Arbitration CAS 2014/A/3823 Kayserispor Kulübü Derneği v. Zurab Khizanishvili, award of 15 June 2015

Panel: Mr Hendrik Kesler (The Netherlands), Sole Arbitrator

Football
Set off of a club's debts (outstanding salaries) towards a player by means of various fines imposed on him
Right of objection to fines imposed by a club on a player
Fine imposed by a club on a player and right of the player to defend himself
Reduction of excessive contractual penalties by the judge under Swiss law
Criteria for the reduction of a penalty clause by the judge.
Validity of a fine imposed on a player for poor performance in the absence of contractual clause to this effect

1. **A player should always be allowed to object to fines being imposed on him by a club, and this requirement is even more dominant if the employment contract between the club and the player specifically provides such right to the player.**

2. **If a player maintains that he was not aware of any fines having been imposed on him by his club, the burden of proof to evidence that the player was indeed provided with an opportunity to defend himself lies with the club. If the club fails to do so, any fines imposed on the player must be declared null and void and cannot be set off against any outstanding remuneration of the player.**

3. **Whereas Article 163(1) of the Swiss Code of Obligations (SCO) provides that parties may freely determine the amount of a contractual penalty, on the basis of Article 163(3) of the SCO, the judge has the duty to reduce the amount of the penalty if the amount is found to be excessive. However, there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages. Article 163(3) is part of public policy and as a consequence the judge must apply it even if the debtor did not expressly request a reduction, whilst observing a degree of deference, in order to respect the contract as much as possible.**

5. **A reduction in the penalty clause by the judge is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place. Various criteria play a determining role, such as the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties, as well as the potential interdependency between the parties.**

6. As a matter of principle, no fine can be imposed on a player for poor performance, particularly if this is not contemplated for in the employment contract, if it is not based on objective criteria and if it can be determined at the free subjective discretion of the club.

I. PARTIES

1. Kayserispor Kulübü Derneği (hereinafter: the "Appellant" or the "Club") is a football club with its registered office in Kayseri, Turkey. The Club is registered with the Turkish Football Federation (*Türkiye Futbol Federasyonu* – hereinafter: the "TFF" or the "Turkish FA"), which in turn is affiliated to the Fédération Internationale de Football Association (hereinafter: "FIFA").

2. Mr Zurab Khizanishvili (hereinafter: the "Respondent" or the "Player") is a professional football player of Georgian nationality.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeals arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On 17 May 2013, the Player and the Club concluded an employment contract (hereinafter: the "Employment Contract"), valid for one football season, *i.e.* from 1 June 2013 until 31 May 2014.

5. The Employment Contract contains, *inter alia*, the following relevant terms:

> *"**ARTICLE 6- OBLIGATIONS OF THE CLUB***
>
> ***6.1-** The Club is obliged to pay the amounts as written below to the Player in return of his services subject to this employment contract, all payments indicated in the employment contract are to be considered as "net" payments. All payments and remunerations are net of any kind of taxes and deductions of any nature. The obligations of taxes and stamp duty shall be bear* [sic] *by the Club.*
>
> ***A- For 2013/2014 Football Season :***
>
> ***Salary of the Player : 750.000,00-Euro (Seven hundred fifty thousand Euros)***

The aforementioned amount is to be paid as follows.

25/08/2013: 300.000,00-Euro (Three hundred thousand Euros)
25/10/2013: 150.000,00-Euro (One hundred and fifty thousand Euros)
25/01/2014: 100.000,00-Euro (One hundred thousand Euros)
20/03/2014: 100.000,00-Euro (One hundred thousand Euros)
20/05/2014: 100.000,00-Euro (One hundred thousand Euros)

The stamp duty for all the copies of this Agreement shall be borne by the CLUB.

6.2- *In case of non-payment of salaries in full or any other monetary obligation of the Club in the amount of at least two consecutive or three non-consecutive payments, the Player shall have the right to end the contract with just cause. Anyway, and first of all, the Player shall notify the Club in writing of such non-payment and give 15 (fifteen) working days for the payment. If the payment is done within this given deadline, the notice of termination will be void but if the payment is not done, the Player shall then end his contract with just cause.*

6.3- Bonuses

The Club undertakes to make 50.000,00-Euro (Fiftythousand Euros) guarantee bonus payment to the Player during the 2013 / 2014 football season. In this context, the bonus payments that are to be made to the Player during the season shall be deducted from the aforementioned guarantee amount and the remaining amount, between the guarantee amount and actual bonus payments made during the season, shall be made to the Player in 30 (thirty) days following the end of the 2013 / 2014 football season".

B. Proceedings before the Dispute Resolution Chamber of FIFA

6. On 1 May 2014, the Player lodged a claim against the Club with the FIFA Dispute Resolution Chamber (hereinafter: the "FIFA DRC"), which was amended on 21 May and 1 July 2014, finally alleging that the Club had only paid him EUR 80,000 out of the salary of EUR 100,000 that fell due on 25 January 2014 and that the Club had not paid the instalments that fell due on 20 March 2014 (EUR 100,000) and 20 May 2014 (EUR 100,000) and that the he had only received EUR 15,517 out of a guaranteed bonus of EUR 50,000. The Player thus claimed a total amount of EUR 254,483, plus 5% interest as from the respective due dates.

7. The Club contested the Player's allegations by arguing that three fines had been imposed on the Player and that these fines had to be set off against the remuneration the Player was entitled to.

8. On 20 August 2014, the FIFA DRC rendered its decision (hereinafter: the "Appealed Decision"), with, *inter alia*, the following operative part:

1. *"The claim of the* [Player] *is partially accepted.*

2. *The* [Club] *has to pay to the* [Player]*, within 30 days as from the date of notification of this decision, the amount of EUR 254,483, plus 5% interest until the date of effective payment as follows:*

a. 5% p.a. as of 26 January 2014 on the amount of EUR 20,000;
b. 5% p.a. as of 21 March 2014 on the amount of EUR 100,000;
c. 5% p.a. as of 21 May 2014 on the amount of EUR 100,000;
d. 5% p.a. as of 31 July 2014 on the amount of EUR 34,483".

9. On 30 October 2014, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- The FIFA DRC, *"taking into account the claim of the player as well as the reply of the club, the members of the Chamber acknowledged that the following two questions needed to be addressed:*

  i) Can the club set-off its debt towards the player by means of the various fines imposed on him?
  ii) Is the player entitled to the amount of EUR 34,483 related to the "guaranteed bonuses"?

- *Turning to the first question, the Chamber analysed the fines imposed on the player due to his alleged absence from training sessions. In this respect, the Chamber first of all noted that it appeared from the content of the fines that those were not imposed on the player for his absence from training, but rather for leaving the town of Kayseri without the club's authorization. Indeed, the translations of the relevant decisions indicate that the player was fined because he "went out of town without Club authorities' written permission". However, regardless of the foregoing remark, the Chamber emphasised that a fine amounting to the total amount of EUR 133,320 for missing just two training sessions is manifestly excessive and disproportionate and cannot be upheld. Hence, the Chamber was unanimous in its conclusion that the fines imposed on the player on 18 April 2014 must be disregarded.*

- *As to the fine imposed on the player on 29 May 2014, i.e. two days before the expiry of the contract, the Chamber pointed out that a player cannot be fined for alleged poor performance, as this is purely unilateral and subjective evaluation by the club. Thus, the Chamber emphasised that poor or unsatisfactory performance cannot, by any means, be considered as a valid reason to reduce a player's salary or fine a player. Hence, the Chamber considered that by fining the player based on poor performance, the club acted in an abusive manner and therefore, decided to also disregard the fine imposed by the club on 29 May 2014.*

- *Furthermore, and in any case, the Chamber wished to point out that the imposition of a fine, or any other available financial sanction in general, shall not be used by clubs as a means to set off outstanding financial obligations towards players.*

- *In conclusion, the Chamber determined that the club could not set-off its debt towards the player by means of the various fines imposed on him and that thus, the amount of EUR 220,000 is due to the player.*

- *Turning to the second question, the Chamber examined art. 6 par. 3 of the contract and noted that indeed, as claimed by the player, he was entitled to a "guaranteed bonus" of EUR 50,000. What is more, the Chamber underlined that although the club had been invited to reply to the amended claim of the player, it did not submit any observation as to the additional request of the player. Hence, the player's entitlement to the "guaranteed bonus" of EUR 50,000 had not been disputed by the* [Club].

- *In view of the foregoing consideration and taking into account that the player had already received the amount of EUR 15,517, the Chamber decided that the player is entitled to the amount of EUR 34,483 related to the outstanding part of the "guaranteed bonus".*

- *For all the above reasons, the Chamber decided to accept the player's claim and determined that the club must pay to the player the total amount of EUR 254,483 as outstanding remuneration".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. On 20 November 2014, the Club lodged a Statement of Appeal with the Court of Arbitration for Sport (hereinafter: "CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (2013 edition) (hereinafter: the "CAS Code"). In this submission the Club requested the case to be submitted to a Sole Arbitrator.

11. On 24 November 2014, the Player informed the CAS Court Office that he did not agree to submit the present dispute to a Sole Arbitrator.

12. On 25 November 2014, the CAS Court Office informed the parties that the question of the number of arbitrators would be submitted to the President of the CAS Appeals Arbitration Division, or his Deputy, for his decision.

13. On 2 December 2014, the Club filed its appeal brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments. The Club challenged the Appealed Decision, submitting the following requests for relief:

> *"1. To decide that the total fines amounting 148.300 EUR shall be deducted from the total receivables of the Respondent,*
>
> *2. In case the Panel impossibly reaches the conclusion that the fines imposed are disproportionate then to adapt the fines and change the total fines to a proportionate amount which also shall be deducted from the receivables of the Respondent,*
>
> *3. To fix a sum of CHF 15.000.- (Fifteen Thousand Swiss Francs Only) to be paid by the Respondent to the Appellant, to help the payment of its legal fees and costs".*

14. On 9 December 2014, FIFA renounced its right to request its possible intervention in the present arbitration proceedings. Emphasising that this correspondence was not intended to participate in the present arbitration proceedings, FIFA submitted the following observations:

> *"In particular, we took note that the Appellant held that "Secondly, there are many flaws and procedural failures made by FIFA which affected the essence of the case and caused the violation of right of defence and right to answer to the case. The [Appellant] has never been provided with any claim put forward by the [Respondent] stating that the [Respondent] side requesting the payment "Guaranteed Bonus" amounting EUR 50,000.*

In continuation, we noted that the Appellant asserted that the "the monetary fines imposed by the [Appellant] upon the [Respondent] were submitted to FIFA but FIFA has never transmitted those evidences and our submissions to the counter part which clearly shows prejudice o [sic] *the deciding body. As soon as FIFA received the mentioned documents, it closed the investigation phase without forwarding them to the [Respondent] for their perusal and evaluation".*

In this respect, we wish to inform the future Panel / Sole Arbitrator that on 22 July 2014, by means of a correspondence sent to its representative, the Appellant was duly invited to present its position with regard to [the Player's] *amended claim (cf. attached correspondence from* [the Player] *dated 1 July 2014 and FIFA's correspondence dated 22 July 2014, in particular the last two paragraphs of page 1, and its fax reports). We therefore deem that the Appellant's first claim is unjustified.*

Furthermore, and in relation to the Appellant's above-mentioned second claim, we wish to specify that as explicitly specified in FIFA's correspondence dated 5 August 2014 (cf. attached letter and its fax reports for further details), the Appellant's letter dated 23 June 2014 received by courier on 24 July 2014 (cf. enclosure for further details), and which is related to the fines at stake, was duly forwarded to the Respondent of the appeal proceedings at hand. We therefore once more consider that the Appellant's claim in this regard is unjustified.

In light of the aforementioned precisions, and in case it was considered that a mistake had been made in connection with the unravelling of the proceedings having led to the challenged decision, quod non, we are confident that CAS, in accordance with its long and well-established jurisprudence related thereto, will heal the above-mentioned Appellant's grieves".

15. On 8 January 2015, the Player filed his Answer in accordance with Article R55 of the CAS Code. The Player submitted the following requests for relief:

"1. The players' outstanding due debt is ruled 254.483.EUR plus interest %5 p.a by FIFA DRC decision and it is confirmed by the applicant club [sic].

2. There is no any new evidence for application to CAS and challenged decision, the applicant club' purpose for application is just buying time and postponing the payment to the player.

3. The applicant club is trying to make deduction from the player's outstanding credit by imposing baseless fines. Those fines are not valid and CANNOT BE MAKE DEDUCTION players' outstanding credit [sic].

4. Therefore, we kindly request that CAS should confirm the challenged decision of FIFA dated on 20 October 2014. (rov 14-00719)

5. To fix a sum of 10.000.CHF to be paid by applicant to the respondent as legal fee and expenses".

16. On 9 and 29 January 2015 respectively, the Player and the Club indicated to prefer the present matter to be decided on the basis of the parties' written submissions.

17. On 29 January 2015, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeal Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:

- Mr Henk Kesler, attorney-at-law in Enschede, The Netherlands, as Sole Arbitrator.

18. On 9 February 2015, upon request of the Sole Arbitrator and pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the present matter.

19. On 23 February 2015, the CAS Court Office informed the parties that the Sole Arbitrator decided not to hold a hearing, but to render an award based solely on the parties' written submissions. In the same letter, the parties were invited to answer the following questions:

"a) To comment the statements made by FIFA in its letter of 9 December 2014.

b) To advise the Sole Arbitrator whether the Respondent has been heard after his (alleged) absences at the training sessions and if he had a chance to clarify his behaviour. In the negative, the Appellant is requested to state the reason(s) why the Player was not given such opportunity.

c) To advise the Sole Arbitrator how the fines imposed to the Respondent were communicated to him. The Appellant is further invited to specify the role of the Notary Public as mentioned in the Board of Directors' decision.

Within the same time limit, and with reference to paragraph C., lit. c) of item n. 2 of its statement of appeal (page 4) dated 19 November 2014, the Appellant is further requested:

- *To provide some examples of the FIFA rules and its well-established practice it is referring to".*

20. On 26 February and 15 March 2015 respectively, the Player and the Club filed their comments to the questions posed by the Sole Arbitrator. Both parties however failed to address the specific questions raised by the Sole Arbitrator.

21. On 10 and 20 April 2015 respectively, the Player and the Club returned duly signed copies of the Order of Procedure to the CAS Court Office. Both parties agreed that their right to be heard had been respected.

22. The Sole Arbitrator confirms that he carefully took into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

23. The Club's submissions, in essence, may be summarised as follows:

- The Club argues that there were many flaws and procedural mistakes in the proceedings before the FIFA DRC that caused the violation of the Club's right of defence and right to be heard. The Club submits that it was never provided with any claim put forward by the Player stating that the Player claimed payment of the guaranteed bonus of EUR 50,000.

- Furthermore, the monetary fines imposed by the Club were submitted to FIFA, but, according to the Club, FIFA never transmitted this evidence to the Player, which clearly shows prejudice of the deciding body against the Club.

- The Club also maintains that the monetary fines that were imposed on the Player were completely in line with FIFA rules and its well-established practice. The Club finds that it had the right to fine the Player instead of terminating the employment relation. The Club finds that the fines shall be accepted, or at least adapted, as the Club is of the view that if the FIFA DRC considered the fine to be excessive, it should have adapted the fine rather than deeming it null and void completely.

24. The Player's submissions, in essence, may be summarised as follows:

- The Player maintains that there is no discussion regarding the credit of the Player from the Club. The Club merely recognises that it has an outstanding debt towards the Player in the amount of EUR 254,483.

- The Player finds that the Club's attempt to reduce the amount due by means of three fines is not based on concrete evidence and that these *"three frivolous disciplinary decisions"* are not valid for both procedural aspects and in essence. The Player maintains that he *"never received such fines when he was at the club"* and that the documents submitted by the Club are *"only three piece of paper those ones prepared unilaterally"* by the Club.

- The Player finally disputes the reasons invoked by the Club to justify the imposition of the fines and argues that the fines lack his signature and that it is not legible on which date the notary seal was added.

V. JURISDICTION

25. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

26. The Sole Arbitrator observes that the Employment Contract determines the following in this respect:

"ARTICLE 9- MISCELLANEOUS (…)

B) In the event of any dispute between the parties arising from this agreement the parties elect the jurisdiction of FIFA as the first instance and CAS (Court of Arbitration for Sports [sic]*) in Lausanne as last instance body".*

27. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

28. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

29. The appeal was filed within the 21 days set by article 67(1) of the FIFA Statutes (2014 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

30. It follows that the appeal is admissible.

VII. APPLICABLE LAW

31. Article R58 of the CAS Code provides the following:

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

32. The Sole Arbitrator notes that article 66(2) of the FIFA Statutes 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".

33. The Sole Arbitrator observes that the Employment Contract determines the following in this respect:

"ARTICLE 9- MISCELLANEOUS

(…)

B) (…) The parties further agree that in the event of any dispute the applicable law shall be Turkish Law and the applicable rules will be TFF and FIFA rules and regulations".

34. The Sole Arbitrator observes that neither of the parties specifically invoked any provisions of national law in their respective written submissions in the present appeal arbitration proceedings, that the Club found that Swiss law is to be applied subsidiarily and that the Player did not put forward any position on the applicable law.

35. The Sole Arbitrator is therefore satisfied, in accordance with article 66(2) of the FIFA Statutes, 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.

VIII. MERITS

A. The Main Issues

36. As a result of the above, the main issues to be resolved by the Sole Arbitrator are:

i) Did the FIFA DRC commit any procedural mistakes, and if so, what are the consequences thereof?
ii) To what amount of outstanding remuneration is the Player entitled?
iii) Can the Club set-off its debt towards the Player by means of the various fines imposed on him?

i. Did the FIFA DRC commit any procedural mistakes, and if so, what are the consequences thereof?

37. The Sole Arbitrator took note of the Club's argument that FIFA committed several procedural mistakes, *i.e.* that the Club was not informed of the Player's amended claim and that the Player was not provided with the evidence and submissions of the Club in respect of the fines that were imposed on him and that this shows prejudice of the FIFA DRC against the Club.

38. The Player did not make any comments in this respect.

39. By correspondence dated 9 December 2014, FIFA provided certain observations, maintaining that no procedural mistakes were made. FIFA clarified *inter alia* that *"on 22 July 2014, by means of a correspondence sent to its representative, the* [Club] *was duly invited to present its position with regard to* [the Player's] *amended claim"* and that *"the Appellant's letter dated 23 June 2014 received by courier on 24 July 2014* […]*, and which is related to the fines at stake, was duly forwarded to the* [Player]*"*.

40. The Sole Arbitrator took due note of the parties respective positions on this point and observes that the FIFA file contains a positive report of a fax consisting of thirteen pages that was sent by FIFA to a fax number that corresponds to the fax number indicated in the Club's "Reply Brief" submitted in the proceedings before the FIFA DRC. As such, the Sole Arbitrator has no doubt that FIFA indeed duly forwarded the Player's amended claim (dated 1 July 2014) to the Club on 22 July 2014.

41. As to the Club's second objection, the Sole Arbitrator observes that the FIFA file contains a positive report of a fax consisting of eleven pages that was sent by FIFA to a fax number that corresponds to the fax number indicated in the Player's "Claim" submitted in the proceedings before the FIFA DRC. As such, the Sole Arbitrator has no doubt that FIFA indeed duly forwarded the Club's submission and annexes (dated 23 June 2014) to the Player on 5 August 2014.

42. Consequently, the Sole Arbitrator finds that no procedural violations were committed by the FIFA DRC and that it does therefore not have to be addressed what the consequences of such possible procedural violations would be.

ii. To what amount of outstanding remuneration is the Player entitled?

43. The Sole Arbitrator observes that the Player claims to be entitled to outstanding remuneration from the Club in an amount of EUR 254,483.

44. The Sole Arbitrator observes that the Club does not dispute that the Player was entitled to this amount but rather that it had imposed certain monetary fines on the Player and that these fines need to be set off against the outstanding remuneration.

45. Hence, the Sole Arbitrator will consider whether such fines can be set off against the outstanding remuneration below, but concludes here that it is undisputed that the Player is, in principle, entitled to receive an amount of EUR 254,483 as outstanding remuneration from the Club.

iii. Can the Club set-off its debt towards the Player by means of the various fines imposed on him?

46. The Sole Arbitrator observes that the Club imposed three monetary fines on the Player:

- On 18 April 2014, a fine of EUR 53,320 was imposed on the Player by the Board of Directors of the Club because the Player *"went out of town without Club authorities' written permission on 22.03.2014"*;

- On 18 April 2014, a fine of EUR 79,980 was imposed on the Player by the Board of Directors of the Club because the Player *"went out of town without Club authorities' written permission on 14.04.2014"*;

- On 29 May 2014, a fine of TRY (Turkish Lira) 45,000 was imposed on the Player by the Board of Directors of the Club because *"in accordance with the report "the season-wide performances of the football players" dated 26.05.2014 issued by our technical staff that* [the Player] *underperformed in our Professional A Team trainings, did not make necessary effort and seriousness which expected from them by our technical staff and our club in aforesaid trainings, according to the performance review he did not reach the sufficient level and it drew attention to his unwillingness, the* [Player] *persisted with abovementioned attitudes in proportion as season-wide and this situation provided extraordinary failure, taking into consideration that the bonus payments, which has been*

paid by the [Club] *in addition to* [the Player's] *contractual amounts and not to exceed these bonus amounts".*

47. The Club argues that *"[i]n accordance with FIFA jurisprudence as well as the employment rules, if a player does not fulfil its obligations stemming from the contract such as attending the training session and informing the club his whereabouts must lead to monetary fines".*

48. The Club submits that *"without getting any response from the Player and without entering into the merits of the fine whether the ground of fine was correct or not, FIFA decided that the fine is excessive and disproportionate. It is also weird reaching such a conclusion without asking for the reply of the* [Player]*".* If the FIFA DRC would have found that the fine was excessively high, then it should have changed it to a proportionate amount instead of disregarding it and declaring it null and void.

49. The Club contends that since *"it is undisputed that the* [Player] *committed an unacceptable act and violated the main principles of the relation between an employer and an employee, the monetary fine amounting to EUR 53,320 is binding, valid and shall be set-off from the receivables of the* [Player]*".*

50. As to the second fine, the Club contends that the Player *"did the same breach again, on 14.04.2014, despite having been warned and imposed a monetary sanction. In his second breach, the* [Club] *decided to cancel his contract but bearing in mind the principle to maintain the contractual stability, the latter imposed another sanction upon the player amounting 79.980.-EUR which is completely in line with the internal disciplinary regulations of the Club".*

51. As to the third fine, the Club maintains that the Club *"has made bonus payments in the season to the* [Player] *and as it is clearly stated in the decision and the notification, this fine does not exceed the bonus payment and as the bonus payment was made in Turkish Lira, the fine was also imposed as Lira too".* The Club argues that *"[t]his is a general principle that if an employee is rewarded for his good performance and success, he may also be sanctioned for his low performance and flippancy".* Consequently, the Club concludes that TRY 45,000, which is equivalent to approximately EUR 15,000 shall be deducted from the receivables of the Player.

52. The Club concludes that *"the total amount that shall be deducted from the claim of the* [Player] *is EUR 148.300.-EUR".*

53. The Player argues that the fines are *"serious and legally are not valid for both procedural aspect and in essence".* The Player maintains that he never received such fines when he was at the Club.

54. The Player further contends that the documents with the decisions of the Board of Directors of the Club *"are only three piece of paper those ones prepared unilaterally by applicant club itself"*, do not contain a signature of the Player and that it is not clear when the notary sealed these documents.

55. The Player finally argues that the third fine was imposed on 29 May 2014, whereas his Employment Contract was due to expire on 31 May 2014 and refers to the argumentation of the FIFA DRC in determining that the fines were baseless.

56. The Sole Arbitrator observes that the Employment Contract contains several references to the Club's discretion to impose monetary fines on the Player:

"ARTICLE 5- OBLIGATIONS OF THE PLAYER

i. The Player agrees to comply with Disciplinary Instructions and other related instructions that apply to every player of the Club's professional football team ("Instructions") as made known to him in writing and / or announced in accordance with the TFF regulations. The Player shall be provided with an English version of the instructions as of the beginning of the season. The receipt of the standard club seasonal Disciplinary Instructions and Regulations shall not be understood that the sanction(s) to be implemented to the PLAYER in accordance with this Instruction and Regulation is accepted is accepted by the PLAYER. The PLAYER's fundamental right of objection and/or appeal for the penalty decision(s) and/or fine(s) before the competent bodies at every level and faculty is reserved.

[…]

j. The Player hereby accepts to obey disciplinary sanctions to be applied by the Club against him in case any contrary actions against the said disciplinary instructions save his fundamental right of objection and / or appeal before the competent body at every level and faculty. The Parties herewith agree that Player's penalty payments salary or bonus reductions, or any other financial penalties resulting from disciplinary and / or material sanction in connection with this Contract and / or its annexes including-without-limitation the Instruction ("Penalty Event") shall be limited as follows: for all penalty events within one season up to 10 % of the yearly base salary amount as set out in the relevant clause. The PLAYER's fundamental right of objection and/or appeal for the penalty decision(s) and/or fine(s) before the competent bodies at every level and faculty is reserved.

[…]

p. The player hereby agrees that in case of a breach by the player of his obligations set forth herein, the Club shall be entitled to fine the player in the amount of monthly salary of the Player for every breach, and that the player shall pay this penal sum to the Club upon receipt of the Club's written request, and that the Club shall be entitled to set off and compensate for this sum from or out of the receivables the Player may have with the Club".

57. The Sole Arbitrator observes that the Employment Contract determines in multiple provisions that the Player has a *"fundamental right of objection"* in respect of fines being imposed on him by the Club.

58. Although the Sole Arbitrator finds that a player should always be allowed to object to fines being imposed on him by a club, this requirement is even more dominant in the matter at hand since the Employment Contract specifically provides such right to the Player.

59. Since the Player maintains that he was not aware of any fines having been imposed on him by the Club, the Sole Arbitrator finds that the burden of proof to evidence that the Player was indeed provided with an opportunity to defend himself lies with the Club.

60. After the first round of written submissions, the Sole Arbitrator provided both parties with an additional opportunity to *"advise the Sole Arbitrator whether the Respondent has been heard after his (alleged) absences at the training sessions and if he had a chance to clarify his behaviour. In the negative, the Appellant is requested to state the reason(s) why the Player was not given such opportunity"*. The parties were further invited to *"advise the Sole Arbitrator how the fines imposed to the Respondent were communicated to him"*.

61. The Club however failed to answer these specific questions and merely reiterated the arguments made in its Appeal Brief.

62. On the basis of the evidence at his disposal, the Sole Arbitrator is not satisfied that the Player was indeed granted an opportunity to defend himself against the imposition of the fines. There is no correspondence on file where the Player is invited to attend a meeting where his behaviour would be discussed. The documents by which the fines are imposed on the Player are not signed by the Player, nor do they contain any indication that the Player was aware of the possibility that a fine would be imposed on him or that these documents were delivered to the Player.

63. Hence, already on this basis the Sole Arbitrator concludes that the fines imposed on the Player are null and void and cannot be set off against the outstanding remuneration of the Player.

64. The Sole Arbitrator however finds that there are several other elements leading to the conclusion that the fines cannot be imposed, or at least not fully.

65. The Sole Arbitrator observes that according to Article 163 of the Swiss Code of Obligations (hereinafter: the "SCO") – Swiss law being the law subsidiarily applicable to the matter at hand – determines the following:

> 1. *"Die Konventionalstrafe kann von den Parteien in beliebiger Höhe bestimmt werden.*
>
> 2. *Sie kann nicht gefordert werden, wenn sie ein widerrechtliches oder unsittliches Versprechen bekräftigen soll und, mangels anderer Abrede, wenn die Erfüllung durch einen vom Schuldner nicht zu vertretenden Umstand unmöglich geworden ist.*
>
> 3. *Übermässig hohe Konventionalstrafen hat der Richter nach seinem Ermessen herabzusetzen"*.

Which can be translated as follows:

> 1. *"The parties are free to determine the amount of the contractual penalty.*
>
> 2. *The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.*
>
> 3. *At its discretion, the court may reduce penalties that it considers excessive"*.

66. Thus, whereas Article 163(1) of the SCO provides that parties may freely determine the amount of a contractual penalty, on the basis of Article 163(3) of the SCO, the Sole Arbitrator considers that he has the duty to reduce the amount of the penalty if he considers this amount to be excessive.

67. In several cases, the Swiss Federal Tribunal underlined that the discretion of the judge according to Article 163(3) of the SCO should be used with reluctance: The possibility to reduce liquidated damages by the judge is against the principles of contractual freedom and contractual loyalty and, therefore, should be applied with reluctance (SFT 4C.5/2003; 114 II 264; 103 II 135). According to legal commentators, there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages (GAUCH/SCHLUEP/SCHMID/REY, Schweizerisches Obligationenrecht, Allgemeiner Teil, 8th Ed. (2003), N 4049)).

68. In CAS 2012/A/2202 the following is determined with reference to TAS 2008/A/1491, §97-101:

> *"Finally, Article 163 al. 3 CO provides that "excessively high liquidated damages shall be reduced at the discretion of the judge".*
>
> *The Swiss Supreme Court held that this latter norm is part of public policy and that as a consequence the judge must apply it even if the debtor did not expressly request a reduction, whilst observing a degree of deference, in order to respect the contract as much as possible (ATF 133 III 201, c. 5.2).*
>
> *As such, a reduction in the penalty clause by the judge is justified "when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place. To judge the excessive character of the contractual penalty, one must not decide abstractly, but, on the contrary, take into consideration all the circumstances of the case in hand" (ATF 133 III 201, c. 5.2).*
>
> *The Swiss Supreme Court holds that various criteria play a determining role, such as the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties, as well as the potential interdependency between the parties (ATF 133 III 201, ibid.).*
>
> *When proceeding to reduce the contractual penalty, the judge must make use of his discretion, but with a certain reserve, since the parties are free to fix the amount of the penalty (article 163 al. 1 CO) and the contracts must in principle be respected. The protection of the economically weak party authorises however more a reduction than if those affected are economically equal parties" (free translation)".*

69. Against this background, the Sole Arbitrator observes that clause 5(j) of the Employment Contract appears to determine that the total amount of fines imposed on the Player in one season may not exceed 10% of the Player's yearly salary, whereas clause 5(p) determines that for each and every fine a monetary fine equalling a monthly salary may be imposed.

70. Since the Club fined the Player with a total amount of EUR 148,300, whereas the Player's monthly salary constituted only EUR 62,500 (EUR 750,000 / 12), the Sole Arbitrator finds that the totality of the fines is utterly disproportionate and deems it intolerable that such significant fines are imposed on a player for a minor offence such as leaving the city without the written permission of the Club. The Sole Arbitrator indeed considers this to be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand.

71. It does not derive from the decisions of the Board of Directors whether the Player missed any important events because of these alleged infringements, nor was this contended by the Club in the proceedings before the FIFA DRC or CAS, but even if this would have been the case, the Sole Arbitrator finds that this would, in principle, not justify the imposition of such extraordinary fines.

72. Furthermore, the Club argues that after having imposed the first fine, the Player committed the same infringement again. This is however not true, the first and second fine were both imposed on the Player on 18 April 2014. As such, the Sole Arbitrator finds that the Player was not warned that his behaviour – even if considered culpable – would not be tolerated by the Club and could have prevented the Player from making the same mistake again.

73. Moreover, and importantly, the Sole Arbitrator finds that the Club did not provide any evidence from which it can be derived that the Player indeed left the city without the Club's written authorisation.

74. As such, the Sole Arbitrator finds that, taking into consideration the content of clause 5(j) of the Employment Contract and whilst observing a degree of deference, the total amount of fines that could have been imposed on the Player could in any event not exceed EUR 75,000 (EUR 750,000 x 10%). However, as determined *supra*, the Sole Arbitrator finds that the fines are null and void in their entirety and that the fines can therefore not be set off against the outstanding remuneration of the Player.

75. Specifically in relation to the third fine, the Sole Arbitrator finds that the language of clause 6(3) of the Employment Contract is clear: *"The Club undertakes to make 50.000,00-Euro (Fiftythousand Euros) guarantee bonus payment to the Player during the 2013 / 2014 football season"*. Since it is specifically stated that this is a guaranteed bonus, the Sole Arbitrator finds that this bonus cannot be reduced at the discretion of the Club, but is indeed guaranteed.

76. Furthermore, the Sole Arbitrator finds it rather striking that the Club imposed such a significant fine on the Player a mere two days before the expiration of his Employment Contract. The Sole Arbitrator finds that this is indeed an indication that the Club only attempted to reduce the amount of outstanding payments by imposing monetary fines on the Player and arguing that these fines were to be set off against the outstanding payables.

77. Finally, and importantly, the Sole Arbitrator finds that, as a matter of principle, no fine can be imposed on a player for poor performance, particularly if this is not contemplated for in the

employment contract and if it is not based on objective criteria, but can be determined at the free subjective discretion of the club.

78. Consequently, the Sole Arbitrator finds that the Club cannot set off its debt towards the Player by means of the various fines imposed on him.

B. Conclusion

79. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Sole Arbitrator finds that:

i. No procedural violations were committed by the FIFA DRC and it does therefore not have to be addressed what the consequences of such possible procedural violations would be.
ii. The Player is entitled to receive an amount of EUR 254,483 as outstanding remuneration from the Club.
iii. The Club cannot set off its debt towards the Player by means of the various fines imposed on him.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 18 September 2014 by Kayserispor Kulübü Derneği against the Decision issued on 20 August 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The Decision of the Dispute Resolution Chamber of the Fédération Internationale de Football Association issued on 20 August 2014 is confirmed.

(…)

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