Arbitration CAS 2015/A/4187 Charles Fernando Basílio da Silva v. FC Lokomotiv Moscow, award of 25 April 2016

Panel: Mr José Juan Pintó (Spain), President; Prof. Luigi Fumagalli (Italy); Mrs Yasna Stavreva (Bulgaria)

Football
Termination of a contract of employment by a player
CAS full power of review
Interpretation of a contractual provision
Breach of his contractual obligation by the player derived from a termination agreement
Proportionality of an agreed compensation

1. **Except in those cases in which the particular circumstances require that the case is referred back to the previous instance to duly guarantee the principle of due process and the parties' right to be heard, the CAS panel's full power of review implies that any procedural flaw that may have occurred during the previous instance proceedings can be cured by the panel within the appeal arbitration procedure.**

2. **Pursuant to Article 18.1 of the Swiss Code of Obligations (CO), to settle the discrepancies existing amongst the parties with regard to the interpretation of a contractual provision, the true and common intention (consensus) of the parties must be ascertained when they concluded the contract without dwelling on any inexact expressions or denominations that they may have used, either in error or to conceal the true nature of the agreement. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context, as well as all circumstances.**

3. **The contractual obligation of a party regarding the payment of a stipulated compensation within a set deadline and in a valid form of payment i.e. by means of a method which enables the creditor to receive the payment shall be complied with. In this respect, a player shall bear the consequences of his acts and decisions that led him to breach his contractual obligations. This without prejudice of the potential actions that he may have against his advisors.**

4. **A compensation agreed which is totally in line with the personal and economic situation of the parties and the circumstances and particularities of the case, does not jeopardize *"the economic existence"* of the debtor. Therefore, there is no legal reason that could lead to the reduction or moderation of the compensation agreed. On the contrary, it shall be fully paid by the debtor pursuant to the legal principle *pacta sunt servanda*.**

I. PARTIES

1. Charles Fernando Basílio da Silva (hereinafter the "Appellant" or the "Player") is a Brazilian professional football player born in Rio de Janeiro on 14 February 1985.

2. F.C. Lokomotiv Moscow (hereinafter the "Respondent" or the "Club") is a Russian football club with its seat in Moscow, Russia. It is affiliated to the Russian Football Association (hereinafter "RFA"), which in turn is a member of the *Fédération Internationale de Football Association* (hereinafter "FIFA").

II. FACTUAL BACKGROUND

3. A summary of the most relevant facts and the background giving rise to the present dispute will be developed based on the parties' written submissions, the evidence filed with these submissions, and the statements made by the parties and the evidence taken at the hearing held in the present case. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. The Panel refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning. The Panel, however, has considered all the factual allegations, legal arguments, and evidence submitted by the parties in the present proceedings.

4. On 28 August 2008, the Brazilian football club Cruzeiro Esporte Clube (hereinafter "Cruzeiro") and the Respondent entered into a transfer agreement pursuant to which the Player was transferred from Cruzeiro to the Respondent for the total price of EUR 5,000,000.

5. On the same date, the Appellant and the Respondent signed an employment contract (hereinafter the "Contract") valid from 29 August 2008 until 31 December 2012. In the most relevant parts the Contract reads as follows:

"ARTICLE 8
Termination of the Contract

8.1. […].

8.2. In accordance with the article 348.12 of the Russian federation labor code, the Football player has the right to terminate the present Contract by his own initiative (by his own choice), informing the Club about it in writing not later than one month (provided that the present Contract is not concluded for the period, that is less than four months), however, in this case the Football player is obliged to pay to the Club on the date of dismissal the money payment (compensation), at the rate, which is equivalent to 25000000 (twenty five million) Euro at the rate of the Central Bank of Russia on the day of termination.

8.3. […].

8.4. In accordance with the RFU Regulations for the status and transfer of players, in that case, if the present Contract is terminated by the Club unilaterally in the absence of faulty action (inactions) of the Football player, the Club is obliged to pay to the Football player the compensation in amount of three average monthly salaries of the Football player.

The dismissal of the Football player is performed by the Order of the President of the Club or the person which has the right of hiring and dismissal of the employees.

8.5. […].

[…]

ARTICLE 11
Final provisions

11.1. In case of rising of a dispute between the Parties, it is subject to settlement by direct negotiations. If the dispute between the Parties is not settled, than it is subject to settlement in accordance with the Regulation of RFU over the status and transfers of the Football players, and in applicable cases – with the Regulations of FIFA over the status and transfers of the Football players.

11.2. The conditions of the Contract may be changed only by written agreement of the Parties.

11.3. In all other cases, which are not foreseen by the present Contract, the Parties are governed by the appropriate provisions of active legislation of the Russian Federation, and also by the documents of the Club, FIFA, UEFA, RFU, RFPL.

[…]".

6. On 29 December 2010, the Appellant, the Respondent and the Brazilian Football club Santos Futebol Clube (hereinafter "Santos") entered into a loan agreement by virtue of which the Respondent transferred the Player to Santos on a temporary basis as from 1 January 2011 until 31 December 2011.

7. On 18 July 2011, Santos requested from the Respondent an authorization to "sub-loan" the Player to Cruzeiro until the end of the loan period, to which the Respondent agreed. As a result, the Player was "sub-loaned" to Cruzeiro until 31 December 2011.

8. Once the "sub-loan" period expired the Player did not return to Moscow.

9. On 13 January 2012, the Respondent received the following text message (SMS) from Ms. Stephanie Vilarinho, who claimed to be the Player's manager:

"He is very concerned that should have gone in Jan 8 and has not been there for you.. [sic] *But its* [sic] *just because* ***he no longer want to go to russia*** [sic] ***and stay away from his family…Since he dont wanna*** [sic] ***play for locomotiv anymore and no longer wanna*** [sic] ***live in***

russia..[sic] *Charles is letting go all the deals with you guys..* [sic] *about money and everything.. I need to come to moskow* [sic] *as soon as you can receive me to pick up his papers and finish with locomotive everything for him! thanks"* (emphasis added).

10. On the same date, the Respondent sent an email to Ms. Stephanie Vilarinho whereby it requested the latter to send the power of attorney or document by means of which she was authorized to act on behalf of the Appellant. In this e-mail the Respondent also informed Ms. Vilarinho that the Player had a valid contract with the Club and thus he had to return to Moscow, unless he was willing to pay the compensation agreed in Clause 8 of the Contract.

11. On 16 January 2012, the Respondent sent a letter to the Player through Santos and Cruzeiro, by means of which Lokomotiv (i) warned the Appellant that he had to return to Moscow at the very beginning of January 2012, once the loan period expired, (ii) requested the Player to immediately return in order to avoid the enforcement of the sanctions stipulated in the Contract and/or in the FIFA Regulations and, finally, (iii) requested the Player to confirm to the Respondent whether Ms. Stephanie Vilarinho was authorised to represent him or not.

12. On 19 January 2012, the Respondent sent an e-mail to Ms. Vilarinho by virtue of which, besides asking her again to prove that she was authorized to represent the Player, it also forwarded to her the above-mentioned letter addressed to the Player.

13. On this same day, Santos informed the Respondent that once the loan agreement expired (*i.e.*, 31 December 2011) the Player had been released and thus at that moment it had no longer any contact with the latter.

14. On 20 January 2012, Ms. Stephanie Vilarinho sent an e-mail to the Respondent in which she asked the latter *"How can we cancel the contract with Lokomotiv and Charles? And how we can get his release at the club?"*.

15. On this same day 20 January 2012, the Respondent sent a communication to Ms. Stephanie Vilarinho and Mr. Flavio Guilherme Raimundo, acting as the lawyer of the Agent, informing them about the following:

> *"[…]*
>
> *However, according to the Labor contract, concluded between Charles and FC Lokomotiv on 28 August 2008,* ***the only way for the Football player to unilaterally prematurely terminated the contract is to act in accordance with clause 8.2 of the Contract****. Thus, Charles has the right to terminate the Contract through serving a written note to the Club at least 1 month before the cancellation. And in this case the monetary payment in amount of 25 mln Euros should have been made by the Player to the Club.*
>
> *Therefore, if Charles is ready to pay the compensation which was contractually and voluntarily agreed, we ask to immediately proceed with the payment to the following bank account of our club:*
>
> *[…]*
>
> ***If Charles is not ready to pay the compensation for unilateral cancellation of contract, then his actual action constitute a breach of contract****, and we warn Mr. Charles Fernando*

Basilio da Silva (through his representative) that such modus operandi is not acceptable and can lead to sanction, according to clauses 8.2-8.3 of his Labor contract, as well as according to Article 17 of the FIFA Regulations of the Status and Transfer of Players.

Being the sports entity we understand that it is almost impossible to force a player to play if he doesn't want to do it, but anyway, as we have a valid contract with Mr. Charles we are of the opinion that ***the player should carefully fulfil his contractual obligations until the day when all parties of the Contract reach an agreement about cancellation of Contract****.*

Thus, we invite Mr. Charles Fernando Basilio da Silva to ***immediately come to Moscow and join the team****.*

We are ready to consider your proposal regarding the terms of cancellation of the Labor agreement *(actually we have heard that some clubs in Brazil are interested in Charles, thus we would prefer to consider a possibility of his transfer, first of all), but while the negotiations are in progress the player should keep training with our team, because he is still contractually bound.*

Otherwise we will have no other choice but to blame him in the breach of contract and take respective legal action against the player.[…]" (emphasis added).

16. On 24 and 25 January 2012, negotiations were held between the Respondent and the Appellant aimed to reach an agreement on the conditions for the termination of the Contract.

17. On 25 January 2012, the Appellant notified to the Respondent the termination of the Contract by means of a written notice which reads as follows:

"To the President of FC Lokomotiv

Mrs. Olga Smorodskaya

Dear Madame,

I, Charles Fernando Basilio da Silva, the professional footballer player of FC Lokomotiv, ***hereby officially inform you that I have decided to unilaterally terminate the Labour contract dated 28 August 2008, concluded between me and FC Lokomotiv, according to clause 8.2 of the Contract****.*

Therefore, the Contract shall be terminated as of the day of this letter.

Fernando Basilio da Silva

25 January 2012" (emphasis added).

18. On the same 25 January 2012, the Respondent served a written notice to the Player (that was signed by the latter in proof of its receipt), in which it provided to the Appellant the details of the bank account in which the payment of the compensation established by Clause 8.2 of the Contract had to be made.

19. Also on this same date, the parties signed an agreement named *"Additional Agreement to the Labour Contract dd. 28.08.2008"* (hereinafter the "Termination Agreement"), by means of which they agreed to amend Clause 8.2 of the Contract. In the most relevant parts the Termination Agreement reads as follows:

"[…]

1. To change clause 8.2 of the Labour Contract dd. 28.08.2008 as follows:

8.2. The football player has the right to prematurely terminate the present Contract by his own initiative (by his own choice), however, in this case the Football player is obliged to pay to the Club a Compensation (according to Article 17 of the FIFA Regulations on the Status and Transfer of Players) in amount of:

- ***300000 (three hundred thousand) US dollars -*** *if the Compensation is paid by the Football player or his new club within 20 days following the date of termination of this Contract; or*
- ***1000000 (one million) US Dollars -*** *if the Compensation is paid by the Football player or his new club later than within 20th day but earlier 60th day following the date of termination of this Contract.*

If the Football player fails to pay the Compensation within 60 days following the date of terminations [sic] of this Contract, the interest of 10 per annum shall apply.

2. The Football player notified the Club that he wants to prematurely and unilaterally terminate this Contract.

3. As far as the Football player used the option to unilaterally terminate this Contract, the Contract shall be terminated as of 25 January 2012.

4. As far as the Football player hasn't returned from his loan to FC Santos and hasn't worked in the Club in January 2012, no salary or other remuneration shall be paid to the Football player.

5. Moreover, all and any other obligations of the Club before the Football player shall be cancelled and annulled, i.e. the Club shall not pay any amount to the Football player at all.

6. As the Football player used the option to unilaterally terminate the Contract, he shall therefore pay to the Club the Compensation, set forth in clause 8.2 of the Contract. […]".

20. At the beginning of March 2012, the Respondent received a letter dated 16 February 2012 from Mr. Carlos Alberto Giannoccaro, who claimed to be acting as the Player's agent in Brazil (hereinafter the "Agent"), with a cheque that had been issued by the Agent in the amount of USD 300,000 and dated 17 February 2012, for the payment of the compensation agreed in the Termination Agreement. In its correspondence the Agent stated that the cheque was to be charged *"immediately against Safra National Bank, account number […], to free our obligation"*.

21. On 19 March 2012, Cruzeiro sent an email to the Respondent in which it requested the release of the Appellant in order to obtain his International Transfer Certificate (ITC) through the FIFA TMS, allowing his registration with the *Confederaçao Brasileira de Futebol* (hereinafter "CBF").

22. On 21 March 2012, the Player's ITC was sent to the CBF.

23. On this same day, 21 March 2012, the Respondent sent a letter to the Appellant stating, *inter alia,* the following*:*

"[…]

On the 25th day of January 2012 you filed a notice of termination.

On the same day you were provided with the notification that the amount of Compensation was to be paid to the bank account of FC Lokomotiv. The bank requisites were attached.

The 20-days period expired on 14 February 2012.

On 17th February 2012 your agent, Mr. Carlos Alberto Giannoccaro, issued a bank check for the amount of USD 300'000 and sent this check to FC Lokomotiv via courier post.

We therefore state that:

- *the payment was not made in a form, ordered by FC Lokomotiv*
- *the check was issued outside of the 20-days period and should thus has been issued for the amount of USD 1'000'000*
- *the check was delivered to the club much latter then [sic] 20-days period*
- *bank check is not a form of payment used in Russia and thus intermediary of an international bank is required, which entail unnecessary costs for FC Lokomotiv, which will be determined later*
- *it takes 6 weeks to receive a decision of the bank on whether the check can be accepted or not*
- *preliminary the bank gave its opinion that the check could be not accepted as it filled inaccurately*

In this respect by means of this letter we officially warn you that:

- ***if the check will not be accepted by the bank we will request you to pay the amount of compensation in the sum of USD 1'000'000 as it is agreed for the case of payment outside the 20-days period.***
- *if the check will be accepted we will request you to cover our unnecessary expenses caused by the payment in the form, non-usable in Russia.*

As an alternative in order to avoid unnecessary risks ***we kindly invite you to immediately proceed with the bank transfer payment*** *of USD 300'000 to the following bank account of FC Lokomotiv:*

[bank details]

Should the payment be made within this week we will consider the problem fully resolved.

[…]" (emphasis added).

24. On 18 April 2012, the Respondent sent a formal notice to the Player and Cruzeiro, informing that the Player had failed to fulfil his obligations arising out of the Termination Agreement and requesting them to settle the overdue payment. In the most relevant parts this formal notice reads as follows:

"[…] Besides, we informed Mr. Charles Fernando Basilio da Silva that if the check is not accepted by the bank we will request to pay the amount of compensation in the sum of USD 1'000'000 as it is agreed for the case of payment outside the 20-days period.

As an alternative and in order to avoid unnecessary risks we invited the Player to immediately proceed with the bank transfer payment of USD 300'000 to the bank account of FC Lokomotiv.

No reply has been received since then.

Today we can confirm that ***the Commerzbank AG has returned the check unpaid****. Please find the respective SWIFT attached.*

In this respect we refer to the Additional agreement dated 25 January 2012 as well as to Article 17 of the FIFA Regulations for the Status and Transfer of Players, according to which the compensation stipulated by the contract shall be paid.

Pursuant to paragraph 2 of the same Article of the FIFA RSTP, if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in contract or agreed between the parties.

In this respect we ask both – Mr. Charles Fernando Basilio da Silva and FC Cruzeiro Esporte Clube – ***to immediately proceed with the payment of compensation in amount of 1'000'000 (one million) US Dollars, together with the interest at a rate of 10% per annum, calculated as from the 60-th day of delay (according to the Additional agreement dated 25 January 2012), i.e. from 15th of April 2012****.*

The bank requisites of FC Locomotiv are attached.

If we receive no payment within the nearest 10 days we will ask FIFA for intervention. […]" (emphasis added).

From the report provided by the Respondent's bank and enclosed to that letter it appears that the cheque was unpaid due to the following reason *"Refer to maker". Please be advised that "Refer to maker" means that* ***the payee needs to contact the maker of the check for further details regarding why this item was not honored****. As the drawn on bank is not willing to provide any further details"* (emphasis added).

25. On the same date 18 April 2012, Cruzeiro sent an email to the Respondent in which it informed the latter that it was not a party to the negotiations between the Appellant and the Respondent and therefore that any and all claims had to be brought exclusively against the Player.

26. On 19 April 2012, the Respondent sent an email to Cruzeiro in which it stated that, pursuant to Article 17 of the FIFA's Regulations on the Status and Transfer of Players, the latter was joint and severally liable for the payment of the compensation that it was claiming to the Player.

27. On 7 May 2012, Cruzeiro sent an email to the Respondent in which it informed the latter that *"the question regarding the payment of the combined values for the transfer of the athlete Charles Basilio already been resolved, so kindly request to resubmit the check that was previously sent to be compensated by the bank […]".*

28. On 10 May 2012, the Respondent sent an email to Cruzeiro and to the Agent requesting them to pay the compensation immediately and, in any event, before 20 May 2012. In its relevant parts this correspondence reads as follows:

"[…]

We have already informed all involved parties that we do not use bank checks in Russia and therefore the only way for its acceptance is through an intermediary bank –Kommerzbank – and it takes 6 weeks to get its decision.

We already submitted the check for the payment and after this long period they refused to pay it. Besides, certain amount of money was charged from FC Lokomotiv in this respect.

Thus we now see no possibility to submit it once again and wait for another 6 weeks, as the new application cannot be based only on unsupported allegations of your club, which is not the one who issued the check.

We therefore once again invite you to immediately proceed with the payment through a bank transfer to our account that was communicated to you earlier. […]

Referring to the stated above ***we hereby set a final deadline for the payment – no later than 20 May 2012****.*

Should the payment not be effected until 20 May 2012 we will have no other choice but to request for FIFA intervention" (emphasis added).

29. On 21 May 2012, the Respondent informed Cruzeiro, the Agent and the CBF that, given the fact that the Player had not paid the amount due, the Respondent intended to file a formal claim before FIFA's Dispute Resolution Chamber.

30. On this same day 21 May 2012, the Player's Agent informed the Respondent that *"The money is in the bank like we spoke before and you must take the check because is already available over there"*.

31. On 24 September 2012, the Respondent sent a letter to the Appellant and Cruzeiro reiterating the following:

"[…]

By means of the email dated 07 May 2012 Mr. Edison Travassos from FC Cruzeiro informed us that the question regarding the payment had been resolved and we were requested to resubmit the check for the payment.

On 24 May 2012 the check was resubmitted to our bank account for the payment.

Today we can confirm that the check has been returned unpaid again. Please find the respective SWIFT attached.

In this respect we refer to the Additional agreement dated 25 January 2012 as well as to Article 17 of the FIFA Regulations for the Status and Transfer of Players, according to which the compensation stipulated by the contract shall be paid.

Pursuant to paragraph 2 of the same Article of the FIFA RSTP, if a professional is required to pay a compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in contract or agreed between the parties.

In this respect we ask both – Mr. Charles Fernando Basilio da Silva and FC Cruzeiro Esporte Clube – ***to immediately proceed with the payment of compensation in amount of 1,000,000 (one million) US Dollars, together with the interest at a rate of 10% per annum, calculated as from the 60-th day of delay*** *(according to the Additional agreement dated 25 January 2012), i.e. from 15 April 2012, to the following bank account of FC Lokmotiv:*

[bank details]

If we receive no payment within the nearest 10 days we will ask FIFA for intervention.

[…]" (emphasis added).

According to the SWIFT that was enclosed to this correspondence, the cheque was not paid because *"We contacted the drawee bank who advised this item will be returned unpaid, pending receipt of return item"*.

32. On 25 September 2012, Mr. Flávio Guilherme Raimundo sent an email to the Respondent with the following content:

"Dear Mr. Eugene Krechetov:

As the attorney of Mr. Carlos Alberto Giannoccaro, I report the following in response to the email received:

The amount of US$ 300.000,00 (three hundred thousabnd [sic] *US dollars) relative to check n. 3759 issued by client is in current account in the Safra National Bankl* [sic] *of New York available to the FC Lokomotiv since its issuance.*

Considering that the chek [sic] *has misplaced, according to the information provided by Wells Farco* [sic] *Commercial Bank,* ***the solution to the paymente*** [sic] ***requires in advance a statement signed by LFC Lokomotiv declaring that****:*

- after the transfer of US$ 300.000,00 to uyour [sic] *account the club will discharge the chek* [sic] *n. 3759 issued by my client, against the Safra National Bank of New York;*

- after such transfer or payment off [sic] *the chek* [sic] *amount via Well Fargo Bank, the Club will have nothing to complain or to receive from my client Mr. Carlos Alberto Giannoccaro and from Mr. Charles Fernando Basilio da Silva.*

The statement should be sent immediately via Post/Fedex to the following address:

[address]

Finally, I assert that client Mr. Carlos Alberto Giannoccaro and Mr. Charles Fernando Basilio da Silva have no responsibility for the loss or misplacement of the above-mentioned chek, being thesole [sic] *responsibility of Wells Fargo Bank […]".*

33. On the same date, the Respondent sent the following email to the Agent's lawyer, Mr. Flávio Guilherme Raimundo:

"Dear Mr. Raimundo,

Please not that we are not in position to spend another months trying to cash the check which has already been rejected by the bank twice.

As you may see from the attached file Mr. Charles Fernando Basilio da Silva was provided with the bank requisites to which the payment of compensation should have been made. You may also see his signature acknowledging the receipt.

We thus assume that the player was clearly and sufficiently instructed about the way by means of which the payment should have been made.

Therefore, as we have already written, we kindly invite the player, as well as the club Cruzeiro being jointly and severally liable, to immediately proceed with the payment of compensation in order to avoid necessity of FIFA intervention along with the question about possible inducement of the breach by the club.

Faithfully yours,

Eugene Krechetov

Legal Director".

34. On 26 September 2014, the Agent's lawyer, Mr. Flávio Guilherme Raimundo, sent the following letter to the Respondent:

"Dear Mr. Krechetov:

The check has not been rejected twice by the Bank. In fact, the American Bank-Wells Farco [sic] *Bank, which is the conductor of the check, has lost the original check and intends to charge with a copy of the cheque.*

Anyway, having said that, in order for ***the drawee bank (Safra Bank) to pay the check, it is needed a statement by your club declaring that after the payment of USD 300.000,00 is done, you"ll*** [sic] ***have nothing to complain or to receive from my client Carlos Alberto Giannoccaro and the player Charles****.*

This procedure is quite common in Brazil and in the United States when a check is lost.

With the above-mentioned declaration we can proceed to the payment of USD 300.000,00 by Safra Bank and the issue will be over.

Please note Mr. Krechetov that we are really committed to paying your club as soon as possible. All we need now is a declaration stating that you agree receiving USD 300.000,00 from my client and that after the paymente [sic] *is done he shall owe nothing to your club.*

Kind regards.

Flávio Guilherme Raimundo" (emphasis added).

35. On the same date, the Respondent sent the following email to the Agent's lawyer:

"Dear Mr. Raimundo

I'm sorry if I was not clear. Let me try to explain you our position in detail.

1. We have no claim to your client – Mr. Giannoccaro – and he thus owes nothing to us.

2. It was Mr. Charles Fernando Basilio da Silva who breached his contract first when he refused to come back from the loan in January 2012 and then when he served the notice of cancellation of the employment agreement.

3. Therefore, according to that notice we want the mentioned player to pay the compensation that was agreed between us in advance.

4. As far as pursuant to Art. 17 FIFA RSTP FC Cruzeiro is jointly and severally liable for payment of compensation we ask the club to proceed with the payment as well.

5. As the player had been employed by FC Cruzeiro before and became employed immediately after his unilateral breach of contract we therefore have grounds to assume that the club induced the breach.

6. After the first rejection to pay the check (it was the rejection and we provided all interested parties with the swift in this respect) ***we requested the payment to be immediately made through the bank transfer, however we were told that everything was settled with the drawee bank and we just needed to present the check for payment once again****.*

7. Now therefore we are not in position to provide any notices and we believe ***that if the player really wishes to solve the problem he (or his club) can quickly pay his debts****, otherwise we would definitely prefer to spend the time waiting for a FIFA formal decision instead of waiting for a new decision of the bank.*

Finally I may assure you that as soon as the payment is made in accordance with the terms and conditions of the compensation clause we will have no claim against either the player nor the club. […]" (emphasis added).

36. On 5 October 2012, the Respondent received a letter from the bank "Promsviazbank", returning the cheque and informing the latter about the following[1]:

"[…] We have received from the corr. bank Commerzbank AG the unpaid cheque #3759 for the amount of USD 300'000.00 together with the refusal to pay the cheque and together with the mark "refer to maker". In this respect we return to you the unpaid cheque together with the letter of Commerzbank AG and a copy of the SWIFT message MT999 ref.SEP2012-004 issued by the maker's bank Safra National Bank of New York with the information about the refusal. […]".

37. A photocopy of the cheque and a SWIFT note of remittance was enclosed to the letter received by "Promsviazbank" from the intermediary bank "Commerzbank". In the photocopy of the cheque there is a seal from "Commerzbank" stating that *"This is a facsimile of the original cheque which was endorsed in the usual way for collection by this bank and thereafter reported lost, stolen or destroyed while in the regular course of collection all* [illegible] *and missing endorsements and the validity of this facsimile are hereby guaranteed and upon payment hereof instead of the original cheque this bank will indemnify and hold each collecting bank and the drawer bank harmless from any loss suffered provided the original cheque is unpaid and payment stopped thereon".*

In addition, with the SWIFT note of remittance enclosed therein the following statement from Safra National Bank of New York was included:

"[…] CHEQUE OF USD 300,000.00 NUMBER 3759 DD 2-17-12 MAKER CARLOS ALBERTO GIANNOCCARO, DRAWEE BANK SAFRA NATIONAL BANK OF NY ABA 066014959 PAY TO THE ORDER OF THE CLUB CJSF FC LOKOMOTIV-

[1] Translation provided by the Respondent in its Answer, not contested by the Appellant.

WE CONFIRM MAILLING THE ORIGINAL COPY TO WELLS FARGO BANK, N.A., PHILADELPHIA INT OPERATIONS CENTER PO BOX 13866 PHILADELPHIA, PENN 19101 ON SEPT 25, 2012 WITH REF. RETURNING CHECK TO YOU UNPAID FOR REASON: REFER TO MAKER.

KINDLY HAVE YOUR CLIENT CONTACT THE MAKER DIRECTLY AS WE DO NOT HAVE ANY FURTHER INFORMATION AVAILABLE".

III. PROCEEDINGS BEFORE FIFA'S DISPUTE RESOLUTION CHAMBER

38. On 17 October 2012, the Respondent lodged a claim before the FIFA's Dispute Resolution Chamber (hereinafter the "DRC") against the Appellant and Cruzeiro, requesting the payment of the following amounts: (i) EUR 25,000,000 in accordance with the compensation clause of the Contract or, alternatively, USD 2,430,079, corresponding to the non-amortised expenses and the residual value of the Contract; and (ii) interest of 10% *p.a.* as of 26 March 2012 (61st day following the termination) or, alternatively, interest of 10% *p.a.* as of 18 April 2012 (the date on which the formal request to pay interest was served by the Respondent). In addition it also requested the DRC to apply consequences for failing to give the notice of termination within 15 days since the last official match of the season.

39. On 30 July 2014, the DRC decided the following:

> 1. *The claim of the Claimant, FC Lokomotiv Moscow, is partially accepted.*
> 2. *The Respondent 1, Charles Fernando Basilio da Silva, has to pay to the Claimant, within 30 days as from the date of notification of this decision, the amount of USD 1,000,000 plus 10% interest p.a.as from 26 March 2012.*
> 3. *If the aforementioned amount plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
> 4. *Any further claim lodged by the Claimant is rejected.*
> 5. *The Claimant is directed to inform the Respondent 1 immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
> 6. *The Claimant is ordered to return to the Respondent 1, within 30 days as from the date of notification of this decision, the cheque bearing the date 17 February 2012 for an amount of USD 300,000".*

40. On 31 July 2015, the grounds of the decision rendered by the DRC on 30 July 2014 were notified to the parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

41. On 20 August 2015, the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (hereinafter the "CAS") against the Player, challenging the decision rendered by the

DRC on 30 July 2014 (hereinafter the "Appealed Decision"), with the following requests for relief:

"FIRST – To dismiss in full the Appealed Decision since it prima facie ignored the facts surrounding the matter, the laws, legal principles and regulations relating to the ongoing matter;

SECOND – To confirm that the Appellant complied with its contractual obligations, that is to say, paid by cheque to the Respondent the compensation amount of USD 300,000 set out in the settlement agreement dated 25 January 2012 and for the early termination of the employment contract signed 29 August 2008;

THIRD – To condemn the Respondent to the payment of the legal expenses incurred by the Appellant during the ongoing arbitration; and

FOURTH – To establish that the costs of this arbitration procedure before CAS shall fully borne by the Respondent.

Alternatively and only in the event that the above is rejected,

FIFTH – To dismiss, any order whatsoever issued by the Appealed Decision, in which the Appellant shall pay to the Respondent USD 1,000,000, plus default interest of 10% p.a. as from 26 March 2012;

SIXTH – To confirm that any decision which orders the Appellant to pay the aforementioned amount as compensation is per se baseless, disproportional, abusive and inter alia violates the Swiss public policy;

SEVENTH – To ratify that the Appellant is not obliged to pay any (further) compensation nor amount whatsoever to the Respondent based upon the settlement agreement, until the original form of the cheque received by the Respondent is effectively returned to the Appellant;

EIGHTH – To condemn the Respondent to the payment of the legal expenses incurred by the Appellant during the ongoing arbitration; and

NINETH [sic] *– To establish that the costs of this arbitration procedure before CAS shall be fully borne by the Respondent".*

42. On 27 August 2015, the CAS Court Office informed FIFA about the appeal filed by the Appellant and invited FIFA to inform the CAS whether it intended to participate in the present arbitration proceedings or not.

43. On 4 September 2015, the Appellant filed his Appeal Brief in which he reiterated the petitions previously filed with his Statement of Appeal, except for the request for relief "SEVENTH" that was replaced by the following one:

"SEVENTH – To confirm that in the unlikely event the Panel understand that the Appellant failed to pay a compensation amount to the Respondent, the Appellant shall be ordered to pay a compensation amount not higher than USD 300,000 but conditional on the prior receipt of the original form of the cheque from the Respondent".

44. On 21 September 2015, FIFA informed the CAS Court Office that it renounced to its right to intervene in the present arbitration proceedings.

45. On 10 November 2015, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the

parties that the Panel appointed to settle the present dispute had been constituted as follows: (i) Mr. José Juan Pintó, attorney-at-law in Barcelona, Spain, as President of the Panel; (ii) Mr. Luigi Fumagalli, Professor and attorney-at-law in Milan, Italy, as the arbitrator appointed by the Appellant and (iii) Ms. Yasna Stavreva, attorney-at-law in Sofia, Bulgaria, as the arbitrator appointed by the President of the CAS Appeals Arbitration Division *in lieu* of the Respondent.

46. On 2 December 2015, the CAS Court Office informed the parties that, pursuant to Article R57 of the CAS Code, the President of the Panel had requested FIFA to provide a complete copy of the file related to the present procedure.

47. On 7 December 2015, the Respondent filed its Answer before the CAS, requesting the Panel to render an award in the following terms:

1. "Dismissing the appeal of Mr. Charles Fernando Basilio da Silva

2. Confirming the Decision of the FIFA'S DRC dated 14 August 2014

3. Ordering the Appellant to pay the arbitration costs".

48. On 5 January 2016, FIFA produced a copy of the first instance file regarding the present dispute.

49. The hearing of the present procedure took place in Lausanne on 5 February 2016. At the hearing the Appellant was represented by his lawyers, Mr. Breno Costa Ramos Tannuri and Mr. Ramy Abbas Issa; and the Respondent by its lawyer Mr. Jan Kleiner and by Ms. Elena Sukhorukova, the Club's representative. In addition, Mr. Brent J. Nowicki, counsel to the CAS and Mr. Yago Vázquez Moraga, *ad hoc* clerk, assisted the Panel at the hearing.

50. At the outset of the hearing, all the parties confirmed that they had no objections as to the constitution of the Panel and as to the jurisdiction of the CAS in the present matter. Before giving the floor to the parties to present their opening statements, the Panel invited them to try to reach an amicable agreement in this case. However, although the hearing was suspended and the parties held some discussions, finally they did not reach any agreement and, thus, the hearing was resumed.

51. At the hearing, the parties had the opportunity to present their case, to submit their arguments and to answer the questions posed by the Panel. At the end of the hearing all the parties expressly declared that they did not have any objection with respect to the procedure and that their right to be heard had been fully respected.

52. Both parties countersigned the Order of Procedure issued by the CAS Court Office.

53. The language of the present arbitration is English.

V. SUMMARY OF THE PARTIES' SUBMISSIONS

54. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

V.1. The Appellant

- *As to the Appealed Decision*

55. The Appealed Decision did not meet the procedural requirements established by Article 14, par. 4 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter, "FIFA's Procedural Rules"), in particular because it did not give the *"reasons for the findings"*.

56. In particular, it is indisputable that the refusal of the Respondent to return the original cheque to the Appellant is of crucial importance in the case at stake. Indeed, the DRC implicitly recognized such importance since it ordered the Respondent to return the original cheque to the Appellant within 30 days as from the issuance of the Appealed Decision. However, it did not clarify the manner in which the Respondent had to comply with the aforementioned order, since the referenced original cheque had been lost, and did not clarify the consequences that should apply in case the Respondent failed to forward the original form of the cheque to the Appellant.

57. Although the Appealed Decision declared that *"the Claimant had presented convincing documentation confirming that it had been unable to cash-in the cheque"*, it did not explain which documents were so persuasive to reach this conclusion, taking into account that the main document *in casu* was the original cheque that the Respondent had lost.

- *As to the Termination Agreement and the payment of the compensation amount*

58. In the Termination Agreement both parties established the consequences of the early termination of the Contract. Indeed, the Contract was terminated by mutual agreement by means of the signature of the Termination Agreement.

59. It is undisputed that Clause 1 of the Termination Agreement referred to two compensation amounts, conditioned upon the date in which the payment was effectively complied by the Appellant.

60. The Appellant sent a cheque of USD 300,000 to the Respondent in order to comply with the payment of the compensation. To that purpose, the Player transferred the corresponding amount to the bank account indicated by his Agent, in order to allow for the issuance of the cheque.

61. However, on 21 March 2012, more than 30 days after having received the cheque, the Respondent informed the Appellant that *"the payment was not made in a form, ordered by F.C. Lokomotiv"*.

62. The Termination Agreement did not establish the form in which the Appellant had to pay the compensation amount and thus the cheque was issued in good faith by the Appellant, since he had never been informed that cheques are not valid means of payment in Russia. The Respondent's argument according to which the form of payment used by the Appellant was not a valid payment method is baseless, as the Termination Agreement neither specified it, nor established that the payment could only be made by means of a bank transfer.

63. By accepting the cheque sent by the Appellant instead of immediately refusing it, the Respondent accepted this method of payment.

64. In addition, by accepting the cheque and starting the proceedings to cash it through the competent bank, the Respondent was confirming that the Player's 4 days delay in making the payment was irrelevant. Thus, the Respondent tacitly accepted that the compensation amount could be paid even after the expiry of the 20 days deadline.

65. In this context, taking into account that the Respondent confirmed that it had started the procedure to cash the cheque and that it also consented the issuance of the Player's ITC, the Player had no reason to doubt that the payment of the compensation of USD 300,000 had been properly made.

66. Furthermore, the Respondent refused to return the original cheque, despite the several requests made by the Appellant to the Respondent. According to the information collected before the Safra National Bank of New York, the cheque had not been cashed because the intermediary bank used by the Respondent had presented a copy *in lieu* of an original form of the referenced cheque.

67. In this regard, the Respondent informally communicated to the Appellant that its bank had misplaced and lost the original form of the cheque. However, the Appellant agreed to transfer to the Respondent the USD 300,000 due as compensation on condition that it provided him with a written statement in which it released him from any further amount due as compensation pursuant to the Termination Agreement, as well as releasing the Appellant from any liability arising from the loss of the cheque. However, the Respondent refused to comply with the above-mentioned request and subsequently lodged a claim against the Appellant before the DRC.

68. The terms and conditions of the Termination Agreement should be interpreted in accordance with Swiss law. In this regard, in accordance with Article 163 of the Swiss Code of Obligations and pursuant to the CAS jurisprudence (CAS 2010/A/2317 & 2011/A/2323 or CAS 2011/A/2593 & 2598) the compensation (*i.e.* USD 1,000,000) stipulated in the Termination Agreement is disproportionate, taking into account the benefits obtained by the Respondent by means of the signature of the Termination Agreement.

69. In any case, raising the compensation amount from USD 300,000 to USD 1,000,000 for a 4 days delay is to be considered arbitrary and disproportionate.

70. Therefore, taking into account the savings made by the Respondent with the termination of the Contract, any higher amount due as compensation would certainly violate the legal principle of proportionality and the principle of good faith.

71. The amount of USD 300,000 agreed in the Termination Agreement was clearly of compensatory nature, in view of the early termination of the Contract. The aim of the parties was to fix the amount of the compensation in USD 300.000. On the contrary, the compensation set out in section 2 of Clause 1 of the Termination Agreement had a preventive intention (to put pressure on the Player to pay the compensation on the agreed time), *in lieu* of a compensatory aim. In addition, the amount established therein (*i.e.* USD 1,000,000) as well as the condition that triggered its application is legally baseless.

- *As to the Swiss Public Policy*

72. In the present case, Swiss public policy applies since the Appealed Decision was issued by a legal body of FIFA, that is to say an association governed by Swiss law.

73. The Appealed Decision, by ordering the Appellant to pay USD 1,000,000 plus default interest at a rate of 10% *per annum* as from 26 March 2012, clearly violates public policy.

74. The DRC ignored that when the Appellant signed the Termination Agreement the Appellant surrendered his freedom or restricted the use of it to a degree which violates the law or public morals.

75. Moreover, since the current employment contract of the Appellant with Cruzeiro is about to expire (*i.e.* on 31 December 2015) and given the fact that the Appellant is close to the age of 31, his career is about to initiate a declining stage as the new contracts he will be offered will not include remunerations that are as high as the ones paid by Cruzeiro, which is a top club in Brazil.

76. Therefore, the Appealed Decision clearly violates the public policy since it jeopardizes the economic existence of the Appellant.

- *Default Interests*

77. The Respondent accepted the cheque sent by the Appellant and thus during the period in which it tried to cash it, no interest whatsoever should apply. In accordance with the principle of good faith, no default interest shall be applied during the period of time in which the cheque remained with the Respondent and/or with the bank.

78. In addition, even if the Panel understands that no compensation has been paid by the Appellant, no default interest should be applied in light of the Respondent's refusal to return the original cheque to the Appellant, as requested by the latter.

V.2. The Respondent

79. The Appellant breached the Contract by not returning to Russia at the end of the loan period with Cruzeiro and subsequently terminated the Contract by means of a written notice dated 25 January 2012. In this scenario, the Appellant had to pay compensation for breach of the Contract.

80. The Appellant was aware of the conditions stipulated in Article 8.2 of the Contract, according to which he had the right to terminate the Contract prematurely and by his own initiative provided that he: (i) informed the Club in writing not later than one month before the termination, and (ii) paid a compensation of EUR 25,000,000.

81. However, the Appellant asked to reduce the amount of the compensation in exchange of its quick payment. In this regard, the Respondent, acting in good faith and wishing to resolve the dispute for the benefit of both parties, proposed the alternative option stipulated in the Termination Agreement, *i.e.* a compensation of USD 300,000, if such payment was made by the Player or his new club within 20 days following the date of termination of the Contract, or, otherwise, a compensation of USD 1,000,000, if the payment was executed later than within 20 days following the termination of the Contract.

82. The Termination Agreement established an alternative obligation whereby the Appellant could choose between the two above-mentioned options of payment that depended on the time in which the payment was made. Pursuant to Article 72 of the Swiss Code of Obligations, Article 8.2 of the Termination Agreement shall be interpreted as an alternative obligation or an obligation with an alternative option.

83. In addition, if the Appellant failed to pay the compensation within the stipulated 60 days following the date of termination of the Contract, *i.e.* before 26 March 2012, an interest of 10% *per annum* shall apply.

84. As the Appellant did not pay the compensation amount of USD 300,000 within 20 days following the day of termination, *i.e.* before 14 February 2012, he shall pay a compensation amounting to USD 1,000,000, together with the interest at a rate of 10% *per annum* as he failed to pay before the 60th day following the day of termination of the Contract.

85. According to Article 104 of the Swiss Code of Obligations, a debtor in default shall pay interest at the rate of 5% *per annum* even if a lower rate was stipulated by contract. Where the contract envisages an interest rate of interest higher than 5%, this rate shall be applied.

86. In addition, pursuant to Article 102 of the Swiss Code of Obligations, where a deadline for performance of the obligation has been set by the parties or as a result of the duly exercise of a right of termination reserved by one party, the obligor is automatically in default at the expiry of the deadline. In the case at hand, the deadline was clearly set in the Termination Agreement, by means of which it was stipulated that an interest of 10% *per annum* shall apply as of the 61st day following the termination of the Contract.

87. With regard to the cheque issued by the Appellant, the Respondent duly notified the Appellant about the form in which the payment had to be made, *i.e.* by means of a bank transfer, as cheques are not a valid method of payment in Russia and its cashing could entail difficulties. In accordance with the information provided by the bank, the cheque could not be honored because the account against which it was drawn had no funds. This is the reason why the SWIFT report stated to contact the maker to clarify the non-payment of the cheque.

88. Additionally, the amount of the cheque should have been USD 1,000,000, as it was issued after the 20 days deadline stipulated in the Termination Agreement and thus the compensation due at the time of its issuance amounted to USD 1,000,000.

89. Finally, Article 8.2 of the Termination Agreement does not infringe any personality right of the Appellant in the sense of Articles 27 et *seq.* of the Swiss Civil Code. Therefore the Appealed Decision did not violate Swiss public policy.

VI. ADMISSIBILITY

90. Pursuant to Article 67, para. 1 of the FIFA Statutes, in connection with Article R49 of the CAS Code, the Appellant had 21 days from the notification of the Appealed Decision to file its Statement of Appeal before the CAS.

91. The grounds of the Appealed Decision were communicated to the Appellant on 31 July 2015, and the Statement of Appeal was filed on 20 August 2015, *i.e.* within the time limit required both by FIFA Statutes and Article R49 of the CAS Code.

92. Consequently, the Appeal filed by the Appellant is admissible.

VII. JURISDICTION

93. Article R47 of the CAS Code provides as follows:

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

94. In the present case the jurisdiction of the CAS, that has not been disputed by any party and has been confirmed by the signature of the order of procedure, arises out of Article 66 and 67 of the FIFA Statutes and Article 24, par. 2 of the FIFA Regulations on the Status and Transfer of Players, in connection with the above-mentioned Article R47 of the CAS Code.

95. Therefore, the Panel considers that the CAS has jurisdiction to rule on this case.

VIII. APPLICABLE LAW

96. Article R58 of the CAS Code reads as follows:

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

97. In addition, Article 66 par. 2 of the FIFA Statutes provides:

"The provisions of the CAS Code of Sports- related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

98. In view of the above, the Panel agrees with what has been submitted by both parties in the course of this arbitration and concludes that the applicable rules in the present case are the FIFA Regulations and, additionally, Swiss law.

IX. MERITS

A. The Panel's full power of review of the Appealed Decision

99. The Appellant contends that the Appealed Decision is not valid because it failed to meet the necessary formal requirements established by the FIFA Regulations and, in particular, those set out in Article 14, par. 4, lit. f) of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter the "FIFA Procedural Rules"), according to which any decision passed by those jurisdictional bodies of FIFA shall contain *"the reasons for the findings"*.

100. In this respect, the Panel, after analysing the FIFA file and the Appealed Decision, does not consider that the Appealed Decision did not give the reasons for its findings. On the contrary, the Panel notes that DRC gave the necessary grounds and reasons of the decision passed. In any case, the Panel considers that this allegation of the Appellant is not relevant at all herein because, pursuant to Article R57 of the CAS Code, *"The Panel has full power to review the facts and the law"*, and thus it can issue a new decision which replaces the Appealed Decision and cures any potential procedural defect or error committed in the previous instance.

101. A clear and uniform jurisprudence has been established by the CAS in this respect, declaring that, except in those cases in which the particular circumstances require that the case is referred back to the previous instance to duly guarantee the principle of due process and the parties' right to be heard, the Panel's full power of review implies that any procedural flaw that may have occurred during the previous instance proceedings can be cured by the Panel within the appeal arbitration procedure. In line with this Jurisprudence, a *de novo* hearing is *"a completely fresh hearing of the dispute between the parties"*, in which *"any allegation of denial of natural justice or any defect or procedural error even in violation of the principle of due process which may have occurred at first instance, whether within the sporting body or by the Ordinary Division CAS panel, will be cured by*

the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations" (CAS 2008/A/1574).

102. Therefore, for the above-mentioned reasons the Panel considers that, in order to settle the present dispute, it is not necessary to consider the Appellant's preliminary allegation, because any procedural defect, flaw or fault in which the DRC may have incurred are cured by the present appeal proceedings.

B. Scope of the Termination Agreement and obligations arising out of it

103. Taking into account that both parties agree with the fact that by signing the Termination Agreement they freely and mutually established the consequences of the early termination of the Contract, that hence was terminated with effect from 25 January 2012, the Panel, in order to settle the present dispute, has to determine only:

i. which is the amount of the compensation to be paid by the Appellant to the Respondent;

ii. whether the Player breached his obligation to pay this amount or not; and, in this event,

iii. which are the consequences to be applied in accordance with the Termination Agreement and the law.

104. In this regard the Panel notes that, as the result of the negotiations held between the Appellant and the Respondent on 25 January 2012, the parties agreed to modify the content of Article 8.2 of the Contract and, at the same time, acknowledged that the Contract had been terminated on 25 January 2012. Pursuant to the new wording of Clause 8.2 of the Contract:

"1. To change clause 8.2 of the Labour Contract dd. 28.08.2008 as follows:

8.2 The football player ***has the right to prematurely terminate the present Contract by his own initiative (by his own choice)****, however, in this case the Football player is obliged to pay to the Club a Compensation (according to Article 17 of the FIFA Regulations on the Status and Transfer of Players) in amount of:*

- ***300000 (three hundred thousand) US dollars -*** *if the Compensation is paid by the Football player or his new club* ***within 20 days following the date of termination*** *of this Contract; or*
- ***1000000 (one million) US Dollars -*** *if the Compensation is paid by the Football player or his new club later than within 20th day but earlier 60th day following the date of termination of this Contract.*

If the Football player fails to pay the Compensation within 60 days following the date of terminations [sic] of this Contract, the interest of 10 per annum shall apply" (emphasis added).

105. In addition, Clause 6 of the Termination Agreement established that *"As the Football player used the option to unilaterally terminate the Contract, he* ***shall therefore pay to the Club the Compensation, set forth in clause 8.2 of the Contract****"* (emphasis added).

106. Taking this into account, the Panel observes that the scope of the Termination Agreement was:

- to amend the Contract, replacing Clause 8.2 with a new one in which the economic and timing requirements for the exercise of the Player's contractual right of termination were changed; and
- at the same time, to acknowledge the exercise of the Player's right of termination (*"the Football player used the option to unilaterally terminate this Contract"*, as stated in Clauses 3 and 6 of the Termination Agreement) and, consequently, to establish the enforceability of the new Clause 8.2 of the Contract and thus the obligation of the Player to pay the compensation agreed therein, which became payable from that moment onwards (*i.e.* 25 June 2012).

107. As a starting point, and before addressing the interpretation of the Termination Agreement (and, in particular, of the new Clause 8.2 of the Contract) the Panel deems it is necessary to clarify that during the negotiations held on 25 January 2012 between the parties in order to agree on the terms of the Termination Agreement, the Player was assisted by (i) his lawyer, Mr. Flavio Guilherme Raimundo, (ii) his "manager", Ms. Stephanie Vilarinho, (iii) Mr. Carlos Alberto G. Vilarinho, and (iv) a Russian translator. Therefore, taking into account this circumstance, the Panel comes to the conclusion that the allegations filed by the Appellant according to which this agreement was *"exclusively drafted by the Respondent"* (page 47, par. 153 of his Appeal Brief) and thus it shall be interpreted in accordance with the principle *contra proferentem,* has to be rejected: the terms of the Termination Agreement were the result of a negotiation, and not the object of a text unilaterally prepared by only one of the parties.

108. As the Appellant recognizes, in the Termination Agreement *"the parties expressly agreed with the termination of the Employment Contract, and whereby the Appellant inter alia was obliged to pay a compensation amount to the Respondent"* (page. 35, par. 98 of the Appeal Brief). Therefore, it is clear and undisputed that the Appellant had to pay a compensation to the Respondent.

109. In this regard, the Panel notes that, pursuant to the new wording of Clause 8.2 of the Contract, the amount of the compensation to be paid by the Player for the exercise of his *"right to prematurely terminate the Contract"* depended on the time in which its payment was effectively made by the Appellant. In particular:

- if the payment of the compensation was effectively made by the Player (or his new club) within 20 days following the date of termination of the Contract (*i.e.* 25 January 2012), the amount of the compensation to be paid was USD 300,000;
- if the payment of the compensation was effectively made by the Player (or his new club) more than 20 days after the date of termination of the Contract, but before the 60th day following that date, the amount of the compensation to be paid was USD 1,000,000.

110. In addition, the parties agreed to establish an additional obligation for the Player, consisting in the payment of default interests at the rate of 10% *per annum*, that was exclusively envisaged

for the event that the Player did not pay the corresponding compensation *"within 60 days following the date of termination"* of the Contract.

111. To settle the discrepancies existing amongst the parties with regard to the interpretation that has to be given to Clause 8.2 of the Contract, the Panel shall take into account that, pursuant to Article 18.1 of the Swiss Code of Obligations (hereinafter "CO") *"Pour apprécier la forme et les clauses d'un contrat, il y a lieu de rechercher la réelle et commune intention des parties, sans s'arrêter aux expressions ou dénominations inexactes dont elles ont pu se servir, soit par erreur, soit pour déguiser la nature véritable de la convention"* (which can be freely translated into English as *"In order to assess the form and the terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or denominations that they may have used, either in error or to conceal the true nature of the agreement"*).

112. Article 18 of the CO has been extensively interpreted and applied by the CAS, establishing a consolidated and uniform Jurisprudence according to which *"The interpretation of a contractual provision in accordance with article 18 SCO aims at assessing the intention the parties had when they concluded the contract. On this basis, Swiss scholars (Wigand, in Basler Kommentar, No. 7 et seq., ad Art. 18 CO) and case law (decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) have indicated that the primary goal of interpretation is to ascertain the true common intentions (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context, as well as all circumstances"* (CAS 2010/A/2098).

113. In the present case, even though the Appellant recognizes that the Termination Agreement established *"an amount in the event the payment occurs within the first 20 days as from the date of termination of the Employment Contract or a second amount whether it happens between the 20th and 60th days"* (page 34, para. 88 of the Appeal Brief), he however submits that the real intention of the parties was to fix the compensation in the amount of USD 300,000. In the Appellant's opinion, this would have been implicitly and explicitly confirmed by the Respondent's own acts. Therefore, the Appellant holds that with the inclusion of section 2 in Clause 1 of the Termination Agreement (the compensation in amount of USD 1,000,000) the Respondent intended *"to force the Appellant to comply with the obligation to pay the amount set out in the section 1 of said clause within a reasonable time"* (page 48, para. 162 of the Appeal Brief), by way of a kind of penalty clause.

114. On the contrary, the Respondent contends that with this clause the parties agreed on an alternative obligation according to which the Player could exercise his right to terminate the Contract either by paying USD 300,000 within the next 20 days or by paying USD 1,000,000 after that date.

115. In this regard, the Panel is of the opinion that the aim and meaning of Clause 1 of the Termination Agreement (*i.e.* new Clause 8.2 of the Contract) is crystal clear and leaves no room for doubt, because from its literal wording the *"true and common intention of the parties"* is easily identifiable and recognizable, and this wording does not contain any inexact expression or denomination that may lead to confusion.

116. In this context, it seems clear to the Panel that by this clause the parties intended to establish the different economic obligations for the Player as regards the termination of the Contract, which would ultimately depend on the effective time in which the Player settled these obligations towards the Respondent. In particular, following the parties envisaged the following three potential scenarios:

a. Fulfilment by the Player of his economic obligations within the 20 days following the date of the termination (*i.e.* 25 January 2012), that is to say before 14 February 2012: in this case the Player had to pay USD 300,000 without any interest.

b. Fulfilment by the Player of his economic obligations within the period comprised between the 21st day after the termination of the Contract (*i.e.* from 15 February 2012 onwards) and the 60th day as from the termination (*i.e.* 25 March 2012): in this case the Player had to pay USD 1,000,000 without any interest.

c. Fulfilment by the Player of his economic obligations towards the Respondent after the 60th day as from the termination of the Contract (*i.e.* after 25 March 2012): in this case the Player had to pay USD 1,000,000 plus the interests accrued at the rate of 10% *per annum* as from that date (*i.e.* interests accrued from 25 March 2012).

C. Amount of the compensation

117. Bearing this interpretation in mind and taking into account the facts of the case, the Panel shall determine which is the amount of the compensation that the Player has to pay to the Respondent in the case at stake. In this regard, considering that the position of the Appellant is that the Player paid (or at least, thought that he had paid) the compensation by means of the issuance of the cheque on 17 February 2012 (*i.e.* after 14 February 2012, which was the 20th day as from the date of termination), there is no doubt that, in any case, he did not pay the compensation *"within 20 days following the date of termination of this Contract"*.

118. Therefore, the Panel concludes that the amount of the compensation that the Player had to pay pursuant to Clause 1 of the Termination Agreement is USD 1,000,000.

D. Did the Player pay the compensation?

119. The Panel notices that, as the Appellant contends, the Termination Agreement did not stipulate the form or payment method through which the compensation had to be paid. However, the Appellant was contractually obliged by means of the Termination Agreement to pay the compensation and, although the form of payment was not specifically established in the Termination Agreement, what is undeniable is that this payment had to be done in such a way that enabled the Respondent to receive the payment within the agreed term.

120. The Appellant argues that, in order to pay the compensation, on 17 February 2012 the Player transferred the amount of R$550,000 (*i.e.* USD 320,961 at that time) *"to the bank account indicated by his Agent in that occasion* […] *in order to permit the latter, subsequently, to address the cheque to the Respondent"* (page 57, para. 205 of the Appeal Brief). Afterwards the Agent sent the cheque to

the Respondent. In the Appellant's opinion this ultimately would demonstrate the Player's good faith, as he did his best efforts to comply with the payment of the compensation.

121. The Panel cannot agree with the Appellant's approach. First of all, it is undisputed that although it tried to cash the cheque in several occasions (incurring in several bank expenses to that purpose) the Respondent did not succeed and thus did not receive any payment from the Appellant. Besides the fact that cheques may not be a usual method of payment in Russia, from the evidences produced within this procedure it has been proven that the cheque was not paid due to a reason linked with the maker of the cheque (*i.e.* Mr. Carlos Alberto Giannocaro), who either refused to pay it or simply did not have the necessary funds in the corresponding bank account. Therefore, the alleged loss of the cheque, that has been indicated by the Appellant as the reason why the cheque could not be cashed by the Respondent, is not relevant.

122. In any case, from the bank documentation produced it appears that the intermediary bank "Commerzbank" is assuming any and all liabilities for the potential loss of the cheque and guaranteeing at the same time that the copy of the cheque produced by the latter *"is a LEGAL COPY of your check. You can use it the same way you would use the original check"*.

123. The Panel is convinced that, as the bank documentation proves (*"Refer to maker"*), the cheque was not cashed just because of the actions (or omissions) of Mr. Carlos Alberto Giannoccaro. Ultimately this is confirmed by the proven fact that the Player has brought legal actions against Mr. Carlos Alberto Giannoccaro (and also against Ms. Stephanie Vilarinho) to recover the amounts that he transferred to him (*i.e.* decision rendered by the Tribunal de Justiça do Estado de São Paulo on 31 July 2014 ordering the seizure of the defendant's properties). Therefore the Panel is convinced that if the cheque was not paid, even though all the efforts made by the Respondent to cash it, this was due to the Player's advisors (Mr. Carlos Alberto Giannoccaro and Ms. Stephanie Vilarinho) fault. Obviously, it is the Player and not the Respondent who shall bear the consequences of this.

124. In this particular point, it shall be outlined that the Appellant had the obligation to ensure that he had fully performed his contractual obligations by paying the stipulated compensation amount within the set deadline and in a valid form of payment, that is to say, by means of a method which enabled the Respondent to receive the payment. However, the Player did not meet his contractual obligations, being in the Panel's opinion careless.

125. In this regard, the Panel notes that the Player could have easily made the requested payment. Particularly, the Panel notes that from the very beginning the Player was aware of the bank details of the Respondent (i.a. this information was provided by the Respondent to the Appellant with the Termination Agreement). Therefore, the Panel cannot understand why the Player, instead of transferring the amount of the compensation directly to the bank account of the Respondent, decided to transfer this amount to an American bank account of a third party (Mr. Carlos Alberto Giannocaro) in order to later issue a cheque addressed to the Respondent. In these circumstances the Panel considers that the Appellant shall bear the consequences of his acts and decisions that led him to breach his contractual obligations. This without prejudice of the potential actions that he may have against his advisors.

126. Finally, and for the sake of completeness, the Panel wants to stress that, in any case, when the cheque was issued the amount of the compensation to be paid was USD 1,000,000, and not USD 300,000. For this reason, regardless of what the cause for the non-payment of the cheque was, in any case with the issuance of this cheque (or even with its payment, in case this would have happened) the Appellant did not fulfil with his economic obligations towards the Respondent derived from the Termination Agreement.

127. On the other hand, the fact that in its first correspondence after having received the cheque the Respondent was willing to accept the payment of USD 300,000 instead of the USD 1,000,000 as compensation for the termination of the Contract, even though *"the check was issued outside the 20-days period and should thus has been issued for the amount of USD 1,000,000"* (correspondence from the Respondent of 21 March 2012) cannot be interpreted as the Appellant intends (*i.e.* that the amount of the compensation to be paid is USD 300,000). In particular, this was only proposed by the Respondent in good faith, but making it clear at the same time that *"if the check will not be accepted by the bank we will request you to pay the amount of compensation in the sum of USD 1'000'000 as it is agreed for the case of payment outside the 20-days period"* (correspondence from the Respondent dated 21 March 2012). In the other correspondence exchanged the Respondent always claimed the payment of USD 1,000,000 plus interests, and thus it never renounced to this higher amount. Therefore, the Appellant submissions in this regard shall be rejected.

128. For all these reasons the Panel concludes that the Appellant did not pay the compensation agreed by the parties in the Termination Agreement (*i.e.* USD 1,000,000).

E. Total amount to be paid by the Appellant to the Respondent

129. Taking into account the foregoing and that at today's date the Respondent has not received any payment from the Player, it is indisputable that the latter has failed *"to pay the Compensation within 60 days following to date of termination of the Contract"* and therefore, *"the interest of 10 per annum shall apply"* (section 2 of Clause 1 of the Termination Agreement).

130. As a consequence, the Panel finds that the Player shall pay to the Respondent the following amounts:

- USD 1,000,000;
- interest accrued at the rate of 10% *per annum* as from the 60th day following to the date of termination of the Contract (*i.e.* interest accrued from 25 March 2012).

131. With regard to the interest agreed, the Panel considers that its rate is perfectly in line with Swiss Law and completely valid under this legal regime. In particular, the interest rate applied is in full conformity with Article 104 of the CO and is not against any mandatory law. Therefore, pursuant to Article 102 of the CO, the Appellant was automatically in default since 25 March 2012 and hence the agreed interest should be applied as from that date.

F. As to the alleged infringement of Swiss public policy

132. With regard to the allegations of the Appellant that the amount of the compensation to be paid (USD 1,000,000 plus default interests at a rate of 10% *per annum*) *"clearly violates Swiss public policy"*, the Panel considers them groundless and thus shall reject them.

133. In the case at stake, even though initially the compensation agreed in Clause 8.2 of the Contract was EUR 25,000,000 -which was clearly disproportionate-, the Respondent agreed to moderate the amount of the compensation to be paid, reducing it from the initial amount to USD 300,000 or USD 1,000,000 (depending on the date of payment). Therefore, this amount was freely and mutually agreed by the parties, taking into account their mutual circumstances at that time and thus, pursuant to the legal principle *pacta sunt servanda* the Appellant, shall respect it.

134. In addition, the Panel does not deem this amount disproportionate or excessive or against Swiss Public Policy if one takes into account the following circumstances:

- the Respondent paid EUR 5,000,000 for the transfer of the Player for a 4 year and 4 months contract (*i.e.* an average annual cost to be amortised of EUR 1,150,000 per year);
- the annual remuneration of the Player was USD 862,079 (*i.e.* USD 689,664 due as salary and USD 172,415 due as "additional premiums");
- even though at the beginning of the negotiations held to terminate the Contract the Respondent proposed to consider the possibility to do it by means of a transfer to a Brazilian club (see e-mail dated 20 January 2012), in which case the Player probably would not have had to pay any compensation for the early termination of the Contract, the Player decided to directly *"unilaterally terminate the Labour contract […] according to clause 8.2 of the Contract"*, even though he was fully aware of the economic consequences of this termination.

135. On the contrary, the Panel considers that the compensation agreed is totally in line with the personal and economic situation of the parties and the circumstances and particularities of the case, and thus it does not jeopardize *"the economic existence of the Appellant"*. Therefore, the Panel does not see any legal reason that could lead to the reduction or moderation of the compensation agreed that, on the contrary, shall be fully paid by the Appellant pursuant to the legal principle *pacta sunt servanda*. As a consequence, the Appellant's submissions in this regard are rejected.

136. For the aforementioned reasons the Panel concludes that the Appealed Decision shall be upheld and thus the Appellant shall be ordered to pay to the Respondent the amount of USD 1,000,000 plus interests at the rate of 10% *per annum* as from 25 March 2012.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Charles Fernando Basílio da Silva against the Decision rendered by the Dispute Resolution Chamber of FIFA on 30 July 2014 is dismissed.

2. The Decision rendered by the Dispute Resolution Chamber of FIFA on 30 July 2014 is confirmed.

3. (…).

4. (…).

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