Arbitration CAS 2017/A/5164 Football Association of Thailand (FAT) v. Victor Jacobus Hermans, award of 2 March 2018

Panel: Prof. Martin Schimke (Germany), President; Mr David Wu (China); Mr Michele Bernasconi (Switzerland)

Football
Termination of the employment contract with just cause by a coach
Implicit choice of law
Applicable regulations
Law to be applied subsidiarily
Validity of the employment contract
Net salary
Obligation to arrange for a work permit and/or visa and effect on the employment contract
Late payment as just cause of termination
Principle of the positive interest

1. **By agreeing on the jurisdiction of the CAS the parties are declaring – implicitly at least – that they agree with the application of the CAS Code. Thus the CAS case law generally regards an agreement conferring jurisdiction upon the CAS as an implicit and indirect choice of law by the parties within the meaning of the first alternative of Article 187(1) of Switzerland's Federal Code on Private International Law.**

2. **FIFA is competent to hear employment-related disputes between a club or an association and not only a player, but also a coach, provided the dispute is of international dimension (Art. 22 lit. c of the FIFA Regulations on the Status and Transfer of Players, RSTP). At the same time, the FIFA RSTP do not apply *in toto* to the merits of a contractual dispute between a coach and a football club (or a national association) because (i) Article 1 of the FIFA RSTP (entitled "Scope") provides that the FIFA RSTP concern players, not coaches, and (ii) the FIFA Statutes no longer contain the provision equating players with coaches, which provision appeared in the 2001 version of the FIFA Statutes at Article 34(4). In particular, Article 17 of the FIFA RSTP only applies to contractual disputes between players and clubs.**

3. **The main objective of the FIFA regulations is to create a standard set of rules to which all actors within the football community are subject to and can rely on. This objective would not be achievable if the decision making-bodies of FIFA would have to apply the national law of a specific party on every dispute brought to them. With the choice of law clause set out in the FIFA Statutes (i.e. that the CAS shall *"primarily apply the various regulations of FIFA and, additionally, Swiss law"*), the FIFA Statutes take into account an important characteristic of international sport. For, the latter is a global phenomenon which demands globally uniform standards. Only if the same terms and conditions**

apply to everyone who participates in organized sport, are the integrity and equal opportunity of sporting competition guaranteed.

4. **According to Article 1(1) and Article 2(1) of the Swiss Code of Obligations (SCO), an agreement is concluded only if the parties have, reciprocally and by mutual assent, expressed their common intent on all essential points. If an employment contract includes, *inter alia*, (i) a date, (ii) the names of the parties, (iii) the duration of the agreement, (iv) the position of the employee, (v) the remuneration components to be paid, and (vi) the signatures of the parties, it contains all *essentialia negotii* to be considered a valid and binding agreement between the parties.**

5. **A "net salary" is not an uncommon feature of employment contracts in professional football. Under such an arrangement, the employer, who is domiciled in the country where the employment contract is concluded and is familiar with its tax implications, assumes the responsibility to discharge the tax obligations arising from income owed to the employee under such employment contract.**

6. **It is generally the employer's duty to take the necessary measures to obtain a work permit or a visa for an employee to enter and perform his professional activity in a particular country. Moreover, an employment contract is not void just because the employee does not have a valid authorization to work due to his citizenship status.**

7. **To justify an assertion of "just cause", the breach upon which the contract termination is based must have a sufficient degree of seriousness. This determination requires consideration of whether the obligation which is breached lies at the core of the agreement between the parties. Late payment of an employee's salary, or failure to pay an employee's salary – particularly if such failure is continuous or repeated – may constitute "just cause" for termination of the employment contract by the employee. Termination for just cause based on unpaid remuneration is subject to two conditions: (i) the unpaid amount must not be "insubstantial", and (ii) the employee must have notified the employer of his breach.**

8. **According to the principle of the so-called positive interest (or "expectation interest"), applicable in principle to any calculation of damages where a contract is breached, the injured party must be awarded both the (i) outstanding remuneration due up to the date of termination, and (ii) remuneration owed under the employment contract from the date of termination until its expiry, with deduction of any income earned elsewhere because of the early termination of the employment contract. Such a deduction is in line with Article 337c(2) SCO and is on the basis that the injured party must not be enriched or over-compensated.**

I. PARTIES

1. Football Association of Thailand ("FAT" or the "Appellant") is a sports federation governing football, futsal and beach soccer in the Kingdom of Thailand and is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Victor Jacobus Hermans ("Mr. Hermans" or the "Respondent") is a Dutch futsal coach who coached Thailand's national futsal team between 2012 and 2016.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 3 January 2014, Mr. Hermans and the FAT entered into an employment agreement (the "Employment Contract") with a stated contract period of 20 February 2014 until 19 February 2017.

5. The Employment Contract was signed by Mr. Hermans and Mr. Worawi Makudi ("Mr. Makudi"), who served as the FAT President from 2007 and 2015. FIFA suspended Mr. Makudi in October 2015 for 90 days and banned him in October 2016 for five years on the basis that he was found to have altered the FAT Statutes without the approval of the FAT Congress.

6. Pursuant to the Employment Contract, Mr. Hermans agreed to work as the *"National Futsal Coach"* of the *"Thai National Futsal Team"*. In exchange for his services, Mr. Hermans was entitled to receive, *inter alia*, the following:

- *"[…]*
- *Salary: $17,500 US Dollars monthly […] Payment via cheque or bank account. Salary is net, all local taxes paid.*
- *Work permission and visum: to be arranged by the FAT for Mr. and Mrs. Hermans.*
- *Suitable 3 bedroom apartment.*

  […]
- *[…] each year 1 return flight ticket Thailand-Holland in Economy Class […]".*

7. In March 2016, the FAT stopped paying the salaries and monthly apartment rental amounts owed to Mr. Hermans pursuant to the Employment Contract.

8. Subsequently, Mr. Hermans and the FAT met to discuss their contractual situation and on 1 April 2016, the FAT proposed a new employment agreement to Mr. Hermans which specified, *inter alia*, a monthly salary of $10,000 USD.

9. On 12 May and 9 June 2016, Mr. Hermans sent letters to the FAT requesting payment of the outstanding salaries and rent owed to him pursuant to the Employment Contract.

10. On 20 June 2016, Mr. Hermans sent a third letter to the FAT stating the following: *"[…] I kindly urge for the last time to resume with the payment of the outstanding amount of USD […] and BAT […] by no later than 27 June 2016. Should you not [sic!] let this deadline pass without any reaction nor payment, I will then proceed to file a formal complaint with the FIFA's Players' Status Committee […]".*

11. On 24 June 2016, Mr. Hermans sent a letter to the FAT stating the following: *"[…] This intolerable situation has been lasting too long and living without any salary for several months is becoming harmful for my family and me. Therefore, in view of your reluctance to reply to my previous letters and to comply with your contractual obligations, I […] hereby terminate with just cause the [Employment Contract] […]".*

12. On 4 July 2016, the FAT sent a letter to Mr. Hermans stating that the FAT:

    (i) has not ignored the Employment Contract and had attempted to negotiate a new employment agreement with Mr. Hermans, and

    (ii) *"[…] respects your decision and accepts the termination of the [Employment Contract] whereby FAT willingly accepts the obligation to pay you the [outstanding amount of THB 1,922,662] as agreed. Pursuant to the rules and regulations of FAT, however, FAT will be able to pay you the [THB 1,922,662] upon the approval of the FAT's Board of Directors […]".*

13. On 30 September 2016, Mr. Hermans filed a Statement of Claim against the FAT with the FIFA Players' Status Committee (the "PSC") claiming the following amounts from the FAT:

    - USD 52,500 as outstanding remuneration for the months of March, April, and May 2016, plus 5% interest per year as from the dates due;
    - USD 15,750 as outstanding remuneration for the period of 1 until 27 June 2016, plus 5% interest per year as from the date due;
    - THB 192,000 as reimbursement for the apartment rental amounts for the months of March, April and May 2016, plus 5% interest per year as from the dates due;
    - THB 55,925 as reimbursement of one return flight ticket, plus 5% interest per year as from the date of departure (i.e., 30 June 2016);
    - USD 135,333.25 as compensation for the FAT's breach of the Employment Contract, plus 5% interest per year as from 28 September 2016;

- Any and all costs, expenses and fees arising in connection with Mr. Hermans' claim against the FAT.

14. In response, the FAT asserted that Mr. Hermans' claim should be rejected in its entirety on the basis that, *inter alia*, the Employment Contract was not valid and binding between the parties and that Mr. Hermans had illegally worked in Thailand without a work permit.

15. On 28 February 2017, the Single Judge of the FIFA PSC rendered his decision on the claim presented by Mr. Hermans against the FAT (the "Decision"), which partially accepted Mr. Hermans' claim and ordered the FAT, *inter alia*, to pay the following amounts:

- Outstanding remuneration in the amounts of USD 68,250 and THB 192,000, plus interest as follows:
    - 5% p.a. over the amount of USD 17,500 as from 1 April 2016 until the date of effective payment;
    - 5% p.a. over the amount of THB 64,000 as from 1 April 2016 until the date of effective payment;
    - 5% p.a. over the amount of USD 17,500 as from 1 May 2016 until the date of effective payment;
    - 5% p.a. over the amount of THB 64,000 as from 1 May 2016 until the date of effective payment;
    - 5% p.a. over the amount of USD 17,500 as from 1 June 2016 until the date of effective payment;
    - 5% p.a. over the amount of THB 64,000 as from 1 June 2016 until the date of effective payment;
    - 5% p.a. over the amount of USD 15,750 as from 28 June 2016 until the date of effective payment.
- Reimbursement of flight ticket in the amount of THB 55,925 and compensation for breach of contract in the amount of USD 127,666, plus 5% interest p.a. on the said amount as from 28 September 2016 until the date of effective payment.

16. With its appeal, the FAT is challenging the Decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 26 May 2017, the FAT filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to Article R48 of the Code of Sports-related Arbitration (the

"Code"), to challenge the Decision. The Statement of Appeal included the Appellant's nomination of Mr. David Wu as arbitrator.

18. On 9 June 2017, the Appellant filed its Appeal Brief pursuant to Article R51 of the Code.

19. On 12 June 2017, the Respondent nominated Mr. Michele A. R. Bernasconi as arbitrator.

20. On 10 July 2017, the Respondent filed his Answer pursuant to Article R55 of the Code. The Answer included the Respondent's request that the panel exclude certain items of evidence submitted in the Appeal Brief pursuant to Article R57.3 of the Code.

21. Also on 10 July 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the parties that the panel appointed to decide the appeal (the "Panel") was as follows:

President:	Prof. Dr. Martin Schimke, Attorney-at-Law, Dusseldorf, Germany
Arbitrators:	Mr. David Wu, Attorney-at-Law, Shanghai, P. R. China
	Mr. Michele A. R. Bernasconi, Attorney-at-Law, Zurich, Switzerland

22. On 13 July 2017, the parties were invited to inform the CAS Court Office whether they preferred a hearing to be held in respect of the appeal, or for the Panel to issue an award based solely on the parties' written submissions.

23. On 20 July 2017, the Appellant requested that a hearing be held. On the same day, the Respondent stated that he would prefer that a decision be issued on the papers.

24. On 26 July 2017, the parties were informed that the Panel had decided to hold a hearing.

25. On 10 October 2017, the parties were informed that the Panel had decided to reject the Respondent's request to exclude evidence and that the reasons for the Panel's decision would be communicated to the parties at the hearing.

26. On 11 and 13 October 2017, the Respondent and Appellant, respectively, signed and returned the Order of Procedure.

27. On 19 October 2017, pursuant to Article R57 of the Code, a hearing was held in Lausanne, Switzerland. The Panel was assisted by the CAS Head of Mediation Mr. José Luis Andrade and the *ad hoc* Clerk, Mr. Daniel Ratushny, and joined by the following:

<u>On behalf of the Appellant:</u>

Mr. Trin Kanhirun (Appellant's Representative)

Dr. Xavier Favre-Bulle (Attorney-at-Law)

Mr. Mark Bovet (Trainee)

Mrs. Prachumsil Button (Interpreter)

On behalf of the Respondent:

Mr. Victor Jacobus Hermans

Mr. Johann Weiss (Attorney-at-Law)

Ms. Wilhelmina Johanna Hubertina Bovij (Legal Representative)

28. At the hearing, the Appellant called the following witnesses to testify: Mr. Chanin Kanhirun (as the FAT Legal Secretariat) and Mr. Adisak Benjasiriwan (as the FAT Chairman of the Futsal Committee).

29. At the outset of the hearing, the parties confirmed that they had no objections to the constitution of the Panel. The parties were given the opportunity to present their cases, make their submissions and arguments, and answer questions asked by the Panel. At the conclusion of the hearing, the parties confirmed that they had no complaint regarding the conduct of the proceedings and that their right to be heard had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

30. This section summarizes the substance of the parties' main arguments as set out in the parties' written submissions and evidence offered. While this section does not contain every contention and allegation made by the parties, the Panel has carefully considered all the written submissions and evidence offered by the parties, including those not specifically mentioned in the following summary.

A. The Appellant's Submissions

31. In its Appeal Brief, the Appellant requests the following relief:

> *"– make an award to annul the decision of the Single Judge of the Players' Status Committee of FIFA dated 28 February 2017;*
>
> *– order Mr Victor Jacobus Hermans to pay all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the Football Association of Thailand (FAT);*
>
> *– dismiss any other relief sought by Mr Victor Jacobus Hermans;*
>
> *– order any such other relief as the CAS Panel may deem appropriate".*

32. The Appellant's submissions in support of its requests may be summarized as follows:

1) Applicable Law

33. The law to be applied to the present dispute is (i) Swiss law, (ii) the rules and regulations of the FAT and (iii) certain rules of Thai public law, based on the reasoning set out below and pursuant to Article R58 of the Code, which states:

> *"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".*

34. The FIFA Statutes and regulations *"are of no use for governing the substance of the [Employment Contract] and of the dispute at stake"*, because:

- *"Except for Article 22(c) of the FIFA Regulations on the Status and Transfer of Players ("RSTP") (in conjunction with Article 23 RSTP), the FIFA Statutes and regulations do not contain any provision regarding employment of futsal coaches".*
- Article 22(c) RSTP in conjunction with Article 23 RSTP are rules of a pure procedural nature providing that the FIFA PSC is competent to hear disputes such as the present one.
- Articles 13 to 18 RSTP apply to contractual relationships between professionals and clubs *"but not to a relationship such as the one purportedly between FAT and Mr Hermans".*

35. Swiss law is applicable because FIFA is domiciled in Zurich, Switzerland.

36. The rules and regulations of the FAT and certain rules of Thai public law must be applied or taken into account in the present dispute because (i) such dispute is between a Thai sports association and a Dutch futsal coach, (ii) the Employment Contract was signed by Mr. Hermans and Mr. Makudi in Thailand in 2014 and was for services to be rendered by Mr. Hermans in Thailand, (iii) in 2014, both Mr. Hermans and Mr. Makudi were domiciled in Thailand, and (iv) *"[a] National Federation cannot be expected to breach mandatory legal provisions of its own country".*

2) The Nullity of the Employment Contract

37. Article 20(1) of the Swiss Code of Obligations ("SCO") states: *"A contract is void if its terms are impossible, unlawful or immoral".*

38. Similarly, section 150 of the Thailand Civil and Commercial Code states: *"An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals".*

39. The Employment Contract *"stipulated that '[s]alary is net, all local taxes paid', meaning that Mr. Hermans shall not pay any local taxes himself. This is illegal in Thailand as this breaches Sections 35, 50*

and 37bis of the Revenue Code of Thailand. The object of the [Employment Contract] was to set up an illicit and undeclared employment relationship, permitting Mr Hermans to avoid paying taxes in Thailand in breach of the Revenue Code of Thailand". The Employment Contract is therefore unlawful and, pursuant to Article 20(1) SCO, void.

40. Article 20(2) SCO provides for selective nullification of offensive contractual terms and maintenance of the rest of the contract, unless, after having established the hypothetical will of the parties, *"it can be assumed that the contract would not have been concluded without the provision under scrutiny"*. However, the Employment Contract would not have been concluded without the provision that illegally shifts onto the FAT the duty to pay taxes because *"[i]n 2016, Mr. Hermans refused to even negotiate with FAT a proper agreement implying that he would have to pay taxes"*.

41. The whole Employment Contract is null and void under Article 20 SCO. The FAT could not make payments to Mr. Hermans under the Employment Contract without breaching Thai law and *"the only option was to immediately revert to Mr Hermans and rectify the situation with a new agreement that would be capable of being performed"*.

3) The Non-binding Nature of the Employment Contract because of Lack of Representative Power by Mr. Makudi

42. Pursuant to Article 32(1) SCO, the rights and obligations arising from the Employment Contract made by Mr. Makudi in the name of the FAT are binding on the FAT if the following two cumulative conditions are met:

(i) Mr. Makudi shall act in the name of the FAT, and

(ii) Mr. Makudi shall have the necessary powers to do so.

43. *"In the case at hand, none of the two cumulative conditions of Article 32(1) SCO are met.*

44. In respect of condition (i) set out above, Mr. Makudi did not act in the name of the FAT because the Employment Contract *"is not made on the FAT's letterhead and Mr. Makudi did not use the FAT's seal, contrary to longstanding practice"*.

45. In respect of condition (ii) set out above, Mr. Makudi did not have the powers to bind the FAT through the Employment Contract for the following reasons:

- Article 35 of the 2013 edition of the Regulations of Administration of Football Association of Thailand under the Patronage of His Majesty the King (the "FAT Regulations") *"sets out the various exclusive powers of the FAT Executive Committee. One of these exclusive powers is to 'appoint the coaches for the representative teams and other technical staff"*.

- Article 38.2.1 of the FAT Regulations stipulate that the main responsibility of the FAT President (i.e., Mr. Makudi at the time) *"is to implement the decisions passed by the Congress and the Executive Committee […] Failing a prior decision of the Executive Committee to appoint a*

national coach, FAT's President has no power to enter into an employment contract with a coach in the name and on behalf of FAT".

- *"There are no minutes of an Executive Committee meeting reporting that FAT's Executive Committee decided in 2014 to appoint Mr Hermans. The reason is that it was Mr Makudi's sole decision".*

46. According to Section 71 of the Thai Civil and Commercial Code, the FAT Regulations are relevant to define the powers of Mr. Makudi as agent of the FAT: *"In the case where a juristic person has several representatives, if not otherwise provided by the law, or defined in regulations or constitutive act, decisions as to the affairs of juristic person are made by a majority of representatives".*

47. Under the FAT Regulations, Swiss law and Thai law, Mr. Makudi did not have the powers to bind the FAT through the Employment Contract.

48. Article 38(1) SCO states: *"Where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless he ratifies the contract".*

49. Pursuant to Article 38(1), *"Mr Makudi's legal acts did not pass to FAT, for FAT did not ratify Mr Makudi's acts".*

50. Assuming that the Employment Contract is not null and void, then the contracting parties are Mr. Hermans and Mr. Makudi. Mr. Hermans may bring a claim against Mr. Makudi, but not against the FAT.

4) As Alternative Argument, the Valid Suspension of the Employment Contract

51. *"a) The work visa was a condition precedent to the Contract.*

In Swiss law, conditions precedent are governed by Article 151 SCO, which provides as follows:

1 A contract is conditional if its binding nature is made dependent on the occurrence of an event that is not certain to happen.

2 The contract takes effect as soon as this condition precedent occurs, unless the parties clearly intended otherwise".

52. The Employment Contract required Mr. Hermans to have *"work permission and visum". "An interpretation of the Contract in accordance with the rules of good faith leads to the conclusion that the parties intended to give effect to the [Employment Contract] only if and when Mr Hermans obtained a work visa".*

53. Mr. Hermans never requested or obtained a work visa, the issuance of which *"is an uncertain event".* He chose an illicit and undeclared employment relationship, avoided being a taxpayer and worked without having a taxpayer identification number.

54. *"Considering that the condition precedent (work visa) never materialised, […] FAT validly suspended the performance of the Employment Contract because the condition precedent was not met".*

55. *"b) In the absence of a work visa the Contract was impossible to perform".* The FAT also validly suspended the performance of the Employment Contract because in the absence of a work visa, the Employment Contract was impossible to perform for legal reasons.

56. The Working of Alien Act of Thailand at section 27 prohibits employers from hiring and therefore paying workers who have no valid working permit. Mr. Hermans had no work visa and therefore, it was impossible for the FAT to pay him due to legal reasons.

57. Article 119(1) SCO states: *"An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor".* This impossibility may be due to factual circumstances or legal reasons.

58. FAT's obligation to pay the salary and benefits pursuant to the Employment Contract therefore extinguished under Article 119(1) SCO.

5) As further Alternative Argument, the Lack of Just Cause for the Termination of the Employment Contract Made by Respondent

(i) The Employment Contract was terminated before the expiry of the time limit in Mr. Hermans' notice.

59. Mr. Hermans' notice to the FAT of 20 June 2016 *"fixed a final time limit until 27 June 2016 for the payment of the outstanding salaries and benefits".*

60. *"When a notice contains a time limit to remedy a default, the author of the notice …cannot terminate the contract with immediate effect before the expiry of such time limit".*

61. *Nevertheless, Mr Hermans decided to unilaterally terminate the [Employment Contract] on 24 June 2016, i.e. three days before the time limit set forth in his notice of 20 June 2017 […] Under these circumstances, according to Swiss law, Mr Hermans' immediate termination of 24 June 2016 cannot amount to a termination for just cause. Therefore, Mr. Hermans terminated the [Employment Contract] with immediate effect, but without just cause".*

(ii) The pursuit of the contractual relationship was not impossible.

62. Mr. Hermans also terminated the Employment Contract without just cause because *"[i]n his notice of 20 June 2016, Mr Hermans explained that he was hoping 'to find a solution to this uncomfortable situation'. By his own admission, the situation was not untenable to the degree that the pursuit of the contractual relation was impossible, which is the relevant standard in Swiss law".*

63. It is well established that when the seriousness of the alleged cause does not render impossible the pursuit of the contractual relation, a warning shall be sent to the other party before the termination for just cause can occur.

64. *"Mr. Hermans was obliged to send to FAT a proper warning announcing his intention to terminate the [Employment Contract] for just cause. He failed to do so […]. This rendered the termination without just cause".*

B. The Respondent's Submissions

65. In his Answer, the Respondent requests the following relief:

"1. The Appeal filed by the Appellant shall be dismissed in its entirety and that the CAS confirms the presently challenged decision passed by the Single Judge of the Players' Status Committee on 28 February 2017 in its entirety.

2. The Appellant shall bear all the costs of these arbitration proceedings".

1) Applicable Law

66. The Employment Contract is silent as to the applicable law.

67. Article 57(2) of the FIFA Statutes provides: *"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

68. The Decision challenged by FAT was rendered by the FIFA PSC. The laws applicable to this dispute are *"the FIFA Statutes and rules, primarily the regulations […] but also the subsidiary application of Swiss law should the need arise to fill a possible gap in the Regulations of FIFA".*

69. In respect of the Appellant's assertions that the Panel must consider certain rules of Thai public law, Article 25(6) of the RSTP and Article 2 of the FIFA Rules Governing the Procedures of the PSC and Dispute Resolution Chamber require the application of the FIFA Regulations and Statutes *"whilst taking into account (not mandatorily apply!) national laws. The terms of the articles precisely reflect the intention to leave scope of discretion to the deciding bodies so as for them to be in a position to apply general legal principles in the international context and not to be bound by national laws. By doing so […] the FIFA deciding bodies act in accordance with one of the main purposes of the FIFA regulations, i.e. to create a standard set of rules to which all football stakeholders are subject to and able to rely on. By acting in a different way, i.e. in the present situation by constraining itself to apply national laws of specific parties involved in disputes […] the FIFA deciding bodies, would not be able to pursue its purpose".*

70. The CAS has recognized and confirmed the legitimacy of such approach in jurisprudence such as CAS 2005/A/983 & 984, which is generally meant to protect players and coaches against the financial consequences of the non-execution of domestic administrative formalities by a football club or a member association, such as a club's failure to register the coach's employment contract with the relevant national football association. *"This stance usually protects coaches against clubs or associations' negligence or malice".*

2) The Validity of the Employment Contract

71. Based on the arguments set out below, the Respondent is of the view that the Employment Contract is a valid and legally binding contract.

72. According to jurisprudence of FIFA and the CAS, the inclusion of *"essentialia negotii"* in a document signed between parties is *"the only criterion to be applied"* in determining whether such document is a valid contract (see for example CAS 2013/A/3221 at no. 8.4).

73. The Employment Contact contains all *"essentialia negotii"* as it is signed by both parties, stipulates a clear duration for the employment relationship and specifies the obligation of Mr. Hermans to work as national futsal coach and the obligation of the FAT to pay monthly remuneration of USD 17,500 to Mr. Hermans. *"With this in mind, the Respondent wishes to highlight that it is clear that the parties' intentions were to conclude in good faith a contractual relationship for a fixed duration of time"*.

74. In respect of the Appellant's assertion that the Employment Contract did not contain the Appellant's seal, the lack of such formalities does not invalidate an otherwise valid contract, as stated in paragraph 15 of the Decision: *"[T]he non-compliance of pure formalities cannot per se affect the validity of a contract as long as the 'essentialia negotii' are contained in the relevant contract which is clearly the case"*.

75. In respect of the Appellant's assertion that the Employment Contract was not legally binding between the parties because it was signed by Mr. Makudi:

- When the Employment Contract was signed, Mr. Makudi was the FAT President.
- Mr. Makudi is mentioned in the Employment Contract as the FAT President.
- It is reasonable to assume that the President of a football association can legally represent that association's interests and enter into contractual agreements on its behalf.
- *"[I]t could not reasonably be expected of the Respondent to have known whether Mr. Makudi had the necessary authority to represent and bind the Appellant at the time the agreement was concluded"*.

76. If it were found that the Employment Contract was invalid, Article 320(3) SCO states: *"Where an employee performs work in good faith for the employer under a contract which is subsequently found to be invalid, both parties must discharge their obligations under the employment relationship as if the contract had been valid until such time as one party terminates the relationship on grounds of the invalidity of the contract"*. Therefore, even if the Panel were to consider the Employment Contract as invalid, the Respondent still had the obligation to comply with such contract (i.e. to pay the Respondent's salaries and rent) until the date of termination pursuant to Article 320(3) because *"the Respondent had still performed his work in good faith for the Appellant under the [Employment Contract] until 27 June 2016"*.

3) The Termination of the Employment Contract was made with Just Cause

77. Article 14 RSTP states that a contract *"may be terminated unilaterally by either party without consequences of any kind […] where there is just cause"*. However, "just cause" is not defined in such regulations.

78. Article 337(2) SCO provides that the nature of the breach must be sufficiently serious to constitute "just cause": *"In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice"*.

79. The jurisprudence of CAS reinforces that *"just cause to terminate a contract is generally said to exist where the breach has reached such serious levels that the injured party cannot in good faith be expected to continue the contractual relationship (CAS 2008/A/1447 and CAS 2008/A/1517)"*.

80. *"[B]efore proceeding with the termination, it is advisable, depending on the circumstances, for the aggrieved party to send a notice to the breaching party asking it to desist its breachful acts"*.

81. *"[A] party that has not been paid its salary for more than three months has just cause to terminate the contract (CAS 2014/A/3584 at paragraph 87)"*.

4) The Breach of the Employment Contract by the Appellant

82. It is undisputed that the Respondent performed his obligations for the Appellant for more than two years without any complaint from the Appellant, who was fully satisfied with the Respondent's work.

83. The Appellant breached the Employment Contract without just cause by neglecting its main contractual duties to pay the Respondent's salary and rent for the months of March, April, May and part of June 2016 without any valid reason.

84. The Respondent vehemently rejects that he was negotiating with the Appellant a new employment contract. The Appellant's main purpose for attempting to conclude a new employment contract with the Respondent was to reduce the Respondent's salary.

5) The Warning Sent by Respondent to Appellant

85. In CAS 2014/A/3460 at paragraph 63, the panel held that *"[a]lthough the need to send notices is not mandatory in all cases and is established on a case by case basis, CAS panels have regarded the notices as a vital step which could possibly have played a role in bringing an end to an unexplained breach or series of breaches, particularly where the breach or breaches in question has not yet reached a fundamentally unacceptable level and / or unduly prejudiced the non-breaching party to the extent that the latter cannot be reasonably expected to continue the contract"*.

86. While fully complying with his contractual obligations, the Respondent issued three different warnings to the Appellant to allow the Appellant to rectify the unsustainable and unbearable situation.

87. The Appellant never replied to the Respondent's warnings, nor did it pay the outstanding amounts requested by the Respondent.

88. *"[T]he Respondent, being in an unbearable situation, had no other choice than to rightfully terminate the contractual relationship with the Appellant at the latter's fault"*.

6) The Financial Consequences of the Breach of the Employment Contract

89. In accordance with the general legal principle of *"pacta sunt servanda"*, the Appellant is liable for the premature termination of the Employment Contract and must bear the financial consequences of its breach.

90. At the time of termination of the Employment Contract, the Appellant was liable to pay the due and outstanding remuneration of March, April, May and part of June 2016 for a total sum of USD 68,250 as well as THB 192,000 for the rental cost of the apartment for the same time period.

91. The Respondent is also entitled to be reimbursed for the cost of his flight ticket to the Netherlands in the amount of THB 55,925.

92. Since the FIFA Regulations do not specify the manner in which compensation is to be awarded in employment disputes between clubs and coaches, reference is made to Article 337c(1) of the SCO, which states: *"[i]f the employer dismisses the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period"*.

93. By analogy, a coach is entitled to compensation in case of termination of his employment contact with just cause due to a breach committed by his employer. With no express termination clause in the Employment Contract and considering the normal practice of FIFA decision-making bodies, *"the residual value of the [Employment Contract] serves as the basis for calculation of the compensation"*.

94. The Respondent is *"entitled to compensation corresponding to what he would have earned had the Employment Contract been fulfilled to its expected date of expiry, pursuant to the so-called doctrine of restitution (CAS 2008/A/1519-1520)"*.

95. The Employment Contract was valid until 19 February 2017. The Respondent concluded a new employment contract with the Football Association of Indonesia for a monthly wage of USD 11,500. Therefore, the Respondent is *"entitled to receive from the Appellant the total amount of USD 127,666 as compensation, i.e., USD 135,333 less USD 7,667, as rightfully (set out in the Decision)"*.

V. JURISDICTION

96. Article R47 of the Code provides as follows:

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

97. Article 58(1) of the FIFA Statutes states:

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

98. Article 23(3) RSTP also states: *"Decisions reached by the single judge or the Players' Status Committee may be appealed before the Court of Arbitration for Sport (CAS)".*

99. The jurisdiction of the CAS is not disputed by the parties and the Panel deems that the CAS has jurisdiction, as confirmed by the parties in the Order of Procedure.

VI. ADMISSIBILITY

100. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

101. The time limit in Article R49 of 21 days to file the statement of appeal may be derogated by the statutes or regulations of the federation, association or sports-related body concerned. In this regard, Article 58(1) of the FIFA Statutes states that *"[a]ppeals against final decisions passed by FIFA's legal bodies […] shall be lodged with CAS within 21 days of notification of the decision in question".*

102. The Appellant was notified of the grounds of the Decision on 5 May 2017. The Statement of Appeal was filed on 26 May 2017.

103. The Appellant filed its Appeal Brief on 9 June 2017 pursuant to Article R51 of the Code.

104. For the above reasons, the Panel is satisfied that the Appellant complied with the applicable time limits and that therefore the Appeal is admissible.

VII. APPLICABLE LAW

105. The following summarizes the Panel's reasoning in respect of the law that it shall apply to the merits of this dispute.

(i) The PILA

106. As a starting point, the provisions of Chapter 12 of Switzerland's Federal Code on Private International Law ("PILA") will apply to any arbitration if (i) the seat of the arbitral tribunal is in Switzerland, and (ii) at the time that the arbitration agreement was concluded, at least one of the parties was neither domiciled nor habitually residing in Switzerland (see Article 176(1) PILA).

107. However, Article 176(2) PILA permits the parties to exclude Chapter 12 PILA from the arbitration and agree to the application of the third part of the Swiss Code of Civil Procedure by an express statement in the arbitration agreement or in a later agreement.

108. The CAS has its seat in Lausanne, Switzerland and at least one of the parties in the present dispute is neither domiciled nor habitually resident in Switzerland. There was no exclusion of Chapter 12 PILA by the parties to this dispute pursuant to Article 176(2) PILA. Therefore, Chapter 12 PILA applies to the present proceedings.

109. Article 187(1) of PILA instructs the arbitral tribunal to decide the present dispute according to (i) the rules of law chosen by the parties or, in the absence of such a choice, (ii) the rules of law with which the case has the closest connection.

(ii) The Parties' implicit choice of law under Article 187(1) PILA

110. The parties to the present dispute did not, in the Employment Contract or during the proceedings before the CAS, explicitly choose a law to be applied to the merits.

111. However, the CAS jurisprudence has consistently held that the parties' choice of law under Article 187(1) PILA need not be explicit: *"The PILA is the relevant arbitration law […]. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. In agreeing to arbitrate the present dispute according to the Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the Code"* (CAS 2014/A/3850 at no. 45 & 49; also see CAS 2008/A/1705 at no. 7.2; CAS 2008/A/1639 at no. 10.2.).

112. This legal doctrine was further explained as follows: *"[B]y agreeing on the jurisdiction of the CAS the parties are declaring – implicitly at least – that they agree with the application of the CAS Code […] Thus the CAS case law generally regards an agreement conferring jurisdiction upon the CAS as an implicit and indirect choice of law by the parties within the meaning of the first alternative of Article 187(1) of the PILA"* (HAAS U., *Applicable law in football-related disputes*, CAS Seminar, Evian, 8 October 2015).

113. Each of the parties to the present dispute is, at least indirectly, affiliated to FIFA and each submitted to arbitration rules contained in the FIFA Statutes and Regulations. Article 57(1) of the FIFA Statutes recognizes the CAS to resolve disputes such as the present one between a member association and a coach, and Article 58(1) of the FIFA Statutes provides for the jurisdiction of the CAS to hear an appeal of the Decision.

114. Therefore, in respect of Article 187(1) of PILA, each of the parties to the present dispute is deemed to have implicitly agreed to the application of the Code and specifically, to a determination of the law applicable to the merits pursuant to Article R58 of the Code, which states:

"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".

115. Accordingly, the Panel must first identify the *"applicable regulations"* for the present dispute.

(iii) The Applicable Regulations

116. Article 57(2) of the FIFA Statutes states: *"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".*

117. In the present case, the FIFA Statutes and Regulations are the "applicable regulations" and Article 57(2) of the FIFA Statutes also provides that Swiss law shall apply additionally.

118. With regard to this, the Panel can only confirm that FIFA is competent to hear employment-related disputes between a club or an association and not only a player, but also a coach, provided the dispute is of international dimension (see Art. 22 lit. c of the FIFA RSTP). At the same time, it is well-established FIFA and CAS jurisprudence, that the FIFA RSTP do not apply *in toto* to the merits of a contractual dispute between a coach and a football club (or a national association) because (i) Article 1 of the FIFA RSTP (entitled *"Scope"*) provides that the FIFA RSTP concern players, not coaches, and (ii) the FIFA Statutes no longer contain the provision equating players with coaches, which provision appeared in the 2001 version of the FIFA Statutes at Article 34(4) and stated *"[c]oaches shall be classified as players as far as status is concerned"* (see CAS 2008/A/1464 & 1467 at no. 24; CAS 2012/A/2906 at no. 72). In particular, Article 17 of the FIFA RSTP only applies to contractual disputes between players and clubs (see Decision of the FIFA Player Status Committee, No. 01120974, dated 30 January 2012).

119. Therefore, the Panel is of the view that the FIFA RSTP do not provide assistance for the issues of merit that are in front of the Panel in the present case.

(iv) The law or rules of law to be applied subsidiarily

120. Article R58 establishes that the Panel shall decide the dispute not only according to the applicable regulations, but also according to another law or other rules of law, which shall apply subsidiarily.

121. The parties have not agreed in the Employment Contract or during the proceedings before the CAS on the application of a specific national law. Therefore, the Panel shall subsidiarily apply either (i) Swiss law on the basis that FIFA, through the PSC, issued the Decision which is being challenged and FIFA is an association registered and headquartered in Switzerland (i.e. *"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 (ii) *"the rules of law that the Panel deems appropriate"*.

122. The Appellant asserts that in addition to applying Swiss law to the present dispute, (i) certain rules of Thai public law *"must be taken into account by the Panel under Article R58 of the CAS Code ('…or according to the rules of law the Panel deems appropriate')"*, and (ii) the FAT Regulations *"must be applied"* by the Panel.

123. In this regard, the Panel concurs with the general statement of the Single Judge of the FIFA PSC at paragraph 14 of the Decision: *"[T]he main objective of the FIFA regulations is to create a standard set of rules to which all actors within the football community are subject to and can rely on. This objective would not be achievable if the decision making-bodies of FIFA …would have to apply the national law of a specific party on every dispute brought to him"*.

124. In a previous CAS award, the panel noted that with the choice of law clause set out in Article 57(2) of the FIFA Statutes (i.e. that the CAS shall *"primarily apply the various regulations of FIFA and, additionally, Swiss law"*) *"the FIFA Statutes take into account an important characteristic of international sport. For, the latter is a global phenomenon which demands globally uniform standards. Only if the same terms and conditions apply to everyone who participates in organized sport, are the integrity and equal opportunity of sporting competition guaranteed"* (CAS 2006/A/1180 at no.12).

125. Similar with the present dispute, the appellant in CAS 2008/A/1517 requested that the panel apply, in addition to the FIFA regulations, the regulations of the Hellenic Football Federation and Greek law because the applicable employment contract was explicitly subject to various Statutes and regulations of Greek law. The panel in that case stated at paragraph 7: *"[D]ue to the indispensable need for the uniform and coherent application worldwide of the rules regulating international football (TAS 2005/A/983-984, paragraph 24), the Panel rules that Swiss law will be applied for all the questions that are not directly regulated by the FIFA Regulations"*.

126. For the reasons summarized above, the Panel shall apply Swiss law to the present dispute pursuant to Article R58 of the Code and in accordance with the applicable regulations.

VIII. MERITS

The Issues

127. The main issues to be resolved by the Panel in deciding this dispute are the following:

(i) Is the Employment Contract a valid contract binding on the FAT?

(ii) If the Employment Contract is valid and binding, did the FAT "validly suspend performance"?

(iii) If the Employment Contract is valid, binding and was not "validly suspended" by the FAT, did Mr. Hermans terminate the Employment Contract with "just cause"?

(iv) If Mr. Hermans terminated the Employment Contract with "just cause", should the compensation awarded by the FIFA PSC to Mr. Hermans be modified?

(i) Is the Employment Contract a valid contract binding on the FAT?

a) Valid Contract

128. According to Article 1(1) and Article 2(1) SCO, an agreement is concluded only if the parties have, reciprocally and by mutual assent, expressed their common intent on all essential points (CAS 2015/A/3959 at no. 97; see also CAS 2008/A/1589 at no. 13).

129. The Employment Contract includes, *inter alia*, (i) a date, (ii) the names of the parties, (iii) the duration of the agreement, (iv) Mr. Hermans' position as coach of the Thai National Futsal Team, (v) the remuneration components to be paid to Mr. Hermans, and (vi) the signatures of the parties.

130. The Panel is of the view that the parties agreed on all the essential elements of their employment relationship and that the Employment Contract contained all *essentialia negotii* to be considered a valid and binding agreement between the parties (see CAS 2015/A/3953 & 3954 at no. 44; CAS 2014/A/3573 at no. 66).

131. Nevertheless, the Appellant asserts that because of the clause *"Salary is net, all local taxes paid"*, the object of the Employment Contract was to create *"an illicit and undeclared employment relationship, permitting Mr Hermans to avoid paying income taxes in Thailand"* in breach of applicable Thai law, thus rendering the Employment Contract void under Article 20(1) SCO.

132. The Appellant further submits that Article 20(2) SCO, which provides for selective nullification of offensive contractual terms and maintenance of the rest of the contract, may not be applied because *"Mr Hermans refused to even negotiate with FAT a proper agreement implying that he would have to pay taxes"* and therefore, the Employment Contract would not have been concluded without the clause that illegally shifts onto the FAT the duty to pay taxes. Therefore, the fundamentally illegal nature of the Employment Contract renders it wholly null and void under Article 20 SCO, according to the Appellant.

133. At the hearing, Mr. Hermans stated that he assumed, based on the clause *"Salary is net, all local taxes paid"*, that the FAT was obliged to pay and was paying all required taxes arising from his gross salary under the Employment Contract. The Panel finds Mr. Hermans' assumption to be reasonable.

134. In this regard, the Panel notes that a "net salary" is not an uncommon feature of employment contracts in professional football. Under such an arrangement, the employer, who is domiciled in the country where the employment contract is concluded and is familiar with its tax implications, assumes the responsibility to discharge the tax obligations arising from income

owed to the employee under such employment contract: *"It must be added that it is a common understanding in the practice of sports contracts […] that the "net amount" refers to the final amount the creditor expects to receive in its bank account. Under this approach, all sorts of taxes, expenses and charges due to the tax authorities […] in connection with the payment […] are to be paid by the debtor on top of the agreed net amount"* (CAS 2012/A/2806 at no. 75).

135. To highlight the alleged illegality of the Employment Contract, the Appellant introduced as evidence (i) the draft of the contract dated 1 April 2016, proposed by the Appellant to Mr. Hermans, and (ii) the contract dated 1 July 2016 between the FAT and Mr. Hermans' successor, Mr. Miguel Rodrigo Conde Salazar (the "Salazar Contract"). Each of these two contracts contain the following clause: *"E. Compensation […] Personal Income Tax Revenue Deduction of 15% will be implemented by Department of Internal Revenue for foreign workers under Constitutional Law of the Kingdom of Thailand"*. Such clause is certainly more detailed than *"Salary is net, all local taxes paid"* (as contained in the Employment Contract), but both clauses can be reasonably interpreted to mean that the appropriate amount of tax arising from the gross salary would be deducted or withheld at source prior to payment of the net salary to the employee. In this regard, the Panel does not recognize how the alleged illegality of the Employment Contract would have been somehow cleansed, as argued by the Appellant, by the more developed wording contained in these two subsequent contracts.

136. The Panel is not convinced that a system of deduction or withholding of income taxes payable or more generally, the FAT paying taxes on behalf of Mr. Hermans, constitutes a breach of Sections 35, 50 and 37bis of the Revenue Code of Thailand, as asserted by the Appellant in the Appeal Brief without explanation. Moreover, when the witness Mr. Adisak Benjasiriwan was asked at the hearing to compare the Employment Contract with the Salazar Contract and specifically, Section E. of the Salazar Contract, he stated that the FAT can and was required to deduct tax on behalf of the taxpayer.

137. The Panel is also not convinced by the Appellant's claim that Mr. Hermans refused to negotiate with the FAT a *"proper agreement implying that he would have to pay taxes"* and finds it more likely that Mr. Hermans' aversion to the draft agreement dated 1 April 2016 was because under such agreement his monthly salary would be reduced by $7,500 USD, or 43%.

138. Finally, the Panel doubts that the object of the Employment Contract was to create a tax-avoidance scheme for Mr. Hermans and finds it more likely that such contract sought to extend his tenure as the coach of the Thai National Futsal Team.

b) Binding on the FAT

139. The Appellant further argues that the Employment Contract did not bind the FAT pursuant to Article 32(1) SCO because (i) the Employment Contract *"is not made on the FAT's letterhead and Mr. Makudi did not use the FAT's seal, contrary to longstanding practice"*, and (ii) Mr. Makudi did not have the necessary powers to bind the FAT through the Employment Contract.

140. The Panel notes that Article 320(1) SCO provides that an individual employment contract is not subject to any specific formal requirement, except where the law provides otherwise. The

Appellant did not submit evidence of any legal requirement for the FAT's letterhead or seal to be included or used in the Employment Contract.

141. The Panel is also not convinced by the Appellant's arguments that Mr. Makudi, as the FAT President at the time the Employment Contract was signed, did not have the power to enter into the Employment Contract in the name of and on behalf of the FAT. In this regard, the Panel notes that pursuant to the FAT Regulations, the FAT President *"represents the Association legally"* under Article 38.1 and is entitled to sign for the Association under Article 40. Contrary to the Appellant's assertions, the Executive Committee's power to appoint the coaches for the representative teams under Article 35.10 is not necessarily an *"exclusive power"* and further, the list of the FAT President's responsibilities set out in Article 38.2 is not exhaustive.

142. If, however, as asserted by the Appellant, Mr. Makudi did not have the power to enter into the Employment Contract in the name of and on behalf of the FAT, this was not a matter within Mr. Hermans' knowledge or control. On the contrary, Mr. Hermans had reasonable grounds to believe, based on Mr. Makudi's position and conduct, and based on the fact that the Mr. Hermans was indeed able to work for the FAT since 2012 without any objection or intervention whatsoever by the FAT, that Mr. Makudi had apparent authority to act on behalf of the FAT and was fully empowered to negotiate and conclude the Employment Contract. Moreover, Article 39(1) SCO may provide recourse for the FAT to bring an action against Mr. Makudi for compensation if, in fact, Mr. Makudi entered into the Employment Contract on behalf of the FAT without authority.

143. For the reasons set out above, the Panel finds that the Employment Contract was a valid contract binding on Mr. Hermans and the FAT.

(ii) Did the FAT "validly suspend performance" of the Employment Contract?

144. The Appellant submits that Mr. Hermans *"opted for an illicit and undeclared employment relationship. He never asked for (and never obtained) a work visa. Without work visa, Mr Hermans could avoid being a taxpayer in Thailand"*.

145. The Panel notes that under the Employment Contract, the FAT had the obligation to arrange Mr. Hermans' work visa: *"Work permission and visum: to be arranged by the FAT"*.

146. CAS jurisprudence has held that *"it is generally the employer's duty to take the necessary measures to obtain a work permit or a visa for an employee to enter and perform his professional activity in a particular country"* (CAS 2009/A/1838 at no. 53). Moreover, *"an employment contract is not void just because the employee does not have a valid authorization to work due to his citizenship status"* (CAS 2009/A/1838 at no. 42).

147. At the hearing, Mr. Hermans stated that he assumed that the FAT had arranged for him to work legally in Thailand, based on (i) the clause *"Work permission and visum: to be arranged by the FAT"* in the Employment Contract, and (ii) the fact that he had not experienced any problems making multiple entries into Thailand each year since he began working in Thailand in 2012. The Panel finds Mr. Hermans' assumption to be reasonable.

148. Finally, Article 8 of the Swiss Civil Code states that *"[u]nless 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"*. CAS jurisprudence similarly establishes that *"if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegation with convincing evidence"* (see CAS 2003/A/506 at no.54; CAS 2009/A/1810 & 1811 at no. 18). The Panel notes that the Appellant's assertion that Mr. Hermans worked without a valid work permit is made without any supporting evidence. Therefore, the Appellant's argument that it validly suspended the performance of the Employment Contract is rejected without further consideration.

(iii) Did Mr. Hermans terminate the Employment Contract with "just cause"?

149. The concept of "just cause" in respect of an employment relationship refers to a reasonable basis for the termination of such relationship by one of the parties.

150. Whether just cause (sometimes referred to as "good cause") exists is established on a case-by-case basis and is informed by the relevant provisions of the applicable law (CAS 2008/A/1447 at no. 10; see also CAS 2006/A/1062 at no. 13) and by reference to judicial interpretation of the concept.

151. Article 337 SCO provides as follows, in loose translation:

> *"(1) Both employer and employee may terminate the employment relationship with immediate effect at any time for good cause; the party doing so must give his reasons in writing at the other party's request.*
>
> *(2) In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice.*
>
> *(3) The court determines at its discretion whether there is good cause […]".*

152. CAS case law has consistently held that to justify an assertion of "just cause", the breach upon which the contract termination is based must have a sufficient degree of seriousness. This determination requires consideration of whether the obligation which is breached lies at the core of the agreement between the parties:

> *"According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case […]. Particular importance is thereby attached to the nature of the obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present […]. In other words, it may be deemed as a case of application of the clausula rebus sic stantibus. According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning […] In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as serious breach of confidence […]. Pursuant to the jurisprudence of the Swiss Federal Supreme Court, the early termination for valid reasons shall be however restrictively admitted"* (CAS 2006/A/1180 at paragraph 25).

153. Based on well-established jurisprudence of the CAS, late payment of an employee's salary, or failure to pay an employee's salary – particularly if such failure is continuous or repeated – may constitute "just cause" for termination of the employment contract by the employee (CAS 2012/A/2967 at no. 143; CAS 2015/A/4322 at no. 65).

154. In this regard, the panel in CAS 2006/A/1180 (at no. 26) stated the following: *"[…] the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future […] The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee"*. In the same case, the Panel noted that termination for just cause based on unpaid remuneration was subject to two conditions: (i) the unpaid amount must not be "insubstantial", and (ii) the employee must have notified the employer of his breach (also see CAS/2013/A/3091, 3092 & 3093). In respect of notification requirements, the panel in CAS 2014/A/3460 stated that *"[a]lthough the need to send notices is not mandatory in all cases and is established on a case by case basis, CAS panels have regarded notices as a vital step which could possibly have played a role in bringing an end to an unexplained breach or series of breaches, particularly where the breach or breaches in question has not yet reached a fundamentally unacceptable level and/or unduly prejudiced the non-breaching party to the extent that the latter cannot be reasonably expected to continue the contract"*.

155. In the present case, it is undisputed that the FAT failed to pay Mr. Hermans his monthly salary payments and apartment rental amounts for a period of almost four months. It is also undisputed that during this time, Mr. Hermans continued to perform his obligations under the Employment Contract and sent three separate notifications to the FAT requesting immediate payment of the outstanding amounts. In his final notification to the FAT on 20 June 2016, Mr. Hermans warned that in the absence of a reaction or payment by 27 June 2016, he intended to file a formal complaint with the FIFA PSC. Therefore, considering the wording of the final notice of 20 June 2016, the Panel does not share the view of Appellant according to which no termination was possible before the expiry of the deadline of 27 June 2016. In addition, it may be noted that based on the behavior of Appellant and the previous warning notices, there is no valid legal reason to restrict the power of Respondent to terminate the Employment Contract before the expiry of the deadline mentioned in his final notice.

156. The Panel finds that the FAT's persistent non-compliance with its core obligation under the Employment Contract caused Mr. Hermans to lose confidence in the FAT's future performance in accordance with the Employment Contract and rendered the continuation of the employment relationship in good faith unconscionable for Mr. Hermans.

157. Consequently, the Panel finds that Mr. Hermans had just cause to unilaterally and prematurely terminate the Employment Contract.

(iv) Should the compensation awarded by the FIFA PSC to Mr. Hermans be modified?

158. Having established that the FAT is to be held liable for the early termination of the Employment Contract, the Panel will now proceed to assess whether to maintain or modify the compensation awarded to Mr. Hermans pursuant to the Decision of the FIFA PSC.

159. In CAS 2008/A/1519-1520, the panel stated that in determining the compensation for the breach of a valid contract, *"the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e., it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur"*.

160. According to this principle, applicable in principle to any calculation of damages where a contract is breached, the Panel agrees with the FIFA PSC that it is fully justified to award to Mr. Hermans both the (i) outstanding remuneration due up to the date of termination, and (ii) remuneration owed under the Employment Contract from the date of termination until its expiry, with deduction of any income earned by Mr. Hermans elsewhere because of the early termination of the Employment Contract. Such a deduction is in line with Article 337c(2) SCO and is on the basis that Mr. Hermans must not be enriched or over-compensated (HAAS U., *Football Disputes between Players and Clubs before the CAS*, in: Sports Governance, Football Disputes, Doping and CAS Arbitration, Berne 2009, p. 243, see also the authorities cited in footnote 142).

161. The Panel notes that the Employment Contract was terminated by Mr. Hermans on 24 June 2016, not on 27 June 2016 as stated in the Decision. Therefore, the amount of the "partial salary" owed to Mr. Hermans for June 2016 is adjusted to USD 14,000. Consequently, the outstanding salary remuneration due to Mr. Hermans on the date of termination of the Employment Contract, consisting of USD 17,500 for each of March, April and May 2016, and USD 14,000 for the period of 1 to 24 June 2016, is hereby modified to a total amount of USD 66,500, plus 5% interest per year as of the relevant due dates.

162. The Panel agrees with the FIFA PSC that the outstanding apartment rental remuneration due to Mr. Hermans on the date of termination of the Employment Contract, consisting of THB 64,000 for each of March, April and May, amounts to a total of THB 192,000, with 5% interest per year as of the relevant due dates.

163. The Panel also agrees with the FIFA PSC that a return flight ticket was a remuneration component of the Employment Contract. Mr. Hermans provided evidence of having paid THB 55,925 for such flight and is entitled to be reimbursed for such amount.

164. The remuneration owed to Mr. Hermans under the Employment Contract from the date of termination until its expiry amounts to a total of USD 137,875, which consists of the amounts set out below (and is based on the stated monthly salary of USD 17,500):

- Salary from 25 June to 30 June 2016 = USD 3,500;
- Salary from 1 July 2016 to 31 January 2017 = USD 122,500;

- Salary from 1 February to 19 February 2017 = USD 11,875.

165. Mr. Hermans concluded a new employment contract with the Football Association of Indonesia effective 2 February 2017 with a monthly salary of USD 11,500 and therefore earned, from 2 to 19 February 2017 an amount of USD 7,393 under such new employment contract. Consequently, after deduction of this amount, the Panel concludes that the total compensation to be paid to Mr. Hermans for breach of contract by the FAT is USD 130,482, with 5% interest per year as of the relevant due dates. However, the Panel notes that this amount is more than the USD 127,666 awarded in the Decision to Mr. Hermans as compensation for breach of contract. In the absence of an appeal filed by Mr. Hermans, the Panel is precluded from awarding Mr. Hermans an amount higher than USD 127,666 as compensation for breach of contract.

166. Therefore, the Panel concludes that the FAT must pay to Mr. Hermans, within 30 days as from the date of notification of this award:

(i) As outstanding remuneration, the amount of USD 66,500 and of THB 192,000, plus interest as follows:

- 5% per year over the amount of USD 17,500 as from 1 April 2016 until the date of effective payment;
- 5% per year over the amount of THB 64,000 as from 1 April 2016 until the date of effective payment;
- 5% per year over the amount of USD 17,500 as from 1 May 2016 until the date of effective payment;
- 5% per year over the amount of THB 64,000 as from 1 May 2016 until the date of effective payment;
- 5% per year over the amount of USD 17,500 as from 1 June 2016 until the date of effective payment;
- 5% per year over the amount of THB 64,000 as from 1 June 2016 until the date of effective payment;
- 5% per year over the amount of USD 14,000 as from 28 June 2016 until the date of effective payment;

(ii) as reimbursement of the flight ticket, the amount of THB 55,925; and

(iii) as compensation for breach of the Employment Contract by the FAT, the amount of USD 127,666, plus 5% interest per year as from 28 September 2016 until the date of effective payment. As for the amounts due and the starting dates of the late payment interests, the Panel wishes to add that the Respondent did not file an appeal against the Decision. Accordingly,

no date and no amount could be changed in favour of Respondent. At the same time, on the basis of the information and evidence submitted by the parties, the Panel is satisfied that all dates and all amounts indicated above shall be confirmed, with the mentioned minor exception of the amount due for outstanding remuneration pursuant to the Employment Contract.

167. The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties to the Panel. Accordingly, all other prayers for relief are rejected.

168. In rendering the present award, the Panel wishes to note that it is aware of the many challenges faced by the FAT in recent years in respect of improving the state of its governance. The Panel applauds the FAT's recent efforts to improve transparency, standardize contracts and generally ensure the compliance of its operations with relevant and applicable laws and regulations.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 26 May 2017 by the Football Association of Thailand against the decision of the Single Judge of the Players' Status Committee of FIFA rendered on 28 February 2017 is partially upheld.

2. The decision of the Single Judge of the Players' Status Committee of FIFA rendered on 28 February 2017 is modified as follows:

   (a) The Football Association of Thailand shall pay Mr. Hermans USD 66,500 plus BHT 192,000 as outstanding remuneration, plus interest, as follows:

   - 5% per year over the amount of USD 17,500 as from 1 April 2016 until the date of effective payment;

   - 5% per year over the amount of THB 64,000 as from 1 April 2016 until the date of effective payment;

   - 5% per year over the amount of USD 17,500 as from 1 May 2016 until the date of effective payment;

- 5% per year over the amount of THB 64,000 as from 1 May 2016 until the date of effective payment;

- 5% per year over the amount of USD 17,500 as from 1 June 2016 until the date of effective payment;

- 5% per year over the amount of THB 64,000 as from 1 June 2016 until the date of effective payment;

- 5% per year over the amount of USD 14,000 as from 28 June 2016 until the date of effective payment;

(b) The Football Association of Thailand shall pay Mr. Hermans BHT 55,925 as reimbursement for flight expenses; and

(c) The Football Association of Thailand shall pay Mr. Hermans USD 127,666 as compensation for breach of contract, plus 5% interest per year as from 28 September 2016 until the date of effective payment.

3. (…).

4. (…).

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