Arbitration CAS 2014/A/3757 AFC Astra v. Kevin Hatchi, award of 4 May 2015

Panel: Mr Michael Gerlinger (Germany), Sole arbitrator

Football
Contract of employment between a player and a club
FIFA competence to adjudicate upon employment-related disputes
Termination of contract by the player with just cause
Condition of reduction of the financial rights of the player for showing disrespect to the coach
Principle of 'positive interest'

1. **Article 22 lit b) of the FIFA Regulations on the Status and Transfer of Players (RSTP) establishes a rule and an exception. The rule is that FIFA is competent to decide upon employment-related disputes between a club and a player of an international dimension. The exception is that FIFA is not competent, if national arbitration tribunals exist and specific requirements for such tribunals are met. In case of an unclear provision in a contract of employment, which could be interpreted in the way that the parties actually agreed on the competence of the FIFA arbitration bodies, a party choosing such *forum* cannot be prevented from doing so. The reason for this is that – if there is no reference to the national arbitration system and an unclear reference to the FIFA arbitration system – there would be a risk for the party seeking access to arbitration not to be able to access any arbitration system at all. As a result, the guarantee of access to courts, provided under Article 29a of the Federal Constitution of the Swiss Confederation would not be complied with.**

2. **According to Article 14 of the FIFA RSTP, to terminate a contract with just cause there must be an act of termination, a warning and a substantial amount of salary outstanding. The conditions are fulfilled where a player warned the club on three occasions and where the sign-on fee as well as three consecutive salary payments are outstanding.**

3. **A cut-off of 25 % of all financial rights for showing disrespect to a coach shall not apply where the club did not put forward any evidence of such behavior and where such reduction is disproportionate. In any event, if a club wants to rely on a financial sanction with respect to the termination of a contract, it needs to serve such sanction to the other party. Until the sanction has been served, it only constitutes an internal decision of one party.**

4. **Considering the principle of 'positive interest' the compensation for the breach or the unjustified termination of a valid contract shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur.**

I. PARTIES

1. Asociatia Fotbal Club Astra (hereinafter referred to as the "Appellant" or the "Club") is a professional football club with its registered office in Giurgiu, Romania. It is a member of the Romanian Football Association (hereinafter referred to as the "FRF") and plays in the Romanian first league.

2. Mr Kevin Roland Benjamin Germain Hatchi (hereinafter referred to as the "Respondent" or the "Player") is a professional football player, with a last assignment with the club Royal White Star in Brussels, Belgium, in the second Belgium division.

II. FACTUAL BACKGROUND

A. Background Facts

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

4. On the initiative of his agent, the Respondent went to the Appellants' premises beginning of September 2009 for a try-out with the Club. Since the try-out was successful, the Respondent stayed at the Club until the signing of an employment agreement.

5. On 10 September 2009, the Parties concluded an agreement (hereinafter referred to as the "Agreement") with the following stipulations:

"Art. I For the sporting performance had within F.C. ASTRA PLOIESTI for the period 10.09.2009-10.07.2011 of the Romanian National Football Championship – 1st League, the player will receive the counter value of his money rights, as follows:

I. For the period 10.09.2009 – 10.07.2010 the amount of 70,000 EURO: this amount must be understood net from taxes and other social welfare contributions that S.C. F.C. ASTRA PLOIESTI is obliged to pay in favour of the Player. The salary will be paid divided in 10 months starting from the month of September 2009, for the amount of 6,000,00 EURO per month payable the 10th day of the month.

- *The player will benefit 10,000 nt 16.09.2009.*

The club has the first option of extending the contract with one year, the option being made by May 10, 2010.

II. For the period 10.07.2010 – 10.07.2011 – 80.000 euro divided in 12 months – 6,666 euro/monthly,

III. The player will benefit by a fully furnished 2 rooms apartment and 2 plane round trip tickets by season.

[…]

- *The contract is valid in the English language, and the parties agree to adhere to the FIFA rules as well as international law and applicable Treaties".*

6. After signing the Agreement, the Respondent left for a couple of days to return to Paris, and then resumed duty at the Club, where he played in several official matches until the middle of December 2009.

7. On 29 September 2009, Mr David Lasaracina (hereinafter referred to as the "Agent"), who was the Respondent's agent at that time, sent a default notice to the Appellant, reminding on the non-payment of the amount of EUR 10,000 due on 16 September 2009, and failure to provide the apartment as well as the payment of his own agent fee. He also informed the Appellant that the Player needed to return to Paris urgently to regulate some personal affairs.

8. In its answer of 30 September 2009, the Appellant requested the representation contract between the Agent and the Respondent, which was sent to the Appellant the same day. By letter of 1 October 2009, the Appellant informed the Agent that the Player was allowed to travel to Paris from 4 to 7 October 2009.

9. On 22 October 2009, the Agent sent a second default notice to the Appellant regarding above payment, the apartment and in addition to the salary of EUR 6,000 due on 10 October 2009. The Agent also referred to the fact that he then advised the Player to refer to FIFA to protect his interests.

10. On 24 December 2009, the Respondent's counsel, Maître Denis, sent a letter to the Appellant, stating that except a payment of EUR 3,111 on 21 October 2009, the Respondent had not received any other payments. In addition, the Respondent had neither been furnished the apartment. The letter invites the Appellant to cure such failures and states:

"Failing this even in the absence of positive reaction within the time limit, in accordance with the FIFA Rules concern the Status and the Transfer of the Players (edition October 2009) and in particular article 14 relating the breach of contract with just cause, I have instruction to proceed before the Dispute Resolution Chamber of the FIFA".

11. A respective claim at the FIFA Dispute Resolution Chamber (hereinafter referred to as the "FIFA DRC") was deposited on 8 January 2010, claiming for outstanding salaries as well as compensation for breach of contract. The Respondent, in such claim, argues that he had the right to terminate the Agreement for just cause in accordance with Article 14 of the FIFA Regulations governing the Status and Transfer of Players (hereinafter referred to as the "FIFA RSTP").

12. The Respondent's counsel, referring to a FIFA communication, proposed a compromise to the Appellant with letter of 15 January 2010.

13. On 4 February 2010, the Appellant sent a letter to the Agent inviting the Respondent to resume training until 8 February 2010 the latest. The Appellant also referred to the fact that otherwise, sanctions shall be applied to the Player.

14. The Respondent's counsel answered by letter of 9 February 2010 and reminded the Appellant that a FIFA procedure had been initiated and that a compromise proposal was made on 15 January 2010. The letter invited the Appellant to address the compromise proposal within 5 days.

15. In its answer of 12 February 2010, the Appellant refused the compromise proposal and informed that disciplinary proceedings against the Player had been initiated.

16. By fax dated 7 April 2010, the Romanian Football League addressed the Player in a communication in Romanian language.

17. In a fax of 8 April 2010, addressed to the Agent and dated 24 March 2010, the Appellant submitted a "disciplinary decision" against the Player with a match and training ban taken by club directors.

18. In a decision dated 15 April 2010, the Romanian Football League confirmed the disciplinary sanction taken by the Appellant against the Player.

19. On 2 April 2013, the Appellant paid a further amount of EUR 12,399 to the Respondent.

B. Proceedings before the FIFA Dispute Resolution Chamber

20. On 25 April 2014, the FIFA DRC ruled as follows (hereinafter referred to as the "DRC Decision"):

> *"1. The claim of the Claimant, Kevin Hatchi, is admissible.*
>
> *2. The Respondent, Fotbal Club Astra Ploiesti, has to pay to the Claimant, Kevin Hatchi,* ***within 30 days*** *as from the date of notification of this decision, outstanding remuneration in the amount of EUR 12,490.*
>
> *3. The Respondent, Fotbal Club Astra Ploiesti, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision , compensation for breach of contract amounting to EUR 100,000.*
>
> *4. In the event that the amounts due to the Claimant in accordance with the above mentioned numbers 3. and 4. are not paid within the stated time limit, an interest at the rate of 5 % p.a. will fall due as of the expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

[…].

21. The DRC Decision including grounds was sent via telefax to the Appellant on 4 September 2014.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 25 September 2014, the Appellant lodged a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS"). It submitted the following requests for relief:

"The Appellant respectfully applies that the Court of Arbitration for Sport shall rule as it follows:

- *The Decision issued on April 25, 2014, by the FIFA Dispute Resolution Chamber is set aside;*
- *The claim lodged by the player Kevin Hatchi is dismissed;*
- *AFC Astra does not owe any amount to Kevin Hatchi;*
- *All the arbitration cots shall be borne by the respondent, who will be obliged to reimburse AFC Astra the entire amount paid as arbitration costs".*

23. By communication of 10 October 2014, the CAS informed the Parties that the President of the Appeals Arbitration Division had decided to submit the case to a Sole Arbitrator. The Parties did not raise any objections as to such decision.

24. FIFA renounced its right to request intervention with letter dated 3 November 2014, emphasising that – since FIFA was not designated a party by the Appellant – the question of competence of FIFA's decision making body with respect to the DRC Decision had become final and binding.

25. On 22 October 2014, the Respondent filed its Answer with the CAS. The Respondent submits the following requests for relief:

"- Declares the appeal brought by AFC ASTRA against Mr K. Hatchi, to be admissible as well as no founded.

Confirms the decision of the FIFA DRC on 25 April 2014 as follows:

- *Declares that Mr K. Hatchi terminated (on the 8 January 2010) the employment contract binding him to AFC ASTRA, in accordance with art. 14 of the FIFA Regulations in force, i.e. for just cause (this termination being exclusively attributed to AFC ASTRA).*
- *Orders AFC ASTRA to pay an amount of € 112,490.00 Net (plus interest of 5 % per annum) to Mr K. HATCHI, subject to the following breakdown:*

€ 12,490.00 Nets as outstanding remuneration plus interest of 5 % per annum from 8 January 2010 until the date of perfect payment by AFC ASTRA;

€ 100,000.00 Nets as compensation for breach of contract plus interest of 5 % per annum from 8 January 2010 until the date of perfect payment by AFC ASTRA.

- *Rejects any broader claim of any nature by AFC ASTRA against Mr Kevin HATCHI.*
- *Orders AFC ASTRA to pay all arbitration costs.*
- *Orders AFC ASTRA to pay defence costs and other miscellaneous costs incurred by Mr K. HATCHI, these costs being estimated ex aequo et bono in the amount of CHF 5,000.00".*

26. By letter dated 13 November 2014, the CAS Court Office informed the parties that Mr Michael Gerlinger, Munich, Germany, had been appointed as Sole Arbitrator. The parties did not raise any objections as to the appointment of the Sole Arbitrator.

27. On 19 December 2014, the CAS Court Office informed the parties that the Sole Arbitrator had determined to convene a hearing on 26 January 2015.

28. On 26 January 2015, a hearing was held in Lausanne, Switzerland ('the Hearing').

29. The following persons attended the Hearing:

- For the Appellant: Mr Costel Lazar, Sports Director
  Mr Bogdan Lucan, Counsel
- For the Respondent: Mr Kevin Hatchi himself
  Mr Laurent Denis, Counsel to Mr Hatchi

30. As a preliminary issue, the Appellant presented a print-out of the *"Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)"* (hereinafter referred to as the "EC Regulation"), on which it intended to rely on regarding the competence of the DRC to issue the DRC Decision. The Respondent refused to admit such document. The Respondent was asked by the Sole Arbitrator to specify the CAS award he was relying on in his Answer regarding the competence of the FIFA DRC to issue the decision under appeal. The Respondent specified the case CAS 2008/A/1518 Ionikos FC v. Marco Paulo Rebelo Lopes. The Appellant refused to admit such award into the proceedings.

31. The parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Sole Arbitrator.

32. After the Parties' closing submissions, the Sole Arbitrator invited them, by 9 February 2015, to inform the CAS whether they had reached an amicable settlement and to file additional submissions:

- The Appellant with respect to above CAS award

- The Respondent with respect to the EC Regulation

33. By letters of 4 and 9 February 2015, the Parties filed their respective submissions. Neither party informed the CAS whether an amicable settlement had been reached, the Sole Arbitrator, thus, understood that this was not the case.

IV. SUBMISSIONS OF THE PARTIES

34. The Appellant's submissions, in essence, may be summarized as follows:

As to the Facts:

- The text of the Agreement was "imposed" on the Appellant by the Agent. It was the Agent who drafted the Agreement.

- The Respondent played in a match on 9 November 2009 against the club SC FC CFR 1907 Cluj SA in the 1st Romanian Football league. In such match, he was asked to leave the pitch for a replacement, which he refused. He showed disrespect to the coach Nicolo Napoli, while waving his hand and addressing the coach with a statement similar like "Fuck you". The Player had serious problems with the coach and also showed a "general" problem in behavior, when closing himself in his room and refusing to talk to the management.

- Mr Lazar tried to solve the above problems of the Player and also the payment problems. However, the problems with the Player remained.

- On 29 December 2009, the Board of Directors of the Appellant met to discuss the above-referenced issues. The Board of Directors took a formal decision labelled "resolution" on the same day, by which the Player was sanctioned with a cut-off of all financial rights due to him of 25 %. The Appellant could not specify, when such decision was served to the Respondent.

- The Appellant was not aware of any refusal to issue the FIFA International Transfer Certificate (hereinafter referred to as the "ITC") for another club in summer. Mr Lazar was in contact with the Player regarding the settlement of the dispute, but not regarding the issuance of the ITC.

As to the Law:

- The applicable law was the Romanian Law. The Agreement did not provide for the applicable law. According to Art. 8.2. of the EC Regulation, the law of the country, in which the performance is carried out, applies. Since such country was Romania, Romanian Law shall apply. In addition, the Romanian Status on the Transfer of the

Football Players (hereinafter the "Romanian RSTP") applies. According to Art. 3 of the Romanian RSTP, those are mandatory for all clubs and players.

- The FIFA DRC was not competent to issue the DRC Decision. According to Article 22 lit. b) of the FIFA RSTP, in exception to the rule, the FIFA DRC is not competent, if an independent arbitration tribunal guaranteeing fair proceedings and complying with the principle of equal representation of players and clubs has been established at national level. Such exception applied here. The mere existence of the tribunal was enough. Contrary to the DRC Decision, a reference to the tribunal in the employment contract was not required.

- In substance, the Appellant admits that the length of the Agreement was not entirely clear. However, the option included into the Agreement with the deadline mentioned therein only made sense for a one year contract with a potential prolongation by the option.

- Regarding the termination and according to Article 18 of the Romanian RSTP, the employment contract stayed in force until a decision was rendered under the applicable Romanian RSTP, which was not sought for by the Player. The Agreement, therefore, was never terminated.

- The sanction of the Player was not appealed against, which is why it had become final and binding. For this reason and due to the financial sanction, the termination would not have been justified in any case.

- Finally, the applicable Romanian Law did not foresee the payment of interests.

35. The Respondent's submissions, in essence, may be summarized as follows:

As to the Facts:

- Before signing the Agreement, the Agent showed him the draft and both went to the club's office. He assumed that the draft was written by the Respondent. In the office, he met with Mr Lazar and the club secretary and signed the Agreement.

- He expected payment to his bank account in France, but did not receive those. For this reason, he first asked some other foreign players, whether delays in payments were normal. Because the other players denied this question, he contacted the Agent to notify the Appellant. The communication was done by the Agent and he only dealt directly once with the Appellant.

- There was no problem with the coach whatsoever. He never showed any bad attitude towards the coach and it would have been easy to discuss with him, since he had lived in the stadium.

- When returning after the last match in December, he contacted Mr Denis, who advised him to send the warning and start the proceedings at the FIFA DRC. After depositing

the claim on 8 January 2010, he assumed that there was no contractual obligation with the Appellant whatsoever anymore. He never received the alleged sanction by the Appellant of 29 December 2009, but only saw it, when Mr Denis showed him the Appellant's submission n the FIFA proceedings in September 2010.

- He was not aware of any potential legal situation under Romanian Rules and Regulations. Since the Agreement foresaw the application of FIFA Rules, there was no need for him to assess the Romanian Law.

- He had asked his agent to find him another club and found an interested club in Cyprus in August 2010. He trained with the club and also signed an employment contract, but the latter was not counter-signed by the club, since the ITC was not issued. He kept on training with the club in Cyprus, but was not allowed to play and did not receive any salary. Since the club did not want to keep him, he moved to Montreal Impact in 2011.

As to the Law:

- With respect to the applicable law, the Agreement provided for a choice of law, *i.e.* the FIFA rules. Therefore, Romanian Law was not applicable.

- The FIFA DRC was competent to issue the DRC Decision. The jurisprudence of the FIFA DRC as well as the CAS required a clear reference to the national dispute resolution system under the exception of Article 22 lit. b) of the FIFA RSTP. Since there was no reference in the Agreement, the exception did not apply.

- The termination by the Respondent of 8 January 2015 was justified within the meaning of Article 14 of the FIFA RSTP. In a total, 4 months of salary were outstanding in addition to the signing fee. The Player gave many warnings to the Appellant. The sanction of 25 % of the financial rights was, first, disproportionate to the alleged breach. The breach was, second, not existing. And third, the sanction was never served to the Player, but only showed up in a submission of the FIFA DRC proceedings of 3 September 2010.

- The Respondent also did everything to mitigate the damages. The fact that he could not sign with the Cypriote club was the Respondent's fault, since it did not issue the ITC. The only attributable salary, therefore, was the salary received by Montreal Impact, which the FIFA DRC took into account.

V. JURISDICTION

36. Article R47 of the Code provides as follows:

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

37. The jurisdiction of the CAS is not disputed by the Parties. It derives from Art 67 para. 1 of the FIFA Statutes and Art. 24 para. 2 of the Regulations on the Status and Transfer of Players, (Edition 2009) according to which a decision of the FIFA DRC maybe appealed to the Court of Arbitration for Sport in Lausanne.

38. It follows that the CAS has jurisdiction to decide on the appeal against the DRC Decision. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law and may issue a de novo decision, partially or entirely, superseding the appealed decision.

VI. ADMISSIBILITY

39. Article R49 of the Code provides as follows:

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

40. The appeal was filed on 25 September 2014, *i.e.* with the deadline of 21 calendar days after receipt of the reasoned decision as set by Art.67 para. 1 of the FIFA statutes.

41. It follows that the appeal is admissible.

VII. APPLICABLE LAW

42. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, 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.

43. The Parties disagree as to whether a choice of law within the meaning of Article R58 of the Code exists or not. The Agreement contains no specific heading with respect to the choice of law. However, the Agreement contains the following clause:

"The contract is valid in the English language, and the parties agree to adhere to the FIFA rules as well as international law and applicable Treaties".

44. The Agreement, therefore, contains an explicit stipulation on the law that the Parties adhere to, *i.e.* the law that the Parties deemed applicable. For this reason, the Sole Arbitrator accepts that a choice of law exists, and that such choice of law declares first the FIFA rules applicable. Those include in particular the rules governing contractual stability and termination of contract, the FIFA RSTP.

45. The Parties also agreed to apply, in addition, *"international law and applicable Treaties"*. However, according to another "FIFA rule", *i.e.* Article 66 para. 2 of the FIFA Statutes, CAS shall apply primarily the various regulations of FIFA and, in addition Swiss Law. Therefore, the Parties might have intended to apply *"international law and applicable Treaties"* as the subsidiary law to the FIFA regulations and in addition or instead of Swiss law. The reference to the *"international law"* and the *"applicable treaties"* is not further specified. It is a general reference to applicable laws, in particular to the principles of Private International Law. Therefore, it seems that those are meant to apply complementary to the primary choice of law, the "FIFA rules", including Swiss Law. Consequently, the Sole Arbitrator accepts that the FIFA regulations apply and in addition Swiss Law. In case of both cannot provide a sufficient source of law and the need to fill a gap arises, the applicable law shall be determined under the principles of International Private Law including respective Treaties.

VIII. MERITS

A. The competence of the FIFA DRC

46. The Appellant first argues that the FIFA DRC was not competent to issue the DRC Decision and refers to the fact that a national arbitration tribunal existed in Romania and the competence needed to be established according to the EC Regulation. The FIFA DRC as well as the Respondent argue that the competence of the FIFA DRC derives from Article 22 lit. b) of the FIFA RSTP without the exception of a national arbitration tribunal being applicable. FIFA itself informed the CAS that they consider the question of competence having become final and binding, because the appeal was directed against FIFA.

47. Article 22 lit. b) of the FIFA RSTP reads as follows:

"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

…

b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;

48. Article 22 lit b) of the FIFA RSTP establishes a rule and an exception. The rule is that FIFA is competent to decide upon employment-related disputes between a club and a player of an international dimension. This is the case here, since the Player is of French nationality. The exception is that FIFA is not competent, if national arbitration tribunals exist and specific requirements for such tribunals are met.

49. The wording of Article 22 lit b) of the FIFA RSTP does not require that the contract itself refers to the national arbitration tribunal, but only requires that such tribunal exists. The Respondent relies on the award in *CAS 2008/A/1518*, which in paras. 127 and 128 refers to

the FIFA Commentary on the FIFA RSTP and establishes that a *"clear reference to the national arbitration tribunal"* needed to be included in the employment contract. The Sole Arbitrator is not fully convinced that Article 22 lit b) of the FIFA RSTP requires such reference, since there is no basis in the wording of such provision. However, the Sole Arbitrator does not need to decide upon this issue for the following reason:

50. Notwithstanding the application of Article 22 lit. b) of the FIFA RSTP, the Agreement might contain a choice of *forum*. There is no explicit clause on the choice of *forum*. The Agreement only refers to the application of FIFA rules. Since the Parties agreed to "*adhere to the FIFA rules*", they might have agreed to submit any dispute to the relevant arbitration system of FIFA. In this respect, the clause in the Agreement is unclear. A decision on the choice of *forum* cannot be taken *contra proferentem*, since it could not be established what party had drafted the Agreement. However, the Sole Arbitrator is satisfied that in case of an unclear provision, which could be interpreted in the way that the Parties actually agreed on the competence of the FIFA arbitration bodies, a party choosing such *forum* cannot be prevented from doing so. The reason for this is that – if there is no reference to the national arbitration system and an unclear reference to the FIFA arbitration system – there would be a risk for the party seeking access to arbitration not to be able to access any arbitration system at all. Indeed, there might be reasons to deny the competence of the national arbitration bodies, because there is no reference to those and an unclear reference to FIFA's arbitration Bodies. There might also be reasons to deny the competence of FIFA's arbitration bodies, because the reference is unclear and a national arbitration tribunal might exist. Such dilemma would not be sufficient to comply with the guarantee of access to courts, provided under Article 29a of the Federal Constitution of the Swiss Confederation. Therefore, in such situation, the party seeking access to arbitration cannot be denied access to FIFA arbitration.

51. Consequently, the Sole Arbitrator does not need to decide, whether the exception to Article 22 lit. b) of the FIFA applies to the present case, neither, whether the DRC Decision had become final and binding in that respect (whereas the Sole Arbitrator tends to agree with the Panel in *CAS 2008/A/1518*, which in para. 116 *et seq*. justifies the power of CAS to review the jurisdiction of the DRC). The competence of the FIFA DRC derives from Article 22 lit. b) of the FIFA RSTP in connection with the Agreement and does not need to be established under Private International Law nor under the EC Regulation.

B. Termination with just cause or not

52. The applicable law for the termination of the Agreement are the FIFA RSTP. As mentioned above, the Parties agreed on the application of such rules in the Agreement. The FIFA RSTP contain a full set of rules for assessing the termination of employment contracts, which is why no recourse to any other rules is necessary.

53. The Player terminated the Agreement by his claim to FIFA on 8 January 2010, in particular referring to a termination for just cause under Article 14 of the FIFA RSTP.

54. The Sole Arbitrator notes that Article 14 of the RSTP states:

"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".

55. Further, in the Commentary to this part of the RSTP, FIFA states:

"The principle of respect of contract is, however, not an absolute one. In fact, both a Player and a Club may terminate a contract with just cause, i.e. for a valid reason.

The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally".

56. The jurisprudence regarding the non-payment of salary as a just cause is substantial and is outlined, for example, in *CAS 2006/A/1180* in para 26 as follows:

"The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute "just cause" for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non-public award of 6 August 2004); for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract (see also CAS 2005/A/893; CAS 2006/A/1100, marg. no. 8.2.5 et seq.)".

57. Therefore, Article 14 of the FIFA RSTP requires

- an act of termination,
- a warning and
- a substantial amount of salary outstanding.

58. As already outlined, the formal act of terminating was the claim brought to FIFA on 8 January 2010. Several warnings to the club were given by letters of 29 September 2009 and 22 October 2009. Also, in the letter of 24 December 2009 the Player's counsel particularly referred to the termination for just cause under Article 14 of the FIFA RSTP. Both requirements are, therefore, met.

59. The third question now is, whether a substantial amount of salary was outstanding as per 8 January 2010. On 8 January 2010, the salary payments due on 10 October, 10 November and 10 December of € 6,000 each as well as the signing-fee of € 10,000 were outstanding, while the Appellant had only paid an amount of € 3,111, totalling an amount of € 24,889 of outstanding salaries.

According to the CAS jurisprudence mentioned above, particularly also outlined in *CAS 2012/A/2844*, para. 8.63, the repeated non-payment of salary in principle justify a termination for just cause. As the sign-on fee as well as three consecutive salary payments were outstanding, while only a small part of such amount had been paid in the meantime, the Sole Arbitrator sees no reason, why the non-payment – in the present case – should not constitute just cause. In particular, neither can financial difficulties justify the non-payment, nor did the Appellant show effective measures to solve the problems with the outstanding amounts. At the hearing, Mr Lazar argued that he tried to solve the payment problems, but no specific efforts could be established in that respect. It could not be expected from the Respondent to further wait for the payments.

60. The Appellant argues that the amount due needs to be reduced by a sanction decided on 29 December 2009 by its Board of Directors. Such decision stated that the Respondent was to be sanctioned with a cut-off of all financial rights of 25 % because of showing disrespect *vis-à-vis* the coach at a match of 9 November 2009. The Appellant further argues that such decision had been ratified by the Romanian Football Authorities and had become final and binding. The Appellant, therefore, wants to deduct such sanction from the amount due to the Respondent with respect to the termination for just cause.

61. A cut-off of 25 % of all financial rights for showing disrespect to the coach seems disproportionate to the Sole Arbitrator. In addition, the Respondent denied all allegations in this respect brought forward in the hearing by the Appellant. The latter was also not able to provide proof for such allegations. However, the Sole Arbitrator does not need to decide about those questions, because the Appellant cannot deduct the sanction for the amount due for the following reason: if a party wants to rely on a financial sanction with respect to the termination of a contract, it needs to serve such sanction to the other party. Until the sanction has been served, it only constitutes an internal decision of one party. In the present case, the Respondent argues that he only learnt from the sanction when receiving a submission in the FIFA arbitration proceedings in September 2010. The Appellant, on the other hand, could not specify at all, when the sanction would have been served. Therefore, the sanction cannot be deducted from the amount due on 8 January 2010.

62. In view of the above, the Sole Arbitrator considers that the Respondent terminated the contract with just cause.

C. Damages

63. The Respondent, first, shall receive the above outstanding salaries, considering a payment made by the Appellant of € 12,399, resulting in an amount of € 12,490 for outstanding salaries.

When assessing the further damages to be awarded to the Respondent, the Sole Arbitrator refers to previous CAS jurisprudence which established that the purpose of Article 17 of RSTP is basically nothing more than to reinforce contractual stability, *i.e.* to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (*CAS 2008/A/1519-1520, para. 86; CAS 2005/A/876, p. 17; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 9*).

64. In particular, above jurisprudence refers to the principle of "positive interest" as follows (*CAS 2008/A/1519-1520, para. 86*):

"As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred".

65. Therefore, the Sole Arbitrator shall now determine, which amounts the Respondent would have received, if the Appellant had not breached the Agreement.

66. The first question is, whether the Agreement was concluded for a period of two years or a period of one year. In its Article I, the Agreement referred to the sporting performance *"for the period 10.09.2009-10-07.2011"*. On this basis, the Agreement was first concluded for a period of two years. However, the Agreement sets a salary for the period of 10.09.2009-10.07.2010 in a first paragraph and grants a *"first option of extending the contract with one year"* at the end of such paragraph. This speaks for a duration of one year with a unilateral option to extend the Agreement for another year. On the other hand, a third paragraph sets an increased salary for the period of 10.07.2010-10-07.2011. The Appellant itself, therefore, comes to the conclusion that the Agreement is *unclear* in that respect. Indeed, the Agreement needs interpretation with respect to the duration. An interpretation has to consider the intentions of the Parties when concluding the contract, in particular the common understanding of the Parties. The Agreement, although being only of one page and very short, provided for the terms and conditions for both years 2009-2010 and 2010-2011. In particular, the clause on the salary for the 2010-2011 season was not subject to any condition precedent or antecedent. Furthermore, the Agreement also summarized the period covered in the contract in its headline as the period of 2009-2011. In conclusion, the Sole Arbitrator is satisfied that the Parties actually intended that the Respondent would play at least two years for the Appellant, consequently the period of 2009-2011 shall serve as a basis for the calculation of damages.

67. It is not disputed between the Parties that the amount that would have been due in a two-year-period is € 122,000. The only question in this respect is a potential mitigation of the damages by the Respondent. It is also not disputed that the Respondent signed a contract with the club Montreal Impact from 1 February 2011 until 31 October 2011 with a salary of € 22,000 during the relevant period. The Respondent argues that no other salary was paid to him in the relevant period until February 2011. However, the Appellant referred to the fact

that the Respondent stayed with a club in Cyprus for several months allegedly without a contract and/or payment. In the hearing, the Respondent outlined that a contract had been negotiated with the Cypriote club, but wasn't signed, since the Appellant refused to sign the ITC and that he hoped to be able to be registered later on, but that the club lost interest in him. The Appellant, on the other hand, declared that it had no knowledge of the ITC having been refused. Although it could not be established for what reason the contract with the Cypriote club did not come into force, the Appellant was not able to provide any specification of proof for a salary paid to the Respondent in the relevant period in addition to the amount paid by Montreal Impact. For this reason, the Sole Arbitrator deems that the relevant amount for outstanding salaries is € 100,000.

68. In conclusion, the Sole Arbitrator holds that the DRC Decision has to be upheld entirely.

D. Interests

69. Since – as already outlined – Swiss Law applies, the Sole Arbitrators also confirms the DRC Decision with respect to interests in a rate of 5 % *p.a.*, which applies if no interest rate had been agreed contractually (*CAS 2012/A/2866, para. 8.82*).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Appellant on 25 September 2014 against the decision issued by the FIFA Dispute Resolution Chamber on 25 April 2014 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 25 April 2014 is confirmed.

3. (…).

4. (…).

5. All other prayers for relief are dismissed.