Arbitration CAS 2017/A/5366 Club Adanaspor v. Mbilla Etame Serges Flavier, award of 7 August 2018

Panel: Mr Mark Hovell (United Kingdom), President; Mr Efraim Barak (Israel); Mr Bernhard Welten (Switzerland)

Football
Termination of contract by a player without just cause
Interpretation of a contractual clause
Behaviour amounting to a termination of contract
Objective criteria for the calculation of the amount of compensation due to a club
Case by case analysis
Inclusion of future match bonuses in the assessment of a player's residual salary
Non enforcement of fines

1. **When assessing the form and terms of a contract, *in casu* the actual expiry date of a contractual relationship, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of an agreement.**

2. **The fact that a player walks away from a club he is still contractually bound to for one sporting season to join another club with whom he signed an overlapping employment contract is a *de facto* termination of the first contract by the player.**

3. **Although not mentioned in the enumeration of objective criteria set forth by art. 17 of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP), some objective costs incurred by a club that unlawfully lost the services of a player, such as replacements costs, a loss of a transfer fee or the loss of an opportunity, qualify as objective criteria in the sense of the aforementioned article.**

4. **Each case is to be dealt with on its own merits. Each CAS panel is free to find the appropriate method, always applying the provisions of art. 17 FIFA RSTP, to find the correct solution for a case.**

5. **While evaluating a player's residual salary with a club, a CAS panel may include in such calculation a sum corresponding to the projected amount a player would have been able to earn on the basis of payments related to match appearances.**

6. **A fine imposed by a club upon a player should not be enforced if there is no copy on file of the disciplinary procedure that should have been applied and no evidence that it was properly applied, *i.e.* that the player was able to defend himself and to appeal any decision.**

I. PARTIES

1. Club Adanaspor (the "Club" or the "Appellant") is a football club with its registered office in Adana, Turkey. The Club is currently competing in the TFF First League, which is the second division in Turkey. It is a member of the Turkish Football Federation (the "TFF"), which in turn is affiliated to Fédération Internationale de Football Association ("FIFA").

2. Mr Mbilla Etame Serges Flavier (the "Player" or the "Respondent") is a Cameroonian citizen and professional football player. He currently plays for Alanyaspor in Turkey.

II. FACTUAL BACKGROUND

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

A. Background facts

4. The Player was born on 22 June 1988.

5. On 30 July 2008, the Player and the Club signed an employment contract valid until 31 May 2011 (the "First Employment Agreement").

6. TFF regulations stipulate certain restrictions regarding the number and age of foreign players, as well as the duration of their employment contracts. Those restrictions are determined and announced on a seasonal basis by the TFF. Before the beginning of the 2010/2011 season, the TFF issued its 2010/2011 Circular, which stated (emphasis added by the TFF):

> *"Bank Aysa 1. Lig clubs can sign contracts with 3 foreign players on the condition that they are born on or after 01.01.1987, the expiry date of contracts with such players should be at the latest 31.05.2013".*

7. On 29 November 2010, during the term of the First Employment Agreement and in the 2010/2011 season, the Player and the Club signed a second employment contract, for the purported period between 1 June 2011 and 31 May 2014 (the "Second Employment Agreement"). The Second Employment Agreement was signed outside the relevant transfer window in Turkey, which was permitted under TFF regulations.

8. The Second Employment Agreement had the following material terms[1]:

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[1] The Panel notes that the original version of the Second Employment Agreement was in Turkish, and has quoted the terms of the Agreement using the English translation provided by the Club.

*"**2 – TERM OF CONTRACT***

Start of contract (day - month – year)	*01.06.2011*
End of contract	*31.05.2013"*

The date for the end of the Second Employment Agreement initially stated *"31.05.2014"*, however this was changed as set out above and the change was initialled by the Player. The Second Employment Agreement also contained these further terms:

*"**3 – FEE***

Net Monthly Wage *(Not to be lower than the minimum wage)*	*For the season 2011-2012; 3.500 Euros per month from August to May* *For the season 2012-2013; 3.500 Euros per month from August to May* *For the season 2013-2014; 3.500 Euros per month from August to May*
Pre Match Payment	*For season 2011-2012; 2.645-Euros* *For season 2012-2013; 2.940-Euros* *For season 2013-2014; 3.235-Euros*
Other wages promised by the club	*Seasonal guaranteed wage payments* *For season 2011-2012: 55.000-Euros* *For season 2012-2013: 65.000-Euros* *For season 2013-2014: 70.000-Euros*
Payment Type	*Monthly payments within the first week of month follow* […] *deserved month* *Per match payments: at the end of the first and second halve* […] *season* *Guaranteed wages: during the season*

(…)

8 – SPECIAL PROVISIONS

1 - The per match allowances of the player shall be as follows; The footballer will reserve 100% of per match fee if he starts to play within the first 11 players, 75% of the fee if he is fielded as a substitute and %50 of fee in case he is unused substitute but in the 18 man squad. The player shall be due no match fee if he is outside 18-man squad.

(…)

5 - Following the signature date of this contract, the Footballer has to submit to the Club the documents necessary for his registration before Turkish Football Federation within determined periods by the Club, as well as to be present at the designated place by the club to undergo medical examinations. In case the footballer refrains from fulfilling these obligations or signs a contract with another club, he accepts and undertakes to pay a compensation of 3.000.000 TL to the club, that the compensation amount is neither excessive nor subject to any reduction.

(…)

8 - In case of groundless termination of the contract by the footballer or its termination by the club based on justification, the footballer shall pay a compensation of unjust termination of 3.000.000 TL to the club. The compensation amount is determined by free will of the parties and shall be subject to no reduction".

9. Later on 29 November 2010, the Second Employment Agreement was registered by the TFF, after the term was reduced to 31 May 2013.

10. In or around the summer of 2011, whilst still under contract with the Club, the Player joined another club's (Club Odense's) training sessions. As a result, on 28 July 2011, the Club wrote to the Player stating that he was fined EUR 54,000 (the "Fine"). It appears that the Player never paid the Fine, nor did the Club look to deduct any monies from his salaries.

11. Before the beginning of the 2011/2012 season, the TFF issued its 2011/2012 Circular, which stated (emphasis added by the TFF):

"Bank Aysa 1. Lig clubs can sign contracts with 3 foreign players on the condition that they are born on or after 01.01.1988, the expiry date of contracts with such players should be at the latest 31.05.2014".

12. On 15 July 2011, the Club alleged that the Player requested and they both signed a second version of the Second Employment Agreement, with the expiry date now being reinstated to 31 May 2014 (the "Third Employment Agreement"). This also had a slightly different start date from the Second Employment Agreement and was signed by a different official on behalf of the Club, otherwise, it was identical. The Third Employment Agreement was never registered with the TFF.

13. On 31 May 2012, the Club submitted an application to the TFF requesting that the Second Employment Agreement's registration dates be modified to end in 2014 instead of 2013. The Player's signature did not appear on this submission, which stated as follows:

> *"Subject: The subject matter is to submit our request for amendment of the end date, 31.05.2013 of Professional Footballer contract registered at the Federation between our club and Mbilla Etame Serges Flavier, as 31.05.2014 and for its registration.*
>
> *An Off-Season contract has been made between Mbilla Etame Serges Flavier and our club within 2010-2011 so as to be valid between 01.06.2011 and 31.05.2014; and it was submitted to the Federation for registration.*
>
> *Pursuant to the rules declared by TFF (Turkish Football Federation) for the season 2010-2011, teams in Bank Aysa 1. Lig competition can sign 3 foreign players on the condition that they are born on or after 01.01.1987, and contracts with such players can expire at the latest on 31.05.2013.*
>
> *In line with abovementioned rule, it is indicated by the Federation that the expiry date of related contract cannot be registered as 31.05.2014, but only as 31.05.2013. Thereupon, the expiry date of contract was amended as 31.05.2013.*
>
> *Nevertheless, even though Off-Season contract was signed during season 2010-2011, it would come into effect as of 01.06.2011, that is, season 2011-2012. Therefore, the mentioned contract cannot undergo the rules declared for season 2010-2011.*
>
> *As a matter of fact, pursuant to the rules declared for season 2011-2012, teams in Bank Aysa 1. Lig can sign 3 foreign players on the condition that they are born on or after 01.01.1988, and contracts with such players can expire at the latest on 31.05.2014. Accordingly, Off-Season contract between the parties, with respective start and expiry dates 01.06.2011 and 31.05.2014, fulfils the corresponding rules and regulations. The birth date of Mbilla Etame Serges Flavier is 22.06.1988. And the Off-Season contract has come into effect in season 2011-2012. Therefore, it is erroneous not to register the Agreement expiry date as 31.05.2014.*
>
> *The will of parties is to determine the expiry date as 31.05.2014. There is no obstacle against application of rules for season 2011-2012 with respect to abovementioned contract. As a result of an improper implementation, the Federation has registered the contract expiry date as 31.05.2013, non compliantly with the will of parties and related regulations. The true will of parties is proven by means of the Professional Footballer contract in the annex, which has respective start and expiry dates 15.07.2011 and 31.05.2014 and which was not registered by the Federation.*
>
> *We kindly submit for your information and inform our request that the expiry date of present Off-Season contract registered by the Federation is changed as 31.05.2014, or that the Federation registers Agreement, a sample of which is in the annex, beginning on 15.07.2011 and ending on 31.05.2014 for that all actions remain in line with the true will of parties and relevant regulations and that no loss of right is in question".*

14. On 13 May 2013, the Club received an offer by email from German club FC Union Berlin to sign the Player on a permanent basis. The offer was for EUR 100,000 plus a 7.5% sell on fee.

15. On 4 June 2013, the Player's counsel wrote to the Club stating that the contractual relationship between the Player and the Club had ended on 31 May 2013, and requested the Club not to interfere with the Player's intention to enter into a contract with another club, otherwise the Club could be liable for damages.

16. On 6 June 2013, the Club wrote to the Player stating that it was unlawful for the Player to negotiate with other clubs without its consent as he was still under contract with the Club. The Club requested the Player to honour his contractual obligations or risk facing legal action.

17. On 10 June 2013, the Club wrote to the Player again explaining, *inter alia*, the contractual history between the two parties and requested once again that the Player honour his contractual obligations to the Club.

18. On 20 June 2013, the Club wrote to the Player for a third time in a similar manner. There was no response from the Player to these three letters sent by the Club in June 2013.

19. On 26 June 2013, the Club wrote to the Player's counsel stating that their pre-season training camp would begin on 4 July 2013, and they expected the Player to join the team by that date. Later that same day, the Player's counsel responded to the Club and directed the Club to the Player's agent.

20. On 5 July 2013, the Player wrote to the Club, copying in the TFF, stating that the expiry date of the Second Employment Agreement was 31 May 2013 and that he had no intention to extend the contract any further. Moreover, the Player claimed that the Third Employment Agreement was in Turkish and was never translated to his native language (French) and claimed that the provisions against him were unacceptable. The Player also claimed that the Club had to pay him the amount of EUR 24,360, which was the amount of outstanding match bonus payments.

21. On 11 July 2013, the Club responded to the Player stating, *inter alia*, that the end date of the Second Employment Agreement was 31 May 2014 and that the French translation of the contracts had been provided to the Player. The letter also referred to the Fine, which had still remained unpaid.

22. On 3 August 2013, the Player signed an employment contract with Azerbaijani club Khazar Lankaran (the "Khazar Employment Agreement").

B. Proceedings before FIFA

23. On 22 October 2013, the Club filed a claim at the FIFA Dispute Resolution Chamber ("DRC"), requesting the Player and Khazar Lankaran be held jointly and severally liable in the amount of 3,000,000 Turkish Lira (EUR 1,107,054). The Club also requested to be reimbursed EUR 29,640

from the Player and requested that sporting sanctions be imposed on the Player and his new club.

24. On 14 October 2014, the Club and the Player were informed by FIFA that the club Khazar Lankaran had been disaffiliated from its national federation and therefore was no longer a party to the FIFA proceedings.

25. On 30 October 2014, the Player filed a counter-claim against the Club requesting to be paid EUR 26,320 as outstanding remuneration as well as legal fees.

26. On 13 July 2017, the FIFA DRC rendered its decision as follows (the "Appealed Decision"):

> *"1. The claim of the Claimant/Counter–Respondent, Adanaspor, is rejected.*
>
> *2. The counterclaim of the Respondent 1/Counter-Claimant, Mbilla Etame Serges Flavier, is accepted.*
>
> *3. The Claimant/Counter–Respondent has to pay to the Respondent 1/Counter-Respondent the amount of EUR 26,320 as outstanding remuneration,* ***within 30 days*** *as from the date of notification of this decision.*
>
> *4. In the event that the aforementioned sum is not paid by the Claimant/Counter-Respondent within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision".*

27. The grounds of the Appealed Decision were notified to the parties on 27 September 2017.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

28. On 18 October 2017, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the Club filed a Statement of Appeal with the CAS challenging the Appealed Decision and requesting the following prayers for relief:

> *"- To grant a permanent relief reversing the appealed decision; to accept the Appellant's claim and to reject the Respondent's counter-claim,*
>
> *- To condemn the Respondent to pay the Appellant the legal fees and other expenses in connection with the legal proceedings".*

29. In its Statement of Appeal, the Club requested the appointment of a Sole Arbitrator to resolve this dispute.

30. On 30 October 2017, in accordance with Article R51 of the CAS Code, the Club filed its Appeal Brief with the CAS with the following prayers for relief:

"1. To set aside the challenged FIFA Dispute Resolution Chamber decision;

2. To decide as the Respondent, Mr. Mbilla Etame Serges Flavier terminated the employment contract unilaterally without just cause and breached the contract,

3. To condemn the Respondent:

a. Accordingly, to pay in favour of the Appellant the amount of 3.000.000,-TL (EUR 1.103.468,57-) as compensation for breach of the contract without just cause,

b. To reimburse the amount of EUR 27.640,- in favour of the Appellant as outstanding and non-paid part of the fine,

4. To condemn the Respondent as the only responsible of this trial and to establish that the costs of the arbitration procedure shall be borne by the Respondent".

31. On 31 October 2017, the CAS Court Office wrote to the parties stating, *inter alia*, that since the Player did not state his position regarding the Club's request for a sole arbitrator to be appointed to this case, in accordance with Article R50 of the CAS Code it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue taking into account the circumstances of the case.

32. On 8 November 2017, the Player wrote to the CAS Court Office confirming that he did not agree to the appointment of a sole arbitrator.

33. On 20 November 2017, the Player wrote to the CAS Court Office requesting that the time limit for filing his Answer be fixed only after the payment by the Club of his share of the advance of costs. Further, in accordance with Article R53 of the CAS Code, the Player nominated Mr Bernhard Welten, Attorney-at-Law, Bern, Switzerland, as an arbitrator.

34. On 21 November 2017, the CAS Court Office wrote to the parties confirming that the time limit for the Player to file his Answer was suspended until the Club paid his share of the advance of costs in accordance with Article R55 of the CAS Code and informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the dispute to a Panel of three arbitrators.

35. On 28 November 2017, in accordance with Article R48 of the CAS Code, the Club nominated Mr Efraim Barak, Attorney-at-Law, Tel-Aviv, Israel, as an arbitrator.

36. On 21 December 2017, the CAS Court Office wrote to the parties confirming that the Club had paid its share of the advance of costs for this procedure, and accordingly the Player had 20 days to submit his Answer pursuant to Article R55 of the CAS Code. Further, in accordance with 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 this case was constituted as follows:

President: Mr Mark Hovell, Solicitor, Manchester, England

Arbitrators: Mr Efraim Barak, Attorney-at-Law, Tel Aviv, Israel

Mr Bernhard Welten, Attorney-at-Law, Bern, Switzerland

37. On 19 January 2018, out of the time limit stipulated by Article R55 of the CAS Code, the Player filed his Answer to the Club's Appeal.

38. On 22 January 2018, the CAS Court Office wrote to the parties acknowledging receipt of the Player's Answer and invited the Club to comment on the admissibility of the Answer within 3 days.

39. On 25 January 2018, the Club wrote to the CAS Court Office stating that the Answer was filed late, and should therefore be deemed inadmissible.

40. On 25 January 2018, the CAS Court Office wrote to the parties acknowledging the Club's position on the admissibility of the Answer. The CAS Court Office also invited the parties to state by 29 January 2018 whether they preferred for a hearing to be held in this matter or wished for the Panel to issue an Award solely on the written submissions.

41. On 29 January 2018, the Club wrote to the CAS Court Office requesting that a hearing be held in this matter.

42. On the same date, the Player wrote to the CAS Court Office stating that he did not wish for a hearing to be held in this matter.

43. On 31 January 2018, the CAS Court Office wrote to the parties confirming that a hearing would be held in this matter. The CAS Court Office also invited the Player to explain the reasons for filing his Answer only on 19 January 2018.

44. On 5 February 2018, the Player wrote to the CAS Court Office stating, *inter alia*, as follows:

> *"All of our defenses* [sic] *have already been reported in the FIFA DRC file. Our defense is the same in this file. Because of this, all of our defences under the scope of the dispute have already been presented in the FIFA DRC file, so the appellant's objection is of no practical benefit.*
>
> *But I only received the letter dated January 16, 2018 and we sent respondents answer immeadetly* [sic].
>
> *On December 22, I did not receive any posts. Maybe it is a mistake of my secretary, but we demand that our answers be taken into consideration".*

45. On 7 February 2018, the CAS Court Office wrote to the parties confirming that a hearing would be held in this matter on 27 March 2018.

46. On 8 February 2018, the CAS Court Office wrote to the parties stating as follows:

> *"Answer*
>
> *(…)*
>
> *On behalf of the Panel, the Parties are informed as follows: the Respondent does not contest the fact that he only filed his Answer on 19 January 2018. Therefore, in order to decide whether or not the Respondent's Answer was timely filed, the issue that needs to be assessed by the Panel is when the 20-day time limit provided for in Article R55 of the Code of Sports-related Arbitration ("Code") expired.*
>
> *The Panel notes that the 20-day time limit was fixed by means of CAS' letter of 21 December 2017 ("twenty (20) days of receipt of this letter by courier"). The Panel has taken note of the Respondent's indication that "On December 22, I did not receive any posts. Maybe it is a mistake of my secretary* […]*". Having assessed the evidence on file, the Panel considers that it is established that CAS' letter of 21 December 2017 was received by the Respondent by fax on the same day and by DHL on 22 December 2017. The Panel therefore considers that the time limit for the filing of the Answer was 11 January 2018 and that, consequently, the Answer was filed after the expiry of said time limit.*
>
> *Moreover, the Panel notes that, pursuant to Article R56 of the Code, a party may only be authorised to, inter alia, supplement its submissions after the filing of the appeal brief and of the answer, if (a) the parties agree or (b) the Panel orders otherwise on the basis of exceptional circumstances. The Panel notes that (a) the Appellant has objected to the admissibility of the Answer and (b) despite having been afforded with the opportunity to do so, the Respondent has not established the existence of any exceptional circumstances for the purposes of Article R56 of the Code.*
>
> *In light of the above, the Panel has decided that the Answer filed by the Respondent on 19 January 2018 is inadmissible.*
>
> *FIFA file*
>
> *The Parties are advised that the Panel has decided to request that FIFA provides a copy of the entire file of the FIFA proceedings for this case, pursuant to Article R57 of the Code".*

47. On the same date, pursuant to Article R57 of the CAS Code the CAS Court Office wrote to FIFA requesting a copy of the complete FIFA file.

48. On 22 February 2018, FIFA wrote to the CAS Court Office providing a copy of the complete FIFA file on this matter. On the same date, the CAS Court Office sent a copy of the FIFA file to the parties.

49. On 13 March 2018, the CAS Court Office wrote to the parties with the Order of Procedure for this matter, which was returned signed on 13 and 19 March 2018 by the Respondent and the Appellant, respectively.

50. A hearing was held on 27 March 2018 in Lausanne, Switzerland. The parties did not raise any objection as to the composition of the Panel. The Panel were all present and was assisted by Mr Daniele Boccucci, Legal Counsel at the CAS. The following persons attended the hearing:

    i. the Club: Mr Kemal Kapulluoğlu, counsel; and

    ii. the Player: Mr Mehmet Aygün, counsel and Mrs Fatima Karakulah, translator.

51. The parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. The hearing was then closed and the Panel reserved its detailed decision to this written Award.

52. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their respective rights to be heard and to be treated equally in these arbitration proceedings. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

IV. THE PARTIES' SUBMISSIONS

53. 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.

A. The Club's submissions

54. The true will of the parties was for the Second Employment Agreement to run until 31 May 2014. This Agreement had been entered into outside of a transfer window (as allowed under the TFF's regulations), but needed to be provided to the TFF during the next window. However, as it was due to commence immediately after the First Employment Agreement expired on 31 May 2011, it did not need registering until that time.

55. The parties knew that by the time the Second Employment Agreement was due to be registered, the 2011/12 TFF Circular would be in force, so for a foreign player of the Player's age, the maximum term could be until 31 May 2014, hence this was the expiry date included in the Second Employment Agreement.

56. When the Second Employment Agreement was sent to the TFF, it was unable to upload this on their systems, so they suggested changing the expiry date to 31 May 2013 temporarily. Thus, later on the Club approached the TFF to rectify this, which it did.

57. There was no pressure put on the Player to sign the Second Employment Agreement, he was receiving a six-fold increase in his remuneration.

58. Further, the Player sought to ignore the Second Employment Agreement and his agent looked to take him to Odense. However, when the Club informed Odense of the Second Employment Agreement, the Player returned. He was concerned that the registered version was only for a couple of years, so he requested a contract that was for 3 years, until 31 May 2014. As such, the parties executed the Third Employment Agreement.

59. This was never registered, as the TFF agreed to amend their records to show that the Second Employment Agreement would run until 31 May 2014. Further, a translated copy of the Third Employment Agreement was provided to the Player's counsel. However, when before FIFA, it mistakenly took this translation as an unsigned contract with the Player.

60. The Club denied the Player's claims that he never signed the Third Employment Agreement. At the hearing, the Player's counsel suggested that the Club had got the Player to sign an extra copy of the Second Employment Agreement and had submitted this as a signed version. However, the Club pointed out that in addition to the expiry date being different, so was the commencement date and the signatory on behalf of the Club.

61. When the Player refused to come back after the end of the 2012/2103 season, he breached the Second Employment Agreement, which the parties intended to run until 31 May 2014, without just cause.

62. Article 8 of the Second Employment Agreement clearly sets out the agreed remedy for such a breach. The Player has to compensate the Club in the amount of TL 3,000,000. Further he never paid the Fine, but the Club acknowledged it owed the Player EUR 26,360.

63. At the hearing, the Club's counsel acknowledged that the penalty clause may not be proportionate, and directed the Panel to the offer (that it turned down) that FC Union Berlin made for the Player around the time he breached without just cause, in the sum of EUR 100,000, with a sell on fee.

B. The Player's submissions

64. The Player denied that he ever signed the Third Employment Agreement. Before FIFA he alleged that it was forged and at the hearing, his counsel maintained this accusation. When directed to a purportedly signed copy of the Third Employment Agreement, his counsel suggested that it was a duplicate of an earlier contract (*i.e.* the Second Employment Agreement) that had been changed.

65. As such, the contract between the Parties was the Second Employment Agreement. The Player's position was that he had been pressured into signing it in the first place, and that it had been modified so that the expiry date was 31 May 2013. He had accepted this and initialled the change, which was on the version of the contract registered with the TFF.

66. The Club approached the TFF without the Player's knowledge and persuaded them to change their records to show that the expiry date was now 31 May 2014, however, he never agreed to

this modification and the contract could only be modified with his consent. Without this consent, the Second Employment Agreement expired on 31 May 2013, after which he was free to join Khazar Lankaran, as he did on 3 August 2013.

67. In the alternative, the Player alleged a breach of Article 18.2 of FIFA's Regulations on the Status and Transfer of Players (the "RSTP"), as the combination of the First and Second Employment Agreements would have a term of 6 years, if allowed to run until 31 May 2014, which is greater than the 5 years allowed under the RSTP. As such the term should be until 31 May 2013 to be compliant.

68. With regard to the Fine, he was not aware of this, but he did have arrears of salaries still due to him in the amount of EUR 26,320. As such, he should be paid this sum and the Fine be ignored, as FIFA had done. The Appeal should be dismissed.

V. JURISDICTION OF THE CAS

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

> *"An appeal against a 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".*

70. Moreover, the Club relied on Articles 57 and 58 of the FIFA Statutes. The jurisdiction of CAS was not disputed by either of the parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both parties.

71. It follows that the CAS has jurisdiction to hear this dispute.

VI. APPLICABLE LAW

72. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS, 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

73. Both parties in this dispute agreed (the Player's counsel doing so at the hearing) that the various rules and regulations of FIFA and Swiss law were applicable in accordance with Article R58 of the CAS Code. The Panel observes that article 57(2) of the FIFA Statutes (2016 edition) stipulates the following:

> *"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".*

74. As such, the Panel is satisfied to primarily apply the various regulations of FIFA and, subsidiarily, Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

VII. ADMISSIBILITY

75. The grounds of the Appealed Decision were notified to the parties on 27 September 2017.

76. The Statement of Appeal, which was filed on 18 October 2017 and therefore within the 21-days deadline, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

77. The Club also filed the Appeal Brief within the time limit stipulated by Article R51 of the CAS Code.

78. It follows that the Appeal is admissible.

VIII. MERITS OF THE APPEAL

A. The Main Issues

79. The Panel observes that the main issues to be resolved are:

a. Which contract was binding upon the parties?
b. What was the expiry date of that contract?
c. Was there a breach of Article 18.2 of the RSTP?
d. Did the Player breach such contract (without just cause)?
e. If so, what is the compensation for any such breach?
f. Should the Player pay the Fine?
g. Should the Player be entitled to his unpaid salaries?

These issues will be considered in turn.

a.) Which Contract was binding upon the parties?

80. It is acknowledged by the parties that the First Employment Agreement expired and that the parties entered into the Second Employment Agreement prior to such expiry, with the intent that it commenced immediately after that expiry. The Club claimed at the hearing that it regarded the Second Employment Agreement as the one that had been breached. Indeed, the Player claimed that the Third Employment Agreement was never signed by him or that it was forged. He too wished to rely upon the Second Employment Agreement.

81. The Panel were disappointed that the Player did not participate at the hearing; he made some serious accusations against the Club (such that it forged the Third Employment Agreement),

which he did not turn up to support and be examined on. Overall, the Panel were left with the impression that he did sign the Third Employment Agreement, as, in July 2011, he wanted the security of the 3 years money, however, it appeared that by the end of the 2012/13 season, it may have suited him to be a free agent.

82. The Third Employment Agreement was never registered with the TFF, as it ultimately treated the Second Employment Agreement as running until 31 May 2014. As such the parties seem to share the opinion that the relevant contract is the Second Employment Agreement, with the Club maintaining that the Third Employment Agreement simply shows the true will of the Player, *i.e.* that he be bound to it until 31 May 2014.

83. The Panel determined that the Second Employment Agreement was the contract at the centre of this dispute.

b.) What was the expiry date of the binding contract?

84. The position of the Player is simply that the Second Employment Agreement was modified by the parties together to comply with the 2010/2011 TFF Circular. It was not possible under these TTF regulations to have a term that went beyond 31 May 2013, so the parties modified the contract to reflect this. However, he did not agree to revert back to 31 May 2014 at a later date. Such a change would be a further variation of the contract and would require his consent. As such, the Second Employment Agreement expired at 31 May 2013.

85. The Club, on the other hand, explained that the parties knew that every season a new TFF Circular comes out and that the 2011/2012 TFF Circular would come out before the expiry of the First Employment Agreement, so the Second Employment Agreement could run until 31 May 2014. As it would not need registering with the TFF until May 2011, there was no need to modify the terms that had been accepted by the parties, including an expiry date of 31 May 2014. However, the computer system of the TFF could not understand this, so the TFF suggested that the *"2014"* was temporarily changed to *"2013"* until the computer system could be updated in the future. The Club said that the parties and the TFF agreed. As such, there wasn't a modification, rather the TFF made a temporary change so the contract could be registered when it was first lodged with the TFF.

86. The Panel notes that the Player appeared to disregard the terms of the Second Employment Agreement almost immediately, regardless of whether the expiry date was 2013 or 2014, when he left the Club to attempt to join Odense. The Panel also notes that the Third Employment Agreement bore the signature of the Player. Whilst the Panel noted the allegations of forgery and duress, ultimately, it notes, as many CAS panels have before, that the burden of proof in such situations is on the party making such accusations. In that regard, the Panel notes that Article 8 of the Swiss Civil Code states *"[u]nless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact"*.

87. Ultimately, it was the Player's personal decision not to attend the hearing and to be examined on these claims or to bring his agent, *etc.*. He chose not to. The Panel were left with the

impression that there was absolutely no substance to these allegations. The Player's counsel's attempts to argue that this was a duplicate of the Second Employment Agreement that the Club must have got the Player to sign (and later changed the expiry date and called it the Third Employment Agreement) were denied by the Club, which also managed to demonstrate that there were other material differences between the documents, indicating that this could not be a duplicate. Instead, the Panel sees this unregistered Third Employment Agreement as evidence that the Player's will (and the Club's too) was that the arrangements between them would end on 31 May 2014.

88. The Second Employment Agreement with the corrected ending date of 31 May 2013 has to be seen as a simulated contract in the sense of Article 18 Swiss Code of Obligations. The Panel is convinced that the parties' real will in the moment of the signature of the Second Employment Agreement was – as stated before – to close a contract ending on 31 May 2014. Therefore, this date has to be considered as the valid expiry date.

c.) Was there a breach of Article 18.2 RSTP?

89. The Panel notes that this regulation stipulates that *"the maximum length of a contract shall be 5 years"*. The Player's position was that if the expiry date of the Second Employment Agreement was until 31 May 2014, then, as the Player had been already employed with the Club under the First Employment Agreement, the total time with the Club would exceed the 5 years.

90. The Panel determines that Article 18.2 of the RSTP is of no assistance to the Player. This regulation applies to a single contract (hence the use of *"a contract"*) and the terms of both the First Employment Agreement and the Second Employment Agreement were each for less than 5 years. The regulations do not seek to aggregate the terms of consecutive contracts as in the case at hand. Accordingly, this argument by the Player is dismissed. The Panel is of the opinion that there was no breach of Article 18.2 RSTP.

d.) Did the Player breach such contract (without just cause)?

91. The Panel notes that at the hearing, the Player's counsel made a reference to there being unpaid salaries due at 31 May 2013 which could have entitled him to have terminated the Second Employment Agreement with just cause. These reasoning was brought up for the first time at the hearing but the Player did not file any supporting proofs and he was personally not present to support these allegations. This argument was not included in the Player's submissions before the FIFA DRC and, for the Panel it is most important to see that the Player did not actually seek to terminate the Second Employment Agreement on such grounds; he simply walked away from the Club in stating that the Second Employment Agreement ended on 31 May 2013. The Panel is of the opinion that the reasoning regarding the outstanding bonus payments is just an explanation 'produced' afterwards, after having factually terminated the Second Employment Agreement in leaving the Club and signing the Khazar Employment Agreement. Such behaviour of the Player is against good faith and will not put him in a position to be protected by the RSTP respectively having just cause to terminate the Second Employment Agreement.

92. As such, the Panel determines that the Player simply sought to leave the Club on 31 May 2013 and had already (through his agent) been in touch with FC Union Berlin in early May 2013 which is confirmed by the offer received by the Club on 13 May 2013. He ultimately signed the Khazar Employment Agreement in August 2013, during the currency of the Second Employment Agreement, and started to play for that club.

93. In all letters sent back and forth between the Club and the Player after 31 May 2013, the Club relied on the valid and ongoing Second Employment Contract meanwhile the Player clearly stated that this contract ended on 31 May 2013 and he was a free agent. Therefore, also in his letter of 5 July 2013 he only asked for payment of the open bonus payments but did not put the Club in delay or threatened to cancel the Second Employment Contract for just cause.

94. The actions of the Player were in breach of the Second Employment Agreement, which the Panel determines were without just cause, in violation of Article 17 of the RSTP (see *e.g.* CAS 2015/A/4094; CAS 2008/A/1519 & 1520; CAS 2007/A/1358).

e.) If so, what is the compensation for any such breach?

95. Article 17 of the RSTP governs the consequences of a party breaching a contract without just cause. The Panel notes that FIFA allows the parties to provide for the consequences of such a breach in the contract itself and that the Club has referred to clause 8 of the Second Employment Agreement, which reads as follows:

> *"In case of groundless termination of the contract by the footballer or its termination by the club based on justification, the footballer shall pay a compensation of unjust termination of 3.000.000 TL to the club. The compensation amount is determined by free will of the parties and shall be subject to no reduction".*

96. The Panel notes that the clause is unilateral, in that there is no similar clause in favour of the Player should it be the Club that was guilty of a groundless termination. The clause is unilateral in nature and solely for the benefit of the Club. In accordance with CAS jurisprudence (see *e.g.* CAS 2014/A/3509), the Panel considers this clause to be null and void.

97. As such, the Panel returns to Article 17.1 of the RSTP and notes that it contains a non-exhaustive list of criteria that the Panel can utilise to compensate the Club. The Panel notes that it should consider the remuneration for the Player under the Second Employment Agreement and the Khazar Employment Agreement, take note of the time remaining under the Second Employment Agreement, any fees and expenses incurred by the Club in acquiring the Player and take note of whether the breach occurred in the Protected Period[2] (*in casu*, the first three years of the Second Employment Agreement) or not. Ultimately, the aim of the Panel is to apply the positive interest principle under Swiss law and to compensate the Club for its losses.

98. The salary under the Khazar Employment Agreement was USD 400,000 for the 2013/14 season, whereas under the Second Employment Agreement the maximum annual salary of the

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2 In the FIFA RSTP, the 'Protected Period' is defined as the first three seasons/years of a contract if the contract was entered into by a player before his 28th birthday, or two seasons/years if entered into after his 28th birthday.

Player for that 2013/14 season would have been EUR 195,580, had he played in all 36 matches of the season, and a guaranteed amount of EUR 105,000 if he was never fielded at all. The Second Employment Agreement had 1 year to run and the breach occurred in the Protected Period, as the Player was under 28 and the breach was at the end of the second year of the Second Employment Agreement. Finally, the Panel noted that there was no evidence of any unamortised fees and expenses of the Club from acquiring the Player and that FC Union Berlin were prepared to pay the Club EUR 100,000 for the Player at that time.

99. There is no reference to replacement costs, lost transfer fees or lost opportunities in Article 17 itself, but the Panel notes that other CAS panels (in cases such as CAS 2008/A/1519 & 1520 and CAS 2009/A/1880 & 1881, to name a few) have determined that this is within *"any other objective criteria",* as referred to in Article 17 of the RSTP.

100. The Panel notes that there have over the years been a number of different methods adopted by different CAS panels to determine the compensation due. The Panel was simply not convinced that one method should be used over another. Each case should be dealt with on its own merits (as the CAS panel in CAS 2008/A/1519 & 1520 noted, *"on a case by case"* basis) and each CAS Panel should be free to find the appropriate method, always applying Article 17 of the RSTP, to find the correct solution for that case. The Panel notes that the 2018 Edition of the RSTP now harmonises the calculation process, however, that edition is not the applicable one to the case at hand.

101. In the case at hand, the Panel noted that the Club rejected the sum offered by the German club of EUR 100,000, together with a sell on fee, considering that this did not adequately compensate them for the loss of the Player. The residual wages of the Player for the 2013/14 season appear to be EUR 105,000 guaranteed (the 10 months at EUR 3,500 and the annual sum of EUR 70,000), but if the Player had played he would have received an additional EUR 3,235 per match. The Panel cannot be sure how many matches he may have featured in, but note that in the previous season (*i.e.* 2012/13) he appeared to have played 28 times[3], he was now a more experienced player and the Club had expressed its wish to retain him, by not selling him to the German club.

102. If he played half of the 36 matches in the 2013/14 season, then his potential salary would increase by EUR 58,230 (being 18 matches at EUR 3,235 a match) to EUR 163,230. The Panel notes that the Player benefited from his breach, as he moved to a club that paid him USD 400,000 (approx. EUR 335,000 using an exchange rate of 1 USD to 0.8 EUR), thus substantially increasing his salary from what he could have received from the Club even if he had played every match for it during the 2013/14 season.

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[3] Neither of the parties submitted evidence regarding the number of appearances made by the Player in the 2012/13 season, so the Panel relied on a simple internet search and the following web pages for this figure: https://www.transfermarkt.com/adanaspor/leistungsdaten/verein/6/plus/0?reldata=%262012; https://en.wikipedia.org/wiki/Mbilla_Etame

103. With that in mind and considering that the residual salary method best suits the matter at hand, the Panel determines to award the Club the sum of EUR 163,230 as compensation to be paid by the Player for his breach of the Second Employment Agreement without just cause.

f.) Should the Player pay the Fine?

104. The Club claimed that the Fine was never paid by the Player, despite it being issued in 2011.

105. The Panel notes that the FIFA DRC, in the Appealed Decision, disregarded the Fine determining that the motive of the Club was to issue a fine to offset arrears of salary that it owed the Player.

106. The Panel determines not to award the Fine, but for different reasons to those of FIFA. In the case at hand, the Fine predates the arrears of salary, so could not have been created to offset those arrears. The reasoning for the Panel is again the lack of evidence from the Club that this Fine was properly levied. Whilst the Panel notes that the Player sought to train elsewhere, he returned immediately. There is no copy of any disciplinary procedure that should have been applied in such a situation, no evidence that it was properly applied (such as that the Player was able to defend himself and to appeal any decision), nor was there any reasoning as to why the Club failed to enforce the Fine in the subsequent two years when the Player played for it.

107. The Panel were left with the impression that the proper procedure to levy a fine against the Player was not followed and that the Club only looked to enforce this once the Player had walked away. In particular, the Fine was equivalent to a third of the Player's assumed annual salary which could be considered as disproportionate. The Panel does not have to take any decision on this in the proceedings at hand and in looking at all the circumstances, it determined that the Fine was not issued in a correct way, giving the Player the possibility to defend himself and, therefore, not to enforce the Fine.

g.) Should the Player be entitled to his unpaid salaries?

108. There was no dispute between the parties that the sum of EUR 26,360 arrears of match bonuses from the 2012/13 season remained unpaid from the Second Employment Agreement. The Panel noted that before the DRC the Player claimed both EUR 26,360 and EUR 26,320 and was awarded the lower amount, however, the Club have confirmed the actual amount was EUR 26,360. Despite this inconsistency, the Panel notes that the Appealed Decision awarded the Player EUR 26,320 and this was not appealed by the Player at the CAS. The Club, in its Appeal, did not request the Panel to amend this amount. As such, the Panel has no room to amend the Appealed Decision in this particular regard. Therefore, the Player is entitled to receive EUR 26,320 from the Club.

B. Conclusion

109. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel partially allows the Appeal by the Club and determines that the

Player must pay the sum of EUR 136,910 (being the EUR 163,230 compensation less the EUR 26,320 the Club owed the Player) to the Club.

110. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 18 October 2017 by Club Adanaspor against the decision rendered by the FIFA Dispute Resolution Chamber on 13 July 2017 is partially allowed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 13 July 2017 is set aside and replaced by this award.

3. Mbilla Etame Serges Flavier shall pay Club Adanaspor the sum of EUR 136,910 (one hundred and thirty six thousand nine hundred and ten Euros).

4. (…).

5. (…).

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