Arbitration CAS 2017/A/5183 Elaziğspor Kulübü v. Fabio Alves da Silva, award of 1 March 2018

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Termination of the employment contract by the player
Principles applicable to the interpretation of contracts
Burden of proof regarding facts alleged by a party

1. **Under Swiss Law, in order to decide on the interpretation of contracts, the competent authority has to seek the real and common intention of the parties, without limiting such interpretation on any inexact expressions the parties may have used. Given the content of Article 18 Swiss Code of Obligations, finding the real and common intention of the parties undertakes not only considering the wording of the contract in question but also the principles of good faith and trust, especially when the parties do not concur on what their real intention was. Thus, the subjective intention of the parties takes precedence over the objective contents of their respective declarations. Accordingly, all circumstances which preceded the conclusion of the agreement at stake should be taken into account in order to verify the parties' good faith and common intention.**

2. **Pursuant to Article 8 of the Swiss Civil Code a party who derives rights from an alleged fact shall have the burden of proving the existence of that fact. Where the parties stand on diametrically opposed sides, it is for each of them to prove the existence of the facts alleged. Where neither party has produced any evidence, it is for the panel to weigh up the evidence on record and consider the circumstances at the time and the good faith of the parties.**

I. PARTIES

1. Elaziğspor Kulübü Derneği (the "Club" or the "Appellant") is a football club with its registered office in Elaziğ, Turkey. The Club is currently competing in the Turkish First League. It is a member of the Turkish Football Federation (the "TFF"), which in turn is affiliated to Fédération Internationale de Football Association ("FIFA").

2. Fabio Alves da Silva (the "Player" or the "Respondent"), is a Brazilian citizen and professional football player, born in Campina Grande, Brazil on 4 January 1979.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and evidence. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On an unspecified date in 2012, the parties entered into an employment agreement for 2 years.

5. On another unspecified date in 2014, the Respondent lodged a claim against the Appellant before the FIFA Dispute Resolution Chamber (the "FIFA DRC") for unpaid salaries due under the 2012 contract. Such case was filed under reference number 14-01071/ssa (the "First Claim").

6. On 28 August 2014, the parties entered into a second employment contract valid from 28 August 2014 until 31 May 2015 (the "Employment Agreement"). Pursuant to the Employment Agreement, the Player, *inter alia*, was entitled to the following:

"1. The Salary Of The PLAYER

For 2014/2015 Football Season : 150.000.-EURO (OneHundredFiftyThousand Euros) [sic]

50.000.-Euro (Fifty Thousand Euros) of the above mentioned amount is to be paid as the advance payment after medical check, when this CONTRACT is duly signed by the PARTIES.

The rest of the aforementioned amount is to be paid to the PLAYER by the CLUB in 10 (ten) equal installments [sic] *on the below mentioned dates:*

30/09/2014 : 10.000,00.-EURO (Ten Thousand Euros)

30/10/2014 : 10.000,00.-EURO (Ten Thousand Euros)

30/11/2014 : 10.000,00.-EURO (Ten Thousand Euros)

30/12/2014 : 10.000,00.-EURO (Ten Thousand Euros)

30/01/2015 : 10.000,00.-EURO (Ten Thousand Euros)

30/02/2015 : 10.000,00.-EURO (Ten Thousand Euros)

30/03/2015 : 10.000,00.-EURO (Ten Thousand Euros)

30/04/2015 : 10.000,00.-EURO (Ten Thousand Euros)

30/05/2015 : 10.000,00.-EURO (Ten Thousand Euros)

30/06/2015 : 10.000,00.-EURO (Ten Thousand Euros)"

7. On 27 November 2014, the FIFA DRC rendered a decision on the First Claim (the "First Decision"), ruling that:

"1. The Claim of the Claimant, Fabio Alves da Silva, is partially accepted.

2. The Respondent, Elazigspor, has to pay to the Claimant, within 30 days as from the date of notification of this decision, the amount of EUR 525,000 plus 5% interest p.a. as from 2 July 2014 until the date of effective payment.

3. In the event that the aforementioned amount plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's 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".

8. On or about 31 March 2015, the Player sent a letter to the Club. It read, *inter alia,* as follows:

"SUBJECT: Given that our rights In future and more to be reserved, in accordance to the Professional Football Player Agreement starting on 28.08.2014 and ending on 31.05.2015, and signed between the acceptor ELAZIGSPOR KULUBU and client, this is the warning that the client has 30.000.00.-EURO (Thirty thousands Euro) [sic] *unpaid wages to be paid by acceptor ELAZIGSPOR KULUBU, under which client performs as a Professional Football Player, and in case of NOT TRANSFERRING the amount to the bank account specified in 10 (ten) days, the professional football player agreement signed between the parties will be CANCELLED UNILATERALLY WITH A VALID REASON.*

[…]

REMARKS:

[…]

30.0000-Euro remaining amount of monthly net wages from January, February and March of 2015, The payments from the half of 2014/2015 football season were not paid so far".

9. On 9 April 2015, the Player sent a new letter to the Club informing that it had not responded to his previous letter nor paid the amount requested. In such letter the Player also informed the Club that the Employment Agreement *"was cancelled unilaterally with a valid reason".*

10. On an unspecified date after the First Decision was rendered, as the Club had not abided by the terms of the First Decision, the FIFA Disciplinary Committee (the "FIFA DC") were

seized with the enforcement of that decision, under reference No. 150942/bep (the "Disciplinary Proceeding").

11. On 12 August 2015, the Player put the Club in default for the amount of EUR 60,000, corresponding to salaries from January to June 2015 under the Employment Agreement, granting the Club ten days for payment.

12. On 17 November 2015, the Player filed second a claim against the Club with the FIFA DRC (the "Second Claim"). The Second Claim was filed under reference number 15-01692/ebo. The Player sought the following relief:

"We request the Dispute Resolution Chamber to determine the payment of 60.000,00€ net by the Respondent to the Claimant as responsibility of the club arising from clause 3, of the written mutual agreement signed by the parties, more interests about the amount of 60.000,00€ until full payment, according to the FIFA Statutes and regulations, taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist all [sic] *national level, as well as the specificity of sport, under penalty of imposition of disciplinary measures to the Respondent if the above obligation is not observed".*

13. On 26 January 2016, the Club replied to the FIFA DRC, claiming it had made a payment of EUR 25,000 in January 2015, that the Player had been dropped from the first team and fined EUR 15,000 for a lack of discipline and had missed some training sessions, so he had breached the Employment Contract.

14. On 4 March 2016, the FIFA DC rendered a decision on the Disciplinary Proceeding (the "Disciplinary Decision"). Such decision, *inter alia,* read as follows:

"1. The club Elazigspor is pronounced guilty of failing to comply with the decision passed by the Dispute Resolution Chamber on 27 November 2014 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.

[…]

3. The club Elazigspor is granted a final period of grace of 60 days as from notification of the present decision in which to settle its debts to the creditor, Mr. Fabio Alves da Silva.

4. If payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that 6 (six) points be deducted from the debtor's first team in the domestic league championship. Once the creditor has filed this request the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee".

15. On 29 April 2016, the Player and the Club entered into a "Protocol" (the "Protocol"), which established the following:

"1.) This protocol as signed on 29th of April, 2016 by ELAZIGSPOR KULUBU (Turkish football club, location in Elazig, Turkey, represented by Akif XIRAÇ. [And] *on the other side Fabio Alves Da Silva (Brazilian Football player).*

This protocol was signed for Fabio Alves da Silva's due which is originate from FIFA DRC Ref No 14-01071/SSA and Disciplinary Committee Ref. No. 150942 bep.

The Parties irrevocably agree and undertake that ELAZIGSPOR shall pay Fabio Alves Da Silva, and in this context Parties agree to amicably solve the dispute between them.

The amount of 640.000. Euro (six hundred, forty thousand Euros) will be paid by ELAZIGSPOR in seven (7) installments [sic]*, in the following conditions:*

1. First payment has to be paid until 30th July 2016	*100.000,00.-€*
2. Second payment has to be paid until 30th August 2016	*90.000,00.-€*
3. Third payment has to be paid until 30th October 2016	*100.000,00.-€*
4. Forth payment has to be paid until 30th November 2016	*100.000,00.-€*
5. Fifth payment has to be paid until 30th December 2016	*100.000,00.-€*
6. Sixth payment has to be paid until 30th January 2017	*100.000,00.-€*
7. Seventh payment has to be paid until 28th February 2017	*50.000,00.-€*
	TOTAL AMOUNT: 640.000,00.-€

2.) Parties agree that the disciplinary proceedings including but not limited with the one before FIFA Disciplinary Committee with the Ref. No 150942 bep shall be immediately suspended upon the signing of this Protocol and shall be immediately canceled [sic] *once the payments determined above are fully and timely made by ELAZIGSPOR. In this context, Fabio Alves da Silva shall make his lawyer to send the relevant statements before FIFA Disciplinary Committee. Fabio Alves Da Silva agrees and undertakes that he shall inform his lawyer regarding the content and undertakings of this Protocol right after the signing.*

3.) In case of delay in the payment on the agreed date, if ELAZIGSPOR should not pay any of the installments [sic] *within such final deadline, Fabio Alves Da Silva shall be entitled to terminate the present Protocol and immediately continue the case at FIFA, proceed with the claim or any other dispute related to Fabio Alves Da Silva's Professional Football Contract, charging the entire amount. In this case, additionally to the amount claimed before FIFA, ELAZIGSPOR shall be condemned to pay a fine of 30% (thirty percent) over the total amount of the remaining Professional Football Contract, plus an interest of 5% p.a. since the date in which the payment should have been concluded.*

4.) As soon as the full payment of the amount of clause 1 above is made by ELAZIGSPOR, the Professional Football Contract of the player, Fabio Alves Da Silva, and the legal proceedings in connection with it is fully and definitively settled.

5.) Any disputes arising from this Protocol shall be solved by the FIFA's bodies. Fabio Alves Da Silva, who is creditor side, should inform FIFA about this protocol as soon as possible in order to avoid irreparable damages".

16. On 2 May 2016, the FIFA DRC responded to the Club's letter of 26 January 2016 and requested further information from the Club in relation to the Second Claim.

17. On 8 June 2016, the Player informed the FIFA DC that no payment had been made by the Club pursuant to the Disciplinary Decision and accordingly requested the FIFA DC to enforce point 4 of the Disciplinary Decision and deduct six points from the Club's first team.

18. On 21 June 2016, the FIFA DRC again wrote to the parties reminding the Club that it had not responded to its letter of 2 May 2016.

19. On 11 July 2016, the FIFA DRC, having heard nothing further from the parties, wrote to them to inform them that the investigation-phase of this matter (the Second Claim) was now closed.

20. On 25 August 2016, the FIFA DC wrote to the TFF. Its letter read as follows:

"We refer to the above-mentioned case [i.e. the First Claim] *and acknowledge receipt of the letter from the legal representative of the player Fabio Alves da Silva dated 8 June 2016, a copy of which is enclosed to the other party's attention.*

According to the contents of this letter, the player Fabio Alves da Silva requests that six (6) be deducted from the club Elazigspor first team in the domestic league championship. Consequently, we ask your association to immediately implement point 4 of the terms of the decision taken by the FIFA Disciplinary Committee on 4 March 2016 and to deduct six (6) points from the club's first team in the domestic league championship.

As a member of FIFA, your association is responsible for implementing the decision, as stated in point 6 of the terms of the decision of the FIFA Disciplinary Committee. We therefore kindly ask you to send us immediately the proof of the points deduction, in particular the standings of the relevant division, on which it can be seen that six (6) points have been deducted from the first team in the domestic league championship of the club Elazigspor. Please let us remind you that in case your association should fail to do so, the FIFA Disciplinary Committee will pronounce an appropriate sanction against the Turkish Football Federation. This can lead to expulsion from all FIFA competitions.

Please forward this letter to the club Elazigspor immediately".

21. On 3 February 2017, the FIFA DRC informed the parties that the Second Claim would be submitted to the Chamber for a formal decision on the occasion of its next meeting on 9 February 2017.

22. On 6 February 2017, the Club wrote to the FIFA DRC stating the following:

"TO THE ATTENTION OF FIFA

Ref No. 15-01692

Relating with. Fabio Alves Da Silva, Brazil/ Elaziğspor Kulübü, Turkey

Dear Sir,

We have already taken your notification dated 03rd February 2017. In this regard, we would like to say that we agreed with Player side [sic]. *According to the agreement we have to pay 640.000 Euros to the player in total. Attorney of the player are going to confirm us about this matter. Even if he doesn't confirm us, the numbers can easily approve us.*

According to our agreement;

1-) We had to pay 525.000 Euros + 52.500 Euros (interest) because of the case, Ref. number 14-01071/SSA

2-) We had to pay 70.000 Euros because of abovementioned case.

Therefore, we would like to say that this case will be end by player's side with releasing [sic]*".*

23. On the same day, the FIFA DRC wrote to the parties. Its letter read as follows:

"We refer to our letter dated 3 February 2017, by means of which we informed the parties that the present case will be submitted to the Dispute Resolution Chamber (DRC) for a formal decision on the occasion of its next meeting on 9 February 2017.

In this context, we acknowledge receipt of the Elazigspor Kulubu Dernegi's correspondence dated 6 February 2017, herewith enclosed for the player's information.

In this regard, we kindly ask you to inform us, by 7 February 2017 at the latest, as to whether the parties found an amicable resolution to the present matter.

Please be informed that, in absence of a statement to the contrary within the aforementioned time limit, we will deem the present matter to be not settled and, in accordance with our aforementioned correspondence, we shall then proceed to submit the case to the DRC for a formal decision on the occasion of its next meeting on 9 February 2017".

24. On 7 February 2017, the Player wrote to the FIFA DRC, stating as follows:

"In representation of Fabio Alves Da SILVA, claimant better Identified in the case 15 – 01692/ebo, and which was respondent Elazigspor, we got your latest telefax and its attachments dated 06 February 2017.

As you can easily see, the agreement which was signed between the Club and the Player (my client) is about the another case. (FIFA DRC Ref. No 14-01071/SSA and Disciplinary Committee Ref. No.150942 bep.)

So there is no agreement about this case. We don't accept the Club's petition. We dispute all the claims.

For this reason we want from DRC to continue our case for a formal decision on the occasion of its next meeting on 9 February 2017".

25. On 9 February 2017, the FIFA DRC rendered a decision on the Second Claim (the "Appealed Decision"), ruling that:

"1. The claim of the Claimant, Fabio Alves da Silva, is accepted.

2. The Respondent, Elaziğspor Kulübü Derneği, has to pay to the Claimant, within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of EUR 30,000.

3. The Respondent has to pay to the Claimant, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 30,000.

4. In the event that the amount due to the Claimant in accordance with the above-mentioned numbers 2. and 3. are not paid by the Respondent within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

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".

26. On 22 March 2017, the Player warned the Club that it had not complied with the Protocol, referring to the FIFA references of the First Claim (14-01071/saa) and for the FIFA DC matter (150942/bep) stating that EUR 32,138 remained unpaid. Additionally, he warned the Club that EUR 60,000 was due from the Appealed Decision.

27. On 5 April 2017, the Club made a payment of EUR 18,000 to the Player. The Club submitted that this was the final payment required in accordance with the Protocol and that it had actually paid EUR 640,255.97 in total.

28. On 18 May 2017, the grounds of the Appealed Decision were served by the FIFA DRC to the parties.

III. PROCEEDINGS BEFORE THE CAS

29. On 7 June 2017, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the Appellant filed a Statement of Appeal with the CAS challenging the Appealed Decision and requesting the following prayers for relief:

"a. to set the appeal in motion,

b. to set aside the challenged FIFA Dispute Resolution Chamber decision,

c. to accept the requests filed by the Appellant,

d. to condemn the Respondent to pay the legal fees and other expenses".

30. In its Statement of Appeal, in accordance with Article R48 of the CAS Code, the Appellant named the Player and FIFA as Respondents. Moreover, in accordance with Article R50 of the CAS Code, the Appellant requested the matter to be decided by a sole arbitrator.

31. On 13 June 2017 the CAS Court Office acknowledged the receipt of the Appellant's Statement of Appeal and invited the Respondents to inform whether they agreed to the appointment of a sole arbitrator.

32. On 16 June 2017, FIFA wrote to the CAS Court Office requesting its exclusion from the proceeding.

33. On 19 June 2017, in accordance with Article R51 of the CAS Code, the Appellant filed its Appeal Brief and partially amended its requests for relief, as follows:

> *"1. To uphold the present appeal of ElazigsporKulübüDerneği in view of the several reasons pointed out in both Statement of Appeal and this Appeal brief. To dismiss the decision of the FIFA Dispute Resolution Chamber in the case ref.huk 15-01692/ebo rendered on 18 of May 2017.*
>
> *2. To fix a sum of 15,000 CHF to be paid by the Respondents to the Appellant, to help the payment of its legal fees costs.*
>
> *3. To condemn the Respondents to the payment of the whole CAS administration costs and Arbitrators fees".*

34. On 20 June 2017, in accordance with Article R55 of the CAS Code, the CAS Court Office invited the Respondents to present their answers to the Appellant's Appeal.

35. On 28 June 2017 the Appellant agreed to FIFA's request to be excluded from the proceeding and withdrew its appeal against FIFA.

36. On 5 July 2017, the CAS Court Office wrote to the parties informing that it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide on the number of arbitrators that would hear this matter. The CAS Court Office, in accordance with Article R55 of the CAS Code, further informed that the deadline for the filing of the Respondent's Answer would be fixed after the payment by the Appellant of the advance of costs, as requested by the Respondent on the same date.

37. On 3 August 2017, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel was appointed was as follows:

> Sole Arbitrator: Mr Mark A. Hovell, Solicitor, Manchester, United Kingdom

38. On 23 August 2017, in accordance with Article R55 of the CAS Code, the Respondent filed his Answer. He made the following requests for relief:

> *"- to reject all appeals of the Appellant,*

- *to fix a sum of 15.000.-CHF to be paid by the Appellant to the Respondents, to help the payment of its legal fees costs,*
- *to condemn the Appellant to the payment of the whole CAS administration costs, Attorney's fee and the arbitrators fees and the others".*

39. On 8 September 2017, the CAS Court Office wrote to the Parties on behalf of the Sole Arbitrator informing that the Sole Arbitrator, having considered the parties' positions with respect to a hearing, and pursuant to Article R57 and R44.3 of the CAS Code, having taken into account the parties' preference for an award to be rendered only on the basis of their written submissions, had decided to invite the parties to submit a second round of submissions. Furthermore, the CAS Court Office informed that the Sole Arbitrator had asked the parties to produce additional documents and clarify certain issues. The instructions were as follows:

"- to produce the contract between Respondent and the Appellant signed on 28 August 2014;

- *to produce copies of all the communications between the parties and FIFA regarding the proceeding ref. no. 15-0492/bep before the FIFA Disciplinary Committee;*
- *to clarify which payments were made by the Appellant to the Respondent and when, and both to produce evidence accordingly;*
- *the Respondent to clarify its statement "We declare we didn't accept any of the declarations and documents (except the declarations and documents we provide in our file) sent by Elazigspor Kulubu to the file and sent to us by them". The Respondent, in particular, is invited to clarify whether, by such statement, he is challenging the evidence presented by the Appellant and, if so, to specify exactly which evidence (so refer to any exhibits by number) and on what grounds".*

40. On 22 September 2017, the Appellant filed its Reply. The Appellant did not, however, make any additional requests for relief nor present additional arguments. The Appellant solely filed (i) a copy of an agreement entered into by the parties in Turkish language and (ii) several payslips in Turkish indicating payments allegedly made by the Appellant to the Respondent. Part of the documentation filed by the Appellant was illegible.

41. On 25 September 2017, FIFA sent its case file in relation to the FIFA DRC proceedings of the Second Claim to the CAS Court Office.

42. On 26 September 2017, the CAS Court Office wrote to the parties and invited the Appellant to present it with a translation of the Employment Agreement to English and to re-submit the contents of the Appellant's Reply in a legible way. The CAS Court Office further noted that the Appellant had failed to produce the correspondence with FIFA regarding the Disciplinary Proceeding.

43. On 29 September 2017, the Appellant wrote to the CAS Court Office and presented it with a translation of the Employment Agreement into English. The Appellant furthermore re-

submitted the other documents it had filed with its Reply. Such documentation was presented again in Turkish.

44. On 2 October 2017, the CAS Court Office wrote to the parties and invited the Respondent to file his Rejoinder to the Appellant's Reply within 15 days of receipt of such letter by courier and to also file the documents and clarifications requested by the Sole Arbitrator indicated in the CAS Court Office letter of 8 September 2017.

45. On 18 October 2017, the Respondent filed his Rejoinder. He did not present any additional documentation. The Respondent furthermore reiterated his requests for relief indicated in his Answer.

46. On 7 November 2017, in accordance with Article R57 of the CAS Code, the CAS Court Office wrote to the parties inviting them to inform whether they wanted a hearing to be held in the matter of for the Sole Arbitrator to issue an award based solely on the parties' written submissions until 14 November 2017.

47. On 15 November 2017, the CAS Court Office wrote to the parties noting that they had failed to indicate their position with regard to holding a hearing within the time limit granted. Accordingly, and pursuant to Article R57 of the CAS Code, it would be for the Sole Arbitrator to decide whether to hold a hearing or not.

48. On 16 November 2017, in accordance with Article R57 of the CAS Code, the CAS Court Office wrote to the parties on behalf of the Sole Arbitrator informing that the Sole Arbitrator deemed himself sufficiently well informed to render a decision in the matter without the need to hold a hearing. The CAS Court Office furthermore provided the parties with a copy of the Order of Procedure and requested them to return a signed copy by 23 November 2017.

49. On 22 November 2017, both parties submitted to the CAS Court Office a signed copy of the Order of Procedure. By the signature of the Order of Procedure both parties confirmed that their right to be heard had been fully respected.

50. On 4 December 2017, the Club filed with the CAS Court Office a late submission, rebutting some arguments raised by the Player on his Rejoinder. Additionally, the Club filed a copy of the letter addressed to the TFF from the FIFA DC dated 25 August 2016 in relation to the case number 150942/bep, as well as the letter from the Player to the FIFA DC date 8 June 2016.

51. On 7 December 2017, the CAS Court Office wrote to the parties inviting the Respondent to comment on the admissibility of the Club's submission of 4 December 2017.

52. On 11 December 2017, the Respondent wrote to the CAS Court Office objecting to the Club's submission of 4 December 2017.

53. On 12 December 2017, the CAS Court Office wrote to the parties on behalf of the Sole Arbitrator informing them that the Sole Arbitrator had decided to allow the late evidence, as it was what he had previously asked for.

IV. THE PARTIES' SUBMISSIONS

54. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

A. The Club's Submissions

55. In summary, the Club submitted the following in support of his Appeal:

- The Parties entered into the Protocol on 29 April 2016 in order to solve amicably the disputes involving the First Claim and the Second Claim.
- The Player verbally committed himself on 29 April 2016 to withdraw the First and the Second Claims.
- The Appealed Decision should be cancelled to prevent unjust enrichment of the Player.

a) The Protocol meant to settle both the First Claim and the Second Claim

56. The objective of the Protocol entered into by the Parties on 29 April 2016 was to reach an amicable solution for both the First Claim, with reference number 14-01071/ssa, and the Second Claim, with reference number 15-01692/ebo.

57. The Club submitted that it undertook, under the Protocol, to pay EUR 640,000 to the Player in light of the following calculation:

"Decision of FIFA DRC with ref no: 14-010/ssa

525.000 Euros for rendered decision.

36.750 Euros for interest from 27th November 2014 (notification date of decision) to 29th April 2016 (date of protocol)

Decision of FIFA DRC with ref no: huk 15-01692/ebo

60.000 Euros

GRAND TOTAL: 621.750 Euros".

58. The Club further claimed that the Player was entitled to receive EUR 621,750 Euros for both the First Claim and the Second Claim and that the Club accepted to pay EUR 640,000 to settle such cases.

59. Finally, the Club explained that it unfortunately did not indicate in the Protocol the reference number of one of the claims with the FIFA DRC, namely case number 15-01692/ebo, which is the case associated with the Appealed Decision, but that the Protocol nevertheless included such claim.

b) The Player verbally committed himself to withdraw his claims before FIFA

60. On 29 April 2016 the Player verbally accepted to *"the closing of both cases"*. The Club stated that, however, after the all payments were made, *"he has refused his acceptance* [sic] *and he hasn't withdraw his claim in front of FIFA (huk 15-01692/ebo)"*.

c) The Appealed Decision should be cancelled to prevent unjust enrichment of the Player

61. The Club submitted that despite the fact that the Player has received *"more than he earns, he still reqeust* [sic] *for more and more"*. Hence, the Club is of the opinion that the Appealed Decision should be cancelled in order to prevent unjust enrichment by the Player.

B. The Player's Submissions

62. In summary, the Player submitted the following in support of his Answer:

- The Protocol agreement referred only to the First Decision and not to the Second Claim.
- The Player did not verbally accept to withdraw his claims before the FIFA DRC.
- The Club paid the Player after the Appealed Decision was issued which shows that the Club accepts its debts.

a) The Protocol refers only to the First Decision

63. The Player submitted that there are two separate cases relating to receivables of the Respondent against the Appellant and that the Appellant is trying to gain time by purportedly confusing the two.

64. The first case is FIFA DRC case with reference number 14-01071/ssa (i.e. the First Claim) and FIFA DC reference number 15-0942/bep (i.e. the Disciplinary Proceeding). The Respondent submitted that after the First Decision was issued by the FIFA DRC and not satisfied, the Appellant was faced with a penalty of deduction of six points by the FIFA DC.

65. The Player further submitted that the Club, in order to avoid such penalty whilst not being able to afford the payment in a lump sum, contacted the Player and offered a deferred payment schedule accounting for a higher amount than the actual debt due and interest, which was accepted by the Respondent.

66. The Player stated that such agreement was reflected in the Protocol and that according to this the FIFA DC would then suspend the sanctions against the Club.

67. The Player furthermore highlighted that the Protocol referred only to the First Decision, i.e. case number 14-01071/ssa. He further stated that an examination of the Protocol confirmed that the Second Claim, which relates to the Appealed Decision, was not mentioned in the Protocol.

68. Finally, the Respondent submitted that the Protocol was accepted and signed by both parties. The Player moreover claimed that no agreement was reached regarding the Second Claim.

b) The Player did not verbally accept to withdraw his claims before the FIFA DRC

69. The Player stated that he *"never accepted the closing both case with verbal on the date of Protocol* [sic]*"*. The Player further submitted that he has sent several written warnings to the Club due to the fact that not all payments had been made.

c) The Club paid the Player after the Appealed Decision was issued which shows that the Club accepts its debts.

70. The Player claimed he sent a written notice to the Club on 22 March 2017 (i.e. after the Appealed Decision was issued) and that after such notice the Club paid him EUR 18,000. The Player was of the opinion that such (partial) payment demonstrated that the Club has implicitly accepted its debts and continues to be a debtor.

V. JURISDICTION OF THE CAS

71. Article R47 of the CAS Code provides as follows:

"An appeal against a decision of a federation, association or sports related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or regulations of that body".

72. Moreover, the Club relied on Article 67(1) of the FIFA Statutes. The jurisdiction of CAS was not disputed by either of the parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both parties.

73. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

74. The Statement of Appeal, which was filed on 7 June 2015, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee. The Appeal Brief was also filed within the time limit stipulated by Article R51 of the CAS Code.

75. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

76. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS, the *"panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

77. Article 66(2) of the FIFA Statutes provides that in proceedings before the CAS, *"the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. The provision makes it clear that the FIFA rules and regulations have been drafted against the backdrop of a certain legal framework, *i.e.* Swiss law.

78. Moreover, the Appellant has made direct reference to both Article R58 of the CAS Code and Article 66(2) of the FIFA Statutes. The Respondent has made no direct observation towards the applicable law to the proceeding but has nevertheless made reference to the CAS Code, which tacitly denotes his agreement to the application of the CAS Code.

79. Consequently, the Sole Arbitrator will apply the rules and regulations of FIFA (in this case the FIFA Regulations on the Status and Transfer of Players) and Swiss law on a subsidiary basis.

VIII. ADMISSIBILITY OF THE CLUB'S LATE SUBMISSION AND EVIDENCE

80. The Club filed a late submission on 4 December 2017, to which the Respondent has objected. With the late submission, the Club presented copies of communications between the parties and the FIFA DC in connection with the Disciplinary Proceeding. The Sole Arbitrator had requested the parties to produce such communication before, but both parties failed to do so.

81. The Sole Arbitrator finds that the aforementioned documents contributed to a better understanding of the facts and their legal consequences[1]. Accordingly, and pursuant to Articles R57 and R44.3 of the CAS Code, the Sole Arbitrator has decided to allow these documents and the late submissions.

IX. MERITS OF THE APPEAL

A. The Main Issues

82. The Sole Arbitrator observes that the main issue to be resolved is whether the Protocol was intended to settle both the First and Second Claims or whether it related solely to the First Claim.

[1] See *CAS 2007/A/1429 & 1442*, award of 25 June 2008, para 7. See also MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (1st ed, 2015), page 338.

83. Under Swiss Law, in order to decide on the interpretation of contracts, the presiding authority has to seek the real and common intention of the parties, without limiting such interpretation on any inexact expressions the parties may have used. Article 18 of the Swiss Code of Obligations ("CO") provides as follows:

"When interpreting the form and the contents of a contract, the mutually agreed real intention of the parties must be considered and not incorrect terms or expressions used by the parties by mistake or in order to conceal the true nature of the contract […]".

84. The methodology of interpretation according to Article18 CO has been described by a CAS panel (*CAS 2008/A/1544*, award of 13 February 2009) as follows:

"(…) the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention (WINIGER, Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO). This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them (WINIGER, op. cit., n. 26 ad art. 18 CO; WIEGAND, Obligationenrecht I, Basel 2003, n. 19 ad art. 18 CO). The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation (WINIGER, op. cit., n. 33, 37 and 134 ad art. 18 CO; WIEGAND, op. cit., n. 29 and 30 ad art. 18 CO)".

85. Given the content of Article 18 CO, finding the real and common intention of the parties undertakes not only considering the wording of the contract in question but also the principles of good faith and trust (see Swiss Federal Tribunal, Decision 4A_124/2014 of 7 July 2014, para. 3.4.1), especially when the parties do not concur on what their real intention was. Thus, according to Swiss law the (subjective) intention of the parties takes precedence over the objective contents of their respective declarations. Accordingly, the Sole Arbitrator has taken into account all circumstances which preceded the conclusion of the Protocol in order to verify the parties' good faith and common intention.

86. The Sole Arbitrator further notes that pursuant to Article 8 of the Swiss Civil Code a party who derives rights from an alleged fact shall have the burden of proving the existence of that fact. In the case at hand, the Sole Arbitrator notes that the parties stand on diametrically opposed sides: whereas the Club has submitted that the Protocol intended to settle both the First and the Second Claims, the Player stated that it related merely to the First Claim. It follows that it was for the Club to prove that the Protocol settled both claims, and for the Player to prove that it referred solely to the First Claim. The Sole Arbitrator's task in deciding the dispute then also entails weighing the evidence presented by either party in support of its allegations.

87. On the one hand, the Sole Arbitrator notes that the amounts due from the Club to the Player on the day the Protocol was executed, included the First and Second Claims, and that these total of these claims were roughly equivalent to EUR 640,000. The Player was due EUR 525,000 from the First Decision. Interest on this amount was accruing at 5% pa (so EUR 26,250 pa), so after 1 ½ years of non-payment, approximately EUR 40,000 would have accrued giving a total of EUR 565,000 due from the First Decision at that time. Additionally, EUR

60,000 was being claimed under the Second Claim. An approximate total of EUR 625,000. Additionally, the Sole Arbitrator considers that as both claims had been made before the Protocol was signed, it would have made some sense to settle both disputes at the same time.

88. The Sole Arbitrator notes that the Club had conflicting calculations relating to the Protocol before the FIFA DRC and the CAS, i.e. claiming firstly at FIFA that, in addition to the principle sum of EUR 525,000, it would pay EUR 52,500 as interest accrued as per the First Decision and EUR 70,000 for the Second Claim, which totals EUR 647,500. However, before the CAS, the Club that, in addition to the principle sum of EUR 525,000, EUR 36,750 was on account of interest and EUR 60,000.00 related to the Second Claim, which totalled EUR 621,750. It had agreed to pay EUR 640,000 in total, so the extra was the inducement to the Player to agree to defer. The latter of these is more in line with the Sole Arbitrator's own calculations.

89. On the other hand, the Sole Arbitrator notes that the Protocol only mentions the First Claim and the Disciplinary Proceeding, but at no time expressly refers to the Second Claim. The Sole Arbitrator also notes the parties used particular words in singular and not in plural, such as *"Parties agree to amicably solve the dispute between them"* and *"immediately continue the case at FIFA, proceed with the claim"*. The Sole Arbitrator further notes that at the relevant time only one disciplinary proceeding (i.e. the Disciplinary Proceeding) was ongoing and that the Player was not yet a creditor on the Second Claim, as the Appealed Decision had not been rendered at the time of conclusion of the Protocol.

90. It would have made sense for the parties to settle the First Claim and agree to end the Disciplinary Proceeding in light of the fact that the FIFA DC had threatened to deduct points from the Club. The Club was under pressure to resolve that matter as quickly as possible in order to avoid having points deducted from its first team, but perhaps the same urgency did not exist at that time regarding the Second Claim.

91. Additionally, the Sole Arbitrator gave due consideration to the time that elapsed between the conclusion of the Protocol and the Club actually informing the FIFA DRC that was dealing with the Second Claim that it had apparently been settled. The Appellant waited more than nine months to let the FIFA DRC know of the conclusion of the Protocol despite having received communications by the FIFA DRC in at least three opportunities in that interim. All three communications were simply ignored. One might have expected the Club to reply to one of these and send a copy of the Protocol.

92. The Sole Arbitrator is therefore left looking for the evidence that supports either possibility. Unfortunately neither party has produced any evidence to demonstrate how the Protocol was negotiated and drafted. Moreover, the Sole Arbitrator was particularly unimpressed that the Club argued that the Player had verbally committed himself to withdraw his claims, but yet did not produce any evidence to this extent nor requested to examine the Player at a hearing. With regards to communications between the parties, one might have expected to see, as is usual in such cases, a letter or email from one party to the other offering an amount to settle, or even some document demonstrating how the figures agreed in the Protocol were calculated at the time the document was drafted. One would expect that there should be something extra being paid to the Player to effectively buy his agreement that he would be paid late (having

already had to wait a year and a half). Given that under the Protocol the Player agreed to wait for additional 10 months to be paid EUR 640,000 when he was already due EUR 625,000 for both claims, is EUR 15,000 a reasonable compensation for agreeing to the aforementioned deferral? If so, this would support the Club's claim that he was compromising both claims. However, if he was only agreeing to defer the EUR 565,000 from the First Claim, with interest, then the compensation would be EUR 75,000, as the Player submits.

93. The Sole Arbitrator is not convinced by the Club's argument that its payment of EUR 18,000 made on 5 April 2017 constituted an acknowledgement of the Protocol by the Player. The Player had served two notices to the Club on 22 March 2017, one referring to the Protocol and another referring to the Appealed Decision, confirming his opinion that the two claims were separate and that he was taking the EUR 18,000 on account of sums due under the Protocol. His actions treated the claims as separate.

94. In weighing up the evidence on record and considering the circumstances at the time and the good faith of the parties while concluding the Protocol, the Sole Arbitrator finds it unlikely that the parties wished to settle both claims. Had this been the case, not only would some direct reference to the Second Claim have been inserted in the wording of the Protocol, but also the Club would have had informed the FIFA DRC as soon as possible. Additionally, on the Club's calculations, the Player would have received just EUR 18,000 for waiting another 10 months to finally be paid the EUR 525,000 that had been due to him for nearly 1 ½ years already, the interest that he was due and the balance of his contract too. This would represent about 3% of what he was due. Interest was running at 5% at the time, so that would wipe out this alleged inducement to give a poor creditor yet more time. However, if the inducement was EUR 60,000 more, so EUR 78,000, then that would be a payment of approximately 14% more. This seems in the opinion of the Sole Arbitrator a far more likely sum to tempt the Player not to enforce the deduction of points from the Club and to wait another 10 months to finally get what was due to him under the First Decision. The Sole Arbitrator is further convinced, when he notes that the parties agreed in the Protocol that should the Club not abide by its terms an additional 30% of the debt could be claimed. An amount of approximately 14% to induce the Player to enter into the Protocol and a further 30% should the Club breach it. Finally, whilst the Second Claim had commenced, it was a long way from being finally concluded, so one could see that the two disputes would be kept separate.

95. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Sole Arbitrator dismisses the Appeal by the Club and upholds the Appealed Decision.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 June 2017 by Elazigspor Kulübü Derneği against the decision rendered by the FIFA Dispute Resolution Chamber on 9 February 2017 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 9 February 2017 is upheld.

3. (…).

4. (…).

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