Arbitration CAS 2013/A/3216 Anorthosis Famagusta FC v. Sinisa Dobrasinovic, award of 14 May 2014

Panel: Mr András Gurovits (Switzerland), President; Prof. Petros Mavroidis (Greece); Mr Bernard Hanotiau (Belgium)

Football
Termination of a contract of employment without just cause
Submissions of facts and legal arguments by the parties under Article R51 and R55 of the CAS Code
Termination of a contract of employment for important reasons under Swiss law
Unjustified early termination of an employment agreement by the employer according to Swiss law
Inadmissibility of counter-claims in CAS appeal proceedings

1. **Article R51 para. 1 of the CAS Code provides that in the appeal brief an appellant has to submit the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely; Article R55 para. 1 of the CAS Code provides a similar duty of a respondent. This is in line with the generally accepted principle that each party must provide evidence for any fact which supports its notions. This is set out, for instance, in Article 8 of the Swiss Civil Code.**

2. **Pursuant to Article 337 of the Swiss Code of Obligations (CO), both, employer and employee, are entitled to terminate an employment agreement at any time and with immediate effect for important reasons. The terminating party shall give reasons if the other party so requests. An important reason is given, in particular, if in light of a fact or occurrence the terminating party cannot be expected, in good faith, to continue the employment relationship. The judge shall determine, at its discretion, whether or not an important reason is given.**

3. **Pursuant to Article 337c para. 1 CO, in case of an unjustified early termination of an employment agreement by the employer, an employee is entitled to a compensation that shall correspond to the total salary that the employee would have earned up to the agreed expiry date of the employment agreement. Para. 2 of Article 337c CO provides that the salary that the employee earned elsewhere during this period (or which he deliberately omitted to earn) must be deducted from such total amount. The judge can also, in addition to the aforementioned amount, award a compensation at his own discretion; such compensation shall not exceed the amount of salaries for six months (Article 337c para. 3 CO).**

4. **A counter-claim is not admissible in CAS appeal proceedings. First, the directions of FIFA with respect to the appeals procedure before CAS clearly provides that *"Since 1 January 2010, the CAS appeals procedure does no longer provide for the possibility of filing counterclaims"*. Second, the CAS has in its practice expressly confirmed that**

counter-claims are not possible in appeals proceedings. A respondent should rather file an own appeal within the relevant deadline.

I. THE PARTIES

1. The Appellant, Anarthosis Famagusta FC ("the Club"), is a Cypriot professional football club and plays in the Cypriot first division.

2. The Respondent, Mr Sinisa Dobrasinovic ("the Player"), is a citizen of Serbia and Cyprus who had been engaged by the Appellant as a professional player.

II. FACTS

3. On 28 April 2008, the Appellant and the Player entered into an agreement (the "Employment Agreement") in accordance to which the Appellant employed the Respondent as full time football player. On 29 April 2008, the parties entered into a further agreement (the "Supplementary Agreement"; Employment Agreement hereinafter including the Supplementary Agreement, unless otherwise indicated) providing for additional terms, including specific financial conditions.

4. The Employment Agreement provided, inter alia, for the following

"GENERAL CONDITIONS

(…)

(7) In the case of a financial dispute as between the Employer and the Player this shall be subject of arbitration before the competent authority of the Cyprus Football Association (CFA) pursuant to the provisions governing financial disputes as the same are applicable by the CFA and/or any competent authority of FIFA. (…)

(9) The Employer shall pay the player's emoluments in the manner specified herein with a grace period of 30 (thirty) days. In the event that the Club does not make available due payment then the Player can hold the Club responsible and the Player has the right to terminate the agreement. (…)

(12) The present contract is terminated when:

a) Its agreed duration has expired

b) By mutual consent and/or agreement of the Parties

c) As a result of a final sanction imposed upon the Player (…)

d) Unilaterally for a very serious reason. For purpose of this contract a "very serious reason" means any serious breach and/or serious default of the terms and/or conditions of the contract, the disciplinary rules of the Employer and/or the CFA and the constant wrongful behaviour and/or conduct by any one of the Parties.

e) When the team delegate to the second division of the national championships.

(13) The Parties hereto agreed and acknowledge that their respective relations and governed exclusively by this contract and submit to the exclusive jurisdiction of the competent sporting organs and/or authorities of Cyprus setting aside and/or otherwise waiving the provisions of any labour law and/or labour related tribunal as well as the jurisdiction of the civil courts".

SPECIFIC CONDITIONS

(1) The employment of the Player, subject to termination as provided herein above, shall be for a fixed period commencing on the 1st day of June 2008 and ending on the 30th day of May 2010.

(2) The emoluments of the Player for the period 1/06/2008 to 30/05/2010 are agreed to €80,000.00 (say eighty thousand Euro) and will be paid in twenty monthly instalments of EURO 4,000.00 (say four thousand Euro) starting1st August 2008 and ending May 2010. "

5. The Supplementary Agreement provided, inter alia, for the following:

"SPECIFIC CONDITIONS

(…)

(2) The emoluments of the Player for the period 02/06/2008 to 30/05/2010 are agreed to €180,000.00 (say one hundred and eighty thousand Euro) and will be paid as follows:

(a) €30,000.00 (say thirty thousand Euro) on 1st June 2008.

(b) €30,000.00 (say thirty thousand Euro) on 1st June 2009.

(c) €120,000.00 (say six thousand Euro) payable in 20 monthly instalments commencing from 1st August 2008 ending 30.05.2010.

The employer shall provide the player the following:

a) Use of a car. All maintenance and other running expenses due at the cost fo the Player.

b) Accommodation in a flat or house for a rent of not more than Euro 700.00 (say seven hundred Cyprus pounds) per month (including water, electricity and other related household expenses).

c) Bonuses for wins as per the internal regulation of the club with a maximum guaranteed amount of 10,000 Euro.

d) Two(2) air-tickets per year L/CA-SERBIA-/L/CA

e) (…)

f) 10,000 euro per season in the case the employer wins the cup or participate to UEFA.

g) 10,000 euro per season in the case the employer wins the championship".

6. On 31 May 2009, the Appellant submitted a letter to the Respondent terminating the Employment Agreement as per the same day. The Respondent confirmed receipt of the termination letter, but noted that he would reserve all his rights for unpaid salaries and other consideration under the Employment Agreement as a result of its termination without just

cause.

7. On 11 June 2009, the Respondent's counsel sent a letter to the Appellant requesting payment of EUR 193'286 until 1 June 2009 for unpaid salaries, benefits and bonuses as well as for compensation of the early termination by the Appellant of the Employment Agreement.

8. On 18 June 2009, the Respondent submitted a claim against the Appellant before the FIFA Dispute Resolution Chamber (DRC) requesting payment of EUR 193'286.

9. On 27 February 2013, the FIFA DRC passed its decision (the "Challenged Decision"), in accordance to which the Appellant was held to pay to the Respondent outstanding remuneration in the amount of EUR 11'400 as well as compensation for breach of contract in the amount of EUR 137'792, both within 30 days from the date of the notification of the decision. The grounds of the decision were communicated to the parties on 31 May 2013.

III. PROCEEDINGS BEFORE CAS

10. The Appellant filed its statement of appeal on 20 June 2013, pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"). It later filed its appeal brief on 1 July 2013, pursuant to Article R51 of the Code.

11. On 26 June 2013, the Respondent requested the appointment of a Sole Arbitrator in this case, in the absence of an agreement from the Appellant; this issue was submitted to the Deputy President of the CAS Appeals Arbitration Division who decided, on 9 July 2013, to submit the present procedure to a panel composed of three arbitrators.

12. On 16 July 2013, the Appellant filed an English translation of some of its exhibits to the appeal brief.

13. On 2 August 2013, the Respondent filed his "Memory of the Respondent" (i.e. answer) pursuant to Article R55 of the Code as well as a counter-claim.

14. On 7 August 2013, the Appellant requested a second round of submissions, while, on 14 August 2013, the Respondent objected to such request and informed the CAS Court office of his preference for a hearing to be held.

15. By letter dated 13 September 2013, the CAS Court Office, pursuant to Article R54 of the Code, confirmed the appointment of the current Panel to decide the matter at hand.

16. On 8 October 2013, the CAS Court Office sent a letter to FIFA requesting, on behalf of the Panel, the production of the complete case file. The case file was sent to the CAS Court Office

by letter dated 10 October 2013, and forwarded to the parties by the CAS Court Office on 15 October 2013.

17. By letter of 8 October 2013, the CAS Court Office informed the Parties that the Panel had declared inadmissible the counter-claim of the Respondent, invited the Appellant to justify his request of 7 August 2013 for a second round of written submissions and invited the Respondent to disclose further documents in response to an evidentiary request in the Appellant's appeal brief.

18. On 14 October 2013, the Appellant submitted his response as to why a second round of submission was appropriate and requested that the holding of a hearing be substituted by such second round of submissions.

19. By letter of 15 October 2013, the CAS Court Office invited the Respondent to inform the CAS Court Office whether he would agree that a hearing be substituted by a second round of submissions. As the Respondent had not responded, the CAS Court Office re-iterated the request by letter dated 29 October 2013. The Respondent did not respond to such second request either.

20. By letter of 13 November 2013, the CAS Court Office informed the parties that the Panel had decided that a second round of submissions shall take place. The CAS Court Office further explained that the Respondent had failed to produce the documents that he had been ordered to produce by the CAS letter of 8 October 2013 and, therefore, invited the Respondent to submit such documents within five days from receipt of the letter.

21. As the Respondent had again failed to produce the documents requested by the CAS Court Office, the latter re-iterated its request for document production on 6 December 2013. On 9 December 2013, the Respondent submitted some documents.

22. By letter dated 10 December 2013, the CAS Court Office invited the Appellant to submit its reply within 15 days from receipt of that CAS letter. The Appellant submitted its reply on 27 December 2013.

23. By letter dated 30 December 2013, the CAS Court Office invited the Respondent to submit his rejoinder within 15 days from receipt of that CAS letter, but the Respondent failed to do so.

24. By letter dated 18 February 2014, the CAS Court Office sent the parties the order of procedure, which *inter alia* mentioned that the Panel considers itself to be sufficiently well informed to decide this matter without the need to hold a hearing and which the Appellant signed and returned on 24 February 2014.

25. On 27 February 2014, the Respondent's counsel sent a letter to the CAS Court Office stating

that he had sent the rejoinder on 14 January 2014 (and attaching a copy of such) and referring to an inaccuracy in the order of procedure in respect of the payment of the advance of costs.

26. On 27 February, the Respondent send an email to the CAS Court Office confirming, in substance, the information provided by his counsel on the same day.

27. By letter dated 4 March 2014, the CAS Court Office sent an amended order of procedure to the parties confirming that also the Respondent had paid his share of the advance of costs. In the same letter, the CAS Court Office requested the Respondent to submit any document evidencing the date of the sending of the Respondent's rejoinder as it was not to be found in the files of the CAS Court Office.

28. On 8 March 2014, the Respondent's counsel responded to the CAS Court Office's letter of 4 March 2014 and explained that on 14 January 2014 the rejoinder had been sent to the FIFA DRC instead of the CAS Court Office. He, further, raised a number of questions, which the CAS Court Office answered by letter dated 13 March 2014.

29. By letter, dated 24 March 2014, the Appellant expressed its refusal of the Respondent's rejoinder being admitted to the case file. The Panel, after consideration of the submissions of the parties as well as after reviewing the CAS Code, in particular its Article R32 and Article R56, determined that the Respondent had not demonstrated any exceptional circumstances that would have permitted the Panel to admit the Respondent's rejoinder that had apparently not been sent to the CAS Court Office within the deadline granted by the CAS and, consequently, determined not to admit the Respondent's rejoinder to the case file. The Panel indeed considers that the Respondent was duly represented by a legal Counsel and that having sent, within the granted deadline, a document to a wrong fax number is not a circumstance justifying its acceptance in the CAS file.

IV. THE PARTIES' SUBMISSIONS

30. The following outline of the Parties' positions is illustrative and does not comprise every contention put forward by the Parties. The Panel has, however, considered all the submissions timely made by the Parties, even absent specific reference to those submissions in the following summary.

31. In its appeal brief the Appellant submitted the following requests for relief:

That the Panel

"1. Revoke the decision of FIFA's Dispute Resolution Chamber of 27th February 2013.

2. Accept all and every manifestation, argument, document and proof that the Appellant made and present as valid and true.

3. Order the Respondent to present originals from whatever agreement, contract or negotiations documents he had with Kavala FC in respect of his registration there.

4. Decide that the termination of the employment contracts of June 1st 2009 was with just cause and was provoked by the Respondent.

5. Decide that no compensation at all is due to the Respondent.

6. Decide and order the Respondent to return the amount of 86.000 Euros that he received in excess of the annual remuneration of season 2008/2009 or alternatively calculate such amount of whatever compensation is deemed that he should receive.

7. Decide that the remuneration that the Respondent received from Kavala FC was of at least 130.000 Euros.

8. Condemn the Respondent to bear all the administrative costs and arbitrators fees of this case.

9. Condemn the Respondent to compensate the legal costs of the Appellant of as a sum of 20.000 CHF".

32. The Appellant principally submits that:

a. The FIFA Statutes designate CAS as the competent body to solve this dispute under the Employment Agreement.

b. While the Respondent had a very good start with the club and a very good relationship with the coach of the team, he later started to have problems with the coach and everybody started to sense that the Respondent wanted to move to a bigger club.

c. In order to become free to join another club and to receive a significant compensation, the Respondent had orchestrated the termination of the Employment Agreement after he had signed a new contract with Kavala FC, thus giving the Appellant the right to terminate the Employment Agreement.

d. On 31 May 2009, the Appellant terminated the Employment Agreement with just cause.

e. The Appellant had honoured all its financial obligations vis-à-vis the Respondent as per 31 May 2009.

f. In December 2008 the Appellant had paid to the Respondent an amount of EUR 70'000 which was not due under the Employment Agreement and which was an advance payment on the request of the Respondent. The Respondent had received, in total, an amount of EUR 86'000 which he should not have received in accordance with the terms of the Employment Agreement.

g. When moving to Kavala FC, the Respondent had not only received a nice advance of EUR 50'000 from his new club, but also EUR 86'000 from the Appellant to which amount, however, he was not entitled to.

h. The Respondent decided to ask for compensation of damages, although he never incurred such damages. On the contrary, he greatly benefitted from the termination of the Employment Agreement as he could move to another club.

i. After he had lodged his claim with FIFA, it took the Respondent nearly three years to provide FIFA with his employment contract with Kavala FC. The fact that he did not provide his new employment contract, entered into in August 2009, before August 2012 perfectly demonstrates that the Respondent had not suffered at all any damages as a result of the early termination by the Appellant of the Employment Agreement.

j. In accordance with the documentation provided, the Respondent would have earned a monthly salary of EUR 757.72 as captain with its new club Kavala FC which is not plausible. It is not possible to believe that a player like the Respondent who has a full transfer period ahead him would hurry to sign an agreement with a new club pursuant to which he would earn ten times less than before.

33. In the Memory of the Respondent (i.e. answer), the Respondent requested the CAS

"To declare the Appeal admissible and unfounded.

To Reform the decision pronounced by the FIFA Dispute Resolution Chamber on 27 February 2013, i.e.:

On the one hand, the termination of the contract of employment by the Appellant (on 31 May 2009) without just cause;

In addition, to condemn the Appellant to pay the outstanding payments due in conformity with the contract of employment and the supplementary agreement to the amount of € 31,300 Nets (as wages of May 2009, accommodation costs for March and May 2009, bonuses guaranteed and qualification for UEFA competition);

Lastly, to condemn the Appellant to pay a compensation for breach of contract to the amount of € 137,792 Nets.

In all the cases, to condemn the Appellant to pay an interest at the rate of 5% per annum on the principal (outstanding payments of the contract of employment and compensation for breach of the contract) from 18 June 2009 until the perfect payment to the Respondent).

In all circumstances:

To reject all request filed by the Appellant;

To condemn the Appellant to bear all of the costs of the proceedings of arbitration.

In fine, to condemn the Appellant to pay the costs of defence exposed by the Respondent, the costs above-mentioned are fixed ex aequo et bono to a reasonable and proportionate sum of 10,000 CHF".

34. The Respondent principally submits that:

a. The CAS is competent in the present matter based on the FIFA Statutes.

b. In accordance with the Employment Agreement, the Respondent was entitled to monthly wages in the amount of EUR 10'000 net plus premiums and other benefits.

c. During the 2008 - 2009 season, the Respondent always acted with serious professionalism and took part in 38 official games of the club.

d. On 31 May 2009, after the Respondent had returned to training, the Appellant, without explanation and justification, notified the Respondent of the termination of the employment relationship with immediate effect. The termination letter was handed over to the Respondent personally who, after having consulted with his counsel, confirmed receipt, but stated that he would reserve his rights for unpaid salaries and damages as a result of the termination of the Employment Agreement.

e. The Appellant terminated the Employment Agreement without just cause. The Respondent had never been sanctioned for disciplinary matters, and the Appellant had neither provided any explanation as to why it was entitled to terminate the Employment Agreement with immediate effect, nor did it produce any evidence that the Respondent had breached the Employment Agreement in a way that would have entitled the Appellant to give notice of termination.

f. The Appellant's explanation as to why the payments of EUR 86'000 are to seen as an advance on the Respondent's salaries during the next following season are unfounded and unproven. Further, paying an advance on salaries would be contrary to usual practice. The Appellant rather effected these payments as a premium for the participation in the Champions League.

g. In respect of the outstanding remuneration under the Employment Agreement, the Challenged Decision of the FIFA DRC disregards an amount of EUR 10'000 as a guaranteed amount of bonuses and EUR 10'000 as a bonus for qualification for UEFA competitions, i.e. EUR 20'000 in total, so that the total outstanding remuneration due to the Respondent under the Employment Agreement is EUR 31'400 (and not only EUR 11'400 as retained by FIFA). The compensation for breach of contract as a result of the Appellant's early termination without just cause is EUR 137'792 as also the Challenged Decision holds.

V. ADMISSIBILITY

35. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for the appeal shall be twenty one days from the receipt of the decision appealed against […]".

36. The Challenged Decision is dated 27 February 2013 and, according to FIFA, was notified to the parties on 31 May 2013. Supposing that the Challenged Decision was duly notified to the parties on the same day (which, however, can be left open) the 21-day period in accordance with Art. 49 of the CAS Code started running on 1 June 2013. As the CAS Court Office received the statement of appeal on 20 June 2013, it was lodged on time. Likewise, the appeal brief submitted on 1 July 2013 was submitted on time.

37. The Panel, therefore, holds that the appeal is admissible.

VI. JURISDICTION

38. According to Article R27 of the Code *"These Procedural Rules* [the ones of the Code] *apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such reference may arise out of an arbitration clause inserted in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) […]. Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport. […]".*

39. In this regard, Clause 7 of the General Conditions of the Employment Agreement provides that *"In case of a financial dispute as between the Employer and the Player this shall be subject of arbitration before the competent authority of the Cyprus Football Association (CFA) pursuant to the provisions governing financial disputes as the same are applicable by the CFA ad/or any competent authority of FIFA"*, while Clause 13 provides that *"The Parties hereto agreed and acknowledge that their respective relations and governed by this contract and submit to the exclusive jurisdiction of the competent sporting organs and/or authorities of Cyprus setting aside and/or otherwise waiving the provisions of any labour law and/or labour related tribunal as well as the jurisdiction of any civil courts".*

40. Clauses 7 and 13 of the General Conditions of the Employment Agreement are, thus, inconsistent insofar as the right to submit the dispute to FIFA is concerned (while Clause 7 does, Clause 13 does not mention this remedy). However, Clause 7 which allows to submit (alternatively) a dispute to FIFA expressly mentions financial disputes, and the matter at hand is of financial nature. Further, both parties participated in the FIFA proceedings and both parties acknowledged in the appeal brief and in the answer, respectively, that the CAS shall be competent to hear the present dispute on the basis of the relevant regulations of the FIFA. The Panel, therefore, concludes that the parties had a mutual understanding that a potential (financial) dispute may be brought to FIFA and thereafter, in accordance with the FIFA Statutes (Article 67 para. 1), the CAS shall have jurisdiction to determine, on appeal, the dispute.

41. Further, even if one were to assume that no such mutual understanding had existed between the parties, by making their appearance in the present proceeding, without raising any objection as to the jurisdiction of the CAS, the parties would have confirmed competence of the CAS.

42. The Panel, therefore, holds that the CAS has jurisdiction to hear the present dispute.

VII. APPLICABLE RULES

43. Pursuant to Article R58 of the Code, the dispute must be decided *"according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate"*.

44. Clause 13 of the General Conditions of the Employment Agreement provides that the parties *"agreed and acknowledge that their respective relations and [are] governed exclusively by this contract"*. Other than that, the Employment Agreement does not provide any express rule in respect of the laws applicable on the merits. The Panel, however, notes that both, the Appellant and the Respondent, explained in the appeal brief and in the answer, respectively, that FIFA Regulation and, additionally, Swiss law shall apply. In addition to the mutual understanding of the parties that Swiss law shall apply, it is also to be noted that the association having issued the Challenged Decision is FIFA. FIFA is domiciled in Switzerland so that, in light of Art. R58 of the Code, the law of the country where the federation which has issued the decision is domiciled, is also Swiss law. Further, Article 66 para. 2 of the FIFA Statutes provides that *"CAS shall apply the various regulations of FIFA and, additionally, Swiss law"*. The Panel thus holds that FIFA Regulations and, additionally Swiss law, are applicable.

45. Considering the above, the Panel finds that the present matter is to be determined in accordance with the laws of Switzerland. To the extent appropriate, the Panel will also take into consideration the FIFA Regulations on the Status and Transfer of Players (RSTP).

VIII. MERITS

A. The Question of Termination for Just Cause of the Employment Agreement

46. The parties disagree as to whether or not the Appellant was entitled to terminate the Agreement with just cause and with immediate effect. The FIFA DRC held that the Appellant had terminated without such just cause.

47. Article R51 para. 1 of the Code provides that in the appeal brief an appellant has to submit the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely; Article R55 para. 1 of the Code provides a similar duty of a respondent. This is in line with the generally accepted principle that each party must provide evidence for any fact which supports its notions. This is set out, for instance, in Article 8 of the Swiss Civil Code. This means that in the case at hand the Appellant has the burden of proof in respect of the fact that he was entitled to terminate the Agreement on 31 May 2009, notwithstanding its contractually agreed fixed term until 30 May 2010.

48. Clause 10 of the Employment Contract provides that the Appellant may prematurely terminate

the Agreement, inter alia, *"in the case of persisting and/or repeated breach or violation of very serious terms by the Player and provisions of this Contract"* (para. c). The other reasons for contract termination provided in Clause 10 of the Employment Agreement are not pertinent in the matter at hand.

49. Pursuant to Article 337 of the Swiss Code of Obligations, both, employer and employee, are entitled to terminate an employment agreement at any time and with immediate effect for important reasons; the terminating party shall give reasons if the other party so requests. An important reason is given, in particular, if in light of a fact or occurrence the terminating party cannot be expected, in good faith, to continue the employment relationship. The judge shall determine, at its discretion, whether or not an important reason is given. With respect to the RSTP, it also provides for the termination of a contract for just cause, but only mentions, under its Article 15, one concrete example of sporting just cause, which is not relevant *in casu*.

50. As the wording of the Employment Agreement and of the Swiss Code of Obligations are not identical, the question arises whether Clause 10 c) of the Employment Agreement is more limited in respect of the right to early terminate than Article 337 of the Swiss Code of Obligations; Clause 10 c) provides that only in case of breach *"of very serious terms by the Player"* the employer shall have the right to terminate. The Panel, however, finds that this question may be left open in the case at hand for the reasons discussed herein below.

51. Against the above background, the Panel has to establish whether or not the Appellant has provided evidence which demonstrates that it was entitled to terminate the Employment Agreement in accordance with Clause 10 c) of the Employment Agreement or Article 337 of the Swiss Code of Obligations, respectively.

52. The Panel, first, notes that in its termination letter of 31 May 2009 the Appellant did not provide any explanation as to why it was terminating the Employment Agreement with immediate effect. On the other hand, the Respondent confirmed receipt of the termination letter, but he made also clear that he was not accepting and agreeing to such early termination and expressly reserved all his rights not only for past outstanding payments, but also for damages as a result of the early termination.

53. In order to support its argument that the Respondent had orchestrated his termination, the Appellant refers to two articles in the Greek media. The Panel, however, notes that irrespectively of the fact that media reports are, *per se*, not suited to prove allegations as those brought forward by the Appellant in the present case, the content of the media reports that the Appellant replicated in its appeal brief does by no means prove that the Respondent had so seriously breached the Employment Agreement that the Appellant was entitled to give notice of termination. Further, these articles are dated early July 2009, i.e. were issued more than one month after the Appellant had given notice of termination and deal, mostly, with the fact that the Respondent had signed-up with Kavala FC. They do not describe any fact or incident that would justify the termination of the Employment Agreement with immediate effect.

54. The Appellant has, further, provided two witness statements. One witness statement was issued by Mr Jullo Konaris, the Club's team administrator, who was, according to his explanations, the Appellant's team secretary and who had handed over to the Respondent the termination letter on 31 May 2009. In respect of the Respondent's behaviour, nothing negative can be found in his statement. Mr Konaris explains, inter alia, that *"both the fans and the administration respected and appreciated his services. Not only for the very decisive role in winning two very critical matches …, but for the whole contribution to the matches of the club and his total presence within and outside the pitch especially until Christmas 2008 when the player started not to be very satisfied with the coach but without having any serious conflict or disagreements"*. In the Panel's view, this is to be read that the Appellant was, and had to reasons to be, satisfied with the services and behaviour of the Respondent. Even the fact that the Respondent, according to Mr Konnaris, started not to be very satisfied with the coach, did apparently not entail any serious conflicts or disagreements.

55. In the second last paragraph of his statement, Mr Konnaris explains that *"having in mind that the Player possibly had already found a new Club we thought that once he had received practically a big part of the money due to him … that it was a fair termination, once he would have been a free player to seek better financial terms, the whole transfer window"*. This indicates that the Appellant had not terminated the Employment Agreement because of a serious breach of the agreement by the Respondent, but rather as it deemed this to be *"a fair termination"* as the Appellant thought the Respondent would be looking for an employer that offered better conditions.

56. Further, given that the Respondent is a professional football player and not a legally educated expert, it was appropriate for him to seek advice from his counsel before confirming receipt of the termination letter.

57. In light of all this, the Panel does not see any explanation in the witness statement of Mr Konnaris that would illustrate that the Respondent had breached the Employment Agreement and that such breach would allow the Appellant to terminate the Employment Agreement with immediate effect.

58. The second witness statement provided by the Appellant was issued by Mr Savvas Kakos who was, according to him, a member of the Board of Directors of the Appellant and at the time acting as a liaison between the Board of Directors and the team. Also Mr Kakos confirms in his witness statement that the Respondent was *"an easy going person"* and *"well received at the Club among fellow players, coaching staff and also by the President and other members of the Board of the Club"*. According to Mr Kakos, close to the end of the first season, the Respondent became unease and there were rumours that the Respondent wanted to go to Greece. At the end, the Respondent *"was a bit late in trainings, he was soon indifference but nothing really very serious other than demonstrating his wish to leave"*. Although there may have been some minor issues, this statement does not indicate at all that there were serious problems that would have called for and justified an immediate termination of the employment.

59. In sum, the evidence provided by the Appellant does not demonstrate that the Respondent had seriously breached the Employment Agreement. The witness statements produced by the

Appellant even indicate that the Respondent had behaved and performed well, except for some minor flaws at the end of the first season. Therefore, the Panel concludes that the Appellant could not prove that on 31 May 2009 it was entitled to give notice of termination of the Employment Agreement. The Appellant, thus, terminated the Employment Agreement without just cause.

B. The Consequences of the Breach of the Employment Agreement

aa. Outstanding remuneration for the first season

60. Given that the Appellant had no right to terminate the Employment Agreement, it is now to be determined whether the Respondent is entitled to claim a compensation from the Appellant for the consequences of the latter's breach of the Employment Agreement.

61. In respect of the burden of proof it can be held that in accordance with the applicable principles of the Code as well as under Swiss law as set out above, the Respondent is to specify and give evidence for the damage it has possibly incurred as a result of the unilateral early termination by the Appellant of the Employment Agreement.

62. In accordance with Clause 1 of the Specific Conditions, the Employment Agreement had been concluded for a term from 1 June 2008 until 30 May 2010. The Appellant, however, terminated the Employment Agreement as per 31 May 2009, i.e. one year before the contractually agreed end date. This is undisputed.

63. Pursuant to Article 337c para. 1 of the Swiss Code of Obligations, in case of an unjustified early termination of an employment agreement by the employer, an employee is entitled to a compensation that shall correspond to the total salary that the employee would have earned up to the agreed expiry date of the employment agreement. Para. 2 of Article 337c of the Swiss Code of Obligations provides that the salary that the employee earned elsewhere during this period (or which he deliberately omitted to earn) must be deducted from such total amount. The judge can also, in addition to the aforementioned amount, award a compensation at his own discretion; such compensation shall not exceed the amount of salaries for six months (Article 337c para. 3 of the Swiss Code of Obligations).

64. When conducting its proceedings, the FIFA DRC concluded that the FIFA RSTP, edition 2008, were applicable. The Panel has no grounds not to concur. Article 17 para. 1 of the FIFA RSTP provides that the party in breach shall pay a compensation. The compensation shall be calculated with due consideration for the laws of the country concerned, for the specificity of sport and other objective criteria. Such criteria include, in particular, the benefits due to the player under the existing and/or new contract.

65. Against the above background, the compensation shall be determined by giving due regard to

the salary and benefits which the Respondent would have earned until the expiry of the Employment Agreement, by deducting, however, what he has elsewhere earned (or deliberately omitted to earn). In a next step, the Panel will may ask, whether the specificity of sport pursuant to Article 17 para. 1 of the FIFA RSTP may require to amend the amount so determined.

66. Clause 2 of the Specific Conditions under the Employment Agreement provides that in the period from 1 August 2008 until end of May 2010 the Respondent was entitled to a salary of EUR 4'000 per month, i.e. a total of EUR 80'000. Further, Clause 2 of the Specific Conditions under the Supplementary Agreement provides that, in the period from 2 June 2008 to 30 May 2010, the Respondent was entitled to a remuneration of EUR 180'000 to be paid as follows: a) EUR 30'000 on 1 June 2008; b) EUR 30'000 on 1 June 2009; c) EUR 120'000 payable in monthly 20 instalments of EUR 6'000 starting from 1 August 2008 to 30 May 2010. Pursuant to Clause 2 of the Supplementary Agreement the Respondent was, further, entitled to the following benefits: a) use of a car; b) accommodation in the amount of EUR 700 per month; c) bonuses for wins as per the internal regulation of the Appellant with a minimum guaranteed amount of EUR 10'000; d) two return air-tickets to Serbia; e) insurance cover; f) EUR 10'000 per season in case the Appellant wins the cup or participates in UEFA competitions; g) EUR 10'000 per season if the Appellant wins the championship.

67. According to the payment receipts that the Appellant provided, and which are not contested by the Respondent in principle, the Appellant had effected the following payments to the Respondent:

- 23 March 2008: EUR 30'000 identified as *"Part of Contract"*;
- 20 April 2008: EUR 10'000 identified as *"Salary August"*;
- 3 August 2008: EUR 2'100 identified as *"Rents for Flat 3 Months Jun, July, August"*;
- 20 September 2008: EUR 10'700 identified as *"Salary and Rent September"*;
- 15 October 2008: EUR 10'700 identified as *"Rent and Salary October"*;
- 3 December 2008: EUR 10'700 identified as *"Salary and Rent November"*;
- 9 December 2008: EUR 10'700 identified as *"Salary and Rent December"*;
- 31 January 2009: EUR 700 identified as *"Rent for January"*, 6'000 identified as *"Salary January Part"* and EUR 4'000 identified as *"Salary January Part"*;
- 27 February 2009: EUR 700 identified as *"Rent for February"*, EUR 4'000 identified as *"Part of Salary for February"*, EUR 6'000 identified as *"Part of Salary February"*;
- 6 April 2009: EUR 19'700 identified as *"Part of Champions League Prims"* (while the Appellant explained in its appeal brief that EUR 700 were for rent in March 2009);
- 7 April 2009: EUR 4'000 identified as *"Part of Salary March"*, EUR 6'000 identified as *"Part of Salary March"*;

- 6 May 2009: EUR 5'700 identified as *"Part of Champions League Prims"*;
- 29 May 2009: EUR 4'000 identified as *"Part of Salary April"*, EUR 700 identified as *"Rent for April"*, EUR 6'000 identified as *"Part of Salary April"*;
- 12 November 2008: EUR 70'000, with no indication of purpose of payment.

68. The Panel notes that for the first season or contract year, respectively, i.e. up to 31 May 2009, the Respondent had paid to the Respondent

- EUR 30'000 in accordance with Clause 2 a) of the Specific Conditions of the Supplementary Agreement,
- the monthly payments due in accordance with Clause 2 of the Specific Conditions under the Employment Agreement and Clause 2c) of the Specific Conditions under the Supplementary Agreement in the amount of EUR 4'000 and EUR 6'000, respectively, except for the month of May 2009, and
- the monthly rent of EUR 700, except for the month of May 2009, as well as
- EUR 19'700, EUR 5'700 and EUR 70'000, the purpose of such payments being disputed.

69. While the FIFA DRC concluded that in respect of the 2008 - 2009 season up to end of May 2009 the Appellant had failed to pay the salary for May 2009 as well as the rent for March and May 2009, thus concluding that for that first season the Appellant was to pay the Respondent an amount of EUR 11'400, the Panel is convinced by the Appellant's explanation, that the payment in the amount of EUR 19'700 made on 6 April 2009 also included the rent for March 2009 in the amount of EUR 700. The Panel, thus, concludes that for the first season under the Employment Agreement, i.e. up to 31 May 2009, the Appellant owes the Respondent an amount of EUR 10'700.

70. In a next step the Panel analyzed how these three payments made by the Appellant on 7 April 2009 in the amount of EUR 19'000 (the remainder of EUR 19'700 after deduction of EUR 700 for the March 2009 rent), on 6 May 2009 in the amount of EUR 5'700 and on 12 November 2008 in the amount of EUR 70'000 are to be treated. While the copies of the payment receipts and cheque provided by the Appellant indicate that the two former payments, i.e. in the amount of EUR 19'000 and EUR 5'700, were made as premium for the Champions League participation, the payment receipt for the latter, i.e. for EUR 70'000, does not bear any reference as to the reason for the payment. Given that, pursuant to Clause 2 of the Specific Conditions under the Supplementary Agreement, the Respondent was entitled to a minimum guaranteed bonus of EUR 10'000 as well as EUR 10'000 per season in case the Appellant participated in a UEFA competition, the question arises whether these two payments were made in application of Clause 2 of the Specific Conditions under the Supplementary Agreement, or whether, as the Respondent requests in his answer, that the Appellant still owes these EUR 20'000. The Panel will discuss this question in the next paragraph addressing the Appellant's claim for repayment

of EUR 86'000.

bb. The Appellant's claim for repayment of EUR 86'000

71. The Appellant requests from the Respondent repayment of EUR 86'000. In this respect it is, first, to be noted the Appellant has the burden of prove that it had actually effected advance payments. Second, it is unclear how the Appellant has calculated the amount of EUR 86'000. The Panel noted that payments made by the Appellant in the first season other than the down-payment of EUR 30'000 as well as payments for salary and rent, consisted of the three above mentioned payments in the amount of EUR 19'000, EUR 5'700 and EUR 70'000, i.e. in the total amount of EUR 94'700. In the Panel's view, EUR 10'000 (the minimum guaranteed bonus) and EUR 10'000 (bonus for the Champions League participation) are to be seen as bonus payments for the Champions League participation in accordance with what is indicated on the payment receipts that the Appellant has produced. The amount that cannot be clearly allocated is, thus, EUR 74'700, and not EUR 86'000.

72. The copy of the cheque in the amount of EUR 70'000 provided by the Appellant does not indicate for what purpose this payment was made, i.e. does not answer the question whether the payment was made as an advance on the salary for the next following season or whether it was paid as bonus for the Champions League qualification. Also the Employment Agreement and the Supplementary Agreement do not provide any express provision that would answer the question at hand.

73. The Panel, however, notes that pursuant to Clause 2 c) of the Specific Conditions under the Supplementary Agreement the Respondent was entitled to *"bonuses for wins as per the internal regulation of the club with a minimum guaranteed amount of 10,000 Euro"* and that this clause may have served as the Appellant's basis to effect these payments as the EUR 10'000 were expressly specified as a *minimum* guaranteed amount. As the Panel notes that the evidence made available allows to conclude that the above payments were made in accordance with the Employment Agreement in connection with the UEFA Champions League participation, and as the Appellant did not produce a separate written agreement pursuant to which the Appellant agreed to make an advance payment, the Panel considered whether the other evidence provided by the Appellant would allow to determine that the Appellant had actually made an advance payment as it contends.

74. In this context, the Panel notes that in support of its notion that the Appellant had made an advance payment, and not a payment to which it was obliged under the Employment Agreement, the Appellant submitted the two witness statements already mentioned above.

75. Mr Konnaris explains, inter alia, that *"Close to the end of the sporting season 2008/2009 and around the beginning of the month of May, it became apparent that the Player was not very satisfied and the differences with the coach became unbridgeable. This lead to deterioration with the relationship with the Administration which in the meantime found out that he was looking for another club although in three different occasions, the*

administration has gone outside its unusual practice and gave him an amount of 86.000 Euros as an advance payment for the next season that is for 2009/2010".

76. This statement, however, does not appear plausible. First, it is to be noted that on the payment receipts for the amounts of EUR 19'700 and EUR 5'700 paid on 7 April and 6 May 2009 it is clearly indicated that these payments were made as premiums for the Champions League participation. Second, the by far highest amount, i.e. EUR 70'000, was paid on *"12/11/2008"* as can be seen on the copy of the cheque that the Appellant submitted, i.e. was made about six months before *"the beginning of May"* 2009 when, as the Appellant explains, it had found out about the plans of the Respondent. Third, it must be noted that Mr Konnaris states that the advance payment was made outside usual practice. This is in clear contradiction to Mr Kakos who explained in his witness statement that advance payments were a usual practice at the time. Finally, the termination notice of 31 May 2009 was unconditional and did not contain any reference to the alleged advance payment and any relevant underlying agreement between the parties, although one would expect that if an employer terminates an employment agreement and it believes it has an outstanding claim against the employee in the considerable amount of EUR 86'000 it would expressly state that it expects repayment or undertake any other appropriate measure to make sure that the advance must be repaid. For all these reasons, the Panel concludes that the statement of Mr Konnaris is not suitable to prove that the Appellant had effected an advance payment of EUR 86'000 which the Respondent has to repay.

77. Mr Kakos, providing the second witness statement, explains that *"Having spoken to our financial advisors and accounts department during the tenure of Mr. Dobrasinovic at the Club, I can honestly say that when the Club gave Mr. Dobrasinovic 86.000 Euros outside any of the two agreements he had signed with the Club, it was an advance payment that was the usual practice at the time and would have been deducted from his wages at a later stage".*

78. The Panel holds also in respect of this statement that it is not plausible. First, no explanation, again, is given as to why the advance shall be EUR 86'000. The Appellant has not explained how this amount shall match with the payment receipts and copy of the cheque that the Appellant has submitted. Second, Mr Kakos does not provide any more detail as to when he talked to whom about the advance payment. Third, if it was the *"usual practice"* of the Appellant to make such kind of advance payments (which is in clear contradiction to Mr Konnaris' statement), the Appellant would have been in a position to provide evidence that it had actually made this kind of payments also in other cases. As the Appellant has not provided any such explanation or evidence, and for the reasons discussed in the context of the first witness statement, the Panel holds that the Appellant has not proved that it had made an advance payment of EUR 86'000 that the Respondent has to repay.

cc. Conclusion as to the consideration due for the first season

79. Therefore, in respect of the period up to 31 May 2009, the Appellant, in accordance with the Employment Agreement, the RSTP and Swiss law, owes the Respondent the amount of EUR

10'700. The Panel sees no grounds to amend this amount for reasons of the specificity of the sport.

dd. The compensation for damages for undue early termination

80. As regards the compensation for the period from 1 June 2009 until the contractually agreed expiry date of the Employment Agreement on 30 May 2010, the following applies.

81. In its Challenged Decision the FIFA DRC held that the monies payable to the Respondent from 1 June 2009 until 30 May 2010 under the Employment Agreement and Supplementary Agreement amounted to EUR 148'400, i.e. EUR 100'000 salary, EUR 8'400 costs for accommodation, EUR 10'000 as guaranteed bonus plus EUR 30'000 as a lump sum payment, and such amount served as the basis for the final determination of the amount of compensation for breach of contract. The Panel concurs with the calculation and explanation of the FIFA DRC.

82. The FIFA DRC then deducted the salary earned by the Respondent under the new contract with its new club Kavala FC until 30 May 2010, i.e. EUR 10'608, and concluded that, as a result, the compensation payable by the Appellant to the Respondent for salaries not earned from 1 June 2009 until 30 May 2010 amounts to EUR 137'792. The Panel also concurs with this calculation provided by the FIFA DRC in its Challenged Decision.

83. The Appellant contends that it is not convincing that the Respondent only earned approx. EUR 10'000 when he joined Kavala FC after a successful season with the Appellant and explained, *inter alia*, that it is not possible that a club that received for one season (2009-2010 season) only from Super League Greece the amount of EUR 2'584'000 would pay its captain only EUR 757.72 per months. Also the Panel notes the significant difference in salaries which the Respondent had earned with the Appellant and the one earned with Kavala FC. Therefore, the Panel scrutinized the proof that the Respondent provided in respect of his new salary with Kavala FC as well as the proof which the Appellant provided to underpin its notion that the Respondent had actually earned a higher salary from his new club.

84. In response to an evidentiary order of the CAS issued further to a request formulated by the Appellant, the Respondent's counsel answered on 9 December 2013 that the Respondent cannot furnish any other document than the employment contract with Kavala FC dated 7 August 2009 and the corresponding termination agreement as per 30 March 2010. On the basis of this employment agreement the Respondent earned during his employment relationship with FC Kavala 8 times EUR 826 per month (i.e. EUR 6'608) plus 2 times EUR 2'000, i.e. EUR 10'608 in total. While the Panel concurs with the result of the calculation of the FIFA DRC in respect of the salary earned by the Respondent from Kavala FC, the Panel also notes this amount covered the period until end of March 2010 only as Kavala FC and the Respondent had apparently terminated the employment agreement as per such date. Neither the Respondent, nor the Appellant have submitted any other agreement which the Respondent had

entered into for the relevant period, i.e. up to 30 May 2010, so that the Panel has only to consider the employment agreement that the Respondent has produced and the salary agreed there under, respectively.

85. In order to support its position, i.e. that the Respondent had actually earned a much higher salary with Kavala FC, the Appellant refers to certain media reports. However, the Panel must note that these reports are not more than hearsay and do not constitute objective proof for the explanations provided by the Appellant. The Panel also holds that Mr Kakos' statements that *"I am sure that he would have never accepted to play for amounts that are as low as 1,000 thousand euros per month"* and *"I know that this amount was impossible to propose to a player in 2008 especially in the first division of either Greece or even Cyprus and especially in a Player like Sinisa"* may be an expression of his own considerations and judgments, but cannot serve as proof for the fact that the Respondent had actually earned more.

86. The Panel had reservations regarding the veracity of the information provided by the Player regarding his annual salary at his new club, Kavala F.C. Indeed, the salary seems to be hard to reconcile with the fact that he had been a successful player with his previous club, where he had earned a substantially higher salary only the previous football season. Moreover, the Panel noted that the Respondent almost rushed to sign the new contract accepting a sum many times below his previous salary, while he could have waited for one more month and explore other options. Nevertheless, the Panel was of the view that it could not proceed any further for two reasons. First, because of the legal *maxi actor incumbent probatio*, it was for the Appellant to rebut the salary of the Player. It did not. Besides indeterminate claims to the effect that the salary was unacceptably low, the Appellant did not submit any evidence demonstrating that the Player had indeed been paid a higher salary. Second, the Appellant did not make any evidentiary request regarding the salary that had actually been paid to the Player other than requesting production by the Respondent of all agreements, contracts or negotiation documents he had with Kavala FC in respect if his registration there. In response to this request, on 8 October 2013, the Panel ordered that the Respondent produce all agreements and documents relating to his employment with Kavala FC. On 9 December 2013, the Respondent re-submitted his employment agreement with Kavala FC dated 7 August 2009 and confirmed that no other agreement was available. Under these circumstances, the Panel had no choice but to accept that the annual salary of the Player paid by Kavala F.C. was that submitted by the Player already before the proceedings at the DRC.

87. The Panel, therefore, holds that the Appellant must compensate the Respondent for the consequences of the early termination of the Employment Agreement with EUR 137'792, i.e. EUR 148'400 less EUR 10'608. This amount is established on the basis of the Employment Agreement and Swiss law. The Panel sees no ground to amend this amount for reasons of the specificity of the sport pursuant to Article 17 para. 1 of the FIFA RSTP.

88. In addition, as discussed above, the Appellant is to pay the Respondent for unpaid salary and benefits for the first period under the Employment Agreement, i.e. up to 31 May 2009, the amount of EUR 10'700.

ee. The Respondent's counter-claim

89. In its answer the Respondent requested, in addition to what the FIFA DRC had ordered in the Challenged Decision, payment of another EUR 10'000 for minimum guaranteed bonus of EUR 10'000, plus EUR 10'000 for the participation in an UEFA competition.

90. As this total amount of EUR 20'000 exceeds the amount awarded by the FIFA DRC in its Challenged Decision this request is, in substance, a counter-claim, which, however, is not admissible. First, the directions of FIFA with respect to the appeals procedure before CAS clearly provides that *"Since 1 January 2010, the CAS appeals procedure does no longer provide for the possibility of filing counterclaims"*. The Respondent was, thus expressly made aware of the requirements for counter-claims. Second, the CAS has in its practice expressly confirmed that counter-claims are not possible in appeals proceedings (cf. CAS 2010/A/2202; CAS 2011/A/2325). In light of the above, the Respondent should have filed an own appeal within the relevant deadline which he, however, did not. The Panel, therefore, holds that this request of the Respondent is to be disregarded.

91. The FIFA DRC ordered in its Challenged Decision that the amount payable by the Appellant shall be subject to interest of 5%, and that such interest shall fall due after the expiry of 30 days as from the date of notification of the Challenged Decision. The Challenged Decision was notified to the parties on 31 May 2013 so that the according to the Challenged Decision, the interest was due as from 1 July 2013. The Panel concurs that under Swiss law, unless the parties otherwise agree, late payment interest is five % per annum (Article 104 para.1 of the Swiss Code of Obligations). In his answer the Respondent requested that the late payment interest shall be due as from 18 June 2009, and not as from 1 July 2013. However, for the reasons discussed above this request is also to be seen as a counter-claim which is not admissible. The Panel, therefore, holds that interest shall be due as from 1 July 2013.

C. Conclusion

92. Based on all the above, the Panel finds that the Appellant breached the Employment Agreement when it terminated the Employment Agreement with immediate effect. The Appellant owes the Respondent EUR 10'700 for unpaid salary and benefits for the period up to 31 May 2009, and the Appellant must pay the Respondent EUR 137'792 as a compensation for the salaries and benefits the Respondent would have earned until the expiry of the Employment Agreement on 30 May 2010 had the Appellant not given undue notice of termination.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of the Appellant, Anorthosis Famagusta FC, is partially upheld.

2. The Appellant, Anorthosis Famagusta FC, shall pay the Respondent EUR 10'700 and EUR 137'792, plus interest at a rate of 5% as from 1 July 2013.

3. (…).

4. (…).

5. All other and further claims for relief are dismissed.