Arbitration CAS 2020/A/6748 Milos Jokic v. PAS Lamia 1964, award of 3 February 2021

Panel: Mr Manfred Nan (The Netherlands), Sole Arbitrator

Football
Termination of a pre-contract of employment
Power of the CAS to assess the jurisdiction of FIFA if FIFA is not a party to the proceedings
Distinction between pre-contract and final contract
Effects of a pre-contract
Compensation for damages resulting from a pre-contract

1. **A CAS panel may examine the issue whether the FIFA Dispute Resolution Chamber (DRC) had jurisdiction over an horizontal dispute even if the appellant has not summoned FIFA as a respondent in the CAS proceeding. If FIFA feels that in a given CAS case it has some matter of principle to look after or some interest at stake, FIFA is always entitled – when not summoned by the appellant – to intervene as a party or, with the agreement of the Panel, as an *amicus curiae* (pursuant to Articles R41.3 and R41.4 of the CAS Code). However, FIFA's choice to stay absent from a CAS appeal proceeding deriving from the horizontal dispute – having been informed of the appeal – does not prevent the appointed CAS panel from addressing all relevant issues with full scope of review and, eventually, from adjudicating the horizontal dispute at hand.**

2. **FIFA Regulations and Swiss law do not provide a specific, explicit definition of a "pre-contract". This notion is however well known in legal practice and is defined as the reciprocal commitment of at least two parties to enter later into a contract, a sort of "promise to contract". The clear distinction between a "pre-contract" and a "contract" is that the parties to the "pre-contract" have not agreed on the essential elements of the contract or at least the "pre-contract" does not reflect the final agreement. On the contrary, if the interpretation of the "pre-contract" leads to the conclusion that the parties agreed on all the essential elements of the final contract, on the basis of the general principles applicable to the conclusion of a contract as defined under Article 1 et seq. of the Swiss Code of Obligations (SCO), the "pre-contract" would be nothing else but the final contract.**

3. **Obligations deriving from a "pre-contract" are not as strict as they are in a definite employment contract. However, this does not mean that a party is entirely free to detract itself from the obligations that transpire from the conclusion of a "pre-contract". Determining otherwise would mean that the "pre-contract" would basically have no value at all.**

4. **The scope of article 17(1) of the FIFA Regulations on the Status and Transfer of Players is not limited to definite employment contracts, also the compensation for**

breach of a "pre-contract" can be calculated on this basis. However, just like the obligations deriving from a "pre-contract" are not the same as those deriving from a definite contract, the damages resulting from a breach of a "pre-contract" are not the same either. Indeed, the damages incurred in case of a breach of a "pre-contract" are generally lower as one needs to be conscious that there is still a chance that no definite agreement will come about.

I. PARTIES

1. Mr Milos Jokic (the "Appellant" or the "Player") is a professional football player of Serbian nationality.

2. PAS Lamia 1964 (the "Respondent" or the "Club") is a professional football club with its registered office in Lamia, Greece. The Club is currently competing in the Super League, which is the highest league in professional football in Greece, and is registered with the Hellenic Football Federation (the "HFF"), which in turn is affiliated to the *Fédération Internationale de Football Association* (the "FIFA").

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

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, 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 28 August 2015, the Player and the Club concluded an employment contract (the "First Employment Contract"), for the 2015/2016 football season, i.e. valid as from the date of signing until 30 June 2016.

5. On 24 June 2016, the Player and the Club signed an agreement entitled *"PROFESSIONAL PLAYER'S PRE-CONTRACT"* (the "Pre-Contract") with regard to the 2017/2018 football season. The Pre-Contract contains the following relevant terms:

> *"**PROFESSIONAL PLAYER'S PRE-CONTRACT***
>
> *Between the* [Club] *and the* [Player] *agreed the following:*

> *If the Club promoted to Super League for the period 2017-2018 the annual salary of the player will be 90.000 € devised in 10 months".*

6. On 24 August 2016, the Player and the Club concluded an employment contract (the "Second Employment Contract"), for the 2016/2017 football season, i.e. valid as from the date of signing until 30 June 2017.

5. At the end of the 2016/2017 football season, the Club promoted to the Greek Super League.

6. On 4 July 2017, the Player sent a notice to the Club, *inter alia*, pointing out that *"he has not been informed when the preparations for the season 2017/2018 will start".*

7. On 26 July 2017, the Club replied to the Player, stating that it had an employment contract with the Player *"till 30-6-2017 and in no case for the period 2017-18".*

8. On 1 August 2017, the Player sent the following reminder to the Club:

> *"We are informed that the club's preparations for the following season are finished and that the club started playing the friendly matches* […]. *[T]he Player does not understand why he was cut from the team and was not informed about the preparations for the following season".*

9. On 24 August 2017, the Player concluded an employment contract with the Greek club AO Trikala (the "Trikala Contract"), for the 2017/2018 football season, valid as from the date of signing until 30 June 2018 (for a total remuneration of EUR 11,354, divided into 12 monthly instalments of EUR 654.50, as well as a total amount of EUR 3,500, payable in 10 instalments of EUR 350 each). However, the Trikala Contract was terminated on 30 January 2018 and therefore, the Player was only entitled to the renumeration for 5 months amounting to EUR 5,022,50.

10. On 30 January 2018, the Player concluded an employment contract with the Greek club Doxa Dramas (the "Doxa Contract"), for the second half of the 2017/2018 football season, valid as from the date of signing until 30 June 2018, for a total remuneration of EUR 18,927.

B. Proceedings before the FIFA Dispute Resolution Chamber

15. On 23 January 2018, the Player lodged a claim against the Club for breach of the Pre-Contract before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting EUR 66,073 as compensation for breach of contract, plus 5% interest *p.a.* as from 1 July 2017, corresponding to the value of EUR 90,000 from the Pre-Contract minus EUR 5,000 from the Trikala Contract and minus EUR 18,927 from the Doxa Contract.

16. The Club contested the Players' claim, including FIFA's competence.

17. On 3 October 2019, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

"1. The claim of the [Player] *is inadmissible".*

22. On 22 January 2020, the grounds of the Appealed Decision were communicated to the Parties determining, *inter alia*, the following:

"2. […] [T]he members of the Chamber referred to art. 3 par. 1 of the Procedural Rules and confirmed that, in accordance with art. 24 par. 1 in combination with art. 22 lit. b of the Regulations on the Status and Transfer of Players, the Dispute Resolution Chamber shall adjudicate on employment-related disputes between a player and a club that have an international dimension.

3. As a consequence, the Dispute Resolution Chamber would, in principle, be competent to decide on the present litigation which involves a Serbian player and a Greek club regarding an employment-related dispute.

4. However, the Chamber acknowledged that the [Club] contested the competence of FIFA's deciding bodies on the basis of clause 10 of the [First Employment Contract].

[…]

6. As a result the Chamber understood that the first element to consider in this respect is the contractual basis over which the current dispute is grounded, and which jurisdiction clauses may be applicable.

7. In this respect, the Chamber took note that, on 28 August 2015, the player and the club concluded [the First Employment Contract], valid as from 28 August 2015 until 30 June 2016, which included the aforementioned clause 10.

8. Subsequently, the members of the Chamber observed that, according to the [Player], on 24 June 2016, he and the club signed [the Pre-Contract], valid, "if the club promoted to Super League for the period 2017/2018".

9. In view of the above, the members of the Chamber understood that the employment relationship between the player and the club was fundamentally governed by the [First Employment Contract].

10. Subsequently, the members of the Chamber observed the contents of the [Pre-Contract] signed on 24 June 2016, and noted that it included a single clause, namely a promise that the player's annual salary would increase to EUR 90,000, which is a higher amount when compared to his basic remuneration following the primary contract, which according to its clause 4.4. of the contract, amounted to EUR 16,593.25. The Chamber noted that said promise was linked to the club's performance in the national league.

11. As a result, the Chamber understood that, beyond its formal naming as "pre-contract", the aforementioned document shall be understood, in fact, as an additional clause that is part of the [First Employment Contract]. In other words, the Chamber considered that the [Pre-Contract] is in its very substantial aspect an extension clause, by means of which the contract and the player's remuneration could be extended on the basis of certain sporting achievements.

12. Consequently, the Chamber considered that, when assessing the current matter, all the contractual stipulations included in the [First Employment Contract] shall be taking into account, including its jurisdiction clause.

[…]

17. On account of the above, the DRC established that the present matter it is not competent to deal with the present matter since a) the applicable employment contract contains a clear jurisdiction clause in favour of the national arbitration body of the HFF, b) the CAS confirmed that the relevant Greek deciding body fulfills the requirements of equal representation and of an independent chairman and guarantees fair proceedings, i.e. the relevant Greek deciding body is competent to adjudicate disputes between players and clubs like the matter at hand.

18. In light of the above, the Chamber unanimously decided that it is not in a position to deal with the substance of the present matter, as it falls under the jurisdiction to the national arbitration body of the HFF".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 11 February 2020, the Player 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 2019 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Player named the Club as the sole respondent, and, *inter alia*, requested for a sole arbitrator to be appointed.

24. On 24 February 2020, upon being invited by the CAS Court Office to express its position in this regard, FIFA renounced its right to request its possible intervention in the present arbitration proceedings, adding the following position with regard to the Club's standing to be sued:

> *"[W]e would like to underline that the Appellant has not designated FIFA as a respondent to the present procedure, whereas his only contention is related to an alleged competence of FIFA's decision-making body to pass a decision in connection with the matter having opposed the parties reference. Consequently, in line with its longstanding jurisprudence, the CAS and the specific Panel or Sole Arbitrator may not take into consideration any question related to the alleged lack of competence of the DRC to pass a decision on the substance of such dispute. From a formal point of view, the competence-related aspect does not fall within the discretion of any deciding body anymore.*
>
> *Indeed, whilst considering which of the mentioned deciding bodies has jurisdiction to deal with a matter, FIFA does not simply act as a court of first instance in a dispute between players and clubs. It is rather performing an assessment of its own competences, which has a direct impact on the rights and duties of its direct and indirect members in the sense of Article 75 Swiss Civil Code. Accordingly, and pursuant to this provision, the present matter must be considered as a membership-related dispute, entailing that it should have been directed exclusively against FIFA.*

Furthermore, it is common knowledge that under Swiss law, applicable pursuant to Articles 57(2) FIFA Statutes and R58 CAS Code, the defending party has standing to be sued (legitimation passive) if it is personally obliged by the 'disputed right' at stake. In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it.

As already pointed out by the CAS, when considering 'vertical disputes' such as those concerning the decision to decline jurisdiction, the Appellant "has standing to bring a challenge against the Appealed Decision against the CAS, however, that should be directed at the association itself, i.e. FIFA. More in particular, only if FIFA is summoned as respondent, then all the parties may have the opportunity to ask the Panel or Sole Arbitrator to consider jurisdictional issues and subsequently the merits. In the case at stake, however, this remains moot since FIFA was not summoned. In this respect, we wish to highlight that FIFA is not automatically a party to any CAS procedure and cannot be forced to be a party if not called by the Appellant.

In the present proceedings, FIFA is the only entity with a disputed right at stake and with a legitimate interest in relation to its prerogative to establish whether its deciding body has jurisdiction or not, yet it has not been called as a party by the Appellant. Consequently, in light of all the foregoing, the appeal shall be rejected, as the CAS cannot review the decision of the first instance in FIFA's absence. In other words, in the absence of an appeal directed against FIFA, there actually exists no real and/or justiciable dispute between the Respondent and the Appellant. Hence, any request for relief sought in that respect shall also be dismissed. […]" (emphasis in original).

25. On 28 February 2020, upon being invited by the CAS Court Office to express his position in this regard, the Player filed his comments (with enclosures) on FIFA's position with regard to the issue of standing to be sued, referring to CAS jurisprudence and concluding that *"the CAS shall examine the issue whether the DRC had jurisdiction over the dispute even if the Appellant has not summoned FIFA as a respondent before the CAS"*.

26. On 23 March 2020, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

Sole Arbitrator: Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands

27. On 30 April 2020, the Player filed his Appeal Brief, in accordance with Article R51 CAS Code.

28. On 20 May 2020, the Player filed a signed version of a witness statement enclosed to his Appeal Brief.

29. On 26 May 2020, the Club filed its Answer, in accordance with Article R55 of the CAS Code.

30. On 9 and 18 June 2020 respectively, upon being invited to express their opinion in this respect, the Club indicated that it did not consider a hearing necessary, whereas the Player requested a further round of written submissions *in lieu of* a hearing.

31. On 25 June 2020, the Club objected to the Player's request for a second round of written submissions.

32. On 29 June 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to grant the Parties a second round of written submissions.

33. On 20 July 2020, the Player filed his Reply (with enclosures).

34. On 17 August 2020, the Player submitted a FIFA DRC decision (the "FIFA DRC Decision") that it had received on that same day and certain documents related thereto. The FIFA DRC Decision was rendered in an unrelated dispute between different entities, in which an arbitration clause identical to the ones incorporated in the First and Second Employment Contract was at stake, but where the FIFA DRC ruled that the claim concerned was admissible.

35. On 26 August 2020, the Club filed its Rejoinder.

36. On 29 August 2020, the Player submitted a specification of legal services *"which should be considered when making a decision on costs",* and requested *"to receive the operative part of the award prior to the reasons"*.

37. On 29 September 2020, the Sole Arbitrator proposed to hold a video-conference with the Parties with the purpose of discussing the admissibility and relevance of the exhibits filed by the Player on 17 August 2020 and to explore the possibilities of a settlement.

38. On 13 October 2020, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the Player and the Club on 13 and 19 October 2020 respectively, confirming, *inter alia*, that the Sole Arbitrator would decide this matter solely based on the Parties' written submissions and that their right to be heard had been respected.

39. On 15 October 2020, the Player submitted the grounds of the FIFA DRC Decision.

40. On 21 October 2020, a video-conference took place with counsel of the Parties.

41. On 2 November 2020, as agreed during the video-conference, the Club filed its comments on the admissibility and relevance of the FIFA DRC Decision.

40. The Sole Arbitrator confirms that he considered himself to be sufficiently informed without the need of an oral hearing and that he carefully took into account in his decision all of the submissions, evidence, and arguments presented by the Parties, if admissible, 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

50. The Player's submissions, in essence, may be summarised as follows:

- The Pre-Contract is the relevant document for establishing whether or not the FIFA DRC has jurisdiction, and not the First and Second Employment Contract, as the Pre-Contract *"gives rise to the dispute"*.
- As the Pre-Contract does not contain any dispute resolution clause, the FIFA DRC is competent in accordance with Article 22(b) and 24 FIFA RSTP.
- The Pre-Contract, drafted by the Club and containing all *essentialia negotii,* is not an extension clause, but it is a *"self-sufficient document"* that binds the Parties.
- The FIFA DRC is a *"more suitable forum, comparing to the HFF"*, because the procedures before the Greek NDRC are conducted in Greek, and the Player would have to pay an advance of costs and an amount for the handling fees of the NDRC. Moreover, *"the Pre-Contract would be declared invalid in a potential HFF dispute"*.
- The Club's behaviour *"is unacceptable and it contradicts the fundamental principles of good faith and pacta sunt servanda"*.
- By breaching the Pre-Contract without just cause, the Club is liable to pay compensation to the Player in accordance with Article 17 FIFA RSTP.
- The Player's *"earnings under the Pre-Contract shall be reduced by his income at AO Trikala and Doxa Dramas"*, and therefore the Club shall be obliged to compensate the Player in the amount of EUR 66,073, plus interest as from 1 July 2017.

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

> *"**1.-** to annul the decision of the FIFA Dispute Resolution Chamber dated 3 October 2020;*
>
> ***2.-** to order PAS Lamia 1964 to pay to Mr. Milos Jokic an amount of EUR 66,073 as damage compensation, plus interest of 5% per annum from 1 July 2017 until the payment is effectively made;*
>
> ***3.-** to order PAS Lamia 1964 to bear the costs of these arbitration proceedings; and*
>
> ***4.-** to grant Mr. Milos Jokic a contribution towards his legal fees and other expenses incurred in connection with these arbitration proceedings in the amount of CHF 5,000"*[1].

[1] The Sole Arbitrator notes that both Parties increased their initial prayer for relief to be granted a contribution of CHF 5,000 to CHF 7,500 in the prayers for relief in their second written submissions. Pursuant to Article R56 of the CAS Code,

B. The Respondent

52. The Club's submissions, in essence, may be summarised as follows:

- The FIFA DRC rightfully decided that the Player's claim is inadmissible, as the substance of the present matter in accordance with the arbitration clause in both employment contracts *"falls under the jurisdiction to the national arbitration body of the HFF* […] *which national arbitration bodies of the HFF fulfill the requirements of equal representation and of an independent chairman and guarantees fair proceedings"*.

- The employment relationship between the Parties *"is fundamentally governed by the two consecutive professional player's contracts concluded between the two parties for the seasons 2015-2016 and 2016-2017* […] *regardless of the time the dispute arose or will occur"*.

- The Pre-Contract *"does not have and cannot have legal autonomy, independence or self-existence"*. The Pre-Contract *"does not have the necessary contents to be considered as such, and particularly does not have an established duration, not even the exact fees, the bonuses and other benefits, the installments of the player nor the dates of payments"*.

- The legal nature of the Pre-Contract *"is that it was just a promise of the club to the player about his annual salary in case the team would have achieve its target to promote in the Greek Super League* […] *and the two parties would have wanted to extend their employment contract for the next year (period 2017-2018). As a result, the said agreement does not oblige the club to sign a new contract with the player for the period 2017-2018, but only rules the annual salary of the player, in case he and the club agree to bind themselves with a contract for the next year (i.e. for the period 2017-2018)"*. In this regard, the Club refers to the undisputed fact that the Parties did not want to sign a two-year contract for the seasons 2016-2017 and 2017-2018.

53. On this basis, the Club submits the following prayers for relief:

> *"1. To reject the appeal as inadmissible and to ratify the decision of the FIFA Dispute Resolution Chamber passed on 3 October 2020*
>
> *2. To order the Appellant to bear the costs of these arbitration proceedings; and*
>
> *3. To grant PAS Lamia 1964 FC a contribution towards its legal fees and other expenses incurred in connection with these arbitration proceedings in the amount of CHF 5,000.*
>
> *Subsidiarily, and only in the event that the above is rejected:*

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it is in principle not permitted to amend prayers for relief following the filing of the Appeal Brief and the Answer. In the absence of a compelling justification being submitted by the Parties, their requests for a higher amount in comparison with the prayers for relief in the Appeal Brief are inadmissible and the Sole Arbitrator will decide based on the prayers for relief referring to CHF 5,000.

1 *To reject the appeal as essentially unfounded and to ratify the decision of the FIFA Dispute Resolution Chamber passed on 3 October 2020*

2 *To rule that no contractual relationship and/or obligation existed between the Appellant and the Respondent for the season 2017-2018 and, as a result, there was no breach of any contract;*

3 *to rule that no compensation or any other amount whatsoever is due by the Respondent to the Appellant;*

4 *to condemn the Appellant to the payment in the favour of the Respondent of the legal expenses incurred;*

5 *to establish that the costs of the arbitration procedure shall be borne by the Respondents".*

V. JURISDICTION

54. The jurisdiction of CAS derives from Article 58(1) FIFA Statutes (2018 Edition), as it 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 CAS Code. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by both Parties.

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

VI. ADMISSIBILITY

56. 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 CAS Code, including the payment of the CAS Court Office fee.

57. It follows that the appeal is admissible.

VII. APPLICABLE LAW

58. The Player submits that, in accordance with Article R58 CAS Code and Article 57(2) FIFA Statutes, the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") shall be applied primarily, and subsidiarily, Swiss law.

59. The Club did not submit any position in respect of the law to be applied.

60. Article R58 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".

61. Article 57(2) 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".

62. The Pre-Contract does not contain any specific choice-of-law clause.

63. Consequently, the Sole Arbitrator finds that the regulations of FIFA are primarily applicable and, if necessary, additionally, Swiss law.

VIII. MERITS

A. The Main Issues

64. The main issues to be resolved by the Sole Arbitrator are:

i. Does CAS have the power to examine the issue whether the FIFA DRC had jurisdiction over the dispute as FIFA is not a party to the present proceedings?

ii. If so, was the FIFA DRC competent to adjudicate the Player's claim?

iii. If so, what is the nature of the Pre-Contract?

iv. Did the Club breach the Pre-Contract?

v. If so, what amount of damages the Player is entitled to receive from the Club?

i. Does CAS have the power to examine the issue whether the FIFA DRC had jurisdiction over the dispute as FIFA is not a party to the present proceedings?

65. As the Club did not submit any position on this issue, the Sole Arbitrator understands that it has no objection against the competence of CAS to decide on the competence of the FIFA DRC in the proceedings leading to the Appealed Decision, even though FIFA is not a party.

66. Since FIFA is not a party to the present proceedings, the Sole Arbitrator is not required to decide on FIFA's objection to the competence of CAS to review the competence of the FIFA DRC.

67. Nevertheless, for the sake a clarity, the Sole Arbitrator nonetheless addresses the issue.

68. In its letter dated 24 February 2020, FIFA indicates that without calling FIFA as a respondent, *"the competence-related aspect does not fall within the discretion"* of CAS. The Sole Arbitrator agrees that, based on the reasoning of the Appealed Decision one may infer that the FIFA DRC considered itself not competent, but notes that the operative part of the Appealed Decision actually declares the Player's claim inadmissible.

69. Be this as it may, and considering the issue as a matter of jurisdiction, the Sole Arbitrator observes that the Player refers to CAS 2014/A/3690, where the CAS panel concluded that *"CAS shall examine the issue whether the DRC had jurisdiction over the dispute even if the Appellant has not summoned FIFA as a respondent before the CAS".*

70. The CAS panel in CAS 2014/A/3690 further reasoned, *inter alia*, as follows:

> *"The fact that the DRC's jurisdiction is being put into question still does not affect any FIFA's direct interest – notwithstanding the position expressed by FIFA in its letter* […] *– because the authority granted by the FIFA rules to that FIFA body is merely instrumental to the adjudication of a horizontal dispute between indirect members. As a result, the Panel may examine the issue whether the DRC had jurisdiction over the present dispute even if the Appellant has not summoned FIFA as a respondent in this CAS proceeding. Of course, FIFA always has a general interest that its rules governing the relationships between indirect members (such as the FIFA RSTP) be correctly interpreted and applied; accordingly, if FIFA feels that in a given CAS case it has some matter of principle to look after or some interest at stake, FIFA is always entitled - when not summoned by the appellant – to intervene as a party or, with the agreement of the Panel, as an amicus curiae (pursuant to Articles R41.3 and R41.4 of the CAS Code). However, FIFA's choice to stay absent from a CAS appeal proceeding deriving from an horizontal dispute – having been informed of the appeal – does not prevent the appointed CAS panel from addressing all relevant issues with full scope of review and, eventually, from adjudicating the horizontal dispute at hand"* (CAS 2014/A/3690, para. 83 – 101).

71. Although FIFA in its letter dated 24 February 2020 refers to *"longstanding jurisprudence"* of CAS to argue that CAS is not competent to decide on the jurisdiction of the FIFA DRC if FIFA is not called as a party, no such *"longstanding jurisprudence"* was provided and could not be identified by the Sole Arbitrator. Indeed, the only jurisprudence on file in this respect is CAS 2014/A/3690 and this jurisprudence points in a different direction.

72. The Sole Arbitrator fully agrees with the reasoning of the CAS panel in CAS 2014/A/3690. Also the present appeal arbitration proceedings concern a horizontal dispute. If FIFA considered it relevant to express its views with respect to the jurisdiction of the FIFA DRC in the proceedings leading to the Appealed Decision, it should have exercised its right to request its possible intervention in accordance with Article R41.3 of the CAS Code, as it was invited to do by letter of the CAS Court Office dated 12 February 2020.

73. Consequently, the Sole Arbitrator finds that he is competent to adjudicate and decide on the question of whether or not the FIFA DRC was competent to decide on the Player's claim.

ii. Was the FIFA DRC competent to adjudicate and decide on the Player's claim?

74. The Player argues that the Pre-Contract is the relevant document for establishing whether or not the FIFA DRC has jurisdiction, whereas the Club submits that the employment relationship between the Parties is governed by the two consecutive employment contracts concluded by the Parties for the seasons 2015-2016 and 2016-2017.

75. The starting point of the Sole Arbitrator's analysis is Article 22 FIFA RSTP, which provides as follows:

> *"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:*
>
> […]
>
> *b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs".*

76. Given that the Club is based in Greece and the Player is of Serbian descent, the dispute has an international nature. The dispute further concerns an employment relationship. Consequently, the competence of the FIFA DRC is, in principle, given.

77. However, Article 22 FIFA RSTP allows to deviate from the competence of the FIFA DRC if a club and a player *"explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement".*

78. The Sole Arbitrator notes the following chronological sequence of events:

- 28 August 2015: conclusion First Employment Contract (season 2015/2016);
- 24 June 2016: conclusion Pre-Contract (related to season 2017/2018);
- 24 August 2016: conclusion Second Employment Contract (season 2016/2017).

79. The Sole Arbitrator notes that the temporal scope of the Pre-Contract is different from the First and Second Employment Contract, i.e. whereas the First and Second Employment Contract concern the seasons 2015/2016 and 2016/2017, the Pre-Contract concerns the 2017/2018 season.

80. Furthermore, as examined in more detail below, the Sole Arbitrator finds that the Pre-Contract is not a definite employment contract, but only a pre-contract by means of which

the Parties committed themselves to negotiate about an extension of the employment relationship to the 2017/2018 season, if the Club was promoted to the Super League.

81. Since the Pre-Contract entailed a duty to negotiate about a potential extension of the employment relationship, the Sole Arbitrator finds that it does not form part of the employment relationship governed by the First and Second Employment Contract.

82. The Sole Arbitrator agrees with the Club that the employment relationship between the Parties is governed by the two consecutive employment contracts concluded between the Parties for the seasons 2015/2016 and 2016/2017, but finds that these contracts do not *ipso facto* govern the relationship of the Parties after the 2016/2017 season, unless specifically provided for.

83. Although the Pre-Contract was concluded at the end of the 2015/2016 season, the dispute has nothing to do with the employment relationship for that season. The Sole Arbitrator finds that the fact that the Player was under contract at the moment of signing of the Pre-Contract is not decisive. The Pre-Contract cannot be seen as an extension clause in the First Employment Contract ending on 30 June 2016 (as considered by the FIFA DRC), because the Pre-Contract applied to the season after the season following the end of the First Employment Contract and because the Player indicated in his Appeal Brief that, at the time of conclusion of the Pre-Contract, he also did not yet want to commit himself to an extension of the employment contract for the 2017/2018 season.

84. The same counts for the Second Employment Contract which was concluded after the Pre-Contract was signed. If the Pre-Contract had to be seen as an extension of this employment contract, the Pre-Contract should have been incorporated into the employment contract or signed after the conclusion of the Second Employment Contract.

85. It is evident that each contract applies to a different football season.

86. As such, the content, including the jurisdictional clauses, of both the First and the Second Employment Contract are not relevant for the question whether the FIFA DRC is competent to decide on the dispute arising from the Pre-Contract.

87. The Sole Arbitrator observes that the dispute arose at the beginning of the 2017/2018 season and that the Pre-Contract does not refer to any national arbitration body.

88. Consequently, the Sole Arbitrator finds that the default rule set forth by Article 22 FIFA RSTP is applicable and that the FIFA DRC was therefore competent to adjudicate and decide on the Player's claim.

89. The Parties have extensively addressed issues related to the question whether or not the Greek arbitration bodies as referred to in the First and Second Employment Contract comply with the prerequisites set out in the regulations of FIFA. Indeed, following the filing of the Appeal Brief and the Answer, the Player filed new arguments and new documents supporting his alternative stance that the Greek national arbitration bodies do

not comply with the applicable FIFA Regulations, and that therefore the FIFA DRC was competent to adjudicate his claim.

90. The Club not only objected to the admissibility of those new arguments and new documents, but also argued that the Greek national arbitration bodies fully comply with the applicable regulations of FIFA and that the Player failed to prove that they were not compliant.

91. However, taking into account the considerations above, the Sole Arbitrator does not deem it necessary to examine the issue of whether or not the Greek national arbitration bodies comply with the prerequisites set forth in the regulations of FIFA, and whether the Player's new arguments and documents on this subject are admissible, as these issues are not relevant anymore, and therefore moot.

92. Consequently, the Sole Arbitrator finds that the FIFA DRC was competent to adjudicate and decide on the Player's claim.

iii. What is the nature of the Pre-Contract?

93. The Club argues that the Pre-Contract *"was nothing more than a promise to the player that, if after the expiration of his contract, both parties (the club and the player) agree to renew their cooperation by signing a new contract and the team competes in Super League (first National division), he will be entitled to increased annual earnings (€90,000) compared with those received in the same division"*. In this regard, the Club refers to the content of the Appeal Brief in which the Player argues that he and the Club *"did not want to enter into a fixed 2-seasons long contract"* after the 2015/2016 season.

94. Furthermore, the Club stresses that the Pre-Contract is not valid as it was not deposited with the HFF and that it does not contain all *essentialia negotii.*

95. The Player submits that the Pre-Contract is valid, that it contains all *essentialia negotii,* and that the Club should therefore pay compensation to him in accordance with Article 17(1) of the FIFA Regulations on the Status and Transfer of Players ("FIFA Regulations").

96. First of all, the Sole Arbitration finds that the mere fact that the Pre-Contract was not registered with the HFF does not affect the validity of the Pre-Contract. At least the Player could legitimately rely on the Pre-Contract as the Player would normally play no role in the registration of a contract with the HFF, but this would be a formality to be performed by the Club.

97. In the Pre-Contract containing the Club's letterhead, the Parties agreed as follows:

> *"If the Club promoted to Super League for the period 2017-2018 the annual salary of the player will be 90.000 € devised in 10 months"*.

98. The Sole Arbitrator finds that the wording is clear: if the Club would be playing in the Greek Super League at the start of the 2017/2018 season, the Player's annual salary would be EUR 90,000, payable in 10 monthly terms.

99. Although the Club submitted that the Pre-Contract was not registered with the HFF, the Pre-Contract in no way indicated that the validity thereof was made conditional upon any other condition besides the promotion of the Club to the Greek Super League after the 2016-2017 season. As it is undisputed that the Club was promoted to the Greek Super League after the 2016/2017 season, and therefore started the season 2017/2018 in the Greek Super League, the suspensive condition was exercised and the Pre-Contract entered into force.

100. However, the Sole Arbitrator finds that the Pre-Contract cannot simply be equated to a definite employment contract. Indeed, both Parties effectively agree that it was not an employment contract or an extension of the Second Employment Contract, but that it was rather a "pre-contract".

101. The Panel observes that another CAS panel determined the following in respect of "pre-contracts" in football:

> *"Starting with the argument of the existence of a "pre-contract", the Panel first noted that the FIFA Regulations and Swiss law do not provide a specific, explicit definition of a "pre-contract". This notion is however well known in legal practice and the Panel would define it as the reciprocal commitment of at least two parties to enter later into a contract, a sort of "promise to contract" (in French: "promesse de contracter"). The clear distinction between a "pre-contract" and a "contract" is that the parties to the "pre-contract" have not agreed on the essential elements of the contract or at least the "pre-contract" does not reflect the final agreement. On the contrary, if the interpretation of the "pre-contract" leads to the conclusion that the parties agreed on all the essential elements of the final contract, on the basis of the general principles applicable to the conclusion of a contract as defined under Article 1 et seq. of the Swiss Code of Obligations (SCO), the "pre-contract" would be nothing else but the final contract (see notably Art. 1 and 2 par. 1 SCO). In this respect, the Panel stressed that it was well known that in contractual negotiations, the parties must consider the risk to be bound at an earlier stage than they sought. This risk is covered by specific wordings that one can find for instance in letters of intent, which can in some cases be considered as "pre-contract" as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments already taken at the level of the letter of intent. However, good practice requires from the parties to expressly mention that the document is not the final contract and that it does not represent the definitive agreement between the parties"* (CAS 2008/A/1589, para. 13 of the abstract published on the CAS website).

102. Although the CAS panel in CAS 2008/A/1589 concluded that the relevant contract was not a "pre-contract" but a definite employment contract because it contained all the *essentialia negotii*, the Sole Arbitrator finds that several elements lead him to the conclusion that the Pre-Contract is indeed a "pre-contract" rather than a definite employment contract.

103. First, the wording *"Professional Player's Pre-Contract"* in the title of the contract already indicates that it is not a final contract.

104. Second, the Player argues in his Appeal Brief that *"it was not only him who did not want to enter into a fixed 2-seasons long contract, but it was also the Club that did not suit an unconditional commitment for both 2016/2017 and 2017/2018. Namely, it would be financially difficult (and unprecedented in the Club at the time) to have a player with an annual salary of EUR 90,000, while competing in the second division of Greece".*

105. Third, the Pre-Contract contains no wording to the effect that the employment contract would be automatically extended if the Club would promote to the Super League. Indeed, this could not have been done, because at the time of signing the Pre-Contract, the Parties had no employment contract for the 2016/2017 season, because the Second Employment Contract had not yet been concluded.

106. Fourth, if the Parties reciprocally wanted to be obliged to enter into an employment contract for the season 2017/2018, they could have incorporated it in the Second Employment Contract or could have adjusted the wording of the Pre-Contract. It appears that both the Player and the Club preferred to defer the definite decision to potentially extend their employment relationship into the 2017/2018 season until later, but already agreed on the salary that would be payable to the Player in case they would agree to extend the employment relationship with another season.

107. For the reasons set out above, the Sole Arbitrator finds that the Pre-Contract cannot be considered as a definite employment contract, but that it only comprised an agreement between the Parties to negotiate about the conclusion of a binding employment contract for the 2017/2018 season if the condition precedent, i.e. the promotion of the Club to the Super League, would be complied with.

108. The Sole Arbitrator finds that the Pre-Contract served as some kind of warranty for the Parties that they would not withdraw from the negotiations about a potential further extension of the employment relationship lightly and, indeed, already agreed in advance on the salary payable to the Player, i.e. one of the main issues to be discussed.

109. Consequently, the Panel finds that the Pre-Contract is to be considered as a "pre-contract" rather than a definite employment contract.

iv. Did the Club breach the Pre-Contract?

110. The Sole Arbitrator observes that the wording of the Pre-Contract is clear, and, as such, the Sole Arbitrator has no doubt that the Parties, by signing the Pre-Contract on 24 June 2016, and considering that the condition precedent was complied with, obliged themselves to negotiate about the potential conclusion of a new employment contract for at least the 2017/2018 season, whereby the salary to be paid would, in principle, not be open to discussion.

111. The Sole Arbitrator finds that the Club should at least have invited the Player to negotiate the potential conclusion of a new employment contract for the 2017/2018 season, which the Club failed to do.

112. Although the Player did not specifically demand from the Club to enter into negotiations about the potential conclusion of a new employment contract for the 2017/2018 season, it is undisputed that, on 4 July 2017, after the expiry of the Second Employment Contract, the Player sent a notice to the Club whereby he, *inter alia*, pointed out that he *"has not been informed when the preparations for the season 2017/2018 will start"*, and that after the Club informed him on 26 July 2017 that it had a contract with the Player *"till 30-6-2017 and in no case for the period 2017-18"*.

113. On 1 August 2017, the Player sent another letter to the Club stating that he *"does not understand why he was cut from the team and was not informed about the preparations for the following season"*.

114. The Sole Arbitrator finds that these letters dated 4 July and 1 August 2017 indicate that the Player was of the mistaken impression that the Pre-Contract entailed a binding extension of the employment relationship, rather than a duty to negotiate about a potential extension. The Sole Arbitrator finds that the Player's letter dated 4 July 2017 is to be considered as a notification of the Player, reminding the Club of its duties under the Pre-Contract and his wish and availability to extend his employment relationship with the Club.

115. It transpires from the Club's letter dated 26 July 2017 that it rightly considered that no employment contract existed for the 2017/2018 season. The Sole Arbitrator however finds that it may also be inferred from this letter that the Club was not interested in extending the employment relationship with another season and therefore did not consider it necessary to engage into discussions about the conclusion of an employment contract for the 2017/2018 season.

116. The Pre-Contract being a "pre-contract" brings about that the obligations deriving therefrom are not as strict as they are in a definite employment contract. However, this does not mean that a party is entirely free to detract itself from the obligations that transpire from the conclusion of a "pre-contract". Determining otherwise would mean that the "pre-contract" would basically have no value at all. The Sole Arbitrator finds that the Pre-Contract required both Parties to negotiate in good faith about the conclusion of an employment contract for the 2017/2018 season and that they should not abandon the negotiations lightly for frivolous reasons.

117. The Sole Arbitrator finds that the Club in the matter at hand did not comply with this obligation.

118. The Sole Arbitrator finds that the Club did not act in good faith, as it did not invite the Player to start negotiations for the conclusion of a definite agreement. Rather, the Club explicitly replied to the Player that it only had an employment contract with him till 30 June 2017 and *"in no case"* for the season 2017/2018. The Club provided no reason as to why it

was not interested anymore in concluding an employment contract for the 2017/2018 season.

119. The Sole Arbitrator finds that the reason invoked by the Club to not even start negotiations, arguing that none of the Parties *"showed interest to continue their employment"*, is flawed, because on 4 July and 1 August 2017 respectively, the Player sent notices to the Club whereby he pointed out that he was interested in continuing the employment relationship with the Club.

120. Consequently, the Sole Arbitrator finds that the Club breached its obligations vis-à-vis the Player under the Pre-Contract.

v. If so, what amount of damages is the Player entitled to receive from the Club?

121. Just like the obligations deriving from a "pre-contract" are not the same as those deriving from a definite contract, the damages resulting from a breach of a "pre-contract" are not the same either. Indeed, the damages incurred in case of a breach of a "pre-contract" are generally lower as one needs to be conscious that there is still a chance that no definite agreement will come about.

122. As the Club refused to conclude an employment contract without providing any reasons for this decision and without even engaging in negotiations with the Player, the Sole Arbitrator finds that the Club is liable for any damages incurred by the Player.

123. The Sole Arbitrator, however, also finds that the Player could have been more explicit in his notifications dated 4 July and 1 August 2017 by reminding the Club of its obligation to enter into negotiations with him on the basis of the Pre-Contract, rather than presuming that a valid employment contract existed for the 2017/2018 season.

124. The Sole Arbitrator finds that, if the Club had been reminded about the content of the Pre-Contract, it may have acted differently, even though it had already made up its mind that it did not want to continue with the Player.

125. Furthermore, the Sole Arbitrator also finds that the Player could have been more proactive and should have notified the Club earlier than only on 4 July 2017. The Second Employment Contract expired on 30 June 2017. It would therefore have made sense for the Player to already remind the Club about the Pre-Contract as soon as promotion to the Super League was secured at the end of the 2016/2017 season.

126. Furthermore, the Player found new employment soon after the breach. His damages therefore remained fairly limited because the Player successfully mitigated his damages.

127. The Sole Arbitrator finds that the Player, on the one hand, lost a significant financial opportunity if one compares the terms of the Pre-Contract with the employment contracts finally concluded with AO Trikala and Doxa Dramas, however, on the other hand, it was not certain that the Parties would reach an understanding in respect of the extension of

their employment relationship and that this was indeed unlikely in light of the Club's response dated 26 July 2017. The Sole Arbitrator finds that this uncertainty and unlikeliness must be taken into account in awarding compensation for breach of contract to the Player.

128. The Sole Arbitrator finds that the scope of article 17(1) FIFA Regulations is not limited to definite employment contracts, but that also the compensation for breach of a "pre-contract" can be calculated on this basis. Indeed, article 17(1) FIFA Regulations is headed *"consequences of terminating a contract without just cause"*.

129. Article 17(1) FIFA Regulations determines as follows:

> *"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period"*.

130. The Sole Arbitrator takes due note of previous CAS jurisprudence establishing that the purpose of Article 17 FIFA Regulations is basically nothing else than to reinforce contractual stability, *i.e.* to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (CAS 2008/A/1519-1520, para. 80, with further references to: CAS 2005/A/876, p. 17*: "[…] it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' […]"*; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92: *"[…] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability […]"*; confirmed in CAS 2008/A/1568, para. 6.37).

131. In respect of the calculation of compensation in accordance with article 17 FIFA Regulations and the application of the principle of "positive interest", the Sole Arbitrator follows the framework as set out by a previous CAS Panel as follows:

> *"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*
>
> *As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in*

integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.

The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wyler, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).

The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations" (CAS 2008/A/1519-1520, at para. 85 *et seq.*).

132. The Sole Arbitrator finds that the legal framework set out above and the principle of positive interest are applicable to the present case and that it has a considerable scope of discretion in awarding compensation.

133. The Sole Arbitrator notes that the Pre-Contract refers to the 2017/2018 season, with a starting date of 1 July 2017, whereas the Player only found new employment with AO Trikala on 27 August 2017. The Player therefore certainly incurred damages in these specific months.

134. Under the circumstances, the Sole Arbitrator considers it just and fair that the Club shall compensate the Player with the salary he would have received during these months if a definite employment contract would have been concluded with the Club. Since the Club was supposed to pay the Player an annual salary of EUR 90,000 payable in 10 months, the Player would normally have received EUR 18,000 for the months of July and August 2017.

135. Due to the flagrant difference between the salary that the Player was supposed to earn with the Club (EUR 90,000 for the 2017/2018 season) and the salary due on the basis of the employment contract concluded by the Player with AO Trikala and Doxa Dramas (in the total amount of EUR 23,927 as submitted by the Player and not disputed by the Club), the Sole Arbitrator deems it just and fair to award the Player the equivalent of one month's salary under the terms of the Pre-Contract (i.e. EUR 9,000).

136. Consequently, the Sole Arbitrator finds that the Club shall pay compensation for breach of the Pre-Contract to the Player in the amount of EUR 27,000 (EUR 18,000 + EUR 9,000), with interest at a rate of 5% *p.a.* accruing as from 23 January 2018 (i.e. the date the Player lodged his claim at FIFA).

B. Conclusion

137. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Sole Arbitrator finds that:

i) The FIFA DRC was competent to adjudicate and decide on the Player's claim in the Appealed Decision;

ii) The Pre-Contract is to be considered a "pre-contract" rather than a definite employment contract;

iii) The Club breached its obligations vis-à-vis the Player under the Pre-Contract;

iv) The Club shall pay compensation for breach of the Pre-Contract to the Player in an amount of EUR 27,000, plus interest.

138. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 11 February 2020 by Milos Jokic against the decision issued on 3 October 2019 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision issued on 3 October 2019 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is set aside.

3. PAS Lamia 1964 has to pay to Milos Jokic compensation for breach of contract in an amount of EUR 27,000 (twenty-seven thousand Euros), plus 5% (five percent) interest *per annum* on said amount as from 23 January 2018 until the date of effective payment.

4. (…).

5. (…).

6. All other and further motions or prayers for relief are dismissed.