Arbitration CAS 2021/A/8356 Football Club Dynamo Brest v. Khacheridi Yevhen Hryhorovych, award of 13 June 2022

Panel: Mr Cesare Gabasio (Italy), Sole Arbitrator

Football
Termination of the employment contract with just cause by the player
Request for intervention
Validity of a penalty clause
Reduction of a penalty clause

1. **The participation of a third party may only occur as a consequence of the request of a respondent, according to Article R41.2 (Joinder), or as a result of a spontaneous intervention of the third party wishing to participate in the proceedings, according to and under the conditions set forth by Article 41.3 of the CAS Code. An intervention application should be granted where the applicant will be significantly affected by a possible decision, where the parties do not object to the application and where the applicant is a party to the arbitration agreement. Therefore, pursuant to Articles R41.2 and R41.3 of the CAS Code, an appellant cannot cause a third party to participate in the arbitration.**

2. **A penalty clause is to be considered valid and applicable under Swiss Law if it contains all the necessary elements required for such purpose, taking into account that: a) the parties bound thereby must be mentioned; b) the kind of penalty has to be determined; c) the conditions triggering the obligation to pay must be set; and d) its measure must be specified.**

3. **Pursuant to the principle of contractual freedom, the parties can freely determinate the amount of a contractual penalty. However, the Swiss legislator has enacted a limitation to this freedom in Article 163 of the Swiss Code of Obligations (SCO) in order to warrant public order and the principle of proportionality as a standard in Swiss law. Article 163 of the SCO is mandatory and the parties cannot contractually depart from it. Therefore the judge shall examine this amount. However, the reduction of a penalty clause shall only be reserved for exceptional cases that occur when the penalty is grossly and evidently unfair since the possibility of a reduction affects the contractual freedom of the parties. A reduction of the penalty by the judge is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain the entire claim, measured concretely at the moment the contractual violation took place. To evaluate the excessive character of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration all the circumstances at hand. The factors to consider are (i) the creditor's interest in the other party's compliance with the undertaking; (ii) the severity of the default or breach; (iii)**

the intentional failure to breach the main obligation; (iv) the business experience of the parties; and (v) the financial situation of the debtor.

I. PARTIES

1. Football Club Dynamo Brest (the "Appellant" or the "New Club") is a Belarusian professional football club, affiliated to the Belarusian Football Association ("ABFF), which, in turn, is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Mr Khacheridi Yevhen Hryhorovych (the "Respondent" or the "Player") is a Ukrainian football player.

3. The Appellant and the Respondent shall be jointly referred to as the "Parties", where applicable.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in these proceedings. References to additional facts and allegations found in the Parties' written 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, the Award only refers to the submissions and evidence he deems necessary to explain his reasoning.

A. Backgrounds facts

5. On 23 October 2019, the Player and LLC FC Dynamo-Brest ("LLC FC Dynamo Brest" or the "Old Club") entered into an employment contract (the "Employment Contract"), as amended on the same date by the *"additional agreement n. 1 to the Contract dated 23 October 2019"*, valid as from 3 February 2020 until 31 December 2021.

6. As far as it is relevant for the present proceedings, in accordance with Article 4 of the Employment Contract the Old Club undertook to pay the Player as follows:

   - a standard salary rate on the day of signing of the Employment Contract in the amount of Belarusian rubles (BYN) 170.61;

   - increasing standard salary rate, to be summed up with the standard salary rate, forming the official salary in the total amount of BYN 1,450.19;

   - the total amount of bonus payments established in the amount of BYN 45,971.12;

- a professional fee in the amount of BYN 758,741, which on the execution day of the Employment Contract was equivalent to USD 372,096, to be paid in eight instalments of BYN 94,842.63 (equivalent to USD 46,512) due on 1 April 2020, 1 July 2020, 1 October 2020, 1 January 2021, 1 April 2021, 1 July 2021, 1 October 2021 and 31 December 2021.

7. In the Employment Contract the Player and the Old Club also specified that:

- on the execution date of the Employment Contract the total salary of BYN 47,421.31 corresponded to a net amount of BYN 40,782.33, which on the same date was equal to USD 20,000 at the rate of the National Bank of the Republic of Belarus;

- the total salary *"in foreign currency (USD 20,000) is "net" (after withholding taxes, fees and other mandatory payments provided for by the legislation of the Republic of Belarus, which the Employer independently charges and transfers to the budget in accordance with the legislation). Thus the Employer monthly pays the Employee a guaranteed minimum wage, which, as agreed by the parties, is an amount of rubles equivalent to USD 20,000 at the rate of the National Bank of the Republic of Belarus on the day of payment of wages"*;

- *"regardless of the change in the exchange rate in relation to Belarusian ruble, the amount indicated in this contract in foreign currency are basic (determining the amount of the payment), unconditional and fixed. Payment of these amounts can be made in the specified currency or in the Belarusian rubles at the rate of the National Bank of the Republic of Belarus on the day of payment"*.

8. On the same date the Player and the Old Club signed an *"additional agreement n. 1 to the Contract dated 23 October 2019"*, whose appendix n. 1 stated that *"in addition to the payments"* specified in the Employment Contract *"the Club also pays the Employee compensation in connection with the relocation and change of residence for the period of this contract in the "net" amount of USD 200,000"*.

9. According to Article 5 of the Employment Contract, the salary and the one-time payments should have been paid on a regular basis (on the 10th of each month) in monetary units of the Republic of Belarus at the rate of the National Bank of the Republic of Belarus on the day of payroll by transferring funds to the Player's bank-card.

10. Articles 16 and 17 of the Employment Contract state as follows:

"16. This contract cannot be terminated unilaterally by either the Employee or FC Dynamo Brest, except for the cases specified in clause 17 of this contract. In case of early termination of the contract by one of the parties, FC Dynamo-Brest is obliged to notify the Association within 7 (seven) days, indicating the reasons for early termination of the contract. The parties agreed that in the event of early unjustified (without a proper reason) termination of the contract by one of the parties, the guilty party shall pay the other party compensation for early termination in the amount of 1,000,000.00 (one million) US dollars. […]

17. This contract may be terminated early:

17.1 on the initiative of the Employer on additional grounds provided for by law, for the following violations by the Employee of the labour duties assigned to him:

17.1.1. systematic violations of the terms of clause 2 of this contract, if these violations are significant and entail negative consequences for FC Dynamo Brest;
17.1.2. at the fault of the Employee in the use of doping;
17.1.3 if the Employee is disqualified by a decision of the disciplinary bodies of FIFA, UEFA or ABFF for more than 6 months.
17.1.4. repeated (two or more times within 6 months) submission of incomplete or inaccurate information to the authorized state bodies and/or FIFA, UEFA or ABFF;
17.1.5. failure to take, measures to eliminate the violations identified, as well as to compensate for material damage caused as a result of violations of the law, without good reason within the time period established by legal instructions of law enforcement or control authorities;

17.2 at the request of the Employee in case of systematic non-fulfilment or improper fulfilment of the terms of the contract through the fault of the Employer. In this case the Employer pays monetary compensation to the Employee for the deterioration of his legal status".

11. On 9 December 2020 the Player put the Old Club in default of payment of USD 174,794.58, granting the Old Club 22 days in order to remedy its default.

12. On 4 January 2021 the Player sent a second default notice to the Old Club, requesting payment of his outstanding remuneration in the amount of USD 204,794.58, granting the Old Club until 20 January to comply with its financial obligations. In the same letter the Player made reference to Article 17.2 of the Employment Contract, stating that the Employment Contract *"could be early terminated by the employee in case of a repeated failure to properly fulfil the contractual obligation by the Employer"* and that *"[i]n this case, the Employer shall pay a compensation to the Employee for the deterioration of his legal status"*.

13. On 27 January 2021 the Player terminated the Employment Contract in accordance with Article 17.2 of the Employment Contract due to the Club's systematic violations of labour laws and contractual financial obligations.

14. On 28 January 2021 the Old Club sent the Player a letter with the following statement: *"[t]he club acknowledges the validity of reason for the unilateral termination of the employment relations with FC Dynamo-Brest and the existing outstanding salary debt of the Club towards you. We hereby confirm the 27.1.2021 as the employment termination date. In addition, we inform that the debt will be paid out within the shortest possible time starting from 01.02.2021"*.

15. On 26 February 2021, the Old Club transferred to the New Club *"irrevocably and free of charge, all exclusive rights to participation of Dynamo-Brest football team in sports competitions"* and *"football activities"*.

16. On 2 March 2021, the Player confirmed that the New Club had fulfilled *"all its financial obligations to me related to payroll, which were occurred before 31.12.2020"*.

17. On 30 March 2021, the Player sent the Old Club a letter, where he confirmed that the Old Club had fulfilled all financial obligation regarding his salary, the professional fee, the

relocation allowance, as well as the bonus payment, for the entire validity of the Employment Contract until 27 January 2021. However, the Player claimed the Old Club the compensation as a result of the early termination of the Employment Contract in the amount of USD 1,380,000.00, specifying that he *"had not signed a contract with a new club after the Contract termination"*.

18. On 1 April 2021 the Old Club sent the Player a letter with the following statements:

"The limited liability company FC Dynamo-Brest (hereinafter referred to as the Company) has processed the application of your authorized person dated on 30.03.2021 no. 487.

We report the following on the matter of fact of the application:

On 26.02.2021 the limited liability company FC Dynamo-Brest handed over the football activities to the Institution of physical culture and sports "The state football club "Dynamo-Brest" (hereinafter referred to as the Institution). The Institution was granted the rights and obligations of the Company related to the membership in the Association "Belarus Football Federation", including all obligations, in particular the obligations disputed by the parties (sport succession).

As previously reported, the Club had acknowledged the validity of reason for the unilateral termination of employment relations with the FC Dynamo-Brest and the existing outstanding debt of the Club towards you. The salary debt has been paid out to you in full.

In addition, we inform you that you may apply to the court of general jurisdiction at the Company's location to resolve the labour dispute".

B. Proceedings before the FIFA Dispute Resolution Chamber

19. On 27 April 2021, the Player lodged a claim against the New Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting payment of the compensation for the early termination of the Employment Contract in the amount of USD 1,000,000.

20. In its reply the New Club stated that (i) the provisions set out in Article 16 of the Employment Contract would have not been applicable to the cases of termination of contract with a just cause, such the one at stake, but only in cases of unjustified early termination; (ii) the Player's claim would have been an attempt of unjustified enrichment.

21. On 12 August 2021, the FIFA DRC passed a decision on the matter (the "Appealed Decision"), stating as follows:

"1. The claim of the Claimant, Khacheridi Yevhen Hryhorovych, is accepted.

2. The Respondent, FC Dinamo Brest, has to pay to the Claimant the amount of USD 1,000,000 as compensation for breach of contract.

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

4. *Pursuant to article 24bis of the Regulations on the Status and Transfer of Players if full payment (including all applicable interest) is not paid within 45 days of notification of this decision, the following consequences shall apply:*

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

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

5. *The consequences shall only be enforced at the request of the Claimant in accordance with article 24bis paragraphs 7 and 8 and article 24ter of the Regulation on the Status and Transfer of Players.*

6. *This decision is rendered without costs"* (emphasis omitted).

22. The grounds of the Appealed Decision were communicated to the Parties on 6 September 2021.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 21 September 2021, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code") against the Player and FIFA with respect to the Appealed Decision.

24. On 1 October 2021, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

25. On 8 October 2021, FIFA requested to be excluded as a party in the arbitration, taking into account that the present procedure relates to a dispute between the New Club and the Player, that does not concern FIFA. On 15 October 2021, the Appellant agreed to exclude FIFA from these proceedings.

26. On 8 November 2021, the Parties were informed that the President of the CAS Appeals Arbitration Division had appointed Mr Cesare Gabasio, Attorney-at-Law in Turin, Italy, as Sole Arbitrator in accordance with Article R54 of the CAS Code.

27. On 15 November 2021 the Appellant requested the Old Club to be included as third party of the case.

28. On 23 November 2021, the Respondent objected to the participation of the Old Club, as the application was filed by the Appellant and it did not indicate which rights and interests of the LLC FC Dynamo Brest would have been affected by the arbitration.

29. On 27 November 2021, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

30. On 30 November 2021, the Sole Arbitrator, who had considered the Parties' position regarding the possible intervention of the Old Club in the present procedure, invited the Appellant to indicate (a) which entity was a party in the procedure before FIFA DRC and (b) which entity paid the Respondent the amounts due as salary, professional fee, relocation allowance and bonus.

31. On 6 December 2021, the Appellant gave the clarifications requested by the Sole Arbitrator, specifying that the New Club was party of the procedure before FIFA DRC, while all the payments arising from the Employment Contract were made by the Old Club in several tranches until 25 February 2021.

32. On 6 December 2021, the Respondent specified that the Old Club did not take any part in the proceedings before FIFA DRC, since at the date the Player filed its claim, the Old Club completely transferred the rights and obligations of the football entity to the Appellant. The Respondent also confirmed that payments to the Player for the worked period were made by LLC FC Dynamo Brest.

33. On 16 December 2021, the Sole Arbitrator rejected the request to include the Old Club in the arbitration pursuant to Article R41.3 of the CAS Code, noting that (i) the request for intervention was not filed by LLC FC Dynamo Brest, but by the Appellant, which cannot cause a third party to participate in the arbitration; (ii) even to consider the intervention correctly filed, LLC FC Dynamo Brest did not specify the reasons of its possible intervention and, in particular, in which way it could be significantly affected by the final award; (iii) there was no evidence of the respect of the ten-days deadline set out in Article R41.3 of the CAS Code.

34. On 30 December 2021, LLC FC Dynamo Brest filed a renewed request for intervention.

35. On 24 January 2022, the Sole Arbitrator rejected the renewed request for intervention filed by LLC FC Dynamo Brest pursuant to Article R41.3 of the CAS Code, as such request was not filed within 10 days after LLC FC Dynamo Brest was made aware of the present arbitration.

36. On the same date, the CAS Court Office, on behalf of the Sole Arbitrator, issued the Order of Procedure, which was duly signed by the Parties. By signing the Order of Procedure, the Parties confirmed the CAS jurisdiction to hear the appeal and were informed that the Sole Arbitrator decided to held a video-hearing on 8 February 2022.

37. On 8 February 2022 a video-hearing took place, with the participation, in addition to the Sole Arbitrator and Ms Delphine Deschenaux-Rochat, CAS Counsel, of the following persons:

For the Appellant: Mr Andrei Lazaruk, Mr Sergey Nagikh, Ms Oksana Smagina, Legal Counsels, Mr Nikolai Peshin, expert, and Yuri Yurchenko, interpreter;

For the Respondent: Mr Illia Skoropashskin, Mr Nikita Sydorenko, Mr Valeriy Shevchenko, Legal Counsels, and Ms Olga Choban, interpreter.

38. During the video-hearing the Parties were given a full opportunity to present their case, submit their arguments/submissions and answer the questions posed by the Sole Arbitrator. No Party objected to the constitution of the arbitral tribunal and at the conclusion of the hearing, the Parties expressly confirmed that their right to be heard was fully respected.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

39. In its Appeal Brief the Appellant submitted the following requests for relief:

"The Appellant respectfully requests that the CAS to set aside the decision FPSD-2390 issued on September 6, 2021, by the FIFA Dispute Resolution Chamber to pay monetary compensation in the amount of 1,000,000 (one million) US dollars by the football club Dynamo Brest in favour of Khacheridi Y.H., as taken without taking into account all the circumstances of the case and violating provisions of the contract between FC Dynamo Brest and Khacheridi Y.H.".

40. The submissions of the Appellant, in essence, may be summarized as follows.

- The provisions set out in Article 16 of the Employment Contract can be only applied, when the Employment Agreement is early terminated without a just reason. As in the present case the Player terminated the Employment Contract with just cause pursuant to Article 17.2, the penalty clause set out in Article 16 of the Employment Contract (the "Penalty Clause") cannot be applied, being instead applicable Article 17.2 of the Employment Contract that grants the Player *"monetary compensation (…) for the deterioration of his legal status"*.

- The provisions set out in Article 13 and Article 15 of the ABFF Regulations on the status and transfer of players, which distinguish between termination with a good reason and termination without a good reason, were taken into account in full in the Employment Contract. Accordingly with those provisions, Article 16 of the Employment Contract provides for the conditions and procedure for terminating the contract without a good reason and Article 17.2 the conditions and procedure for terminating the contract for a good reason.

- On 12 January 2021 the New Club became a state club and on 26 February 2021 it became the sporting legal successor of LLC FC Dynamo Brest, which was taken over debt-free in accordance with the Auditor's report. As the annual budget of a state institution is about USD 1,500,000, the payment of compensation in the amount of USD 1,000,000 would lead to the closure of the football school and the layoff of 350 maintenance employees of the city's football infrastructure.

- The average salary of the first team of the Club in 2021 was equal to USD 24,000 per year. Thus, for the amount claimed by the Player, the Appellant would have been able to support the team for almost three years.

- The amount of compensation does not correspond to the Player's qualifications.

B. The Respondent

41. The Respondent submitted the following requests for relief:

"1. To dismiss the appeal filed by FC Dynamo Brest on 01 October 2021 in their entirety.

2. To confirm the Decision rendered by the FIFA Dispute Resolution Chamber on 12 August 2021

3. To order FC Dynamo Brest to pay the full CAS arbitration costs.

4. To order FC Dynamo Brest to make significant contribution to the legal and other costs of Mr. Khacheridi Yevhen Hryhorovych in connection with these proceedings".

42. The submissions of the Respondent, in essence, may be summarized as follows.

- The Penalty Clause should be applied in the present case, as the termination of the Employment Contrast was due to the Old Club's contractual breach. As stated in the commentary of the FIFA Regulations on the Status and Transfer of Players (2021 ed.) and by CAS jurisprudence, if the contractual agreement provides for a determinable amount of compensation payable by the party responsible for the breach to the injured party, this amount must be applied. The Respondent also argued that the Appellant deliberately acted in delaying payments towards the Player in order to persuade him to terminate the Employment Contract.

- As stated in the Appealed Decision, the Penalty Clause cannot be considered excessive or disproportionate, as the total amount of the two-year Employment Contract was USD 1,000,000 and the Player's buyout was set by the parties at USD 1,000,000 regardless of the period, being on the contrary irrelevant the arguments raised by the Appellant on this regard.

V. JURISDICTION

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

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

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

VI. ADMISSIBILITY

46. The appeal is admissible as it complies with all the requirements set forth by Articles R47 and R48 of the CAS Code and the Appellant submitted it within the deadline provided by Article R49 of the CAS Code as well as by Article 58 (1) of the applicable FIFA Statutes.

47. The grounds of the Appealed Decision were notified to the Appellant on 6 September 2021. The Appellant filed the Statement of Appeal with CAS on 21 September 2021 and filed his Appeal Brief on 1 October 2021. Therefore, the appeal is admissible.

VII. APPLICABLE LAW

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

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

49. 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".*

50. As a result, the Sole Arbitrator remarks that the "applicable regulations" are primarily FIFA Regulations and that Swiss Law shall apply subsidiarily, whenever warranted.

VIII. PRELIMINARY ISSUES

51. The Sole Arbitrator confirms that the Appellant's request to include LLC FC Dynamo Brest as third party of the case, as well as the Old Club's request for intervention filed on 30 December 2021, must be rejected on the following grounds.

52. CAS jurisprudence has stated that *"the participation of a third party may only occur as a consequence of the request of the Respondent, according to Article R41.2 (Joinder), or as a result of a spontaneous intervention of the third party wishing to participate in the proceedings, according to and under the conditions set forth by Article 41.3 of the CAS Code"* (CAS 2017/A/5536). The CAS has also specified that *"an intervention application should be granted where the applicant will be significantly affected by a possible decision, where the parties do not object to the application and where the applicant is a party to the Arbitration Agreement"* (CAS 2012/A/2737).

53. The Sole Arbitrator notes that the first request for intervention was filed on 15 November 2021 by the Appellant and that the Respondent expressly objected to the participation of LLC FC Dynamo Brest in the present proceedings. Taking into account that pursuant to Articles R41.2 and R41.3 of the CAS Code the Appellant cannot cause a third party to participate in

the arbitration and that the Respondent objected to the participation of LLC FC Dynamo Brest in the present proceedings, the Appellant's request should be dismissed.

54. For the sake of completeness, the Sole Arbitrator also observes that, even to consider the request for intervention correctly filed, the reasons of the possible intervention of LLC FC Dynamo Brest were not duly specified, not being indicated in which way the Old Club could be significantly affected by the final award. In any case it should be also considered that the interests of the Old Club are adequately protected by the active participation of the Appellant in these proceedings, as the latter opposed the Player's claim and the Appealed Decision in their entirety.

55. The application for intervention submitted by LLC FC Dynamo Brest on 30 December 2021 must also be rejected, as such request was not filed within 10 days after the Old Club was made aware of the present arbitration. To this regard the Sole Arbitrator observes that, as LLC FC Dynamo Brest became aware of the present arbitration, at the latest, on 15 November 2021, it should have filed its request for intervention within the following 10 days (*id est* 25 November 2021).

IX. MERITS

56. The main issues to be resolved by the Sole Arbitrator are:

A. Is the Penalty Clause applicable in the present dispute?

B. If it is applicable, should the Penalty Clause be reduced for being disproportionate?

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

A. Is the Penalty Clause applicable in the present dispute?

58. Initially, the Sole Arbitrator notes that the factual circumstances of this case are undisputed by the Parties and, in particular, (i) that on 27 January 2021, due to the Old Club's breach of contract, the Player unilaterally terminated the Employment Contract with just cause; and (ii) that the Appellant is the sporting successor of the Old Club and it is thus liable to pay compensation for the damages incurred by the Player as a consequence of the early termination of the Employment Contract.

59. The matter demanded to the Sole Arbitrator is exclusively to decide whether the Penalty Clause could be applied, or not, in the present dispute, as the Employment Contract was terminated pursuant to Article 17.2 of the Employment Contract.

- Article 16 of the Employment Contract states that *"neither the Employee nor the FC Dynamo-Brest, except for the cases specified in i.17 herein, can terminate this contract unilaterally"* and that *"in the event of early unjustified (without a good reason) termination of the contract by either party, the guilty party shall pay the other party a compensation for early termination in the amount of 1,000,00.00*

USD". The subsequent Article 17 provides that the Employment Contract may be terminated early *"at the request of the Employee in case of a regular non-fulfilment or improper fulfilment of the terms of the contract through the fault of the Employer"*, specifying that *"in this case the Employer shall pay monetary compensation to the Employee for the deterioration of his legal status"*.

60. The Sole Arbitrator observes that, although it was the Player who legitimately terminated the Employment Contract pursuant to Article 17.2, it is the Old Club that caused the termination of the Employment Contract due to its failure to fulfill its contractual obligations towards the Player and therefore, as also recently observed in the commentary of FIFA RSTP (ed. 2021) in relation to Article 17 of FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), it must *"be treated as if it had itself terminated the contract without just cause"*.

61. This approach has been followed by CAS jurisprudence, which stated that *"although it was the Player who terminated the Employment Contract, the Club was at the origin of the termination by breaching its contractual obligations towards the Player and is thus liable to pay compensation for the damages incurred by the Player as a consequence of the early termination"* (CAS 2019/A/6626; CAS 2015/A/3891).

62. The above interpretation is also confirmed by the translation of Article 16 of the Employment Contract, proposed by the Appellant, that reads as follows: *"the parties agree that in the event of termination of the contract as a result of unjustified evasion of the fulfillment of contractual obligations by one of the parties (…), the guilty party shall pay the other party compensation for early termination in the amount of 1,000,000 US dollars"*. The case at stake falls evidently within the area of application of the Penalty Clause, because, as already said, it is undisputed that the early termination of the Employment Contract was caused by the Old Club's failure to comply with its economic obligations towards the Player.

63. In this context the Sole Arbitrator finds that, contrary to what the Appellant claims, the provisions set out in Articles 13 and 15 of the ABFF Regulations on the status and transfer of players are not decisive in the interpretation of Article 16 of the Employment Contract. Indeed, those provisions confirms that, in case of early termination of the employment contract due to a club's failure, monetary compensation must be paid to the player and that *"the amount of such monetary compensation for unilateral termination of the contract may also be specified in the player's contract"*.

64. The Sole Arbitrator also notes that the different interpretation of the provisions set out in the Employment Contract, as raised by Appellant, would lead to aberrant and unacceptable consequences, because it would allow the defaulting party, who acted in such a way as to provide the other party to terminate the contract with just cause, to escape the application of the contractual penalty clause, essentially depriving the penalty of any deterrent function.

65. As the Old Club is to be considered *"guilty"* of the early termination of the Employment Contract due to its failure to fulfill its contractual obligations towards the Player, in the Sole Arbitrator's opinion the Penalty Clause must be applied in the present dispute.

66. Even if the validity of the Penalty Clause was not the subject of discussion between the Parties, the question should be in any case analyzed to establish if it could be applied in the present dispute.

67. The Sole Arbitrator has determined that the rules and regulations of FIFA must apply primarily and Swiss Law subsidiarily. It shall be taken into account that the FIFA RSTP does not foresee any provision regarding penalty clause and consequently offers no guidance on this issue. Therefore, in order to analyse the validity of the Penalty Clause, the Sole Arbitrator has to take into account the provisions regarding penalty clauses set out in Swiss Law, specifically in the Swiss Code Obligation ("SCO").

68. Articles 160 et seq. of SCO state as follows:

"Article 160: Relation between penalty and contractual performance

1. *Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.*
2. *Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.*
3. *The foregoing does not apply if the debtor can prove that he has the right to withdraw from the contract by paying the penalty.*

Article 161: Relation between penalty and damage

1. *The penalty is payable even if the creditor has not suffered any damage.*
2. *Where the damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault.*

Article 163: Amount, nullity and reduction of the penalty

1. *The parties are free to determine the amount of the contractual penalty.*
2. *The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.*
3. *At its discretion, the court may reduce penalties that it considers excessive".*

69. In the Sole Arbitrator's opinion the Penalty Clause is to be considered valid and applicable under Swiss Law as it contains all the necessary elements required for such purpose, taking into account that: a) the parties bound thereby are mentioned; b) the kind of penalty has been determined, as it can be qualified as a liquidated damages clause; c) the conditions triggering the obligation to pay are set, being identified with the early unjustified termination of the Employment Contract; and d) its measure is specified (CAS 2020/A/6809 & 6843).

70. In the light of the above consideration, the Appellant's arguments, according to which the Penalty Clause provided for by Article 16 of the Employment Contract would not be applicable in the present dispute, are dismissed.

B. If it is applicable, should the Penalty Clause be reduced for being disproportionate?

71. Pursuant to the principle of contractual freedom, the parties can freely determinate the amount of the contractual penalty. However, the Swiss legislator has enacted a limitation to this freedom in Article 163 of the SCO in order to warrant public order and the principle of proportionality as a standard in Swiss law.

72. The issue of whether a penalty clause should be reduced for being disproportionate under Article 163 of the SCO has been dealt with in several occasion by CAS jurisprudence, which stated the following principles:

- the provision set out in Article 163 of the SCO *"is mandatory and the parties cannot contractually depart from it. Therefore the judge (or the Sole Arbitrator in this matter) shall examine this amount"* (CAS 2018/A/5738);

- *"the reduction of a penalty clause shall only be reserved for exceptional cases that occur when the penalty is grossly and evidently unfair since the possibility of a reduction affects the contractual freedom of the parties"* (CAS 2020/A/6809 & 6843; CAS 2018/A/5857);

- *"a reduction of the penalty by the judge is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain the entire claim, measured concretely at the moment the contractual violation took place. To evaluate the excessive character of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration all the circumstances at hand"* (CAS 2017/A/5304; CAS 2019/A/6626);

- *"the factors to consider when deciding whether a reduction of a penalty clause is applicable, are as follows: (i) the creditor's interest in the other party's compliance with the undertaking; (ii) the severity of the default or breach; (iii) the intentional failure to breach the main obligation; (iv) the business experience of the parties; and (v) the financial situation of the debtor"* (CAS 2018/A/5857).

73. In applying the aforementioned principle, the Sole Arbitrator notes, first of all, that the amount of the Penalty Clause equal to USD 1,000,000 substantially corresponds to the net value of the Employment Contract for its entire duration and that the termination of the Employment Contract, to be considered the trigger event raising the obligation to pay the Penalty Clause, took place on 27 January 2021, when eleven months were remaining to the expiry of the Employment Contract on 31 December 2021.

74. Taking into account that the Penalty Clause had the function to ensure contractual stability, the Player's interest in the stability of the Employment Contract, which was at its maximum at the execution date of the contract, had gradually decreased over time. Since the termination of the Employment Contract took place after 15 months from the execution date (23 October 2019), when the remaining duration of the Employment Contract was eleven months, in the Sole Arbitrator's opinion the amount of the Penalty Clause equal to of USD 1,000,000, when measured at the time the Employment Contract was terminated, is to be considered excessive and disproportionate according to Swiss Law.

75. It is also undisputed that the Player received all the payments due for the worked period set out in the Employment Contract. Taking into account that, as specified in the Employment Contract, the amount indicated in foreign currency *"are basic (determining the amount of the payment), unconditional and fixed"*, the Sole Arbitrator observes that the total amount collected by the Player can be quantified in a sum not less than USD 425,000, plus the relocation allowance of USD 200,000.

76. A Penalty Clause equal to USD 1,000,000 in favour of the Player would lead to an unjustified enrichment of the Respondent, as he would receive, as a consequence of the early termination of the Employment Contract, an overall sum far higher than the sum that he would have earned under the entire duration of the Employment Contract.

77. With regards to the other criteria above-mentioned, the Sole Arbitrator considers the violation of the Employment Contract and its consequent early termination as a severe contractual breach, as it caused the definitive termination of the labour relationship between the Player and the Old Club, as well as he considers the Old Club's default to its obligations towards the Player to be intentional. However, these elements, within the specific context of the present case, are not enough to support the proportionality of the Penalty Clause with respect to the default of the Employment Contract, even they are to be considered relevant in determining the amount of the Penalty Clause owed to the Player.

78. The business experience of the parties and the financial situation of the debtor cannot, on the contrary, be considered relevant in the present case: the first, because both Parties professionally operate in the field of football; the second, because the Appellant did not give any evidence of its alleged financial situation and of the consequences that the payment of a Penalty Clause of USD 1,000,000 would entail (closure of the football school and layoff of 350 employees).

79. Taking into account all the specific circumstances of the case, the Sole Arbitrator considers the Penalty Clause of USD 1,000,000 to be disproportionate, as it exceeds the admissible amount in consideration of justice and equity.

80. Pursuant to Article 163(3) of the SCO, the Sole Arbitrator reduces the Penalty Clause to USD 600,000, determined as follows:

- USD 500,000, as the amount to be considered consistent with the function of the Penalty Clause and with the eleven months remaining duration of the Employment Contract at the date of its termination (27 January 2021) in relation to the execution date (28 October 2019) and the effective date (1 February 2020);

- USD 100,000, as additional amount due to the severity of the contractual breach and the Old Club's intentional failure to comply with the obligations towards the Player.

C. Conclusion

81. Based on the foregoing analysis and after having taken into due consideration all the specific circumstances of the case, the evidence produced and arguments submitted by the Parties, the Appeal is partially upheld, as the Sole Arbitrator concludes that:

a) the Penalty Clause can be applied in the present dispute and it is valid under Swiss Law;

b) the Penalty Clause, that the Appellant must pay to the Respondent, is reduced to USD 600,000.

82. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by FC Dynamo Brest against the decision issued by the FIFA Dispute Resolution Chamber on 12 August 2021 is partially upheld.

2. The decision issued by the FIFA Dispute Resolution Chamber on 12 August 2021 is confirmed, except for paragraph 2 of the Operative Part, which is amended as follows:

"2. FC Dynamo Brest has to pay to Khacheridi Yevhen Hryhorovych the amount of USD 600,000 as compensation for breach of the employment contract".

3. (…).

4. (…).

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