Arbitration CAS 2018/A/5534 Yannick Toapry Boli v. FC Anji Makhachkala, award of 8 August 2018

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Football
Contract of employment between a player and a club
Discretion of a CAS panel to exclude evidence under Article R57.3 CAS Code
Entitlement of the player to outstanding monthly salaries, incentive payments and incentive premium
Irrelevance of the burden of proof in case of publicly known facts

1. **Article R57 para. 3 of the CAS Code provides the CAS panel with a large margin of discretion regarding the exclusion of evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. In this regard, absent any valid justification, the request of one party to exclude the new evidence of the other party while relying itself on evidence in the proceedings before CAS that it failed to submit before the previous instance should not be granted.**

2. **The outstanding monthly salaries provided by an employment contract are due to an employee (the player) until the term of a valid employment contract. Furthermore, incentive payments mentioned in the employment contract whose amount can be derived from an attachment signed by the parties should be considered part of the employment contract and added to the amount due to the player. Finally, if the conditions for an increased incentive premium have been fulfilled e.g. the promotion of the club to a higher division, the correponding amounts should also be added to the amount due to the player.**

3. **The burden of proof is irrelevant as long as a fact remains uncontested. Taking guidance – in the ambit of Article 182 para 2 of the PILA – from Article 151 of the Swiss Civil Procedure Code, publicly known facts, facts known to the court and commonly accepted rules of experience do not need support by evidence rendering the question of burden of proof moot. Publicly known facts are facts that are part of common knowledge. It is not necessary that one is constantly aware of the respective fact. Instead, it is sufficient that the fact is easily accessible for everyone without significant efforts. Information that is officially published on the internet (provided that there is a certain reliability with respect to the publisher of the information) and that is easily retrievable is deemed to be a publicly known fact. The results and the final standings in professional national club football published on the internet and easily retrievable must be considered "publicly known facts".**

I. PARTIES

1. Mr Yannick Toapry Boli (hereinafter the "Player" or the "Appellant") is a French-Ivorian professional football player who currently plays in the USA.

2. FC Anji Makhachkala (hereinafter the "Club" or the "Respondent") is a professional football club headquartered in Makhachkala, Russia. The Club is registered with the Football Union of Russia (*Rossijski Futbolny Sojus* – hereinafter "RFS"), which in turn is affiliated to the *Union Européenne de Football Association* (hereinafter "UEFA") and to the *Fédération Internationale de Football Association* (hereinafter "FIFA"). The Respondent currently participates in the Russian Football Premiere League (hereinafter "RFPL"), which is the highest national football league.

II. FACTUAL BACKGROUND

3. The matter in dispute in these arbitration proceedings is a contractual claim of the Appellant for salary and premiums against the Respondent.

4. Below is a brief summary of the main facts and allegations based on the Parties' written submissions, the CAS file and the content of the hearing that took place in Lausanne, Switzerland on 28 June 2018. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in other parts of this award.

5. On 21 August 2014, the Appellant and the Respondent concluded and signed an employment contract (hereinafter the "Employment Agreement") whereby the Appellant was hired as a professional football player. The contracting parties agreed on a fixed contract term of 4 years, i.e. until 30 June 2018.

6. Furthermore, the contracting Parties agreed on a basic salary of RUB 166,667.00 per month and, additionally thereto, monthly incentive premiums as provided for in the Attachment 1 to the Employment Agreement. In this regard, Art. 7 of the Employment Agreement titled *"Salary and remuneration"* provides – *inter alia* – as follows:

   "7.1. Football Player is to be paid a monthly salary in amount 166.667 (one hundred sixty-six thousand six hundred sixty-seven) rubles.

   (…)

   7.3 The order and rates of incentive premiums, money assistance as well as other remunerations are to be determined according to the existing in Club Standing Order; the named remuneration and premiums are to be executed as a special attachment to the present Agreement (Attachment 1) which is integral part of the present Agreement".

7. When the Parties executed the Employment Agreement in August 2014, the Respondent played in the Russian Football National League (hereinafter "RFNL"), which is the second division in Russian football. During the following season 2015/2016 the Club was promoted to the RPFL. Also in the season 2016/2017, the Respondent participated in the RFPL.

8. On 15 February 2017, the Appellant was transferred to the Chinese football club Dalian Yifang F.C. on a permanent basis with immediate effect.

9. By letter and email of 28 April 2017, the Appellant requested from the Respondent outstanding salaries and incentive payments for January 2017 and for 15 days of February 2017, i.e. until the effective date of the Player's transfer to Dalian Yifang F.C., in a total amount of EUR 129,310.50. The Appellant in his letter set the Respondent a deadline of 10 days to settle these claims.

III. PROCEEDINGS BEFORE THE DISPUTE RESOLUTION CHAMBER OF FIFA

10. On 29 May 2017, the Appellant lodged a claim against the Respondent before the FIFA Dispute Resolution Chamber (hereinafter "FIFA DRC") requesting payment in the amounts of RUB 250,000.00 and EUR 129,310.50. The claim was for outstanding salaries and incentive premium payments for the period of 1 January 2017 until 15 February 2017, plus interest on the aforementioned amount at a rate of 5 % p.a. as from the date these amounts had become due.

11. By letter dated 14 June 2017 (received by the Respondent on 22 June 2017), the FIFA DRC invited the Respondent to submit its position regarding the Appellant's claims until 22 July 2017.

12. With letter of 25 August 2017, the FIFA DRC advised the Parties that the Respondent had failed to provide its position within the fixed deadline and closed the investigation phase.

13. After being advised of the closure of the investigation phase, the Respondent (unsolicited and belated) submitted its position regarding the Player's claims.

14. On 9 November 2017 (received by the Appellant on 23 December 2017), the FIFA DRC issued its decision – hereinafter the "Decision" – that reads – *inter alia* – as follows:

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

2. The Respondent (…) has to pay to the [Appellant]*, within 30 days as from the date of notification of this decision, the amount of EUR 17,241, plus 5% interest p.a. until the date of effective payment as follows:*

a. on EUR 11,494 as of 11 February 2017;

b. on EUR 5,747 as of 11 March 2017.

3. In the event that the aforementioned sum 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 [Appellant] *is rejected.*

5. The [Appellant] *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".*

15. The FIFA DRC gave – *inter alia* – the following reasons for its decision:

"(…) the DRC acknowledged that, according to the contract signed by the parties on 21 August 2014, the [Appellant] *was entitled to a monthly salary of RUB 166,667. In addition, according to the attachment 1 to the contract, the* [Appellant] *was entitled to receive monthly incentive payments as follows: (i) a minimum incentive payment which, together with the monthly salary, brought to the monthly remuneration up to EUR 11,494 and (ii) in case the Respondent was promoted to the Russian RFPL Championship for the season 2015/2016, an incentive payment which, together with the monthly salary, brought the monthly remuneration up to EUR 86,207.*

The members of the Chamber further noted that the attachment 1 to the contract specified (i) that the [Appellant's] *monthly remuneration would remain EUR 11,494 in case the Respondent did not achieve the promotion to the Russian RFPL Championship for the season 2015/2016 and (ii) that the amount of EUR 86,207 would constitute the* [Appellant's] *monthly remuneration in case the Respondent was promoted to the Russian RFPL Championship for the season 2015/2016 and retained the right to participate in such league in the following season.*

(…) the members of the Chamber noted that, according to the [Appellant], *the Respondent was promoted to the Russian RFPL Championship for the season 2015/2016 and that, therefore, (…), he was entitled to receive the higher monthly incentive payment of EUR 86,207 (…).*

Furthermore, the DRC noted that the Respondent had been given the opportunity to reply to the claim submitted by the [Appellant], *but that it presented its response in this respect after notification of the closure of the investigation into the present matter. As a result, (…), the DRC decided not to take into account the reply of the Respondent.*

In addition, as a consequence of the preceding consideration, the DRC established that, (…), it shall take a decision upon (…) the statements and documents presented by the [Appellant].

(…) the Chamber firstly pointed out that, (…), any party claiming a right on the basis of an alleged fact shall carry the burden of proof. In this respect, the members of the Chamber noted that the [Appellant] *did not submit evidence that the Respondent was promoted to the Russian RFPL Championship for the season 2015/2016, nor that it had maintained this alleged position in the 2016/2017 season. Consequently, the DRC concluded that the* [Appellant] *failed to submit evidence demonstrating that the contractual condition in order for the* [Appellant] *to receive EUR 86,207 as monthly incentive payment instead of the amount of EUR 11,494 was in fact fulfilled.*

(…) As a result, the Chamber agreed to reject the [Appellant's] *argument that he was entitled to a monthly incentive payment of EUR 86,207 in addition to the RUB salary as per the contract and decided on the basis of the documentation on file that the* [Appellant] *was entitled to receive EUR 11,494 on a monthly basis for the period between 1 January 2017 and 15 February 2017.*

(…) Consequently, the DRC decided that, (…), the Respondent is liable to pay the amount of EUR 17,241 to the [Appellant].

In addition, (…), the Chamber decided to award the [Appellant] *interest of 5% p.a. as of the day following the day on which the relevant payments fell due (…)".*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 13 January 2018, the Appellant filed his Statement of Appeal before the Court of Arbitration for Sport (hereinafter the "CAS") against the Decision according to Article R48 of the Code of Sports-related Arbitration (hereinafter the "Code"). The appeal is directed against the Respondent. The Appellant requested that the present case be submitted to a Sole Arbitrator.

17. By letter dated 18 January 2018, the CAS Court Office acknowledged receipt of the Appellant's statement of appeal and provided the Respondent with a copy thereof. Furthermore, the CAS Court Office invited the Appellant pursuant to Article R51 of the Code to file his Appeal Brief with CAS within 10 days following the expiry of the time limit for the appeal. Additionally, the Respondent was invited to inform the CAS Court Office within 5 days as from the receipt of this letter whether it agreed to the appointment of a Sole Arbitrator in the present matter.

18. On 23 January 2018, the Appellant filed his Appeal Brief.

19. By letter of 29 January 2018, the CAS Court Office forwarded a copy of the Appeal Brief to the Respondent and invited the latter to submit an Answer within a deadline of 20 days upon receipt of this letter.

20. On 30 January 2018, the CAS Court Office noted that the Respondent failed to indicate, within the set time limit, whether it agreed with the appointment of a Sole Arbitrator. The CAS Court Office advised the Parties that, in consequence and according to Article R50 of the Code, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide on the number of arbitrators.

21. By letter of 7 February 2018, the Respondent requested the CAS to provide it with a copy of the Player's Statement of Appeal. Moreover, the Respondent requested that the time limit for the filing of its Answer be fixed after the payment of the Appellant's share of the advance of costs in accordance with Article R64 para 2 of the Code.

22. By letter of the same day, the CAS Court Office informed the Respondent that the Appellant's Statement of Appeal had been sent to the Respondent on 29 January 2018 and that there was proof of receipt of the documents by the shipping company. Furthermore, pursuant to Article R55 para 3 of the Code, the CAS Court Office suspended the time limit for filing the Answer in accordance with the Respondent's request of 7 February. The CAS Court Office also informed the Parties that a new time limit shall be fixed upon the Appellant's payment of its share of the advance of costs.

23. On 15 February 2018, the CAS Court Office informed the Parties that, in accordance with Article R50 of the Code, the Deputy President of the CAS Appeals Arbitration Division had decided to submit the present matter to a Sole Arbitrator in accordance with Article R54 of the Code.

24. With letter dated 4 April 2018, the CAS Court Office acknowledged receipt of the Appellant's payment of the total of the advance of costs. Consequently, a new time limit was set for the filing of the Answer by the Respondent pursuant to Article R55 of the Code. Furthermore, the CAS Court Office announced that the Panel appointed to decide the present case was constituted as follows:

    - Mr Ulrich Haas, professor in Zurich, Switzerland, as Sole Arbitrator

    A Copy of the Notice of Formation of a Panel was forwarded to the Parties together with this letter. The Parties did not lodge any objections with regard to the constitution of the Panel.

25. On 24 April 2018, the Respondent filed its Answer.

26. With letter dated 25 April, the Parties were invited to inform the CAS Court Office by 2 May 2018 whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

27. With letter of 3 May 2018, the Respondent informed the CAS Court Office of its preference not to hold a hearing.

28. With email dated 3 May 2018, the Appellant informed the CAS Court Office that the latter had not yet received the Respondent's Answer of 24 April 2018 by courier and, therefore, was unable to decide on the question of hearing. Thereupon, the CAS Court Office extended the Appellant's deadline to comment on the issue of the hearing until 9 May 2018.

29. On 8 May 2018, the Appellant sent a letter requesting that a hearing be held.

30. By letter dated 9 May 2018, the CAS Court Office advised the Parties that according to Article R57 of the Code it was now for the Sole Arbitrator to decide whether to hold a hearing in this case or to render an award only on the basis of the Parties' written submissions.

31. With letter dated 11 May 2018, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing. The letter also invited the Parties to provide their availabilities for the different dates proposed for a hearing by 16 May 2018 at the latest.

32. By letter of 14 May 2018, the Respondent confirmed its availability for a hearing on 28 June 2018.

33. By email of 15 May 2018, the Appellant also confirmed to be available to attend a hearing on 28 June 2018.

34. With letter dated 15 May 2018, the CAS Court Office advised the Parties that the hearing in the present case would be held on 28 June 2018 at the CAS Headquarters in Lausanne, Switzerland. Furthermore, the Parties were invited to provide the CAS Court Office on or before 31 May 2018 with the names of all persons attending the hearing on their behalf.

35. On 16 May 2018, the CAS Court Office forwarded to the Parties an Order of Procedure and requested them to return a signed copy thereof by 31 May 2018.

36. Also on 16 May 2018, the CAS Court Office, on behalf of the Sole Arbitrator, granted the Appellant a deadline of 10 days as from the receipt of this letter to file a reply to the Respondent's Answer. The Respondent was advised that it would be granted an equal deadline to file its rejoinder. For this second round of submissions the Sole Arbitrator requested the Parties – referring to Article 16 para 1 2nd sentence of the Swiss Private International Law Act (hereinafter the "PILA") – to (i) provide him with the text (in English language) of any provision (other than the FIFA Regulations and/or Swiss Law) they intended to rely upon for the merits of the present case, and (ii) to clarify the scope of application of the provisions referred to and to explain how these provisions shall be applied under the given circumstances. Finally, both Parties were advised that the Sole Arbitrator will apply the FIFA Regulations and subsidiarily Swiss Law, in case the Parties fail to provide the requested information within the time limit prescribed.

37. The Appellant returned a duly signed copy of the Order of Procedure on 23 May 2018.

38. The Respondent returned its signed copy of the Order of Procedure on 25 May 2018 together with the list of persons that will be attending the hearing on its behalf.

39. On 26 May 2018, the Appellant filed his reply by email of the same day.

40. By letter of 28 May 2018, the CAS Court Office forwarded a copy of the Appellant's reply to the Respondent and invited the latter to file its rejoinder within 10 days as from the receipt of this letter.

41. By letter of 30 May 2018, the Respondent objected to the additional submission of the Appellant and requested that it be declared inadmissible according to Article R56 of the Code.

42. With a letter dated the same day, the CAS Court Office advised the Respondent that the Appellant's submissions had been filed in response to the Sole Arbitrator's directions issued on 16 May 2018 and, therefore, were admissible. Furthermore, the Respondent was reminded of its deadline (28 May 2018) to file its rejoinder.

43. On 11 June 2018, the CAS Court Office noted that the Respondent had not filed any rejoinder within the prescribed deadline.

44. On 28 June 2018, a hearing was held at the CAS Court Office in Lausanne, Switzerland.

45. Besides the Sole Arbitrator, the CAS Deputy Secretary General Mr William Sternheimer and Mr Oliver Vogel, *Ad hoc* Clerk, the following persons attended the hearing:

    a) For the Appellant:

        1) Mr Lorin Burba, legal counsel
        2) Loris Familari, legal counsel

b) For the Respondent:

1) Mr Dmitry Kiginko, legal counsel
2) Mr Igor Merkulov, legal counsel
3) Ms Nadja Bayard, interpreter

46. At the closing of the hearing, the Parties expressly stated that they did not have any objections with regard to the procedure. The Parties further confirmed that they were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel and that their right to be heard had been respected.

V. POSITIONS OF THE PARTIES

47. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered all the evidence and arguments submitted by the parties, even if no specific or detailed reference has been made thereto in the following outline of their positions and in the ensuing discussion of the merits.

A. The Appellant

48. The Appellant is – in essence – of the view that the Decision of the FIFA DRC must be set aside insofar as it (partially) dismisses the Player's claims for salary and incentive payments. In support of his requests, the Appellant submits as follows:

(a) It is a fact – acknowledged by the FIFA DRC in its Decision – that there was a contractual relationship between the Parties and that the Employment Agreement entitles the Appellant to monthly salaries of RUB 166,667.00 and monthly incentive payments of EUR 11,494.00. The Employment Agreement further provides that these payment obligations shall increase up to EUR 86,207.00 in case of the Respondent's promotion to the RFPL for the season 2015/2016. This follows from Art. 7.1 and 7.3 of the Employment Agreement in conjunction with Art. 2.1 of the Attachment 1 which – *inter alia* – reads as follows:

"2.1. Types and incentive premium rates to be paid to Football Player as a player of the main team of Club in addition to the monthly salary per the Employment Agreement:

2.1.1. Football player who fulfils his obligations per the Employment Agreement in a proper way is to be paid a monthly incentive premium, which, in the aggregate with the monthly salary per the Employment Agreement, makes up 11.494 (eleven thousand four hundred ninety-four) Euros, i.e. the amount of the monthly incentive premium shall be calculated as follows: the sum 11.494 (eleven thousand four hundred ninety-four) Euros less the sum resulting after division of the sum 166.667 rubles (Football Player's monthly salary) by the official rate of the Central Bank of the Russian Federation ruble/Euro on the last day of the month under review.

2.1.2. If upon the results of the current sporting season in the Russian FNL Championship Club gets right to participate in the Russian RFPL Championship in the next sporting season, the amount of the monthly incentive

premium indicated in Clause 2.1.1 above will be increased by 74.713 (seventy-four thousand seven hundred thirteen) Euros from the beginning of the Russian RFPL Championship in question.

Reference: if upon the results of the current sporting season in the Russian RFPL Championship Club retains the right to participate in the Russian RFPL Championship in the next sporting season, the amount of the monthly incentive premium indicated in Clause 2.1.1 above, subject to its possible increase in accordance with Clause 2.1.2 above, will remain unchanged, i.e. it (this amount) will make up 86.207 (eighty-six thousand two hundred seven) Euros; otherwise, i.e. if upon the results of the current sporting season in the Russian RFPL Championship Club forfeits the right to participate in the Russian RFPL Championship in the next sporting season, the amount of the Football Player's monthly incentive premium will be decreased to the amount indicated in Clause 2.1.1 above from the date of ending of the Russian RFPL Championship in the current sporting season.

(…)"

(b) It is undisputed that the Respondent finished the RFNL (second tier division) for the season 2014/2015 in second place in the final standing of this competition and, thus, was promoted to the RFPL (first tier division) for the season 2015/2016. Consequently, the Appellant finds that the condition for claiming the increase of the monthly payments from EUR 11,494.00 to EUR 86,207.00 has materialized. Therefore, the Appellant is entitled to outstanding salary and incentive payments (plus interests) for the time period of 1 January 2017 until 15 February 2017, i.e. RUB 250,000.50 and EUR 129,310.50.

(c) The Appellant submits that the reasoning in the Decision stating that

"in accordance with art. 12 par. 3 of the Procedural Rules, any party claiming a right on the basis of an alleged fact shall carry the burden of proof. In this respect, the members of the Chamber noted that the Claimant did not submit evidence that the Respondent was promoted to the Russian RFPL Championship for the season 2015/2016, nor that it had maintained this alleged position in the 2016/2017 season".

is false and unjustified for the following reasons:

- It is true, that it is – in principle – for the Appellant to prove that he is entitled to the increase in the monthly payments. However, whether or not the Respondent was promoted to the RFPL for the season 2015/2016 is an information that is publicly available. It can be easily retrieved from the internet.
- An official confirmation of the Respondent's promotion to the RFPL can only be provided by a third party, i.e. the RFS. The latter is not involved in the present proceedings and the Appellant has no authority over it. Thus, the Appellant is not in a position to obtain evidence that the Respondent was promoted to the RFPL for the season 2015/2016. It appears, therefore, excessive to require from the Appellant to provide an official declaration/confirmation that the Respondent has been promoted to the RFPL. Instead, it is common practice for FIFA's judicial bodies to retrieve such information from its member federations *ex officio*.

- The fact that the FIFA DRC did not undertake such investigation *ex officio* demonstrates *"a lack of willingness for pursuing the truth of the facts presented by the parties. Especially, this lack of willingness is also proved by the fact that, these information are freely accessible on line (internet sources), consequently, public information"*.
- The Appellant further submits that the *"DRC did not request any further information from the Appellant, nor did provide any other time period in order to supplement any previous arguments or facts, with other arguments or facts. Having said this, it is clear that, by ordering the closure of the investigation, it results that the DRC was comfortably satisfied with the content and the probating force and effects of the evidences submitted by the Appellant, thus, no other facts or evidences were required from the Appellant in order for the DRC to render a decision on the matter"*.

49. The Appellant further submits as follows:

(d) The Respondent has alleged – for the first time – in his Answer to the CAS that it has paid the outstanding monthly salaries. In support of its submission the Respondent has submitted a payment order (#995 of 29 August 2017). The Appellant contests the probative value of the document, since it *"does not contain the name, signature and stamp of the institution (private or public) issuing the document"* The document appears to be an online bank statement. However, it does not specify the domain or website from which it is retrieved. The Appellant submits that Respondent has fabricated the document.

(e) The Appellant submits that Attachment 1 is an integral part of the Employment Agreement. The Attachment 1 and the Employment Agreement refer to each other and are linked. The Attachment 1 has been signed by the Parties and these signatures are similar to the ones affixed on the Employment Agreement. This is sufficient proof that the Parties executed the Employment Agreement and the Attachment 1. The Respondent, on the contrary, has not submitted any evidence for its allegation that the Attachment 1 was never executed.

(f) The Appellant notes that the Respondent, in its Answer, has not challenged or objected to the following facts which, therefore, must be accepted by the Panel:

(i) Respondent employed the Appellant until 15 February 2017, and

(ii) the Respondent was promoted to the RFPL for the season 2015/2016 after having finished the previous season 2014/2015 in the RFNL in second place.

Consequently, according to the Appellant,

(i) no objection can be raised in regard to whether or not the Appellant is entitled to the monthly salaries and premiums for the period 1 January 2017 to 15 February 2017, and

(ii) it is uncontested that the Appellant is entitled under the Employment Agreement to the increased the monthly payments in the amount of EUR 86,207.00 per month as from 1 July 2015 until the expiry of the Employment Agreement.

(g) The Appellant submits that the Respondent's financial situation does not affect his right to be paid the contractually owed monthly salaries and premiums. Additionally, the Appellant remarks that the Respondent – so far – has not provided any evidence that it is in bad financial conditions. In addition, if the Respondent would be in serious financial difficulties, the RFS would have refused to grant a license to the Club to play in the RFPL.

(h) The Appellant acknowledges that there were contract negotiations between the Respondent and FC Al Ain (United Arab Emirates) to transfer the Player. However, the Appellant submits that he himself never conducted unauthorized negotiations with FC Al Ain. The reason why the transfer failed in the end was due to the Respondent's unprofessional conduct. After agreeing to the transfer in a first place, the Club then suddenly retracted and demanded a higher transfer fee to which the Arab club did not consent. In light of these facts the Appellant did not breach any contractual obligations by attending the medical examinations at FC Al Ain (instead of staying with the team of the Club). Consequently, there is no reason to reduce the remuneration owed by the Club. This finding is further backed by the fact that the Appellant was never sanctioned with a disciplinary fine by the Club for breaching the Employment Agreement.

50. The Appellant has filed the following prayers for relief:

1. The complete acceptance of the appeal;

2. The reversing of the Decision of date 9 November 2017 rendered by [FIFA DRC].

3. The obligation of the Respondent to pay to the Appellant the overdue payables amounting to 250,000.50 Russian rubles and EUR 129,310.50;

4. The obligation of the Respondent to pay interest for the overdue payables, as following:

- 5 % p.a. of EUR 86,207.00 as of 10 February 2017;
- 5 % p.a. of 166,667 Russian rubles as of 10 February 2017;
- 5 % p.a. of EUR 43,103.50 as of 10 March 2017;
- 5 % p.a. of 83,333.50 Russian rubles as of 10 March 2017;

5. All the arbitration costs to be carried out by the Respondent.

6. The obligation of the Respondent to reimburse the advocacy costs to the Appellant amounting to EUR 25,000.00.

B. The Respondent

51. The submissions of the Respondent, in essence, may be summarized as follows:

(a) The Respondent acknowledges that the Player is entitled to salary payments in the amount RUB 250,000.50 for the time period between 1 January 2017 and 15 February 2017. The Respondent submits, however, that it has fully discharged this debt and has submitted a copy of a payment order #995 of 29 August 2017 as evidence. This payment order was

sent to the FIFA DRC after the closure of the investigation phase and, therefore, could not be taken into account by the latter. In any case, the Respondent finds that there is no legal ground for it to pay the amount of RUB 250,000.50 to the Player twice.

(b) The Respondent objects to the application of the terms contained in Attachment 1. According to the Respondent the Parties have not agreed on the contents of the Attachment 1. This document was not executed by the Parties. The Club has not signed the Attachment 1 and, therefore, is under no obligation to make the incentive payments claimed by the Appellant.

(c) It is true that Art. 7.3. of the Employment Agreement refer to incentive payments. However, according to the Respondent this provision must be construed to mean that *"the procedure and amount of payment of bonuses (…) are established in accordance with the current situation in the Club. These remunerations and payments are formalized by a special attachment to the employment contract. In accordance with the aforementioned clause of the employment agreement, attachment (…) 1 may be entered only in the event of the establishment of appropriate payments by the Club"*. The Club submits that *"at the time of the employment agreement, the provision on bonuses was not accepted at the Club, the football players were rewarded on the basis of the decision of the Club management based on the results achieved"*.

(d) The Respondent also refers to the wording of Art. 2.1.1. of the Attachment 1 whereupon a monthly incentive premium shall be paid only to the *"Football Player who fulfils his obligations per the Employment Agreement in a proper way (…)"*. The Respondent contests that this condition is fulfilled. The Respondent submits that the Player was not with the team in January and February 2017, but was looking for employment with a new club instead. On 16 January 2017, e.g., it was officially announced on "Twitter" that the Player was soon to sign a contract with FC Al Ain (United Arab Emirates). Thus, the Respondent finds that *"under such circumstances, and given the difficult financial situation, the Club management has rightly decided not to pay the Player incentive payments"*.

(e) The Respondent supports the Decision of the FIFA DRC according to which the Appellant failed to meet the burden of proof to be entitled to claim the additional amounts.

(f) Finally, the Respondent objects to the submission of all evidence attached to the Appellant's appeal based on Article R57 of the Code. Such evidence – according to the Respondent – could already have been submitted before the FIFA DRC. Consequently, pursuant to Article R57 of the Code, such new evidence must be rejected by the Sole Arbitrator.

52. The Respondent has submitted the following prayer for relief:

"1. Refuse the appeal of the [Appellant] *in full"*.

VI. JURISDICTION

53. The jurisdiction of CAS, which is not disputed between the Parties, derives from Article 58 para 1 of the FIFA Statutes. The latter provides that

> *"appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

54. Furthermore, Article R47 para 1 of the Code reads as follows:

> *"An appeal against the 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 it prior to the appeal, in accordance with the statues or regulations of that body".*

55. The jurisdiction of CAS in the present matter is further confirmed by the Order of Procedure duly signed by the Parties.

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

VII. ADMISSIBILITY

57. Article R49 of the Code provides as follows:

> *"In absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".*

58. The appeal was filed within the deadline of 21 days set by Article 58 para 1 of the FIFA Statutes (cited above). Furthermore, the appeal complies with all other requirements of Article R48 of the Code. It follows that the appeal is admissible.

VIII. OTHER PROCEDURAL ISSUES

59. According to Article R57 para 1 of the Code and in line with the consistent jurisprudence of the CAS the Sole Arbitrator has, in principle, full power to review the facts and the law of the case. The Sole Arbitrator, therefore, deals with the present case *de novo*, evaluating all facts and legal issues involved in the dispute.

60. The Respondent requests that all (new) evidence submitted by the Appellant in these proceedings should be excluded based on Article R57 para 3 of the Code. This provision reads as follows:

"The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply".

61. The Sole Arbitrator notes that the above article provides for a wide margin of discretion. Furthermore, when applying such discretion the Sole Arbitrator must also take account of the principle of equal treatment of the Parties. The Sole Arbitrator notes that the Respondent relies on evidence in these proceedings before CAS that it failed to submit before the FIFA DRC. However, at the same time the Respondent requests that the Appellant's new evidence shall be excluded. The Sole Arbitrator is not prepared to accept such unequal treatment of the Parties absent any valid justification. Thus, in light of the proceedings before the FIFA DRC and the Parties' behavior in the first instance proceeding, the Sole Arbitrator declares that no exception from the principle in Article R57 para 1 of the Code is warranted in the case at hand and, consequently, dismisses the Respondent's request to exclude the Appellant's new evidence from the file.

IX. APPLICABLE LAW

62. Article R58 of the Code provides the following:

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

63. Article 57 para 2 FIFA Statutes determines 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".

64. By letter of the CAS Court Office dated 16 May 2018, both Parties were invited, pursuant to Article 16 para 1 2nd sentence of the PILA, to provide the Sole Arbitrator with all provisions of other laws than the FIFA Regulations and/or Swiss Law on which they intended to rely for the merits of the present case. Additionally, the Parties were advised that the Sole Arbitrator will apply the FIFA Regulations and, subsidiarily, Swiss Law absent any indication to the contrary by the Parties. Following these directions, the Appellant expressly stated and confirmed that the FIFA Regulations and Swiss Law (subsidiarily) shall be applicable (see Appellant's email of 26 May 2018), while the Respondent failed to reply to the procedural order. At the outset of the hearing on 28 June 2018, however, both Parties agreed that the FIFA Regulations and subsidiarily Swiss Law shall apply to the merits of this dispute.

65. Accordingly, the Sole Arbitrator considers that the present dispute shall be resolved on the basis of the applicable FIFA Regulations and, subsidiarily, based on Swiss Law.

X. MERITS

66. In the case at hand the Appellant partially challenges the Decision. The Sole Arbitrator – in essence – must assess the following questions in application of the FIFA Regulations and (subsidiarily) Swiss Law:

i. Is the Respondent obliged to pay the Appellant monthly salaries and incentive payments for the period of 1 January 2017 to 15 February 2017?

ii. In case (i) is answered in the affirmative, has the Respondent discharged all or parts of its debts?

iii. Is the Respondent obliged to pay interests to the Appellant?

A. Is the Appellant entitled to monthly salaries and incentive premiums?

67. Whether the Appellant is entitled to monthly salaries and incentive premiums for the time period between 1 January 2017 and 15 February 2017 depends first and foremost on the contractual arrangement between the Parties.

a) Basic monthly salary

68. It is undisputed that the Parties entered into the Employment Agreement on 21 August 2014 and that the term of the Employment Agreement lasts until 15 February 2017.

69. The Employment Agreement provides in Art. 4.1.1. and Art. 7.1. for monthly salaries for the Appellant in the amount of RUB 166.667. Consequently, for the time period 1 January 2017 to 15 February 2017 the Appellant is, in principle, entitled to RUB 250,000.50.

b) Incentive premiums

70. Art. 7.3. of the Employment Agreement mentions incentive premiums. However, the provision does not stipulate the exact monthly amounts. The latter can be derived from Art. 2.1 Attachment 1.

ba) Is the Attachment 1 a part of the contractual agreement between the Parties?

71. The Respondent submits that the Parties have not concluded Attachment 1. The Club submits that the copy of the Attachment 1 submitted by the Player does not bear the signatures of the Parties and that any incentive payments made by the Club were on a purely voluntary basis.

72. The Club's submission are clearly made in bad faith. First of all the Sole Arbitrator notes that the incentive payments allegedly made by the Club prior to January 2017 on a purely voluntary basis strangely match the amounts due under the Attachment 1. More disturbingly, the Sole Arbitrator notes that – contrary to the submissions of the Respondent – the Attachment 1 is signed by the Parties on every single page (i.e. six times in total). The signatures are clearly visible when looking at the pdf of the Attachment 1 on a computer screen. Only when one prints out the pdf the signatures become barely visible. In addition, the Sole Arbitrator notes that the signatures affixed on the Attachment 1 are identical with the ones on the Employment Agreement. In particular, the signature of Mr Sergey V. Korablev, General Director of the Club, can be easily identified both on the Employment Agreement as well as on the Attachment 1.

bb) Are the conditions for an increased incentive premium fulfilled?

73. The Attachment 1 provides in Art. 2.1 for an increased incentive premium in case the Club has been promoted to the RFNL. The Decision concluded that this condition was not fulfilled, since the Player had failed to meet its burden of proof.

74. The Sole Arbitrator notes that the Club's promotion to the RFNL has not been challenged by the Respondent during the proceedings before the FIFA DRC. However, only if a (relevant) fact submitted by one is disputed by the other party, the burden of proof comes into play. Moreover, also during in the proceedings before the CAS, the Respondent did not contest that the Club was promoted to the RFPL. Instead, the Respondent only reiterated the grounds of the Decision according to which the Appellant had *"failed to meet its burden of proof"*. As previously stated, the burden of proof is irrelevant as long as a fact remains uncontested. In addition, the Sole Arbitrator takes guidance – in the ambit of Article 182 para 2 of the PILA – from Article 151 of the Swiss Civil Procedure Code. According thereto publicly known facts, facts known to the court and commonly accepted rules of experience do not need support by evidence rendering the question of burden of proof moot.

75. Publicly known facts are facts that are part of common knowledge (cf. KUKO ZPO- SCHMID Art. 151 N. 1). According to the jurisprudence of the Swiss Federal Court (cf. BGer, 5A_62/2009, E 2.1: *"La jurisprudence précise que, pour être notoire, un renseignement ne doit pas être constamment présent à l'esprit: il suffit qu'il puisse être contrôlé par des publications accessibles à chacun"*.), it is not necessary that one is constantly aware of the respective fact. Instead, it is sufficient that the fact is easily accessible for everyone without significant efforts. Information that is officially published on the internet (provided that there is a certain reliability with respect to the publisher of the information) and that is easily retrievable is deemed to be a publicly known fact (cf. BSK ZPO-GUYAN, Art. 151 N. 2).

76. In light of the above, the results and the final standings in professional Russian club football published on the internet and easily retrievable via google must be considered "publicly known facts". This is especially true for information on the Russian top league published on the official league website (http://eng.rfpl.org/). According thereto, the Club participated in the RFPL in the seasons 2015/16, 2016/17 and 2017/18 (finished in 13th place, 12th place and 14th place). Thus, it is uncontested that the Respondent was promoted from the RNFL (Russian second football division) to the RFPL (Russian first football division).

c) The relation of the monthly salaries and the incentive premiums

77. Article 2.1. of the Attachment 1 – *inter alia* – reads as follows

"2.1. Types and incentive premium rates to be paid to Football Player as a player of the main team of Club in addition to the monthly salary per the Employment Agreement:

2.1.1 Football Player (…) is to be paid a monthly incentive premium, which, in the aggregate with the monthly salary per the Employment Agreement, makes up 11.494 (…) Euros, i.e. the amount of the monthly incentive premium shall be calculated as follows: the sum 11.494 (…) Euros less the sum resulting after division of the sum 166.667 rubles (Football Player's monthly salary) by the official rate of the Central Bank of the Russian Federation ruble/Euro on the last day of the month under review.

2.1.2. If upon the results of the current sporting season in the Russian FNL Championship Club gets the right to participate in the Russian RFPL Championship in the next sporting season, the amount of the monthly incentive premium indicated in clause 2.1.1 above will be increased by 74.713 (seventy-four thousand seven hundred thirteen) Euros from the beginning of the Russian RFPL Championship in question" (emphasis added).

78. The Sole Arbitrator notes that the wording in Art. 2.1., 2.1.1. and Art. 2.1.2 is ambiguous. The Appellant is of the view that he is entitled to the increased incentive premium (EUR 11,494 + EUR 74,713) in addition to the monthly salary in the amount of RUB 250,000.50. Consequently, he claims incentive bonuses for the period of 1 January 2017 until 5 February 2017 in the total amount of EUR 129,310.50 in addition to RUB 250,000.50.

79. The Sole Arbitrator does not concur with the Appellant's interpretation. Contrary to what the Appellant holds, the base incentive premium in Article 2.1.1. of the Attachment 1 does not amount to EUR 11,949. Instead, the incentive premium is calculated by subtracting the monthly salary of RUB 166,667 from EUR 11,949. This follows from the wording in clause 2.1.1. according to which the EUR 11,949 constitute *"the aggregate with the monthly salary per the Employment Agreement"* [emphasis added]. Consequently, the EUR 11,949 cover both, the monthly incentive payments and the monthly salaries.

80. The interpretation followed here is neither contradicted by Article 2.1. nor by the last part of the sentence in Article 2.1.1. according to which incentive premium is to be paid *"in addition to the monthly salary per the Employment Agreement"* and *"the monthly incentive premium shall be calculated as follows: the sum 11.494 (…) Euros less the sum resulting after division of the sum 166.667 rubles (Football Player's monthly salary) by the official rate of the Central Bank of the Russian Federation ruble/Euro on the last day of the month under review"*. The term "division" is misleading and is obviously a mistake. The true intention of that sentence is in the view of the Sole Arbitrator that the monthly salary of RUB 166,667 must be converted in Euros based on the official rate of the Central Bank of Russia and then subtracted from EUR 11,949 in order to calculate the monthly incentive premium. The result of this subtraction finally determines the ("real") incentive premium which is to be paid indeed, i.e. in line with the wording of Article 2.1., additionally to the amount of monthly salary (RUB 166,667).

81. Since the amount of EUR 11,949 in Article 2.1.1 of the Attachment 1 covers both the monthly salary and the incentive premium, the increase of the aforementioned amount by EUR 74,713 (according to Article 2.1.2 of the Attachment 1) necessarily must also include both the increased incentive premium and the monthly salary. Consequently, the Appellant is only entitled to monthly payments in the amount of EUR 86,662 covering both salaries and incentive payments. With regard to the period of 1 January 2017 – 15 February 2017 the Appellant is entitled to EUR 129,310.50 in total.

B. Has Respondent discharged all or parts of its debts?

82. The Respondent submits that it paid RUB 257,777.89 to the Appellant on 29 August 2017. This amount corresponds (on the basis of the official exchange rate of the Central Bank of the Russian Federation on that date - 1 Euro = 69.8465 Russian rubles) to EUR 3,690.63. The Respondent has submitted a document titled Payment Order No. 995 issued by Sberbank PJSC as evidence.

83. When being questioned by the Sole Arbitrator, the Appellant explained that he had doubts as to the authenticity of the evidence submitted by the Respondent (Payment Order). However, the Appellant did not challenge the payment of the above amount by the Respondent *per se*. Instead, counsel for the Appellant expressly stated in the hearing that he did not know whether such payment had been made, i.e. that he could neither confirm nor deny the payment because the Appellant had not checked his bank account. In view of the above, the Sole Arbitrator decides that the Respondent's submission that it paid EUR 3,690.63 has not been contested by the Appellant in a substantiated manner.

84. Accordingly, the Sole Arbitrator concludes that the Respondent is obliged to pay the Appellant the following amounts:

	EUR	86,207.00	(Jan 2017)
	EUR	43,103.50	(1/2 Feb 2017)
Subtotal	EUR	129,310.50	
./.	EUR	3,690.63	(./. payment 29 August 2017)
Total	EUR	125,619.87	

85. The Appellant has filed his claim in EUR. The Respondent has not submitted that it must pay any outstanding amounts in a currency other than EUR. Consequently, the Sole Arbitrator finds that the Appellant may claim in the above amounts in EUR.

C. Interests

86. The Appellant requests interests at a rate of 5 % p.a. as following

- on EUR 86,207.00 as of 10 February 2017;
- on EUR 43,103.50 as of 10 March 2017;

87. The Sole Arbitrator observes that the subsidiarily applicable Swiss law (Article 102 of the Swiss Code of Obligations – hereinafter the "CO") stipulates as follows:

"(1) Le débiteur d'une obligation exigible est mis en demeure par l'interpellation du créancier.

(2) Lorsque le jour de l'exécution a été déterminé d'un commun accord, ou fixé par l'une des parties en vertu d'un droit à elle réservé et au moyen d'un avertissement régulier, le débiteur est mis en demeure par la seule expiration de ce jour".

Free translation: *"(1) Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee. (2) Where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right of termination reserved by one party, the obligor is automatically in default on expiry of the deadline".*

88. Furthermore, Article 104 CO reads as follows:

"(1) Le débiteur qui est en demeure pour le paiement d'une somme d'argent doit l'intérêt moratoire à 5 % l'an, même si un taux inférieur avait été fixé pour l'intérêt conventionnel.

(2) Si le contrat stipule, directement ou sous la forme d'une provision de banque périodique, un intérêt supérieur à 5 %, cet intérêt plus élevé peut également être exigé du débiteur en demeure.

(3) Entre commerçants, tant que l'escompte dans le lieu du paiement est d'un taux supérieur à 5 %, l'intérêt moratoire peut être calculé au taux de l'escompte".

Free translation: *"(1) A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract. (2) Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default. (3) In business dealings, where the normal bank discount rate at the place of payment is higher than 5%, default interest may be calculated at the higher rate".*

89. Finally, Art. 7.1. of the Employment Agreement and Art. 2.4. of the Attachment 1 – *inter alia* – provides that

"7.1. (…) the salary is to be paid (…) every half-month (not later than on 25th of the month under review as an advance payment and the remaining part – not later than on 10th of each month following the month under review); (…)"
and

"2.4. All the above mentioned inventive premiums are to be paid (…) every month – not later than on 10th of each month following the month under review, if another payment's term of any of the incentive premiums isn't fixed above".

90. In light of the above, the Respondent has to pay the Appellant interests at an annual rate of 5 %

- *on EUR 86,207.00 as of 11 February 2017 to 29 August 2017 (the date of the settled payment in the amount of EUR 3,690.63, see above)*
- *on EUR 82,516.37 as of 30 August 2017;*
- *on EUR 43,103.50 as of 11 March 2017.*

D. Summary

91. The Respondent must pay to the Appellant

- salaries and incentive premiums for the time period of 1 January 2017 to 15 February 2017 in the total amount of EUR 125,619.87 and
- 5% interest p.a. on
  - EUR 86,207.00 as of 11 February 2017 until 29 August 2017;
  - EUR 82,516.37 as of 30 August 2017 until the date of effective payment and
  - 5% p.a. on EUR 43,103.50 as of 11 March 2017 until the date of effective payment.

92. All other and/or further reaching requests are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Yannick Toapry Boli on 13 January 2018 against the decision issued on 9 November 2017 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.

2. Part 2 of the decision of the Dispute Resolution Chamber of the Fédération Internationale de Football Association issued on 9 November 2017 is amended as follows:

   Football Club Anji Makhachkala has to pay to Mr Yannick Toapry Boli, within 30 days as from the date of notification of the present award, the amount of EUR 125,619.87, plus 5% interest p.a. until the date of effective payment as follows:

a. on EUR 86,207.00 as of 11 February 2017 until 29 August 2017;

b. on EUR 82,516.37 as of 30 August 2017 until the date of effective payment of the principal amount;

c. on EUR 43,103.50 as of 11 March 2017 until the date of effective payment of the principal amount.

3. (…).

4. (…).

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