

**Arbitration CAS 2021/A/8221 Kayserispor KD v. Robert Prosinecki, award of 21 April 2022**

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

*Football*

*Employment-related dispute*

*Implicit choice of law*

*Contract modification as a result of change of circumstances*

*Entitlement to bonus due to non-relegation*

*Default interest rate under Swiss law*

1. **Article 187(1) of the Federal Act on Private International Law (PILA) enshrines the principle of party autonomy with respect to the applicable law. The parties are free to choose the law applicable to the merits of the dispute. It is undisputed that such choice of law may be made directly, by referring to a specific law, or indirectly, by referring to a “conflict-of-law” provision designating the applicable law to the merits. In addition, since a choice of law is not required to take a particular form, it can be entered into either expressly or tacitly. By submitting the dispute to CAS, the parties to an employment contract in football implicitly agree that Article R58 of the CAS Code, and thus, FIFA regulations and Swiss law, shall govern the arbitration proceedings.**
2. **Under Swiss law, contracts must be performed as agreed pursuant to the principle of *pacta sunt servanda*, regardless of whether the contract has become useless or burdensome for one of the parties. Exceptionally, though, a contract may be modified by a judge or arbitrator if the circumstances have changed fundamentally. To this end, the change must have occurred after the conclusion of the contract, must not have been foreseeable or avoidable by the parties and must result in an obvious imbalance of the interests at stake. Finally, the risk associated with the changed circumstances must not have been assigned to one party by the contract or by law.**
3. **A contractual clause providing for the payment of a bonus to a football coach by his employing club subject to his team being retained in the first league can be revised following the annulment of the relegation mechanisms due to the COVID-9 outbreak by way of the decision of the relevant national federation. Such a clause presupposes the achievement of sporting merit, and does not encompass the consequences of an extraordinary administrative decision. Its amount may be reduced, or even eliminated altogether, when it appears that the parties simply would not have entered into it had they considered the course of events that occurred.**
4. **The FIFA regulations, and more specifically the Regulations on the Status and Transfer of Players (RSTP), do not contain any provisions on the interest rate for outstanding salary claims. Consequently, the Swiss 5% default interest rate contained in article 73 of the Swiss Code of Obligations (CO) shall apply.**

## **I. PARTIES**

1. Kayserispor Kulübü Derneği (hereinafter also the “Appellant” or “Club”) is a professional football club with its registered office in Kayseri, Turkey. The Club is a member of the Turkish Football Federation (hereinafter “TFF”), which is in turn affiliated with the Fédération Internationale de Football Association (hereinafter “FIFA”).
2. Roberto Prosinecki (hereinafter the “Respondent” or “Coach”), was born on 12 January 1969 and is of Croatian nationality.
3. The Club and the Coach are jointly referred to as the “Parties”.

## **II. FACTUAL BACKGROUND**

### **A. Introduction**

4. The dispute in these proceedings revolves around the decision rendered by the Single Judge of the FIFA Players’ Status Committee (hereinafter “Single Judge” or “Single Judge of the FIFA PSC”). The decision issued on 17 June 2021 (hereinafter “the Appealed Decision”) concerns an employment-related dispute between the Club and the Coach. The Single Judge found that the Club is, *inter alia*, liable to pay to the Coach outstanding salary (EUR 130,000.00) and bonus (EUR 250,000.00) plus 5% p.a. interest rate.
5. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced during these proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submission and evidence he considers necessary to explain his reasoning.

### **B. Background facts**

6. On 13 January 2020, the Club and the Coach signed an employment contract (hereinafter the “Employment Contract”).
7. According to Article 4 (TERM OF THE CONTRCAT) of the Employment Contract:

*“The term of the Contract is between 13.01.2020 and 31.05.2020 or any later date on which an official match is played in the respective football season to be effective for the remaining matches of the 2019/2020 football season.*

*The term of the football season expresses the season, the commencement and expiry dates of which are already determined / to be determined by TFF according to the Statutes of the Leagues, UEFA and FIFA whereby the broader term of the definition shall prevail.*

*The parties may terminate, amend, modify the terms hereunder or shorten or extend the term herein with their mutual consent in writing”.*

8. In accordance with Article 7 A. (OBLIGATIONS OF THE CLUB) of the Employment Contract, the Coach was entitled to a salary of EUR 325,000.00 for the remaining matches of the 2019-2020 football season. In particular, the salary for the 2019/2020 season was payable as follows:

*“On the last day of January 2020: € 65.000.-*

*On the last day of February 2020: € 65.000.-*

*On the last day of March 2020: € 65.000.-*

*On the last day of April 2020: € 65.000.-*

*On the last day of May2020: € 65.000.-*

*The payments are to be due and payable on the above-mentioned dates and it shall be transferred to the bank account, which is to be provided by the Coach. In case the Club falls into a default for any payment for more than thirty (30) days the Coach shall have the option to terminate the contract with just cause. In order to exercise this option, the Coach shall first send a written notification to the Club by fax, and if the Club fails to pay the amount due to the Coach within fifteen (15) days after the receipt by the Club of the notification, the Coach shall be free to terminate the Contract”.*

9. In addition, according to Article 7 B. (BONUSES) of the Employment Contract, the Coach was also entitled to a bonus payment. In this regard, said clause provides as follows:

*“If the Club does not relegate, the Coach will receive a bonus of € 250.000 (two hundred fifty thousand Euro). This bonus will be paid out within 30 days of the last official match being played”.*

10. During the term of the Employment Contract, the Club paid to the Player three installments of wages (installments for the months of January, February and March 2020).
11. On 19 March 2020, the TFF announced that all football activities in Turkey are immediately suspended until further notice due to the COVID-19 pandemic.
12. Between 12 June 2020 and 26 July 2020, the remaining eight football matches of the Turkish national championship were played.
13. According to Article 3 of the 2019/2020 of the Turkish Super League Cemil Season Statute of Competition, the bottom three teams with the lowest points coefficient at the end of the Super League season (i.e. rankings 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup>) shall be relegated to the 1<sup>st</sup> Division (second tier of the Turkish Football Pyramid).
14. On 26 July 2020, the Club ended the Super League (national championship) in the 17<sup>th</sup> place.

15. On 28 July 2020, 18 Super League Clubs, including the Appellant and 3 more clubs that were promoted from Turkish 1<sup>st</sup> Division came together in a meeting organized by the Foundation of the Turkish Super League Clubs. After the meeting, the president of the Foundation of the Turkish Super League Clubs announced that all Clubs reached a consensus to annul the relegation for the 2019-2020 season.
16. On 29 July 2020, the TFF announced that due to the COVID-19 pandemic no club would be relegated to a lower league for the 2019-2020 season in the top-tier Turkish Super League and that the latter would consist of 21 teams for the 2020-2021 season.
17. TFF registered the clubs for the various leagues on 14 August 2020 and no relegation was announced.

### III. PROCEEDINGS BEFORE THE SINGLE JUDGE OF THE PLAYERS' STATUTES COMMITTEE

18. On 5 April 2021, the Coach lodged a claim before the Single Judge against the Club for breach of the Employment Contract. The Coach submitted that the Club failed to pay his salaries for the months of April and May 2020. In addition, the Coach maintained that, as a result of the outbreak of the COVID-19 pandemic, the Turkish Championship was prolonged and that he, therefore, provided his services to the Club for two additional months. The Coach, therefore, claimed to receive additional remuneration for the months of June (full) and July (26 days). Furthermore, the Coach also claimed the payment of an amount of EUR 250,000.00, corresponding to the bonus for the Club not have been relegated. To sum up, Coach filed the following prayers for relief:

*“a. EUR 65,000, corresponding to the April 2020, plus 5% interest p.a. as from 30 April 2020 until the date of the effective payment;*

*b. EUR 65,000, corresponding to the May 2020, plus 5% interest p.a. as from 31 May 2020 until the date of the effective payment;*

*c. EUR 65,000, corresponding to the June 2020, plus 5% interest p.a. as from 30 June 2020 until the date of the effective payment;*

*d. EUR 56,333, corresponding to the July 2020 (i.e. pro rata 26 days out of 30), plus 5% interest p.a. as from 26 July 2020 until the date of the effective payment;*

*e. EUR 250,000, corresponding to the bonus of performance in line with art. 7, item b) of the employment contract, plus 5% interest p.a. as from 25 August 2020 until the date of the effective payment”.*

19. On 17 June 2021, the FIFA PSC issued the Appealed Decision, therein partially accepting the claim of the Coach.
20. The operative part of the Appealed Decision reads as follows:

*“1. The claim of the Claimant, Robert Prosinecki, is partially accepted.*

2. *The Respondent, Kayserispor Kulubu, has to pay to the Claimant, the following amounts:*

- *EUR 65,000 as outstanding remuneration plus 5% interest p.a. as from 1 May 2020 until the date of effective payment;*

- *EUR 65,000 as outstanding remuneration plus 5% interest p.a. as from 1 June 2020 until the date of the effective payment; and*

- *EUR 250,000 as outstanding remuneration plus 5% interest p.a. as from 26 August 2020 until the date of effective payment.*

3. *Any further claims of the Claimant are rejected.*

4. *Full payment (including all applicable interest) shall be made to the bank account set out in the enclosed Bank Account Registration Form.*

5. *Pursuant to article 8 of Annex 8 of the Regulations of the Status and Transfer of Players if full payment (including all applicable interest) is not paid within 45 days of notification of this decision, the following consequences shall apply:*

*1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of three entire and consecutive registration periods.*

*2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not paid by the end of the three entire and consecutive registration periods”.*

21. The grounds of the Appealed Decision were notified to the Parties on 20 July 2021.

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

22. On 9 August 2021, the Club filed its Appeal before the Court of Arbitration for Sport (hereinafter “CAS”) and submitted its Statement of Appeal in accordance with Article R48 of the Code of Sports-related Arbitration (edition 2021) (hereinafter the “CAS Code”). In its Statement of Appeal, the Club requested the case to be submitted to a sole arbitrator.

23. On 18 August 2021, the CAS Court Office acknowledged receipt of the Appellant’s Statement of Appeal and reminded the Appellant to file its Appeal Brief within the deadline pursuant to Article R51 of the Code.

24. On the same day, the CAS Court Office informed FIFA of the Appeal and invited it to state whether it wished to participate in these proceedings according to Article R41.3 of the CAS Code.

25. On 23 August 2021, the Respondent informed the CAS Court Office that he agrees to refer the dispute to a sole arbitrator to be appointed in accordance with Article R54 of the CAS Code.
26. On 24 August 2021, the CAS Court Office acknowledged receipt of the Respondent's letter.
27. On 30 August 2021, FIFA informed the CAS Court Office that it renounces to its right to participate in these proceedings.
28. Still on the same day, the CAS Court Office acknowledged receipt of FIFA's letter and advised the Parties accordingly.
29. On 7 September 2021, the Respondent advised the CAS Court Office that he will not pay his share of the advance on costs. Furthermore, the Respondent requested that the time limit for the filing of the Answer be fixed after the payment of the advance on costs by the Appellant.
30. On the same day, the CAS Court Office acknowledged receipt of the Respondent's letter.
31. On 18 September 2021, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.
32. On 27 September 2021, the CAS Court Office acknowledged receipt of the Appellant's share of the advance of costs and set a deadline for the Respondent to file his Answer in accordance with Article R55 of the CAS Code.
33. On 27 October 2021, the Respondent filed his Answer in accordance with Article R55 of the CAS Code and within the relevant deadline, previously extended.
34. On 29 October 2021, the CAS Court Office acknowledged receipt of the Respondent's Answer and invited the Parties to inform the CAS Court Office by 5 November 2021 whether they prefer a hearing to be held.
35. On 2 November 2021, the CAS Court Office informed the Parties that the Appellant had paid the total amount of the advance on costs and that the Sole Arbitrator, Mr Ulrich Haas, Professor in Zurich, Switzerland was called upon to resolve the dispute.
36. On 4 November 2021, the Respondent informed the CAS Court Office that it did not deem a hearing necessary in the case at hand.
37. Still on the same day, the Appellant requested that a hearing to be held in the present proceedings.
38. Still on 4 November 2021, the CAS Court Office acknowledged receipt of the Parties' respective letters.
39. On 9 November 2021, the CAS Court Office informed the Parties of the Sole Arbitrator's decision to hold a hearing in this matter and invited the Parties to inform the CAS Court

Office whether they would be available on either of the following dates: 20, 21, 22 December 2021.

40. On 12 November 2021, the Respondent submitted his availabilities for a hearing.
41. On 16 November 2021, the CAS Court Office informed the Parties that the Appellant had not responded to the CAS Court Office letter dated 9 November 2021 and it, therefore, was deemed that the Appellant did not have any objections to the proposed hearing dates. Accordingly, the CAS Court Office informed the Parties that the hearing would be held on 20 December 2021 via videoconference. In addition, the CAS Court Office invited the Parties to provide it with the names of all persons who would be attending the hearing on their behalf until 23 November 2021.
42. On 23 November 2021, the Respondent informed the CAS Court Office that Ms Didem Sunna would attend the hearing on his behalf.
43. On 24 November 2021, the CAS Court Office acknowledged receipt of the Respondent's letter and reminded the Appellant to provide its list of participants for the hearing without delay.
44. On 13 December 2021, the CAS Court Office issued an Order of Procedure (hereinafter "OoP"), which was signed and returned on 14 December 2021 by the Respondent and on 20 December 2021 by the Appellant. and invited the Parties to return a signed copy thereof by 16 December 2021.
45. On the same day, a hearing was held via videoconference. The Sole Arbitrator was assisted by Mr Giovanni Maria Fares, Counsel of the CAS. Furthermore, the following persons attended the hearing:

For the Appellant: Mr Batu Mosturoglu, counsel;

For the Respondent: Ms Didem Sunna, counsel.

46. At the outset of the hearing the Parties acknowledged that they had no outstanding procedural issues and that they, more particularly, had no objection in relation to the appointment of the Sole Arbitrator. At the closing of the hearing, the Parties expressly stated that they had sufficient opportunity to present their factual and legal arguments. Additionally, all Parties confirmed that their respective rights to be heard and to be treated equally had been respected in the present proceedings. The Sole Arbitrator has carefully taken into account all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been expressly summarized in the present Award.

## **V. SUBMISSIONS OF THE PARTIES**

47. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In

considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

#### **A. The Appellant's Position**

48. On 9 August 2021, in its Statement of Appeal, and on 18 August 2021, in its Appeal Brief, the Club requested the following relief:

*"1. Accept the claim of the Appellant*

*2. Confirm the outstanding remuneration of the Respondent as EUR 130,000.00.*

*3. Order the Respondent to handle all procedural costs and all costs, fees and expenses made by the Appellant".*

49. The Appellant's submissions in support of its Appeal may, in essence, be summarized as follows:

##### **1. Bonus Payment**

50. The Appellant submits that the Club finished the football season 2019/2020 as one of the three teams with the lowest points and was therefore subject to relegation:

- Under ordinary circumstances and according to the previously applicable legislation, the Club ended the 2019/2020 season on place 17 and would, under normal circumstances, have been automatically relegated. The participation of the Club in the 2020-2021 Turkish Super League was not a consequence of sporting merit but rather a result of an extraordinary administrative decision.
- The TFF decision reinstated the clubs that had been relegated by the end of 2019/2020 football season. Such reinstatement into the respective higher tier of football was a consequence of a structural reform in Turkish Leagues on an account of changes made in the Competition Status of 2020/2021 football season.
- Since the reinstatement followed the relegation, it can be said that the Club – at least for some time – was part of Turkish 1<sup>st</sup> Division (second tier) for the 2020/2021 football season.
- The main purpose and objective of the Employment Contract is achieving sportive success and thereby avoiding relegation of the Club. Bonus payments to respective football players and coaches are incentives for achieving this purpose. The Coach has failed to guide the Club out of the relegation zone by the end of the relevant football season as the Club has completed the season in 17<sup>th</sup> place and faced relegation.



- According to Article 9 of the FIFA Regulations on Status and Transfer of Players (hereinafter “RSTP”), the concept of a season is defined as “*the period starting while the first official match of the relevant national league championship and ending with the last official match of the relevant national league championship*”. In accordance with FIFA’s definition of the term “season”, the 2019-2020 football season ended after the last official match of the Turkish Super League, i.e. on 25 July 2020. According to the wording of Article 7 B. of the Employment Contract the bonus had to be paid following the last official match. Therefore, the decisive moment in time to assess, whether the Coach is entitled to the payment is at the end of the 2019/2020 football season, i.e. of 25 July 2020. At that time, however, the Club was in 17<sup>th</sup> place and faced (automatic) relegation. Hence, no entitlement for a bonus payment was earned by the Coach.

## 2. **Interest Rate**

- Turkish Law must be applied as the applicable law was not specified under the Employment Contract. Article 24/4 of the Turkish Act on Private International Procedural Law (1) (Act No. 5718) provides – similarly to Article 117 of the Swiss Private International Law Act (hereinafter “PILA”) – as follows:

*“If the parties have not explicitly designated any law, the relation arising from the contract will be governed by the most connected law to the contract. This law is accepted to be the law of the habitual residence (at the moment of the conclusion of contract) of the debtor of the characteristic performance; the law of the workplace or (in absence of a workplace) the law of the residence of the abovementioned debtor in case the contract is concluded as a result of commercial and professional activities; in case the debtor has multiple workplaces the law of the workplace which is the most tightly related to the contract. Nevertheless, considering the state of all affairs if there is a law more tightly related to the contract, that particular law shall govern”.*

- This conflict-of-law provision refers to the law of the State to which the contract has the closest connection (in the absence of a choice-of-law clause agreed between the Parties).
  - Article 24/4 of the Turkish Act on Private International Procedural Law (1) (Act No. 5718) is applicable to the Employment Contract, because there is an element of international dimension, since the Coach is of Croatian Nationality.
  - Moreover, Article 117 of the PILA covers cases where the parties have failed to choose any law applicable to the merits of the case.
- Since the Club and the Coach are based in Turkey and the employment relationship was to be executed in Turkey, Turkey is the state to which the matter in dispute has the strongest connection. Consequently, Turkish Law must apply. The matter of interests is, therefore, covered by the Turkish Act on Legal Interest and Default Interest (Act No. 3095). As the designated currency for the payments (in the Employment Contract) was Euros (instead of Turkish Lira), Article 4/A of Act No. 3095 shall apply. The provision reads as follows:

*“Interest rate for Foreign Currencies: In case interest rate offered by State Owned Banks shall be taken into account for determination of interest rate for the relevant foreign currency”.*

- Since the highest annual interest rate offered by Turkish State-Owned Banks in May 2020 was at 0,21% p.a., the applicable interest rate in the case at hand is 0,21% p.a.
- The Single Judge failed to provide any reasons for awarding 5% p.a. interests. This is a severe violation of Club’s right to be heard and breaches the Club’s rights deriving from Article 6 of the European Convention of Human Rights (hereinafter “ECHR”). The Appealed Decision – insofar – is also in violation of Swiss public policy.

### **3. Interpretation of the Employment Contract**

- The interpretation of the Employment Contract must be made in accordance with Turkish and Swiss doctrine. In case of conflict between the Parties regarding the interpretation of a contractual clause, both Turkish and Swiss law of obligations foresee a two-step approach: subjective and objective interpretation, whereby the subjective theory prevails the objective theory.
- Contrary to the above, the Single Judge applied the *Eindeutigkeitsregel*. The latter was abandoned in 2001 by the Swiss Federal Tribunal and no longer applies.
- Turkish law also rejects the approach of *Eindeutigkeitsregel* and rejects any interpretation solely based on the text of the contract.
- The (subjective) will of the Parties clearly was that any bonus shall be based on sportive accomplishments of the Club. Article 7 B. of the Employment Contract must be interpreted to reward the Coach on the condition that he avoids relegation.
- The TFF’s intervention in the form of restructuring the league system which allowed the Club to compete in the 1<sup>st</sup> Division of Turkish Football was an extraordinary measure that the Parties could not have foreseen when executing the Employment Contract.

### **B. The Respondent’s Position**

51. In his Answer dated 27 October 2021, the Respondent sought the following prayers for relief:

*“For the facts and legal arguments that were developed above, the Sole Arbitrator is respectfully requested:*

- 1. To dismiss the claims of Club Kayserispor KD in full,*
- 2. To confirm the decision of the FIFA Dispute Resolution Chamber dated 17 June 2021;*
- 3. To condemn Club Kayserispor KD to payment of CHF 10.000 in the favor of the Respondent of legal expenses incurred,*

4. *To establish that the costs of the present arbitration procedure shall be borne by the Appellant”.*

### **1. Bonus Payment**

- The TFF did not confirm the relegation of the Club and the latter was never part of the Turkish 1<sup>st</sup> Division (second division).
- Seven clubs appealed to the TFF (including the Appellant) and requested that the TFF set aside relegation for the relevant season and proposed that the 2020/2021 be played with 21 teams instead of 18.
- The wording of Article 7 B. of the Employment Contract is clear and does not leave room for interpretation (*in claris non fit interpretatio*).
- The reasons of non-relegation, i.e. whether for sportive or administrative reasons, is irrelevant.
- Parties mutually agreed by signing the Employment Contract that the payment will be due in any case, unless the Appellant continues to compete in the Super League for the 2020-2021 season.
- Relegation to a lower league cuts the income of the clubs. The clause (providing for the bonus payment) is meant to apply, if the Club remains in the Super League. Since the income of the Club will not be affected for the 2020/2021 season it is only just and fair to grant the bonus to the Respondent.

### **2. Interest Rate**

- The Parties agreed that any disputes be handled by FIFA and the CAS, the latter acting as an appeal body within the framework of Swiss law.
- Article 24/4 of the Turkish Act on Private International Procedural Law (1) (Act No. 5718) or any other regulation are not applicable to determine the interest rate in the case at hand.

## **VI. JURISDICTION**

52. In accordance with Article 186 of the PILA, the CAS has the power to decide upon its own jurisdiction.
53. Article R47 of the CAS Code stipulates that

*“An appeal against the decision of a federation may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the*

*Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.*

54. Article 56(1) of the FIFA Statutes (May 2021 edition) provides that:

*“FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents”.*

55. Furthermore, Article 9 C) – MISCELLANEOUS of the Employment Contract provides the following:

*“The dispute arising from the present contract maybe referred to the FIFA Dispute Resolution Chamber as the first instance body. The court of arbitration for sport (CAS) in Lausanne will act as an appeals body”.*

56. In addition, the Appealed Decision provides as follows:

*“According to article 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision”.*

57. Moreover, the Parties do not dispute the jurisdiction of the CAS in the present case, as confirmed at the hearing of 20 December 2021 and in the signed OoP.

58. It follows from all of the above that the CAS has jurisdiction to adjudicate and decide on the present dispute.

## **VII. ADMISSIBILITY**

59. Article R49 of the CAS Code provides as follows:

*“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties”.*

60. According to Article 57(1) of the FIFA Statutes (May 2021 edition) *“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”.*

61. In addition, the Appealed Decision provides – in its pertinent parts – as follows:

*“According to article 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision”.*

62. The Appellant filed its Statement of Appeal on 9 August 2021 and therefore within the 21-day time limit prescribed by Article 57(1) of the FIFA Statutes (May 2021 edition) and by the Appealed Decision. The Appeal was, thus, filed in time.

### VIII. APPLICABLE LAW

63. With regard to the applicable law, the Appellant submits that this dispute is governed by Turkish law. In turn, the Respondent submits that the Parties agreed the disputes to be handled before FIFA and CAS as appeal body and, thereby, implicitly referred to Swiss Law.

64. Contrary to what the Appellant holds the relevant conflict-of-law provision does not derive from Turkish law. Instead, it is to be found in Article 187(1) of the PILA, which provides as follows:

*“The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of the law with which the case has the closest connection”.*

65. The Parties may choose the applicable law either explicitly or implicitly. In CAS 2017/A/5111 the panel held as follows:

*“Article 187 para 1 of the PILA enshrines the principle of party autonomy with respect to the applicable law. The parties are free to choose the law applicable to the merits of the dispute. It is undisputed that such choice of law may be made directly (by referring to a specific law) or indirectly, i.e. by referring to a “conflict-of-law” provision designating the applicable law to the merits (KAUFMANN-KOHLER & RIGOZZI, Arbitrage International. Droit et pratique à la lumière de la LDIP, 2a ed., Berne 2010, p. 400). In addition, since a choice of law is not required to take a particular form, it can be entered into either expressly or tacitly (CAS 2008/A/1517, no 13)”.*

66. The Sole Arbitrator notes that no explicit choice of law was made in the Employment Contract. However, by submitting the dispute to the CAS (and to the CAS Code), the Parties implicitly agreed that Article R58 of the CAS Code shall govern the arbitration proceedings. This conclusion is further backed by OoP that has been duly signed by both Parties and which refers to Article R58 of the CAS Code. The latter provision 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”.*

67. The “applicable regulations” within the above meaning are the FIFA regulations. Article 57(2) of the FIFA Statutes (June 2019 edition) reads as follows:

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

68. Consequently, the Sole Arbitrator shall (subsidiarily) apply Swiss law to the interpretation of the FIFA regulations as part of the “applicable regulations”. In case a specific matter is not covered by the FIFA regulations, Article R58 of the CAS Code refers the Sole Arbitrator either to the rules of law chosen by the parties or in the absence of such choice to the law of the country in which the respective federation that issued the decision under appeal is domiciled. Since, as previously stated, the Parties failed to agree on the applicable law in the Employment Contract, the Sole Arbitrator will apply Swiss law as the law of the country, in which FIFA is domiciled, unless the application of Turkish law is deemed more appropriate.

## **IX. MERITS**

69. The relevant questions that the Sole Arbitrator needs to answer in this Appeal can be grouped into two sets of issues:

- i. Is the Coach entitled to Bonus payment?*
- ii. What is the applicable Interest Rate?*

### **A. Entitlement to Bonus Payment**

70. Article 7 B of the Employment Contract provides as follows:

*“If the Club does not relegate, the Coach will receive a bonus of EUR 250.000 ... This bonus will be paid out within 30 days of the last official match”.*

71. As the Appealed Decision rightly stated, the conditions of the above provision are fulfilled, since it is uncontested that the Club was not relegated. However, contrary to what the Single Judge held, the provision is not clear and unequivocal. It is rather obvious that the Parties, when executing the Employment Contract, were of the view that the system of relegation will apply to the 2019/2020 season of the Turkish Super League. The Parties – obviously – did not know that the TFF would decide that no club would be relegated, that there would be a structural reform of the Turkish League and that the 2020/2021 season would provide for 21 club competing in the Turkish Super League. The question, thus, is if and to what extent the Parties’ common misconception of the future development of events impacts the agreement concluded by the Parties.
72. In the case of long-term contracts, the problem often arises that the external circumstances under which the contract was concluded (e.g. the economic framework conditions) change in the course of time. Under Swiss law, the starting point for dealing with such a problem is the principle of *pacta sunt servanda*. According to this principle, contracts are to be upheld and fulfilled as agreed despite changed circumstances. It is, in principle, up to the party concerned to take all necessary precautions in the original contract for future changes in circumstances by insisting on the inclusion of appropriate clauses that allow for the contract to be adapted. Sometimes the law also provides for adjustment rules in case of changing circumstances (HUGUENIN C., *Obligationenrecht*, 3<sup>rd</sup> ed. 2019, no. 321). For example, there is – for certain

contracts – a right to terminate the contract if the debtor’s financial circumstances deteriorate, in particular if bankruptcy proceedings are opened over the debtor’s assets (cf. Articles 266h, 297a, 316 Swiss Code of Obligations – hereinafter “CO”).

73. However, even in the absence of a contractually agreed or statutory adjustment rule, Swiss law – by way of exception – allows the court to adjust a contract in case of a change of circumstances. The change of circumstances may relate to the factual or regulatory framework. Methodologically, the court will engage in these situations in a judicial supplementation of the contract (HUGUENIN C., *Obligationenrecht*, 3<sup>rd</sup> ed. 2019, no. 322). The Parties unconsciously or consciously (because they misjudged how things would develop) omitted a contractual regulation for the case that has now occurred. Their regulatory plan was incomplete with regard to the question of adjustment to changed circumstances and, therefore, the Court will adjust the contract.

#### **1. *The Conditions for adjusting a contract***

74. However, strict requirements must be applied to a judicial adjustment of the contract in order not to undermine the principle *pacta sunt servanda*. The judicial adjustment of a contract can therefore only be considered under strict requirements (HUGUENIN C., *Obligationenrecht*, 3<sup>rd</sup> ed. 2019, no. 230). In particular, it is not the task of the judge to make sensible contracts out of foolish ones, transform unjust contracts into just ones or substitute the parties’ will with the will of the judge.
75. In essence, Swiss law provides for the following conditions in order for the judge / arbitrator to adjust the contract (SCHWENZER/FOUNTOULAKIS, *Schweizerisches Obligationenrecht – Allgemeiner Teil*, 8<sup>th</sup> ed., no. 35.08; HUGUENIN C., *Obligationenrecht*, 3<sup>rd</sup> ed. 2019, no. 327 et seq.):
- The change of circumstances must occur after the execution of the contract and must be relevant to the contract.
  - Furthermore, the change of circumstances is only relevant, if it was not foreseeable at the time of the execution of the contract. If, however, the changes were foreseeable, then it is upon the affected party to take care of such developments by inserting respective clauses into the contract. If a party failed to do so, it cannot demand any adjustment of the contract. Normal inflation rates, exchange rate fluctuations or changes in legislation are, typically, foreseeable and do not justify the contract to be adapted. Things may be different in the face of revolution, general strikes, natural disasters or pandemics. For the question of whether a development was foreseeable, the test is whether a reasonable person would have expected the change of the corresponding circumstances according to the usual course of events and the general experience of life.
  - Even if the specific circumstance was not foreseeable, a contract adjustment cannot be considered if the risk associated with the changed circumstances is assigned to one party by the contract or by law. If a risk has materialized that lies within the sphere of risk of one

party, the latter cannot escape liability simply because the facts have changed. For example, a guarantor cannot demand an adjustment of the contract if the economic conditions of the principal debtor have deteriorated, because it is precisely the meaning and purpose of the guarantee contract to shift that risk to the guarantor.

- Finally, an adjustment of the contract can only be considered if the change in circumstances leads to a serious disruption of the equivalence of the contract, i.e. performance and consideration are grossly disproportionate to each other. Where the disruption of equivalence is only minor, an adjustment of the contract is out of the question. In individual cases it is not always easy to determine where the threshold lies beyond which it is no longer reasonable to adhere to the original terms of the contract.

## ***2. The application of the above criteria to the case at hand***

76. When applying the above criteria to the case at hand, the Sole Arbitrator finds that the readjustment of the Turkish Leagues and the decision that none of the clubs would be relegated in the 2019/2020 season is a circumstance that occurred after the execution of the Employment Contract and was not foreseeable at this moment in time. This is a very rare event that – as the Appellant has submitted in the hearing – occurs at the maximum every twenty years. Also, the Respondent has not submitted that this administrative decision of the TFF was something the Parties could have expected when entering into the Employment Contract.
77. The Sole Arbitrator also finds that the event in question is material for the Employment Contract, because if the Parties would have known beforehand that none of the clubs of the Turkish Super League would be relegated, the Parties for sure would not have agreed to Article 7 B of the Employment Contract. In addition, the Sole Arbitrator finds that the decision of the TFF is neither rooted in the sphere of risk of the Appellant nor the Respondent. No provision in the Employment Contract allocates the risk associated with the change of the competition modus for the 2020/2021 season to either party of the contract.
78. The Bonus provided for under 7 B of the Employment Contract is a major component of the remuneration of the Coach. The purpose of the remuneration is to reward the Coach for the services provided, which somehow causal for the Club to stay in the Turkish Super League and reap the benefits associated with it. In the case at hand, however, the services of the Coach did not contribute in any way whatsoever to the non-relegation of the Club. The (unforeseen) changed circumstances associated with the administrative decision of the TFF lead to a significant windfall profit to the benefit of the Coach. Such windfall profit seriously disrupts the equivalence of the contract and therefore demands that the Employment Contract be adapted.

## ***3. The legal consequences of contract adaptation***

79. If – as in the present case – the prerequisites for a judicial adaptation of the contract are fulfilled, the assessment of how the contract can be adapted to the changed circumstances is



within the discretion of the court (SCHWENZER/FOUNTOULAKIS, Schweizerisches Obligationenrecht – Allgemeiner Teil, 8<sup>th</sup> ed., no. 35.10). In exercising its discretion, the court must – as in the case of contract amendment in general – take into account the hypothetical will of the parties and the requirement of good faith. Insofar the Sole Arbitrator takes guidance from a decision of the Swiss Federal Tribunal (SFT 127 III 300, consid. 6a), in which the latter stated as follows:

*“Der aufgrund veränderter Umstände gebotene richterliche Eingriff in den Vertrag kollidiert mit dem Prinzip der Vertragstreue und wirkt sich unweigerlich zu Lasten einer der Parteien aus. Bei der Zuweisung des Änderungsrisikos ist dabei in erster Linie auf eine allfällige privatautonome Regelung und sodann auf die dispositiven gesetzlichen Anpassungsregeln zurückzugreifen ... wie dies der in den Grundzügen in Lehre und Rechtsprechung unbestrittenen Stufenordnung der Risikoverteilungsregeln entspricht ... Mangelt es an einer solchen vertraglichen oder gesetzlichen Regel, ist für die richterliche Vertragsanpassung auf den hypothetischen Parteiwillen abzustellen ... Das Gericht hat demnach zu ermitteln, was die Parteien nach dem Grundsatz von Treu und Glauben vereinbart haben würden, wenn sie den eingetretenen Verlauf der Dinge in Betracht gezogen hätten. Dabei hat es sich am Denken und Handeln vernünftiger und redlicher Vertragspartner sowie an Wesen und Zweck des konkret in Frage stehenden Vertrages zu orientieren”.*

Free translation: *Judicial intervention in the contract due to changed circumstances collides with the principle of contractual loyalty and inevitably works to the disadvantage of one of the parties. In allocating the risk of change, recourse must be made in the first instance to any private-autonomous regulation and then to the dispositive statutory rules of adjustment...as this corresponds to the tiered order of the rules of risk distribution, which is undisputed in the main features in doctrine and case law ... In the absence of such a contractual or statutory rule, the judicial adjustment of the contract must be based on the hypothetical intention of the parties ... Accordingly, the court must determine what the parties would have agreed according to the principle of good faith if they had taken into account the course of events that has occurred. In doing so, it must be guided by the thoughts and actions of reasonable and honest contracting parties as well as by the nature and purpose of the specific contract in question.*

80. The Sole Arbitrator notes that the Parties have not made any submissions with regard to a possible judicial intervention to adapt the contract to changed circumstances. The Sole Arbitrator finds that the Bonus is part of the Coach’s remuneration scheme that consists of conditional and fixed salary components. The Sole Arbitrator has contemplated whether in light of the hypothetical will of the Parties and the principle of good faith, the Parties would have agreed on a higher fixed salary component had they known that no relegation was foreseen for the 2019/2020 season. Absent any submissions by the Parties to the contrary the Sole Arbitrator is not persuaded that this would have been the case, since without relegation, the coach’s performance was less important. Then, however, the Club would have had little incentive to pay the Coach a higher fixed amount. Thus, based on the evidence and submissions before him, the Sole Arbitrator is not persuaded to the required standard of proof that if the Parties would have known at the time of the execution of the Employment Contract that no relegation was possible, that they would have agreed on a higher fixed salary for the Coach.
81. To conclude, the Sole Arbitrator finds that the Coach is not entitled to bonus payments under the Employment Contract.

**B. Interests**

82. The FIFA regulations, and more specifically the RSTP do not contain any provisions on the interest rate for outstanding claims. As stated above, the Sole Arbitrator finds that Swiss law is applicable subsidiarily, where the FIFA regulations contain a lacuna. However, Article R58 of the CAS Code provides that the Sole Arbitrator may apply any other rules of law that he deems more appropriate. In the case at hand the Sole Arbitrator finds that Swiss law is appropriate to deal with the matter of interests, since the FIFA adjudicatory bodies in their constant jurisprudence always apply and refer to the Swiss statutory interest rate contained in Article 73 CO.

**C. Conclusion**

83. The Sole Arbitrator concludes that the Appealed Decision must be annulled insofar as it awards the Coach bonus payments under the Employment Contract. All further reaching requests of the Appellant must be dismissed.

**ON THESE GROUNDS**

**The Court of Arbitration for Sport rules that:**

1. The Appeal filed on 10 August 2021 by Kayserispor Kulübü Derneği Football Club against the decision rendered on 17 June 2021 by the Single Judge of the Players' Status Committee is upheld.
2. Item 2 of the decision issued on 17 June 2021 by the Single Judge of the Players' Status Committee is partially amended as follows:  
  
*“Kayserispor Kulübü Derneği Football Club shall pay to Mr Robert Prosinecki:*
  - *EUR 65'000 as outstanding remuneration plus 5% interest p.a. as from 1 May 2020 until the date of effective payment;*
  - *EUR 65'000 as outstanding remuneration plus 5% interest p.a. as from 1 June 2020 until the date of effective payment; and”*
3. (...).
4. (...).
5. All other and further motions or prayers for relief are dismissed.