Arbitration CAS 2021/A/8020 Muangthong United v. Alexandre Torreira Da Gama Lima, award of 21 April 2022

Panel: Mr Patrick Grandjean (Switzerland), Sole Arbitrator

Football
Contract of employment between a club and a coach
Advance of costs
Force majeure
Burden of proof regarding COVID-19 pandemic as force majeure justifying a unilateral salary reduction
Acceptance of a salary reduction
Mutual agreement for the termination of the employment contract

1. **The issue of the advance of costs is an administrative issue, which is dealt with by the CAS Court Office and the non-payment of the advance of costs within the deadline prescribed cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible. The deadlines which are fixed only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with Article R64.2 of the CAS Code.**

2. ***Force majeure*** **is generally used to describe a situation or event, which is beyond the control of the parties, which prevents them from fulfilling their contractual obligations and for which they believe they should not carry any liability or obligations. With regard the COVID-19 pandemic, in view of FIFA circular letters n°1712, 1714, 1720 and in particular the FAQ, it appears that no automatic recourse to the concept of *force majeure* is supported by the FIFA applicable regulations and/or can be made by clubs or employees impacted by the pandemic. According to FIFA, each situation must be assessed on a case-by-case basis*, "vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement"*. Under Swiss law, there is no statutory definition of *force majeure*. However and according to the Swiss Federal Tribunal, there is *force majeure* in the presence of an unforeseeable and extraordinary event that occurs with irresistible force. The legal consequences of non-performance of a contract depend on whether the impossibility to discharge obligation is temporary or permanent and whether one of the contractual parties is at fault.**

3. **Based on Article 8 of the Swiss Civil Code, any party wishing to prevail on a disputed issue in CAS arbitration must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In this respect, it is for the employer/club alleging that the pandemic is a force majeure event justifying a salary reduction to establish that a) it was objectively impossible for it to fully perform its contractual obligations, b) because of the pandemic, c) there was a causal link between the pandemic and its failure to fulfil**

its side of the employment agreement and d) it was not at fault. It is not sufficient to simply assert a state of fact. This is especially true since the conditions for the occurrence of *force majeure* are to be narrowly interpreted, as *force majeure* introduces an exception to the binding force of an obligation. Thus, the exclusive reliance on unsubstantiated general statements are not convincing reasons allowing a unilateral reduction of the employer's salary i.e. a deviation of the principle *"pacta sunt servanda"*, particularly since a club's financial difficulties or the lack of financial means allegedly caused by the pandemic cannot be invoked as a justification for the non-compliance with a payment obligation.

4. **On the basis of Article 322 (1) and 341 of the Swiss Code of Obligations, the parties may agree to reduce the salary during the contractual relationship and they may do so by tacit acceptance or by conclusive acts. In principle, the silence of the employee does not imply that he accepts the salary reduction proposed by the employer. A tacit acceptance can only be admitted in circumstances where, according to the rules of good faith, one must expect a reaction from the employee, should he disagree with the pay cut. The employer has the burden of establishing these circumstances. In a context where the employee is faced with the prospect of receiving back (sooner or later) his unpaid wages, the latter should be considered as having no reason to contest the temporary pay cut or to serve a notice for non-payment of the full salary. A club acts very carelessly if it imposes to all of its players important pay cuts without formalizing the process in a written form, in order to avoid disputes or to keep itself safe from massive termination of employment contracts for just cause with claims for significant compensations and/or sporting sanctions. As a consequence, the club must take responsibility for its nonchalant approach of its contractual obligations and the employee should not be considered to have waived the payment of a portion of his wages.**

5. **The parties may at any time agree to terminate the employment relationship by mutual consent. Such a termination is not subject to any particular form and can therefore be made in writing, orally or even by tacit agreement. A WhatsApp message sent by a club's official to its employee following the latter's resignation letter, clearly indicating that the resignation was approved and "effective immediately", produces legal effects and deprives the club to formally set its conditions to the employee's departure.**

I. PARTIES

1. Muangthong United Football Club is a football club with its registered office in Bangkok, Thailand (also "the Club"). It is a member of the Football Association of Thailand, itself affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Mr Alexandre Torreira Da Gama Lima is a professional football coach of Brazilian nationality ("the Coach").

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings, and evidence adduced in these proceedings. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he deems necessary to explain his reasoning.

B. The contract signed between the Parties

4. On an unspecified day of June 2019, the Club and the Coach signed an employment agreement ("the Employment Agreement"), which contains the description of each Party's respective obligations. The main characteristics of this contract can be summarised as follows:

   - It is a fix-term agreement effective from *"June 2019"* until 30 November 2020.

   - The Club agreed to pay to the Coach *"US$ 40,000 (…) net (without Tax) per month which will be paid equally on monthly basis". "All the payments to the head coach (s.a. salary, bonuses, or any other compensations) are net of any tax or any social contributions".*

   - According to Article 7 of the Employment Agreement, *"For any differences or controversies that may occur, Chamber Resolution Litigation of FIFA or a Commission that is approved by FIFA will be responsible for the resolution and the rules of FIFA will be applied".*

5. The Coach's assistants, Mr Cezar Diniz Pereira Roque and Mr Anderson Goncalves Nicolau, signed an employment contract with the Club valid from June 2019 until 30 November 2020 and from 20 January 2020 until 31 October 2020, respectively.

6. At the time of the signature of the Employment Agreement, the football season in Thailand ran from February until October of the same year.

7. On 3 March 2020, on account of the spread of COVID-19, the Thai League released a statement, whereby it declared that the competitions organized under its auspices were postponed until 17 April 2020.

8. On 26 March 2020 and following the state of emergency issued in response to the COVID-19 pandemic ("the Pandemic") by the Thai government, the Thai League released another statement announcing the postponement of all matches for an indefinite period of time.

9. In response to the financial impact of the Pandemic, the Club reduced its staff's salary by 30% during the provisional suspension of the football competitions.

10. It is undisputed that, as of April 2020 (for the March salary), the Coach was paid USD 28,000 each month by the Club (USD 40,000 – (40,000 x 30%) = USD 28,000).

11. Whereas the Coach denies having ever agreed to such a cut in his wages, the Club alleges that the measure had been *"accepted orally by all the employees (players and coaches). Not any dispute occurred relating to it until the current case"*. According to the Cub, it committed to pay the outstanding salaries *"in case the financial resources would enable the Club to pay back the said deductions"*.

12. On 16 October 2020, the Coach asked to meet with Mr Wiluck Lohtong, the Club's President, Mr Ronnarit Suewaja, the Club's Sport Director and Mr Kan Janrat, the Team Manager to inform them of his intention to resign.

13. According to the witness statements on file:

- Mr Wiluck Lohtong recalled that the Coach *"told us that he was not happy, he felt worry about the team, he felt guilty about the results, and stressed. Then he said that he would like to resign. We were surprised to hear that and we told him that we would like him to respect his contract and that anyway we do not have a possibility to find another coach due to the Covid crisis. He said that he plans to go to take a rest in Brazil and then trying to work again in Gulf. I said to him that if it is really his decision, we cannot force him to stay but we would have to deal on the conditions of his departure. He said that anyway he did not plan to coach in Thailand. I answered something like "of course, let's formalized that next week if you are sure of yourself, but please take time to think about it and give us time also to eventually prepare us for this change""*.

- Mr Ronnarit Suewaja exposed that the Coach expressed *"his desire to leave the Club and go back to Brazil to take a rest. He said he was very tired by the stress"*. The Club's management *"tried to convince him to be compliant to his contract and to stay until the end of it [and] told him that [it had] to think about his departure and the conditions of its. He promised that he does not plan to coach in Thai League. [The Club's management] said that on this last condition [it] could accept such a termination. But [it] said that [it] rather him to stay"*.

- Mr Kan Janrat testified that the Coach *"said he wanted to leave is function of head coach and take a rest probably in Brazil. He was upset about the income. He said anyway that he does not plan to coach in Thailand. MR. WILUCK LOHTONG was satisfied about that and said he could accept the termination of the contract under this sole condition. Nevertheless, he insisted that he preferred the coach to stay to complete his contract and advise him to think more, or at least to give us time to find a solution"*.

14. On 17 October 2020, the Coach sent a letter, entitled *"Resignation Letter"*, to Mr Ronnarit Suewaja, the Club's director, which read as follows:

"I would like to inform you of my intension (sic) to resign from Head coach at Muangthong United Football Club on 18 October 2020

I appreciate for the opportunities you gave me during my position at Muangthong United Football Club

Thank you".

15. On 18 October 2020, each of the Coach's assistants, Mr Anderson Goncalves Nicolau and Mr Cezar Diniz Pereira Roque, sent to Mr Ronnarit Suewaja a similar letter informing him of their intention to resign on 19 October 2020.

16. On 19 October 2020 and via a WhatsApp message in which was copied the resignation letters of the three coaches, Mr Ronnarit Suewaja confirmed to the Coach that *"the club has approved your resignation already and effective immediately"*. When the Coach inquired whether he had to sign any documents, Mr Ronnarit Suewaja answered that he would *"manage everything tomorrow at 1400 with [the Coach] and [his assistants]"*.

17. On the same day, the Club released the following two announcements on its Facebook page:

    - *"[The Club] wishes to express thanks to [the Coach] and his coaching team and wish them all the best in their future endeavours"*.

    - *"Redvolution strike – Mario Gjurovski: the New Head Coach at [The Club]"*.

18. On 20 October 2020, referring to *"1. Head Coach Agreement made on June 2019"* and *"2. Resignation letter dated on 17 October 2020"*, the Coach sent another letter to the Club, which reads as follows:

    "As I having been informed that the Company have approved my resignation as the head coach of [the Club], effective 18 October 2020, I have rewritten this letter to officially confirmed the said resignation and also the termination of the Head Coach Agreement.

    I appreciate for your kindness and opportunities you gave me during my position at [the Club]".

19. On 29 October 2020, the Coach sent a formal notice to the Club requesting the outstanding payment of his salaries from March 2020 until 18 October 2020.

20. On 16 November 2020, the Club's legal representative rejected the Coach's claim and insisted on the following points:

    - The formal notice sent on 29 October 2020 came as a surprise to the Club.

    - On 16 October 2020, the Coach had shared with some of the Club's executives his intention to resign or to be demoted to the position of technical director. *"The Club told him during this discussion that it would rather him to respect his contract as the head coach of the first team"*.

    - Nevertheless, between 17 and 18 October 2020, the Coach and his assistants sent to the Club a letter of resignation. *"The synchronization of those three decisions, and the similar terms used in the letters, indicate that the coaches has definitively taken the decision to resign together. The way the decision has been notified to the Club shows that it was not supposed to be subjected to any acceptation of the employer"*. The Club had no choice but to take note of the Coach's decision.

    - The Coach wanted to prematurely leave the Club in order to join its historical rival in the national league, *i.e.* Buriram United F.C., with which it appeared he had contacts before

his resignation. *"We can also highlight that [the Club], on 17 October 2020, leaded by Mr. Gamma Lima, have lost 3 points in his dual with Buriram, just the day before the coach reached Buriram United FC"*.

- *"[The Club] has never approved the resignation of the main coach and his assistants. If one executive of the Club has taken note of the departure of the coaches, the Club had the intention to meet his former employees to negotiate the conditions by which they will leave. In other words, if a member of the Club has accepted to acknowledge the decisions of the coaches it does not mean that such departure could be done, freely, without any compensation"*.

- There was no written consent of the Club to the Coach's departure, which was an obvious requirement, given *"that the current case involves an international coach in the frame of a high level football professional context where every decisions use to be formalized by official documents"*.

- The Coach and his assistants had unilaterally and prematurely terminated their employment contract with the Club without just cause. Thereby, they caused great damages to the Club, which had to find new coaches in a very short period of time, during a particularly challenging moment due to the Pandemic and while important games were still to be played.

- The Coach and his assistants were hired by the Club for the entire 2020 season. Pursuant to the FIFA Circular Letter n° 1714, the employment contracts of the Coach and of his assistants were automatically extended until 30 April 2021, *i.e.* the end of the 2020 season, which was postponed because of the Pandemic.

- Following the extension of the employment relationship, the Club *"can consider that, at least, the coaches had to purchase their contractual freedom at a rate matching with the remaining salaries they were supposed to perceive until 30 April 2021"*, that is USD 240,000 for the Coach (USD 40,000 x 6 months = USD 240,000). This amount has to be reduced by the outstanding amounts due by the Club to the Coach for the month of October 2020, which amounted to USD 24,000.

21. On 10 December 2020, the Coach's legal counsel answered to the Club's letter of 16 November 2020, contending that the Parties mutually agreed upon the termination of the Employment Agreement on 19 October 2020. He maintained that, as of this date, the Coach was a free agent but, nevertheless, was entitled to the payment of his outstanding salaries as he had never agreed to any wage cut. He summoned the Club to pay USD 108,000 by 19 December 2020.

22. The Club left unanswered the last notice served on behalf of the Coach.

C. The Coach's new employment agreement

23. The Coach, Mr Anderson Goncalves Nicolau and Mr Cezar Diniz Pereira Roque signed an employment contract with the Thai club Buriram United FC, effective from 1 November 2020 until 30 April 2022.

D. The Proceedings before the Single Judge of FIFA's Players' Status Committee

24. On 28 December 2020, the Coach filed a claim with FIFA against the Club requesting the payment of *"USD 108,000 net outstanding remuneration, as well as 5% interest p.a. as from the respective due dates, as well as to impose legal and procedural costs on the club"*.

25. The Club filed a counterclaim before FIFA requesting the payment of USD 240,000, alternatively USD 60,000 for the breach of the Employment Agreement without just cause.

26. In a decision dated 20 April 2021, the Single Judge of FIFA's Players' Status Committee ("the FIFA Single Judge") accepted the Coach's claim and rejected the Club's counterclaim based upon the following considerations:

- The Club's claim according to which the Employment Agreement was automatically extended until 30 April 2021 in accordance with FIFA Circular Letter n° 1714 could not be upheld. This document was merely a guideline and *"can by no means be interpreted as that a club can unilaterally decide to extend the contract of one of its employees, without the approval of the employee. In the matter at hand, there appears to be no explicit confirmation from the coach by means of which he agrees that the contract is to be extended until 30 April 2021"*.

- It resulted from the events which took place between 17 and 19 October 2020, that the Parties mutually agreed to end their working relationship. Hence, the Club could not be awarded any compensation for an alleged unilateral termination without just cause of the Employment Agreement by the Coach and, therefore, its counterclaim must be rejected.

- In light of the foregoing considerations, the Club must fulfil its contractual obligations until the date of termination of the Employment Agreement, which occurred on 19 October 2020.

- Bearing in mind that the Coach had never agreed to a 30% cut of his wages and that the Club failed to provide documentation establishing that it was authorized by some national law in Thailand to impose unilaterally such a reduction in salary, *"the coach is entitled to his full salary for said period"*.

27. As a result, on 20 April 2021, the FIFA Single Judge issued the following decision:

"(…)

1. The claim of [the Coach] is accepted.

2. The Claim of the [Club] is rejected.

3. [The Club] has to pay to the [Coach], ***within 30 days*** *as from the date of notification of this decision, the following amount:*

- USD 108,000 net as outstanding remuneration, plus 5% interest p.a. until the date of effective payment, as follows:

• *on the amount of USD 12,000 as from 1 April 2020;*

• *on the amount of USD 12,000 as from 1 May 2020;*

• *on the amount of USD 12,000 as from 1 June 2020;*

• *on the amount of USD 12,000 as from 1 July 2020;*

• *on the amount of USD 12,000 as from 1 August 2020;*

• *on the amount of USD 12,000 as from 1 September 2020;*

• *on the amount of USD 12,000 as from 1 October 2020;*

• *on the amount of USD 24,000 as from 20 October 2020.*

4. Any further claim of the [Coach] is rejected (…)".

28. On 12 May 2021, the Parties were notified of the decision issued by the FIFA Single Judge (hereinafter the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

29. On 31 May 2021, the Club lodged its Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code").

30. On 9 June 2021, the CAS Court Office acknowledged receipt of the Statement of Appeal of the Club and of its payment of the CAS Court Office fee. It noted that the Club chose English as the language of the arbitration. In this respect, it informed the Coach that, unless he objected within three days, the procedure would be conducted in English. The CAS Court Office also invited the Coach to comment within five days on the request of the Club to refer the present matter to a sole arbitrator. Finally, in accordance with Article R50 of the Code, considering that *CAS 2021/A/8021 Muangthong United v. Anderson Goncalves Nicolau* and *CAS 2021/A/8022 Muangthong United v. Cesar Diniz Pereira Roque.* clearly involved the same issues as those of the present matter, the CAS Court Office invited the Parties to state whether they agreed to submit these three proceedings to the same sole arbitrator/panel.

31. On 14 June 2021, the Club filed its Appeal Brief in accordance with Article R51 of the Code.

32. On 15 June 2021, the Coach informed the CAS Court Office that it agreed to refer the matter to a sole arbitrator.

33. On 17 June 2021, the CAS Court Office informed the Parties that, unless informed to the contrary, the Coach agreed to submit the present dispute to the same sole arbitrator as the cases

CAS 2021/A/8021 Muangthong United v. Anderson Goncalves Nicolau and *CAS 2021/A/8022 Muangthong United v. Cesar Diniz Pereira Roque.*

34. On 21 June 2021, FIFA confirmed to the CAS Court Office that it had renounced its right to request to intervene in the present arbitration proceedings.

35. On 22 June 2021, the Coach informed the CAS Court Office that he would not pay his share of the advance of costs and requested the time limit to file his Answer to be fixed once the advance of costs had been fully paid by the Club.

36. On 2 August 2021, the CAS Court Office acknowledged receipt of the Club's payment of the total amount of the advance of costs and invited the Coach to submit his Answer within 20 days. It also informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had decided to refer the present matter as well as the cases *CAS 2021/A/8021 Muangthong United v. Anderson Goncalves Nicolau* and CAS *2021/A/8022 Muangthong United v. Cesar Diniz Pereira Roque* to the same sole arbitrator, whose name would be communicated at a later date.

37. On 5 August 2021, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had appointed Mr Patrick Grandjean, Attorney-at-law, Belmont, Switzerland as Sole Arbitrator.

38. On 23 August 2021, the Coach filed his Answer in accordance with Article R55 of the Code.

39. On 31 August 2021, both Parties requested for a hearing to be held in the present matter.

40. On 8 September 2021, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing, which was eventually scheduled for 4 November 2021, with the agreement of the Parties.

41. On 12 October 2021, the CAS Court Office sent to the Parties the Order of Procedure, issued on behalf of the Sole Arbitrator, and which was returned duly signed by the Coach on 12 October 2021 and by the Club on 19 October 2021.

42. The hearing was held on 4 November 2021, via video-conference.

43. In addition to the Sole Arbitrator and Mrs Andrea Sherpa-Zimmermann, CAS Counsel, the following persons attended the hearing:

For the Club:

1) Mr Kan Janrat, its team manager;

2) Mr Christophe Larrouilh, its counsel.

For the Coach (who was not present):

1) Mr Menno Teunissen, his counsel;

2) Mr Thomas Spee, his counsel.

44. The Sole Arbitrator heard evidence from the following persons:

- Mr Mario Gjuorski

45. The witness was heard via video-conference and invited by the Sole Arbitrator to tell the truth subject to the consequences provided by the law. He was examined and cross-examined by the Parties and questioned by the Sole Arbitrator.

46. At the outset of the hearing, the Parties confirmed that they had no objection as to the appointment of the Sole Arbitrator.

47. After the Parties' final arguments, the Sole Arbitrator closed the hearing and announced that his Award would be rendered in due course. At the conclusion of the hearing, the Parties accepted that their right to be heard in the present proceeding had been fully respected.

48. On 13 November 2021, the Appellant filed further "post-hearing submissions and exhibits", which were forwarded by CAS Court Office letter of 16 November 2021 to the Sole Arbitrator for his consideration.

49. On 18 November 2021, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that this latter had decided not to admit such documents for the following reasons:

- *"these documents were unannounced and unsolicited;*

- *pursuant to Article R56 of the CAS Code, once the Appeal Brief has been filed, the Sole Arbitrator may authorize the Appellant to supplement it only on the basis of "exceptional circumstances";*

- *the Appellant has not explained what were the exceptional circumstances that justify the consideration of the new documents submitted by it on 13 November 2021;*

- *in this regard and on 13 November 2021, the Appellant filed:*

  1) *a copy of the operative parts of a decision issued by FIFA on 3 September 2021 ordering the Appellant to pay to the Player Vanderley Dias Marinho "USD 75,000 as outstanding remuneration" and "Thai Baht (…) 2,371,782 as outstanding amount";*

  2) *a letter sent to FIFA on behalf of the Club on 11 October 2021 asking for a payment plan to settle the decision of 3 September 2021.*

  These two documents are of no relevance to the matter at stake as no analogies can be drawn with the present dispute. This is particularly true as the FIFA decision was issued without grounds.

The fact that a payment plan was requested by the Appellant because of its financial impact related to the COVID-19 pandemic is an allegation that was made during the present arbitral proceedings and which could have very well be substantiated at a much earlier stage. There are no "exceptional circumstances" as per Article R56 of the CAS Code

3) *a copy of pages 2, 11, 14 of a decision with grounds issued by the FIFA Dispute Resolution Chamber in a matter involving the Appellant and its former goal keeper Dang Van Lam, whereby it was found that "given the very particular circumstances of this case and assessing it in light of the COVID-19 Guidelines, the above-referenced salary reductions must be deemed to have been tacitly accepted, or at least tolerated, by the [goal keeper], and therefore the members of the Chamber concluded that the employment contract was terminated without just cause by the [goal keeper] on 6 January 2021"(emphasis added).*

This document is only an excerpt of a decision a) regarding a player (and not a coach), b) making reference to "very particular circumstances" (which cannot be assessed in the absence of the full decision) and c) making reference to "COVID-19 Guidelines", which cannot also not be identified due to the partial production of the decision.

As a consequence, based on Article R56 of the CAS Code and in the absence of exceptional circumstances, the Sole Arbitrator found that the documents presented by the Appellant on 13 November 2021 must be excluded from the present arbitral proceedings".

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

50. In its Appeal Brief, the Club submitted the following requests for relief:

*"**For those reasons, the appellant asks the Court :***

- *To reverse the decision ref. 21-00022 rendered on 20 April 2021 by the Players' Status Committee of the FIFA,*
- *To reject the claim of [the Coach],*
- *To consider that [the Club] does not have to be sentenced to pay any wages overdue to his former coach,*
- *To the contrary, to state that [the Coach] has to be declared responsible for the breach of his employment contract with [the Club],*
- *To sentence the Coach to pay the amount of USD [240,000]* as damages for the breach of the said contract,*
- *To sentence the Coach to pay also the interests of 5% p.a. as from the date of the claim,*
- *To order the [Coach] to reimburse the [Club] and his lawyers for all the expenses incurred in connection*

with this proceeding".

* This amount was not indicated in the Appeal Brief but was articulated during the hearing before the CAS

51. The submissions of the Club, in essence, may be summarized as follows:

- *"[The Club] asked to the Players' Status Committee to reject its jurisdiction. Indeed, [the Coach], in the grounds of his claim, requested the Club to provide "relevant tax certificates" (even if this request was not confirmed in the final conclusion of the claim). (…) [The Club] considered that the PSC of the FIFA had no jurisdiction to enforce the Club to provide such documents. This request was related to a tax dispute, not a labor law case. Only a Thai tax authority could enforce the Club to provide such tax certificates".*

- *"[The Club] asked the Players' Status Committee to declare the claim of [the Coach] inadmissible"* as the latter failed to mention his personal address in his claim.

- On 17 October 2020, before an important game, the Coach asked for a meeting with the Club's executives. On that occasion, he pretended that he was psychologically tired, disappointed with the results achieved so far and needed to rest in Brazil before finding a new employer somewhere in the Persian Gulf. Relying on the Coach's assurances that he would not work with another Thai team, the Club reluctantly accepted his resignation in spite of the fact that it would have preferred for the Employment Agreement to be carried out until the end of the 2020 season. With his attitude and fake promises, the Coach only intended to obtain a premature termination of his employment relationship with the Club so that he could sign with its historical rival, Buriram United FC, which he joined in November 2020.

- At the end of the match played on 17 October 2020, the Coach announced to the Club's players that he was not going to train them any longer. In view of the letters sent to the Club by the Coach and his assistants on 17 and 19 October 2020, respectively, bearing in mind their very similar wording, *"it began to be clear that [the Coach] did not intend to go back to Brazil for personal reason as his assistants resigned as well".* At this moment and from a legal standpoint, the Coach had no intention to carry on with the Employment Agreement, which he terminated prematurely without just cause. *"Indeed the letter sent by [the Coach] on October the 17th was not a proposal of rupture by mutual consent. It was a letter of definitive rupture. And faulty because without any just cause. As a definitive termination letter, [the Club] did not have the choice to accept or refuse the resignation of the coach. It was obliged to accept it".* The WhatsApp message sent to the Coach by a Club' representative has no legal effect. It only was *"a way of acknowledging the principle of the coach's resignation and that the modalities of his departure had yet to be defined. Here again, the PSC did not really respond to the argument or only implicitly"* (emphasis by the Club).

- *"To avoid to lose face before the fans, the communication strategy was to explain that after the loss [of the game played on 17 October 2020], the coach has proposed his resignation that has been accepted by the Club. But usually, in professional football world, behind this short information there are always some*

unofficial negotiations that finalize the conditions of the termination. That is why on Monday 19 October Mr. Ronnarit sent a text message at 14:00: "just let you know The club has approved your resignation already and effective immediately".

- *"On the same day the Club had to communicate and show it controls the situation. On its facebook page, trying to not lose face, it wished farewell to [the Coach] and welcomed Mario Gjurovski as a new coach the Club. In such emergency there was not any other solutions than to promote the trainer of the reserve team who had never coached before at high professional level. It was a default choice".*

- The Coach had accepted the cut in his wages. This is established by the fact that he had never expressed his disagreement with such a salary reduction, he agreed to be paid USD 28,000 (instead of USD 40,000) for several months, without having ever complained or sent a default notice. *"Moreover, when he sent his resignation letter on 18 [recte 17] October 2020, he never recalled this point and thanked the Club".*

- The 30% salary reduction was compliant with the Thai labour law, which authorizes an employer to not fully pay his employees, in an event of *force majeure*. In the world as well as in Thailand, the Pandemic is considered to be a case of *force majeure*. In addition, *"[The] reduction has been reasonable and fair pursuant to the guiding principles proposed by the Fifa (circular 1744 (recte 1714) of the Fifa and its guidelines)".*

- It must be observed that during the Pandemic, clubs as prestigious as Bayern Munich and Real Madrid have reduced the salaries of their players. Moreover, the *"Thai Football Association and the Professional Thai League has authorized the clubs to operate a reduction up to 50% on the wages of the players and the coaches".*

- The financial damage caused by the Coach to the Club must be assessed in accordance with the criteria set out in the FIFA Regulations on the Status and Transfer of Players ("RSTP"). In accordance with Article 17 of the RSTP, the Club is entitled to a compensation equivalent to the residual value of the Employment Agreement, which corresponds to the Coach's wages until the natural expiry of the contractual relationship with the Club.

- Considering that the Coach was hired for the entire 2020 season, his Employment Agreement was automatically extended until 30 April 2021, *i.e.* the end of the 2020 season, which was postponed following the Pandemic. This is expressly provided for in FIFA Circular letter n° 1714. *"We also reminded that the Covid-19 guidelines attached to the said circular proposed that: "where an agreement is due to expire at the original end date of a season, such expiry be extended until the new end date of the season".*

- From the moment the Coach prematurely terminated the Employment Agreement without just cause until the end of the 2020 season, 6 months have elapsed. The Club is entitled to a compensation of USD 240,000 (= 6 x USD 40,000).

- Alternatively, should Article 337 d of the Swiss Code of Obligations ("SCO") be applicable, the Club is entitled to a compensation of USD 60,000 (= ¼ of USD 240,000). *"But taking into account :*

  - *the way the coach has lied to his employer,*
  - *the way he has betrayed his employer by hiding the fact that he left to reach the historical enemy,*
  - *the way he has left the Club, without leaving it time enough to choose another coach,*
  - *the way he left with his 2 assistants, denuding almost the whole technical staff,*
  - *the way he has coached his last match, depriving [the Club] of 3 points that could be important in his dual with Buriram,*

  [The Club] requested [the Coach] to be sentenced to pay 180,000 USD additional complementary damages, making a total as of 240,000 USD".

B. The Respondent

52. The Coach submitted the following requests for relief:

"The [Coach] request (sic) that the CAS admits this Statement of defence in response to the Appeal against the Decision rendered by the FIFA Dispute Resolution Chamber on 20 April 2021.

The [Coach] requests the Court of Arbitration for Sport to:

1. Declare this Appeal as inadmissible;

In the alternative

2. Reject the Appeal filed by the [Club] in full;

3. Uphold the FIFA DRC decision dated 20 April 2021;

In any event

4. Order the [Club] to bear in full the costs of the arbitration proceedings before the Court of Arbitration for Sport;

5. Order the [Club] to pay [the Coach] a fee of CHF 10,000 as contribution to its legal fees and costs".

53. The submissions of the Coach, in essence, may be summarized as follows:

- The Appeal is inadmissible as the Club failed to make the payment of the total amount of the advance of costs related to the present CAS proceedings in a timely manner.

- The Parties mutually agreed to put an end to the Employment Agreement. This is evidenced by the letter sent to the Club by the Coach on 17 October 2020 and by the response received by the latter via WhatsApp.

- The Club confirmed that the Coach was officially released of his contractual obligations through its official Facebook pages, whereby it thanked the Coach as well as his assistants and wished them all the best *"in their future endeavours"*. Simultaneously, the Club announced the signing of a new coach, Mr Mario Gjurovski, which suggests that it was *"well prepared for the situation as it presented the successor of the [Coach] on the same day of termination on official Club channels"*.

- Pursuant to Swiss law, the Coach is entitled to receive the salaries for the work he carried out until the end of his employment relationship. The Coach has never agreed to a cut in his wages. Such a reduction cannot be unilaterally imposed upon the Coach, even during the Pandemic.

- *"As stipulated in the appealed decision FIFA did not declare that the COVID-19 outbreak as a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure"*. The Club has not offered any convincing evidence allowing it to deviate from the *pacta sunt servanda* principle on the basis of a *force majeure* event.

- The Employment Agreement was not automatically extended until April 2021. Contrary to the Club's allegation, such an extension is not provided for by FIFA Circular Letter n° 1714, which is, moreover, not applicable to coaches.

V. JURISDICTION

54. The jurisdiction of the CAS, which is not disputed, derives from Articles 57 et seq. of the applicable FIFA Statutes and Article R47 of the Code. It is further confirmed by the Order of Procedure duly signed by the Parties.

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

56. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

VI. ADMISSIBILITY

57. The Coach contends that the Club failed to pay the advance of the costs of the present arbitral proceedings in a timely manner and, therefore, its appeal must be deemed withdrawn, in accordance with Article R64.2 of the Code.

58. It is undisputed that the Club was requested to make the payment of the arbitration costs by 20 July 2021.

59. On 2, 3 and 18 August 2021, the Coach requested from the CAS Court Office to be informed of the *"specific day of payment"*.

60. On 19 August 2021, the CAS Court Office notified the following to the Coach:

> *"Pursuant to CAS constant jurisprudence, the issue of the advance of costs is an administrative issue, which is dealt with by the CAS Court Office and "[t]he non-payment of the advance of costs within the deadline prescribed cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible. The deadlines which are fixed only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with Article R64.2 of the CAS Code" (cf CAS 2017/A/5219, par. 80)* (emphasis added).
>
> *In light of the above, no further information related to the payment by the Appellant of the advance of costs will be provided to the Respondent at this juncture".*

61. At the hearing before the CAS, Mrs Andrea Sherpa-Zimmermann, CAS Counsel, confirmed to the Parties that, according to the available information, the Club gave the payment instruction to its bank on 20 July 2021 and that the amount was received by the CAS on 22 July 2021, *i.e.* two days later, which was usual for international money transfers.

62. In spite of this confirmation, the Coach maintained his principal request for relief, asking the CAS to consider the appeal as withdrawn.

63. On 5 November 2021 and in an unsolicited manner, the Club sent to the CAS Court Office a copy of the relevant banking order, which was forwarded to the Coach and which indicates that the instructions to make the relevant payment in relation with the present proceedings were given on 20 July 2021.

64. In view of the above, bearing in mind the CAS precedent cited by the CAS Court Office in its letter of 19 August 2021, which is consistent with the position expressed by other CAS Panels (see CAS 2010/A/2144; CAS 2010/A/2170; CAS 2010/A/2171), the Sole Arbitrator decides to set aside without further consideration the Coach's argument related to the alleged late payment by the Club of the arbitration costs.

65. The appeal is admissible as the Club submitted it within the deadline provided by Article R49 of the Code as well as by Article 58 (1) of the applicable FIFA Statutes. It complies with all the other requirements set forth by Article R48 of the Code.

VII. APPLICABLE LAW

66. Article R58 of the 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".*

67. Pursuant to Article 57 (2) of the applicable FIFA Statutes, *"[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.

68. In Article 7 of the Employment Agreement, the Parties expressly agreed that *"For any differences or controversies that may occur, (…) the rules of FIFA will be applied"*.

69. As a result and in light of the foregoing, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply complementarily, whenever warranted. It can be observed that, in their respective submissions, the Parties referred to FIFA's regulations as well as to Swiss law.

70. The present case was submitted to FIFA on 28 December 2020, *i.e.* after 18 September 2020 and 24 August 2020, which are the dates when the FIFA Statutes, edition September 2020 and the RSTP edition August 2020, came into force.

71. These are the editions of the rules and regulations, which the Sole Arbitrator will rely on to adjudicate this case.

VIII. MERITS

72. It is uncontroversial that a) according to the Employment Agreement, the Coach was entitled to receive a monthly salary of USD 40,000, b) as from March 2020, the Coach's salary was reduced to USD 28,000 and c) the employment relationship was terminated on 19 October 2020.

73. Are disputed the facts that a) the Club was entitled to reduce the salary of the Coach because the Pandemic is a *force majeure* event, b) such reduction was accepted by the Coach and c) the termination of the employment relationship was mutually agreed by the Parties.

74. The matters in dispute to be resolved by the Sole Arbitrator are as follows:

A. Does the Pandemic qualify as a *force majeure* event enabling the Club to unilaterally impose on the Coach a 30% salary reduction?

B. Was the reduction of salary accepted by the Coach?

C. Was the termination of the employment relationship mutually agreed?

75. The Sole Arbitrator will address these issues in turn below.

A. Does the Pandemic qualify as a *force majeure* event enabling the Club to unilaterally impose on the Coach a 30% salary reduction?

76. Succinctly expressed, *force majeure* is used to describe a situation or event, which is beyond the control of the parties, which prevents them from fulfilling their contractual obligations and for which they believe they should not carry any liability or obligations.

77. With respect to the possible consequences of the Pandemic on the contractual relationship between the Parties, the resolution of the dispute will need a two-phase approach. At first, it is necessary to assess whether the Employment Agreement includes specific provisions, which deal with the non-performance or partial performance due to events like the Pandemic (e.g., a *force majeure* clause). Secondly, the situation must be reviewed in the light of the applicable law and regulation.

1.- The Employment Agreement

78. The Employment Agreement does not contain a *force majeure* clause. In this document, the Parties did not contemplate the non-performance or partial performance of the contract following the occurrence of a specified event, which is beyond their control or which they could not have anticipated.

2.- FIFA Regulations

79. Article 27 RSTP, entitled "Matters not provided for", reads as follows:

"Any matters not provided for in these regulations and cases of force majeure shall be decided by the FIFA Council whose decisions are final".

80. There is no definition of *force majeure* in the FIFA Regulations.

81. At FIFA level, the concept of *force majeure* related to the Pandemic was addressed in several FIFA circular letters ("CL"):

- 13 March 2020 (CL n° 1712): On account of the spread of COVID-19, it was observed that *"Many national governments have put in place restricted travel and immigration requirements, introduced quarantine periods, and banned public gatherings. Football (and public) authorities have taken similar precautions in ordering matches to be postponed or played behind closed doors, restricting access to team dressing rooms and stadiums, and suspending or cancelling competitions. FIFA itself recently postponed the Asian and South American qualifiers for the FIFA World Cup Qatar 2022".* Considering that the circumstances *"constitute a situation of force majeure"*, the Bureau of the FIFA Council took several measures with respect to the release of players to association teams. In this CL, FIFA recommended the postponement of any international matches but insisted that *"the final decision on this matter rests with the relevant competition organisers or with the relevant member associations in case of friendlies".*

- 7 April 2020 (CL n° 1714): FIFA provided its members with recommendations *"to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonised in the common interest".* On that occasion, FIFA reiterated that the Bureau of the FIFA Council recognised that the disruption to football caused by the Pandemic was a case of *force majeure* and declared *"The COVID-19 situation is, per se, a case of force majeure for FIFA and football".* In this CL, FIFA submitted *"proposed guiding principles"*, which covered three core matters; *i.e.* a) expiring employment agreements; b) employment agreements

which cannot be performed as the parties originally anticipated; and c) registration periods. In the introduction of the CL n° 1714, FIFA insisted that it was not in a position to instruct FIFA Member Associations ("MAs") or make a determination on when football should recommence in each country or territory. Its role was to provide appropriate guidance and recommendations, which suggests strongly that the CL n° 1714 does not contain any mandatory rules. This seems to be confirmed by its wording (as emphasised hereafter). With respect to the salary reduction, this document provides the following:

"PROPOSED GUIDING PRINCIPLES

In order to guarantee some form of salary payment to players and coaches, avoid litigation, protect contractual stability, and ensure clubs do not go bankrupt, while considering the financial impact of COVID-19 on clubs, it is proposed that:

(i) Clubs and employees (players and coaches) be strongly encouraged to work together to find appropriate collective agreements on a club or league basis regarding employment conditions for any period where the competition is suspended due to the COVID-19 outbreak.

Such agreements should address, without limitation: remuneration (where applicable salary deferrals and/or limitation, protection mechanisms, etc.) and other benefits, government aid programmes, conditions during contract extensions, etc. (…)

(ii) Unilateral decisions to vary agreements will only be recognised where they are made in accordance with national law or are permissible within CBA structures or another collective agreement mechanism.

(iii) Where:

a. clubs and employees cannot reach an agreement, and

b. national law does not address the situation or collective agreements with a players' union are not an option or not applicable,

Unilateral decisions to vary terms and conditions of contracts will only be recognised by FIFA's Dispute Resolution Chamber (DRC) or Players' Status Committee (PSC) where they were made in good faith, are reasonable and proportionate.

When assessing whether a decision is reasonable, the DRC or the PSC may consider, without limitation:

a. whether the club had attempted to reach a mutual agreement with its employee(s);

b. the economic situation of the club;

c. the proportionality of any contract amendment;

d. the net income of the employee after contract amendment;

e. *whether the decision applied to the entire squad or only specific employees".*

- 11 June 2020 (CL n° 1720): FIFA issued a document entitled *"Frequently asked questions (FAQs) COVID-19 Football Regulatory Issues"* (the "FAQ"). In a preamble, it is exposed that *"From 8 April 2020 to 7 May 2020, the FIFA administration conducted 13 workshops with representatives from its MAs and confederations, members of the WLF, and members of the ECA, which involved more than 350 participants from around the world. The FIFA administration has also actively responded to any electronic queries received regarding the regulatory and legal impact of COVID-19. This active consultation process led to the identification of frequently asked questions (FAQs) as well as several new regulatory and legal issues for consideration".* The very first questions dealt with in this document were a) whether the Bureau of the FIFA Council declared a *force majeure* situation in any territory and b) whether this declaration can be relied upon by MAs, clubs, or employees.

  The following answer was offered (emphasis by FIFA):

  "In this context, on 6 April 2020, the Bureau made several decisions regarding regulatory and legal issues as a result of COVID-19. In order to temporarily amend the RSTP, the Bureau relied upon article 27 as its source of power, determining that the COVID-19 outbreak was a matter not provided for and a force majeure situation for FIFA and football generally.

  The Bureau did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure.

  For clarity: clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent).

  Whether or not a force majeure situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement" (emphasis added by FIFA).

82. The Pandemic was addressed in further CL and other FIFA publications, none of which makes reference to the concept of *force majeure.*

83. In view of the foregoing and in particular the FAQ, it appears that no automatic recourse to the concept of *force majeure* is supported by the FIFA applicable regulations and/or can be made by clubs or employees impacted by the Pandemic. According to FIFA, each situation must be assessed on a case-by-case basis*, "vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement".*

84. It must be observed that the Club has not filed the regulations and guidelines adopted by the leaders of its country on the basis of the Pandemic. The only Pandemic-related documents on file were three statements released by the Thai League and one letter sent to the Club by the Football Association of Thailand:

- In an announcement released on 3 March 2020, the Thai League declared that competitions were suspended until 17 April 2020, *"[following] the announcement of the Ministry of Health, concerning the Corona virus, variant 2019 or (Covid 19), name of a disease causing dangerous symptoms, of the year 2019. The Prime Minister ordered at the ministerial meeting of March 3, 2020, emergency measures to stop the problems related to the Corona virus (Covid 19), so that government agencies and other state units, cooperate with private companies to avoid or postpone the organization of events gathering a large number of people and presenting unnecessary risks of spreading the virus".*

- On 26 March 2020, the Thai League informed its members that *"[regarding] the Covid 19 situation in Thailand, the spread continues and the number of contaminated people is increasing. In addition, the government has declared a state of emergency throughout the country to control and eradicate the pandemic and has announced various measures to be implemented. Consequently, it is impossible to organize the matches as planned"*. As a consequence, the matches were postponed to 2 May 2020.

- On 16 April 2020, the Thai League made public the discussions between the relevant authorities regarding the measures taken in response to the Pandemic. The issues addressed were a) the new match schedule for the 2020 season, b) the purchase and transfer of players, c) *"the sending of club representatives to participate in the AFC Champions League for the 2021 season"*, d) the calculation of the points and e) the remuneration of the players and other persons concerned. With respect to this last point, the Thai League reported that *"[the] members voted unanimously so that the clubs will not have financial difficulties, that the clubs will have to negotiate a salary reduction with the players and other persons concerned, of 50% until the resumption of the championship"* (emphasis added).

- On 8 February 2021, the Football Association of Thailand confirmed to the Club that *"along with Thai League 1 and 2 clubs [it] collectively agreed that a negotiation between respective clubs and their players as well as officials concerning the reduction of fifty percent (50%) salaries upon mutual agreement as per the guidelines provided by FIFA until the resumption of the competition should transpire due to the fact that the Thai League was postponed in March 2020 because of the COVID-19 outbreak in Thailand with rising COVID-19 cases domestically as well as the governmental restrictions namely, the closure of stadia — which prohibited the league to proceed as intended and the League was set to resume in September 2020"* (emphasis added).

85. It results from these documents that a salary reduction was foreseen but clubs were not enabled to impose it upon their employees in a unilateral manner. Such a cut in wage had to be negotiated and be the object of a mutual agreement.

3.- Swiss law

86. The legal concept of *force majeure* is widely and internationally accepted and, in particular, is valid and recognized under Swiss law, which is applicable to the present dispute.

87. Under Swiss law, there is no statutory definition of *force majeure*. However, and according to the Swiss Tribunal federal ("SFT"), there is *force majeure* in the presence of an unforeseeable and

extraordinary event that occurs with irresistible force (WERRO F., in Commentaire Romand 2nd ed., no 46 *ad* Art. 41 CO and references).

88. In CAS 2015/A/3909 (which refers to a decision of the SFT, 2C_579/2011, consid. 1 of 21 July 2022 – which in fact quotes the finding of the lower instance), the Panel held that *"force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner"*. According to other Panels, *"force majeure implies an objective (rather than a personal) impediment, beyond the control of the "obliged party", that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible"* (CAS 2018/A/5537; CAS 2017/A/5496; CAS 2013/A/3471; CAS 2006/A/1110; CAS 2002/A/388). In CAS 2010/A/2144, the Panel found that *"force majeure is an event which leads to the non performance of a part of a contract due to causes which are outside the control of the parties and which could not be avoided by exercise of due care. The unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it. (…) Moreover, force majeure is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference"*. Consistently with the SFT (WERRO F., *ibidem*), several CAS Panels have insisted on the fact that *"The conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation"* (CAS 2018/A/5537; CAS 2015/A/3909; CAS 2006/A/1110).

89. In the absence of a *force majeure* clause in the Employment Agreement, Swiss statutory law applies. The legal consequences of non-performance of a contract depend on whether the impossibility to discharge obligation is temporary or permanent and whether one of the contractual parties is at fault.

90. Should the impossibility to fulfil the obligations be only temporary, Articles 107 to 109 SCO apply. According to these provisions, the counterparty can, at its discretion, a) set an appropriate time limit for subsequent performance or ask the court to set such time limit (Article 107 SCO), b) under certain circumstances, insist on performance without delay (Article 108 SCO), c) waive performance and claim damages (Article 107(2) SCO or d) terminate the agreement and demand the return of any performance already made. In addition, it may claim damages for the lapse of the contract, unless the debtor can prove that he was not at fault (Article 109 SCO). In accordance with Article 97 SCO, the debtor's fault is presumed. Pursuant to Article 99(1&2) SCO, the debtor is generally liable for any fault attributable to him. The scope of such liability is determined by the particular nature of the transaction and in particular is judged more leniently where the obligor does not stand to gain from the transaction.

4.- In the present case

91. It is undisputed that the Club accepts that its impossibility to fully perform its side of the Employment Agreement was only limited in time, as the pay cut was to be applied only *"during the suspension of the League as long as the sanitary crisis will impact the financial resources of the Club"*. In addition, it insisted on the fact that it was willing to pay the Coach's full salary *"in case the financial resources would enable the Club to pay back the said deductions"*.

92. In any case, it appears from the above considerations that it is for the Club to establish that a) it was objectively impossible for it to fully perform its contractual obligations, b) because of the Pandemic, c) there was a causal link between the Pandemic and its failure to fulfil its side of the Employment Agreement and d) it was not at fault.

93. With respect to the burden of proof, Article 8 of the Swiss Civil Code ("SCC") states that *"Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact"*. As a result, the Sole Arbitrator reaffirms the principle established by CAS jurisprudence that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (CAS 2014/A/3546, para. 7.3 and references). In general, the burden of proof is satisfied whenever the judge is convinced of the truthfulness of a factual allegation based on objective grounds. Absolute certainty is not required. It is sufficient if the judge has no serious doubt about the existence of the alleged facts or if any remaining doubt appears to be tenuous (ATF 130 III 321, consid. 3.3).

94. The Club did not offer any documented information related to a) whether the legislation of Thailand had a specific definition of *force majeure,* b) the measures taken by the Thai government to limit the spread of the COVID-19, c) how these measures affected the performance of contracts in the world of Thai football as well as on the domestic market in general, d) whether Thailand was effectively in a lockdown situation, for how long and to what extent, e) the potential financial relief available, f) etc… This lack of evidence makes it impossible for the Sole Arbitrator to assess whether the proposed guidelines by FIFA in its CL n° 1714 can be of any assistance for the Club's case. As a matter of fact, and according to this document, unilateral salary cuts are conceivable only if *"national law does not address the situation or collective agreements with a players' union are not an option or not applicable"*; *"whether the club had attempted to reach a mutual agreement with its employee(s)"; "[depending on] the economic situation of the club"; "whether the decision applied to the entire squad or only specific employees"*. None of these aspects have been addressed by the Club, at least not with concrete evidence.

95. Regarding its specific situation, the Club did not offer convincing evidence that it was objectively impossible for it to fully perform its side of the Employment Agreement because of the Pandemic. In particular it did not satisfy its burden of proof that no fault could be attributed to it for the failure to comply with its contractual obligations. As a matter of fact, the Club exclusively filed an undated one-page document drafted by Mrs Sunisa Soiydon, its chief accountant, which enumerates the financial loss suffered by the club in 2020, allegedly caused by the fact that the Club had to face *"many difficulties for [its] operations in the year 2020, which was impacted by the epidemic Covid-19 disease. And the government has a policy to cancel any activities in order to reduce the spread of disease which from the said policy making the company postpone every professional football tournament and has been greatly affected, especially in the liquidity of the company"*. According to this document and compared to the 2019 season, the Club received 94.47% of its sponsorship income; 12.61% *"of the dotation from the fat"*; 46.67% of its tv rights; 31.93% of its ticketing income and 55.22% of its *"goods income"*.

96. The Sole Arbitrator finds that the probative value of this document is limited for several reasons: a) it was drafted by the Club's own chief accountant, whose impartiality cannot be guaranteed; b) Mrs Sunisa Soiydon was not called by the Club to comment her report during the hearing before the CAS, denying the Coach the possibility of cross-examining her; c) the said document is not supported by any evidence, in particular the figures presented by Mrs Sunisa Soiydon are absolutely not substantiated; d) there is no indication of the revenues generated or the actual costs incurred by the Club in 2020.

97. In addition, the Club did not file its financial statement for 2020, which is fundamental evidence to establish whether or not it was objectively impossible for it to comply with its contractual obligations towards the Coach.

98. It follows from the above that the Club relied exclusively on unsubstantiated general statements according to which a) the Pandemic was worldwide, b) it was an event of *force majeure,* c) its financial difficulties were the direct result of the Pandemic, d) which had a great impact on Thailand, e) the Club had no choice but to reduce the salary of the Coach.

99. The Club failed in its duty to objectively demonstrate the existence of what it alleges. It is not sufficient for it to simply assert a state of fact for the Sole Arbitrator to accept it as true. This is especially true since *"The conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation"* (CAS 2018/A/5537; CAS 2015/A/3909; CAS 2006/A/1110).

100. As a consequence, the Club has not brought forward any convincing reasons allowing the Sole Arbitrator to deviate from the principle *"pacta sunt servanda"* on the basis of a *force majeure* event. In other words, the Club did not establish that it was entitled to unilaterally reduce the Coach's salary by 30%. Any other approach based on so little evidence would lead to the unreasonable result that, in the presence of a worldwide pandemic, the *force majeure* exception would be applied automatically, regardless of the specific circumstances of each situation. It can be accepted that the Pandemic made the Club's performance of its side of the Employment Agreement more difficult, but certainly not impossible. In this regard and according to the well-established CAS jurisprudence, financial difficulties or the lack of financial means of a club cannot be invoked as a justification for the non-compliance with a payment obligation (CAS 2018/A/5537 and references).

B. Was the reduction of salary accepted by the Coach?

101. For the reason exposed hereabove, the Club did not establish its right to unilaterally reduce the Coach's salary by 30%. Hence, the question that follows is whether the Coach accepted such a cut in his wages.

102. The Club contends that the salary reduction was *"accepted orally by all the employees (players and coaches). Not any dispute occurred relating to it until the current case"*. In particular and with respect to the specific situation of the Coach, the Club puts forward the fact that he had never expressed his disagreement with such a salary reduction. On the contrary and according to the Club, the Coach had agreed to be paid USD 28,000 (instead of USD 40,000) for seven months, without

having ever complained or sent a default notice. Moreover, when he sent his resignation letter, he did not discuss this aspect and thanked the Club for the opportunities it offered him.

103. The Coach claims that he had never accepted such a salary reduction.

104. According to Article 322 (1) of the SCO, *"The employer must pay the agreed or customary salary or the salary that is fixed by standard employment contract or collective employment contract"*. This provision is not mandatory and, in particular, does not fall under Article 341 SCO, which provides that *"For the period of the employment relationship and for one month after its end, the employee may not waive claims arising from mandatory provisions of law or the mandatory provisions of a collective employment contract"* (decision of the SFT, 4A_404/2014, consid. 5.1 of 17 December 2014). As a consequence, the parties may agree to reduce the salary during the contractual relationship and they may do so by tacit acceptance or by conclusive acts (decisions of the SFT 4C.242/2005 consid. 4.2 of 9 November 2005; 4A_223/2010 consid. 2.1 of 12 July 2010).

105. In principle, the silence of the employee does not imply that he accepts the salary reduction proposed by the employer. A tacit acceptance can only be admitted in circumstances where, according to the rules of good faith, one must expect a reaction from the employee, should he disagree with the pay cut (ATF 109 II 327 at 2b p. 330; decisions of the SFT 4C. 242/2005 consid. 4.3 of 9 November 2005; 4A_443/2010 consid. 10.1.4 of 26 November 2010; 4A_216/2013 consid. 6.3 of 29 July 2013). The employer has the burden of establishing these circumstances. Such is the case when it is recognizable for the employee that the employer has assumed that the employee tacitly agreed to the cut in his wages and that, otherwise, the employer would take other measures or terminate the contract. In such a situation, the employee must express his disagreement within a reasonable time (decision of the SFT 4A_443/2010 consid. 10.1.4 of 26 November 2010; 4A_223/2010 consid. 2.1.2 of 12 July 2010). If the employer pays a reduced salary in accordance with what he has announced to the employee, it is generally recognizable for the employee that the employer presumes that he has tacitly accepted the salary reduction. It is also accepted that if the employee has been paid a reduced salary for at least three months without making any reservations, there is a presumption that he has tacitly agreed to the pay cut. Under these circumstances and should the employee subsequently intend to claim the payment of the difference between the contractually agreed salary and the reduced wage, he will need to rebut this presumption by establishing specific circumstances on the basis of which the employer should not have inferred, despite the employee's long silence, an acceptance on his part with this reduction (decisions of the SFT 4A_404/2014, consid. 5.1 of 17 December 2014; 4A_223/2010, consid. 2.1.2 of 12 July 2010; 4C.242/2005 consid. 4.3 of 9 November 2005).

106. In the case at hand, it must be observed that the Parties did not substantiate their respective position with much evidence.

107. On the one hand, the Club simply claims that the pay cut had been *"accepted orally by all the employees (players and coaches)"*. However, there is absolutely no indication about a) what was actually said to the Club's employees, b) how the pay cut was announced, c) the details about the proposed salary reduction, namely its duration and the consequences of a possible refusal. It also did not explain what the Coach was doing during the suspension of the competitions

and whether he kept working, in spite of the fact that the matches could not be played over a period of several months.

108. On the other hand, the Coach confines himself to stating that he had never agreed to the reduction of the salary. At the hearing before the CAS and for the first time, he tried to rely on the witness statement of Mr Kan Janrat, who declared that *"Gama said he wanted to leave is function of head coach and take a rest probably in Brazil. He was upset about the income. He said anyway that he does not plan to coach in Thailand"* (emphasis added – it must be noted that, at the hearing, the Club contended that Mr Janrat intended to say "outcome" instead of "income"). In particular, the Coach did not explain a) what the Club told him about the salary reduction, b) how he reacted, c) why he had never served a default notice until 29 October 2020 requesting the outstanding payment of his salaries from March until October 2020.

109. Under these circumstances, the Sole Arbitrator recalls that the contractually agreed salary was set at USD 40,000 before it was reduced by 30% at the beginning of the Pandemic, when the competitions were suspended and the matches could not be played. Between March and October 2020, the Coach had not received his full salary and there is no evidence on file that he had complained about the situation until October 2020.

110. In such a context, the Sole Arbitrator considers as a key element the fact that, in its Appeal Brief, the Club confirmed the following:

"Being immediately aware of the financial crisis that such a suspension could provoke, the Club, on March 3rd 2020, organized several meetings with the players first and the technical staff separately to negotiate a deduction of salaries (…).

The proposal consisted in two sub-proposals :

- *a reduction of the monthly salaries (30%) during the suspension of the League as long as the sanitary crisis will impact the financial resources of the Club,*

- *the reimbursement of the missed earnings in case the financial resources would enable the Club to pay back the said deductions".*

111. It appears that the salary deduction was only temporary and the unpaid amount (equivalent to 30% of the salary) was not irretrievably lost for the Coach as it would be remitted subject to a return to better days for the Club. Such an interpretation is consistent with the fact that, as exposed by the Club's chief accountant, Mrs Sunisa Soiydon, the Pandemic *"greatly affected (…) the liquidity of the company"*. The measure foreseen appears to have allowed the Club a) to cope with its liquidity crisis and, once the situation improves, b) to undertake *"the reimbursement of the missed earnings"*. Faced with the prospect of receiving back (sooner or later) his unpaid wages, the Coach did not have a reason to contest the temporary pay cut or to serve a notice for non-payment of the full salary.

112. Furthermore, the Sole Arbitrator finds that, under the specific circumstances of the case, the Club acted very carelessly by imposing to all of his players and technical staff important pay

cuts without formalizing the process in a written form, in order to avoid disputes like the present one or to keep itself safe from massive termination of employment contracts for just cause with claims for significant compensations and/or sporting sanctions. As a consequence, it must take responsibility for its nonchalant approach of its contractual obligations.

113. On the basis of the above considerations, the Sole Arbitrator comes to the conclusion that the Coach has never waived the payment of the 30% of his wages.

C. Was the termination of the employment relationship mutually agreed?

114. The parties may at any time agree to terminate the employment relationship by mutual consent (ATF 118 II 58 consid. 2a and references). Such a termination is not subject to any particular form and can therefore be made in writing, orally or even by tacit agreement (ATF 4C.397/2004, para. 2.1).

115. The following facts are undisputed:

- On 16 October 2020, the Coach asked to meet with Mr Wiluck Lohtong, the Club's President, Mr Ronnarit Suewaja, the Club's Sport Director and Mr Kan Janrat, the Team Manager to inform them of his intention to resign. Although it wanted him to stay, the Club management accepted the resignation, allegedly under the condition that the Coach did not join another Thai club.

- On 17 October 2020, the Coach sent to Mr Ronnarit Suewaja a letter entitled *"Resignation Letter"*, whereby he informed the latter *"of [his] intension (sic) to resign from Head coach at Muangthong United Football Club on 18 October 2020"*.

- On 19 October 2020 and via a WhatsApp message in which was copied the resignation letters of the Coach as well as the one of Mr Anderson Goncalves Nicolau and Mr Cezar Diniz Pereira Roque, Mr Ronnarit Suewaja confirmed to the Coach that *"the club has approved your resignation already and effective immediately"*. When the Coach inquired whether he had to sign any documents, Mr Ronnarit Suewaja answered that he would *"manage everything tomorrow at 1400 with [the Coach] and [his assistants]"*.

- On 19 October 2020, the Club released the following two announcements on its Facebook page:

  - *"[The Club] wishes to express thanks to [the Coach] and his coaching team and wish them all the best in their future endeavours"*.

  - *"Redvolution strike – Mario Gjurovski: the New Head Coach at [The Club]"*.

116. In view of the above chronology of events, the Sole Arbitrator finds evident that the Club made clear that it was not interested in the Coach's services anymore. It accepted the early termination of the Employment Agreement, replaced the Coach by another person, *i.e.* Mr Mario Gjurovski, publicly announced the departure of the Coach and thanked him as well as his assistants. Most

importantly, the Club has not alleged nor proved that it had tried to hold the Coach back after his departure on 19 October 2020. Likewise, it had not asked the Coach to pay for any compensation for the alleged termination of the Employment Agreement without just cause. It is only once the Coach sent a formal notice to the Club requesting the outstanding payment of his salaries from March 2020 until 18 October 2020, that the Club counterattacked on 16 November 2020 with the new claim that the Coach and his assistants had unilaterally and prematurely terminated their employment contract with the Club without just cause.

117. The Sole Arbitrator cannot agree with the Club, when it submits that the WhatsApp message sent to the Coach by Mr Ronnarit Suewaja has no legal effect and that it was only *"a way of acknowledging the principle of the coach's resignation and that the modalities of his departure had yet to be defined"*. Such an allegation is inconsistent with the fact that, in his WhatsApp message, Mr Ronnarit Suewaja clearly indicates that the resignation was approved and *"effective immediately*". Such a wording confirms that the employment relationship was over and certainly not conditional upon the performance of any covenant or other actions by the Coach. Contrary to what suggests the Club, the WhatsApp message does not leave the door open to a possible reversal of position by the Club on the termination of the Employment Agreement.

118. The Sole Arbitrator also cannot share the Club's position that it had no choice but accept the resignation of the Coach. It could have very well refused it and warned the Coach that, should he not respect his contractual obligations and/or leave the Club, he would be found guilty of a termination of the Employment Agreement without a just cause. This is not the scenario played out in the present case. On the contrary, the Coach met the Club's executives on 16 October 2020 and informed them of his intention to resign, which was accepted by the Club. The fact that the Club candidly believed the oral explanations given by the Coach to justify his intention to resign as well as his alleged promises not to join another Thai club is not relevant. The Club accepted with immediate effect the Coach's resignation, depriving itself of the possibility to formally set its conditions for the Coach's departure.

119. Based on the above considerations, the Sole Arbitrator finds that the Parties have mutually agreed to terminate their employment relationship on 19 October 2020.

D. Conclusion

120. For the reasons exposed here above, the Sole Arbitrator finds that a) the Club was not in a position to unilaterally impose on the Coach a 30% salary reduction, b) the Coach has not accepted a reduction of his salary and c) the Parties mutually agreed to terminate the Employment Agreement on 19 October 2020. As a consequence, the Coach is entitled to claim the payment of the difference between the contractually agreed salary and the reduced wage.

121. With respect to the payment of default interest, the question is not governed by FIFA Regulations and must therefore be assessed according to Swiss law. The pertinent provisions are:

Article 73 SCO

[1] Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum.

[2] Public law provisions governing abusive interest charges are not affected.

Article 104 SCO

[1] A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract.

[2] Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.

122. Article 104 SCO foresees that the debtor, on notice to pay an amount of money, owes an interest at the rate of 5 % per annum. Where a deadline for performance of the obligation has been set by agreement, a notice is not necessary (see Article 102 SCO; THÉVENOZ L.; in THÉVENOZ/WERRO (eds.), Commentaire Romand, Code des obligations I, Art. 1-252 CO, 3ème édition, 2021, ad Article 102 CO, N. 26 page 918).

123. Regarding the *dies a quo* for the interest, it must correspond to the due date of the salary. It appears that the default interest was correctly assessed in the Litigious Decision, which must therefore be upheld.

124. The above findings make it unnecessary for the Sole Arbitrator to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Muangthong United Football Club against the decision issued by the Single Judge of FIFA's Players' Status Committee on 20 April 2020 is dismissed.

2. The decision issued by the Single Judge of FIFA's Players' Status Committee on 20 April 2020 is confirmed.

(…)

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