Arbitration CAS 2009/A/1975 Jean Amadou Tigana v. Beşiktaş Futbol Yatirimlari San. VE TİC. A.Ş, award of 17 August 2010

Panel: Mr Christian Duve (Germany); President; Mr Luc Argand (Switzerland); Mr Efraim Barak (Israel)

Football
Termination agreement related to a contract of employment
Admissibility of the appeal (scope of article R51 of the CAS Code)
Burden of proof in connection with the modification of the termination agreement
Absence of breach of the club's obligations under the termination agreement

1. **Since article R51 of the CAS Code only applies to the launching of an appeals procedure, the subsequent order by a panel to the appellant to submit a translation of its previous submissions by a certain date does not fall within the scope of article R51 of the CAS Code. Therefore, an appeal shall not be deemed withdrawn despite the fact that the appellant did not adhere to the deadline set forth by the panel for the translation of its statement of appeal and appeal brief.**

2. **The party which asserts facts to support its rights has the burden of establishing them. With regard the modification of a termination agreement, the party who has failed to fully and precisely indicate the new terms of the allegedly modified *"Termination Agreement"*, who did not clarify the sequence of events concerned with the alleged modifications and who did not provide evidence on which to rely has not discharged the proof that the terms of the *"Termination Agreement"* were modified.**

3. **It is the party who asserts that a club did not fulfill its financial obligations who bears the burden of proving such breach. If it is established that the club fulfilled all its financial obligations towards the coach by the requested deadline according to the *"Termination Agreement"*, the club therefore did not breach its obligations under such agreement. Therefore, the employment contract does not take effect again as alleged by the coach and, thus, the latter is not entitled to his annual salary for one sporting season, as he validly forfeited such salary by concluding the termination agreement.**

Mr. Jean Amadou Tigana (the "Appellant" or "Mr. Tigana") is a professional football coach of French nationality.

Beşiktaş Futbol Yatirimlari San. VE TİC. A.Ş. (the "Respondent") is a football club with its registered office in Istanbul, Turkey. It is a member of the Turkish Football Federation, which is affiliated to the Fédération Internationale de Football Association (FIFA).

On 16 March 2006, the Appellant and the Respondent signed an employment contract by which the Appellant became coach of the Respondent (the "Employment Contract"). According to the Employment Contract, the Appellant would receive a net annual salary of respectively EUR 2,300,000 for the 2006/2007 and for the 2007/2008 sporting seasons. These payments were secured by a letter of guarantee limited to the amount of EUR 1,000,000 issued by the Respondent's bank. In addition, the Employment Contract provided that the Appellant would be entitled to receive bonuses in case the club won the Turkish League, the Turkish Cup, the UEFA Cup and/or the Champions League.

On 14 May 2007, the parties concluded an agreement to terminate the Employment Contract by mutual consent (the "Termination Agreement"). The terms of the Termination Agreement read as follows:

> *The Club agrees to pay to Mr Jean Tigana:*
>
> *1. the sum of 200,000 Euros, by credit transfer on May 15, 2007;*
>
> *2. the sum of 311,000 Euros on June 25, 2007. The aforementioned sum will be cashed by the interested party by the presentation for payment of the Letter of Indemnity already in his possession.*
>
> *3. The sums of 47,000 USD representing the various premiums of cup of Turkey due to the Coach as well as the sum of 250,000 Euros representing the premium of classification in championship. These two sums will be respectively paid to Mr Tigana on June 15, 2007 for the second (250,000 Euros) and on June 26, 2007 for the first (47,000 USD)*
>
> *[…]*
>
> ***For his part, Mr. Tigana expressly gives up receiving his contractual annual wages of an amount of 2,300,000 Euros as well as all other rights and credits envisaged in the [the Employment Contract] for the season 2007/2008.***
>
> *[…]*
>
> ***If the engagements, in particular financial ones envisaged in the present Agreement were not respected, [the Employment Contract] would entirely take effect again.*** *In addition, if the present Agreement were respected, Mr Jean Tigana would expressly give up all rights and credits under the terms of the present letters.*
>
> *Once the commitments noted above are fulfilled, the present cancellation will be then completely effective. Contractual relations between the parties being definitively finished.*
>
> [Emphasis added by the Panel]

On 15 May 2007, in accordance with the terms of the Termination Agreement, the Respondent paid to the Appellant an amount of EUR 200,000.

On 8 June 2007, in accordance with the terms of the Termination Agreement, the Respondent paid to the Appellant an amount of USD 47,000.

On 15 June 2007, in accordance with the terms of the Termination Agreement, the Respondent paid to the Appellant an amount of EUR 250,000.

In contrast, the amount of EUR 311,000 was neither paid by the Respondent on 25 June 2009 nor collected by the Appellant by presenting the letter of guarantee for payment to the responsible bank.

According to the Appellant's oral submissions at the hearing, just prior to the due date of the EUR 311,000 payment on 25 June 2009, a meeting took place between the Appellant, one of the members of the Respondent's board of directors who was in charge of the Respondent's finances, Mr. Sogancioglu, and a translator, Mr. Sinam. At this meeting, the Appellant was allegedly asked not to cash the amount by presenting the letter of guarantee as agreed under the Termination Agreement due to the fact that the Respondent was undergoing financial difficulties. Instead, the Appellant suggests that the terms of the Termination Agreement were modified and the Respondent was to pay the remaining EUR 311,000 via wire transfer in two instalments: EUR 150,000 by 25 June 2009 and the remaining balance a few days later.

On 13 July 2007, the Appellant sent to the Respondent a document signed by a public notary from Istanbul, Turkey (the "Notarial Notice"), with the following content:

> *Jean TIGANA and the Club of Football of Besiktas signed an Agreement, on May 14, 2007, governing the conditions of the rupture of their contractual relation, in particular the amounts and methods of payment of the allowances. Jean Tigana agreed to receive part of his compensation on June 25, 2007.*
>
> *However, at the date of June 25, 2007, the sum of 150 000 €, due on this date, was not honoured by the Club.*
>
> *By the present letter, we have the honour to summon you to pay the sum of 150,000 Euros to our customer within 3 (three) days and notwithstanding this payment, we notify you that we reserve the right to ask for the execution of the above mentioned Agreement and all other applicable agreements.*

The Respondent subsequently paid the amount of EUR 311,000 in two instalments: of EUR 163,639.79 on 12 July 2007 and of EUR 147,532.69 on 25 July 2007.

On 23 July 2007, the Appellant filed a claim with the FIFA Players' Status Committee (PSC) arguing that the Respondent had not met its obligations arising under the Termination Agreement and that the Respondent still owed an amount of EUR 150,000. Therefore, the Appellant maintained that the Employment Contract had taken effect again, entitling the Appellant to receive from the Respondent his annual net salary of EUR 2,300,000 for the 2007/2008 sporting season.

On 26 June 2009, the PSC issued a decision rejecting the Appellant's claim in its entirety and ordering him to pay an amount of EUR 7,500 in procedural costs (the "PSC Decision").

The PSC considered that the Respondent had acted in good faith as it could have expected the Appellant to cash in the amount of EUR 311,000 by presenting the letter of guarantee to the Respondent's bank according to the Termination Agreement. The PSC held that the Respondent was not obliged to pay the said sum by other means. Furthermore, the PSC found that the Appellant had

failed to show that he had suffered any distress from the delay of about a month in the payment under the given circumstances.

The alleged modification of the terms of the Termination Agreement was not brought up before the PSC.

On 13 October 2009, the Appellant filed with the Court of Arbitration for Sport (CAS) his Statement of Appeal in the French language requesting to order the Respondent to pay to the Appellant the sum of EUR 2,300,000 as well as all costs of the proceedings.

On 23 October 2009, the Appellant filed with CAS his Appeal Brief, also in the French language.

On 29 October 2009, the Respondent requested the present proceedings to be conducted in the English language.

On 18 November 2009, the President of the Appeals Arbitration Division of CAS issued an order (the "Order regarding the Language of the Arbitration") stating the following:

a) The language of the arbitration CAS 2009/A/1975 Jean Amadou Tigana v/ Besiktas is English.

b) Upon request of the parties, or if the Panel deems it necessary, the Panel shall order translations into English of documents which have already been filed in another language than English.

On 18 November 2009, the Respondent requested the earlier submissions of the Appellant to be translated into English according to section b) of the Order regarding the Language of the Arbitration. In case the request was to be granted, the Respondent requested an extension of the deadline to file an Answer until the Respondent received the said translation.

On 24 November 2009, the parties were informed that the deadline to file the Answer to the Appeal Brief would be suspended until the Panel reached a decision concerning the Respondent's request for a translation of the Appellant's submissions.

On 9 February 2010, the Panel ordered the Appellant to file before 26 February 2010 an English translation of the submissions and documents he had filed.

On 12 March 2010, the Appellant submitted English translations of his Statement of Appeal and Appeal Brief.

On 5 April 2010, the Respondent filed its Answer with CAS.

On 26 April 2010, the parties were informed that the Panel had decided the following:

a. The Appellant is requested to translate into English all the exhibits to his Statement of Appeal and Appeal Brief which have been filed in French or Turkish, on or before 7 May 2010.

b. The parties are requested to file, on or before 7 May 2010, additional submissions specifying if any communication took place between them regarding a possible modification of the Termination Agreement of 14 May 2007 and to further substantiate the facts in this respect.

c. The Panel reserves its right to hold a hearing upon consideration of the parties' additional submissions on the modification of the Termination Agreement.

On 6 May 2010, the Appellant filed with the CAS Court Office translations of the correspondence sent to the CAS Court Office, including the letters dated 16 October 2009, 23 October 2009, 9 November 2009, 17 December 2009 and 12 March 2010. The Appellant, however, did not file English translations of the exhibits to his Statement of Appeal or Appeal Brief. Moreover, the Appellant did not file any further submissions concerning the alleged modification of the Termination Agreement.

On 7 May 2010, the Respondent submitted to the CAS Court Office that no communication had taken place between the parties concerning a modification of the Termination Agreement.

On 18 May 2010, pursuant to Article R29 of the Code of Sports-related Arbitration ("CAS Code"), the Panel requested the Appellant to file English translations of exhibits 1 and 4 to his Appeal Brief, which were filed on 25 May 2010.

LAW

Jurisdiction

1. The jurisdiction of CAS, which is not disputed between the parties, derives from articles 62 and 63 of the FIFA Statutes. Article R47 of the CAS Code also provides basis for the jurisdiction of CAS in the present matter.

2. The scope of the Panel's jurisdiction is defined in article R57 of the CAS Code, which provides:

   Scope of the Panel's review, Hearing

   The panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. […].

3. As a result, CAS is not bound by the facts as established by the PSC if parties present new facts in the present proceedings.

Admissibility

4. The PSC Decision was notified to the parties on 25 September 2009. Under article 63 (1) of the FIFA Statutes, the Appellant had until 16 October 2009 to file his Statement of Appeal, which he did on 13 October 2009. In addition, under article R51 of the CAS Code, the Appellant had until 26 October 2009 to file his Appeal Brief, which he did on 23 October 2009.

5. However, the Respondent argues that the present appeal should be deemed withdrawn pursuant to article R51 of the CAS Code, as the Appellant failed to submit the English translations of his Statement of Appeal and Appeal Brief by the subsequent deadline set by the Panel.

6. The Panel therefore considers the wording of article R51 of the CAS Code, which provides:

Appeal Brief

Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn.

[…].

7. The Panel underscores that in the present matter, the Appeal was properly and timely launched pursuant to article R51 of the CAS Code by filing a Statement of Appeal and Appeal Brief in the French language – one of the working languages of the CAS according to article R29 of the CAS Code.

8. In turn, the Panel notes that pursuant to common practice of CAS, the language of the concerned decision is one of the main criteria for the choice of language of the arbitration. Thus, considering that the PSC Decision had been rendered in English and that neither party was a native English speaker or resident of an English speaking country, the President of the Appeals Arbitration Division of CAS decided English to be the language of the arbitration but did not order the translation of the documents that had already been filed.

9. Furthermore, the Panel takes into consideration that the Appellant was given until 26 February 2010 to translate all of its previous submissions filed in French into English. However, he did not do so until 12 March 2010.

10. The Panel therefore acknowledges that the Appellant did not adhere to the deadline set forth by the Panel for the translation of its Statement of Appeal and Appeal Brief. However, since article R51 of the CAS Code only applies to the launching of an appeals procedure (cf. Arbitration CAS 96/171, order of 3 November 1997), the Panel finds that the subsequent order by the Panel to the Appellant to submit a translation of his previous submissions by a certain date does not fall within the scope of article R51 of the CAS Code. Therefore, the Panel rules that the appeal shall not have been deemed withdrawn.

Applicable Law

11. Abiding by article R58 of the CAS Code, the CAS settles disputes:

[…] according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. […].

12. In the present case, the parties have not explicitly indicated which law they deem applicable to the present dispute. However, the Panel finds that the present case is governed by the FIFA Statutes for two reasons: first, the parties made a tacit choice of law when they submitted themselves to arbitration rules that contained provisions relating to the designation of the applicable law; and second, all parties are – at least indirectly – affiliated to FIFA.

13. Article 62 (2) of the FIFA Statutes provides that 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.

14. CAS jurisprudence has consistently interpreted article 62 (2) of the FIFA Statutes so as to contain a choice of law clause in favor of the regulations of FIFA and, as a subsidiary Swiss law, governing the merits of a dispute (CAS 2008/A/1517 para. 128; cf. CAS 2005/A/902-903, paras. 16 and 36).

15. As a result, in light of the indispensable need for the uniform and coherent application worldwide of the rules regulating international football (CAS 2005/A/983-984, para. 24), the Panel rules that Swiss law will be applied subsidiarily to the merits of this case (cf. CAS 2005/A/871, para. 4.15 and CAS 2009/A/1517, para. 118), the FIFA regulations being applicable primarily.

Merits

16. In order to determine whether the Appellant is entitled to obtain payment of EUR 2,300,000 from the Respondent, the following main issues have to be resolved by the Panel:

    a) What were the parties' obligations under the Termination Agreement?

    b) Where the terms of the Termination Agreement modified?

    c) Depending on the answers to questions a) and b), did Respondent breach its obligations under the Termination Agreement?

    d) What are the legal consequences of the Panel's findings under questions a), b) and c)?

A. The parties' obligations under the Termination Agreement

17. It is undisputed between the parties that they concluded a Termination Agreement on 14 May 2007 with the aim of terminating the employment relationship existing among them. However, it is also undisputed that the Termination Agreement provided that in case the Respondent would not meet its financial obligations, the Employment Contract initially concluded between the parties would take effect again.

18. As explained in detail above, under the Termination Agreement, the Appellant was entitled to payment from the Respondent of four instalments in exchange for renouncing to his right to

his annual salary of EUR 2,300,000 for the 2007/2008 sporting season. In particular, it is undisputed between the parties that pursuant to the Termination Agreement, the instalment amounting to EUR 311,000 due on 25 June 2007 was to be collected by the Appellant upon presentation of the letter of guarantee to the Respondent's bank.

B. Were the terms of the Termination Agreement modified?

19. The Appellant claims that a few days prior to 25 June 2007, a modification of the terms of the Termination Agreement took place. According to the Appellant's oral submissions at the hearing, shortly prior to the due date of the EUR 311,000 payment, the Appellant was asked by the Respondent's representatives not to present the letter of guarantee for payment. Instead, the Appellant alleges that the Respondent undertook the obligation to wire transfer the amount of EUR 150,000 on 25 June 2007 and the remaining balance *"a few days later"*. As evidence of the said modification of the terms of the Termination Agreement, the Appellant submits to the Panel the recollection of the facts provided at the hearing as well as the Notarial Notice sent by the Appellant to the Respondent on 13 July 2007 requesting payment within three days of the amount of EUR 150,000, allegedly due on 25 June 2007.

20. In turn, the Respondent contests the Appellant's allegations and maintains that the terms of the Termination Agreement were never modified by the parties. In addition, the Respondent submits that the Notarial Notice cannot be considered sufficient proof of the alleged modification of the Termination Agreement as it was solely drafted by the Appellant and his legal counsel.

21. Therefore, the Panel has to determine whether the terms of the Termination Agreement were indeed modified as alleged by the Appellant.

a) In general

22. On a preliminary basis, the Panel evaluates which party bears the burden of proof in the present matter. For this purpose, the Panel analyzes article 8 of the Swiss Civil Code ("Swiss CC"), which stipulates:

Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit.

In loose translation:

Each party must, if the law does not provide for the contrary, prove the facts it alleges to derive its right.

23. As a result, the Panel reaffirms the principle established by CAS jurisprudence that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (see also article 8 of the Swiss Civil Code, ATF 123 III 60, ATF 130 III 417). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and*

persuade the deciding body, it must actively substantiate its allegations with convincing evidence" (cf. CAS 2003/A/506, para. 54; and CAS 2009/A/1810 & 1811, para. 46).

24. In the light of the above, the Panel concludes that the Appellant bears the burden of proving that the terms of the Termination Agreement were modified and what the new terms of the Termination Agreement are.

b) In particular

25. The Panel highlights that despite being requested on 26 April 2010 to file further submissions concerning the alleged modification of the Termination Agreement, the Appellant failed to substantiate in his written submissions how the terms of the Termination Agreement were modified. It was only at the hearing that the Appellant submitted for the first time in the present proceedings that a meeting had taken place at the Appellant's residence a few days prior to 25 June 2007 between the Appellant, Mr. Sogancioglu and Mr. Sinam, and that the President of the Respondent had later confirmed to Mr. Tigana what was said at the meeting over the phone. As a consequence, the Respondent's written submissions did not contest that such alleged meeting has taken place or the occurrence of the alleged telephone conversation. The Respondent rather generally denied that any communication between the parties concerning a modification had occurred. At the hearing, however, the Respondent did contest the Appellant's allegations and stated that no meeting or telephone conversation had taken place and that the terms of the Termination Agreement were not modified by the parties.

26. More importantly, even if the meeting as well as the telephone conversation between the parties did occur and that the terms of the Termination Agreement were indeed modified as alleged by the Appellant, the Panel notes that the Appellant has failed to fully and precisely indicate the new terms of the allegedly modified Termination Agreement. Pursuant to the statement of Mr. Tigana at the hearing, the amount of EUR 150,000 was to be paid on 25 June 2007 and the remaining balance *"a few days later"*, which he understood to mean before the beginning of July. However, the Notarial Notice sent on 13 July 2007 only requested payment of the amount of EUR 150,000 allegedly due on 25 June 2007. Neither Mr. Tigana nor his counsel could explain why this amount was claimed. Moreover, one day prior to the Notarial Notice, on 12 July 2007, an amount of EUR 163,639 was debited from the Respondent's bank account and was received the Appellant. Therefore, it is unclear to the Panel why, by means of the Notarial Notice, the Appellant requested payment of the amount of EUR 150,000 allegedly due on the 25 June 2007 although by that time the Appellant had already received the EUR 150,000 due on 25 June 2007. The Appellant could thus have, for example, put the Respondent in default for the remaining EUR 161,000 originally due *"a few days"* after 25 June 2007. However, other possibilities are also conceivable.

27. As a result, notwithstanding the trustworthiness of Mr. Tigana's oral submission, the Panel finds it unclear how the facts provided at the hearing were supported by the Notarial Notice. Even though this document was solely drafted by the Appellant and his legal counsel, the Appellant and Mr. Abega did not clarify the sequence of events concerned with the alleged modification

of the Termination Agreement. Whereas the Panel could speculate about what happened, it has not been convinced by the submissions of the Appellant.

28. Furthermore, the Appellant did not provide evidence on which the Panel could rely. For example, the Appellant could have requested the participation in the hearing of Mr. Sinam, or of Mr. Sogancioglu, who according to the Appellant were present at the meeting that allegedly took place a few days prior to 25 June 2007, when the terms of the Termination Agreement were allegedly modified. Moreover, the Appellant could have also requested the participation of the President of the Respondent in 2007 who allegedly confirmed the said modified terms to Mr. Tigana. In addition, the Appellant could have requested that Mr. Abega provided his recollection of the facts as a witness, as he was involved in the negotiations and advised the Appellant at the time the dispute arose. However, the Appellant failed to appoint any witnesses or to submit any other evidence convincing the Panel of a modification.

29. Consequently, taking into consideration the parties' written and oral submissions and the fact that the Appellant bears the burden of proving the modification pursuant to article 8 of the Swiss CC, the Panel holds that the Appellant failed to sufficiently substantiate his claim that the terms of the Termination Agreement were modified.

C. Did Respondent breach its obligations under the Termination Agreement?

30. The Appellant alleges that the Respondent did not timely fulfil its financial obligations under the Termination Agreement. Consequently, the Appellant submits the Employment Contract concluded between the parties should come back into force again, entitling the Appellant to his initial salary of EUR 2,300,000 for the 2007/2008 sporting season.

31. Given that the Panel has already determined that the Appellant has failed to prove the alleged modification of the terms of the Termination Agreement, the Panel analyzes whether the Respondent breached its obligations arising under the Termination Agreement as concluded in writing on 14 May 2007.

32. First, the Panel notes that, since the Appellant is the one alleging that the Respondent breached its obligations by not making all payments on time, it is the Appellant who bears the burden of proving such breach pursuant to article 8 of the Swiss CC.

33. Second, as mentioned above, the Panel takes into consideration that the Appellant had, under the Termination Agreement, the obligation of presenting the letter of guarantee on 25 June 2007 for payment to the Respondent's bank in order to collect the fourth instalment amounting to EUR 311,000. However, the Appellant failed to do so and, according to the recollection of the facts provided by Mr. Tigana at the hearing, he never presented the letter of guarantee for payment.

34. Finally, the Panel considers that the Respondent nevertheless paid the said amount of EUR 311,000 in two instalments EUR 163,639.79 on 12 July 2007 and EUR 147,532.69 on 25

July 2007. Accordingly, the Respondent fulfilled all its financial obligations towards the Appellant by 25 July 2007.

35. For the reasons set for above, the Panel concludes that the Respondent did not breach its obligations under the Termination Agreement.

D. Legal consequences of the Panel's findings

36. The Panel has found that the Respondent has not breached its obligations under the Termination Agreement. Therefore, the Panel finds that the Employment Contract does not take effect again as alleged by the Appellant and, thus, the Appellant is not entitled to his annual salary of EUR 2,300,000 for the 2007/2008 sporting season, as he validly forfeited such salary by concluding the Termination Agreement.

37. Accordingly, the present appeal is dismissed and all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Jean Amadou Tigana against the Decision rendered by the FIFA Players' Status Committee issued on 26 June 2009 is dismissed.

2. The Decision rendered by the FIFA Player's Status Committee issued on 26 June 2009 is upheld.

(…)

5. All other prayers for relief are rejected.