Arbitration CAS 2013/A/3424 Club Gaziantepspor v. Armand Deumi Tchani, award of 20 June 2014

Panel: Mr Lars Hilliger (Denmark), Sole Arbitrator

Football
Contract of employment
Requirements for a letter to be considered a formal submission of claim before FIFA
Lis pendens before the previous instance and appeal to CAS
Burden of proof and CAS system of arbitral justice
Contract in writing under Swiss law and CAS jurisprudence

1. **It is not decisively important that the formal requirements for content set out in Article 9 para 1 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber have been met in a specific case through the submission of a document with enclosures, which document has been used earlier before another legal body, as the decisive point on this issue is whether the requirements for content have actually been met or not.**

2. **In case of the same claim lodged before the TFF DRC and then before FIFA, the latter is not prevented from hearing the claim if it can no longer be established that the claim before the TFF DRC is pending in a form that would prevent the FIFA DRC from hearing it.**

3. **According to the general legal principle of burden of proof, any party claiming a right on the basis of an alleged fact must carry the burden of proof, proving that the alleged fact is as claimed. This is in line with Article 8 of the Swiss Civil Code. 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. The CAS 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.**

4. **Under Swiss law and CAS jurisprudence, a contract is deemed to be made in writing when it is signed with the original signature of the relevant parties to the contract.**

I. THE PARTIES

1. Club Gaziantepspor (the "Appellant" or the "Club") is a Turkish football club affiliated with the Turkish Football Federation (the "TFF"), which in turn is affiliated with FIFA.

2. Mr Armand Deumi Tchani (the "Respondent" or the "Player") is a professional football player of Cameroon nationality.

II. FACTUAL BACKGROUND

3. The elements set out below are a summary of the main relevant facts as established by the Sole Arbitrator on the basis of the decisions rendered by the FIFA Dispute Resolution Chamber (the "FIFA DRC") on 31 July 2013 (the "Decision"), the written submissions of the Parties and the exhibits filed. Additional facts may be set out, where relevant, in the legal considerations of the present Award.

4. On 25 June 2007, the Appellant and the Respondent signed an employment contract valid as from the date of signature until 31 May 2011 (the "Original Contract").

5. On 21 August 2008, the Parties signed another employment contract valid as from 1 July 2008 until 31 May 2011 (the "Second Contract").

6. Clause 17 of the Second Contract stated inter alia as follows:
"…
Basic Annual Salary
The employer pays the player, a basic annual salary of:
- EUR 350,000.00 .. .. for the first year (2008/2009);
- EUR 375,000.00 …. for the second year (2009/2010);
- EUR 400,000.00 …. for the third year (2010/2011).
Thirty percent (30%) of each annual salary (100%) the employer pays by the end of July each year. The remaining amount of seventy percent (70%) of the annual salary the employer shall pay at the end of each month in ten equal instalments, beginning with the first payment by the end of August….
…".

7. Clause 23 of the Second Contract stated as follows:
"Any subsequent amendments of the employment contract and/or its enclosures signed by the parties shall mandatorily be in writing".

8. According to the Respondent – and as described in the Decision – in September 2009, the Parties agreed on amendments to the Second Contract. However, this is denied by the Appellant.

9. According to the undated "Amendment to the employment contract dated and signed 21 August 2008" (the "Amendment"), which was signed by the Respondent, but only holds the stamp of the Appellant, the Parties agreed inter alia as follows:

"Basic Annual Salary
The employer pays the player, a basic annual salary of:
- EUR 350,000.00 .. .. for the first year (2008/2009);
- EUR 425,000.00 …. for the second year (2009/2010);
- EUR 450,000.00 …. for the third year (2010/2011).
Thirty percent (30%) of each annual salary (100%) the employer pays by the end of July of each year. The remaining amount of seventy percent (70%) of the annual salary the employer shall pay at the end of each month in ten equal instalments, beginning with the first payment by the end of August….

This agreement is an amendment to the agreement signed on 21 August 2008. Having the parties agreed to all the terms of this Agreement, it is signed in two originals in the places and at the dates hereby indicated. With that, the Amendment becomes integral part of the Contract. The terms and conditions set in this Amendment, as far as they are different from the Contract, the Amendment shall govern. In any case the terms and provisions of the Contract shall prevail and remain in full force".

10. On 30 March 2010, the lawyer of the Respondent wrote as follows to the Appellant:

"Based on the employment contract signed on 21 August 2008 amended on in September 2009 your Club is obliged to pay the agreed salaries on a monthly base. We have prove (sic) that in the last months, Mr. Armand Deumi (sic) received these salaries with delays and irregularities. Sometimes he received no payment and the two payments at once but often with unacceptable delay.

As Mr. Armand Deumi (sic) has his financial obligations on his part, we cannot accept such payment behavior anymore. I therefore urge you and your Club to ensure timely and proper payment in the future. Otherwise, my client has to consider a termination of the contract for good reason. …".

11. With no answer from the Appellant, on 7 June 2010, the lawyer of the Respondent wrote as follows to the Appellant:

"… I have written to you on behalf of Mr Armand Deumi Tchani on the 30 March 2010 regarding delays and irregularities with the salary payments.

As the situation has not improved and certain commitments by you and your Club towards Mr Deumi have not been met, I, on behalf of Mr Deumi, herewith terminate the employment contract dated 21 August 2008 for good reason as per 30 June 2010.
…
Copy to Turkish Football Federation…".

12. By letter of 18 June 2010, the TFF acknowledged receipt of the Respondent's letter of 7 June 2010, however informing the Respondent that since his contract with the Appellant had expired on 31 May 2010, *"any kind of unilateral termination of the said contract cannot be made".*

13. On 18 March 2011, the Respondent lodged a claim drafted in English with the TFF Dispute Resolution Committee (the "TFF DRC") for compensation for breach of contract by the Appellant in the amount of EUR 90,000, (salary payment of EUR 30,000.00 for the months of March, April and May 2010) plus 5% interest p.a. Furthermore, the Respondent requested that the Appellant be sanctioned according to the relevant rules of the TFF.

14. By e-mail of 28 March 2011, the Respondent was informed in Turkish that a payment of advanced costs was required to be made, after which the claim would be registered.

15. According to the Respondent, this payment of EUR 2,028, was made in accordance with the request.

16. On 18 May 2011, the TFF DRC decided by a unanimous vote that considering the fact that the Respondent's counsel was a foreigner and the petition was prepared in English, seven days were allowed for the petition to be prepared in Turkish and to be signed by the Respondent himself or by a Turkish lawyer and, in case the deficiencies were not corrected within that particular time, the application would be deemed waived.

17. By letter of 2 September 2011, the Respondent lodged his claim with FIFA.

18. The Respondent stated that it was agreed between the Parties that instead of paying him 30% of the annual salary, *i.e.* EUR 127,500, in August 2009, the Appellant would pay him EUR 125,000, as a first instalment so that the "remaining of a round number" of EUR 300,000, could be paid in ten equal instalments of EUR 30,000, each.

19. Furthermore, the Respondent specified that he received EUR 125,000 in two instalments on 26 August 2009 and 17 November 2009. Furthermore, the Respondent provided FIFA with a bank statement, according to which he received the following amounts:
- EUR 30,000, on 14 October 2009 for the salary of September 2009;
- EUR 60,000, on 18 December 2009 for the salaries of October/November 2009;
- EUR 30,000, on 21 January 2010 for the salary of December 2009;
- EUR 30,000, on 19 February 2010 for the salary of January 2010;
- EUR 30,000, on 14 April 2010 for the salary of February 2010.

However, up until the termination of the contract by the Respondent, he did not receive the amount of EUR 90,000, corresponding to the salaries of March, April and May 2010.

20. By letter of 13 October 2011, FIFA informed the Respondent that *"… FIFA is not able to intervene in a case, that is being handled already at a different decision making body in accordance with the general legal principle Act (lis pendens) …. Finally, we would like to point out that the issues mentioned in this letter are based only on the documents submitted by you, these are purely informative and are not legally binding and have no prejudicial effect. …".*

21. On 26 June 2012, the Respondent reiterated the above-mentioned claim in front of FIFA, arguing that the claim is no longer pending before the TFF DRC.

22. On 13 November 2012, the Respondent received an e-mail from the Head of Legal Department of the TFF stating that *"The present matter between Armand Deumi Tchani and Gaziantepspor is no longer pending before our bodies…"*.

23. Upon FIFA's request to provide documentary evidence that the Respondent's claim was no longer pending before the TFF DRC, the Respondent provided a piece of correspondence dated 18 October 2012 allegedly received from the Legal Department of the TFF, according to which *"Turkish club didn't accept national drc's competence and we have to decline drc's competenœ according to provisional article in our statute and we have to refund you application fee"*, as well as the above-mentioned e-mail of 13 November 2012.

24. In its reply to the claim, the Appellant rejected the Respondent's claim, stating that the claim was time-barred as the claim was only lodged on 26 June 2012 for the salaries of March, April and May 2010, which were due on 31 March, 30 April and 31 May 2010. The Appellant did not provide its position as to the substance of the claim.

25. Against the background of these circumstances, the FIFA DRC concluded, inter alia, as follows:

26. The Respondent had instituted proceedings against the Appellant before the TFF DRC, which subsequently never heard the case on its merits. Since, as confirmed by the TFF in its correspondence to the Respondent, the claim was no longer pending before the TFF DRC, nothing in principle prevented the FIFA DRC from being competent to hear the dispute.

27. The FIFA DRC then recalled that in accordance with article 25 paragraph 5 of the Regulations on the Status and Transfer of Players, it may not hear a dispute if more than two years have elapsed since the event giving rise to the dispute.

28. Since the Respondent's claim was submitted to FIFA on 2 September 2011, the FIFA DRC decided that the time limit of two years had not elapsed between the event giving rise to the dispute, *i.e.* the due date of payment of outstanding salaries for the period between March until May 2010, and the submission of the claim to FIFA, and the claim could therefore be heard by the FIFA DRC.

29. The FIFA DRC then concluded that since the Appellant, for its part, failed to present a response as to the substance of the case in spite of having been invited by FIFA to do so, the Appellant had renounced its right to defence, and thus, the FIFA DRC accepted the allegations of the Respondent.

30. On account of the statements and documents presented by the Respondent, the FIFA DRC decided, inter alia, that the Appellant, in accordance with the general legal principle of *pacta sunt servanda*, must pay any outstanding amounts under the relevant employment contract

which were due and owing to the Respondent until the date on which the latter terminated the employment contract.

31. Based on the above, on 31 July 2013, the FIFA DRC rendered the Decision and decided as follows:
"1. The claim of the Claimant, Armand Deumi Tchani, is admissible.
2. The claim of the Claimant, Armand Deumi Tchani, is partially accepted.
3. The Respondent, Gazioantepspor Kulübü, has to pay to the Claimant, within 30 days as from the date of notification of this decision the amount of EUR 90,000, plus interest at the rate of 5% p.a. as of 2 September 2011 until the day of effective payment.
4. In the event that the aforementioned sum plus interest is not paid within the above-mentioned time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for its consideration and a formal decision.
5. Any further requests filed by the Claimant is rejected.
6. …".

III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

32. On 2 December 2013, the Appellant filed a Statement of Appeal with the CAS against the Decision rendered by the FIFA DRC on 31 July 2013, notified with its ground to the Appellant on 11 November 2013.

33. On 11 December 2013, the CAS Court Office initiated an appeals arbitral procedure under the reference *CAS 2013/A/3424 Club Gaziantepspor v. Armand Deumi Tchani*.

34. On 12 December 2013, the Appellant filed its Appeal Brief.

35. By letter of 14 January 2014, the CAS Court Office informed the Parties that, pursuant to Article R54 of the Code of Sports-related Arbitration (the **CAS Code**), the Deputy President of the CAS Appeals Arbitration Division had decided that the matter would be submitted to a Sole Arbitrator.

36. On 21 January 2014, the Respondent filed its Answer.

37. By letter of 7 March 2014, the Parties were informed by the CAS Court Office that Mr Lars Hilliger, Attorney-at-Law, Copenhagen, Denmark, had been appointed Sole Arbitrator in the matter.

38. On 27 March 2014, the CAS Court Office forwarded the Order of Procedure, which both the Parties signed and returned to the CAS Court Office

IV. HEARING

39. By fax of 11 March 2014, the Appellant informed the CAS Court Office that it preferred an award to be issued based on the written submissions from the Parties only.

40. By fax of 24 March 2014, the CAS Court Office was informed by the Respondent that he had no interest in a hearing to be held.

41. The Parties were then informed that the Sole Arbitrator had decided not to hold a hearing in the case pursuant to Article R57 para. 2 of the CAS Code.

42. By signing the Order of Procedure, the Parties confirmed their agreement that the Sole Arbitrator could decide the matter based solely on the Parties' written submissions. Furthermore, they confirmed by their signatures that their right to be heard had been respected.

43. The Sole Arbitrator examined carefully and took into account in his deliberations all the evidence and arguments presented by the Parties even if they have not been expressly summarised in the present Award.

V. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL

44. Article R47 of the CAS Code states as follows: *"An appeal against the decision of a federation, association or sports-related body may be filed with the 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 the said sports-related body"*.

45. With respect to the Decision, the jurisdiction of the CAS derives from Article 67 of the FIFA Statutes. In addition, neither the Appellant nor the Respondent objected to the jurisdiction of the CAS, and both Parties confirmed the CAS jurisdiction when signing the Order of Procedure.

46. The Decision with its grounds was notified to the Appellant on 11 November 2013, and the Appellant's Statement of Appeal was lodged on 2 December 2013, *i.e.* within the statutory time limit set forth by the FIFA Statutes, which is not disputed. Furthermore, the Statement of Appeal and the Appeal Brief complied with all the requirements of Articles R48 and R51 of the CAS Code.

47. It follows that the CAS has jurisdiction to decide on the appeal of the Decision and that the appeal of the Decision is admissible.

48. Under Article R57 of the CAS Code, the Sole Arbitrator has full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the decision appealed against.

VI. APPLICABLE LAW

49. Art. 66 par. 2 of the FIFA Statutes states as follows: *"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".*

50. Article R58 of the CAS Code states as follows: *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

51. The Sole Arbitrator notes that in the present matter the Parties have agreed as follows in clause 25 of the Second Contract: *"… The Applicable law shall be the Law of the jurisdiction of the appointed and deciding legal body"*. The applicable law in this case will consequently be the regulations of FIFA and, additionally, Swiss law.

52. In accordance with article 26 paragraphs 1 and 2 of the Regulations on the Status and Transfer of Players (2010 and 2012 editions), and considering that the present claim was lodged on 2 September 2011, the Sole Arbitrator further notes that the 2010 edition of the said regulations (the "Regulations") is applicable to the matter at hand as to the substance.

VII. THE PARTIES' REQUESTS FOR RELIEF AND POSITIONS

53. The following outline of the Parties' requests for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to those submissions or evidence in the following summary.

1. The Appellant

54.1 In its Statement of Appeal of 2 December 2013 and in its Appeal Brief filed on 12 December 2013, the Appellant requested the following from the CAS:

"*1. to accept the present appeal against the challenged decision;*
2. to set aside the challenged decision;
3. to establish that the Respondent's case is not admissible;

4. to establish that the Appellant shall pay EUR 40,000.00 to the Respondent;
5. to condemn the Respondent to the payment in the favour of the Appellant of the legal expenses incurred;
6. to establish that the costs of the arbitration procedure shall be borne by the Respondent.

54.2 In support of its requests for relief, the Appellant submitted as follows:

a) The Respondent originally chose the TFF DRC as the judicial authority with jurisdiction to hear his claim dated 18 March 2011.

b) According to the Constitution of the Republic of Turkey and to the Turkish Attorneyship Law, only Turkish lawyers are allowed to act as attorneys in front of Turkish judicial bodies.

c) Since the official judicial language of Turkey is Turkish, all documents submitted to judicial bodies, including bodies of the TFF, must be in the Turkish language. This is why the Respondent in May 2011 was requested to forward the claim in the Turkish language.

d) The Respondent never fulfilled this request.

e) Any person who chooses to file a claim with a judicial body acknowledges that the language of the proceedings is the language of that judicial body.

f) The claim before the TFF DRC was only deemed to have been withdrawn because the Respondent did not respect the interim decision of the TFF DRC, which requested having the claim forwarded in the Turkish language and having it signed by a Turkish lawyer.

g) Thus, the only reason for the TFF DRC not to reach a decision is this negligence by the Respondent.

h) On 2 September 2011, and with the original claim still pending before the TFF DRC, the Respondent forwarded the same claim to FIFA, stating, inter alia, that the attitude of the TFF DRC was based on preventing a claim from being lodged against its affiliated club.

i) As also stated by FIFA in its letter of 13 October 2011, in accordance with the principle of *lis pendens*, FIFA was not in a position to intervene in the case since it was already pending before the TFF DRC.

j) Since the communication from the TFF to the Respondent regarding the lodged claim was communicated with the reference number of the case, it is clear that the case was initiated by the TFF DRC contrary to the allegations of the Respondent.

k) Furthermore, and contrary to the findings in the Decision, the said forwarded claim to FIFA of 2 September 2011 cannot be deemed an official claim since the enclosures to the letter, including the original claim dated 18 March 2011, which was not addressed to FIFA but to the TFF, were only forwarded for the information of FIFA.

l) The actual date of the Respondent's claim before FIFA is 26 June 2012, which is the date on which the claim was forwarded directly to FIFA for the first time.

m) The Respondent's claim before FIFA is based on payments of salaries which the Respondent claimed had to be paid by the Appellant on 30 March, 30 April and 30 May 2010 at the latest.

n) According to article 25 of the Regulations, the DRC, inter alia, *"shall not hear any case subject to these regulations if more than two years have elapsed since the event giving rise to the dispute"*.

o) Since the Respondent's claim is dated 26 June 2012, the claim is not admissible, since it is filed after the two-year time limit expired, which it did on the last day of May 2012.

p) Without prejudice to these procedural challenges, the Appellant does not object to the content of the Original Contract and the Second Contract, which were both signed by the Parties.

q) However, the alleged Amendment is not on record with the Appellant.

r) Furthermore, the Amendment was never signed by the Appellant and only bears the stamp of the Appellant and no signature on behalf of the Appellant.

s) According to the jurisprudence of FIFA, *"Stamp of Club on employment contract is insufficient to bind the Club. Signature of representative is needed"*.

t) Since the Amendment was never signed on behalf of the Appellant, the Appellant is not legally bound by the provision of the Amendment.

u) According to the Second Contract, the Appellant undertook to remunerate the respondent as follows:

"EUR 350,000.00 .. .. for the first year (2008/2009);
EUR 375,000.00 …. for the second year (2009/2010);
EUR 400,000.00 …. for the third year (2010/2011).
Thirty percent (30%) of each annual salary (100%) the employer pays by the end of July each year. The remaining amount of seventy percent (70%) of the annual say the employer shall pay at the end of each month in ten equal instalments, beginning with the first payment by the end of August… ".

v) Since the Appellant is not legally bound by the Amendment, the remuneration foreseen for the 2009/2010 season is EUR 375,000.00 payable in an amount of EUR 112,500.00

by the end of July 2009 and in an amount of EUR 262,500.00 as salary payment in 10 equal instalments starting from August 2009 and ending in May 2010.

w) Thus, the claim for payment of EUR 425,000.00 for the 2009/2010 season is denied.

x) The payments made by the Appellant in connection with the 2009/2010 season are in a total amount of EUR 335,000.00, paid as follows:

- EUR 60,000.00 on 26 August 2009
- EUR 30,000 on 14 October 2009
- EUR 65,000 on 17 November 2009
- EUR 60,000 on 18 December 2009
- EUR 30,000 on 21 January 2010
- EUR 30,000 on 19 February 2010
- EUR 30,000 on 14 April 2010
- EUR 30,000 on 13 May 2010.

y) Based on that, and without prejudice to the procedural challenges, the outstanding amount payable by the Appellant can only be EUR 40,000.00, and the Respondent can only be entitled to receive an interest rate of 5% p.a. calculated as from the date of the lodged claim, which is 26 June 2012.

55. ***The Respondent***

55.1 In its Answer filed on 21 January 2014, the Respondent requested the CAS *"to confirm the FIFA Decision of the Dispute Resolution Chamber passed in Zurich, Switzerland, on 31 July 2013 …"*.

55.2 In support of its requests for relief, the Respondent submitted as follows:

a) In general the Respondent refers to the legal consideration of the FIFA DRC as expressed in the Decision.

b) It is correct that the Respondent originally filed its claim written in the English language with the TFF.

c) Based on a request from the TFF, the Respondent further transferred an amount of EUR 1,800.00 as an advance payment and EUR 228 as expenses to the TFF.

d) The subsequent request from the TFF that the filed claim had to be prepared in the Turkish language and signed by a Turkish lawyer seems to be based on Turkish Attorneyship Law and is only valid for claims presented before official courts of law in Turkey.

e) The TFF and its legal bodies are based on the Statutes and Regulations of the TFF, which again are based on the FIFA Statutes and Regulations.

f) In all the regulations, no obligation to present a claim only in Turkish and signed by a Turkish lawyer can be found and, consequently, has no legal basis.

g) The entire process before the TFF left the Respondent with the impression that the TFF tried to make it impossible for the Respondent to obtain a fair trial on the matter.

h) Therefore, the actions by and before the TFF must be viewed as time-barred.

i) Based on these circumstances, the Respondent filed its claim against the Appellant with FIFA on 2 September 2011.

j) Only after many attempts and many months was it possible to receive a proper confirmation from the TFF that the case was no longer pending before the TFF's legal bodies, and it was therefore only at that time that FIFA proceeded with the case.

k) According to information received from the TFF on 18 October 2012, the case had not been pending before the TFF's legal bodies since January 2012.

l) Based on that, the FIFA DRC was entitled to hear the case.

m) The reason for the Parties to enter into the Second Contract was that the Appellant failed to make payment in full and complete settlement of its obligations under the Original Contract.

n) Based on that insufficient payment, clause 17 of the Second Contract sets forth the condition for the Appellant to pay the outstanding amount of EUR 87,820.00.

o) The Amendment was legally agreed upon between the Parties.

p) The inability of the Appellant to find the Amendment in its records cannot be to the disadvantage of the Respondent.

q) The Appellant fulfilled the obligations agreed upon in the Amendment by paying the first 30% of the annual salary for 2009/2010, equal to EUR 127,500.00, in two instalments of EUR 60,000.00 on 26 August 2009 and EUR 65,000.00 on 17 November 2009, allowing the Appellant to make ten equal monthly instalments of EUR 30,000.00.

r) The following payments made by the Appellant, even with some missing and some delayed, undoubtedly show that the provisions in the Amendment were accepted by the Appellant.

s) The Amendment does not only become a legitimate document by a legal binding signature, but also by the fact that the Parties were executing the content of that Amendment.

t) Given these circumstances, the Decision should be confirmed by the CAS.

VIII. DISCUSSION ON THE MERITS

56. Initially, the Sole Arbitrator notes that it is undisputed between the Parties that both Parties signed the Second Contract on 21 August 2008.

57. Furthermore, it is not disputed by the Appellant that the contractual relationship between the Parties was terminated with just cause – due to the non-payment of salary to the Respondent - by the Respondent, which termination was notified to the Appellant by letter of 7 June 2010.

58. Based on that, it is up to the Sole Arbitrator to decide whether the Respondent is entitled to receive compensation from the Appellant for breach of contract and, in the affirmative, by what amount.

59. Thus, the main issues to be resolved by the Sole Arbitrator are:

a) Is the Respondent's letter of 2 September 2011 to FIFA to be considered as a formal submission of claim against the Appellant before FIFA?

b) In the event that a) is answered in the affirmative, was the FIFA DRC then prevented from hearing the Respondent's claim of 2 September 2011 based on the principle of *lis pendens* in regard to the Respondent's claim of 18 March 2011 before the TFF DRC?

c) In the event that a) is answered in the negative or a) is answered in the affirmative, on what date can the Respondent's claim against the Appellant then be deemed to have been filed with FIFA and will this have any consequence in relation to the rules on time-barring?

d) In the event that the Respondent's claim against the Appellant cannot be deemed to have been time-barred, is the Respondent then entitled to receive compensation for breach of contract from the Appellant and, in the affirmative, what is the amount of compensation?

a. Is the Respondent's letter of 2 September 2011 to FIFA to be considered as a formal submission of claim against the Appellant before FIFA?

60. According to the Appellant, the alleged claim forwarded by the Respondent to the FIFA by letter of 2 September 2011 should not be considered an official claim since the enclosures to

this letter, including the original claim dated 18 March 2011, which was not addressed to FIFA but to the TFF, were only forwarded for the information of FIFA.

61. The Sole Arbitrator notes initially that the Respondent's letter of 2 September 2011 to FIFA expressly states that "[….], *I find the right in myself to once again submit the claim to FIFA hoping for a fair trial*"., which is why at least the Respondent considers the letter with enclosures to be a formal submission of the claim against the Appellant before FIFA.

62. Article 9 para 1 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber states as follows:

"Petitions shall be submitted in one of the four official FIFA languages via the FIFA general secretariat. They shall contain the following particulars:

a) the name and address of the parties;
b) the name and address of the legal representative, if applicable, and the power of attorney;
c) the motion of claim;
d) a representation of the case, the grounds for the motion and or claim and details of evidence;
e) documents of relevance to the dispute, such as contracts and previous correspondence with respect to the case in the original version and, if applicable, translated into one of the official FIFA languages (evidence);
f) the name and address of other natural and legal persons involved in the case concerned (evidence);
g) the amount in dispute, insofar as it is a financial dispute;
h) proof of payment of the relevant advance of costs for any proceedings before the Players' Status Committee or the single judge, or for any proceedings related to disputes concerning training compensation or the solidarity mechanism".

63. The Sole Arbitrator does not find that the material forwarded by the Respondent to FIFA on 2 September 2011 did not contain all the required particulars set out above, which does not appear to have been contended by the Appellant either.

64. Moreover, as mentioned above, the Respondent expressly states in its letter to FIFA of 2 September 2010 that it lodges a claim with FIFA.

65. In that connection, it is not decisively important in the Sole Arbitrator's view that the formal requirements for content set out in Article 9 para 1 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber have been met in this specific case through the submission of a document with enclosures, which document has been used earlier before another legal body, as the decisive point on this issue, in the Sole Arbitrator's view, is whether the requirements for content have actually been met or not.

66. Against the background of these circumstances, the Sole Arbitrator agrees with the FIFA DRC that the Respondent's letter of 2 September 2011 to FIFA has to be considered as a formal submission of claim against the Appellant before FIFA.

67. This being the case, the Sole Arbitrator can endorse the view of the FIFA DRC that the claim could not be regarded as time-barred since two years had not elapsed between the outstanding salaries in dispute for the period March to May 2010 and the submission of the claim.

b. In the event that a) is answered in the affirmative, was the FIFA DRC then prevented from hearing the Respondent's claim of 2 September 2011 based on the principle of lis pendens in regard to the Respondent's claim of 18 March 2011 before the TFF DRC?

68. As it can be concluded on this basis that the Respondent lodged its claim against the Appellant with FIFA on 2 September 2011, the question is whether the fact that the Respondent had lodged the same claim against the Appellant with the TFF DRC already on 18 March 2011 should have prevented the FIFA DRC from hearing the claim.

69. According to the Appellant, the FIFA DRC should have rejected the claim because the case pertaining to the same claim was already pending before the TFF DRC as from March 2011 and because the only reason for the TFF DRC not to reach a decision was the Respondent's negligence by its failure to submit the claim translated into Turkish language and signed by a Turkish lawyer.

70. The Sole Arbitrator initially notes that it appears from the Decision that the FIFA DRC was aware of the question as to whether it was prevented from hearing the claim on its merits in accordance with the principle of *lis pendens*, which was rejected, however.

71. The Sole Arbitrator further notes that the claim lodged against the Appellant is indisputably the same, which has thus originally been brought before the TFF DRC and then before FIFA.

72. It is also concluded that the Sole Arbitrator generally agrees with the Appellant that the FIFA DRC - *inter alia* for the purpose of eliminating the risk of having two equally valid, but perhaps contradicting decisions rendered - will essentially be prevented from hearing a claim if the same case involving the same parties is already pending before another competent arbitration tribunal.

73. However, the Sole Arbitrator can endorse the view of the FIFA DRC that it was not prevented from hearing the claim as the Sole Arbitrator does not find that the claim before the TFF DRC was pending in a form that would prevent the FIFA DRC from hearing it.

74. In that connection, special emphasis is attached to the fact that the TFF DRC, by its decision of 18 May 2011, expressly notified the Respondent that the application would be deemed waived unless the claim was forwarded to the TFF in Turkish language and signed by a Turkish lawyer within a deadline of seven days.

75. As the TFF apparently did not take any follow-up steps in spite of the Respondent's failure to comply with these instructions, the Respondent must properly assume, in the Sole Arbitrator's view, that the claim can no longer be considered to be pending before the TFF.

76. The Sole Arbitrator denies the Appellant's allegation in this connection that it was supposed to have any formal significance for this question that it was solely due to the Respondent's "own negligence" that the ordered translation was not forwarded.

77. Just as the decision to submit the claim could be made by the Respondent, the Respondent was similarly entitled to decide whether he would comply with the instructions to forward the translation, well aware that the consequence would be, according to the information available, that the case could no longer be pending before the TFF.

78. The Sole Arbitrator further notes that the Appellant has not produced any type of evidence to prove that the case was still pending before the TFF after this point of time.

79. Nor does the Sole Arbitrator attach much weight to the fact that the Respondent, after numerous inquiries, had to wait until November 2011 to receive a final confirmation in writing that the TFF was also of the opinion that the case was no longer pending before the TFF's legal bodies.

80. As there are no grounds for assuming, given the circumstances of the case, that the reason why the case was no longer pending before the TFF would have changed since the expiry of the deadline stipulated in para 8.19 above, and as no basis seems to exist for any such other reason, it should not, in the Sole Arbitrator's view, be to the detriment of the Respondent that it was not possible until 2012 to receive a confirmation in writing that the case was no longer pending before the TFF.

81. Based on the above, the Sole Arbitrator concludes that the original claim lodged with the TFF must be deemed waived already from the summer of 2011, and the FIFA DRC was therefore not prevented from hearing this claim on account of the principle of *lis pendens*.

82. The Sole Arbitrator notes in this connection, as a matter of form, that neither FIFA nor the CAS has been presented with any formal, dated decision from the TFF which could provide evidence of the date of a formal decision made by the TFF to the effect that the case could no longer be regarded as pending before the TFF. Nor is there any evidence to prove that the TFF, in any way whatsoever, would have heard and dealt with the claim after the expiry of the deadline mentioned in para 8.19 above.

c) In the event that a) is answered in the negative or a) is answered in the affirmative, on what date can the Respondent's claim against the Appellant then be deemed to have been filed with FIFA and will this have any consequence in relation to the rules on time-barring?

83. As the Respondent's claim against the Appellant in accordance with a) is deemed to have been filed with FIFA on 2 September 2011, the reply to c) is of no relevance.

d) In the event that the Respondent's claim against the Appellant cannot be deemed to have been time-barred, is the Respondent then entitled to receive compensation for breach of contract from the Appellant and, in the affirmative, what is the amount of compensation?

84. The Sole Arbitrator notes initially that the Appellant does not dispute that the Respondent's termination of contract was made with just cause, and it is further noted that the Appellant does not dispute that full payment has not been made to the Respondent in accordance with the agreement concluded between the Parties to this effect and that the Respondent is entitled to receive the outstanding amount as compensation for the breach of contract.

85. Moreover, it is undisputed that the Parties to the Second Contract have agreed that the Respondent's basic annual salary for "the Second year (2009/2010)" should amount to EUR 375,000.00.

86. Furthermore, it is now undisputed between the Parties that the Respondent received the following payments from the Appellant regarding the 2009/2010 salary:

- EUR 60,000 on 26 August 2009;
- EUR 30,000 on 14 October 2009;
- EUR 65,000 on 17 November 2009;
- EUR 60,000 on 18 December 2009;
- EUR 30,000 on 21 January 2010;
- EUR 30,000 on 19 February 2010;
- EUR 30,000 on 14 April 2010;
- EUR 30,000 on 13 May 2010,

which means that the Respondent has indisputably received an aggregate amount of EUR 335,000.00.

87. The Appellant disputes, however, that the Parties have agreed that the terms and conditions of the Amendment should replace the terms and conditions of the Second Contract, which would in such case imply that the Respondent would be entitled to receive EUR 425,000.00 as the 2009/2010 salary, instead of EUR 375,000.00 as agreed in the Second Contract.

88. The Appellant argues in that connection, among other points of view, that the Amendment has not been duly signed by the Appellant, but solely provided with the club stamp, which means that the requirement of written form agreed between the Parties in clause 23 of the Second Contract has not been complied with.

89. In reply hereto, the Respondent argues that the stamp on the contract provides valid evidence of the Appellant's acceptance of the terms and conditions specified, arguing further that the undisputed payments were made in accordance with the alleged agreed salary of EUR 425,000.00.

90. The Sole Arbitrator refers to the general legal principle of burden of proof, according to which any party claiming a right on the basis of an alleged fact must carry the burden of proof, proving that the alleged fact is as claimed.

91. The Sole Arbitrator further notes that this is in line with Article 8 of the Swiss Civil Code ("Swiss CC"), which stipulates as follows:

"Unless 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".

92. As a result, the Sole Arbitrator 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 …. 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; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff).

93. Based on that, the Sole Arbitrator confirms that the burden of convincing him that the Parties have validly concluded the Amendment lies with the Respondent.

94. The Sole Arbitrator notes initially in this connection that the Amendment does not appear to have been signed on behalf of the Appellant, nor has the Sole Arbitrator received any information as to when and by whom the Appellant's stamp has been applied on the Amendment.

95. Under Swiss law and CAS jurisprudence (e.g. CAS 2013/A/3207), a contract is deemed to be made in writing when it is signed with the original signature of the relevant parties to the contract, which does not seem to be the case here as far as the Appellant is concerned.

96. Moreover, the Sole Arbitrator finds that it has not been sufficiently established that the payments effected could only have been made in accordance with the terms and conditions of the Amendment and not in accordance with the terms and conditions of the Second Contract, in which connection the Sole Arbitrator emphasizes partly that the payments were

made at irregular intervals and that the amounts varied, partly that payments in the preceding year had apparently also been of an irregular and varying nature.

97. Against this background, the Sole Arbitrator finds that the Respondent has produced inadequate evidence to show with certainty that the Parties have entered into the Amendment, and it consequently cannot be considered as proven that the Respondent is entitled to receive an aggregate amount of EUR 425,000.00 as the 2009/2010 salary.

98. As it is undisputed, as mentioned above, that the Respondent is entitled to receive an aggregate amount of EUR 375,000, as the 2009/2010 salary, and as the Respondent has also indisputably received EUR 335,000, the Sole Arbitrator finds that the Respondent is entitled to receive EUR 40,000, from the Appellant as outstanding salaries.

99. According to Article 104 of the Swiss Code of Obligations that *"A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum"*, which rule is therefore applied to the Respondent's claim against the Appellant, starting from 2 September 2011.

IX. SUMMARY

100. Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Sole Arbitrator finds that on 2 September 2011, the Respondent lodged a claim with FIFA against the Appellant for compensation for breach of contract.

101. Since the claim was not time-barred, since the Respondent has not been capable of discharging the burden of proof to establish that another valid contract had been concluded between the Parties, and since the Respondent has exclusively lodged a claim for the Appellant's payment of compensation concerning the outstanding salaries payments for the 2009/2010 season, the Appellant is ordered to pay to the Respondent the amount of EUR 40,000, as outstanding salaries.

102. The Appeal filed against the Decision is therefore partially upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed on 2 December 2013 by Club Gaziantepspor against the decision rendered by the FIFA Dispute Resolution Chamber on 31 July 2013 is partially upheld.

2. The decision issued by the FIFA Dispute Resolution Chamber on 31 July 2013 is set aside.

3. Club Gaziantepspor shall pay to Mr Armand Deumi Tchani an amount of EUR 40,000, (forty thousands Euros), plus 5% interest per annum starting from 2 September 2011.

4. (…).

5. (…).

6. All further and other requests for relief are dismissed.