Arbitration CAS 2008/A/1448 S. & Zamalek SC v. PAOK FC & FIFA, award of 25 June 2008

Panel: Mr Lars Hilliger (Denmark), President; Prof. Luigi Fumagalli (Italy); Mr Pantelis Dedes (Greece)

Football
Unilateral termination of the employment contract without just cause
Fate of the counterclaim in case of non-payment of the advance of costs
Late payments of the remunerations
Impossibility of performance
Amount of the compensation for damages
Sporting sanctions
Material scope of the definition of "Official Matches"

1. **Reference to the counterclaim is *expressis verbis* provided in Article R64.2 of the Code of Sports-related Arbitration; no other conclusion can be drawn from this provision than that a counterclaim shall be deemed withdrawn in case of non-payment of the advance of costs by the Respondent/Counterclaimant.**

2. **If a player has not made any complaints regarding the late payment of his salaries nor demonstrated how this affected his situation to a point where he could not be expected to remain in a contractual relationship with his club, he appears to have accepted such practice and does not have a just cause to terminate the labour contract on the basis of it.**

3. **Impossibility of performance (Art. 119 of the Swiss Code of Obligations) may qualify as a reason to void a contract or to terminate it without consequences for any of the contracting parties, in case the following two criteria are met: a) the impossibility must be unforeseen and b) the debtor shall not be responsible for the impossibility. Neither of these two criteria is met in the case of a player perfectly knowing that he can be called to serve the obligatory military service in his country but nevertheless taking the decision to visit it while playing for a club in a foreign country.**

4. **When the counterclaim of a party has been deemed withdrawn for non-payment of the advance of costs, the principle of *non reformatio in pejus* incorporated in Swiss law does not give the authority to a CAS panel to adjudicate to this party an amount of compensation for damages higher than that decided by the previous adjudicating body.**

5. **When deciding upon the duration of the sporting sanction provided by Art. 17 para. 3 of the FIFA Regulations, a repeated offence is to be regarded as an aggravating circumstance.**

6. In view of the Definitions of the FIFA Regulations, matches between national teams shall be also considered Official Matches, played in the framework of Organised Football.

S. ("the Player") is an Egyptian professional football player. He was born in 1986 in Egypt.

Zamalek Sporting Club ("Zamalek") is a football club affiliated to the Egyptian Football Association (EFA), which in turn is a member of FIFA.

PAOK Football Club ("PAOK") is a football club affiliated to the Hellenic Football Federation, which in turn is a member of FIFA.

The Fédération Internationale de Football Association (FIFA) is the world governing body for the sport of football and is registered in Zurich, Switzerland.

On 10 January 2005 the Player signed an employment contract with PAOK valid until 31 December 2008 (the "Contract").

The Contract stipulated the following payments:

- A monthly salary of EUR 800 and a Christmas bonus (one salary), an Easter bonus (half a salary) and a vacation bonus (half a salary);
- Special bonuses in accordance with PAOK's internal regulations;
- Other amenities (house, car etc.) including two flight tickets to Egypt per year;
- The total sum of EUR 1,015,228.48 payable in 20 instalments which would start on 30 January 2005 and finish on 30 September 2008.

Further, para. 2 of the Annex provided that the Contract *"is valid as soon as the Egyptian Football Federation will send the International Transfer certificate of the Player to the Greek Football Federation"*.

On 18 February 2005, the Single Judge of the FIFA Player's Status Committee rejected HFF's request to provisionally register the Player with PAOK, in view of the fact that Zamalek had presented a copy of an employment contract with the Player, indicating a period of validity until the 2005-06 season.

On 11 March 2005, the FIFA Dispute Resolution Chamber (DRC) issued a decision on a claim that had been presented by Zamalek against the Player and PAOK. The DRC *inter alia* decided that:

- The Player had committed a unilateral breach of the employment contract without just cause;
- The Player should pay to Zamalek the amount of USD 250,000 as compensation for breach of contract;
- If the above sum was not paid within 30 days of notification of the decision, PAOK should be deemed jointly responsible for payment of the amount of compensation;

- The Player would be authorised to register with PAOK but he would not be eligible to participate in any official football matches during a four months' period of time as of notification of the decision.

By facsimile dated 22 March 2005, FIFA notified the decision of the DRC with reasons to the parties. The parties did not exercise their right to appeal the decision to the Court of Arbitration for Sport (CAS).

The Player arrived in Greece on 12 April 2005. On 10 May 2005 the Player and PAOK signed an agreement titled "Amendment of the Contract" (the "Amendment"). The Amendment included the following amended provision regarding the financial terms of the contract:

> *"…the financial terms of the contract signed on 10.1.2005.*
>
> *CONTRACT INSTALMENTS : FC PAOK will pay the player for his services the total amount of 831.218,32 euros in 20 instalments as follows :*
>
> *1. Amount 25.380,71 Euros On 14.04.2005*
>
> *2. Amount 31.725,89 Euros On 15.04.2005*
>
> *3. Amount 31.725,89 Euros On 15.05.2005*
>
> *4. Amount 38.071,07 Euros On 30.08.2005*
>
> *[…]*
>
> *20. Amount 38.071,07 Euros On 30.09.2008".*

By letter dated 18 July 2005 PAOK informed FIFA that it had paid the amount of USD 250,000 to Zamalek, according to the decision of the DRC. PAOK's payment of this amount is undisputed during the case.

On 14 April 2006 the Player left for a 10-day holiday in his country of origin with the authorisation of PAOK. When the 10 days had elapsed, the Player did not return to Greece and PAOK informed FIFA about this fact by letter dated 4 May 2005.

At the time of the Player's departure to Egypt in mid-April 2006 the Player had participated in 27 matches of the Greek Championship, 1 match of the Greek Cup and 4 matches of the UEFA Cup. He had received from PAOK a total amount of EUR 290,316.59 in salaries, bonuses and contract instalments.

Shortly after his arrival in Egypt the Player was informed that he was called to serve the military service. In accordance with mandatory Egyptian Law, he was then obliged to stay in his country for 3 years. In addition, the Player was accused and condemned for desertion by the authorities of his country. As a result, he was imprisoned for a period of thirty days sometime between April and July 2007 in the El Gabal El Ahmar Military Camp.

Based on the Player's absence, PAOK decided to suspend the Player's contract for four months, starting from 8 May 2006; such suspension was ratified by the decision No. 498/19-06-2006 of the Greek League's Financial Dispute Resolution Chamber.

On 10 August 2006 the EFA wrote to the HFF requesting the International Transfer Certificate (ITC) for the Player, stating that "one of our Egyptian football clubs is interested to register the player". PAOK objected to the issuance of the ITC invoking the existence of the Contract.

On 14 August 2006 the Player wrote to PAOK explaining the reasons of his absence and his desire to play football in Egypt for the club Al Ahly during the 3-year period of military service.

By letter of the same day, the Player represented by his agent informed FIFA through the EFA about the facts relating to his military service and specifically that he had joined the Egyptian army for the period 29 July 2006 – 1 November 2009. The Player requested FIFA's assistance to terminate his contract with PAOK based on *force majeure*. On 6 September 2006 the Player decided to withdraw this request for assistance to terminate his contract, of which FIFA was informed on the same day by EFA.

On 16 September 2006 the Player declared towards EFA, FIFA and PAOK his will to play for Zamalek during the 2006-07 season and then return to PAOK.

In response to the above correspondence, by letter dated 19 September 2006 Mr Omar Ongaro, Head of Players' Status of FIFA, acknowledged the withdrawal of the Player's request and furthermore stated that: *"[…] from the documentation at our disposal, it appears that an employment contract still exists between the player [S.] and the club FC Paok which, as a general rule, both parties need to respect until its expiration, in accordance with the article 13 of the FIFA Regulations for the Status and Transfer of Players".*

In the meantime, by letter dated 10 September 2006 Zamalek submitted to PAOK a proposal to pay EUR 100,000 for a 1-year loan of the Player. PAOK rejected this proposal on 12 September 2006. However, Zamalek renewed its proposal on 25 September 2006 and invited on 4 October 2006 PAOK's representatives to Cairo to negotiate and conclude a loan agreement.

On 6 November 2006 the Player wrote to PAOK stating *inter alia*:

> *"[…] since my first desire is to continue playing with PAOK club team which I feel honored to play with specially due to it's great fans […] please help me with my military drafting by contacting the officials in the Egyptian Army […] so I can come back to play for PAOK club. […] But in case the officials in the Egyptian Army havent's (sic) agreed on postponing my military service I hope that me and Zamalek club and you can reach an agreement that can preserve both my rights and PAOK club rights […]".*

On 30 November 2006 the Player and Zamalek signed an employment contract valid as from 1 January 2007 until 30 December 2011.

On 27 February 2007 the Single Judge of the FIFA Player's Status Committee (the "Single Judge") authorized the EFA to provisionally register the Player with Zamalek.

On 22 March 2007 PAOK lodged a complaint at FIFA claiming that the Player breached the contract without just cause within the protected period and that Zamalek induced the Player to breach the contract.

On 2 November 2007 the FIFA DRC issued a decision ("the Decision") whereby it partially admitted PAOK's claim. The DRC held that the Player had breached the contract with PAOK without just cause, and that he was therefore liable to pay the Greek club compensation in the amount of EUR 990,000. It further imposed a restriction of six months on his eligibility to play in official matches (the "restriction"). Zamalek was declared jointly and severally responsible for the payment of the compensation to PAOK.

By facsimile dated 13 December 2007, FIFA notified the Decision with reasons to the parties.

By letter dated 31 December 2007 and received by CAS on 2 January 2008 the Appellants filed a Statement of Appeal with CAS against the Decision. Together with the statement of appeal the Appellants filed an application for a stay of execution of the Decision.

By letter dated 11 January 2008 the Appellants filed their Appeal Brief and required from CAS the following:

I. To fully accept the present appeal and, as consequence, to completely set aside the challenged FIFA DRC Decision.

II. To establish that the Respondent 1 breached the employment contract entered with the Appellant 1 without just cause during the "protected period".

III. To establish that the Respondent 1 shall pay to the Appellant the outstanding amount as well as a financial compensation for a total amount of EUR 334,030.13/-.

IV. To sanction the Respondent 1 for the breach of contract without just cause during the protected period with a ban on registering new players during two registration periods, in accordance with Article 17 par. 4 of the FIFA Regulations for the Status and Transfer of Players.

V. For the effect of the above, to state that both the Respondents be condemned to pay pro-quota any and all costs of the present Appeal Arbitration Proceedings including, without limitation, attorney's fee as well as any eventual other costs and expenses.

Only in the case that the above is rejected

VI. To partially accept the present appeal and, as consequence, to completely set aside the challenged FIFA DRC decision.

VII. To establish that the Appellant 1 unilaterally terminated the employment contract entered with the Respondent 1 with a just cause.

VIII. For the effect of the above, to state that both the Respondents be condemned to pay pro-quota any and all costs of the present Appeal Arbitration Proceedings including, without limitation, attorney's fee as well as any eventual other costs and expenses.

On 14 January 2008 the Respondents filed their Answers to the request for stay of execution.

On 7 February 2008 the Panel issued a Preliminary Decision whereby it pronounced the following:

"1. The application by S. and Zamalek Sporting Club to stay the decision issued on 2 November 2007 by the FIFA Dispute Resolution Chamber is allowed.

2. The costs deriving from the present order will be determined in the final award on the merits".

On 7 February 2008 PAOK filed its Answer, which also contained a counterclaim, and submitted the following requests to the CAS:

"To dismiss the appeal of the appellants.

To accept the counterclaim of FC PAOK for the sum of 4.000.000 Euros and to force S. and Zamalek FC in accordance with article 17 par. 2 of the Regulations for the Status and Transfer of Players to pay to jointly and severably PAOK the sum of 4.000.000 Euros.

To impose on Zamalek FC a ban on registering any new players, nationally or internationally, for two Registration Periods, according to art. 17 paragraph 4.

To order payment by the appellants of all costs of the arbitration".

By letter dated 11 February 2008 FIFA filed its Answer and submitted the following requests to the CAS:

"1. To reject the present appeal as to the substance and to confirm, in its entirety, the decision passed by the Dispute Resolution Chamber on 2 November 2007.

2. To order the Appellants to bear all costs incurred with the present procedure.

3. To order the Appellants to cover all legal expenses of the second Respondent related to the present procedure."

A hearing was held in Lausanne on 7 April 2008.

LAW

Jurisdiction

1. Article R47 of the Code of Sports-related Arbitration (the "CAS Code") states:

"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".

2. Article 61 para. 3 of the FIFA Statutes provides the following:

"CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made".

3. The jurisdiction of the CAS has been explicitly recognised by the Appellants and by FIFA in their briefs and in the Order of procedure they have signed.

4. In its Answer PAOK, despite submitting that "the jurisdiction of the C.A.S. is not in dispute in the present case" subsequently objected the jurisdiction of CAS regarding the issue of the period of ineligibility imposed on the Player. Counsel for PAOK maintained this position during the hearing but provided no grounds for this objection. The Panel is of the opinion that the FIFA Statutes provide under Article 61 para.3 (b) a clear indication of cases where CAS would not deal with an appeal arising from a suspension imposed by a FIFA body: a suspension of *up to* three months. In the present case, though, the FIFA DRC imposed a suspension of *six* months on the Player and the latter has decided to challenge such decision before CAS.

5. It follows that the CAS has jurisdiction to decide on every legal aspect in the present dispute.

Applicable law

6. 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".

7. Article 60 para. 2 of the FIFA Statutes provides 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".

8. The Panel does not find any evidence that the parties have agreed on the application of any specific national law. It is comforted in its position by the fact that, in their respective submissions, the parties refer exclusively to FIFA's regulations. As a result, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply complementarily.

9. The case at hand was submitted to the FIFA Dispute Resolution Chamber after 1 July 2005, i.e. the date when the Regulations for Status and Transfer of Players (edition 2005) came into force. Article 26 paras. 1 and 2 of the said revised Regulations stipulates the following:

"1. Any case that has been brought to FIFA before these Regulations come into force shall be assessed according to the previous regulations.

2. As a general rule, all other cases shall be assessed according to these Regulations, with the exception of the following.

a. Disputes regarding training compensation
b. Disputes regarding the solidarity mechanisms
c. Labour disputes relating to contracts signed before 1 September 2001.

Any case not subject to this general rule shall be assessed in accordance with the Regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose".

(emphasis added by the Panel)

10. The dispute at stake involves contracts signed on 10 January and 10 May 2005, thus after 1 September 2001 and before 1 July 2005. The Player left PAOK in April 2006, whereas the Player's contract with Zamalek was concluded on 30 November 2006. Furthermore, the dispute was brought to FIFA by PAOK on 22 March 2007. In view of the above quoted provision the Regulations for the Status and Transfer of Players, edition 2005 (the "FIFA Regulations") shall govern this dispute.

Admissibility

The Appeal

11. The appeal was filed on 2 January 2008, in accordance with the 21-day time limit stipulated in Art. 61 para.1 of the FIFA Statutes and stated in the Decision of the FIFA Dispute Resolution Chamber. It complied with all other requirements of article R48 of the Code.

12. It follows that the appeal is admissible.

The Counterclaim

13. Article R64.2 of the CAS Code states:

"Upon formation of the Panel, the Court Office shall fix, subject to later changes, the amount and the method of payment of the advance of costs. The filing of a counterclaim or a new claim shall result in the calculation of separate advances.

To determine the amount to be paid in advance, the Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant and the Respondent. If a party fails to pay its share, the other may substitute for it; in case of non-payment, the request/appeal shall be deemed withdrawn; this provision shall also apply to any counterclaim".

(emphasis added by the Panel)

14. Furthermore, the Order of Procedure which has been signed by all parties provides:

"11.2 The Appellants paid all shares of the advances of costs.

11.3 Furthermore, Art. R64.2 para. 2 of the Code shall apply".

15. PAOK filed its counterclaim together with its Answer, on 5 February 2008. A week later, by letter dated 12 February 2008 the CAS Court Office reminded the parties that they had to pay their share of the advances of costs, otherwise *"Art. R64.2 of the Code of Sports-related Arbitration will apply"*. PAOK through his counsel responded to CAS the same day declaring that it could not pay its share and that this share "*must be paid by the Appellants"*. During the hearing PAOK submitted that it had never been requested to pay any costs after it filed its counterclaim. It is evident from the above correspondence and the quoted provisions that PAOK had been reminded of his procedural *onus* to pay an advance on costs even after filing its Answer, which contained the counterclaim. Reference to the counterclaim is *expressis verbis* provided in Article R64.2; no other conclusion could be drawn from this provision than that a counterclaim shall be deemed withdrawn in case of non-payment of the advance on costs by the Respondent/Counterclaimant.

16. Therefore, PAOK's counterclaim shall be deemed withdrawn.

Witness N.

17. Article R55 of the Code states:

"Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS an answer containing: […]

- *any exhibits or specification of other evidence upon which the Respondent intends to rely, including the names of the witnesses and experts whom he intends to call; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise".*

18. Article R56 of the Code provides the following:

"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer".

19. In its Answer, PAOK did not name any witnesses neither filed with CAS any witness statements. By letter dated 25 March 2008, PAOK informed the CAS about the persons who would attend the hearing, stating *inter alia* that it *"intends to call as witness N."*. The Appellants objected to the examination of the said witness at the moment of signing the Order of Procedure as well as at the outset of the hearing, considering that the witness had not been named in accordance with Art. R55 of the CAS Code.

20. Counsel for PAOK did not provide any explanation for the late nomination of the witness and merely indicated that the witness is a travel agent who would testify only in relation to the Player's market value. The Panel pointed out PAOK's obligation, being the Respondent in this case, to include in its Answer *"the names of the witnesses and experts whom he intends to call"* as per Article R55 of the CAS Code. Therefore, and in the absence of any exceptional circumstances,

the Panel unanimously decided that the nomination of the witness was belated. With the consent of the parties, though, the Panel allowed the witness to remain in the hearing room.

Merits

21. At the centre of the present proceedings are two questions: firstly, whether the Appellant or the Respondent committed a breach of the Contract (*see* A. and B. below) and secondly what the consequences thereof are (*see* C. below).

A. Did the Player have a just cause to terminate the labour contact on the basis of non-payments and/or late payments by PAOK?

22. The Player submits that the non-payment of two instalments (30 January 2005 and 30 March 2005 – the "disputed instalments") and the fact that PAOK was always paying him without respecting the amounts or the exact dates prescribed in the employment contract constitute a just cause to terminate the contract. Therefore, when the Player left Greece in 14 April 2006 *"he was entitled to consider its (sic) contractual relationship with PAOK FC legitimately terminated"*.

23. Firstly, the Panel wishes to note that it has not been documented that the Player ever served a notice of termination to PAOK or in any other way declared to PAOK his will to terminate the Contract on the basis of late payments. On the contrary, he had received an authorization to travel to his country for 10 days of vacation and he did not return.

24. Furthermore, the Panel notes that the disputed instalments cover the initial period (January – March 2005) of the Contract, when the Player was not rendering his services to PAOK. In a recent case (CAS 2006/A/1141, p. 20) the CAS ruled as follows:

"As a general rule, obligations under a labour contract are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. With this respect, article 82 of the Swiss Code of Obligation provides that «A party who wishes to demand performance of a bilateral contract by the other party must either have already performed himself or tender his performance, unless pursuant to the contents or the nature of the contract he is only required to perform later»".

In the above case the Panel was of the opinion that, since the player was in a default situation himself, it was proper for the Club to withhold the payment of overdue salaries, at least until the situation was settled.

In the present case, the Player and PAOK had agreed in the Annex of the Contract that the Contract will be *"valid as soon as the Egyptian Football Federation will send the International Transfer certificate"*. Despite that, PAOK paid the Player EUR 20,000 on 4 January 2005 as an *"advance of the first instalment of his contract"*. After EFA's refusal to issue an ITC, PAOK through the HFF requested FIFA's authorisation to register the Player; on 18 February 2008 the Single Judge rejected said request because *"the contractual situation of the player needs being verified first"*.

As a result, PAOK was not paying the aforementioned instalments to the Player while the latter was not performing his services and remained in Egypt. Also, the Player was not complaining for the delay in payment. It is therefore evident that, under these circumstances and in anticipation of the DRC's decision about the future employer of the Player, PAOK was entitled to withhold the payment of the disputed instalments. For this reason alone, any failure to pay said instalments cannot be claimed to any substantial effect as reason for the alleged default on payment.

25. The parties are in dispute about the meaning of the Amendment, signed on 10 May 2005, shortly after the Player's arrival in Greece. The Amendment concerns exclusively the *"financial terms of the contract signed on 10.1.2005"* and provides for a new schedule of payments, starting from 14 April 2005. It is necessary for this Panel to construe the Amendment on the basis of its wording and the true will of the parties (Article 18 of the Swiss Code of Obligations). The Panel is of the opinion that with the Amendment the Player and PAOK agreed to substitute *all* the payments contained in the Contract, including the disputed instalments, with a new schedule of payments. The Panel reached such conclusion based on the following reasons:

(a) the *total amount* of the instalments was decreased from EUR 1,015,228.48 to EUR 831,218.32 and the difference of EUR 184,010.16 was approximately equal to the amount of USD 250,000 i.e. the amount of compensation that PAOK and the Player had to pay to Zamalek. Indeed PAOK paid the said compensation in July 2005. Given that the DRC decision was notified in the period between the Contract and the Amendment, it shall be considered as a *novum* that justifies the parties' decision to amend the Contract's financial terms only 4 months after its conclusion;

(b) the *number* of instalments is also 20 while the first two of them are dated back to the days of the Player's arrival in Greece (14 and 15 April 2005), when he actually started to perform his services;

(c) the *dates* of the instalments in the Contract and in the Amendment are the same, except for the disputed instalments (14.04.2005 instead of 30.01.2005; 15.04.2005 instead of 30.03.2005) and an insignificant variation in favour of the Player in the date of the third instalment (15.05.2005 instead of 30.05.2005).

Aside from the disputed instalments, the Player does not specify any other payments, salaries or bonuses which were due by mid-April 2006. Thus, in April 2006 PAOK did not owe to the Player any payments from the employment contract.

26. Further, the Player supplements his argument by presenting PAOK's consistent failure to pay the agreed amounts on the agreed dates.

In this respect the Panel notes that the Player has not demonstrated that he made any complaints regarding late payment of his salaries nor how this affected his situation to a point where he could not be expected to remain in a contractual relationship with PAOK (cf. CAS

2006/A/1180, p. 22 *et seq*.). From the beginning of his relationship with PAOK, the majority of payments were made with delay. The Player was aware of this situation and did not contest it. He appears to have accepted such practice.

Also, the Player acknowledges that he first mentioned the non-payment in April *2007* because he did not want to provoke PAOK while being absent from the team's functions. However, the Player provided no explanation why the alleged non-payment of two instalments in spring 2005 would give rise to a legitimate termination of contract in spring 2006.

Therefore, the Player not only failed to send a notice of termination to PAOK, but also chose not to send even a warning that such a contractual behaviour was not acceptable.

27. Consequently, the Panel is convinced that the Player did not have a just cause to terminate the labour contract on the basis of non-payments and/or late payments by PAOK.

B. Did the Player have a just cause to terminate the labour contact on the basis of "impossibility of performance"?

28. In his submissions before the Single Judge and the DRC, the Player contended that he had to terminate the contract due to *force majeure*, because he was arrested upon arrival in Egypt and had been obliged by the Egyptian authorities to join the army for a period of three years, without being able to travel abroad. Such argument was dismissed by the DRC. In the present proceedings the Player claimed that the same facts fall under the notion of subsequent "impossibility of performance" which constitutes a just cause to terminate (or even void) an employment contract.

29. The Player submitted in his appeal brief and accepted during the hearing that the "impossibility of performance" (either as a generally recognised principle of civil law or as provided in Art. 119 of the Swiss Code of Obligations) may qualify as a reason to void a contract or to terminate it without consequences for any of the contracting parties, in case the following two criteria are met: a) the impossibility must be unforeseen and b) the debtor shall not be responsible for the impossibility.

30. In the present case, the Panel finds that neither of these two criteria is met. The military service in Egypt is obligatory for all men between the age of 19 and 30 and has a maximum duration of three years, during which it is prohibited to travel abroad. The Player, a 19-year old Egyptian citizen, could not (and should not) be unaware of such an obligation towards his country at the moment that he signed the Contract with PAOK. Despite that, the Contract contained the following clause: *"5. Other amenities […] 2 plain* (sic) *tickets to Egypt per year, economy class"*.

Also, and given that the Player was not present at the hearing, the Panel may not disregard the Player's declaration in his appeal brief (p. 22) that he *"perfectly knew that he could have been called to serve the military service; however, he was absolutely confident that he would receive an exception according to Art. 37 of the Law no. 127/1980, due to his particular status of professional football player, who was playing abroad"*. The Player's counsel did not provide any further explanation or legal argumentation

that could justify such an "absolute confidence". Thus, the Player by visiting Egypt in April 2006 acted at least negligently, in that he accepted the risk of being retained for not having served the military service.

This having been said, although it may be true that the Player against his will joined the army in July 2006, the Panel concludes that the triggering element for the "impossibility of performance" was undoubtedly the Player's negligent decision to visit his country.

31. Therefore, the Panel disagrees with the Player's submission and finds that the Player did not have a just cause to terminate the labour contract on the basis of "impossibility of performance".

32. The Player has failed in both his contentions regarding his early termination of the employment contract with PAOK and shall therefore be considered liable for the breach of contract.

C. Consequences for the breach of contract

33. In case of breach of contract, the FIFA Regulations provide for financial compensation as well as sporting sanctions.

a) Financial Compensation

34. Article 17 para. 1 of the FIFA Regulations provides as follows:

"The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period".

35. The Panel notes that the above criteria were also mentioned in the Decision, so far as they were relevant, but the DRC did not provide any specific analysis or calculation on how it determined the compensation to the amount of EUR 990,000. The DRC limited itself to the characterisation as a *"reasonable and justifiable amount"* which resembled to an *ex aequo et bono* judgment.

36. Given that the issue of compensation has been dealt with by numerous CAS Panels, the present Panel also notes that, according to article R58 of the CAS Code, the CAS has full power to review both the facts and the law of the case; there is no binding authority of precedent (CAS *96/149*, CAS Digest I, 251, 258-259).

37. The Panel has to consider a variety of parameters in order to calculate the compensation to be paid to PAOK, using as a starting point the above provision. Firstly, PAOK paid on 18 July 2005 to Zamalek the amount of USD 250,000 [approx. EUR 184,010.16, see above para. 25(a)] as compensation for the breach of contract determined by the DRC. For the purposes of article 17 para.1, such compensation may be calculated as a transfer fee, because it reflects an expense incurred by PAOK for the (even illegal) move of the Player from Zamalek to PAOK. This fee has been amortised to 1/3, since the Contract functioned for 16 out of a total of 48 months. Therefore, by terminating prematurely the labour contract, the Player did not allow PAOK to amortize the entire cost of its investment, causing therefore a financial damage to PAOK of EUR 122.550,73 (=184,010.16 x 66.66%).

Further, due to the termination of the Contract by the Player, PAOK was deprived of his legitimate expectation to receive a fee for the transfer of the Player to another club. In this connection, the Panel assumes that in the actual case PAOK would probably have received one or more attractive transfer offers regarding the Player prior to the expiry of the Player's contract and that PAOK would probably have accepted one of these offers together with a not insignificant transfer fee. The expected size of such transfer fee has not been documented or rendered probable to the Panel during the case. The only "evidence" produced by the parties in this respect is the Player's remuneration under the new contract (EUR 525,000 for 5 seasons) and the similar Zamalek's offer to PAOK for the Player's loan (EUR 100,000 for 1 season). The Panel considers that such amounts shall not be taken into account since they were not determined under free negotiation conditions: the Player had already started the military service and could not leave the country, so that he had to select an employer among a very restricted number of clubs. Failing convincing evidence consisting in offers from other clubs, and/or indication of actual increases in the value of the player in the period after the signature of the contract and up to the moment of the breach, the Panel considers the Player to have a value at least corresponding to the cost for the Player's transfer to PAOK (EUR 184,010.16) plus the total remuneration under the existing contract (EUR 870,418.32), amounting totally to EUR 1,054,028.48. Had the total remuneration under a new contract amounted to more than this, the Panel would in a situation like the present have used this higher amount in its calculations.

The parties – and especially PAOK – provided no further admissible or plausible evidence regarding the issue of compensation, e.g. any expenses incurred by PAOK to replace the Player, a specific offer by another club to transfer the Player etc.

The fact that the breach took place during the protected period shall not be *in casu* considered an aggravating circumstance when determining the compensation, in view of the Player's inability to return to Greece due to domestic legislation. The sporting sanctions should suffice in this respect.

Therefore, in application of the relevant criteria, as interpreted and applied *in concreto* by the Panel, the Player should pay to PAOK the amount of EUR 1,176,579.21 (= 122,550.73 + 1,054,028.48) as compensation for the breach of contract. However, in view of the fact that PAOK's Counterclaim shall be deemed withdrawn for the reasons mentioned above (paras. 13

– 16), the principle of *non reformatio in pejus* as incorporated in Swiss law (cf. CAS 2002/A/432, CAS Digest III, pp. 428-429) shall apply in the present case.

Consequently, the Panel does not consider itself to have the authority to adjudicate in favour of PAOK an amount higher than that decided by the DRC, i.e. EUR 990,000.

38. Article 17 para. 2 of the FIFA Regulations provides as follows:

"Entitlement to compensation cannot be assigned to a third party. If a Professional is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties".

It follows that Zamalek shall be held jointly and severally liable for the payment of the abovementioned amount to PAOK.

b) Sporting sanctions

39. Article 17 paras. 3 and 4 of the FIFA Regulations provide as follows:

"In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period. This sanction shall be a restriction of four months on his eligibility to play in Official Matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following Season of the New Club. Unilateral breach without just cause or sporting just cause after the Protected Period will not result in sporting sanctions. Disciplinary measures may, however, be imposed outside of the Protected Period for failure to give due notice of termination (i.e. within fifteen days following the last match of the Season).

The Protected Period starts again when, while renewing the contract, the duration of the previous contract is extended. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the Protected Period. It shall be presumed, unless established to the contrary, that any club signing a Professional who has terminated his contract without just cause has induced that Professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two Registration Periods".

It is not disputed that the Player terminated the Contract during the protected period. The Player submits that the notion of "aggravating circumstances" does not contain and must be differentiated from a repeated offence. The Panel notes that on two occasions and within a time period of less than 18 months a 21-year old Player has shown remarkable disrespect towards one of the main principles of professional football: contractual stability. The Panel disagrees with the Player's submission and finds that a repeated offence is to be regarded as aggravating circumstance.

Consequently, the suspension of six months must be confirmed, less any period already served by the Player, i.e. from 13 December 2007 until 7 February 2008.

40. On the other hand, it is evident from the facts presented to the Panel that Zamalek had no active role in the Player's decisions that lead to a termination of contract for unjust cause. Indeed, after the Player joined the army, he had first informed PAOK of his will to play for the club Al Ahly without making any reference to Zamalek. Zamalek was for the first time openly involved in this case in early September 2006 and signed the contract with the Player in November 2006. There is no evidence that Zamalek had contacted the Player earlier.

    Therefore, Zamalek did not induce the Player to breach the contract and no sporting sanction shall be imposed on Zamalek.

41. Considering the above, the Panel is of the opinion that there are no sufficient grounds that would merit the change of the sporting sanctions either, which remain intact.

42. The Player submits that the sanction, if any, which applies according to Art. 17 "in Official Matches", shall not apply to matches of his national team.

    The Definitions of the FIFA Regulations provide the following:

    "5. Official Matches: matches played in the framework of Organised Football, such as national league championships, national cups and international championships for clubs, but not including friendly and trial matches.

    6. Organised Football: association football organised under the auspices of FIFA, the confederations and the Associations, or authorised by them".

    In view of the aforementioned definitions, matches between national teams shall be also considered Official Matches, played in the framework of Organised Football. The Panel finds that the wording of the definition of an "Official Match", where the phrase *"such as"* is followed by a list of match-categories, contains a rather indicative and not limited list of Official Matches. Furthermore, neither of the two definitions excludes matches between representative teams of associations, organized under the auspices of FIFA (e.g. FIFA World Cup) or a Confederation (e.g. Africa Cup of Nations by CAF).

The Court of Arbitration for Sport rules:

1. The appeal filed on 2 January 2008 by S. and Zamalek SC against the decision issued on 2 November 2007 by the Dispute Resolution Chamber of FIFA is dismissed.

2. The counterclaim filed by PAOK on 7 February 2008 is deemed withdrawn.

3. The decision issued on 2 November 2007 by the Dispute Resolution Chamber of FIFA is confirmed.

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