Decision of the Dispute Resolution Chamber

passed in Zurich, Switzerland, on 19 January 2017,

in the following composition:

Geoff Thompson (England), Chairman
Johan van Gaalen (South Africa), member
Wouter Lambrecht (Belgium), member

on the matter between the player,

Player A, Country B

as *Claimant*

and the club,

Club C, Country D

as *Respondent*

regarding an employment-related dispute
arisen between the parties

I. Facts of the case

1. On 2 July 2010, the Player of Country B, Player A, (hereinafter: *the Claimant*), concluded an employment contract with the Club of Country D, Club C, (hereinafter: *the Respondent*), originally valid as from 5 July 2010 until 30 June 2012 but subsequently extended until 30 June 2015 by means of the conclusion of a document referred to as "Annex no3" (hereinafter: *the annex*).

2. According to the contract, the Claimant was entitled to a monthly remuneration of 17,600.

3. In addition, and according to the annex to the contract, the Claimant was entitled to the following remuneration:
   - EUR 10,250 per month for the period comprised between 1 January 2013 until 30 June 2013;
   - EUR 12,500 per month *"for the 2013/2014 football season"*;
   - EUR 13,000 per month *"for the 2014/2015 season"*.

4. Moreover, on 2 July 2014, the parties to the contract concluded a termination agreement, by means of which they terminated the contract and the annex, valid as from 1 July 2014.

5. In addition, and following article 2 of the termination agreement, the club agreed to pay to the Claimant the total amount of EUR 43,029.39, as follows:
   - EUR 25,117.39, *"at the day of termination of the* [contract] *and the* [annex] *but no later than* [4 July 2014] *(…) by cash payment"*;
   - EUR 10,000, *"payable latest by* [5 August 2014] *by bank transfer*."
   - EUR 7,912, *"payable latest by* [30 September 2014] *by bank transfer."*

6. Furthermore, article 5 of the termination agreement stipulated the following: *"In the event of a delayed payment of the due amounts* [the Respondent] *is obliged to pay to* [the Claimant] *an amount of EUR 39 000 (…) which is based on the three monthly payments of the* [Claimant's] *salary for season 2014/2015 according to* [the annex]*"*.

7. On 5 August 2016, the Claimant lodged a claim before FIFA against the Respondent, and requested the payment of a total amount of EUR 39,566.66, as well as legal and procedural costs, calculated as follows:
   - EUR 39,000, pursuant to article 5 of the termination agreement, plus 5% interest as from 6 August 2014;
   - EUR 566.66, as interests for the delay in the payment of two instalments of the termination agreement.

8. In particular, the Claimant explained that the Respondent paid on time the amount of EUR 25,117.39 that was stipulated in the termination agreement, but that the other two payments for the total amount of EUR 17,912 were made by

bank transfer on 21 April 2015 only, *i.e.* after the deadlines stipulated in the termination agreement. Therefore, the Claimant was of the opinion that the late payment entitled him to receive the amount stipulated in article 5 of the termination agreement.

9. In this regard, the Claimant explained that, on 7 March 2016, he sent via his legal representative a default notice to the Respondent, by means of which he requested the payment of the amount in dispute.

10. Subsequently, the Claimant explained that, on 18 March 2016, he notified the *"Licensing Commission of the Football Union of Country D"* about the existence of overdue payables towards him, and that an additional notification via email was sent to the Respondent on 21 March 2016.

11. Moreover, the Claimant explained that, on 30 March 2016, the Respondent sent its *"Opinion-Answer"* via the Football Union of Country D, by means of which the latter denied the competence of the aforementioned commission to deal with the matter. Furthermore, and according to said *"Opinion-Answer"*, the Respondent was of the opinion that article 5 of the termination agreement should be deemed as *"null and void"* in accordance with the jurisprudence of the FIFA DRC as well as of the Courts of Country D, since the penalty represents 90.64% of the principal amount, whereas the FIFA DRC established that *"penalty exceeding 18% of the principal is abuse of the law"*.

12. In view of the above, the Claimant stated that he had no other option than to lodge a claim before FIFA.

13. In its reply, the Respondent stated that, in August 2014, it was facing financial difficulties due to payroll restrictions imposed by UEFA for violation of Financial Fair Play rules and that, in view of the above, it agreed "*verbally*" with the Claimant to postpone all payments until April 2015, whereas the Claimant *"explicitly promised* to [the Respondent] *(…) to not file any complain (…)".* In the opinion of the Respondent, the existence of this verbal agreement can be proven by the fact that the Claimant did not send any default letter before the Respondent paid the remaining amount of EUR 17,912 on 21 April 2015 (cf. point I. 9. above).

14. In this regard, the Respondent explained that it received a default notice only in March 2016 for the payment of the fee established in article 5 of the termination agreement, *i.e.* eleven months passed after the debt was settled. Thus, the Respondent was of the opinion that the claim of the Claimant was lodged *"in bad faith"* and that it was contradictory to his previous behaviour *("non venire contra factum proprium"*).

15. Moreover, the Respondent acknowledged that article 5 of the termination agreement *"was contractually agreed by the parties"*, but that FIFA should analyse if said clause is valid and binding, or if it shall be deemed as abusive and excessive.

16. More precisely, the Respondent considered that article 5 of the termination agreement was intended to be established as a *"penalty clause"*, and provided documentation regarding the alleged negotiations that led to the drafting of said clause. In this regard, the Respondent considered that *"any penalty clause exceeding the amount of 18% per annum is abusive"*, and quoted jurisprudence of FIFA, the Court of Arbitration for Sport (CAS) and the Swiss Federal Tribunal in this regard. In particular, the Respondent underlined that the referred penalty clause represents more than 200% of the amount paid late (i.e. EUR 17,912).

17. As to the interests claimed by the Claimant, the Respondent considered that they were not contractually stipulated, and that in accordance with FIFA's jurisprudence, no interests are due over penalty fees.

18. In his *replica*, the Claimant considered that the amount stipulated in article 5 of the termination agreement is not a penalty fee or a compensation for the delay in the payment of his salaries, but *"a genuine amount constituting three monthly salaries"* that should be payable in accordance with the principle of *"pacta sunt servanda"*.

19. Moreover, the Claimant insisted that said article was not meant to *"penalize"* the Respondent. In particular, the Claimant considered that he would have been entitled to terminate the contract with the Respondent with just cause and seek for compensation for the total amount of EUR 156,000, but that he offered an *"alternative"* to the Respondent by signing the termination agreement and its article 5, and that consequently, said article must be deemed as valid.

20. In the alternative, the Claimant considered that the aforementioned article could be seen as *"liquidated damages"*.

21. Also in the alternative, and in case the DRC considered the aforementioned article as a penalty clause, the Claimant highlighted that the DRC previously awarded penalty fees that exceeded the principal amount. Within this context, the Claimant considered that this shall be the case taking into account the specific circumstances of the matter at hand.

22. Furthermore, the Claimant denied the existence of a *"verbal agreement"* with the Respondent (cf. point I. 13. above) and explained that, on 10 September 2014 and 12 November 2014, his agent contacted the Respondent to request the payment of the outstanding amount.

23. As final comments, the Respondent confirmed its previous allegations and, in particular, insisted that the clause in dispute was a penalty fee and that it cannot be considered as a compensation clause.

24. As to the existence of a verbal agreement to defer the payments, the Respondent supported its allegation on the basis of a correspondence dated 13 November 2014, by means of which the Claimant's alleged agent wrote the following email to the Respondent:

"(…) *Thank you for response. You know* [the Claimant] *and me are not the most difficult people but please keep us updated."*

25. In this regard, the Respondent further insisted that the Claimant remained silent as to said debt until April 2015, and that this fact should be considered as sufficient evidence about the existence of the aforementioned verbal agreement.

26. In relation to the claimed interest, the Respondent insisted that no interest is due over penalty fees, but that under any circumstance; it could only be calculated as from 21 March 2016 (cf. point I.10. above).

II. Considerations of the Dispute Resolution Chamber

1. First of all, the Dispute Resolution Chamber (hereinafter: *the DRC* or *the Chamber*) analyzed whether it was competent to deal with the case at hand. In this respect, it took note that the present matter was submitted to FIFA on 5 August 2016. Consequently, the 2015 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: *the Procedural Rules*) is applicable to the matter at hand (cf. art. 21 of the 2015 edition of the Procedural Rules).

2. Subsequently, the Chamber referred to art. 3 of the Procedural Rules and confirmed that in accordance with art. 24 par. 1 and 2 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players (edition 2016) the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a Player of Country B and a Club of Country D.

3. The competence of the DRC having been established, the Chamber decided thereafter to analyse which edition of the Regulations on the Status and Transfer of Players should be applicable as to the substance of the matter. In this respect, he confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (edition 2016), and considering that the present matter was submitted to FIFA on 5 August 2016, the 2016 edition of the aforementioned regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

4. Having established the foregoing, and entering into the substance of the matter, the Chamber continued by acknowledging the above-mentioned facts as well as the documentation contained in the file in relation to the substance of the matter. However, the DRC emphasised that in the following considerations it will refer only to the facts, arguments and documentary evidence which it considered pertinent for the assessment of the matter at hand.

5. In this respect, the DRC acknowledged that, on 2 July 2010, the parties to the dispute had signed an employment contract, originally valid as from 5 July 2010 until 30 June 2012 but subsequently extended until 30 June 2015, in accordance with which the Respondent would pay the Claimant a monthly salary in the

amount of 17,600 and that, according to the annex to the contract, the Claimant was entitled to the following remuneration:

- EUR 10,250 per month for the period comprised between 1 January 2013 until 30 June 2013;
- EUR 12,500 per month *"for the 2013/2014 football season"*;
- EUR 13,000 per month *"for the 2014/2015 season"*.

6. Subsequently, the Chamber noted that, on 2 July 2014, the parties to the contract concluded a termination agreement, by means of which they terminated the contract as from 1 July 2014 and that, according to the article 2 of the termination agreement, the Respondent agreed to pay to the Claimant the total amount of EUR 43,029.39, as follows:
   - EUR 25,117.39, *"at the day of termination of the* [contract] *and the* [annex] *but no later than* [4 July 2014] *(…) by cash payment"*;
   - EUR 10,000, *"payable latest by* [5 August 2014] *by bank transfer*."
   - EUR 7,912, *"payable latest by* [30 September 2014] *by bank transfer."*

7. Furthermore, the Chamber recalled the specific provision contained in article 5 of the termination agreement, which was drafted as follows:
   "In the event of a delayed payment of the due amounts the [Respondent] *is obliged to pay to the* [Claimant] *an amount of EUR 39 000 (…) which is based on the three monthly payments of the* [Claimant's]*' salary for season 2014/2015 according to* [the annex]*"*.

8. In this regard, the Chamber observed that, according to the Claimant, the Respondent failed to pay on time the second and third instalments as stipulated in article 2 of the termination agreement, which were respectively due on 5 August 2014 and 30 September 2014. More specifically, the Chamber noted that said instalments, which correspond to a total amount of EUR 17,912, were only paid by the Respondent on 21 April 2015.

9. Moreover, the Chamber noted that the Respondent acknowledged that, indeed, said amount was paid on 21 April 2015, but that according to the latter, said delay was mutually agreed between the parties in view of a *"verbal agreement"*. The Chamber also noted that, according to the Respondent, the Claimant did not submit any default notice in reference to said payments until that date. Furthermore, the DRC noted that the Claimant had denied the existence of the *"verbal agreement"*.

10. Consequently, the Chamber understood that the first legal issue it had to examine was whether said alleged *"verbal agreement"* could be supported by convincing evidence and, in a subsidiary manner, if it could be understood as valid and binding between the parties.

11. In this regard, the DRC recalled the basic principle of burden of proof, as established in art. 12 par. 3 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof.

12. Within this context, the DRC carefully examined the relevant documentation on file, and noted that no convincing evidence was provided by the Respondent in order to prove the existence of the disputed *"verbal agreement"*.

13. Nevertheless, the Chamber noted that the Respondent tried to prove the existence of said agreement on the basis of the Claimant's behavior.

14. In this regard, the Chamber considered that said argument had a speculative nature, and that the Respondent failed to prove that the referred *"verbal agreement"* may in any form override the stipulations contained in the termination agreement which, on the other hand, has been properly documented and remained undisputed between the parties. Consequently, and following the principle of *verba volant, scripta manent,* the Chamber decided to reject the Respondent's allegation regarding the existence of the aforementioned *"verbal agreement"*. In view of the above, the Chamber unanimously determined that it should mainly take into account the termination agreement as the basis of the present dispute.

15. Reverting to the previous considerations (cf. points II. 6. to II. 8.), the Chamber turned its attention to the second underlying legal question at stake. In particular, the Chamber observed that, as acknowledged by the parties, the Respondent failed to pay on time the amounts stipulated in the termination agreement, respectively due on 5 August 2014 and 30 September 2014. In particular, the Chamber observed that, as stated by the Claimant, said fact may trigger the application of art. 5 of the termination agreement.

16. In relation to said art. 5 of the termination agreement, the Chamber observed that, indeed, the conditions established for its applicability were met, since it was established that the Respondent did not pay on time the amounts respectively due on 5 August 2014 and 30 September 2014.

17. Yet, in this regard, the Chamber noted that, according to the Respondent, the aforementioned clause had to be considered as a penalty clause. Moreover, the Chamber observed that, as a consequence of said reasoning, the Respondent argued that the amount of EUR 39,000 stipulated in said clause was abusive, since it represents more than 200% of the amount paid late (*i.e.* EUR 17,912).

18. Conversely, the Chamber also observed that, according to the Claimant, the amount stipulated in article 5 of the termination agreement is not a penalty fee or a compensation for the delay in the payment of his salaries, but *"a genuine amount constituting three monthly salaries"* that should be payable in accordance with the principle of *"pacta sunt servanda"*.

19. In view of the dissent between the parties, the Chamber turned its attention to the specific nature of the disputed clause while considering the circumstances of the case at hand. In particular, the Chamber noted that the aforementioned clause was clearly drafted and mutually agreed between the parties within the context of a termination agreement.

20. In this regard, the Chamber observed that, indeed, the disputed clause imposed a payment on the Respondent upon his failure to comply with a primary stipulation (*i.e.* the payment on time of the amounts due on 5 August 2014 and 30 September 2014).

21. More precisely, and within the context of the conclusion of the termination agreement, the Chamber underlined that the Respondent failed to pay at that stage to the Claimant an amount equivalent to more than three months of salaries as stipulated in the annex to the contract. In this regard, the Chamber noted that, at that stage, the Claimant expressed his good faith by not claiming the due amounts as well as the remaining value of the contract at an earlier stage, even though he may have been legally entitled to act in said manner, and preferred to settle the matter in an amicable way accepting a considerably lower amount from the Respondent, part of which he would waive in case the Respondent would fulfill its payment obligations in a timely manner.

22. In addition, the Chamber analyzed the drafting of the disputed clause, and observed that the payable amount of EUR 39,000 was not established on the basis of arbitrary, disproportional or punitive criteria, but clearly in view of "*three monthly payments of the* [Claimant's] *salary for season 2014/2015 according to* [the annex]".

23. Therefore, the Chamber unanimously understood that the aforementioned amount was not intended to penalize the Respondent with the payment of an exorbitant sum in case it failed to comply with its obligations, but only to give rise to an obligation that was already established in the annex to the contract concluded between the parties.

24. Thus, the Chamber understood that, when determining the scope of the disputed clause, it had to consider the entire labor relationship between the Claimant and the Respondent, including both the relevant employment contract and its annexes, as well as the termination agreement.

25. In this regard, the members of the DRC deemed that, even if the disputed clause had to be considered as a penalty clause, in consideration of the pre-existing labour relationship as well as the particular circumstances of the matter at stake, the claimed amount is both proportionate and reasonable in the case at hand and, thus, the relevant clause is valid and applicable in the present matter.

26. In view of the above, and in accordance with the principle of *pacta sunt servanda*, the Chamber unanimously decided to accept the claim lodged by the Claimant, and established that the Respondent has to pay to the Claimant the amount of EUR 39,000.

27. In addition, taking into account the Claimant's request as well as its constant practice, the DRC decided that the Respondent shall pay 5% interest *p.a.* as from the due date, i.e. 6 August 2014 until the date of effective payment.

III. Decision of the Dispute Resolution Chamber

1. The claim of the Claimant, Player A, is accepted.

2. The Respondent, Club C, has to pay to the Claimant **within 30 days** as from the date of notification of this decision, the amount of EUR 39,000, plus 5% interest *p.a.* as from 6 August 2014 until the date of effective payment.

3. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

4. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance under point 2. is to be made and to notify the Dispute Resolution Chamber of every payment received.

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Note relating to the motivated decision (legal remedy):

According to art. 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, a copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS (cf. point 4 of the directives).

The full address and contact numbers of the CAS are the following:

Court of Arbitration for Sport (CAS)
Avenue de Beaumont 2
CH-1012 Lausanne
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Tel: +41 21 613 50 00
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For the Dispute Resolution Chamber:

Marco Villiger
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Enclosed: CAS directives