationship of trust between the Parties.

102. Therefore, as a consequence of the Appellant's unilateral termination of the Agreement with "*just cause*", the Sole Arbitrator holds that the Respondent shall be liable to pay to the Appellant a compensation in accordance with Art. 17 para. 1 of the FIFA RSTP, in addition to the amounts due under the Agreement that were outstanding at the time of the early termination.

103. In respect of the calculation of the compensation in accordance with Art. 17 para. 1 of the FIFA RSTP, such provision provides that:

> *"In all cases, the party in breach shall pay compensation. (…) unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

104. In accordance with the CAS jurisprudence, the injured party is entitled to a whole reparation of the damage suffered pursuant to the principle of "positive interest", under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in had the contract been performed until its expiry (see CAS 2016/A/4679; CAS 2012/A/2698; CAS 2008/A/1447). Hence, the compensation has to be calculated – at minimum – on the basis of the salary payable to the Appellant under the Agreement and for the time remaining of the Agreement (*i.e.* the residual value of the Agreement from the date of its immediate termination). Other objective criteria, as foreseen in Art. 17 FIFA Regulations, may also be taken into account (see CAS 2008/A/1519-1520, para. 85 *et seq.*).

105. In the case at hand, the Appellant requests the payment of the residual value of the Agreement, corresponding to an amount of EUR 7'706.70 (*i.e.* the Appellant's salary from 15 January 2017 until 31 May 2017).

106. The Sole Arbitrator also notes that it is undisputed that the Appellant did not sign a new employment agreement with another club for the time remaining of the Agreement and, therefore, did not receive further salaries or other benefits from a third person during that period. As a result, there were no benefits earned by the Appellant which may need to be taken into account in the present case.

107. In conclusion, in addition to the Appellant's missing salary payments due until the date of the immediate termination of the Agreement, the Respondent shall be ordered to pay to the Appellant compensation in an amount of EUR 7'706.70.

108. Having found that the Respondent is liable to pay to the Appellant a compensation in the amount of EUR 7'706.70, in addition to the amount of EUR 793.30 for the unpaid salary for the month of January 2017, the Sole Arbitrator must decide on the Appellant's request for default interest.

109. In the present case, the Agreement does not provide any guidance and neither the Appellant nor the Respondent has provided a submission concerning the issues of the applicable rate of the default interest or the date from which such interest would be due. As a result, the Sole Arbitrator is unable to determine such issues according to the Agreement and/or to Slovak law.

110. In these conditions, the Sole Arbitrator finds that in accordance with Art. 16 PILA, which applies by analogy in arbitration proceedings in Switzerland (CAS 2016/A/4539 & CAS 2016/A/4545, para. 85), Swiss law shall apply instead of Slovak law.

111. Art. 104 para. 1 SCO provides that: *"a debtor in default on payment of a pecuniary debt must pay a default interest of 5% per annum even where a lower rate of interest was stipulated by contract"*. Furthermore, Art. 339 para. 1 SCO reads as follows: *"When the employment relationship ends, all claims arising therefrom fall due"*.

112. The Sole Arbitrator further notes that in the Appealed Decision, FIFA also applied a 5% interest rate and that this rate had been challenged by none of the Parties.

113. In light of the foregoing, the Sole Arbitrator concludes that an interest of 5% *per annum* shall apply on the amounts due by the Respondent and which shall begin to accrue from 15 January 2017.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 12 December 2018 by Mr Alekos Alekou is upheld.

2. The decision passed on 24 August 2018 by the FIFA Dispute Resolution Chamber is amended with the addition of the following new point:

   3bis. (new) FK Poprad is ordered to pay to Mr Alekos Alekou the additional following amounts:

   a. EUR 7'706.70, corresponding to the compensation for the breach of the Agreement, plus 5% interest *per annum* from 15 January 2017 until the date of effective payment.

   b. EUR 793.30, corresponding to the unpaid salary for the period between 1 January 2017 and 14 January 2017, plus 5% interest *per annum* from 15 January 2017 until the date of effective payment.

3. (…).

4. (…).

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