TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2024/A/10646 Club A. v. B.

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Dr Marco Balmelli, Attorney-at-law, Basel, Switzerland

in the arbitration between

Club A., Kazakhstan

Appellant

and

B., Belarus

Represented by Mr Alexander Sverchinsky, Attorney-at-Law in Warsaw, Poland

Respondent

I. PARTIES

1. Club A. (the "Appellant" or the "Club") is a Kazakh Football Club with seat in […], Kazakhstan. It is affiliated to the Kazakhstan Football Federation ("KKF") which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

2. B. (the "Respondent" or the "Player") is a professional Belarusian football player currently employed by PFC […] (Russia).

II. FACTUAL BACKGROUND

A. Facts of the case

3. Below is a summary of the main facts established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the later legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence available in the present proceedings, only the submissions and evidence necessary to explain the reasoning of the award will be referred to in the following paragraphs.

4. On 12 July 2023, the Player and Club concluded an employment contract (the "Contract"), valid as from 12 July 2023 until 30 November 2024. The Player was transferred from FC X. in Belarus.

5. Clause 11.7 of the Contract stipulates the following:

> *"the parties agree that during the period from 1st to 15th December 2023, the Employer or Employee may terminate this employment agreement without compensation payments, while the party initiating the termination must notify the other party in writing on the upcoming termination at least 5 (five) working days in advance before the date of termination of the agreement."*

6. According to Annex 1 of the Contract, the Appellant agreed to pay the Respondent the following gross amounts: KZT 5,403,495 by 10 August 2023, and KZT 7,719,278 monthly by the 10th of each month from September 2023 to November 2024.

7. On 6 December 2023, the Club's lawyer, Mr Sergei Salikzhanov, sent an official notification of the termination of the Contract along with a draft for an agreement on termination (by mutual consent of the parties and without compensation) via WhatsApp to Mr Dmitry Ageev with a request to forward these documents to the Player. Mr Dmitry Ageev is a lawyer in Kazahkstan and also the Chairman of FC X., the former club of the Player. On the same day, Mr Dmitry Ageev allegedly forwarded these documents to the Player via WhatsApp. The Respondent did not reply.

8. On 12 December 2023, the Appellant sent the Respondent a draft mutual termination agreement, dated 11 December 2023, proposing termination without compensation under

Article 11.7 of the Contract. The same day, the Appellant notified the Respondent that his last working day shall be considered 8 December 2023, with an outstanding salary of KZT 2,315,783 and a KZT 2,023,000 bonus for the Kazakh Cup final victory.

9. On 16 December 2023, the Respondent objected to the termination. However, the Appellant informed the Player on 26 December 2023 that, despite his objection, the contractual termination was in line with the labour code of Kazakhstan and the regulations of FIFA.

10. On 6 February 2024, the Appellant issued a "*Proof Of Last Contract End Date*" indicating that the Contract was unilaterally terminated on 11 December 2023. The same day, the Respondent signed an employment contract with the Russian club […], valid until 30 June 2024, with a monthly salary of RUB 600,000.

B. Proceedings before the FIFA Dispute Resolution Chamber

11. On 6 February 2024, The Respondent filed a claim with the FIFA DRC. The Appellant failed to provide a timely position to the claim.

12. On 22 April 2024, the FIFA DRC rendered the following decision (the "Appealed Decision"):

1. The claim of the Claimant, [B.], *is partially accepted.*

2. The Respondent, [Club A.], *must pay to the Claimant KZT 66,112,606.45 as an outstanding amount plus interest of 5% p.a. payable as from 12 December 2023 until the date of effective payment.*

3. Any further claims of the Claimant are rejected. (…)

13. In the grounds of the decision, issued on 16 May 2024, the FIFA DRC evaluated, in summary, the following:

- The Player was dismissed by the Club and did not provide a reason for such an action before FIFA, i.e. no grounds for an eventual just cause, either in the correspondence submitted to the file or in a reply to the claim. Consequently, the threshold of *ultima ratio* required to justify the Respondent's termination was not met and the termination was deemed unlawful.

- Since the Contract lacked a specific compensation clause, the Chamber calculated compensation under Article 17 (1) of the Regulations on the Status and Transfer of Players (the "FIFA RSTP"), based on the agreed amounts, including the contract's residual value through November 2024, resulting in KZT 99,234,831.

- The Chamber noted the Claimant's duty to mitigate damages, considering his new contract with another club, which reduced his losses by KZT 13,976,689, and adjusted the total compensation accordingly.

- Despite the initial calculated amount of KZT 99,234,831, the Chamber limited the compensation to KZT 66,112,606.45 based on the Claimant's request, in accordance with the general legal principle of *ne iudex eat ultra petita partium*.

- Lastly, the Chamber awarded interest at a rate of 5% *per annum* on the awarded compensation, effective from 12 December 2023 until the date of payment.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 5 June 2024, the Appellant filed a Statement of Appeal against the Appealed Decision in accordance with Articles R27 and R47 of the Code of Sports-related Arbitration (2023 edition; the "Code") with the Court for Arbitration for Sport (the "CAS").

15. On 12 June 2024, the Respondent, among others, (i) objected to the Appellant's request for extension of time to submit its Appeal Brief, (ii) agreed to submit this matter to a Sole Arbitrator, and (iii) informed the CAS Court Office that he would be interested in submitting this case to CAS Mediation.

16. On the same day, the CAS Court Office acknowledged receipt of the Respondent's communication and, *inter alia*, noted his objection to the Appellant's request for extension of time to provide its Appeal Brief and his interest to submit this case to CAS Mediation. In this regard, the CAS Court Office granted the Appellant a five-day time limit to file its position, failing which no mediation would be implemented.

17. By letter of 25 June 2024, the CAS Court Office, on behalf of the Division President, informed the Parties that the Appellant's time limit to submit its Appeal Brief was extended until 10 July 2024 and that, failing an explicit agreement from the Appellant, no mediation procedure would be implemented and that these proceedings would proceed in accordance with Articles R47 *et seq*. of the Code.

18. On 9 July 2024, the Appellant filed an Appeal Brief in accordance with Article R51 of the CAS Code.

19. By letter dated 12 July 2024, the Respondent requested that the time limit submit his Answer be fixed after the payment by the Appellant of its share of the advance of costs, pursuant to Article R55 (3) of the Code. The Respondent further informed the CAS Court Office that he would not be able to pay his share of the advance of costs.

20. By letter dated 31 July 2024, the CAS Court Office confirmed the Appellant's payment of the advance of costs and, pursuant to Article R55 (1) of the Code, invited the Respondent to submit his Answer within 20 days.

21. On 20 August 2024, the Respondent filed his Answer to the Appeal in accordance with Article R55 (1) of the Code.

22. On 23 August 2024, the Respondent informed the CAS Court Office that he was leaving the decision whether to hold (or not) a hearing up to the Sole Arbitrator. However, should

a hearing be held, the Respondent requested that such hearing be conducted by videoconference.

23. On 26 August 2024, the Appellant requested that a hearing be held in this matter.

24. On 13 September 2024, pursuant to the Articles R33, R52, R53 and R54 of the Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to hear the dispute was constituted as follows:

Sole Arbitrator: Dr Marco Balmelli, Attorney-at-Law in Basel, Switzerland

25. On 15 October 2024, the CAS Court Office informed the Parties that the hearing will be held on 18 November 2024 via videoconference.

26. On 19 October 2024, the CAS Court Office communicated the Order of Procedure, which was duly signed by all Parties: on 25 October 2024 by the Respondent and on 31 October 2024 by the Appellant.

27. On 24 October 2024, the Appellant submitted the witness statements of Mr Ageev and Mr Curcic, as requested by the Sole Arbitrator in the CAS letter dated 8 October 2024.

28. On 18 November 2024, an online hearing was held. The Sole Arbitrator was assisted by Fabien Cagneux, Managing Counsel. In addition, the following persons attended the hearing:

a) For the Appellant:

- Ms Irina Karikova, Legal Representative
- Mr Sergei Salikzhanov, Inhouse Counsel;
- Mr Milic Curcic (former head coach of the club), Witness;
- Mr Dmitry Ageev (sporting director of FC X.), Witness
- Mr Viktor Valadzko, Interpreter

b) For the Respondent:

- Mr Alexander Sverchinsky, Legal Representative

29. Before the hearing was concluded, each of the Parties expressly confirmed that they did not have any objection with the procedure and that their right to be heard and to be treated equally in the present proceedings before the Sole Arbitrator had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

30. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator has, however, carefully considered all the submissions made by the Parties, even if no explicit

reference has been made in what immediately follows. The Parties' written submissions and the content of the Appealed Decision were all taken into consideration.

A. Appellant

31. The Appellant filed the following requests for relief:

1. The appeal filed by [Club A.] *is upheld,*

2. The Decision of the FIFA Dispute Resolution Chamber passed on 22 April 2024 in the case Nr. FPSD-13848 is annulled and set aside,

3. Establish that [B.] *shall bear all costs incurred with the present procedure and he shall pay* [Club A.] *a contribution towards its legal fees and other expenses incurred in connection with the present proceedings, in an amount to be determined at the CAS's discretion.*

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

- The Appellant could not log into the FIFA Legal Portal, as it had changed its email address. When entering the FIFA Legal Portal via the new email address, no cases opened against the Club were indicated in the section "Cases open against you", i.e. case No. 13848 was not displayed in the Club's personal account in the FIFA Legal Portal. Thus, the FIFA decision was made without any statement from the Appellant (who was the Respondent there). This consists in a violation of the right of defence and the right to be heard.

- Initially, it was the Respondent who wished to include a clause for termination without compensation. Article 11.7 of the Contract allows for termination without compensation between 1 and 15 December 2023 and fully complies with Article 13 of the FIFA RSTP and the established jurisprudence of FIFA and CAS.

- The Club executed such termination already on 6 December 2023. The Respondent had concealed this fact from the FIFA DRC. On 12 December 2023, the Club sent the specified documents to the Respondent again due to his lack of response. However, a screenshot of WhatsApp correspondence between the Player and Mr Dmitry Ageev, dated 6 December 2023, shows that the Respondent received the Notification and Agreement of termination that day (blue check marks).

- The Respondent acted inconsistently. Initially, in his 'Original interpretation' on 12 December 2023, the Player accepted the Club's early termination without compensation, disputing only the dismissal date. In his 'New interpretation' on 16 December 2023, the Player refused to comply with the Contract, claiming lack of consent to the termination agreement and insufficient notice. However, Article 11.7 of the Contract required no further consent, and the Player, having read the Notice on 6 December 2023, demonstrated bad faith by initially agreeing to early termination without compensation, only to later change his position.

- Under Article 11.7 of the Contract, a Party wishing to terminate the Contract must give written notice by 23h59 on 15 December 2023, five working days before the final termination date of 20 December 2023. The Club acted within the framework of the Contract while the Player acted in violation of the agreement and thereby violated the fundamental principles of Swiss law *pacta sunt servanda* and *venire contra factum proprium*.

- Furthermore, the Player never expressed a desire to return to the Club, which shows that he acted in bad faith. In the light of this, there is no basis for any hypothetical demand to change the dismissal date from 11 to 17 December 2023.

B. Respondent (B.)

33. The Respondent filed the following requests for relief:

1. *"For the reasons specified in this Answer and in accordance to the Code the Respondent respectfully requests the CAS to:*

    - *Dismiss in total the Appeal Brief as ill-grounded with respect to both, the facts and the law,*

2. *The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne in their entirety by the Appellant exclusively,*

3. *The Respondent has incurred costs of legal representation and legal assistance in this case and, therefore, requests the CAS to order the Appellant to pay them, in an amount to be determined at the discretion of the CAS, but not less than USD 10,000 (ten thousand U.S. dollars)."*

34. The Respondent relies, in essence, on the following arguments:

- With regards to the alleged "technical issues" with logging into the FIFA Legal Portal from the Appellant's side, the Respondent sustains that the Appellant, as the Club, is responsible for providing its current email address to FIFA and to TMS in accordance with Title III Article 7 let. B) of Annexe 3 FIFA RSTP.

- The Respondent argues that the Appellant failed to exercise due diligence in pursuing the Respondent's claim before the FIFA DRC and was therefore prevented by its own fault from presenting a defense on time. The Appellant did not create and submit a support ticket via the FIFA Legal Portal in accordance with the guidance of the FIFA Legal Platform Support.

- Contrary to the Appellant's statements, the Respondent did not ask for the inclusion of any specific termination clauses. Article 11.7 of the Contract exists because Mr Milic Curcic (new head coach of the Appellant at that time and former coach of the Player at FC X.) was interested in signing the Player. If Mr Curcic had left the Club after the 2023 season, the Appellant would have been granted the right to terminate

the Contract as well. Article 11.7 of the Contract was accepted by the Player after consultation with his representative at that time, Mr Aliaksandr Perapechka.

- Mr Dmitry Ageev sent documents to the Respondent via WhatsApp, allegedly from the Appellant which the Respondent did not open because he had doubts in its authenticity. The Respondent informed Mr Dmitry Ageev that official communication regarding contract matters should be sent directly to him or his representative. On 12 December 2023, the Respondent received messages from the Appellant's lawyer with an offer to sign an Agreement to terminate the Contract by mutual consent without compensation, based on point 11.7 of the Contract. However, the notification was sent after the deadline, meaning the Appellant could no longer terminate the Contract without compensation.

- On 16 December 2024, the Respondent informed the Appellant that he did not agree to sign the agreement because the termination option requirements were not met. In the Respondent's view, the Appellant has breached the Contract, consistent also with the FIFA jurisprudence in similar matters.

- The Respondent's intention of Article 11.7 of the Contract was to set an obligation for the terminating party to send a respective written notice at least five working days in advance before the date of termination of the agreement which is between 1st and 15th December 2023 or on 23h59 of 10 December 2023 at the latest. Since the Appellant drafted the Contract, including the Termination Option, any unclear terms should be interpretated against it under the principle "*in dubio contra stipulatorem"*. This interpretation should also protect the weaker party – in this case, the Respondent, as players are generally considered the "weaker party" in employment contracts with football clubs.

- The correspondence allegedly sent to the Respondent on 6 December 2023, by the Appellant through Mr Dmitry Ageev, the sporting director of FC X., cannot be considered a valid notice under the Termination Option. Mr Dmitry Ageev is not allowed to act as a football agent while holding a position as an employee of a club. Furthermore, the Respondent has an exclusive sports representative, Mr Aliaksandr Perapechka, under an Agent Agreement. This outcome was confirmed by the Appealed Decision.

V. JURISDICTION, ADMISSIBILITY, APPLICABLE LAW

A. Jurisdiction

35. Article R47 of the Code provides as follows:

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

36. The jurisdiction of CAS, which is not disputed, derives from Article 57 (1) of the FIFA Statutes as it determines that "*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*".

37. The Parties further confirmed the jurisdiction of CAS by signing the Order of Procedure.

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

B. Admissibility

39. Article R49 of the Code provides:

> "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against*."

40. In addition, Article 57 (1) of the FIFA Statutes states:

> "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question*."

41. The grounds of the Appealed Decision were notified to the Parties on 16 May 2024 and the statement of Appeal was filed on 5 June 2024, i.e. within the 21 days set by Article 57 (1) of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fee.

42. It follows that the Appeal is admissible.

C. Applicable Law

43. Pursuant to Article R58 of the Code:

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

44. The Panel notes that Article 56 (2) of the FIFA Statutes stipulates 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*."

45. The Sole Arbitrator will decide the present dispute primarily in accordance with the FIFA Regulations and, subsidiarily, in accordance with Swiss Law in case of any lacuna in the FIFA Regulations.

VI. MERITS

A. Overview and scope of the Appeal

46. According to Article R57 (1) of the Code, the Sole Arbitrator has "*full power to review the facts and the law*". As provided for in the CAS jurisprudence, the CAS appeals arbitration procedure thus entails a *de novo* review of the merits of the case as is not confined to merely ruling whether the appealed decision is to be upheld or not. It is the role of the Sole Arbitrator to establish the merits of the case independently.

47. The main question of the present case is whether the premature termination of the Contract was in line with Article 11.7 of the Contract and whether the notice of termination was timely delivered to the Respondent in accordance with Article 11.7 of the Contract. Furthermore, it must be determined whether the Respondent is entitled to any compensation as a result and if yes, to what extent.

B. The Right to be heard

48. The Appellant argues that he was unable to exercise its procedural rights and that, consequently, its right to be heard was violated during the FIFA DRC proceeding. As can be seen from the files, the FIFA DRC decision was made without the Club having pronounced itself during the course of the procedure. This was allegedly due to technical issues when logging into the FIFA Legal Portal in connection with the change of the Appellant's email address from […]@mail.ru to info@[…].kz. It claimed not having been able to log in and therefore not having been aware that proceedings were opened involving the Club. It only became aware of it once having received the FIFA DRC decision.

49. The Appellant further argues that, on 5 March 2024, a notification from the FIFA Legal Portal was sent to the Club's old email address ([…]@mail.ru). However, the Club was unable to access the portal using the provided link and faced technical issues when attempting to log in. Even when using the new email address (info@[…].kz) and logging into the FIFA Legal Portal several times in March 2024, no cases were displayed under "*Cases open against you*" until 16 April 2024. The Appellant emphasizes that it made repeated efforts to resolve the issue, including sending multiple letters to the FIFA Legal Portal support service and attempting to contact FIFA specialists by phone. Nonetheless, these efforts were unsuccessful, and the Club was unable to familiarize itself with the Player's claim in time to provide its position to the FIFA DRC. This is, according to the Appellant, a clear violation of its right to be heard.

50. The Sole Arbitrator notes that the Appellant, as a football club affiliated to its federation and also to FIFA, is responsible to take every necessary precaution for being able to use the FIFA Legal Portal. Contrary to the view expressed in the Appeal Brief, the Sole

Arbitrator holds that the Appellant did not act in good faith by contacting the FIFA office for access to the FIFA Legal Portal rather than creating and submitting a support ticket via the FIFA Legal Portal or even contacting the FIFA Football Tribunal by registered mail, etc. The Appellant did not prove that he did undertake all possible steps in order to participate in the FIFA proceedings, even more so as it apparently was aware of a pending case.

51. Hence, the Appellant was unable to submit a statement in the FIFA DRC procedure in essence due to its own fault. Therefore, the right to be heard of the Appellant was not violated, this even more as the CAS Code provides for a *de novo* review – i.e. any violation of the right of to be heard (*quod non*) is cured during the CAS proceedings – and the Sole Arbitrator can therefore hear all the arguments by the parties. However, the Sole Arbitrator will take the omission of the Appellant during the FIFA proceedings into account with regard to the costs and fees of this present CAS procedure. The Sole Arbitrator now turns its attention to the material points of the Appeal Brief.

C. The Termination Clause in the Contract between the Parties

a) Wording

52. On 12 July 2023, the Appellant and Respondent entered into the Contract. Article 11.7 of the Contract reads as follows:

> *"The parties agree that during the period from 1st to 15th December 2023, the Employer or Employee may terminate this employment agreement without compensation payments, while the party initiating the termination must notify the other party in writing on the upcoming termination at least 5 (five) working days in advance before the date of termination of the agreement."*

53. Before proceeding, it must be examined how the above-mentioned contractual clause – if validly agreed on – must be interpreted.

b) Interpretation of the Termination Clause

aa) Deadline for the execution of the termination

54. Article 11.7 of the Contract between the Appellant and the Respondent stipulates that the Contract can be terminated by either party, within the period from 1st to 15th December 2023, without compensation. The condition for such termination is that the terminating party informs the other party in writing at least five working days in advance before the date of termination.

55. The Appellant interprets this contractual provision as follows: under Article 11.7 of the Contract, a party wishing to terminate must give written notice by 23h59 on 15 December 2023, which is five working days before an eventual final termination date of 20 December 2023.

56. The Respondent, on the other hand, interprets this contractual provision as follows: under Article 11.7 of the Contract, the terminating party must give written notice at least five

working days before the date of termination of the agreement, which is between 1st and 15th December 2023, or by 23h59 of 10 December 2023 at the latest. He justifies such interpretation by stating that the Appellant drafted the contract, including the termination option, and therefore any unclear terms should be interpreted against him under the principle *in dubio contra stipulatorem*. This interpretation would also protect the weaker party – in this case, the Respondent, as players are generally considered the "weaker party" in employment contracts with football clubs.

57. While it is established that the disputed clause 11.7 was proposed by Mr Ageev via WhatsApp, it is evident that the final wording of said clause, including the 5-working-day notice period was ultimately drafted by the Appellant, after discussing it with its management. The Respondent, however, agreed on the Contract including the disputed clause after discussing it with his Representative, Mr Aliaksandr Perapechka. Therefore, the Sole Arbitrator finds that Article 11.7 was included by the Appellant and mutually agreed upon.

58. However, the fact that Article 11.7 was mutually agreed upon does not lead to its clear interpretation. It is therefore up to the Sole Arbitrator to rule on the interpretation of Article 11.7 of the Contract.

59. Considering the above mentioned and further based on the principle of *in dubio contra stipulatorem* as well as Article 18 (1) of the Code of Obligations ("CO"), the Sole Arbitrator interprets the disputed clause to be understood as requiring the terminating Party to give notice to the Counterparty on 10 December 2023 23h59 at latest. Such an interpretation is also necessary because the disputed clause does not contain any indication of a possible termination date – without compensation – after the end of the agreed period from 1 December to and including 15 December 2023.

60. A termination declared on or after 11 December 2023, with the intent to end the employment relationship beyond 15 December 2023, fails to comply with Article 11.7 of the Contract, as any notice of termination must be delivered to the Counterparty on 10 December 2023 at 23h59 at latest.

bb) Form Requirement of the termination

61. After establishing the interpretation of Article 11.7 of the Contract, the Sole Arbitrator turns his attention to the contractual form requirement for the termination in the case at hand.

62. According to Article 11.7 of the Contract, the terminating party must send the notification of termination in writing to the other party.

63. Since the Parties agreed to the requirement of writing without further specification, and the FIFA RSTP does not provide specific provisions regarding the requirement of writing, the Sole Arbitrator again reverts to Swiss law.

64. The general rule of Swiss (employment) law states that a contractual form requirement should be understood as a condition of validity (Article 16 (1) CO *per analogiam*) To

determine if a notice meets the contractual requirement, the general rules of the Articles 13-15 CO as well as the relevant jurisprudence must be consulted (STREIFF/VON KANEL/RUDOLPH, Arbeitsvertrag, Art. 335 N 5).

65. The rules in Articles 13-16 CO for "simple writing" must be observed, particularly regarding the handwritten signature (cf. Article 16 (2) CO). "Simple writing" requires a written statement and a signature. If the medium is not a traditional paper document, it must be determined whether the content satisfies the requirement of writing under Article 13 CO.

66. Swiss legal literature deems a signed original document, which is scanned and sent as a PDF via email, permissible, i.e. in line with the conditions of a written declaration of intent (cf. BSK OR-I SCHWENZER/FOUNTOULAKIS, Art. 13 N 14c, with further references). While there is no case law from the Swiss Federal Tribunal treating this question, the doctrine on this subject is quite clear: Firstly, the document with the agreement is usually signed by hand before it is scanned and sent. Secondly, this does not contradict the wording of the law, as no specific communication forms are listed, allowing for a contemporary interpretation (cf. GERICKE DIETER/JOVANOVIC TANJA, *Genügen PDF-Dateien dem Schriftformerfordernis?,* SJZ-RSJ 14/2017, S. 335 ff.). Furthermore, the concept of the electronic signature would be of little use if the recording of the expression of will on an electronic medium did not satisfy the written form requirement. Since the recognition of the qualified electronic signature, the CO has waived the materialization of the declaration on a physical object and instead accepts the recording on a permanent (including immaterial) medium for the purposes of the written form requirement for simple written declarations (c.f. BSK OR-I SCHWENZER/FOUNTOULAKIS, Art. 13 N 14g; BK-MÜLLER CHRISTOPH, Art. 13 OR, N 96).

67. These considerations apply analogously to terminations sent as a PDF document via WhatsApp.

D. The Termination in the case at hand

68. After determining the formal requirements for termination, the Sole Arbitrator turns to the delivery of the notice of termination in the case at hand between the Appellant and the Respondent. The FIFA DRC did not further address the issue of the delivery of the termination notice.

69. The termination is a unilateral declaration of intent, requiring receipt by the other party and consequently ending the employment relationship. Since the FIFA RSTP does not contain specific provisions regarding the delivery of declarations of intent, the interpretation of the termination notice follows the general principles of interpretation of declarations of intent under Swiss law. Accordingly, a termination must have reached the recipient to have legal effect (cf. decision of the Swiss Federal Tribunal BGE 113 II 261 E. 2). The Respondent must therefore have become aware of it or at least have had the possibility of becoming aware of it. The possibility of becoming aware, in the case of written notices, means the actual control over the document and, based on common practice, the reasonable expectation of the actual receipt. If the recipient becomes aware

of the termination before it could reasonably be expected, the time of actual receipt is decisive (cf. BSK OR I-PORTMANN/RUDOPH, Art. 335 N. 14).

70. What remains to be determined is when, in the present case, the termination is legally deemed to have been delivered. The burden of proof for the termination and its timely delivery lies with the Party asserting the termination, in this case, the Appellant. It must clearly express its intention to terminate the Contract and prove that the termination was received by the Respondent on time.

a) Termination from 6 December 2023

71. First, it must be examined whether the (first) termination was validly delivered to the Respondent on 6 December 2023.

72. The Appellant states that, on 6 December 2023, the Appellant's lawyer, Mr Sergei Salikzhanov, sent the official notification of termination of the Contract, including an agreement on termination of the Contract by mutual consent of the Parties without compensation, as a PDF attachment via WhatsApp to Mr Dmitry Ageev, the Sports Director of FC X.. Mr Dmitry Ageev had *de facto* represented the interests of the Respondent during the negotiations with the Appellant regarding the transfer. On the same day, i.e. 6 December 2023, Mr Dmitry Ageev forwarded these documents via WhatsApp to the Respondent. Based on the colour change of the corresponding checkmarks, the Respondent allegedly received the messages and took notice of them immediately.

73. The Respondent, however, submits that he had spoken with Mr Milic Curcic before his annual vacation, who in turn had informed him that the Appellant intended to continue their collaboration. The Respondent asserts that he neither opened nor took notice of the WhatsApp message forwarded by Mr Dmitry Ageev on 6 December 2023.

74. The Sole Arbitrator notes that the message was sent by the Appellant on 6 December 2023 to Mr Dmitry Ageev, the Sports Director of FC X., who – in the absence of evidence to the contrary – was neither an official agent of the Respondent, nor in any contractual relationship with him. According to Article 5 (1) FIFA RSTP, it is in fact prohibited for a club official to represent a player, which the Appellant must have been aware of. Consequently, the message sent through Mr Dmitry Ageev cannot be considered a proper way of notification to the Respondent.

75. Furthermore, the Sole Arbitrator takes into account that the Respondent was in a direct employment relationship with the Appellant. It appears unusual that the Appellant did not possess the Respondent's WhatsApp number or did not have any other means of communication to reach him (email, etc.). Therefore, the communication via an official of the Respondent's former club seems highly unusual. The Appellant's assertion, to have communicated with Mr Ageev regarding the Respondent's requests after signing the Contract cannot be heard, as – according to the submitted evidence – the latest communication before 6 December 2023 between Mr Ageev and the Appellant was on 14 July 2023, i.e. only two days after the signing of the Contract. In conclusion, the Sole Arbitrator rules that providing information – especially such crucial as a note of

termination – through Mr Ageev could not in any case be seen as an established way of communication.

76. In addition, and as credibly demonstrated during the hearing, the Respondent was on vacation on 6 December 2023. Since WhatsApp messages were not established as a regular means of communication between the Parties, and the Appellant initially did not even have the Respondent's WhatsApp number, the Respondent could not have been expected to check WhatsApp messages during his vacation. It is the Appellant's responsibility to provide evidence of an established and officially recognized communication channel through which the notification of termination was sent. Such evidence has not been provided in the case at hand.

77. The Appellant failed to convincingly demonstrate that the notification of termination was properly delivered to the Respondent on 6 December 2023. Additionally, it remains unclear when the screenshots from Annex No. 6 of the Appeal Brief were created and whether the checkmarks were already blue on 6 December 2023. Therefore, the Sole Arbitrator concludes that the notification of termination of the Contract was not adequately proven to have been delivered on 6 December 2023. The termination of the Contract did not take effect on that date.

b) Termination from 12 December 2023

78. Second, it must be examined whether the notification of the termination of the Contract was validly delivered on 12 December 2023.

79. It is undisputed that the Respondent received messages from the Appellant's lawyer on 12 December 2023. The Respondent replied on the same day, confirming that the Appellant had notified him on that date. The Respondent however took the position that the notice of termination was sent too late. At least implicitly, the Respondent already acknowledges in principle the delivery of the termination by this.

80. As examined in detail above (see para 54 *et seq*.), a written notification of the upcoming termination under Article 11.7 of the Contract must be given by 10 December 2023 at 23h59, at the latest. Therefore, the delivery of the notification of termination of the Contract on 12 December 2023 does not fall inside the expressly specified notification period of Article 11.7 of the Contract.

81. Thus, the Sole Arbitrator concludes that the delivery of the notification of termination of the Contract on 12 December 2023 did not meet the requirements of Article 11.7 of the Contract.

82. As result of the above mentioned a detailed discussion on whether the forwarded notice of termination, to which the Appellant's lawyer, Mr Sergei Salikzhanov, refers to as a *"duplicate"* shall not be considered. It shall however be noted that – if the forwarded document would effectively be found to not be the original – such attachment could not meet the legal requirements for written notifications, as the doctrine only allows for original documents to be scanned and subsequently forwarded by eail, SMS, WhatsApp or similar means of communication (see para 65 ss. above).

83. In conclusion, the notification of termination sent to the Respondent on 12 December 2023 did not meet the conditions of Article 11.7 of the Contract.

c) Validity of Article 11.7

84. Regarding the above established and in respect to the principle of procedural economy the Sole Arbitrator will not examine the validity of the clause under the scope of Swiss employment law, especially Articles 334 and 335c CO, as even if the clause is to be found valid, the Appellant failed to comply with its conditions.

d) Termination with(out) just cause

85. Article 14 (1) RSTP reads as follows:

"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause. In general, just cause shall exist in any circumstance in which a party can no longer reasonably and in good faith be expected to continue a contractual relationship"

86. While neither the RSTP nor the respective Commentary provide for a definition on just cause, it is however declared, that such termination may only be considered as *ultima ratio.* As the Commentary states on p. 129:

"The Regulations do not provide a definition, nor a defined list of what would generally be considered a just cause. It is impossible to capture all potential conduct that might be considered just cause for the premature and unilateral termination of a contract. However, over the years, jurisprudence has established several criteria that define, in abstract terms, which combinations of circumstances should be considered just causes.

[…]

- *The termination of a contract should always be an action of last resort (an "ultima ratio" action)."*

87. The Appellant informed the Respondent with an "*Order About Termination Of Employment Agreement*" dated 11 December 2023 and further with a "*Proof Of Last Contract End Date*" dated 6 February 2024 that the Contract was unilaterally terminated by 11 December 2023 and considering 8 December 2023 the Respondent's last working day.

88. The Appellant however fails to provide any cause for the unilateral termination other than relying on Article 11.7 of the Contract. In view of the established facts, the Sole Arbitrator also sees no such cause. Any further discussion on what may be qualify as just cause is therefore obsolete.

E. Compensation

89. The Sole Arbitrator finds that, in the present case and after an analysis of all the circumstances, the Appellant unilaterally terminated the Contract, failing to – even if ruled valid – comply with Article 11.7 of the Contract and without providing just cause.

90. Following this ruling, the Appellant shall compensate the Respondent according to Article 17 (1) RSTP:

> *In all cases, the party that has suffered as a result of a breach of contract by the counterparty shall be entitled to receive 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 taking into account the damage suffered, according to the "positive interest" principle, having regard to the individual facts and circumstances of each case, and with due consideration for the law of the country concerned. Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:*
>
> *[…]*
>
> *ii. In case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the "Mitigated Compensation"). […]*

91. Firstly, to determine the residual value of the Contract, Article 3.1 as well as Annex 1 of the Contact must be considered. As a result, the residual value estimates at a total of KZT 99,234,831 gross. This calculation is based on twelve remaining monthly salaries at KZT 100,000 as well as the outstanding remuneration according to Annex 1 of the Contract.

92. Secondly, as the Respondent signed a new contract with PFC […] on 6 February 2024 and extended said contract until 31 May 2025, the above calculated amount is to be mitigated by the remuneration the Respondent earned under his new contract in accordance with Article 17 (1) (ii) RSTP.

93. The Respondent was entitled to a monthly salary of RUB 600,000 from February to June 2024 and after extending the contract to RUB 650,000 from July to November 2024.

94. The total amount that must be subtracted from the compensation according to para. 91 therefore estimates at RUB 6,250,000 or – based on an exchange rate of 5.19 on 17 January 2025 – KZT 32,437,500.

95. This said, the Mitigated Compensation to be paid by the Appellant would result in an amount of KZT 66,797,331 gross. However, the Appellant was already required by FIFA DRC to pay the, slightly lower, amount of KZT 66,112,606.45, according to the general legal principle of *ne iudex eat ultra petita partium*. This is still valid in the present proceedings. Taking further into account another important legal principle, the principle

of *non reformatio in peius*, the amount according to the Appealed Decision remains. In addition, the Respondent is entitled to interest in the amount of 5% *per annum* pursuant to Article 104 (1) CO from 12 December 2023.

F. Conclusion

96. The Sole Arbitrator concludes the following:

- The Appeal is dismissed, and the Appealed Decision is upheld.
- The Appellant is required to pay a gross compensation of KZT 66,112,606.45 as well as interest of 5% *per annum* from 12 December 2023 to the Respondent.

VII. COSTS

(…).

*****

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Club A. on 5 June 2024 against the decision rendered 22 April 2024 by the FIFA Dispute Resolution Chamber is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 22 April 2024 is confirmed.

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 17 March 2025

THE COURT OF ARBITRATION FOR SPORT

Dr Marco Balmelli
Sole Arbitrator