

CAS 2022/A/8761 Ratchaburi FC v. Sébastien Wuthrich

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Alexander McLin, Attorney-at-law in Lausanne, Switzerland

Arbitrators: Mr Didier Poulmaire, Attorney-at-law in Paris, France
Mr Michele A.R. Bernasconi, Attorney-at-law in Zurich, Switzerland

Ad hoc Clerk: Mr Pierre Turrettini, Attorney-at-law in Geneva, Switzerland

between

Ratchaburi FC, Ratchaburi, Thailand
Represented by Mr Christophe Larrouilh, Bangkok, Thailand

Appellant

and

Sébastien Wuthrich, Switzerland
Represented by Mr Ludovic Deléchat, Zurich, Switzerland

Respondent

I. PARTIES

1. Ratchaburi FC (the “Club” or the “Appellant”) is a football club with its registered office in Ratchaburi, Thailand. The Club is an affiliated member of the Football Association of Thailand (the “FAT”), which in turn is affiliated to the Fédération Internationale de Football Association (“FIFA”).
2. Mr Sébastien Wuthrich (the “Player” or the “Respondent”) is a professional football player of Swiss nationality, who is currently not engaged with any club.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties’ oral and written submissions and relevant documentation on file produced in these appeal proceedings. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.
4. On 23 May 2021, the Player and the Club signed an employment contract (the “Contract”) valid as from 1 June 2021 until 30 April 2023, right after the Player’s counsel confirmed by email the terms agreed by his client.
5. According to Article 2.1 of the Contract, the Club should pay the following remuneration to the Player:

“Monthly salary of 15,000 US Dollars per month net of all income taxes to be paid on the last business day of each month from 01 June 2021 until 31 May 2022 and 20,000 USD per month net of all income taxes from 01 June 2022 until 30 April 2023.”¹
6. In addition, the Club should provide to the Player an accommodation according to European standards (“house (European standards)”).
7. Article 11 of the Contract provided also the following:

“Should the player be guilty of any actions detailed in Clause 6 and 7 above, the player shall not be entitled to claim or receive any money from the Club in that event. In the event that the participation has been terminated by the Club or the player prior to the expiry of the contract for any cause other than those provided in Clause 6 and 7 above, the party who cancel the contract will be entitled to compensation equivalent to 2 (two) months’ salary maximum as full and final settlement of the playing contract (salary).”
8. On 14 October 2021, the Club delivered, by hand, a letter to the Player – who signed it – in which the Club, in particular:

¹ All quotations are set forth “as is”. Any typographical or grammatical errors are in the source documents, as is any bolding, italicizing or underscoring, unless otherwise indicated.

- reminded that the Player was not allowed to live in another distant city because it required him to drive and endure long commutes not compatible with his duties as a sportsman;
- informed the Player of the following change in the Company Rules and Regulations applicable immediately:

“Any player or member of the squad has to live in Ratchaburi FC city or in the nearby surroundings. More precisely, not any player or member of the squad can have his daily residence beyond a radius of 40 km from our usual training center.”

- indicated that “[a]ny player who will infringe this regulation will expose himself to a breach of contract from the Club”.

9. On 25 November 2021, the Club delivered a letter to the Player with the following content:

- the Club informed the Player that it had decided to terminate the Contract prior to its term;
- reminding that Article 11 was negotiated by the Player who wanted freedom to leave the Club, the latter indicated that it had to pay the Player a compensation equivalent to two months of salary according to this provision;
- the termination of the Contract was based on the fact that, despite oral and written warnings, the Player lived 120 km from the Club – requiring him to drive 240 km per day with his car – which negatively impacted his performance;
- for this reason, while the payment of two months’ salary was not required, the Club nevertheless accepted to pay such compensation to the Player.

10. On the same day, the Player’s counsel wrote to Mr Robert Procureur, Sports Director of the Club. He indicated that the Player had reported, after the game held the preceding day, that he was told by the Club that he needed to sign certain documents. The Player’s counsel therefore requested the Club to provide him with any such documents directly.

11. On 26 November 2021, Mr Robert Procureur indicated to the Player’s counsel that he could contact Mr Christophe Larrouilh, counsel of the Club, for any exchange of information.

12. On the same day, the Player’s counsel wrote to Mr Robert Procureur regarding the documents that the Player received before the training and disputed the content of the letter delivered. In particular, the Player’s counsel indicated the following:

- as of the beginning of the Contract, the Player’s behaviour has been irreproachable;
- the validity of Article 11, referred by the Club, is disputed;
- the accommodation initially proposed to the Player was not in line with European standards as agreed in the Contract and the Player was therefore obliged to find and pay for another suitable accommodation for his family;

- based on instruction from the Club's president, the Player was obliged to bear the costs of a hotel room near the stadium to attend unscheduled morning trainings (at which he was alone) before certain matches;
 - the Player participated in 20 matches, scoring 3 goals and providing 2 assists, proving that he fulfilled his obligation in an impeccable manner according to the Contract;
 - to date, some bonuses and salary amounts had not been paid by the Club;
 - understanding that the Club wishes to terminate the Contract without just cause, the Player disputed what he considered to be the unfounded grounds of such termination;
 - the Player was willing to find an amicable solution to terminate the employment relationship prematurely and, to this end, proposed that the Club pay him the remaining salaries for the first year of the Contract, i.e. salaries from November 2021 to May 2022 (7 months payments), failing which he would continue to perform the Contract.
13. Later the same day, the Player's counsel wrote to Mr Robert Procureur noting that, in breach of the Contract, the Player was banned from training with the team. He added that the Club still owed an amount of EUR 22,000 to the Player corresponding to game premiums and outstanding salaries, which should be paid by the Club immediately.
14. On 27 November 2021, the Club's counsel wrote to the Player's counsel to confirm the termination of the Contract with effect as from 30 November 2021. He also indicated the following:
- the Player was exempt from participating in training but should remain at the Club's disposal until 30 November 2021;
 - the Player would be paid for the full month of November 2021;
 - the Player will receive the compensation provided for in Article 11 of the Contract which allows each party to terminate the Contract, notwithstanding the fact that the Player decided to live 120 kilometres away from his place of work, in breach of his obligations and the specific requests from the Club in this respect;
 - Article 11 of the Contract is valid, as already confirmed by the jurisprudence of the Dispute Resolution Chamber of FIFA (the "FIFA DRC"), and considering that the Player's counsel would not have tolerated the introduction of such an invalid clause when negotiating the Contract for the Player;
 - he will transfer to the Club the request for payment of outstanding sums;
 - he asked the Player's counsel in which capacity he was representing the Player (whether as agent or lawyer).
15. On 29 November 2021, the Player's counsel wrote to the Club's counsel to dispute his last letter, indicating in particular the following:

- the Player, who always acted impeccably, is very disappointed by the termination of the Contract without just cause in the middle of the sporting season;
- Article 11 of the Contract is not as explicit as claimed by the Club and was never requested by the Player – who could not negotiate it – but drafted by the Club;
- the Player, who acted irreproachably, was never notified officially in writing by the Club of any fault which, while the Club owes EUR 22,000 to the Player;
- understanding that the Club wishes to terminate the Contract without just cause, the Player disputes the unfounded grounds of such termination;
- the Player is willing to find an amicable solution to terminate the employment relationship prematurely – to be signed in the following days – and, to this end, proposes that the Club pay him the remaining salaries for the first year of the Contract, i.e. salaries from November 2021 to May 2022 (7 months).

16. On 8 December 2021, the Player’s counsel again requested the payment of the Player’s outstanding remuneration to the Club’s counsel, for a total amount of USD 22,817 as follows:

- USD 15,000 for the November salary;
- USD 2,000 for match bonuses from September to November;
- USD 5,817 as outstanding remuneration up until 30 November 2021, the date of termination without just cause by the Club.

The Player’s counsel also requested to receive salary slips from the beginning of the Contract, and an answer by 10 December 2021 on the settlement proposal communicated on 29 November 2021.

III. PROCEEDINGS BEFORE THE DISPUTE RESOLUTION CHAMBER OF FIFA

17. On 5 January 2022, the Player filed a claim before FIFA requesting the payment of the following amounts:

- USD 22,817 net as outstanding remuneration plus 5% interest *p.a.* as of the due dates;
- USD 310,000 net as compensation, corresponding to the residual value of the Contract, plus 5% interest *p.a.* as of the date of termination.

18. The Club did not submit any reply to the Player’s claim.

19. On 24 February 2022, the FIFA DRC issued a decision (the “Appealed Decision”) as follows:

“1. The claim of the Claimant, Sébastien Wüthrich, is partially accepted.

2. *The Respondent, Ratchaburi FC, has to pay to the Claimant, the following amount(s):*
 - *USD 5,817 net as outstanding remuneration plus 5% interest p.a. as from 1 November 2021 until the date of effective payment;*
 - *USD 15,000 net as outstanding remuneration plus 5% interest p.a. as from 1 December 2021 until the date of effective payment;*
 - *USD 310,000 net as compensation for breach of contract plus 5% interest p.a. as from 05 January 2022 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 indicated in the **enclosed** Bank Account Registration Form.*
5. *Pursuant to art. 24 of the Regulations on the Status and Transfer of Players (August 2021 edition), if full payment (including all applicable interest) is not made **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 the ban shall be of up to 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 made by the end of the three entire and consecutive registration periods.*
6. *The consequences **shall only be enforced at the request of the Claimant** in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*
7. *This decision is rendered without costs.”*
20. *On 4 March 2022, the FIFA DRC notified the operative part of the Appealed Decision to the Parties.*
21. *On 8 March 2022, the Club requested FIFA to “order the restitution” of the Appealed Decision. The Club claimed that FIFA had notified the Appealed Decision to wrong, or no longer active, email addresses.*
22. *On 25 March 2022, FIFA answered the Club indicating that the “email-addresses were, until its recent update on 8 March 2022, included in the contact details of the club in the Transfer Matching System (TMS)” and, therefore, referring to Article 4 (1) of Annexe 3 of the Regulations for the Status and Transfer of Players, “the claim, as well as any other communication during the current proceeding, was duly notified to the club, to the contact details indicated in TMS”.*

23. On 4 April 2022, FIFA notified the grounds of the Appealed Decision to the Parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 24 April 2022, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”) the Club filed a Statement of Appeal at the CAS, challenging the Appealed Decision. The Club indicated English as the language of the arbitration, requested that the panel be composed of three arbitrators and nominated Mr Didier Poulmaire, Attorney-at-law in Paris, France, as arbitrator.
25. On 3 May 2022, the Club filed its Appeal Brief with the CAS Court Office.
26. On 5 May 2022, the CAS Court Office acknowledged receipt of the Statement of Appeal and the Appeal Brief of the Club and transferred a copy to the Player. The CAS Court Office invited the Parties to indicate if they were interested in the submission of the dispute to CAS mediation. The CAS Court Office also informed FIFA about the Statement of Appeal and Appeal Brief filed by the Club and invited FIFA to participate as party, should it want to, within a time limit of 10 days.
27. On 9 May 2022, the Player indicated to the CAS Court Office, among other topics, that the proceedings should not be conducted in the French language but rather in English, considering that all pertinent documentation, as well as the Appealed Decision, was in English. The Player also requested that the panel be composed of three arbitrators and nominated Mr Michele Bernasconi, Attorney-at-law, Zurich, Switzerland, as arbitrator.
28. On the same day, the CAS Court Office acknowledged receipt of the Player’s letter and, suggesting that the proceedings be conducted bilingually in both English and French, requested the Club to comment on the issue of the language within two days. The Club immediately reacted and accepted that the proceedings be conducted in both English and French.
29. On 10 May 2022, the CAS Court Office informed the Parties that the proceedings would be conducted in both languages, considering the agreement of the Parties, but that the Panel should decide in which language the arbitral award will be drafted.
30. On 12 May 2022, FIFA informed the CAS Court Office that it renounced its right to intervene as a party in the proceedings.
31. On 31 May 2022, the CAS Court Office informed the Parties that the Club paid the entire advance of costs. Thus, the Player was requested to submit his Answer within 20 days.
32. On 8 June 2022, the Player submitted his Answer to the Appeal Brief of the Club.
33. On 9 June 2022, the CAS Court Office acknowledged receipt of the Player’s Answer and transferred a copy to the Club. The CAS Court Office also invited the Parties to inform whether they preferred a hearing to be held in the matter or for the Panel to issue an award based solely on the Parties’ written submissions. Finally, the CAS Court Office informed the Parties that the Panel appointed to decide this case was constituted as follows:

President: Mr Alexander McLin, Attorney-at-law, Lausanne, Switzerland

Arbitrators: Mr Didier Poulmaire, Attorney-at-law, Paris, France

Mr Michele Bernasconi, Attorney-at-law, Zurich, Switzerland

34. On the same day, the Club acknowledged receipt of the Player's Answer and submitted new evidence (exhibit 17), corresponding to prayers for relief filed by a party adverse to the Club in another case before the FIFA DRC presenting a legal issue apparently identical to that of the present case.
35. On 15 June 2022, the Player informed the CAS Court Office that he considered it was not necessary to hold a hearing in the present case.
36. On 16 June 2022, the Club informed the CAS Court Office that it considered it was necessary to hold a hearing in the present case.
37. On 20 June 2022, the CAS Court Office informed the Parties that Mr Pierre Turrettini, Attorney-at-law, Geneva, Switzerland, had been appointed as *Ad hoc* Clerk.
38. On 21 June 2022, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing.
39. On 12 July 2022, the CAS Court Office called the Parties to appear at the hearing, which was scheduled for 14 September 2022.
40. On 19 July 2022, the CAS Court Office informed the Parties that the hearing would be held by videoconference.
41. On 12 August 2022, the Club returned the Order of Procedure, duly signed, and informed the CAS Court Office that Mr Robert Procureur, Football Director of the Club, would attend the hearing.
42. On 19 August 2022, the Player returned the Order of Procedure, duly signed.
43. On 7 September 2022, the Player's counsel indicated that he would attend the hearing together with the Player.
44. On 14 September 2022, a hearing took place by videoconference. At the hearing, besides the Panel, Mr Pierre Turrettini, the *Ad Hoc* Clerk and Mr Fabien Cagneux, Managing Counsel, the following persons were present:
 - ii. For the Club: Mr Robert Procureur, Football Director of the Club, and Mr Christophe Larrouilh, counsel;
 - iii. For the Player: Mr Sébastien Wuthrich himself and Mr Ludovic Deléchat, counsel.
45. At the outset of the hearing, the Parties confirmed that they had no objections with respect to the constitution of the Panel and that the Panel had jurisdiction over the present dispute. During the hearing, the Parties had the opportunity to present and

defend their respective positions and reiterate the arguments already put forward in their respective written submissions.

46. Mr Robert Procureur, Football Director of the Club, was heard as a party representative. In substance, he declared the following:

- The Club did not receive any information from FIFA regarding the proceedings.
- The Club and the Player never discussed the issue of exchange rates.
- There was a meeting for the signing of the termination letter. However, the Player refused to sign such letter.
- The Club and the Player discussed Article 11 which was in favour of the Player. When introducing the Player, his agents indicated that he was not enthusiastic about living in a provincial city for family reasons. Article 11 was introduced to allow the Player to get out in the event he was unhappy in a provincial city.
- Adaptation is not easy because there is “nothing to do” in Ratchaburi. The termination of contracts usually run smoothly, except for one player who lost before FIFA judicial bodies.
- The Player decided to live in a beach resort far away. He was informed in writing that he should live closer to the Club. Because of the long-distance journeys, his level was not that which had been expected. For these reasons, the Contract was terminated.
- The Player complained about his accommodation, which was not suitable enough, although the rooms were well equipped and in a compound with a swimming pool and communal fitness area, which suited the majority of the players.
- The Contract was reviewed by the Player’s counsel who made some comments and amendments. The Player’s counsel did not comment on Article 11 of the Contract.

47. The Player was heard as a party. In substance, he declared the following:

- He did not review Article 11 and trusted his counsel because everything ran quickly considering the required registration for the AFC Champions League.
- He requested a two-year contract, not one year as proposed, because he was ready to go to Ratchaburi. He did not request Article 11 of the Contract.

48. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard and to be treated equally had been duly respected.

49. On 30 September 2022, as authorised during the hearing, the Club submitted to the CAS Court Office a copy of the decision of the FIFA DRC of 4 August 2022 which considered a clause similar to Article 11 of the Contract to be reciprocal and proportional.

50. On 7 October 2022, the Player indicated to the CAS Court Office that he considered that the decision submitted by the Club should not be taken into account in the proceedings considering that the hearing had already taken place and that the decision was not mentioned in the Club's Appeal Brief. The Player therefore requested the Panel to refuse to admit such additional evidence. The Player added that, in any case, the facts of these proceedings are different from those in the decision submitted.

V. SUBMISSIONS OF THE PARTIES

51. The following outline is a summary of the Parties' arguments and submissions which the Panel considers relevant to decide the present dispute. It does not necessarily comprise each and every contention put forward by the Parties. The Panel has nonetheless carefully considered all the submissions made by the Parties, even if no explicit reference to them has been made in the following summary. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. The Appellant's Submissions and Requests for Relief

52. The Appellant's submissions in its Appeal Brief as well as those made during the hearing may be summarized as follows:
- Ratchaburi is a small city about one and a half or two hours away from Bangkok and therefore it is very difficult for the Club to attract professional players from Europe. During the discussions between Mr Robert Procureur and the Player regarding the Contract, it appeared that the Player had doubts regarding his capacity to live in such a small city, a feeling which was shared by his wife. For this reason, the Parties included in the Contract the possibility to terminate it without having to pay any financial compensation, just two months of salary.
 - Later in the process, the Player requested his counsel to supervise the negotiation of his Contract and the latter even facilitated the issuance of the International Transfer Certificate between his former club and the Club. The counsel invoiced EUR 500 to the Club for such service. The Contract was finally signed on 23 May 2021, after the Player's counsel had validated its principal terms.
 - During the term of the Contract, the Player and his wife had difficulties to live in Ratchaburi and decided discreetly, instead of living in the accommodation provided by the Club, to rent a villa in the city of Hua Hin, a beach resort located 100 to 120 kilometres away from the Club. Because of the long daily trips to come train and play games, the Player started to underperform which left no choice for the Club but to leave him on the bench most of the time.
 - On 14 October 2021, the Club hand-delivered a letter to the Player requesting him to come back to live in Ratchaburi. Because the Player ignored this warning, on 25 November 2021, before a training session, the Club informed the Player that the Contract was terminated.

- Article 11 of the Contract is clear and allows each party to terminate the Contract by paying an indemnity of two months of salary. This clause was negotiated by the Player's counsel and therefore the Player was well aware of it. The clause is advantageous to the Club when the Player performs badly. However, it would have been advantageous to the Player had he performed well and were to have been in demand by other clubs. The word "*participation*" is often used in South East Asia and means "*execution*" of the Contract.
- After the termination of the Contract, the counsel of the Club and the Player exchanged correspondence and, because the Player's counsel introduced himself as a lawyer, the counsel of the Club expected to receive copies of any judicial action initiated by the Player, in accordance with ethics rules. This is the reason why the Club did not react to the proceedings before the FIFA DRC – in addition to the fact that the email addresses used by the FIFA DRC were incorrect and inactive – and was surprised when receiving the Appealed Decision. The FIFA DRC should have proactively contacted the Club to seek an answer regarding the proceedings initiated by the Player. The Club indeed had never failed to participate to proceedings before FIFA judicial bodies in the past. There is no negligence on the side of the Club, but only with the FIFA DRC. On this basis already, because the proceedings were not fair, and in conformity with Article 148 of the Swiss Code of Civil Procedure and Article 6 (1) of the European Convention on Human Rights, the Appealed Decision shall be annulled.
- The Club expected from the Player, a professional European player, to be a model of professionalism and not to live 100 to 120 kilometres away from the team's daily training venue. In doing so, the Player acted like a tourist and disrespected the Club. Despite a warning, the Player continued to live in Hua Hin, which justified the termination of the Contract.
- The FIFA DRC concluded that Article 11 of the Contract was "*unclear*" and did not meet the criteria of reciprocity and proportionality in line with its jurisprudence. However, in a decision of 25 February 2020 (Kan Soo II against the Club), the FIFA DRC considered that this exact same clause (providing however a compensation of one month of salary instead of two in the present case) was "*fully reciprocal and proportional*". The reasoning in the Appealed Decision is contradictory to this previous decision of the FIFA DRC. In the present case, it is correct to conclude that Article 11 is reciprocal because both Parties may apply it. In addition, the amount of the compensation due the Club is proportional because it corresponds to the amount that the Player would have to pay should he decide to terminate the Contract.
- The Appealed Decision is problematic because the jurisprudence of the FIFA DRC is supposed to ensure legal certainty. The Club used the clause in its contracts because it had been validated by the FIFA DRC. In addition, the Player's counsel did not react to Article 11 when reviewing the Contract for his client.

53. The Appellant submitted the following requests for relief:

“Déclarer et nulle et non avenue la décision du 24 février 2021 dont appel,

En conséquence, renvoyer le joueur à mieux se pourvoir devant la Chambre de Résolution des Litiges de la FIFA,

Subsidiairement,

Infirmier la décision de première instance en toutes ses dispositions,

Dire que le joueur Sébastien Wüthrich a été entièrement payé de ses droits conformément à l'article 11 de son contrat,

Condamner Sébastien Wüthrich à payer l'entièreté des frais d'arbitrage y compris ceux payés par l'appelant."

B. The Respondent's Submissions and Requests for Relief

54. The Respondent's submissions in his Answer, as well as those made during the hearing may be summarized as follows:

- According to Article 2.2 of the Contract, the Player was entitled to an "accommodation with European standard". However, the Club provided only a small and dirty one-bedroom which did not reflect at all what had been agreed in the Contract. For this reason, the Player had to find another flat at his own expense to be able to bring his wife as well. The Player was authorised to have a secondary residence, and he was always present to train and play games.
- While the Player, who is very diligent and does not drink, started with the Club by performing well (participating in the AFC Champions League) and helping the Club with his experience, the Club did not comply with its contractual obligations, being constantly late in the payment of the agreed remuneration, with the wrong exchange rates. The Player received the following late remuneration from the Club:
 - o THB 700,000 instead of THB 816,250 corresponding to the signing fee and June salary;
 - o THB 515,000 on 9 August 2021 corresponding to the July salary;
 - o THB 465,000 instead of THB 489,900 on 7 September 2021 corresponding to the August salary;
 - o THB 459,900 instead of THB 510,972 on 14 October 2021 corresponding to the September salary;
 - o THB 461,000 instead of THB 504,658 on 9 November 2021 corresponding to the October salary.

The salary of November 2021 as well as the bonuses were never paid.

- After the game against Changrai United held on 24 November 2021, Mr Robert Procureur informed the Player on the pitch that the Club wanted to terminate his Contract. The day after, the Player was prevented from accessing the training facilities and Mr Robert Procureur tried to make the Player sign a document by which the Player would have accepted termination for just cause, which the Player refused.

- The Player, who never received any notification regarding the alleged unprofessional acts during the term of the Contract, disputed the termination and facts raised by the Club in relation with the termination. The termination of a contract being the *ultima ratio*, it requires that appropriate steps be taken beforehand.
- The Club should be liable for breach of contract without just cause, and should bear financial as well as sporting consequences. The facts described by the Player were never disputed by the Club during the FIFA DRC proceedings and, therefore, the Club cannot dispute them before CAS, having failed to provide any reply whatsoever during the FIFA DRC proceedings.
- At the time of termination of the Contract, the Club had to pay to the Player the salary of November 2021 amounting to USD 15,000 net, as well as remuneration in arrears amounting to USD 5,817 (considering that the Club paid with the wrong exchange rate). Therefore, the Club owed the total sum of USD 20,817 upon termination of the Contract. Hence, the Club must pay to the Player the outstanding remuneration (salary and bonuses) based on the legal principle of *pacta sunt servanda* of USD 22,817 net as well as interest at a rate of 5% p.a. on the said amount (cf. Article 104 (1) of the Swiss Code of Obligations (“SCO”)), in line with the FIFA jurisprudence.
- Following the “*positive interest principle*”, and in line with CAS constant jurisprudence (CAS 2018/A/3123 § 70) and Swiss law (Article 337b SCO), the Club must also pay compensation to the Player, as rightfully decided by the FIFA DRC, to put him in the position he would find himself in if the Club has not breached the Contract.
- The Contract does not stipulate a valid and explicit compensation clause in the event of a termination without just cause before its term. Article 11 of the Contract indeed appears to be vague and not specific. Such clause refers to “*the participation of...*”, which makes no sense in casu. The Player fails to understand the meaning of “*in the event the participation has been terminated*”. In addition, the mention “*Should the player...*” in the clause confirms that there is no reciprocity. Because this sentence lacks clarity and is misleading, Article 11 of the Contract does not refer to any compensation clause. In the Appealed Decision (§ 39), the FIFA DRC also confirmed that the clause is “*unclear and did not fulfil the criteria of reciprocity and proportionality, in line with the Chamber’s longstanding jurisprudence, and therefore could not be taken into account for establishing the amount of compensation payable to the club by the player*”. The compensation clause shall be explicit to be valid. It is neither a so-called liquidated damages clause, nor a buy-out clause. Also, Article 11 is disproportionate because it is easier for the Club than for the Player to pay two-months’ worth of salary.
- Consequently, bearing in mind that the Player is considered as the weak party to the Contract, he requests that CAS apply Article 17 of the FIFA Regulations on the Status and Transfers of Players (“FIFA RSTP”), confirming what was already decided by the FIFA DRC. The Club shall therefore pay a compensation of USD 310,000 net to the Player, corresponding to the remaining value of the

Contract. In accordance with Article 339 (1) SCO, when the employment relationship ends, all claims arising therefrom fall due. Therefore, interest at a rate of 5% per annum on the compensation shall be applied pursuant to Article 104 (1) SCO.

- The Player also requests that CAS confirm the imposition of a transfer ban of two entire and consecutive registration periods on the Club as rightfully decided by the FIFA DRC.

55. The Respondent submitted the following requests for relief:

“A. AS TO THE FORM

1. To enforce its jurisdiction and to accept the present submission;

B. AS TO THE MERITS

Principally

2. To dismiss the appeal lodged by the Appellant as groundless;

3. To uphold the FIFA Decision rendered on 24 February 2022;

4. To consider the Appellant liable for breach of contract;

5. To condemn the Appellant to pay the Defendant the following outstanding amounts:

- *USD 5,817 net as outstanding remuneration plus 5% interest p.a. as from 1 November 2021 until the date of effective payment;*
- *USD 15,000 net as outstanding remuneration plus 5% interest p.a. as from 1 December 2021 until the date of effective payment;*

6. To condemn the Appellant to pay the Defendant the total amount of USD 310,000 net as compensation for breach of contract plus 5% interest p.a. as from 05 January 2022 until the date of effective payment.

7. To reserve for the Defendant the right to make further reliefs, pleadings, amplify his claim for damages during the whole duration of the proceedings, to supplement and modify the claim set forth herein, and to submit further briefs, documents, exhibits and any other evidence at their own discretion in the course of the proceedings herein;

8. To debar the Appellant from making any other or contrary pleadings.

In any cases

1. Award any and all costs, expenses and fees arising in connection with the present arbitration proceedings, including but not limited to the attorney's fees of the Defendant against the Appellant.

2. Such other relief as the CAS shall deem appropriate.”

VI. JURISDICTION

56. Article R47 of the CAS 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.”

57. The jurisdiction of the CAS, which was not disputed, derives from Articles 56 para. 1 and 57 (1) of the FIFA Statutes.

58. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by the Parties.

59. Accordingly, the Panel is satisfied that CAS has jurisdiction to hear the present case.

VII. ADMISSIBILITY OF THE APPEAL

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

61. The Panel notes that the FIFA DRC rendered the Appealed Decision on 24 February 2022 and that the grounds of the Appealed Decision were communicated to the Parties by email on 4 April 2022.

62. Considering that the Club filed its Statement of Appeal on 24 April 2022, *i.e.* within the deadline of 21 days set in the FIFA Statutes, the Panel is satisfied that the Statement of Appeal was filed in a timely manner. In addition, the Statement of Appeal complied with the requirements of Article R48 of the CAS Code and is therefore admissible.

VIII. APPLICABLE LAW

63. Article R58 of the CAS Code provides the following:

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

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

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

65. In the present case, the Panel notes that the Parties did implicitly agree that the various regulations of FIFA shall apply, with Swiss law applying on a subsidiary basis. Indeed, the Club referred to jurisprudence of FIFA pertaining to its regulations, while the Player requested the application of Article 17 FIFA RSTP and Swiss law.
66. As the case was brought by the Player before FIFA on 5 January 2022, the August 2021 edition of the FIFA RSTP is applicable.
67. In light of the above, the Panel holds that the present dispute shall be decided according to the FIFA RSTP of August 2021 and, subsidiarily, Swiss law.

IX. MERITS

A. The Dispute

68. The object of these proceedings is the Appealed Decision, which ordered the Club to pay to the Player:
 - as outstanding remuneration USD 5,817 plus 5% interest *p.a.* as from 1 November 2021 until the date of effective payment and USD 15,000 plus 5% interest *p.a.* as from 1 December 2021 until the date of effective payment; and
 - as compensation for breach of contract without just cause USD 310,000 plus 5% interest *p.a.* as from 5 January 2022 until the date of effective payment.
69. The Appealed Decision is challenged by the Club which claimed, firstly, that it should be annulled because the Club could not participate to the proceedings before the FIFA DRC and, in particular, that Article 11 of the Contract is clear, fully reciprocal and proportional and therefore allowed the Club to terminate the Contract by paying an indemnity of two months' salary to the Player.
70. In the Appealed Decision, the FIFA DRC decided that the Club did not have just cause to terminate the Contract on 27 November 2021 because the Player's behaviour in the case at hand could not constitute a substantial breach of the Contract. As a consequence, the Club was liable to pay to the Player the outstanding amounts under the Contract at the moment of the termination, *i.e.* USD 20,817 with interest at the rate of 5% *p.a.* Additionally, the FIFA DRC concluded that Article 11 of the Contract was unclear and did not fulfil the criteria of reciprocity and proportionality, and therefore could not be applied. Thus, the FIFA DRC applied Article 17 FIFA RSTP to calculate the amount of compensation and concluded that the amount of USD 310,000 (*i.e.* salaries from December 2021 through April 2023) was due to the Player, considering that he remained unemployed up to the date of the Appealed Decision.
71. As a preliminary remark, the Panel observes that the facts and the law are examined *de novo* by the Panel in the current proceedings, following the power bestowed on it by

Article R57 of the CAS Code. It is thus well established in CAS case law that procedural defects in lower instances can be cured through the *de novo* hearing before CAS (see, *inter alia*, CAS 2016/A/4704 paras. 77 et seq., CAS 2015/A/4162 §§ 70 et seq., CAS 2014/A/3848 §§ 53 et seq., CAS 2013/A/3256 paras. 261 et seq. each with further references). In view of that, the Panel holds that possible procedural flaws in the proceedings before the FIFA DRC – as claimed by the Club, but not recognized here by the Panel – are cured in these *de novo* arbitration proceedings.

72. The Panel shall therefore address the following issues central to the present dispute:
- i. is Article 11 of the Contract valid and applicable to the termination of the Contract on 25 November 2021?
 - ii. what are the financial consequences of the Panel’s answer to the first question in this specific case?
73. The Panel shall answer each of those questions separately.
- i. Is Article 11 of the Contract valid and applicable to the termination of the Contract on 25 November 2021?**
74. The FIFA DRC found that Article 11 of the Contract was unclear and did not fulfil the criteria of reciprocity and proportionality; it therefore could not be applied.
75. On this point, the Club contends that Article 11 is clear and allowed each party to terminate the Contract by paying an indemnity of two months of salary. The word “*participation*” is often used in South East Asia and means “*execution*” of the Contract. According to the Club, the clause may be in its favour when the Player performs badly. However, it may also be in favour of the Player should he perform well and be in demand by other clubs. Therefore, it is proportionate and reciprocal, as already retained by the FIFA DRC in other proceedings.
76. The Player claimed in particular that Article 11 of the Contract is vague, not specific and leads to misunderstandings, while a compensation clause should be explicit to be valid. In addition, Article 11 of the Contract is disproportionate because it is easier for the Club to pay two-months’ worth of salary than for the Player. Consequently, according to the Player, the FIFA DRC was right to apply the criteria of Article 17 FIFA RSTP, *i.e.* in particular to take into account the residual value of the Contract.
77. The Club and the Player both agreed that the Contract was terminated by the Club on 25 November 2021. In addition, the Club did not plead that the termination was for just cause and therefore no compensation was due.
78. In light of the foregoing, the Panel shall review and interpret Article 11 of the Contract to determine whether it is valid or not and therefore applicable to the case at hand considering the *principle pacta sunt servanda* and that Article 17 FIFA RSTP criteria are applicable “*unless otherwise provided for in the contract*”.
79. Firstly, the Panel notes that, under Swiss law (Article 18 SCO), contracts are interpreted in accordance with the true and common intention of the parties, without dwelling on any inexact expressions or designations they may have used either in error or by way of

disguising the true nature of the agreement. The aim is to identify the actual and mutual intention of the parties. If this cannot be established, then the principle of good faith should be applied to determine the meaning the parties could and should have given to their expressions of will.

80. On that basis, the Panel recalls that Article 11 provided the following:

“Should the player be guilty of any actions detailed in Clause 6 and 7 above, the player shall not be entitled to claim or receive any money from the Club in that event. In the event that the participation has been terminated by the Club or the player prior to the expiry of the contract for any cause other than those provided in Clause 6 and 7 above, the party who cancel the contract will be entitled to compensation equivalent to 2 (two) months’ salary maximum as full and final settlement of the playing contract (salary).”

81. The Panel notes that such clause is divided in two parts. The first part provides that the Player shall not receive any money from the Club should he breach his obligations under Articles 6 and 7. In the Panel’s opinion, this part relates to the termination for just cause. The second part is the one in dispute which provides that *“in the event that the participation has been terminated”* by the Club or the Player before the term of the Contract, for any other cause than a breach of Articles 6 and 7, the terminating party should receive compensation of worth two months of salary as full and final settlement of the Contract.

82. While it is true that the wording of the clause is awkward in that it is the terminating party and not the party which has been the subject of the termination that is owed compensation, the Panel nevertheless finds that it does not follow that Article 11 (second part) leads to misunderstanding as to the nature and amount of compensation owed in the event of termination and its consequences. Its true and common intent can only have been to provide appropriate and agreed compensation for the non-terminating party. Contracts often contain liquidated damages clauses, penalty clauses and clauses that set out the obligations of one party or the other. In principle, the purpose of a liquidated damages clause is to compensate one party for an anticipated damage, whereas a penalty clause goes beyond that; an additional penalty is included to encourage performance of the contractual obligation. In the present case, the Panel considers that Article 11 (second part) may be assimilated to a liquidated damages clause.

83. The Panel notes that, according to CAS jurisprudence, the concept of a liquidated damages clause *“is identical to the concept of a contractual penalty clause in Switzerland”* (CAS 2014/A/3555, § 57 of the abstract published on the CAS website). Thus, in principle, there is room for judicial control of substance with respect of such clauses, as set out and within the limits of Article 163 (2) and (3) of the SCO, *i.e.* when the penalties are *“excessive”*.

84. In the interpretation and application of a liquidated damages clause, legal authors hold the following:

“[...] there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties’ agreed assessment of the liquidated damages” (GAUCH/SCHLUEP/SCHMID/EMMENEGGER, Schweizerisches

Obligationenrecht, Allgemeiner Teil, 10th Ed. (2014), N 3828).

85. According to the Swiss Federal Tribunal, a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity (ATF 82 II 142, consid. 3). However, liquidated damages or penalty clauses may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor (CAS 2015/A/3999, § 170).
86. The Panel shall therefore determine whether it can interfere, in one way or another, with the Parties' agreement on the compensation due for termination of the Contract for other reasons than breach of the obligations of Articles 6 or 7.
87. In the case at hand, the Panel notes first that two months of salary as compensation is not high and therefore it cannot be considered as excessive from the perspective of the terminating party, whether it is the Club or the Player. In such a case, the amount is favourable to the terminating party, as rightly sustained by the Club.
88. The Panel shall however determine whether it is excessive to impose on the Player an option for the Club to terminate the fixed term Contract at a relatively minor cost, at least during the earlier portion of the Contract's term. In this respect, the Panel notes that the Player was represented by counsel during the negotiations of the Contract. It is therefore hardly conceivable that he could not understand both the advantage of Article 11 (allowing him to leave the Club with relative ease should he wish to do so), and, conversely, the potential disadvantage associated with the Club's ability to equally terminate the Contract without incurring a penalty of prohibitive magnitude). In addition, the Panel observes that the Contract was concluded for a two-year term, which is not a long-term commitment for a professional football engagement, and therefore the need for protection of such a contract is lower than for a contract of a longer term.
89. Considering the above, without having to review or admit exhibit 17 filed by the Club after the hearing, the Panel is not in a position to conclude that the liquidated damages clause of Article 11 is excessive, bearing in mind also that the FIFA RSTP do not establish a principle of reciprocity nor a prohibition of disparity (see CAS 2016/A/4826, § 105).
90. As a result, the Panel considers that Article 11 is applicable and enforceable, and concludes that the Club must pay two months of salary to the Player as compensation for the termination of the Contract on 25 November 2021.
 - ii. **What are the financial consequences of the Panel's answer to the first question in this specific case?**
91. The Panel must decide on the financial consequences of the termination of the Contract on 25 November 2021.
92. The Panel notes that the monthly salary of the Player was USD 15,000 under the Contract and therefore, as compensation, the Club shall pay to the Player a total amount of USD 30,000.
93. In the Appealed Decision, the FIFA DRC held that, at the date of the termination, the following amounts were due to the Player:

- USD 5,817 from 1 November 2021;
- USD 15,000 from 1 December 2021.

94. The Panel observes that, during the proceedings, the Club did not dispute the remaining monthly salaries due to the Player nor filed evidence that such amounts were paid by it.

95. According to Article 339 (1) SCO, when an employment relationship ends, all claims arising therefrom fall due. As a consequence, in application of Article 104 (1) SCO, interests of 5% *p.a.* shall run on USD 5,817 as from 1 November 2021, on USD 15,000 as from 1 December 2021 and on USD 30,000 as from 30 November 2021.

96. The Appealed Decision shall be amended accordingly.

B. Conclusion

97. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel finds that:

i) Article 11 of the Contract is applicable to the termination of the Contract on 25 November 2021.

ii) The Club shall pay to the Player the following amounts:

- USD 5,817 net as outstanding remuneration plus 5% interest *p.a.* as from 1 November 2021;
- USD 15,000 net as outstanding remuneration plus 5% interest *p.a.* as from 1 December 2021;
- USD 30,000 net as compensation for breach of contract plus 5% interest *p.a.* as from 30 November 2021.

98. The above conclusion makes it unnecessary for the Panel to consider the other requests and submissions presented by the Parties. Accordingly, all other and further motions or prayers for relief are dismissed.

X. COSTS

99. [...]

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ratchaburi FC against the decision issued on 24 February 2022 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.
2. The decision issued on 24 February 2022 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is confirmed, save for para. 2 of the operative part, which shall read as follows:

“2. The Respondent, Ratchaburi FC, has to pay to the Claimant, the following amount(s):

- USD 5,817 net as outstanding remuneration plus 5% interest p.a. as from 1 November 2021 until the date of effective payment;

- USD 15,000 net as outstanding remuneration plus 5% interest p.a. as from 1 December 2021 until the date of effective payment;

- USD 30,000 net as compensation for breach of contract plus 5% interest p.a. as from 30 November 2021 until the date of effective payment.”

3. [...]
4. [...]
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 21 March 2024

THE COURT OF ARBITRATION FOR SPORT

Alexander McLin
President of the Panel

Didier Poulmaire
Arbitrator

Michele A.R. Bernasconi
Arbitrator

Pierre Turrettini
Ad Hoc Clerk