Arbitration CAS 2013/A/3260 Grêmio Foot-ball Porto Alegrense v. Maximiliano Gastón López, award of 4 March 2014

Panel: Mr Rui Botica Santos (Portugal), President; Prof. Massimo Coccia (Italy); Mr Efraim Barak (Israel)

Football
Loan and subsequent transfer of player
Validity of a unilateral option clause inserted in the employment contract
Time limit to inform the player about the implementation of the option clause
Claim for moral damages

1. **FIFA regulations do not contain any express provision which prohibits the unilateral extension of contracts. Whether or not an extension clause is acceptable must be assessed on a case by case basis, with the deciding body having to not only look at the wordings of the said clause, but also at the factual background and circumstances which contributed to its insertion. The following elements have to be taken into consideration: 1) the potential maximal duration of the labour relationship should not be excessive; 2) the option should be exercised within an acceptable deadline before the expiry of the current contract; 3) the salary reward deriving from the option right should be defined in the original contract; 4) one party should not be at the mercy of the other party with regard to the contents of the employment contract; 5) the option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract; 6) the extension period should be proportional to the main contract; and 7) it would be advisable to limit the number of extension options to one.**

2. **It is generally unreasonable for a club to wait until only a few days before the start of the transfer period before exercising its right to extend an employment contract with a player. The player has the right to know well in advance whether or not the club would be extending the employment agreement so that he can take advantage of the transfer period and look for another club and thus avoid having to find himself unemployed in case the club decides not to extend his employment agreement.**

3. **Moral damages are commonly understood as the damages sustained by an individual who has suffered personal harm as result of conduct, acts or omissions which severely damage the personality or reputation of the injured party, causing physical, mental or psychological suffering. Moral damages that have been requested by a legal entity are limited in scope. A club's request for moral damages can only be limited to losses brought about by damage to its image and reputation.**

I. THE PARTIES

1. Grêmio Foot-ball Porto Alegrense (hereinafter referred to as "Grêmio" or the "Appellant") is a Brazilian professional football club affiliated to the Confederação Brasileira de Futebol (hereinafter also referred to as the "CBF") and a member of the Fedération Internationale de Football Association (hereinafter referred to as "FIFA").

2. Mr. Maximiliano Gastón López (hereinafter also referred to as the "Player" or the "Respondent") is an Argentinean professional football player currently playing for the Italian Serie A club Calcio Catania S.p.A. (hereinafter referred to as "Catania").

II. THE FACTUAL BACKGROUND

3. This matter is related to an appeal filed by Grêmio against the decision rendered by the FIFA Dispute Resolution Chamber (hereinafter referred to as the "FIFA DRC") on 23 January 2013 (hereinafter referred to as the "Appealed Decision"). The grounds of the Appealed Decision were notified to the Parties on 26 June 2013.

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and relevant documentation produced. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

a) The contractual relationship between the Player and FC Moscow

5. On 17 August 2007, the Player entered into an employment agreement with the Russian club FC Moscow (hereinafter referred to as the "FC Moscow Employment Agreement"). Under the FC Moscow Employment Agreement, the Player was entitled to receive a monthly salary of EUR […]. The Panel could not establish the exact term of the FC Moscow Employment Agreement, but it was clear that it started on or before August 2007 and would remain in force at least up to the course of 2010.

6. In February 2009, FC Moscow and the Player agreed on the possibility of releasing the Player to another club under certain terms and conditions.

b) The Player accepts to be transferred by FC Moscow to Grêmio on a temporary and/or permanent basis

7. With a view to transferring the Player, two contracts were signed in February 2009:

   i. On 10 February 2009, FC Moscow and the Player signed a contract wherein, *inter alia*, FC Moscow agreed to release the Player and to transfer him on loan to any club in South America (including Grêmio) up to 31 December 2009 on condition that the Player agreed on the employment terms with such new club no later than 18 February 2009 (hereinafter referred to as the "Private Agreement"); and

   ii. On 16 February 2009, the Player, FC Moscow and Grêmio signed a loan agreement under which FC Moscow agreed to loan the Player to Grêmio (hereinafter referred to as the "Loan Agreement").

8. Under the Private Agreement, the Player also accepted to be permanently transferred from FC Moscow to any other club after 31 December 2009, under the condition that either he or the new club paid FC Moscow a compensation of USD […].

9. The relevant parts of the Private Agreement provide as follows:

   "(…)

   2. The Parties have agreed that the [Player] *consents to be transferred under a loan to the other Employer. (…)*

   4. The [Player] *undertakes, up to February 18, 2009, to agree on the conditions of the employment agreement with any other football club in South America (including Grêmio of Porto Alegre).*

   5. (…) from December 31 2009 on, in case any football club or any third party wishes to acquire 100% of the federative and 100% of the economic rights of [the Player]*, then the* [Player] *should pay a compensation of […] US Dollars. The obligation to pay the compensation can be undertaken by the football club or by the third party, for which the* [Player] *wishes to continue his football career. Therefore, the employee obligation to pay the compensation expires at the time a new football club or a third party pays the full amount of compensation. In case the definite acquisition of the rights of the player within the indicated terms does not occur, the former will return to his agreement with the Employer when such loan expires. (…)".*

10. The relevant parts of the Loan Agreement provide as follows:

    "(…)

    2. FC Grêmio undertakes to employ the Player and to sign terminal employment contract with the Player for the period of 16.02.2009 till 31.12.2009.

    3. The Player is obliged to set out to fulfill his labour abilities in FC Moscow after the expiration of the terms of employment contract with FC Grêmio.

    4. The Player is obliged during the period of the employment contract with FC Grêmio not to sign any contracts with other football clubs without FC Moscow's acceptance, and also to fulfill the conditions of the present contract and primarily signed employment contract.

5. Employment agreement between the Player and FC Grêmio must be cancelled since 31.12.2009 and the Player must be discharged due to expiration of the terms of the employment agreement".

c) The Player's contractual relationship with Grêmio

11. On 16 February 2009, Grêmio and the Player entered into an employment agreement (hereinafter referred to as the "Employment Agreement") executed in standard form valid from 16 February 2009 to 31 December 2009 under which the Player was entitled to a monthly salary of […] Brazilian Reais (approximately USD […]).

12. The Employment Agreement contained an additional agreement (hereinafter referred to as the "Addendum to the Employment Agreement") under which the Parties agreed on the following additional conditions:

"8. Grêmio is entitled to enter into a new employment agreement with the Player for a period of 3 years, by paying the Player an amount of domestic currency equivalent to € […] for a period of 3 years, with an agreed annual remuneration of a maximum of USD […] for the first year, USD […] for the second year and USD […] for the third year.

8.1 In the event Grêmio chooses to enter into a new employment agreement pursuant to item "8" hereon, the player is required to terminate his agreement with FC Moscow as he is allowed to do pursuant to clause "5" of the agreement entered into by and between FC Moscow and the Player on February 10th 2009.

8.2 Also in the event Grêmio chooses to enter into a new employment agreement pursuant to item "8" hereon, Grêmio shall acquire 100% (…) of the federative rights and 50% (…) of the economic and financial rights, the other 50% (…) remaining with the player".

d) The Player's alleged breach of his contractual relationship with Grêmio

13. On 29 December 2009, Grêmio initiated a judicial procedure before the Brazilian Labour Court of Porto Alegre (*"ação de consignação em pagamento, nos termos dos arts. 890 e seguintes do Código de processo Civil"*; in English: *"action for payment into court pursuant to section 890 of the Civil Procedure Code et seq".*), under which Grêmio deposited an amount of […] Reais (approximately EUR […]) at the Brazilian labour court to satisfy its contractual obligations towards the Player, claiming that the Player had failed to give his bank account details into which the said amount could have been transferred. Grêmio has attested that the said amount remained at the Player's "entire disposal" from 29 December 2009 until February 2010.

14. In a letter dated 29 December 2009, Grêmio informed the Player that *"(…) considering your refusal to receive your payments in person yesterday, Grêmio (…) has deposited an amount of R$ […] (…) € […] (…) in court by means of an action for payment brought at the Labor Court (…). In this regard, this is to notify you that we have exercised the option provided for in clause 8th of the instrument named 'additional clauses and explanations of the existing ones' executed on February 16th 2009 (…)".*

15. On 31 December 2009, Grêmio informed FC Moscow that they had *"(…) paid last December 29th, (…) the amount of E […] (…) in favor of Maximiliano Gastón Lopez as established in the labor*

contract between the player and Grêmio (…). In view of the aforesaid, this is to inform you that Grêmio has accomplished with its obligation by paying the amount to the player to buy 100% of the federative right established in the contract (…) forcing the player to pay FC MOSCOU the amount of USD […]".

16. On 4 January 2010, the Player informed Grêmio that clause 8 of the Addendum to the Employment Agreement, which represents a promise on the part of the Player to sign a future employment agreement with Grêmio (hereinafter referred to as the "Agreement to Conclude an Agreement") was null and void and that his federative and economic rights had reverted to FC Moscow with effect from 1 January 2010.

17. On 11 January 2010, FC Moscow informed the Appellant that until 31 December 2009, Grêmio had not sent any letter indicating its intention to sign the Player on a permanent basis.

18. On 20 January 2010, Catania informed Grêmio that they had reached an agreement with FC Moscow for the Player's transfer to Catania.

19. On 20 January 2010, Grêmio informed Catania that they had already exercised the option to sign the Player on a permanent basis for three years in accordance with the Agreement to Conclude an Agreement.

II.1. THE FIFA DISPUTE RESOLUTION CHAMBER PROCEEDINGS

20. On 15 April 2010, Grêmio filed a claim before the FIFA DRC claiming that the Player had breached clause 8 of the Addendum to the Employment Agreement by failing to sign a definitive employment contract as agreed. Grêmio sought the following amounts as compensation for the alleged breach:

    a) USD […] corresponding to salaries for the entire three year period under the new employment agreement plus the signing fee;

    b) USD […] for moral and sporting damages; and

    c) A 5% annual interest rate on the said amounts with effect from 1 January 2010.

21. Grêmio claimed that they had the right to exercise the option of signing a new employment agreement with the Player, subject to the only condition of paying the Player EUR […]. It was Grêmio's assertion that clause 8 of the Addendum to the Employment Agreement was a promise rather than a unilateral option clause and that the Player stood to receive a financial benefit from the Agreement to Conclude an Agreement.

22. The Player argued that clause 8 of the Addendum to the Employment Agreement was an invalid unilateral option clause as it allowed one party to force another to contract, in contravention of the principle of freedom of contract.

23. The Player also averred that Grêmio's conduct was aimed at inducing him to breach the FC Moscow Employment Agreement and that Grêmio acted in bad faith by trying to implement clause 8 of the Addendum to the Employment Agreement only two days before his return to FC Moscow.

24. On 23 January 2013, the FIFA DRC rendered the Appealed Decision and held as follows:

"The claim of the Claimant, club Grêmio Foot-Ball Porto Alegrense, is rejected".

25. The Appealed Decision was based on the following grounds:

a) That the Player was still under contract with FC Moscow. Therefore, following the expiry of his Employment Agreement with Grêmio, the Player could not have promised or committed himself to sign a new employment agreement with Grêmio without FC Moscow's consent. Neither Grêmio nor the Player was in a position to contractually agree on a "promise of contract".

b) Consequently, clause 8 of the Addendum to the Employment Agreement could not be considered, since a contractual relationship between the Player and FC Moscow still existed at that particular time.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 16 July 2013, the Appellant filed its Statement of Appeal before the Court of Arbitration for Sport (hereinafter referred to as the "CAS"), pursuant to Article R48 of the Code of Sports-related Arbitration (edition 2012) (hereinafter referred to as the "CAS Code").

27. The Appellant appointed Prof. Massimo Coccia, Law Professor and Attorney-at-law in Rome, Italy, as arbitrator.

28. On 26 July 2013, the Appellant filed its Appeal Brief together with exhibits and a list of witnesses it intended to rely on.

29. On 30 July 2013, the Respondent nominated Mr. Efraim Barak, attorney-at-law in Tel Aviv, Israel, as arbitrator.

30. On 31 July 2013, the Respondent requested that the time limit for filing his answer be fixed once the advance of costs has been paid by the Appellant in accordance with Article R55.3 of the CAS Code as read together with Article R64.2 of the said Code.

31. On 27 September 2013, the Respondent filed his Answer together with exhibits he intended to rely on.

32. On 30 September 2013, the CAS Court Office invited the Parties to state whether they wanted a hearing or preferred to have the matter decided on the basis of their written submissions.

33. By communication dated 1 October 2013, the CAS Court Office informed the Parties that the Panel had been constituted as follows:

a) President: Mr. Rui Botica Santos, Attorney-at-law, Lisbon, Portugal

b) Prof. Massimo Coccia, Law Professor and Attorney-at-law, Rome, Italy

c) Mr. Efraim Barak, Attorney-at-law, Tel Aviv, Israel

34. The Panel also appointed Mr. Felix Majani, Attorney-at-law in Nairobi, Kenya, as *ad hoc* clerk.

35. On 30 September and 1 October 2013, the Parties respectively indicated their wish for a hearing.

36. On 18 November 2013, the CAS Court Office issued an Order of Procedure, which was duly signed by the Parties.

37. On 3 December 2013, the hearing was held in Lausanne, Switzerland. The Panel was assisted at the hearing by Mr. Fabien Cagneux, Counsel to the CAS. Grêmio was represented by Mr. Gonçalo Almeida and Mr. Luis Dias. The Player attended the hearing and was assisted by his counsels Mr. Juan de Dios Crespo Pérez and Mr. Santiago San Torcuato, and by Ms. Marta Lumbreras Preta as an interpreter. Ms. Silvia Claudia di Modica also attended the hearing as part of the Player's delegation.

38. The following testified during the hearing:

- Mr. Jorge Luiz Tomatis Petersen and Mr. Claudio Silveira Batista, witnesses summoned by the Appellant who testified by telephone conference; and
- The Player.

39. At the end of the hearing, the Parties acknowledged that they had no objection in respect to the manner in which the hearing had been conducted and that, in particular, their right to be heard and to be treated equally in the arbitration proceedings had been respected by the Panel.

40. On 3 December 2013, the CAS Court Office invited the Parties to file submissions on costs.

41. On 11 and 12 December 2013, the Parties filed their respective submissions on costs.

IV. THE PARTIES' POSITION

42. The following outline is a summary of the main positions of the Appellant and the Respondent and does not comprise each and every contention put forward by the Parties. However, the Panel has carefully considered all the submissions made by the Appellant and the Respondent, even if no explicit reference has been made in what follows. The Parties' written submissions, the documentary evidence, the content of the Appealed Decision and the oral submissions at the hearing were all taken into consideration. The witness testimonies were also taken into consideration and such reference will be made in the merits section, if and when appropriate.

IV.1 THE APPELLANT'S SUBMISSIONS

43. It is the Appellant's position that the Parties signed a tripartite agreement which would enable Grêmio, through the Player's consent, to acquire 100% of the Player's federative rights as well as 50% of the Player's economic rights in the form of a three-year employment agreement. The Appellant submits that the Respondent breached his contractual obligations towards them by failing to sign a three-year employment agreement and consequently requests compensation.

44. The Appellant's submissions can in essence be summarized as follows:

a) Both the Employment Agreement and the Addendum to the Employment Agreement were freely and voluntarily signed by the Player. They are valid and binding.

b) The Addendum to the Employment Agreement is traceable to the Private Agreement and in particular clause 5 thereof, which foresaw Grêmio's ability to acquire the Player's federative and economic rights in future after the expiry of the Employment Agreement. The only requirement was the payment of USD […] by either the Player or any third club interested in his services.

c) The FIFA DRC made the following errors:

- It ignored the contents of the Private Agreement according to which FC Moscow agreed to cede its federative and economic ownership of the Player in exchange for USD […];
- It ignored the Private Agreement, which proved that the Player was in a position to contractually agree to sign a new employment agreement with Grêmio; and
- It failed to consider the fact that the Player was the main architect of the Agreement to Conclude an Agreement.

d) Grêmio was forced to deposit an amount of […] Reais (approximately EUR […]) at the Brazilian labour court because the Player had failed to provide his bank account details as requested. Both FC Moscow and the Player were informed of the said deposit, which was sufficient to secure the Player's economic and federative rights in the amount of USD […] as agreed with FC Moscow, and also have the Player receive the remaining balance of approximately USD […].

e) Clause 8 of the Addendum to the Employment Agreement makes no reference to a unilateral extension. It talks of the payment of EUR […]. It is therefore valid and binding especially given the fact that the Private Agreement was also freely entered into between the Player and FC Moscow and also the fact that clause 8 of the Addendum to the Employment Agreement would enable the Player to earn an extra income of USD [… *(NB: more than ten times his monthly salary)*], compared to his monthly salary of EUR […] at FC Moscow. This is further proof that the Player was not the weaker party and that the terms provided for under the new employment agreement were as a result of arm's length negotiations.

f) The Player breached the terms of the Addendum to the Employment Agreement, despite having freely and voluntarily signed the said agreement.

g) The Player should compensate Grêmio, which acted in good faith, for all the contractual expectations he falsely created and unilaterally frustrated. Any other decision would imply that the Player was allowed to sign two different contracts containing clauses which are related to each other but to later on argue that such clauses – whose existence he contributed to – are invalid.

h) Grêmio has suffered several and considerable damages at financial, moral and sporting level.

i) In relation to financial damages, Grêmio has suffered an amount *"corresponding to the stipulated signing-on-fee and all the salaries that were contractually established for the entire period of the parties' definitive employment contract. In particular, all the stipulated salaries, amounting to USD […] and the signing-on-fee amounting to € […]"*.

j) Grêmio should also be compensated for the *"moral and sporting damages that it has suffered (…) in a minimum amount of USD […]"*.

45. Grêmio concludes its submissions by requesting the CAS to:

"1. Entirely accept the present appeal and set aside the appealed decision taken by the Dispute Resolution Chamber;

2. Establish that the option right stipulated in Clause 8 of the Addendum to the parties employment contract is valid and binding;

3. Establish that the Respondent has unilaterally breached the parties' employment contract, in particular, the relevant option right, by having failed to sign the respective definitive employment contract;

4. Establish that the Respondent is liable to pay to it, as a compensation for his breach of the parties' employment contract, in particular, for the not fulfilling the definitive employment contract, the amount of USD […];

5. Establish that the Respondent is also liable to pay to it a minimum amount of USD […] (…) as compensation for all the moral and sporting damages suffered as a direct consequence of his contractual breach;

6. Subsidiary, in case the Panel decides that the option right contractually established between the Parties is not legally acceptable (a consideration that the Appellant entirely rejects), to condemn the Respondent to pay a minimum amount of USD […] as a compensation for all the financial, moral, sporting damages and above all the legal but false expectations that it has suffered as a direct consequence of his contractual non-compliance with contracts that were freely signed in advance with the single purpose of precisely allowing the exercise of the relevant option right;

7. Condemn the Respondent to pay to the Appellant default interest at the rate of 5% p.a. over the due amount since 1 January 2010 until its effective payment;

8. Condemn the Respondent to bear all the proceedings costs incurred in the present procedure, as well as to contribute to support the expenses incurred by the Appellant (e.g travel, accommodation and legal assistance) in a minimum amount of CHF […] (…)".

IV.2 THE RESPONDENT'S SUBMISSIONS

46. The Respondent submits that he was not obliged to sign the "Agreement to Conclude an Agreement" because he did not wish to continue playing for Grêmio and was required to return to FC Moscow after 31 December 2009. He asserts that clause 8 of the Addendum to the Employment Agreement is unilateral and therefore invalid. In any case, the Player avers that Grêmio has not suffered any damages.

47. The Respondent's submissions can in essence be summarised as follows:

a) The Player was only transferred to Grêmio on a loan basis. He had to return to FC Moscow once his loan expired on 31 December 2009. Grêmio had expressly agreed to this in the Loan Agreement. At no particular time was Grêmio entitled to sign any other employment agreement with the Player during the validity of the Employment Agreement.

b) Clause 8 of the Addendum to the Employment Agreement contravenes clause 4 of the Loan Agreement, which prohibited the Player from signing any other contract without FC Moscow's consent. The Player could therefore not have committed or promised to sign the Agreement to Conclude an Agreement, as he still had a valid contract with FC Moscow. Clause 8 of the Addendum to the Employment Agreement should therefore not be considered.

c) In order to be valid and enforceable, clause 8 of the Addendum to the Employment Agreement required the Player to consent to a transfer to Grêmio. This was laid forth under clause 5 of the Loan Agreement, which stated that "*(…) the obligation to pay the compensation can be undertaken by the football club or by the third party for which the employee wishes to continue his football career (...)".*

d) The Player did not wish to continue playing for Grêmio. Pursuant to CAS jurisprudence, a player can only be transferred with his consent.

e) The Loan Agreement did not give Grêmio the unilateral right to sign the Player without his consent. The Player was first required to terminate the FC Moscow Employment Agreement.

f) Clause 8 of the Addendum to the Employment Agreement should therefore be declared invalid as it restricts the Player's ability to play football at his club of choice.

g) In addition to the above, clause 8 of the Addendum to the Employment Agreement is invalid because:

i. it tries to force the Player to terminate the FC Moscow Employment Agreement and to unilaterally sign a new employment agreement with Grêmio;

ii. it is unilateral and in contravention of the so-called Portmann Criteria because:

- The "Agreement to Conclude an Agreement" does not give the Player any financial gain. There is no substantial increase in his salary;
- Grêmio's original employment contract with the Player (*i.e* the Employment Agreement) does not state what reward the Player would earn in return for Grêmio renewing the Employment Agreement by exercising clause 8 of the Addendum to the Employment Agreement;
- It does not expressly specify the Player's financial terms. In other words, it does not lay forth how and when he would be paid the amount of USD […], USD […] and USD […] under the Agreement to Conclude an Agreement;
- The Player could only be transferred to a club upon the payment to FC Moscow of the agreed fee of USD […] (clause 5 of the Private Agreement);
- Given the fact that the last match in the Brazilian championship took place on 5 December 2009, Grêmio did not exercise the option within an acceptable deadline. By sending the Player the letter dated 29 December 2009, Grêmio only gave the Player a two days' notice of their intention to exercise clause 8 of the Addendum to the Employment Agreement. They failed to consider the fact that the Player was required to return to FC Moscow, who were keen on retaining his services. In fact, the Player received notice of Grêmio's intention to exercise clause 8 of the Addendum to the Employment Agreement after 31 December 2009, by which time his contract with FC Moscow had already been reactivated;
- It places the Player at Grêmio's mercy; and
- It ought to have been emphasized and inserted in the Employment Agreement so that the Player would be conscious of clause 8 of the Addendum to the Employment Agreement when he signed the Employment Agreement.

h) Clause 8 of the Addendum to the Employment Agreement was linked to clause 5 of the Private Agreement. To this end, Grêmio could not purport to exercise a right it did not have (clause 8 of the Addendum to the Employment Agreement) given the fact that the Player belonged to FC Moscow even at the time the Addendum to the Employment Agreement was signed.

i) Grêmio did not request the Player for his bank account details in order to transfer the alleged amount of EUR […]. Grêmio has not adduced any document proving the said request.

j) Grêmio acted in bad faith by only giving the Player two days' notice of its intention to exercise clause 8 of the Addendum to the Employment Agreement.

k) Whether or not Grêmio complied with its contractual obligations towards the Player is irrelevant, as Grêmio was contractually bound to do this. In fact it is strange for Grêmio to have requested the Player to sign a new employment agreement knowing too well that they actually owed him some money from the Employment Agreement. The Player had to file a suit before the Porto Alegre labour court with a view to compelling Grêmio to pay him his outstanding monies.

l) The Player was trying to comply with his contractual obligations towards FC Moscow and had to return at the end of his loan.

m) Article 42 of the Swiss Code of Obligations (hereinafter referred to as the "CO") makes clear that "*whoever suffers damages must prove the damage*".

n) Grêmio has not suffered any damages and if at all they have, they have failed to prove the same.

o) The Player's failure to remain at Grêmio is evidence of the fact that Grêmio no longer had to pay his salary. As such, they suffered no damages.

48. The Player concludes his submissions by requesting the CAS to:

"1. Accept the present answer to the Appeal Brief presented by the Appellant.

2. Adopt an award dismissing the arguments presented in the aforementioned Appellant's Appeal.

3. Adopt an award in order to uphold the decision of the Dispute Resolution Chamber taken on 23 January.

4. Award the Respondent with an amount of the costs of the case for his legal expenses and fees incurred in its defence.

5. Condemn the Appellant to cover the entire costs of these arbitration proceedings".

V. LEGAL ANALYSIS

V.1. JURISDICTION OF THE CAS

49. The jurisdiction of the CAS, which is not disputed, derives from Article R47 of the CAS Code and Article 67 of the FIFA Statutes (edition 2012).

50. The Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure. It therefore follows that the CAS has jurisdiction to decide the present dispute.

V.2. ADMISSIBILITY

51. In accordance with Article 67.1 of the FIFA Statutes, *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"*.

52. The grounds of the Appealed Decision were notified on 26 June 2013 and the Statement of Appeal filed on 16 July 2013. This was within the required 21 days.

53. It follows that the appeal is admissible. Furthermore, no objection has been raised by the Respondent.

V.3. APPLICABLE LAW

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

"The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

55. Article 66.2 of the FIFA Statutes so 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".

56. Therefore, the Panel holds that the dispute must be decided in accordance with the FIFA regulations and supplemented by Swiss law, if necessary.

VI. MERITS OF THE APPEAL

57. Based on the Parties' written submissions and the discussions held during the hearing, the Panel must decide whether clause 8 of the Addendum to the Employment Agreement is valid, effective and gives rise to binding obligations on the Parties. If the answer to this first question is affirmative, the Panel must also assess whether the Player breached his obligations and, if so, whether damages are awardable to Grêmio.

58. Accordingly, in order to resolve the present matter, the Panel has identified, and must address and determine the following legal issues:

i. Is clause 8 of the Addendum to the Employment Agreement valid and binding?

ii. In case of an affirmative answer, did Grêmio fulfil the conditions precedent under clause 8 of the Addendum to the Employment Agreement, and was the Player obliged to implement the Agreement to Conclude an Agreement?

iii. If so, did the Player breach his contractual obligations towards Grêmio?

iv. Finally, and in case of a positive answer to the previous issue, what damages has Grêmio suffered?

59. The Panel shall here below determine each of the aforementioned issues in turn.

i. Is clause 8 of the Addendum to the Employment Agreement valid and binding?

60. As detailed in paragraph IV.2 above, the Player argues that clause 8 of the Addendum to the Employment Agreement is invalid as not only is it unilateral in contravention of the so-called Portmann Criteria, but also because it restricts his ability to play football at a club of his choice. Among other things, the Player argues that clause 8 of the Addendum to the Employment Agreement does not accord him any financial gain or salary increment, and also forces him to terminate the FC Moscow Employment Agreement.

61. Grêmio asserts that clause 8 of the Addendum to the Employment Agreement is valid and makes no reference to a unilateral extension. According to Grêmio, the Player would earn a substantially increased remuneration.

62. Pursuant to Article 8 of the Swiss Civil Code (hereinafter referred to as the "CC"), *"the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact"*. The burden, therefore, lies on the Player to prove that clause 8 of the Addendum to the Employment Agreement is invalid.

63. In order to establish whether clause 8 of the Addendum to the Employment Agreement is valid, the Panel must analyse and interpret this provision having in mind the deal structure and the context of all other relevant and related contracts that were agreed by and between the concerned parties, *i.e.* the Loan Agreement, the Private Agreement, the Employment Agreement and the Addendum to the Employment Agreement. The Panel also bears in mind the fact that the Player: (1) is an adult, a top professional player with international experience in negotiations leading to international transfers (the Player had previously signed professional contracts with important foreign clubs such as FC Barcelona in 2005 and RCD Mallorca in 2007); (2) has a relatively good financial capacity, considering his monthly income; and (3) was professionally assisted by his agent in the negotiations with Grêmio.

64. All the contracts identified in the previous paragraph, in particular the Addendum to the Employment Agreement, were freely, consciously and voluntarily signed, and the Player has not pleaded to have either been misrepresented or under any fundamental error in relation to the understanding and effects of the Agreement to Conclude an Agreement. The Panel has also not identified any facts or circumstances that could lead or infer to the presence of such situations.

65. Therefore, the Panel must only assess the validity of clause 8 of the Addendum to the Employment Agreement in light of the relevant sporting regulations and the general legal provisions and principles applicable to the case. This means that in interpreting clause 8 of the Addendum to the Employment Agreement, the Panel shall rely on the general contractual provisions and principles of FIFA regulations (namely freedom of contract, contractual stability / *pacta sunt servanda*, and the good faith of the parties), and also Article 18.1 CO,

which states that *"[w]hen assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement"*. The FIFA DRC and CAS jurisprudence shall also be considered.

66. In the Panel's perception, clause 8 of the Addendum to the Employment Agreement does not represent a standard "unilateral extension clause" under which a player is placed in a weaker position *vis-à-vis* the club. It is true that the Player has granted Grêmio the right to decide on whether or not to implement the Agreement to Conclude an Agreement and that such implementation is subject to a condition precedent which solely lies at Grêmio's discretion. However, this *per se* does not lead to the conclusion that the Player was placed in a weaker position in relation to his freedom of movement or his personality rights, thereby invalidating the clause.

67. It must be noted that the FIFA regulations do not contain any express provision which prohibits the unilateral extension of contracts. The decisions issued by the FIFA DRC and the CAS on unilateral extension clauses have always been based on the spirit and legal framework which the FIFA regulations intend to foster, in other words, the principles which prohibit excessive and unwarranted restrictions on a player's freedom of movement and personality rights.

68. Looking at the FIFA DRC jurisprudence, it is apparent that in order to determine whether or not a unilateral extension clause is valid, the following elements have been taken into consideration:

    1. The potential maximal duration of the labour relationship should not be excessive;
    2. The option should be exercised within an acceptable deadline before the expiry of the current contract;
    3. The salary reward deriving from the option right should be defined in the original contract;
    4. One party should not be at the mercy of the other party with regard to the contents of the employment contract;
    5. The option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract;
    6. The extension period should be proportional to the main contract; and
    7. It would be advisable to limit the number of extension options to one.

69. The first five elements aforementioned are based on the Portmann criteria, with the latter two emanating from recent developments in the FIFA DRC and CAS jurisprudence.

70. CAS jurisprudence (for example CAS 2005/A/973) adopts a rather practical and constructive approach in assessing the validity of unilateral extension clauses, and lays emphasis on the principles of contractual stability / *pacta sunt servanda* / contractual freedom and good faith of the parties with a view to ensuring that a player's freedom of movement or personality rights

are not unduly or excessively restricted. In doing this, the CAS gives particular attention and consideration to the player's conduct during the period leading to the negotiation of the alleged unilateral extension clause, and also the player's conduct during the implementation of the contract.

71. Relating the above understanding and principles to the facts beforehand, is clause 8 of the Addendum to the Employment Agreement a standard unilateral extension option clause?

72. The inseparable relationship between the Private Agreement and the Loan Agreement is crucial in determining the validity of clause 8 of the Addendum to the Employment Agreement. This is because: (i) the Private Agreement entitled the Player to legally terminate the FC Moscow Employment Agreement; and (ii) in case Grêmio was unable to exercise its right to implement the Agreement to Conclude an Agreement either because it was not interested in the Player or lacked the necessary funds, the Player would not remain unemployed because he still had a valid contract with FC Moscow.

73. The Panel's understanding and interpretation of the Loan Agreement, the Private Agreement and the Addendum to the Employment Agreement suggests that the parties' real intention when entering the contractual deal structure at stake was to temporarily transfer the Player to Grêmio on a trial period, which period, if successful, would lead to the implementation of the Agreement to Conclude an Agreement. The trial period would also allow Grêmio to obtain the necessary funds to hire the Player on a permanent basis.

74. Even assuming that clause 8 of the Addendum to the Employment Agreement was an extension clause, the Panel is not persuaded that its alleged unilateral nature could lead to its invalidity.

75. The Panel shares the views expressed in CAS 2005/A/973, which held that whether or not an extension clause is acceptable must be assessed on a case by case basis, with the deciding body having to not only look at the wordings of the said clause, but also at the factual background and circumstances which contributed to its insertion, in particular the parties' attitude during the negotiations and the performance of the Employment Agreement.

76. Whereas the Portmann criteria may serve as a guiding benchmark in assessing the validity of unilateral extension clauses, the Panel, like its predecessors in CAS 2006/A/1157 and CAS 2005/A/973, is conscious of the need to not accord too much weight and value to the Portmann criteria at the expense of the very important specifics and circumstances behind each individual dispute.

77. Also speaking in favour of the validity of clause 8 of the Addendum to the Employment Agreement are the following substantial benefits due to the Player under the Agreement to Conclude an Agreement which, if put together, result in a significant increase in his remuneration:

a) An annual net salary of USD […], USD […] and USD […] in the first, second and third year of the Agreement to Conclude an Agreement. Each of these amounts substantially exceeded the gross monthly salary of EUR […] the Player would have received had he continued his employment agreement with FC Moscow after 31 December 2009, as well as the gross salary of […] Reais (approximately USD […]) he was receiving under

the Employment Agreement. The Panel points out that the Player's salary under the Employment Agreement was paid in gross whereas the salary resulting from the Agreement to Conclude an Agreement was to be paid in net. This represents an increase of approximately 30%, considering the average Brazilian tax rate applied on personal income such as the one under consideration;

b) The equivalent in Reais to EUR […] (approximately USD […]), immediately upon signing the Agreement to Conclude an Agreement, out of which he would keep USD […] and pay FC Moscow USD […] in order to become free; and

c) 50% of his economic and financial rights – rights he previously did not hold. Considering the Player's experience, his relatively successful international career, as well as the fact that he would be 25 years old in December 2009, these rights could represent a significant value.

78. In the Panel's view, the mere fact that clause 8 of the Addendum to the Employment Agreement might somehow be vague and unclear for failing to specify how and when these amounts would be paid does not mean that Grêmio's obligation was inadequate to the extent of requiring the Parties to engage in further negotiation. In assessing this issue, the Panel considers the fact that the Parties were already under an employment relationship and any omission would be filled in the same terms and practice of the Employment Agreement.

79. Furthermore, the Panel notes that under clause 8 of the Addendum to the Employment Agreement, the Player only promised to sign a three-year employment agreement. The Panel deems the proposed three-year period as being reasonable, as it was shorter than the maximum period of five years provided for under Article 18.2 of the FIFA Regulations on the Status and Transfer of Players.

80. Briefly going through the elements referred to at paragraph 68 above *vis-a-vis* the specificities and individual circumstances surrounding the present case, the Panel finds that none of the said elements is relevant because:

- The three-year term provided for under the Agreement to Conclude an Agreement is not excessive, and the agreed second and third seasons are not dependent and/or subject to any unilateral decision from Grêmio.
- As detailed in section VI (ii) (b) below, the option was exercised within an acceptable deadline because the Player was still under the FC Moscow Employment Contract.
- As detailed at paragraph 77 above, the Player's financial terms and conditions are substantially higher in comparison to those he received under the Employment Agreement.
- The Player was not at Grêmio's mercy. As detailed in section VI (ii) (b) below, the Player confirmed his wish to continue playing for Gremio until the end of 2009.
- The clause regarding the Agreement to Conclude an Agreement was conspicuously clear, and at no particular time did the Player raise any issue regarding its interpretation and/or his understanding of the same.

- The Agreement to Conclude an Agreement is not a disproportionate "extension" of the Employment Agreement. Even if it were an "extension", it did not exceed the maximum period of five years provided (cf paragraph 79 above); and
- The Agreement to Conclude an Agreement does not contain any further extension.

81. In view of all the foregoing, the Panel finds clause 8 of the Addendum to the Employment Agreement to be valid and binding and consequently dismisses the Player's assertions that it should be declared invalid for being a unilateral extension clause.

ii. Was the Player obliged to implement the Agreement to Conclude an Agreement?

82. The Player states that he was not obliged to implement the Agreement to Conclude an Agreement because Grêmio did not exercise clause 8 of the Addendum to the Employment Agreement within a reasonably acceptable time frame. According to the Player, by sending the letter dated 29 December 2009, Grêmio only gave the Player a two days' notice of their intention to exercise clause 8 of the Addendum to the Employment Agreement, despite the last match of the Brazilian championship having taken place on 5 December 2009. The Player asserts that Grêmio failed to consider the fact that he was required to return to FC Moscow, who were keen on retaining his services. The Player claims that he only received Grêmio's letter dated 29 December 2009 in January 2010, by which time the FC Moscow Employment Agreement had already been reactivated.

83. In order to determine whether clause 8 of the Addendum to the Employment Agreement was properly exercised, the Panel must assess this issue from a formal and material point of view, *i.e.* whether Grêmio fulfilled the agreed requirements, acted in good faith and in an acceptable manner.

a) From a formal point of view

84. The starting point in determining the formalities agreed upon by the Parties is by looking at the structure, wordings and spirit of the contracts entered into between the Parties.

85. Looking at the wording of the Loan Agreement, the Private Agreement, the Employment Agreement and the Addendum to the Employment Agreement, the Panel notes that none of the agreements contains any detailed procedure as to how and when Grêmio was required to act in order to implement the Agreement to Conclude an Agreement. However, in the Panel's understanding, these contracts contain all the necessary elements allowing the Parties to implement the Agreement to Conclude an Agreement in acceptable terms and conditions. These terms would imply the following cumulative conditions and procedures:

i. Payment of an amount in Reais equivalent to EUR […] (clause 8 of the Addendum to the Employment Agreement), before the expiry of the term of the Employment Agreement (this deadline is inferred bearing in mind the term of the Employment Agreement, i.e. 31 December 2009 and the term of the Loan Agreement – clause 5);

ii. Notification to the Player and FC Moscow regarding Gremio's decision to implement the Agreement to Conclude an Agreement so that both would be in a position to accordingly strategize and/or re-arrange their forthcoming sporting and financial plans. This understanding is brought about by the normal practice engaged by clubs and players in the football market; and

iii. Payment by the Player or the acquiring club of USD […] to FC Moscow, in order to release the Player from the FC Moscow Employment Agreement (clause 5 of the Private Agreement).

86. It can therefore be concluded from clause 8 of the Addendum to the Employment Agreement, as read together with clause 5 of the Private Agreement, that in order to properly and formally implement the Agreement to Conclude an Agreement, Grêmio had to pay the Player EUR […] no later than 31 December 2009, in order to give the Player the necessary funds to pay FC Moscow and to free himself. The condition set forth in iii) above could either be fulfilled by the Player or Grêmio, and the latter opted to provide the Player with the relevant funds.

87. Did Grêmio comply with its obligations as abovementioned in order to implement the Agreement to Conclude an Agreement?

88. It has neither been disputed that on 29 December 2009 Grêmio deposited […] Reais (approximately EUR […]) at the Brazilian labour court in favour of the Player nor that the Player and FC Moscow received relevant notices drawing their attention to (i) the said deposit and (ii) Grêmio's decision to hire the Player. Corroborating these facts are (i) a copy of the receipt evidencing the deposit made at the Brazilian labour court (exhibits 5 & 6 of the Appeal Brief) and (ii) a copy of the written notices dated 29 and 31 December 2009 adduced by the Appellant, with the letter dated 29 December 2009 being addressed to the Player and the letter dated 31 December 2009 being addressed to FC Moscow (please see para. 14 and 15 above).

89. In relation to whether the procedure adopted by Grêmio of paying the amount of EUR […] at the Brazilian labour court instead of paying it the Player's Brazilian bank account has any material impact on the manner in which Grêmio performed its payment obligation, the Panel takes note of various aspects.

90. During the hearing, the Panel asked why Grêmio did not transfer the amount of EUR […] directly into the Player's bank account or why it did not transfer the USD […] directly into FC Moscow's account and the balance into the Player's Brazilian bank account.

91. Grêmio stated that they were not sure whether the Player was 100% committed to implementing the Agreement to Conclude an Agreement. According to Grêmio, although the Player had orally assured them of his desire to play for Grêmio, they were not sure about his attitude, particularly because he knew that Grêmio was facing financial difficulties in securing the amount of EUR […]. Grêmio therefore said that it chose to deposit the amount at the Brazilian labour court instead of paying into FC Moscow's or the Player's account because they did not want to go through the trouble and risk of having to recover this amount from

FC Moscow or the Player in case the Player declined to sign a new Employment contract with Grêmio.

92. Whether or not Grêmio requested the Player to provide his bank account details with a view to transferring the amount of EUR […] is not crucial. The Panel understands the reason why Grêmio chose to deposit the amount of EUR […] at the Brazilian labour court instead of transferring it directly to the Player's Brazilian bank account or splitting such payment into two by directly paying FC Moscow USD […] and transferring the balance in the Player's Brazilian bank account. The Panel understands Grêmio's position, due in particular to the Player's unclear attitude of, on one hand, confirming his interest and will to continue with Grêmio but, on the other hand, making the necessary travel arrangements to return to Moscow. In any case, the Panel reiterates that the Player knew that this amount was available to him and he could easily have accessed it and paid the relevant sum to FC Moscow.

93. In view of the foregoing, the Panel finds that from a formal point of view, Grêmio complied with the requirements to implement the Agreement to Conclude an Agreement in a proper manner.

b) From a material point of view

94. The Panel notes the Player's assertion that even from a material point of view, he was not obliged to implement the Agreement to Conclude an Agreement because it was triggered unreasonably late, with only two days left before the expiry of the Employment Agreement.

95. Did Grêmio exercise the Agreement to Conclude an Agreement unreasonably late?

96. Pursuant to CAS jurisprudence (CAS 2005/A/973), it is generally unreasonable for a club to wait so late (for example until only five days before the start of the transfer-period) before exercising its right to extend an employment contract with a player. The reason for this is understandable, because the club is entitled to inform the player whether or not it would be extending the employment agreement way in advance so that the player can take advantage of the transfer period and look for another club and thus avoid having to find himself unemployed in case the club decides not to extend his employment agreement.

97. During the hearing, the Parties confirmed having held some meetings and talks in December 2009, during which Grêmio always informed the Player that it wished to continue its relationship with him for the next three seasons.

98. It has been proven that Grêmio kept the Player well informed regarding its decision to sign him on a permanent basis and also regarding the financial difficulties it was experiencing in relation to securing the required EUR […]. These facts were also corroborated during the hearing by the Player as well as the two witnesses summoned by Grêmio.

99. They all confirmed that, in December 2009, the Parties held several meetings and discussions in relation to the implementation of the Agreement to Conclude an Agreement, and that on 27 December 2009 the Parties held another meeting in Buenos Aires (Argentina), where Grêmio reassured the Player that they were still looking for the necessary funds. During the said meeting, the Player assured Grêmio of his availability to sign a three year contract, and

never indicated his wish to return to FC Moscow and/or any concern about the timing and delay of a final decision from Grêmio.

100. From the above facts and meetings, it can be concluded that the Player was aware of Grêmio's decision to implement the Agreement to Conclude an Agreement and also knew that Grêmio was working to try and obtain the relevant funds.

101. It can also be concluded that Grêmio was not unreasonably late in deciding to sign the Player. This decision was, at the very latest, made known to the Player at the beginning of December 2009. The only issue which was then holding Grêmio back were difficulties in obtaining the relevant funds, an issue which the Player was aware of. In the Panel's view, this is an issue which would not affect the Player's professional situation or potentially leave him unemployed, because he could still resort to the FC Moscow Employment Agreement.

102. In view of the foregoing, the Panel finds that from a material point of view, Grêmio fulfilled its obligations in order to implement the Agreement to Conclude an Agreement.

iii. Did the Player breach his contractual obligations towards Grêmio?

103. Having found clause 8 of the Addendum to the Employment Agreement to be valid and having been properly exercised by Grêmio, the Panel now reverts to assess whether the Player had any valid reason not to fulfil his contractual obligations.

104. The Player argues that clause 4 of the Loan Agreement prevented him from signing any other contracts without FC Moscow's consent and that he was obliged to return to FC Moscow as agreed under clause 3 of the Loan Agreement. Is this a valid reason? The Panel is of the view that these provisions did not prevent the Player from implementing the Agreement to Conclude an Agreement because he could exercise clause 5 of the Private Agreement and free himself from the FC Moscow Employment Agreement by paying (or having the interested club pay) to FC Moskow the required amount.

105. The Player knew that he had voluntarily pledged to sign a three-year employment contract with Grêmio after the expiry of the Employment Agreement. This pledge was perfectly in line within the provisions of Article 22 para. 1 CO, which states that *"[p]arties may reach a binding agreement to enter into a contract at a later date"*. After being informed that Grêmio had deposited the funds in his favour at the Brazilian labour court, the Player only had to undertake certain procedural and administrative steps, such as using part of that amount to pay FC Moscow the amount of USD […] as compensation agreed under clause 5 of the Private Agreement, and then terminating his employment agreement with FC Moscow as agreed under clause 8.1 of the Addendum to the Employment Agreement. This, in the Panel's view, were already acts which the Player had voluntarily undertaken to do in the contracts he signed, and he cannot therefore claim that clause 8 of the Addendum to the Employment Agreement forced him to terminate the FC Moscow Employment Agreement.

106. In addition to the above, the Panel takes note of the fact that both the Player and FC Moscow were clearly not interested in continuing their contractual relationship. This assumption is based on clause 5 of the Private Agreement and the fact that the Player ended up signing an employment contract with the Italian club Catania on 20 January 2010.

107. It therefore follows that the Player breached his contractual obligations towards Grêmio.

iv. Has Grêmio suffered any damages?

108. Grêmio seeks compensation from the Player for all the false contractual expectations he created and unilaterally frustrated, basically claiming financial, marketing, sporting and moral damages.

109. The Player claims that Grêmio has not suffered any damages and/or proved any damages. The Player also corroborates his stance by arguing that Grêmio saved on the costs related to his salary.

110. The Panel notes that none of the contracts signed by the Parties contains a liquidated damages clause. In this regard, the burden therefore lies on Grêmio to prove that it has suffered damages as a result of the Player's breach pursuant to Article 42.1 CO, which states that *"[a] person claiming damages must prove that loss or damage occurred"*.

111. The Panel shall assess each category of damages sought by Grêmio.

a) Financial damages

112. Grêmio requests financial damages *"corresponding to the stipulated signing-on-fee and all the salaries that were contractually established for the entire period of the parties' definitive employment contract. In particular, all the stipulated salaries, amounting to USD […] and the signing-on-fee amounting to € […]"*.

113. In addition to having failed to cite the relevant legal provision on which the above request is based, Grêmio has neither explained how it arrives at the financial damages it seeks nor has it substantiated what category of damages form part of the said damages.

114. Therefore, compensation for breach must be assessed in accordance with Swiss law, which means that Grêmio must prove that it suffered loss or damages. The Panel also points out that under Swiss law, and considering the facts and circumstances of the case, the injured party is entitled to claim "positive interest". The purpose of positive interest is to place Grêmio in the position it would have occupied had the Player performed his contractual obligations.

115. In accordance with CAS jurisprudence, (CAS 2008/A/1519 & 1520 and CAS 2010/A/2145, 2146 & 2147) various elements are considered in determining whether or not a party has indeed suffered damages and is consequently entitled to be compensated in accordance with the principle of positive interest. Among the elements of positive interest which are relevant to this case and can be considered in deciding whether Grêmio is entitled to financial damages, one may include: replacement costs, sponsorship and merchandising losses, image rights losses as well as losses brought about by unsold stadium tickets or loss of a transfer fee.

116. In the present case, based on the evidence submitted by the Appellant in its submissions and during the hearing, Grêmio has failed to prove any financial damages.

117. First of all, Grêmio has neither claimed to have been forced to hire another player at a given cost to replace the Player, nor has it claimed to have hired scouts or agents who were unsuccessful in identifying a suitable replacement. Therefore, Grêmio did not incur any financial expenditure in regards to replacing the Player.

118. In the Panel's view, for Grêmio to simply ask as compensation for the missed hiring the overall remuneration that the Player was going to obtain is misconceived. It is indeed true that Grêmio, owing to the Player's refusal to sign the new employment contract, lost the possibility to enjoy the performances of the Player. However, the value attributed by Grêmio itself to those missed performances (and thus the value of its suffered loss) corresponds exactly to the remuneration that the parties had agreed. Accordingly, since Grêmio no longer had to pay the Player's salary and other benefits as specified in the Agreement to Conclude an Agreement, Grêmio was actually able to save on remuneration and other related costs exactly as much as it lost not having the Player at its disposal. In other words, it is a "zero sum" situation in which Grêmio's loss of utility (the Player's performances) is exactly balanced by its gain of utility (the amount of money that the Player's performances were worth). This position is corroborated by the panel's findings in CAS 2009/A/1856 & 1857, where the element of *"(…) the money saved by* [the] *Club due to the early termination of the contract by the Player (…)"* was deemed to be *"(…) consistent with the principle of the so-called positive interest"*.

119. In regard to commercial aspects, Grêmio has not adduced evidence substantiating that it suffered some loss as a result of the Player's breach.

120. No evidence has been adduced of any ongoing or future marketing, merchandising or sponsorship contracts which Grêmio had or would have signed with third parties in exclusive reliance on the Player's stay at Grêmio, and which contracts had to be cancelled following the Player's breach, consequently causing Grêmio to be penalized.

121. Neither has Grêmio argued or adduced evidence proving that a substantial number of its registered members or fans cancelled their season tickets, or all together declined to buy tickets for the forthcoming season(s) as a result of the absence of the Player from the team's roster.

122. In addition to the above, Grêmio did not claim to have entered into a contract relating to the Player's image rights with a third party, or that it had put everything in place for such a contract to be entered into once the Player fulfilled his obligations under the Agreement to Conclude an Agreement, and that it had to cancel any such contract following the Player's breach.

123. Finally, Grêmio has not contended that it had or could possibly have entered into an agreement with another club for the Player's transfer, and that the Player's breach ultimately made the Appellant to lose out on a guaranteed and specified future transfer fee.

124. It therefore follows that Grêmio has not met its burden of proof; accordingly, its request for a financial compensation of USD […] and EUR […] is dismissed.

b) Moral and sporting damages

125. Grêmio further requests *"moral and sporting damages that it has suffered (…) in a minimum amount of USD […]"*. The Panel remarks that other than quoting an amount of USD […], Grêmio has not substantiated the particulars and/or criteria it has used to arrive at this amount.

126. In the Panel's view, moral damages are commonly understood as the damages sustained by an individual who has suffered personal harm as result of conduct, acts or omissions which severely damage the personality or reputation of the injured party, causing physical, mental or psychological suffering.

127. In the case at stake, the moral damages have been requested by a legal entity and are therefore limited in scope. In other words, as a club, Grêmio's request for moral damages can only be limited to losses brought about by damage to its image and reputation. This is corroborated by the Swiss Federal Supreme Court's decision dated 11 April 2012 (decision 4A_741/2011 para. 6.1), which held that where a legal person is the subject of a violation of its personality, the corporate body itself suffers moral damages which permits it to claim compensation for moral damages. The Panel also remarks that, as a general rule, the awarding of moral damages is usually an exception rather than the rule and that Swiss courts have usually adopted a modest and restrictive approach when it comes to awarding moral damages.

128. Pursuant to Article 49.1 CO, *"[a]ny person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made"*. The burden lies on Grêmio to adduce any evidence demonstrating that the club's reputation was negatively affected as a result of the Player's breach.

129. Looking at the Appellant's submissions, the Panel cannot identify any circumstances which justify and/or give rise to any moral damages suffered by Grêmio, such as contracts which were never concluded because of damage to the club's status.

130. In addition to the above, Grêmio has failed to establish a *nexus* or causal relationship between the Player's conduct and the alleged moral damages, *i.e* Grêmio has not proven that the Player's breach was so serious that it led to direct loss of the club's reputation. In any case, the amounts requested are speculative and uncertain and as such, Grêmio has failed to discharge its burden of proof.

131. In relation to sporting damages, the Panel has also not identified any alleged and/or proven fact or circumstance that could sustain that the Appellant suffered any damages in the sporting realm. Grêmio has not adduced any evidence indicating that their failure to use the Player's services led to poor performances on the field, or that it had a negative impact on the club's sporting results.

132. It consequently follows that Grêmio's request for moral and sporting damages is dismissed.

c) The Appellant's subsidiary request

133. The Panel notes that Grêmio makes a subsidiary request for a minimum amount of USD […] as compensation for all the financial, moral and sporting damages in the unlikely event that

the Panel finds clause 8 of the Addendum to the Employment Agreement to be invalid. Grêmio explicitly states that this subsidiary request is only put forward *"(…) in case the Panel decides that the option right contractually established between the Parties is not legally acceptable"* (see *supra* at para. 45).

134. The Panel notes that the above request is clearly subject to a finding by the Panel that clause 8 of the Addendum to the Employment Agreement is invalid.

135. However, given the Panel's finding that clause 8 of the Addendum to the Employment Agreement is valid, it follows that Grêmio's subsidiary request is irrelevant and can no longer be considered.

136. Even if the said request were to be considered, the Panel refers to Article 42.1 of the CO, pursuant to which Grêmio bears the burden of proving that it suffered losses and damages justifying the award of a minimum amount of USD […] as compensation.

137. The Panel has already remarked that Grêmio has not proven any actual damages and the same is true for this subsidiary request.

138. In view of the foregoing, the Panel dismisses Grêmio's request for USD […] as compensation on a subsidiary basis.

VII. CONCLUSION

139. The Panel finds clause 8 of the Addendum to the Employment Agreement to be valid and binding. Consequently, the Panel finds that the Player was obliged to fulfil his contractual obligation of signing a three year employment agreement with Grêmio. However, the Panel finds that Grêmio did not prove any damages as a result of the Player's failure to sign the Agreement to Conclude an Agreement.

140. It therefore follows that Grêmio's appeal is dismissed and the Appealed Decision is confirmed, although for different legal reasons.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Grêmio Foot-ball Porto Alegrense on 16 July 2013 against the decision issued by the FIFA Dispute Resolution Chamber on 23 January 2013 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 23 January 2013 is confirmed.

(…)

5. Any other or further claims are dismissed.