



**Arbitration CAS 2015/A/4055 Victor Javier Añino Bermudez v. Club Elazigspor Kulübü, award of 27 June 2016**

Panel: Prof. Martin Schimke (Germany), President; Mr Mark Hovell (United Kingdom); Mr Daniel Lorenz (Portugal)

*Football*

*Termination of the employment contract with just cause*

*Just cause for termination of employment contract*

*Just cause for termination of employment contract in case of non-payment of salaries*

*Burden of proof for accrued bonuses due to player following termination of employment contract with just cause*

*Net or gross compensation amount*

*Mitigation of the amount of compensation for damages*

1. While the FIFA rules do not define the concept of “just cause”, according to CAS jurisprudence, reference should be made to the applicable law. In case Swiss law applies, Article 337 para. 2 of the Swiss Code of Obligations (“SCC”) provides that any circumstances which, according to the rules of good faith, mean that the party who has given notice of termination cannot be required to continue the employment relationship, shall be deemed good reason. The concept of “just cause” as defined in Article 14 Regulations of the Status and Transfer of Players (“RSTP”) must therefore be likened to that of “good reason” within the meaning of Article 337 para. 2 of the SCC. CAS has further adopted the jurisprudence of the Swiss Federal Tribunal, according to which an employment contract may be terminated immediately for good reason when the main terms and conditions (either general/objective or specific/personal) under which it was entered into are no longer implemented. Furthermore, in case the immediate termination is at the initiative of the employee, a serious infringement of the employee’s personality rights, consisting, for example, in unilateral or unexpected change in his status which is not related either to company requirements or to organization of the work or the failings of the employee, or even, in certain circumstances, a refusal to pay all or part of the salary may be deemed “good reason”. Finally, only material breaches of a contract can possibly be considered as “just cause” for the termination of the latter.
2. The Commentary to the RSTP, in order to illustrate the concept of “just cause”, refers to the situation of a player who has not been paid his salary for more than three months, despite having informed his club of its default. According to the RSTP Commentary and CAS jurisprudence, the fact that a player has not received his salary for such a long period of time entitles him to terminate the contract with “just cause”, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned. However, the “three-month rule” is only an example and in case of non-payment of salaries other

circumstances may also be taken into consideration, the crucial aspect being that *“the circumstances must be such that, according to the rules of good faith, the party terminating the employment relationship cannot be required to continue it”*. For example, if a player (*e.g.* for tax reasons) accepts not to be paid for the four first months of his activities, and renders his services for this period in the expectation to be paid later, and if under these circumstances, the club refuses payment to the player, alleging financial difficulties without having informed the player earlier, despite having known this fact for a certain period of time, the club is acting in bad faith, which may have a serious impact on the player’s trust towards his employer. This is even more the case if the club, while allegedly wanting to find an agreement with the player, mistreats the player in order to oblige him to accept a disadvantageous agreement and only makes insufficient proposals. If furthermore the club initiates unjustified disciplinary proceedings against the player without respecting the player’s basic procedural rights and imposes various sanctions on the player, it may be found that the accumulation of facts may permanently alter the trust that the player had in his employer and may lead the player to terminate the employment contract for just cause, in accordance with Article 14 RSTP.

3. In case a football player, having terminated his employment contract with just cause following the club’s non-payment of salaries, wishes to claim bonuses as part of the overall compensation to be paid by the club, the player has the burden of proof regarding the determination of the amount to be paid as bonuses. *E.g.* he has to refer to a specific provision of his employment contract foreseeing bonuses, and provide details of the matches he played in to earn such bonuses.
4. In case the provisions of an employment contract do not explicitly foresee provisions governing the question whether the amount of compensation payable in case of termination of the contract shall be net or gross, but the parties have specifically agreed on the payment of a net remuneration, then taxes are to be added to the total sum owed as compensation.
5. In calculating the amount of compensation, any (gross) amounts corresponding to amounts due as remuneration to the player under a subsequent employment contract with a new club shall be deducted from the (gross) amount to be awarded to the player for the breach of the employment contract.

## I. PARTIES

1. Mr. Victor Javier Añino Bermudez (hereinafter referred to as the “Player” or the “Appellant”) is a professional football player. He was born on 9 September 1983 and is of Spanish nationality. He currently plays with the Club Deportivo Tenerife (hereinafter referred to as “CD Tenerife”), based in Santa Cruz de Tenerife, Spain.

2. Club Elazigspor Kulübü (hereinafter referred to as “Elazigspor”, the “Club” or the “Respondent”) is a football club with its registered office in Elazig, Turkey. It is a member of the Turkish Football Federation (hereinafter referred to as “TFF”), itself affiliated to the Fédération Internationale de Football Association (hereinafter referred to as “FIFA”).

## II. THE DECISION AND ISSUES ON APPEAL

3. The Player appeals a decision (hereinafter referred to as the “Appealed Decision”) of the FIFA Dispute Resolution Chamber (hereinafter referred to as the “FIFA DRC”) dated 18 December 2014 imposing the payment, by Elazigspor to the Player, of the amount of EUR 250,000 plus 5% interest p.a. as outstanding salaries following the termination by the Player of his employment contract.
4. The Appellant considers that he terminated his contract with just cause and is therefore entitled to compensation amounting to EUR 3,512,189.06 gross, which Elazigspor shall be condemned to pay, additional to the Player’s accrued bonuses calculated to the date of the contract termination, net of taxes. The Appellant also requests that the Club be ordered to pay applicable interest in relation to these amounts, calculated from 8 February 2014.
5. As a subsidiary request for relief, in case of the dismissal of the Appeal, the Panel should consider that the overdue salaries in the amount of EUR 250,000 granted by the FIFA DRC must be regarded in net terms and therefore the Appellant is entitled to EUR 421,822.48 gross, as he is currently a Spanish tax resident.

## III. BACKGROUND FACTS

6. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submission and evidence it considers necessary to explain its reasoning.
7. On 29 August 2013, the Player and the Club signed an employment agreement valid from the date of signature until 31 May 2016 (hereinafter referred to as the “Employment Contract”). On the same day, both Parties signed a Private Agreement (hereinafter referred to as the “Private Agreement”). According to the Employment Contract, the Appellant was entitled to receive the “OFFICIAL MINIMUM WAGE”. However, pursuant to clause A.3 of the Private Agreement, the Appellant would be a “*first team member of the Club*” and was entitled to the following remuneration:
  - 2013/2014 season: EUR 500,000 net payable as follows:
    - o EUR 125,000 payable on 1 January 2014
    - o EUR 125,000 payable on 1 February 2014

- EUR 62,500 payable on 1 March 2014
  - EUR 62,500 payable on 1 April 2014
  - EUR 62,500 payable on 1 May 2014
  - EUR 62,500 payable on 1 June 2014
  - 2014/2015 season: EUR 600,000 net payable in twelve equal monthly instalments.
  - 2015/2016 season: EUR 600,000 payable in twelve equal monthly instalments.
8. Clause 3.A of the Private Agreement also stipulates that: *“in case of non-payment of two consecutive salaries in full or in part, the Player should notify the Club in writing. If the Club should not pay the notified amount in 30 days starting from the due date of the second unpaid salary, then the PLAYER shall have the right to unilaterally terminate the contract with just cause.*

*In this case PLAYER shall have the right to keep any and all amounts received from the CLUB until the termination date.*

*In case of termination by the PLAYER due to the delay in payment by the CLUB, the PLAYER shall be entitled to receive as an indemnity due to the breach by the CLUB of its payment obligations, all the amounts established in this CONTRACT, including the payments due before and after the termination date, with this situation being treated, as regards its consequences, as the same as that of the unilateral termination without just cause on the part of the CLUB. Upon a termination by the Player this agreement as mentioned above and if the PLAYER is employed by a new CLUB after termination, then the salary and bonuses earned by the PLAYER from the new club for the period between the termination date and expiry date of this Agreement (Reduction Amount) will be deducted from the compensation to be paid by the CLUB as calculated above and CLUB has a right to claim back this Reduction Amount from the PLAYER before the judicial bodies. The PLAYER shall not be entitled to receive any other compensation from the CLUB”.*

9. Clause 3.B of the Private Agreement provides for bonus payments to be made by the Club to the Player, as follows:
- for UEFA Champions League qualification EUR 50,000 per season
  - for UEFA Europa League qualification EUR 40,000 per season
  - for winning the Turkish Cup EUR 30,000 per season.

The above-mentioned bonuses were to be paid within thirty days following the achievement of the described objectives.

Additionally, the Private Agreement provides for bonuses to be paid to the Player on a match-by-match basis, as follows:

- for winning an away game minimum EUR 3,460
- for winning a home game minimum EUR 2,700
- for drawing in an away game minimum EUR 1,730.

The exact bonus amounts would be established through the Club’s internal regulations. The same paragraph also stipulates that if the Player would be fielded in the starting eleven he would

receive 100% of the bonus fee, if he would come on as a substitute during the course of a game he would receive 75% of the bonus fee and if he would be in the match squad, but not fielded at all, he would be only entitled to 50% of the respective match bonus.

10. Clause 3.F of the Private Agreement reads as follows: *“Pursuant to Article 17 of Regulations on the Status and Transfer of Players of the FIFA, if the Club decides to terminate this Contract unilaterally before the termination of its duration, the Club shall pay the Player all the salaries and bonuses pending at the date of termination until 30 of June 2016. Under no circumstance, the amount of the salaries resulting from the anticipated termination of this Contract shall be under the figure that results from subtracting from ONE MILLION AND SEVEN HUNDRED THOUSAND EUROS (1,700,000.00 €) net, the net amount paid by the Club for salary, excluding bonuses; until the date of this hypothetical termination. The amount to be paid resulting from the anticipated termination shall be paid taken into consideration the tax residence of the Player at the moment of termination. Upon a termination by the CLUB without a just cause before the expiry date of this Agreement as mention above and if the Player is employed by a new CLUB after termination then the salary and bones earned by the PLAYER from the new club for the period between the termination date and expiry date of this Agreement (Reduction Amount) will be deducted from the compensation to be paid by the CLUB as calculated above and CLUB has a right to claim back this Reduction Amount from the Player before the judicial bodies. The PLAYER shall not be entitled to receive any other compensation from the CLUB”*.
11. On 6 January 2014, the Club’s legal counsel sent an e-mail to the Player’s attorney, informing him that the Club’s *“economic progress [did] not look good”* and that the president wanted to have a meeting *“about Vitolò’s future in the club”*, as it was becoming difficult for Elazigspor *“to fulfil their monetary obligations”* towards the Appellant and it was attempting to *“get rid of economic distress”*.
12. On 7 January 2014, the Player’s attorney replied that he had been authorized to negotiate a settlement with the Club, subject to further authorization by the Player and stressed that the first salary instalment of 1 January 2014 needed to be paid, as the payment had not been carried out by the Respondent.
13. On 13 January 2014, the Appellant, acting through his legal representative, sent the Club a reminder with regard to the salary payment which was due on 1 January 2014. Pursuant to the Private Agreement, this amounted to EUR 125,000 and not to the EUR 250,000, referred to in the Appellant’s notification. The following statement was also added in supplementation: *“we declare that our client reserves all his relative legal rights”*.
14. On the same day, Elazigspor’s legal counsel responded informing the Player’s representatives that the Club wanted to settle any dispute as soon as possible and proposed to have a meeting on a date between 16 and 18 January in Elazig.
15. In the letter of 14 January 2014, the Appellant re-issued the reminder with an amendment correcting the sum due until that date to the amount of EUR 125,000. The Appellant further objected (again with said reservation clause, see above para. 13) to the fact that he had been excluded from the Club’s First Team in breach of the Private Agreement and sent to train with the reserve team.

16. On the same date, the Player's attorney wrote an e-mail to the Club's legal counsel proposing a different date for the potential meeting with Elazigspor's representatives.
17. On 15 January 2014, the Appellant sent the Club a repeated reminder with the same content as the notice of 14 January 2014. He also requested the training schedule of the First Team.
18. On the same date, the Club sent the Player a communication drawn up in notarised form, according to which the Appellant was only allowed to participate in training with the Club's reserve team on the grounds of "*misbehaviour*".
19. On 16 January 2014, the Club's legal counsel sent an e-mail to the Appellant's attorneys proposing to meet in Elazig on 22 January 2014, or in Istanbul on 29 January 2014.
20. Later that day, the Player's attorney asked via e-mail the Club's legal counsel what the Club's intention was, while also expressing his disappointment with the content of the notification in regards of the Player's alleged misbehaviour.
21. Still on 16 January 2014, the Appellant sent the Respondent another letter of warning, with the same content as the one sent on 15 January 2014, ratifying all previous correspondence and in addition objecting to the disciplinary measures imposed by the Club.
22. On 17 January 2014, the Player sent the Club a new letter of warning, informing its representatives that he had not received the outstanding amount of EUR 125,000, which constituted a serious breach of the Private Agreement. He also stressed that he had trained with the Club's Second Team on the previous day, while being informed by the coaching staff that he was no longer a member of the First Team, which constituted another serious breach of the Private Agreement. The Player also pointed out that he had been told to travel with the Second Team for an away match, but that he would under no circumstance be fielded. The Appellant therefore asked to be paid the amount due and to be allowed to train with the Club's First team.
23. On 18 January 2014, the Club's legal counsel sent a settlement offer to the Player's attorney, according to which it agreed to pay EUR 125,000 in return for the immediate termination of the Private Agreement by mutual consent.
24. On 20 January 2014, the settlement offer was rejected. The Player also sent the Respondent a new letter of warning on that date, asking for the immediate payment of the outstanding amount of EUR 125,000 as well as to be allowed to train with the First Team. He also mentioned that due to the extreme training sessions that the Club was obliging him to carry out he needed a medical examination and urged the Respondent to solve this issue.
25. On 21 January 2014, the Appellant sent Elazigspor another letter of warning, having a similar content to the notification sent on the previous day but adding that he had been denied access to the dressing room of the First Team that he had used until that point. He also indicated that he had been called for training with the Second Team, but that its coach informed him that he was not a member of the Second Team.

26. On the same date, the Respondent sent a new settlement offer, which amounted to EUR 250,000, the Club thus offering to pay the first two instalments of the Player's salary in exchange for the contractual termination by mutual consent.
27. On 22 January 2014, the Player refused the second settlement offer and made a counter-proposal, demanding EUR 1,700,000 in different instalments (EUR 500,000 due on 1 February 2014 and 24 monthly instalments of EUR 50,000 starting 1 March 2014). The Player also offered to pay his taxes in Spain.
28. On 22 and 23 January 2014, the Player sent other letters of warning to the Respondent, with a similar content to the one sent on 20 January 2014. On both occasions, the Player also stressed that he was requested to attend training sessions with the Second Team at 10 AM but none of the staff members were at the training ground, which in his view was equivalent to another harassment manoeuvre. He again asked for the schedule of training sessions.
29. On 24 January 2014, the Appellant sent a new notification of warning to the Club, similar to the ones sent on 22 and 23 January, requesting as previously the payment of EUR 125,000 and to be allowed to train with Elazigspor's First Team, while also adding that the Respondent was again in breach of the Private Agreement by not providing the Player with basic and necessary training equipment.
30. On 27 January 2014 the Player sent another letter of warning to the Respondent, containing the same requests as the letters sent on 22, 23 and 24 January 2014.
31. On 28 January 2014, the Appellant sent a new notification to the Club, requesting the payment of the due amount and reporting that the Respondent's First Team was playing three away matches (against Galatasaray, Karabukspor and Antalyaspor) and that he had not been requested to travel with his teammates.
32. On the same date, the Player sent another letter of warning to the Club, reporting that he had not been provided with the necessary training equipment, thus having to borrow equipment from other players of the second team.
33. On 29 January 2014, the Player sent the Respondent a new letter, reporting the same issues as in the letters sent on 22, 23, 24, 27 and 28 January.
34. On 30 January 2014, the Appellant sent another notification, making the same requests as before and additionally informing the Club that he had been called to a training session at 10 AM only to find that the Second Team had the day off on that date, which was in the Player's view another proof of harassment by the Club.
35. On 31 January 2014, the Player sent the Respondent another notice of warning, with a similar content as the one sent on the previous day.
36. On 1 February 2014, the Club sent the Player a letter informing him that he was obliged to take part in training sessions as well as in matches with the Second Team.

37. On the same day, the Player's attorney sent the Club an e-mail stressing that the Player had been called to attend a meeting of the Second Team at 1 AM and since he was a member of the First Team as stipulated in the Private Agreement, the Player would not travel with the Second Team. The previous requests were reiterated.
38. On 2 February 2014, the Club's legal counsel wrote to the Appellant's representatives, informing them that "*the club has located some difficulties in fulfilling their obligations because of financial distress*" and that "*even so club will force all opportunities to fulfil their obligations as soon as possible*".
39. On the same day, the Appellant responded via e-mail, reporting that the Club was in breach of its contractual obligations and that it was attempting to construe an alleged non-fulfilment by the Player of his contractual duties in order to justify the Club's breach.
40. Later that day, the Respondent sent the Player a third settlement offer, stating that "*all of the fee until the end of the contract for compensation is not acceptable and not payable for the club*", but that it was willing to offer "*EUR 500,000 with a flexible payment plan*".
41. On 3 February 2014, the Player sent a new letter of warning to the Respondent, requesting the payment of the due and outstanding salaries now in the sum of EUR 250,000 as well as the permission to train with the First Team. Additionally, the Appellant reported that he had been obliged to train during the morning and the afternoon, a circumstance which had never occurred before, nor with any member of the First or Second Team. Also, the Player informed the Club that he had still not been provided with proper training equipment.
42. On 4 and 5 February 2014, the Player sent other notices to the Club, with a similar content as the previous one sent on the 3 February 2014, adding that he had been summoned to training at 10 AM but no staff member was present at that time at the training ground.
43. On 6 February 2014, the Appellant sent a new letter to Elazigspor, submitting the same requests as before and additionally stressing that he had been summoned to attend two training sessions on that day, at 10 AM and at 3 PM but that no staff member was present at that time at the training ground. He again requested the training schedule.
44. On 7 February 2014, the Player sent another notification to the Respondent, requesting besides the due amount of EUR 250,000 the outstanding bonus payments and the permission to train with the First Team, while also informing the Respondent that he had again been summoned at 10 AM to attend a training session with the Second Team, but no member of the coaching staff was there. The Player also pointed out that he had had to train alone in the past days. He also requested to be provided with the training schedule of the First Team, as well as with suitable clean clothes and equipment for training, in order to fulfil his contractual duties.
45. On 8 February 2014, the Player sent the Respondent and the TFF a notice of termination of the Private Agreement with just cause. The letter pointed out that the Club had not fulfilled several contractual obligations, by not paying the Player the outstanding amount of EUR 250,000 net of taxes and the accrued bonuses. Other reasons for termination with just cause were also listed: the Player's dismissal from the First Team without being subject to any



disciplinary procedure, the fact that he was obliged to train and travel with the Second Team, although he had been told that he would never be fielded, that he was not notified repeatedly of the correct time and place where he had to train and that he had never been provided with the First Team's training schedule. The Appellant also invoked that he had not been allowed to use the First Team's training ground and that moreover he was obliged to train alone on several occasions, using training clothes and equipment which he borrowed from several team mates. The Appellant also stressed that his photo had been taken out of the Club's official webpage.

46. The notice of contract termination also contained the Player's request of payment of EUR 1,700,000 net of taxes within seven days of receipt, as provided for in clause 3.F of the Private Agreement.
47. On 12 February 2014, the TFF sent the Appellant a letter acknowledging the unilateral termination of his contract with Elazigspor and informing him that *"the termination has been entered to our records and hence, the contractual relationship between you and Club Sanica Boru Elazigspor has been terminated"*.
48. On 17 February 2014 the Appellant sent the Club a notification acknowledging receipt of the communication of 12 February concerning the contract termination and its acceptance. The Player also made a request for the payment of EUR 1,700,000 net of taxes plus the due and outstanding bonuses, also in net terms, warning the Respondent that he would file a claim before the competent bodies, should these obligations not be fulfilled.
49. On 27 February 2014 the Appellant submitted a claim before FIFA against Elazigspor, requesting to be awarded an amount of EUR 3,541,666.66 plus 5% interest p.a. as of 8 February 2014, in accordance with clause 3.A in combination with clause 3.F of the Private Agreement, as compensation for the contractual breach.
50. On 18 December 2014, the FIFA DRC rendered the Appealed Decision. The grounds of said decision were notified to the Parties on 14 April 2015.
51. The FIFA DRC considered in substance that clause 3.A of the Private Agreement was a valid clause established by the free will of the Parties, was applicable to the matter at hand and, therefore, the Appellant's allegations could not be considered as a valid clause to justify the unilateral termination of the Employment Contract. The FIFA DRC therefore decided that the Appellant was not entitled to receive any compensation for breach of contract.
52. However, the FIFA DRC also decided that it was uncontested that at the time of the termination, the salaries for January and February 2014 in the amount of EUR 250,000 had remained outstanding and that the Respondent should be responsible to pay this amount to the Appellant.
53. The operative part of the Appealed Decision is the following:
  1. *The claim of the Claimant, Victor Javier Añino Bermúdez, is partially accepted.*
  2. *The Respondent, Elazigspor Kulübü Derneği, has to pay to the Claimant, within 30 days as from the*

*date of notification of this decision, the amount of EUR 250,000 plus 5% interest p.a. on said amount as from 8 February 2014 until the date of effective payment.*

3. *In the event that the abovementioned amount plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
4. *Any further claim lodged by the Claimant is rejected.*
5. *The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

54. Following the notification of the Appealed Decision, the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”) on 30 April 2015. Within its Statement of Appeal, the Appellant nominated Mr. Mark Hovell, Solicitor in Manchester, United Kingdom, as arbitrator.
55. On 5 May 2015, the CAS Court Office sent a letter to the Parties, informing them on various aspects of the proceedings, in particular that the Appellant’s deadline to file the appeal brief was 10 days following the expiry of the time limit for the appeal and that the Respondent had a deadline of 10 days of receipt to nominate an arbitrator, which would be appointed by the President of the CAS Appeals Division or her Deputy, should the Respondent fail to comply with said deadline. The CAS Court Office also pointed out that unless the Respondent objected within three days from receipt of said letter, all written submissions shall be filed in English and all exhibits submitted in any other language should be accompanied by a translation into English.
56. On 5 May 2015, the CAS Court Office sent a letter to FIFA, informing it that would it intend to participate as a party in the arbitration, it should file with the CAS an application to this effect, together with its reasons therefore, within 10 days of receipt.
57. On 14 May 2015, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.
58. On 18 May 2015, the CAS Court Office sent a letter to the Parties informing them that the Respondent had a deadline of 20 days of receipt to file its answer.
59. On 19 May 2015, the CAS Court Office informed the Parties that in absence of any nomination of an arbitrator by the Respondent within the prescribed deadline, the President of the CAS Appeals Arbitration Division would appoint an arbitrator instead of the Respondent.

60. On 20 May 2015, the CAS Court Office sent the Parties a copy of FIFA's letter dated 19 May 2015, which stated that FIFA had renounced to its rights to request its possible intervention in the present arbitration proceedings.
61. On 22 June 2015 the CAS Court Office informed the Parties about the Appellant's preference for a hearing to be held in the present matter.
62. On the same date, the Respondent filed an answer, requesting a "*10-day grace period to make a defence*".
63. On 23 June 2015, the CAS Court Office informed the Respondent that the deadline for the answer had expired and its request for an extension in this respect would be deemed inadmissible in accordance with Article R32 of the Code of Sports-related Arbitration. It also noted that since the Respondent had not provided its position on the holding of a hearing within the prescribed deadline, the Panel would decide whether to hold a hearing or to render an award on the basis of the written submissions.
64. On 29 June 2015, the Parties were informed that the Panel was constituted as follows:
  - President: Prof. Dr. Martin Schimke, Attorney-at-law, Düsseldorf, Germany
  - Arbitrators Mr. Mark Andrew Hovell, Solicitor, Manchester, United Kingdom
  - Mr. Daniel Lorenz, Attorney-at-law, Porto, Portugal.
65. On 31 July 2015, the Appellant and the Respondent signed the Order of Procedure.
66. On 25 August 2015, the Respondent informed the CAS Court Office that it would be represented by a second counsel, Mr. Volker Hesse, Attorney-at-law in Zürich, Switzerland. A power of attorney was filed in this regard. The Respondent also requested that the Appellant would provide before the hearing on 2 September 2015 the following documents:
  - the employment contract concluded between the Appellant and CD Tenerife;
  - the contracts of other sources of income of the Appellant for the period between 8 February 2014 and 30 June 2016;
  - the bank account statements for the period between 8 February 2014 and the date of the letter.
67. On 26 August 2015, the CAS Court Office sent FIFA a letter inviting it on behalf of the President of the Panel to provide the CAS with a copy of the complete case file produced in connection with the present matter.
68. On the same date, the Appellant sent a letter to the CAS Court Office, pointing out that the Parties were not authorised to supplement or amend their requests or their arguments, nor to produce new exhibits, nor to specify further evidence on which they would rely, after the submission of the appeal brief and the answer. However, as the employment contract concluded between the Player and CD Tenerife had already been filed during the FIFA proceedings, the

Appellant agreed to file it enclosed to this letter for the Panel's revision and the Respondent's study.

69. On 2 September 2015, a first hearing was held in Lausanne Switzerland, during which the Parties agreed to settle the case.
70. On the same date, following the hearing and the Parties' agreement, the CAS Court Office informed the Parties that the present proceedings would be suspended until 17 July 2017, except if one of the Parties expressly requests that the proceedings resume before such date.
71. On 6 October 2015, the CAS Court Office informed the Parties that the procedure would resume, following the Appellant's request, as the settlement agreement concluded between the Parties was allegedly not respected.
72. On 3 November 2015, the Parties were informed that a second hearing would be held on 21 December 2015 at the CAS headquarters in Lausanne.
73. On 13 November 2015, the Respondent requested that the Appellant provides the following documents:
  - 1) *A legible Spanish version of the employment contract with CD Tenerife and a translation into English;*
  - 2) *Other sources of income of the Appellant for the period between February 2014 and 30 June 2016;*
  - 3) *Bank account statements for the time period between 8 February till today which show the incomes of the Appellant;*
  - 4) *Tax declaration of the Appellant with the Spanish authorities for the year 2014.*
74. On 3 December 2015, the CAS Court Office informed the Parties about the Respondent's request for disclosure, as follows:
  - *The Appellant shall file with the CAS, by **10 December 2015**, a legible Spanish version of the employment contract with CD Tenerife, together with a translation in English.*
  - *The Appellant shall inform the CAS, also on 10 December 2015, whether he concluded any other professional football contracts for the period between 8 February 2014 and 30 June 2016, and if so, to provide copies of such agreements.*
  - *All other requests from the Respondent are denied.*
75. On 10 December 2015, the Appellant filed a Spanish version of the employment contract with CD Tenerife, as well as its translation into English. The Appellant further confirmed that he had not concluded any other football contracts for the period between 8 February 2014 and 30 June 2016.
76. On 21 December 2015, the second hearing was held in the CAS headquarters in Lausanne, Switzerland.

77. On 22 December 2015, the CAS Court Office informed the Appellant that the Panel requested within 15 days to be provided with “*the gross and net amounts – meaning all employment-related – income, including all bonuses and the like he received during the first 12 months of his contract with Tenerife*”. The Appellant was also invited to inform the CAS Court Office within the same deadline whether there had been any change to the Spanish tax/social security rates since the end of the first year of his contract with Tenerife.
78. On 5 January 2016, the Appellant filed the requested information.
79. On the same day, the Respondent was provided with a 15-day time limit to submit its comments on the documents filed by the Appellant.
80. On 18 January 2016, the Respondent submitted his comments, including a calculation of the Appellant’s remuneration according to the contract with CD Tenerife, as well as exhibits regarding the market value of the Appellant.

## V. THE HEARING

81. A hearing was held on 21 December 2015 at the CAS headquarters in Lausanne. All the members of the Panel were present. At the outset of the hearing, the Parties declared that they had no objection with regard to the composition of the Panel.
82. The following persons attended the hearing:
  - The Player was represented by Mr. Iñigo de Lacalle Baigorri attorney-at-law;
  - Elazigspor was represented by Mr. Volker Hesse and Mr. Erdal Kesebir, attorneys-at-law;
83. Mr. Antonio de Quesada, Counsel for CAS, and Mr. Serge Vittoz, *ad hoc* clerk, assisted the Panel at the hearing.
84. Mr. Koldo Caminos Garcia, attorney-at-law from Madrid, Spain was heard by telephone conference as an expert witness for the Appellant, regarding the issue of tax.
85. Mr. Gabriel Cordova and Aylin Navajas Plann attended the hearing, as a translator/interpreter.
86. In the course of the hearing, the Respondent requested to file disciplinary regulations of the club, which were an annexe to the Employment Agreement. The Appellant refused to the filing of this new evidence and considered that there were no exceptional circumstances allowing for such filing. The Panel notes that in accordance with Article R56 of the CAS Code, unless the parties otherwise agree or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorised to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer. The Panel considered that in the

case at hand, the Respondent did not demonstrate that there were exceptional circumstances regarding the filing of this new exhibit and decided to reject it.

87. The Parties were afforded the opportunity to present their case, to submit their arguments and to answer the questions asked by the Panel. The Appellant explicitly agreed at the end of the hearing that his right to be heard and to be treated equally in these arbitration proceedings had been fully observed, whereas the Respondent stated that it could not confirm at that moment whether or not its right to be heard had been respected.

## **VI. THE PARTIES' SUBMISSIONS**

### **A. Mr. Victor Javier Añino Bermudez**

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

- Not only did the Club not fulfil its financial obligations derived from the Private Agreement, but also systematically breached it. Although according to the Private Agreement, the Club was to start paying the Player's salary in January 2014, when the first instalment was due and outstanding the Respondent did not pay.
- After the Player sent numerous letters of warning to the Respondent requesting that the payment of his salary and bonuses be carried out, the Club started to harass the Player, in order to force him to accept a termination agreement in disadvantageous conditions or to make him commit a breach of the Private Agreement himself.
- Besides not paying the Player, the Club practiced what is commonly known as "*mobbing*", by: banning the Player from training and playing with the First Team, obliging him to return his training clothes and to train alone or with the Second Team, calling him for training sessions at times when none of the coaching staff and the players of the Second Team were present at the training ground, making the Player train for two physical sessions per day, obliging the Player to retire all his personal belongings from the room that he had been assigned at the Club's premises, not providing him with a training schedule or with clean training clothes and suitable equipment, accusing the Player of misbehaviour without starting an internal disciplinary procedure, and deleting his photo from the Club's official web page.
- The FIFA DRC erroneously considered the time limit stipulated in the Private Agreement, as said time limit was mutually accepted by the Parties for normal situations, which is not the case. The Player had not received any payment since the Private Agreement entered into force, on 13 August 2013, and it was clear that the Club had no intention to pay. According to the FIFA DRC's wrong interpretation, should the Player have terminated the Private Agreement three hours, or even one day, prior to the 30-day grace period, the termination would not have been with a just cause even if the Appellant had been humiliated, harassed and distressed.

- According to the FIFA DRC as only 7 days had elapsed from the 30-day grace period, the Player is not entitled to terminate the Private Agreement with just cause. However, it cannot be reasonable to consider, as the FIFA DRC has done in the Appealed Decision, that if the Club has not fulfilled its contractual obligations by not paying and by not allowing the Player to carry out his duties, in case the Player terminates the Private Agreement and the Club does not challenge the termination, the 30-day grace period can be still taken into consideration.
- In the present case, not only had the Player not received any salaries since August 2013, but the situation itself was critical, as explained before. The Club had breached both its payment obligations and uncountable duties derived from the Private Agreement. Therefore, the Player was more than entitled to terminate the Private Agreement unilaterally, even though the 30-day grace period had not entirely elapsed.
- In a similar case, CAS 2008/A/1518 the Panel found that *“In connection with the training sessions that the Respondent had to attend on December 31, 2006 at 22:00 and on January 1, 2007 at 07:00, the Panel understands that the Appellant was still entitled to require the Respondent to participate in training sessions until its petition pending with the Hellenic FF authorities for the termination of the employment relationship with the Respondent was resolved. However, the Panel finds that making the Respondent attend training sessions at such odd times constitutes an abuse of its rights. Consequently, the Respondent was entitled to terminate the employment relationship with just cause”*.
- In the same case, CAS 2008/A/1518, the Panel ruled that *“the FIFA Regulations do not define what constitutes “just cause”. Therefore, abiding by ample CAS jurisprudence, the Panel examines the relevant provisions of Swiss law, applicable to the interpretation of the FIFA Regulations. For example, in the case CAS 2006/A/1062, the Panel stated that since the FIFA Regulations do not define when there is such “just cause”, one must fall back on Swiss law. Pursuant to this, an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is “good cause” (see also ATF 110 I 167). In this regard, Art. 337 (2) of the Code of Obligations (“CO”) states – in loose translation: ‘Particularly any circumstance, the presence of which means that the party terminated cannot in good faith be expected to continue the employment relationship, is deemed to be good cause’. The courts have consistently held that a grave breach of duty by the employee is good cause (ATF 121 III 467; ATF 117 II 72) (CAS 2006/A/1062, para. 13) (...)”*. Other relevant case law on this matter is the case CAS 2012/A/2698.
- Clause 3.F of the Private Agreement is to be applied and interpreted as a penal clause agreed by the Parties. As the Club has breached the Private Agreement, and due to what is stipulated under clause 3.F, the Club shall pay the Appellant the amount of EUR 1,700,000 net of any taxes and plus any accrued bonuses until the date of termination. Therefore, the Club must pay the Player the previously mentioned net amount free of any direct or indirect tax in Spain as the Player is considered a Spanish Tax Resident for the fiscal year 2014. The rate to be paid in Spain nowadays is of 51.60% so consequently the gross amount is:

EUR 1,700,000 x 100/48.4 = EUR 3,512,189.06, as shown in the legal opinion issued by the tax expert.

- The CAS award with reference CAS 2006/O/1055 dealt with a similar case with an exact penal clause. In the respective case, the Panel decided to gross up the compensation owed to the Appellants.
- For the amount of EUR 250,000 the gross amount is EUR 421,822.48 at a Spanish tax rate of 40.73%.
- With regard to liquidated damage clauses and their application in different disputes deriving from Article 17 of the FIFA Regulations on the Status and Transfer of Players 2012 (hereinafter referred to as the “RSTP”), the following awards constitute relevant case law: CAS 2009/A/1909, award of 25 January 2010, CAS 2008/A/1568, award of 24 December 2008 and CAS 2007/A/1358, award of 26 May 2008.
- The Panel will observe the principles governing Contractual Swiss Law, which apply to the merits of the present dispute and according to which the content of an agreement may be determined within the legal constraints by the will of the Parties (as provided for in Article 19 of the Swiss Code of Obligations). Article 18 para. 1 of the Swiss Code of Obligations stipulates that the contents of a contract are fundamentally determined by inquiring into the intention of the Parties. Precisely in the present case, the true intention of the Parties when determining the purpose of the agreement was to guarantee certain amounts to the Player should the Club decide to unilaterally, without just cause, breach the Private Agreement and therefore terminate it before its natural term.
- Concerning the default interest, Article 104 of the Swiss Code of Obligations must be applicable as this is constant CAS jurisprudence: *“when a debtor is in default of payment of a money debt, he shall pay thereon 5% interest per annum, irrespective of a lower contractual rate of interest”*. Relevant case law in this regard are: CAS 2012/O/2834; CAS 2006/A/1141; CAS 2004/A/565 & 566.

## **B. Elazigspor**

89. As the Respondent has not submitted any answer within the deadline prescribed by the Code for Sports-related Arbitration, only the arguments submitted orally by Elazigspor at the hearing will be summarized, as follows:

- Swiss law is not applicable to the case at hand.
- The Private Agreement is clear on the fact that a 30-day grace period is applicable in case of two subsequent non-payment of salaries; this was not respected by the Appellant.
- The alleged harassment lasted only two weeks, which would in any circumstances not be enough to allow the Appellant to terminate the Private Agreement with just cause.



- According to the FIFA Commentary to the RSTP, the non-payment of three consecutive monthly salaries may, in certain circumstances, allow a player to terminate his employment contract. This principle is not applicable in the case at hand.
- If the Panel decides that the Respondent is liable to pay the Appellant an amount for breach of contract, the money earned with his new club shall be deducted.
- CAS is not competent to deal with tax issues. The tax amount is abstract at the moment and will not be due before there is a decision from the tax authorities in this regard.

## VII. THE PARTIES' REQUEST FOR RELIEF

90. The Appellant's requests for relief are the following:

*"The Appellant respectfully pleads before the CAS that an award be issued granting the following:*

1. *Abolish the decision of the Dispute Resolution Chamber dated 18 December 2014, (notified in full on 14 April 2015) (Ref. 14-00725/gbo – Player Victor Javier Añino Bermudez (Spain) v. Club Sanica Boru Elazigspor Kulübü (Turkey));*
2. *Accept in full the claim for payment made by the Player against the Club, i.e. for the payment of THREE MILLION FIVE HUNDRED TWELVE THOUSAND ONE HUNDRED AND EIGHTY NINE EUROS WITH SIX CENTS OF EURO (EUR 3,512,189.06)*
3. *Accept in full the claim for payment made by the player against the Club, i.e. for the payment of the accrued bonuses to the date of termination and net of taxes;*
4. *Order the Club to pay – as indemnification for default – applicable interest pursuant to Swiss laws in relation to the amount stipulated in points 2 and 3 above, all of which will be calculated from 8 February 2014 and until the effective payment date.*
5. *Order the Respondent to pay all legal costs and other arbitration expenses.*
6. *Subsidiarily, and should this Hon. Panel reject the Appeal, it must, however consider that the payment of TWO HUNDRED AND FIFTY THOUSAND EUROS (EUR 250,000) derived from the Decision must be considered in net terms and therefore the amount should be of FOUR HUNDRED AND TWENTY ONE THOUSAND EIGHT HUNDRED AND TWENTY TWO EUROS WITH FOURTY EIGHT CENTS OF EURO (EUR 421,822.48)".*

91. The Respondent requested at the hearing that (i) the appeal be dismissed, (ii) the FIFA Decision be confirmed and (iii) the costs of the arbitration be paid by the Appellant.

## VIII. CAS JURISDICTION

92. Pursuant to Article R47 of the CAS Code:

*“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as 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”.*

93. The jurisdiction of the CAS to hear this dispute derives from Articles 66 and 67 of the FIFA Statutes, which state in particular that CAS has jurisdiction to consider appeals against a decision of the FIFA DRC.

94. In particular, Article 67.1 of the FIFA Statutes provides as follows:

*“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by the Confederations, Members or League shall be lodged with CAS within 21 days of notification of the decision in question”.*

95. Signature of the Order of Procedure by the Parties confirmed that the jurisdiction of the CAS in the present case was not disputed.

96. Under Article R57 of the CAS Code, the Panel has the full power to review the facts and the law.

#### **IX. ADMISSIBILITY**

97. The appeal was filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. It complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court office fees.

98. It follows that the appeal is admissible.

#### **X. APPLICABLE LAW**

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

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

100. Article 66 para. 2 of the FIFA Statutes provides “[t]he 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”.

101. Clause 10 of the Private Agreement reads as follows:

*“Due to the international nature of the present agreement, any disputes related to the Private Agreement should be submitted in first instance to the Dispute Resolution Chamber of FIFA and in appeal to the Court of Arbitration for Sport (CAS), both proceedings will follow the Swiss legislation and the FIFA regulations for the merits of the case as well as its own rules about the procedure enforce at the time of any possible dispute. Both parties expressly renounce the submission of any dispute to any other body different from FIFA and the CAS”.*

102. Thus, the Parties have agreed on the application of any Swiss law to the present matter. As a result, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily.

## **XI. MERITS**

103. As seen above, the Appellant considers that he is entitled to be compensated for the amount of EUR 1,700,000, plus taxes, bonuses and interest, for the Respondent's breach of contract, which led him to terminate the Private Agreement with just cause.

104. The Appellant believes that he was entitled to terminate the Private Agreement in view of the accumulation of mistreatments imposed on him by the Respondent, in particular the following:

- The Respondent failed to pay the first two instalments due to him in January and February 2014, representing six months of salaries;
- The Respondent started disciplinary procedures against him without any valid justification; and
- He was “mobbed” by the Respondent.

105. The Respondent argued at the hearing that none of the arguments put forward by the Appellant were sufficient to justify a unilateral termination of the Private Agreement by the Appellant.

106. In order to determine whether the Appellant is entitled to receive a compensation payment from the Respondent for the unilateral termination of the Private Agreement, the Panel must first determine whether one of the above-mentioned elements alone or the overall situation could justify such termination by the Appellant.

### **A. Clause A.3 para. 3 of the Private Agreement**

107. The situation of this particular case is specific as the Parties decided, for tax reasons, that the payments to the Player would start in January 2014, although the Appellant started rendering his services as a professional football player in August 2013.

108. According to clause A.1 of the Private Agreement, the Player was entitled to receive EUR 125,000 on 1 January and 1 February 2014, and then EUR 62,500 on the first day of each month until June 2014.

109. Furthermore, clause A.3 para. 3 reads as follows:

*“In case of non-payment of two consecutive salaries in full or in part, the Player should notify the club in writing. If the **CLUB** should not pay the notified amount in 30 days starting from the due date of the second unpaid salary, then the **PLAYER** shall have the right to unilaterally terminate the **CONTRACT** with just cause”.*

110. It is agreed between the Parties that the Respondent did not pay the first two instalments of EUR 125,000 corresponding to the first six months of salaries due to the Appellant, and that the 30-day grace period stipulated in clause A.3 para. 3 of the Private Agreement had not elapsed before the termination.

111. The Panel therefore agrees with the Respondent and is of the opinion that the Appellant cannot rely on clause A.3 para. 3 of the Private Agreement to justify the termination, although the first two instalments corresponded to six months of salaries.

112. However, the Panel considers that the Respondent, by not paying the first two instalments due in January and February 2014, *i.e.* after having benefited from the Appellant’s services for six months without having spent any money in salary, is a serious breach of the Private Agreement. However, considering what follows, the Panel does not have to decide whether this serious breach of the Private Agreement could alone justify the unilateral termination of the latter.

113. As the Private Agreement does not set forth any other particular grounds allowing one or the other party to unilaterally terminate the contract, the Panel must turn to the regulations and/or law applicable to the present case, *i.e.* the FIFA Regulations and Swiss law as determined above, to determine whether the Appellant had just cause to terminate the Private Agreement.

## **B. FIFA Regulations and Swiss Law**

114. The Appellant refers to the principle *pacta sunt servanda*, according to which, under Swiss law, obligations deriving from contracts which are validly entered into must be executed pursuant to the contract’s term unless the parties consensually adopt a new contractual arrangement (ATF 135 III 1, c. 2.4 = JdT 2011 II 524).

115. Article 14 RSTP provides for the possibility of terminating a contract with just cause as follows:

*“A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause”.*

116. The Commentary on the RSTP states the following with regard to the concept of “just cause”: *“The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally”* (RSTP Commentary, para. 2 to Article 14).

117. The CAS has had the opportunity of specifying in its jurisprudence that while the FIFA rules do not define the concept of “just cause”, reference should be made to the applicable law (CAS 2006/A/1062; CAS 2008/A/1447). When Swiss law applies, as in the particular case, Article 337 para. 2 of the Swiss Code of Obligations provides that “*Any circumstances which, according to the rules of good faith, mean that the party who has given notice of termination cannot be required to continue the employment relationship, shall be deemed good reason*”. The concept of “just cause” as defined in Article 14 RSTP must therefore be likened to that of “good reason” within the meaning of Article 337 para. 2 of the Swiss Code of Obligations (CAS 2013/A/3091, 3092 & 3093, para. 188).
118. The CAS has adopted the jurisprudence of the Swiss Federal Tribunal, according to which an employment contract may be terminated immediately for good reason when the main terms and conditions (either general/objective or specific/personal), under which it was entered into are no longer implemented (CAS 2013/A/3091, 3092 & 3093, para. 189; ATF 101 Ia 545). The Swiss Federal Tribunal stipulates in this regard that the circumstances must be such that, according to the rules of good faith, the party terminating the employment relationship cannot be required to continue it (ATF 101 Ia 545; Judgment 4C.240/2000 of 2 February 2001; Judgment 4C.67/2003 of 5 May 2003; WYLER R., *Droit du travail*, Berne 2002, p. 364; TERCIER P., *Les contrats spéciaux*, Zurich 2003, N 3402, p. 496).
119. The Swiss Federal Tribunal also holds that when immediate termination is at the initiative of the employee, a serious infringement of the employee’s personality rights (Judgment 4C.240/2000 of 2 February 2001), consisting, for example, in unilateral or unexpected change in his status which is not related either to company requirements or to organization of the work or the failings of the employee (Unpublished judgments of October 7, 1992 in SJ 1993 I 370, of November 25, 1985 in SJ 1986 I 300 and of 16 June 1981 in case C.40/81), or even, in certain circumstances, a refusal to pay all or part of the salary (STAEHLIN A., *Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Sub-volume V 2c, Der Arbeitsvertrag*, Article 319-362 Code of Obligations, Zurich 1996, N 27 ad Article 337 CO; BRUNNER/BÜHLER/WAEBER/BUCHÉZ, *Commentary of the employment contract*, Lausanne 2010 N 7 to Article 337 CO), may be deemed “good reason” (CAS 2013/A/3091, 3092 & 3093, para. 190).
120. Finally, according to CAS jurisprudence, only material breaches of a contract can possibly be considered as “just cause” for the termination of the latter (CAS 2013/A/3091, 3092 & 3093, para. 191; CAS 2006/A/1062; CAS 2006/A/1180; CAS 2007/A/1210; CAS 2006/A/1100).

### **C. The non-payment of the Appellant’s salaries and other breaches of the Private Agreement by the Respondent**

121. As seen above, the Appellant cannot rely on the provisions of the Private Agreement to justify the early termination of the latter.
122. However, there is abundant CAS jurisprudence with regard to the non-payment of salaries, in particular with the application of Article 14 RSTP and the “three-month rule”. The non-payment or late payment of a player’s salary by his club may constitute “just cause” for terminating the employment contract (CAS 2013/A/3091, 3092 & 3093, para. 203 ff.; CAS

2006/A/1180; CAS 2008/A/1589; Judgement 4C.240/2000 dated 2 February 2001). In this regard, the CAS specifies:

*“[...] the employer’s payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the later non-payment, is irrelevant. The only relevant criteria is whether the breach of the obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer’s obligation to pay the employee” (CAS 2006/A/1180).*

123. The RSTP Commentary takes the same line: to illustrate the concept of “just cause” it refers to the situation of a player who has not been paid his salary for more than three months, despite having informed his club of its default. In this case, the RSTP Commentary points out that: *“The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned”* (RSTP Commentary, para. 3 to Article 14; CAS 2013/A/3091, 3092 & 3093, para. 203 ff.).
124. As seen above, the Respondent considers that the conditions for the “three-month rule”, as explained in the RSTP Commentary for Article 14, to be applied are not met in the case at hand, as the Respondent was only two months late in its payment to the Appellant.
125. The Panel considers that the “three-month rule” is only an example and other circumstances in case of non-payment of salaries may be taken into consideration. As seen above, all the circumstances of the case must be taken into consideration and the crucial aspect is that *“the circumstances must be such that, according to the rules of good faith, the party terminating the employment relationship cannot be required to continue it”* (*infra* para. 116).
126. In the case at hand, the non-payment of two monthly salaries is not the only issue at stake with regard to the financial aspect of the employment relationship between the Parties.
127. First of all, the Appellant accepted not to be paid for the four first months of his activities, for tax reasons. Whether this decision was taken in favour of the Appellant, the Respondent or both, is not material in the Panel’s opinion. The fact is that the Player rendered his services for this period and expected to be paid for this in January and February 2014. This kind of agreement necessarily requires an important level of trust between the Parties.
128. On 6 January 2014, *i.e.* six days after the first instalment of EUR 125,000 fell due, the Respondent suddenly informed the Appellant that it was facing financial problems and that it would likely not be able to fulfil its financial obligations towards the Appellant. The Panel first notes that the Respondent did not provide any evidence of its financial difficulties. Furthermore, the Panel deems that in any circumstances, these financial problems did not occur from one day to the other, and that the Respondent necessarily had known this fact for a certain period of time. By not having informed the Player earlier, although the latter was performing his sporting activities for the Club without remuneration, the Panel considers that the

Respondent acted in bad faith and that this had necessarily a serious impact on the Appellant's trust towards his employer.

129. Furthermore, when the Appellant put the Respondent in default, the Respondent only stated that he wanted to find an agreement with the Appellant for the termination of the Private Agreement. However, the Appellant demonstrated that the proposals made by the Respondent were not sufficient, considering the terms of the Private Agreement, which set forth in particular in its clause 3.F that in case of unilateral termination by the Club, the basis for the compensation to be paid to the Appellant was EUR 1,700,000.
130. In this connection the Panel points out that the - often repeated – announcement “*we declare that our client reserves all relative legal rights*” whilst citing the contractual provision (for the first time in the letter of 13 January 2014, see above para. 13) constitutes a kind of threat of termination within the meaning of a warning.
131. Furthermore, on 15 January 2014, the Respondent notified the Appellant that it had initiated disciplinary proceedings against him, for alleged misbehaviours. The Appellant contested any grounds for the disciplinary proceedings.
132. The Appellant also demonstrated that he was imposed various sanctions, in particular his downgrade to the second team of the Club and the obligation to train alone for training sessions.
133. The Appellant purports that these sanctions were applied by the Respondent in the sole purpose of pushing him to accept a consensual termination of the Private Agreement, on a disadvantageous basis, and that he was never informed about the detailed motives for the sanctions. The Respondent could not evidence the motives for sanctioning the Appellant.
134. The Panel agrees with CAS jurisprudence that in principle a club may impose sanctions on its players in case of contractual violations. However, the Panel considers that even if a club was in principle allowed to impose a sanction to a player, the club has to demonstrate that it respected the player's basic procedural rights including the player's right to be heard, unless otherwise provided in the employment contract (CAS 2014/A/3864, para. 97 ff.).
135. In the case at hand, the Private Agreement itself does not provide for any provisions with regard to sanctions applicable to misbehaviours or other contractual breach. As seen above, in the course of the hearing, the Respondent requested to file the “disciplinary regulations” which allegedly were part of the Private Agreement. Such request was denied by the Panel for the reasons explained above.
136. The Respondent did not provide any evidence, neither on the facts reproached to the Appellant which could have justified any sanction, nor was the Appellant granted the opportunity to defend himself against the Respondent's allegations of misbehaviour. On the contrary, the Appellant demonstrated that it requested answers on the matter from the Respondent, but was never provided with any satisfactory justification.

137. In view of the above, the Panel considers that the whole circumstances of the case, and the accumulation of facts which permanently altered the trust that the Appellant had put in his employer, lead the Appellant to terminate the Private Agreement for just cause, in accordance with Article 14 RSTP.

#### **D. The compensation**

138. Having determined that the Appellant had just cause to terminate the Private Agreement, the Panel must determine the amount to be paid by the Respondent, as compensation for the breach of contract.

139. In this regard, the Panel deems that it has to answer the following questions:

- a) What is the basic amount for the compensation?
- b) Is there any amount to be paid on the basis of bonuses?
- c) Is it the net or the gross amount to be compensated?
- d) Shall the amount be mitigated?
- e) What is the interest rate and from which date shall it starts to run?

*a What is the basic amount for the compensation?*

140. The Appellant considers that the basis for the payment is the amount stipulated in clause 3.F of the Private Agreement, *i.e.* EUR 1,700,000, corresponding to the amount to be paid by the Respondent as salaries during the whole duration of the Private Agreement.

141. The Respondent deems that (i) if the Panel considers that compensation for breach of contract shall be paid in accordance with Article 17 RSTP, one should mitigate the amount of EUR 1,700,000 with the money earned according to the Appellant's new contract with CD Tenerife, *i.e.* EUR 354,000. Furthermore, the Respondent considers that with regard to the taxes (i) CAS is not competent as tax law is a public matter and (ii) the amount of taxes to be paid has not been determined yet.

142. It therefore appears that the Parties are in agreement that the basis for the determination of the compensation to be paid is EUR 1,700,000, whether on the basis of clause 3.F of the Private Agreement, or of Article 17 RSTP. This amount is therefore to be taken into consideration.

*b Is there any amount to be paid as bonuses?*

143. In its requests for relief, the Appellant in particular asks the Panel to accept "*in full the claim for payment made by the Player against the Club, i.e. for the payment of accrued bonuses to the date of termination and net of taxes*". In the Appeal Brief, the Appellant purports that the amount of bonuses to take into consideration is EUR 16,835.35. The Panel notes that the Appellant did not provide any explanation on the calculation which led to this amount.



144. The Respondent did not address this issue in the course of the hearing.
145. According to constant CAS jurisprudence and Article 8 of the Swiss Civil Code, unless the law provides otherwise, each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence. Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court/tribunal. It is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal (ATF 97 II 216, 218 E. 1; BSK-ZGB/SCHMID/LARDELLI, 4th ed., 2010, Article 8 no. 31; DIKE-ZPO/GLASL, 2011, Article 55 no. 15).
146. The Panel considers that the Appellant failed to meet his burden of proof regarding the determination of the amount to be paid as bonuses by the Respondent. The Appellant in particular did not refer to any provision of the Private Agreement in this regard nor provide the Panel with details of the matches the Player played in to earn such bonuses.
147. The Panel therefore concludes that the Appellant is not entitled to any compensation with regard to alleged due bonuses.

*c Is it the net or the gross amount to be compensated?*

148. The Appellant considers that as the remuneration set forth in the Private Agreement is “net”, he should be compensated with the “gross” amount. He supports his position with reference to CAS 2006/O/1055. In the latter case, the relevant agreements include regulations regarding tax, depending on assumed tax residencies, and explicitly refer to a tax rate of 45% applicable in Spain. In other words, the contract/agreement between the parties itself provides for a special tax rate and serves as the legal basis pursuant to which the gross amount (in relation to a certain net amount) is owed.
149. The Panel adheres with the Appellant’s view because the present case involves a situation which is analogous to the one of said CAS decision – even if in the case at hand the provisions governing the tax issue are not laid down in the Employment Contract in the same explicit manner. However, what is at least explicitly stipulated in clauses 3.A.3, 3.C as well as 3.F of the Private Agreement is a net payment. If the Parties have agreed on the payment of a net remuneration, then taxes are added to the total sum owed.
150. The same applies in the case of a claim for damages when the loss consists in the non-payment of remuneration. In such a case, as long as there is the proper causal connection, the claimant is entitled to compensation for all consequential loss incurred due to the other party’s fault by the wrongful premature termination of the employment relationship. The claim is based on the claimant’s legitimate interest in having the contract fulfilled. The innocent party must be put in the position he/she would have been in had the employment contract continued in effect. In doing so, the contractual notice period (or the end of the contract in the case of contracts for limited periods of time) constitutes the limit in terms of time for calculating the damages claim. The damage is calculated according to the so-called difference method, *i.e.* the difference

between the actual situation that occurred because of the termination and the hypothetical situation without the damaging event of wrongful termination. The damage consists of the loss of remuneration plus all other contractual entitlements such as special bonuses and any remuneration in kind. In calculating damages for loss of earnings, the so-called gross-wage method is to be used, *i.e.* loss is calculated based on the injured party's loss of gross earnings. Any advantages obtained by the injured party on account of the damaging event – for example, by tax reduction – must be taken into account by way of corresponding reduction of the damages. The wrongdoer is entitled to raise as part of his/her defence any points which might reduce the damages in that way (see also RSTP Commentary, para. 2 to Article 17 with reference to CAS 2004/A/587 and Article 337c of the Swiss Code of Obligations).

151. Contrary to CAS 2006/O/1055, in the case at hand, the Private Agreement does not set forth the tax rate applicable at the time. However, the Panel is of the opinion that the Tax/Legal Opinion convincingly demonstrated that the Player had to be considered as a tax resident at the relevant time and that the applicable tax rate was 51,60%. The Respondent did not provide any convincing counterevidence in particular that the tax calculation presented by the Appellant was/is wrong.
152. The Panel is therefore of the opinion that the Player shall be compensated with the “gross” amount, *i.e.* EUR 3,512,189.06.

*d Shall the amount be mitigated?*

153. The Respondent considers that the amount of EUR 354,000 shall be mitigated from the amount to be paid to the Appellant. In this regard, the Respondent refers to clause 3.F of the Private Agreement which states in particular that “*the salary and bones [sic.] earned by the PLAYER form [sic.] the new club for the period between the termination date and expiry date of this Agreement (Reduction Amount) will be deducted from the compensation to be paid by the CLUB as calculated above and CLUB has a right to claim back this Reduction Amount from the Player before the judicial bodies*”.
154. The Respondent has demonstrated that the total amount of salary/bonuses due to the Player until 30 June 2016 under the employment contract with CD Tenerife is (correctly calculated) EUR 354,800 gross. This is at least the amount which is presently known based on the documents handed in by the Respondent. The Appellant did not provide convincing evidence that this calculation made by the Respondent was not accurate. If any changes regarding the aforementioned remuneration will occur until 30 June 2016 Respondent is entitled to have the calculation of lost profits corrected pursuant to the Private Agreement (cf. clause 3.A.3 at the end).
155. In view of the above, the Panel considers that the amount of EUR 354,800 gross, which corresponds to the amount due as remuneration to the Appellant according to the employment contract with his new club, shall be deducted from the (gross) amount to be awarded to the Appellant for breach of the Private Agreement.

*e* What is the interest rate and from which date shall it start to run?

156. The Appellant considers that an interest of 5% per annum shall be applied to the amount of compensation awarded, starting to run on the date of the termination, *i.e.* 8 February 2014.
157. According to CAS jurisprudence and Swiss law, the interest rate is to be determined, when the Parties did not agree in this respect, in accordance with Articles 102 et seq. of the Swiss Code of Obligations and therefore be fixed in 5% per annum from the date of the agreement's termination (CAS 2010/O/2132, para. 23).
158. The Panel therefore considers that the interest rate to be applied in the present case is 5% per annum, and that the starting point for the calculation is the date of the termination of the Private Agreement, *i.e.* 8 February 2014.

## **XII. CONCLUSION**

159. In light of the above, the Panel considers that the Respondent, by (i) not paying the Appellant's agreed remuneration for the first six months of his activity in January and February 2014, (ii) initiating unjustified disciplinary procedure against the Appellant and (iii) mistreating the latter in order to oblige him to accept a disadvantageous mutual agreement on the termination of the Private Agreement, seriously breached the latter, which allowed the Appellant to terminate the Private Agreement with just cause, on 8 February 2014.
160. Furthermore, the Appellant did not meet his burden of proof with regard to the compensation for alleged due bonuses.
161. As to the amount of compensation and the issue of the taxes, the Panel considers that the Appellant provided convincing evidence demonstrating that the amount to be awarded to the Player as compensation had to include the tax rate of 51,60%, *i.e.* EUR 3,512,189.06.
162. The monies earned by the Appellant according to the employment contract with CD Tenerife until the day upon which the contract between the Parties would have ended without prior termination, 31 June 2016 (*i.e.* EUR 354,800), shall be deducted from the compensation amount awarded to the Appellant (*i.e.* EUR 3,512,189.06).
163. An interest of 5% per annum shall be added to the sum, starting to run at the date of the termination of the Private Agreement, *i.e.* on 8 February 2014.
164. The appeal is therefore partially upheld.

## ON THESE GROUNDS

**The Court of Arbitration for Sport hereby rules:**

1. The appeal filed by Mr. Victor Javier Añino Bermudez is partially upheld.
  2. The decision of the FIFA Dispute Resolution Chamber rendered on 18 December 2014 is annulled.
  3. Club Elazigspor Kulübü is ordered to pay to Mr. Victor Javier Añino Bermudez the amount of EUR 3,157,389.06 plus 5% interest per annum on said amount as of 8 February 2014 until the effective date of payment.
- (...)
6. All other prayers for relief are dismissed.