Arbitration CAS 2015/A/4296 Boris Galchev v. SC Dinamo 1948, award of 28 February 2017

Panel: Mr Bernhard Welten (Switzerland), Sole Arbitrator

Football
Mutual agreement to early terminate employment contract
Tacit and indirect choice of law applicable to employment contract
Waiver of mandatory rights out of an employment contract

1. **In circumstances where the parties to an employment contract leave the choice regarding the competent authority to decide on a future employment-related dispute open (*i.e.* civil courts or FIFA, see Article 22 Regulations on the Status and Transfer of Players (RSTP)), and where one of the parties files its claim with the FIFA Dispute Resolution Chamber (DRC), the choice for the competent authority also includes a – tacit and indirect – choice of law, *i.e.* here for the Statutes and Regulations of FIFA, and, complementarily, Swiss Law as the law of the country where FIFA is domiciled. Accordingly, those regulations also take precedence over any legal system originally chosen by the parties in the employment contract.**

2. **Apart from Article 13 RSTP, the FIFA Regulations do not contain any further details regarding mutual agreements to early terminate an employment contract. However, in determining a respective dispute, CAS panels are obliged to consider all mandatory laws applicable. In case Swiss law constitutes the (subsidiarily) applicable law, it follows from Article 341 para. 1 of the Swiss Code of Obligations that an employee cannot waive in a legally binding way his mandatory rights out of an employment contract, in particular for remuneration for work already accomplished at the time the contract was mutually terminated. Accordingly, to the extent a mutual termination agreement contains a waiver by an employee of its rights to remuneration for work already accomplished, the respective agreement is not valid.**

I. PARTIES

1. Mr. Boris Galchev (the "Appellant" or the "Player") is a professional football player of Bulgarian citizenship, born on 31 October 1983. He is currently playing for Septemvri Sofia, 2nd League in Bulgaria.

2. SC Dinamo 1948 (the "Respondent" or the "Club") is a football club with its registered office in Bucharest, Romania. The Club plays in the Romanian Professional Football League (the "RPFL"), the highest professional league in Romanian football and the country's primary football competition. The Club is affiliated to the Romanian Football Federation (the "RFF"),

which is itself affiliated to the Fédération Internationale de Football Association ("FIFA"), world football's governing body.

II. FACTUAL BACKGROUND

A. Facts

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and evidence filed. 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 12 July 2012, the Parties signed an employment contract (the "Employment Contract"), valid as from 12 July 2012 until 30 June 2014. According to Article J para. 1 and 4 of the Employment Contract, the Player was entitled to receive from the Club the following monthly net salary, payable until the 5th day of the following month:

   a. EUR 11,000 for the period of 12 July 2012 until 30 June 2013;

   b. EUR 12,000 for the period of 1 July 2013 until 30 June 2014.

5. In addition to the Employment Contract, the Parties signed on 16 July 2012 a financial addendum to the contract (the "Addendum"). According to para. 1 of this Addendum, the Club agreed to pay the Player the following net bonuses for his sport performance:

   a. EUR 900 for participating in a home match won in League I competition;

   b. EUR 400 for each point won as a player in every away matches in League I competition;

   Only 50% of the above mentioned bonus will be paid if the Player performed as reserve field player. Payment will be made monthly, until the 25th of the next month.

6. On 1 and 15 November 2012, the Player's agent, L., sent a reminder to the Club and put the Club in default regarding the payment of the Player's salaries for August and September 2012 as well as match bonuses.

7. On 9 November 2012, the Club sent its answer to the Player asserting that the Club would pay the outstanding amounts to the Player as soon as possible.

8. On 15 November 2012, the Player informed the Club in writing that the term *"as soon as possible"* does not satisfy him; he, therefore, urged the Club to pay the outstanding dues until 26 November 2012. The Club did not answer to this letter.

9. On 4 January 2013, the Player unilaterally terminated the Employment Contract with the Club with immediate effect in writing, invoking just cause.

10. From 7 January 2013 until 6 January 2014, the Player was employed by PFC Botev Plovdiv in Bulgaria. He received a monthly salary of EUR 7,000. The contract did foresee a duration until 30 June 2014, but the Player left early.

11. From 6 January until 30 June 2014, the Player was employed by PFC CSKA Sofia, Bulgaria where he received a total amount of EUR 32'520 (BGN 10'600 per month).

B. Proceedings before FIFA's Dispute Resolution Chamber ("DRC")

12. On 7 January 2013, the Player lodged a claim before the DRC claiming the payment of a total of EUR 259'700, broken down as follows:

    a) EUR 47'500 (4x EUR 11'000 plus EUR 2'000 and EUR 1'500) as outstanding salaries corresponding to the period of 12 August 2012 to 3 January 2013 plus 5% interests p.a.;

    b) EUR 3'700 as match participation and performance bonuses plus 5% interests p.a.;

    c) EUR 208'500 as compensation for breach of contract, corresponding to the remaining salaries from 4 January 2013 to 30 June 2014;

13. On 31 January 2013, the Club contested the competence of FIFA to deal with the present matter. As to the substance, the Club admitted that there had been delays in the payment of some amounts due to the Player, due of the general economic situation of the Club. For this reason, and due to the fact that the Player had some difficulties to adapt to the team's game, the Club and the Player agreed on 13 December 2012 to terminate the Employment Contract (the "Termination Agreement"), with effect as of 20 December 2012. According to this Termination Agreement, the Player declared having no more financial claims against the Club.

14. Based on the file provided by FIFA, the Sole Arbitrator has seen that the Player requested the DRC from 7 March 2013 until 20 November 2014 to send the Club's answer to his claim for which the DRC set a deadline on 31 January 2013.

15. On 23 October 2014, the Club requested the DRC to send the original of the Termination Agreement back in order for the Club to send this document to an expert to verify the original signature of the Player.

16. On 28 November 2014, FIFA sent the original of the Termination Agreement back to the Club.

17. On 19 December 2014, the Player filed his comments regarding FIFA's competence do deal with the present matter. Further, the Player contested the identity of the Termination Agreement and denied having signed such document.

18. On 9 February 2015, the Club reaffirmed its arguments that the DRC is not competent to decide this case, respectively maintained that the Termination Agreement is valid and that it was ready to submit the document to an expert to attest whether the signature of the Player had been forged or not.

19. On 14 May 2015, the Club sent the original of the Termination Agreement back to FIFA.

20. On 4 June 2015, FIFA sent the DRC decision, dated 21 May 2015, to the Parties:

> *"1. The claim of the Claimant, Boris Galchev, is admissible.*
>
> *2. The claim of the Claimant is rejected".*

21. On 12 June 2015, the Player asked FIFA to notify the grounds of the Decision.

22. On 28 October 2015, the reasoning of the Decision was notified to the Parties. It can be summarized as follows:

- The DRC stated that it is competent to decide on employment-related disputes between clubs and players with an international dimension, like in the present matter, involving a Bulgarian player and a Romanian club, based on Article 22 lit. b) Regulations on the Status and Transfer of Players, edition 2012 ("RSTP"). Regarding the Club's objection that the DRC was not competent to decide upon the present matter, it emphasised that the Employment Contract, in Article O, does not make a clear reference to one specific national dispute resolution chamber. Therefore, this Article O cannot be considered as a clear arbitration clause in favour of the national deciding bodies of the RFF or the RPFL; further even FIFA is mentioned as competent authority;

- The RSTP, edition 2012, shall be applicable as to the substance of the matter due to the fact that the claim was lodged with FIFA on 7 January 2013;

- It was undisputed by the Parties that they signed an employment contract valid as from 12 July 2012 until 30 June 2014;

- The core document in the present dispute is the Termination Agreement, apparently signed by both Parties on 13 December 2012. The Player stated that he did not sign this document. Based on Article 12 para. 3 of the Procedural Rules *"Any party claiming a right on the basis of an alleged fact shall carry the burden of proof";*

- The Termination Agreement bears the signature of the Respondent and the alleged signature of the Player; further the Respondent was able to provide the original of this Termination Agreement;

- The members of the DRC compared the relevant signatures of the Player and they had no other option but to conclude that, for a layman, the signatures on these documents, including the Termination Agreement, appear to be the same. For this reason, the Player's allegation of counterfeit cannot be upheld;

- By signing the Termination Agreement, the Player had agreed to terminate the Employment Contract with the Club and declared not to have any pending financial claims towards the Club;

- Based on the case file, including the documents filed as proofs, the DRC concluded that the Player's claim had to be rejected, the Parties have amicably agreed upon the termination of the Employment Contract and the Club does not have any pending financial obligations towards the Player.

III. PROCEEDINGS BEFORE THE CAS

23. On 17 November 2015, the Player filed his Statement of Appeal regarding the Decision, pursuant to Articles R47 et seq. of the Code of Sports-related Arbitration (the "Code"). The Appellant requested a Sole Arbitrator to be appointed by the Appeals Arbitration Division pursuant to Article R50 of the Code.

24. On 27 November 2015, the Respondent requested the CAS Court Office to submit the present dispute to a panel of three arbitrators.

25. On 3 December 2015, FIFA informed the CAS that it renounces to its right to intervene in the present arbitration, pursuant to Articles R54 and R41.3 of the Code.

26. On 8 December 2015, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division or her Deputy will decide on the number of arbitrators and the requested extension of the Appellant's time limit to file the Appeal Brief. Further the Appellant was informed that the Respondent will not pay its advance of costs in this matter.

27. On 11 December 2015, the CAS Court Office informed the Parties about the decision of the President of the CAS Appeals Arbitration Division to submit the present proceedings to a Sole Arbitrator. Further it informed about the extension of the Appellant's time limit to file the Appeal Brief until 16 December 2015.

28. On 16 December 2015, the Appellant filed his Appeal Brief, according to Article R51 of the Code.

29. On 28 December 2015, the Respondent requested the CAS Court Office that the time limit for filing its Answer shall only be fixed after the payment of the advance of costs by the Appellant.

30. On 11 January 2016, the Appellant filed an application for legal aid and requested assistance for the CAS arbitration costs as well as assistance for his own costs.

31. On 12 January 2016, the CAS Court Office suspended the Appellant's deadline to pay his advance of costs.

32. On 28 January 2016, the President of the International Council of Arbitration for Sport (ICAS) issued the order on request for legal aid. The Appellant's application for Legal Aid was dismissed.

33. On 17 February 2016, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had appointed Mr. Bernhard Welten, attorney-at-law in Berne,

Switzerland, as Sole Arbitrator to decide the matter at hand.

34. On 11 March 2016, the Respondent filed its Answer pursuant to Article R55 of the Code.

35. On 17 respectively 22 March 2016, the Appellant stated his favour for a hearing to be hold; respectively the Respondent, waived his right for a hearing to be hold.

36. On 31 March 2016, the Sole Arbitrator decided to appoint an independent graphologist expert and he, therefore, asked the Parties to produce the originals of all contracts, addendums, annexes and agreements allegedly signed by the Appellant.

37. On 12 April 2016, FIFA sent a copy of the complete file of the DRC to the CAS.

38. On 12 July 2016, an independent expert was appointed by the Sole Arbitrator as independent expert pursuant to Article R44.3 of the Code.

39. On 21 July 2016, the Appellant requested that the independent expert shall establish the authenticity of the Appellant's alleged signature and compare the ink paste with the printed text, the handwritten date on the Termination Agreement and the Appellant's signature in order to establish whether the Agreement was really signed on or around 13 December 2012.

40. On 2 September 2016, the CAS Court Office informed the Parties that the expert is generally only able to date an ink entry when comparing a very fresh (weeks or a few months old) entry with an older one. Otherwise such dating methods are unreliable and, therefore, he recommends restricting his mission to the question regarding the authenticity of the Appellant's signature.

41. On 8 September 2016, the CAS Court Office informed the Parties about the Appellant's non-agreement to limit the expert's mission and, therefore, the Sole Arbitrator's decision to appoint another expert.

42. On 15 September 2016, the Parties were informed about the new expert being Dr. Audrey Giles. On the same day, the Appellant sent a fax letter and gave his agreement to the appointment of Mrs. Giles as new independent expert respectively to get the microscope examination instead of the dating of the ink.

43. On 4 October 2016, the CAS Court Office sent the requested documents to the independent expert with the instruction to additionally carry out the microscopic examination of the pen lines in the handwritings on the Termination Agreement.

44. On 21 October 2016, the report of the independent expert was sent to the Parties. They were both given the possibility to comment on the report. The report can be summarized in essence as follows:

- The expert found on the Termination Agreement impressions which have been produced as a result of hand writings on a blue post-it note attached to it, a signature she could not determine the name of, but not matching that of either Mr. Nicolai Badea or the Player, a signature which appears similar in style to the signature of the Player - this presence

suggests that the Player may have signed another document whilst that document was resting directly on top of the Termination Agreement - and an impression appearing to be the name Giles as well as further impressions which she cannot interpret.

- The signatures of the Player and of Mr. Nicolai Badea are made with different pencil; the date "13.12.2012" and the Player's signature on the Termination Agreement are indistinguishable from each other; the microscopic examination shows that they are written with different pressures, the signature being very lightly written and the pen lines of the date much more firmly. The expert is not able to determine whether the Player's signature and the date were made at the same time or on different occasions.

- The expert states that comparing the Player's signatures, it appears that there are some differences. The Player's signature on the Termination Agreement starts with a similar structure as seen in the compared signatures. The following tall structure, however, appears simplified compared to the other signatures; however, the expert states that she has seen some considerable variation in this area of the Player's signature. The vertical stroke in this tall structure is longer than that seen in the majority of the Player's signatures. Nevertheless, the expert concludes that she has strong positive evidence to support the view that the questioned signature on the Termination Agreement is a genuine signature of the Player. She cannot exclude the possibility that this signature is an extremely sophisticated simulation, however, she considered this to be unlikely. Her summary of findings is:

  "1. Microscopic examination of the signature in the name Galchev and the date 13.12.2012 on the questioned Agreement are made in similar ink but are written with different pressures. It is not possible on the basis of these examinations to determine whether the questioned signature in the name Galchev and the date were made at the same time or on different occasions.

  2. My examinations of the signatures, and therefore the conclusions which can be drawn from them, have been limited by the fact that the signatures of Mr. Galchev provided for my examination may not represent the full range of variation to be seen in his signature at the relevant time. Further Mr. Galchev's signatures do demonstrate substantial variation.

  3. The questioned signature is freely and fluently executed, and demonstrates no evidence of simulation. This signature shows close similarity to the signatures of Mr. Galchev provided for my examination, although there are some differences present.

  4. Taking all of these factors into account I have concluded that there is a strong positive evidence to support the view that the questioned signature on the Agreement dated 13th December 2012 is a genuine signature of Boris Galchev".

45. On 28 October 2016, the Appellant sent his statement to the expert report. This statement may be summarized as follows:

- He does not object to the findings of the expert;

- As he does not speak and understand Romanian and English, he could possibly have signed the Agreement by mistake or maybe having being induced to entering into it by the wilful deception of the Respondent;

- He is convinced that he did not sign the Agreement on 13 December 2012, as he was not in Romania on this date;

- The expert's statement that there were impressions of other signatures on the Termination Agreement, possibly coming from other documents being signed on top of the Termination Agreement, corroborates the Appellant's statement that he was induced to sign the Agreement by the wilful deception of the Respondent at an earlier date;

- He did not sign any document with the Respondent in December 2012; the last document he signed with the Respondent was in November 2012, in the presence of the team's goalkeeper K., who acted as interpreter for the Appellant. In November 2012, B. signed for the Respondent; therefore, the impression found by the expert could be from B.

For these reasons, the Appellant requests the Sole Arbitrator to order the Respondent to produce the original document signed by this third person which was signed when resting on top of the Termination Agreement and to allow K. to give oral testimony.

46. On 7 November 2016, the Respondent filed its statement to the expert report which can be summarized as follows:

- It agrees with the conclusions 1 and 4 of the independent expert, which does not mean that it agrees with the conclusions 2 and 3;

- The expert responded to points not being asked by the CAS; therefore the impressions found on the Agreement cannot be taken into account. One of the impressions *"appears to be the name Giles"* which is the name of the independent expert. The impression "Boris Galchev" did not undergo the same examination as the ink signature on the Termination Agreement, however it *"appears similar in style"* based on the expert's statement;

- The Appellant's argument that he signed the Agreement by mistake or because he had been misled cannot be taken into account as any evidence for this is missing;

- As the expert states that it cannot be precisely determined whether the date and signature were made at the same time, the expert also clearly explained that the opposite pretention is impossible to prove (date and signature made on different occasions).

The Respondent objects to the Appellant's requests for new evidence as K. could have been named as witness even in the Statement of Appeal and no exceptional circumstances exist. Further, the Appellant is unable to state what exact document he requests from the Respondent; the Appellant should possess the documents he has signed and no exceptional circumstances are given to justify the request to produce such proofs only now.

47. On 5 December 2016, the Sole Arbitrator decided to reject the Appellant's requests to order

the Respondent to produce the original of the document signed by a third party when resting on top of the Termination Agreement respectively to listen to K. as witness.

48. On 7 December 2016, the Appellant has withdrawn the prayers 1 to 5 of his Appeal Brief being:

> *"1. To set aside and annul the entire decision passed on 21 May 2015 by the FIFA Dispute Resolution Chamber.*
>
> *2. To establish that the Appellant has unilaterally terminated the employment relationship with the Respondent for just cause, on 4 January 2013.*
>
> *3. To order the Respondent to pay the Appellant outstanding salaries in the amount of **EUR 46'000 net**, plus interest of 5% per annum as follows:*
>
> *a) On EUR 2'000 as from 6 September 2012;*
>
> *b) On EUR 11'000 as from 6 October 2012;*
>
> *c) On EUR 11'000 as from 6 November 2012;*
>
> *d) On EUR 11'000 as from 6 December 2012; and*
>
> *e) On EUR 11'000 as from 5 January 2013.*
>
> *4. To order the Respondent to pay the Appellant outstanding match bonuses in the amount of **EUR 2'400 net**, plus interest of 5% per annum as follows:*
>
> *a) On EUR 1'100 (i.e. EUR 200 + EUR 900) as from 26 September 2012; and*
>
> *b) On EUR 1'300 (i.e. EUR 900 + EUR 400) as from 5 January 2013.*
>
> *5. To order the Respondent to pay the Appellant compensation for breach of contract in the amount of **EUR 93'480 net**, plus interest of 5% per annum as from 5 January 2013".*

49. Further the Appellant agreed that the Sole Arbitrator could render his decision based on the Parties' arguments and no hearing shall be held. The Appellant, therefore, adhered to his alternative prayers 6 to 10:

> *"6. To set aside and annul the entire decision passed on 21 May 2015 by the FIFA Dispute Resolution Chamber.*
>
> *7. To order the Respondent to pay the Appellant outstanding salaries in the amount of **EUR 46'000 net**, plus interest of 5% per annum as follows:*
>
> *a) On EUR 2'000 as from 6 September 2012;*
>
> *b) On EUR 11'000 as from 6 October 2012;*

c) On EUR 11'000 as from 6 November 2012;

d) On EUR 11'000 as from 6 December 2012; and

e) On EUR 11'000 as from 5 January 2013.

8. To order the Respondent to pay the Appellant outstanding match bonuses in the amount of ***EUR 2'400 net****, plus interest of 5% per annum as follows:*

a) On EUR 1'100 (i.e. EUR 200 + EUR 900) as from 26 September 2012; and

b) On EUR 1'300 (i.e. EUR 900 + EUR 400) as from 5 January 2013.

In any event

9. To order the Respondent to bear all the costs incurred with the present procedure.

10. To order the Respondent to pay the Appellant a contribution towards its legal and other costs, in an amount to be determined at the discretion of the panel".

50. On 12 December 2016, the Respondent confirmed its view that no hearing is necessary in this case. Therefore, the Sole Arbitrator decided to cancel the hearing which was foreseen for 20 December 2016.

51. On 13 December 2016, the Appellant respectively the Respondent signed the Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

52. In the following summaries, the Sole Arbitrator will not include every argument put forward to support the Parties' claims. Nevertheless, the Sole Arbitrator has carefully considered and taken into account all of the evidence and arguments submitted by the Parties, but limits his explicit references to those arguments that are necessary in order to justify his decision.

A. Appellant's Submissions and Requests for Relief

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

- During the FIFA proceedings, the Respondent did not dispute the validity of the Employment Contract and the Addendum nor the amounts claimed by the Appellant as outstanding. Disputed is, whether the Appellant has signed the Termination Agreement on 13 December 2012 or not and if he validly waived his financial rights. Before the DRC, the Respondent's only argument was based on the Termination Agreement being signed by both Parties. However, the Appellant vehemently denies having signed the Termination Agreement. He therefore asks for an expertise by a graphologist.

- If the Appellant did not sign the Termination Agreement, this Termination Agreement is not legally binding and does not have any effect on the relation between the Parties. In such case, the Appellant had just cause to terminate the Employment Contract according to Article 14 RSTP and Article 337 para. 2 Swiss Code of Obligations ("CO"). The Respondent is then liable to pay the outstanding salary and bonus until 4 January 2013 (EUR 48'400) and a compensation based on Article 17 para. 1 RSTP, calculated based on the remaining contract period, reduced by the salary received from Plovdiv and CSKA Sofia until 30 June 2014 being EUR 93'480. In addition to these amounts an interest of 5% p.a. is due, starting on the due date of the salary, respectively on 5 January 2013 for the compensation.

- In case the Appellant's signature under the Termination Agreement is not a forgery, the Appellant invokes Articles 23 and 24 para. 1 CO, a material error, leading to the consequence that the Termination Agreement is not binding on him. He was asked by the Respondent to sign various documents at the beginning of the employment relationship and within the following couple of months. He therefore beliefs, having signed such document much earlier than on 13 December 2012. On this date, he was not in Romania and could therefore not sign the Termination Agreement at this date; all players were released on annual leave on 11 December 2012 as no other match was played until the end of the year. The Respondent was in arrears of payments of the Appellant's salary for August (EUR 2'000) and September to November (EUR 11'000 x 3). It makes no sense for the Appellant to sign such Termination Agreement in view of the outstanding amounts. Further he submitted the termination notice to the Respondent on 4 January 2013 and filed the claim with FIFA on 7 January 2013. If he had known about the Termination Agreement, it would not make sense to act in this way.

- Several indications prove that the Termination Agreement was pre-drafted, e.g. the signing date not being printed, but left open to be inserted by hand writing and the termination in accordance to the Termination Agreement should enter into force on 20 December 2012 only. Further indications prove that the Appellant did not intend to sign a termination agreement.

- The termination of the Employment Contract was announced on the Respondent's website and in the press only on 5 January 2013, once the Appellant has signed for PVC Potev Plovdiv. If the Termination Agreement would have been signed on 13 December 2012, this would certainly have been announced by the Respondent immediately. Further, the mutual termination was not acknowledged by the competent committee of the RPFL (see Article 18 of the Regulations for the Status and Transfer of Players of the RFF). The Appellant was never summoned or informed about any such proceedings.

- After having received the termination notice of 4 January 2013, the Respondent did not reply and point out to this Termination Agreement with the alleged signature of the Appellant. This Termination Agreement was invoked and adduced by the Respondent, for the very first time, in front of the DRC.

- In case the Sole Arbitrator concludes that the Termination Agreement was effectively

signed by the Appellant, clause 2 seems to be unclear; what is the term "financial claims" referring to? The Appellant is of the opinion that this term only refers to "performance bonuses" but not to "salaries". The Player is, under Swiss law, not allowed to waive his right to be paid his remuneration for the activities already performed at the date of termination. The Respondent did not pay any part of the unpaid due amount.

- In view of Article 341 para. 1 CO the Appellant cannot waive in a legally binding way any claims against the Respondent resulting from mandatory provisions of law during the course of the Employment Contract and for one month after its termination. As the Appellant has not obtained any adequate consideration whatsoever from the Respondent in exchange for the alleged waiver of his rights to be paid, the Respondent is still obliged to pay at least the outstanding salaries and match bonuses for activities already performed (EUR 48'400). Therefore, the alleged waiver of the Appellant's claim to salary until 20 December 2012 is null and void in any case.

- Even under Romanian law, the Player has a fundamental legal right to the salary for the work already performed with the consequence that he cannot waive such salary rights. Therefore, the Termination Agreement has to be considered null and void as far as it is aimed at the limitation of the Player's rights granted under Romanian law.

54. Following the withdrawal of points 1 to 5 of his initial prayers for relief, the Appellant requests as follows:

- *To set aside and annul the entire decision passed on 21 May 2015 by the FIFA Dispute Resolution Chamber.*

- *To order the Respondent to pay the Appellant outstanding salaries in the amount of* ***EUR 46,000 net****, plus interest of 5% per annum as follows:*

    a. On EUR 2,000 as from 6 September 2012;

    b. On EUR 11,000 as from 6 October 2012;

    c. On EUR 11,000 as from 6 November 2012;

    d. On EUR 11,000 as from 6 December 2012; and

    e. On EUR 11,000 as from 5 January 2013.

- *To order the Respondent to pay the Appellant outstanding match bonuses in the amount of* ***EUR 2,400 net****, plus interest of 5% per annum as follows:*

    a. On EUR 1,100 (i.e. EUR 200 plus EUR 900) as from 26 September 2012; and

    b. On EUR1,300 (i.e. EUR 900 plus EUR 400) as from 5 January 2013.

In any event

- *To order the Respondent to bear all the costs incurred with the present procedure.*

- *To order the Respondent to pay the Appellant a contribution towards its legal and other costs, in an amount to be determined at the discretion of the Panel".*

B. Respondent's Submissions and Requests for Relief

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

- The Respondent asked the National Dispute Resolution Chamber of the RFF to issue a decision declaring the termination of the Employment Contract on 7 January 2013. In decision no. 814/6 February 2013, the National Dispute Resolution Chamber of the RFF upheld the Respondent's claim and declared the termination by mutual agreement of the Employment Contract.

- The Respondent was not satisfied with the Player's performance in the first team and before terminating the Employment Contract the Parties corresponded in writing and orally, especially regarding the financial hardship of the Respondent and the Player's performance. The solution was that the Respondent paid a part of the unpaid due amount and in return the Player waived any other claims against the Respondent.

- On 13 December 2012, the first team of the Respondent, including the Player, were training at the Club. The Player was then in the office of the Respondent, located in Soseaua Stefan cel Mare to discuss with the Respondent's representatives which resulted in signing the Termination Agreement. He apparently left Romania in the evening of 13 December 2012.

- The Player had a right for two air tickets per season, round-trip, Bucharest-Sofia. However, the Respondent did not buy any plain tickets for the Player for his flight in December 2012. Without having signed the Termination Agreement, the Player would certainly have asked the Respondent to purchase him a flight ticket.

- In December 2012, the Respondent had financial arears, not only towards the Player but also towards other players of the team. Therefore, the Respondent agreed with several players under contract to terminate the employment contracts. The Player had the opportunity to not sign the Termination Agreement. Such termination agreements were also used in other cases; therefore, there was no printed signing date, but an empty space to put the date in by hand writing. Also the Employment Contract as well as the Addendum do not contain a printed signing date.

- Since 13 December 2012 (date of signing the Termination Agreement) and 21 May 2015, delivery of the Decision, no new facts or evidence arose. The Player asked for the first time for the annulment of the Termination Agreement respectively clause 2 of the Termination Agreement in these appeal proceedings; such request is inadmissible.

- The Player did not consider himself bound under the Employment Contract after 13 December 2012 as he negotiated a new contract with a new club, where he started on 7 January 2013, only three days after having sent his termination notice.

- In the Termination Agreement the Player waived the payment of the amounts due by the Respondent and in return, the Respondent waived its federative rights over the Player. Further the Respondent waived the repayment of the maintenance costs of the apartment from 12 July to 13 December 2012 which should have been paid by the Player.

- On 11 June 2014, the Respondent was placed under judicial administration due to insolvency/bankruptcy. At this date, the Player was not a creditor of the Respondent. If the Player wanted to seek any money from the Respondent, he should have filed his claim in the Respondent's insolvency/bankruptcy proceedings. However, he did not file any such request.

- On 23 September 2015, the Bucharest District Court closed the insolvency proceedings against the Respondent. As the Player was not an employee on 11 June 2014, he was not notified by the judicial administrator to file any claim he had against the Respondent. However, in February/March 2015 the latest, the Player knew about the Respondent's insolvency proceedings.

56. In its prayers for relief, the Respondent requests as follows:

> *"1. To dismiss the appeal filed by the player Boris Galchev against Decision passed by the FIFA Dispute Resolution Chamber on 21 May 2015 and to uphold the appealed decision as founded and legal.*
>
> *2. Pursuant to art. R 64.5 of the CAS Code we ask you to compel the Appellant to pay the costs generated to S.C. Dinamo 1948 S.A., as Respondent in this case, representing arbitration costs and attorney fee".*

V. JURISDICTION

57. 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 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".*

58. Articles 66 and 67 of the FIFA Statutes state that CAS has jurisdiction to decide on appeals against final decisions passed by FIFA's legal bodies like the DRC. Furthermore, Article 24 para. 2 RSTP states that the decisions reached by the DRC may be appealed before the CAS.

59. In the light of the foregoing, the Sole Arbitrator, therefore, confirms that CAS has jurisdiction to hear this appeal. This was further confirmed by the signature of the Order of Procedure by the Parties.

VI. ADMISSIBILITY

60. The Decision was taken by the DRC on 21 May 2015; the grounds of the Decision were subsequently notified to the Parties on 28 October 2015. The Appellant has then filed his Statement of Appeal on 17 November 2015 and therefore, within the 21-days deadline set by Article 67 para. 1 FIFA Statutes (2015 edition) in conjunction with Article R49 of the Code. Furthermore, the Appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office Fee.

61. Therefore, it follows that the Appeal is admissible.

VII. APPLICABLE LAW

62. The law applicable in the present arbitration is identified by the Sole Arbitrator in accordance with Article R58 of the Code, which provides the following:

> *"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".*

63. In the Employment Contract, the Parties stipulated in Article N para. 1: *"The provisions of the present individual employment agreement are completed with the dispositions of the Law no. 53/2003-Code of work and to the applicable collective employment agreement, concluded at the level of the employer/group of employers/professional branch/national level, registered under no. …… / ……, to the Direction of Work of Bucharest and the Ministry of Work and Social Solidarity".*

64. The Appellant, in his Appeal Brief, stated that based on Article 66 para. 2 FIFA Statutes and Article R58 of the Code, FIFA regulations shall apply primarily and Swiss law subsidiarily, as his appeal is directed against a decision of FIFA. Further, the Appellant points out that Article 22 RSTP offers the Parties two different ways: civil courts or FIFA. In agreeing to submit the case to the DRC and not before the equally competent civil courts, the Parties have modified their original choice of law for the choice of law incorporated in Article 66 para. 2 of the FIFA Statutes. Therefore, according to the reasoning of the Appellant, there is no room for the application of Romanian law in this matter, as its application was replaced by the Parties' tacit choice of law when submitting their dispute under the FIFA rules and regulations to the DRC.

65. The Respondent stated only that the Parties agreed in the Employment Contract to the Labour Code (Law no. 53/2003) being applicable and the DRC did not find differently, but declared its subject matter jurisdiction over the case, based on Article 22 lit. b RSTP.

66. The DRC decided that clause O of the Employment Contract is not a clear arbitration clause as requested in Article 22 lit. b RSTP and it also provides the option to lodge a contractual dispute in front of FIFA. The DRC, therefore, decided that the clause cannot be applied. Being competent to decide the case, the DRC applied the FIFA Regulations to the substance.

67. The Sole Arbitrator is of the opinion that the case at hand is governed by the FIFA Statutes and Regulations primarily as the Parties left the choice of the competent authority to decide on such cases open in clause O of the Employment Contract and with the Appellant filing the claim with the DRC the choice for the competent authority was made together with the applicable regulations, being the FIFA Statutes and Regulations. MAVROMATI/REEB, the Code of the Court of Arbitration for Sport, n. 99 to Article R58 states: *"However, in case of appeals against decisions issued by FIFA, there is a tacit and indirect choice of law, in accordance with Article R58 of the Code and Article 60 paragraph 2 of FIFA Statutes* [here version 2015: Article 66 paragraph 2], *and the dispute has to be decided according to the laws and Regulations of the FIFA and, complementarily, Swiss Law as the law of the country where FIFA is domiciled".* Accordingly, the regulations of the federation which has issued the challenged decision also take precedence over a legal system chosen by the parties originally in the employment contract (HAAS U., Football Disputes between Players and Clubs before the CAS, in: BERNASCONI/RIGOZZI (ed.), Sport Governance, Football Disputes, Doping and CAS Arbitration, p. 223; ZIMMERMANN M., Vertragsstabilität im internationalen Fussball, p. 175). Therefore, even if clause N para. 1 of the Employment Contract refers to the (Romanian) Code of Work, the Sole Arbitrator is of the opinion that Swiss law is applicable subsidiarily, based on the reasoning above (see also CAS 2013/A/3149, no. 84 and CAS 2013/A/3411, no. 68).

68. In order to specify which edition of the FIFA Regulations are applicable to this matter, the Sole Arbitrator notes that the case at hand was submitted by the Appellant to the DRC on 7 January 2013, thus before 1 June 2016, which is the date when the revised RSTP (edition 2016) entered into force. Pursuant to Article 26 para. 1 and 2 RSTP 2016, any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations, *i.e.* the 2012 edition. Accordingly, the 2012 edition of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "RSTP"), as already established by the DRC in the Decision, shall be applicable.

VIII. MERITS

A. Request for Additional Proofs

69. Before entering into the merits, the Sole Arbitrator is coming back to his decision of 5 December 2016 with which he rejected the Appellant's requests for production of a document and the participation of K. as a witness. In the before mentioned letter of 5 December 2016, it was stated that the reasons will be given in the final award.

70. The Appellant filed his requests for additional proofs after having received the expert report from Dr. Audrey Giles, dated 20 October 2016. A summary of the expert's finding is stated in para. 46 before. Based on the expert's findings, the Appellant requested:

> *"(1) To order the Respondent to produce the <u>original</u> of the document entered into by a third person (apparently someone at the Respondent) and the Appellant that was resting directly on top of the agreement. ….*

(2) To allow [K.] to give oral testimony on the hearing for the following facts: (i) that the Appellant did not master Romanian and English and that [K.] was translating all conversations between the Respondent and the Appellant; (ii) that the Appellant, upon the Respondent's explicit request, signed a document related to his accommodation in November 2012; (iii) that the Appellant left Romania on 12 December 2012; and (iv) that the Respondent never held negotiations with the Appellant for the early termination of the Contract in the presence of [K.], given that this was the only way for the Respondent to communicate with the Appellant at the time as the latter does not master English and Romanian".

71. The Respondent rejected the acceptance and admissibility of the new evidence requested by the Appellant, in his statement to the expert report on 7 November 2016.

72. Article R56 of the Code states that *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".*

73. As the Respondent objected to the Appellant's requests for new evidence, it is up to the Sole Arbitrator, based on Article R56 of the Code, to accept new relevant documents and proofs if exceptional circumstances are given. The Sole Arbitrator is of the opinion that especially the testimony of K. could have been easily requested by the Appellant in the Appeal Brief. All points raised by the Appellant on which K. should give oral testimony are points existing even before having received the expert report. The Appellant does not give any specific exceptional circumstance for asking for the oral testimony by K. only in his statement to the expert report. Therefore, such request is clearly late in accordance to Article R56 of the Code and, as a consequence, rejected by the Sole Arbitrator's decision of 5 December 2016. Further the oral testimony of K., as requested by the Appellant, is for the Sole Arbitrator not relevant in relation to the legal questions of the validity and real signing of the Termination Agreement, respectively possible just cause for terminating the Employment Contract.

74. In relation to the request to order the Respondent to produce the original document, which was signed when resting on top of the Termination Agreement, the Appellant was not able to give any further details to what kind of document the Respondent should produce. In view of this, it will be impossible for the Respondent to produce any document. Further, even if such a document would be available, it would not bring any proof about the signing date of the Termination Agreement and therefore, in the Sole Arbitrator's view, such document is irrelevant. Such document could only be relevant, if beside the impression of the signature, similar in style to the signature of the Player, a date different from 13 December 2012 could have been seen. However, the expert did not state anything like this. Therefore, even if exceptional circumstances like the expert report, pointing to such a document, only available on 20 October 2016, are given, the Sole Arbitrator is of the opinion that such document is not relevant and therefore he rejected also this request of the Appellant in its decision of 5 December 2016.

75. Consequence of the before reasoning was that with letter of 5 December 2016, the Sole Arbitrator rejected the Appellant's requests for producing new evidence based on Article R56 of the Code.

B. Termination Agreement

76. In looking at the expert report of 20 October 2016, the Sole Arbitrator draws the conclusion that the Termination Agreement was indeed signed by the Player. However, there are some doubts if this Termination Agreement was signed on 13 December 2012. Further doubts are if the Player did understand and was informed about the agreement he signed.

77. The Sole Arbitrator points out that a termination of an employment contract is possible based on Article 13 RSTP upon expiry of the term of the contract or by mutual agreement. The Termination Agreement referred to is such a mutual agreement. Therefore, the Sole Arbitrator has to first check if this termination agreement is valid and binding. In case it is invalid, the question is, if the contract was terminated with or without just cause.

78. As the expert report of 20 October 2016 states, there is strong positive evidence to support the view that the signature on the Termination Agreement is a genuine signature of the Player. As the Player bears the burden of proof to show that his alleged signature is forged, he has to bear the consequences of the expert report's conclusions that it is his genuine signature on the Termination Agreement. Nevertheless, the Sole Arbitrator has serious doubts about the date of the signature respectively that the Player was informed by the Respondent and did understand the Termination Agreement he signed. These doubts derive mainly from the facts that there were impressions found by the expert on the Termination Agreement showing other signatures made on documents resting on top of the Termination Agreement when signed. This is an indication that several documents were signed at the same time by the Player. Further, the filing of the FIFA claim by the Player clearly shows that he did not know having signed this Termination Agreement and not having a copy of it. This could further be a piece of circumstantial evidence that the Player was induced to sign the Termination Agreement without knowing what he exactly signed.

79. Even if the Sole Arbitrator has serious doubts about the date of the signing and the Player's understanding of the content of the Termination Agreement, he was not offered with compelling proofs by the Appellant. The too late requested testimony of K. and the unknown document requested from the Respondent would not bring any such proof. Therefore, the Termination Agreement was validly agreed on by the Parties.

80. The FIFA Regulations do not give any further details regarding the mutual agreement to early terminate an employment contract. The Sole Arbitrator is, however, obliged to consider all mandatory laws applicable. The subsidiarily applicable Swiss law does foresee in Article 341 para. 1 CO the following: *"For the period of the employment relationship and for one month after its end, the employee may not waive claims arising from mandatory provisions of law or the mandatory provisions of a collective employment contract"*. This Article refers to Articles 361 and 362 CO in which the mandatory regulations are listed. Amongst these mandatory regulations there is Article 339 para. 1 CO which states: *"When the employment relationship ends, all claims arising therefrom fall due"*.

81. In other words, all outstanding remunerations due to the Player became due by 20 December 2012. This includes not only the remunerations due for the work accomplished until 20 December 2012, but also a possible compensation until the end date of the contract. WYLER

R., Droit du travail, is of the opinion in comparing other scholars' opinions and the jurisdiction of the Swiss Federal Tribunal that especially for the work already accomplished, the employee, based on Article 341 CO, cannot waive in a legally binding way his rights to be paid: *"Le droit au paiement du salaire de base pour l'activité déjà effectuée revêt un caractère impératif protégé par l'art. 341 CO. … Ces principes s'appliquent également aux bonus, pour autant qu'ils doivent être qualifies de salarie"*. [free translation: *"The right to get the base salary for work already accomplished has a mandatory character protected by Article 341 CO. … These principles are also applicable to bonus payments as far as these are qualified as salary payments"*] (WYLER R., Droit du travail, 7.1.8., p. 279/280). Based on this opinion and in view of the Player not being able to understand English and not having realized having signed the Termination Agreement, which is shown by his FIFA proceedings introduced on 7 January 2013, the Sole Arbitrator is of the opinion that the Termination Agreement is not valid regarding the Player's waiver for his remunerations for work accomplished, including bonus payments, until 20 December 2012. The amount due is therefore a total of EUR 42,400 (EUR 2,000 for August 2012; EUR 11,000 for September, October and November 2012; EUR 7,400 until 20 December 2012). The due dates of these monthly payments is 5 September 2012 (for August), 5 October 2012 (for September), 5 November 2012 (for October), 5 December 2012 (for November) and 20 December 2012 (for December); from such date, there are interests of 5% p.a. for delayed payments due in addition to the salary payments mentioned before.

82. In addition to the salary, based on the Addendum which was a part of the Employment Contract, the Player had a right to certain bonus payments in relation to the points won in the League I games. Such bonus payments are a part of the Player's salary. Therefore, the Sole Arbitrator is of the opinion that the Player is further entitled in relation to his work performed until 20 December 2012 to get bonus payments in the amount of EUR 2,400 (EUR 1,100 for August 2012 and EUR 1,300 for September to December 2012). In addition to these payments, the Club has to pay interests for delayed payment of 5% p.a. since 26 September 2012 on EUR 1,100 and since 5 January 2013 - as requested by the Appellant - on EUR 1,300.

83. The Sole Arbitrator can leave the question open, if the Player was legally allowed to waive any compensation for the remaining contractual period in the Termination Agreement, as the Player has withdrawn the according prayers with letter of 7 December 2015.

84. As far as the Player asserted Article 24 CO, the Sole Arbitrator points out to Article 31 para. 1 and 2 CO which state:

"[1] Where the party acting under error, fraud or duress neither declares to the other party that he intends not to honour the contract nor seeks restitution for the performance made within one year, the contract is deemed to have been ratified.

[2] The one-year period runs from the time that the error or the fraud was discovered or from the time that the duress ended".

85. The Player invoked Article 24 CO in these CAS proceedings for the first time. After he became aware of the Termination Agreement in the FIFA proceedings, he did not point out to this Article 24 CO in his written statement of 19 December 2014. Therefore, at this stage, the Player is no longer able to invoke Article 24 CO, such request is time-barred.

86. Summing up, the Player apparently signed the Termination Agreement, even if the expert raised some doubts about the timing of the signing. As the Player cannot waive his mandatory rights out of the Employment Contract based on Article 341 CO and especially the salary for his work already accomplished when the contract was mutually terminated (on 13 December 2012 with validity on 20 December 2012), the Sole Arbitrator decided that the Club has to pay the Appellant an amount of EUR 42,400 plus interests of 5% p.a. and EUR 2,400 plus interests of 5% as stated above.

ON THESE GROUNDS

The Court of Arbitration for Sports rules that:

1. The appeal filed on 17 November 2015 by Mr. Boris Galchev against the Decision rendered on 21 May 2015 by the Dispute Resolution Chamber of FIFA is partially accepted.

2. The Decision rendered on 21 May 2015 by the Dispute Resolution Chamber of FIFA is annulled.

3. SC Dinamo 1948 shall pay to Mr. Boris Galchev the following amounts:

   - EUR 2,000 plus interests of 5% since 6 September 2012;
   - EUR 11,000 plus interests of 5% since 6 October 2012;
   - EUR 11,000 plus interests of 5% since 6 November 2012;
   - EUR 11,000 plus interests of 5% since 6 December 2012; and
   - EUR 7,400 plus interests of 5% since 20 December 2012, respectively
   - EUR 1,100 plus interests of 5% since 26 September 2012; and
   - EUR 1,200 plus interests of 5% since 5 January 2013.

(…)

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