Arbitration CAS 2018/A/5664 AFC Astra v. Toni Gorupec, award of 4 December 2018

Panel: Mr Jacopo Tognon (Italy), Sole Arbitrator

Football
Termination of employment contract with just cause by player
Choice of applicable law
Relationship between various choice-of-law agreements
Choice among several alternative fora
Definition of just cause
Consequences of termination of professional player contract

1. **The choice of the law applicable to the merits of a dispute may be made directly (by referring to a specific law) or indirectly, *i.e.* by referring to a "conflict-of-law" provision designating the applicable law to the merits. In addition, since a choice of law is not required to take a particular form, it can be entered into either expressly or tacitly. In agreeing to have the dispute solved by an arbitral institution, *e.g.* the CAS, the parties tacitly subject the dispute to the conflict-of-law rules for the determination of the applicable law contained in the rules of said institution.**

2. **The – mandatory – conflict-of-law provision in the CAS Code, Article R58, unlike the rules of other arbitral institutions, stipulates that the rules and regulations of the sports organisation having issued the decision (that is the subject of the dispute) are primarily applicable and only subsidiarily grants the parties scope for determining the applicable law and thus scope for changing the legal basis underlying the decision. Therefore, the indirect submission to the choice-of-law provision in Article R58 CAS Code takes precedence over any other choice-of-law clause. This is because the CAS Code aims at restricting the autonomy of parties: the parties' autonomy only exists within the limits set by the CAS Code. The purpose of concentrating appeals against decisions of an international sports organisation with the CAS is not least the desire to ensure that the rules and regulations by which all the (indirect) members are equally bound are also applied to them in equal measure. This however can only be ensured if a uniform standard is applied in relation to central issues. This is precisely what Article R58 CAS Code is endeavouring to ensure, by declaring the rules and regulations of the sports organisation having issued the decision (that is the subject of the dispute) to be primarily applicable.**

3. **In case a provision provides several *fora* in the alternative, it is – absent any indications to the contrary – up to the party filing a claim to choose among the agreed *fora*. Once the choice is made, it will become binding on both parties.**

4. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally. Non-payment or late payment of a player's salary by his club may constitute "just cause" to terminate the employment contract, as the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. At the same time it is however acknowledged that only a particularly severe breach of an employment contract will result in the immediate dismissal of or, conversely, in the immediate abandonment of the employment position by the employee. Instead, in the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after having been warned.

5. In case a professional player contract is terminated with just cause the question of the consequences of such termination remains. While Article 17 para. 1 of the FIFA Regulations on the Status and Transfer of Players (RSTP) addressing the consequences of termination, is headed *"Consequences of terminating a contract without just cause"*, its purpose is mainly to reinforce contractual stability, *i.e.* to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, whether committed by a club or by a player. Furthermore, FIFA RSTP Commentary specifically foresees that while a party terminating the contract with a valid reason is not liable to pay compensation or to suffer the imposition of sporting sanctions, the other party to the contract, who is responsible for and at the origin of the termination of the contract, is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed. In the absence of any contractual provision determining the financial consequences of a unilateral breach of contract, the applicable consequences are therefore set out in Article 17 para. 1 FIFA RSTP.

I. PARTIES

1. AFC Astra (the "Club" or the "Appellant") is a professional Romanian football club, affiliated with the Romanian Football Federation (RFF), itself a member of the Fédération Internationale de Football Association (FIFA), the international governing body of football.

2. Mr Toni Gorupec (the "Player" or the "Respondent") is a professional football player of Croatian nationality.

II. FACTUAL BACKGROUND

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

A. Background Facts

4. On 16 January 2015, the Player entered an Employment Contract (the "Contract") with the Club, valid as of 16 January 2015 until 30 June 2028.

5. According to the Contract, the Club undertook to pay the player, *inter alia*, the following monthly salaries, due on the '9th of the next month:

> *"1. For the period 16.01.2015-30.06.2015, the player shall receive 5.000 net monthly.*
>
> *2. For the period 01.07.2015-30.06.2016, the player shall receive 6.000 euros net monthly.*
>
> *3. For the period 01.07.2016-30.06.2017, the player shall receive 7.000 euros net monthly.*
>
> *4. For the period 01.07.2017*30.06.2018, the player shall receive 8.000 euros net monthly".*

6. On 17 April 2015, the Player sent a default notice to the Club, requesting the payment of three outstanding salaries within 8 days.

7. On 9 May 2015, the Player terminated the Contract due to the non-payment of the three outstanding months as requested.

B. Proceedings before the FIFA Dispute Resolution Chamber

8. On 20 May 2015, the Player lodged a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"). He argued that he rightfully terminated the contract since he played 11 games for the Club in compliance with the contractual obligations. Yet, he did not receive the salary.

9. The Club in its reply, firstly rejected the Player's claim and stated that the *"conditions for the terminations of the contract were not met"*. The Club argued that the Regulations of the RFF and Romanian law apply. According to the Statute of the RFF, a player claiming outstanding payment must request that the "commission" issues a decision. If the club does not abide by the said decision, the *"contractual relationships between club and player will stop"*. Hence, the Club claimed that the Player ended the Contract without just cause.

10. Secondly, the Club specified that there was a breach of contract also according to the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), since the mere termination notice would not be sufficient to render effective the termination of contract.

11. Thirdly, the Club contested the competence of FIFA to deal with the claim lodged by the Player on 20 May 2015, arguing that the competent judicial bodies are those of the FRF and those part to the Romanian Professional Football League (the "LPF").

12. Finally, the Club requested the FIFA DRC to dismiss the Player's claim arguing that it is a case where the principle of *res judicata* applies. Indeed, on 18 August 2015, the Club had lodged a complaint against the Player before the RFF Dispute Resolution Chamber (the "RFF DRC") and the body had issued a decision stating the "cessation" of the contractual relationship on 2 September 2015.

13. On 23 March 2017, the FIFA DRC passed its Decision, establishing that the Player was entitled to a *"compensation for breach of contract in the amount of EUR 34,500 plus 5% interest p.a. as of 20 May 2015 until the date of effective payment"*.

14. As for the grounds, the FIFA DRC declared that *"it could not recognise [the decision passed by the RFF DRC] as well as its effects, since it was passed by a deciding body in lack of jurisdiction"*.

15. Continuing its analysis, the FIFA DRC – in order to establish its competence – assessed whether the Contract contained *"a clear and exclusive arbitration clause in favour of the judicial bodies of the FRF and LPF"*. In fact, one of the basic conditions to be met in order to establish that a body other than the FIFA DRC is competent to settle employment-related disputes of international nature between a club and a player, is that the jurisdiction of the relevant judicial body derives from "*a clear reference in the employment contract*".

16. Referring to clause O of the Contract, which provides that *"[t]he parties agree not to submit any litigation to the courts of justice before exhausting all the means of the jurisdiction courts of the Romanian Football Federation, Professional Football League and FIFA"*, the DRC asserted that the Contract *"does not make clear reference to a specific national dispute resolution chamber in the sense of Art. 22 lit. b) of the RSTP"*. Furthermore, the same article *"provides for the possibility of lodging contractual dispute in front of FIFA"*.

17. The FIFA DRC acknowledged its competence on the matter at stake on the basis of Art. 22 lit. b) of the FIFA RSTP.

18. Since, the claim was filed on 20 May 2015, the FIFA DRC stated that the 2015 edition of the FIFA RSTP was applicable to the matter in question as to the substance.

19. According to FIFA DRC the crucial issue was to determine whether the contract was terminated by the Player with just cause or not.

20. The FIFA DRC established that the Club had failed to remit to the Player a remuneration amounting to EUR 20,000 up to 9 May 2015 (equal to over 4 months' salary). According to the Chamber therefore, the Club was in breach of its contractual obligations towards the Player for

a substantial period. As a result, the FIFA DRC recognised just cause in the early termination of the Contract by the Player.

21. The FIFA DRC noted that a payment of RON 100,982 (corresponding to approx. EUR 22,500) was made to the Player on 19 June 2015, i.e after the Contract termination.

22. The FIFA DRC decided that the Player was entitled to receive compensation for breach of contract. Since the Chamber established that there was no compensation clause included in the Contract, its amount had to be established in application of other parameters set forth in Art. 17 para. 1 of the FIFA RSTP. Furthermore, due to the non-exhaustivity of the list of parameters, the FIFA DRC recalled that a request for compensation for contractual breach must be assessed *"case by case"*.

23. The FIFA DRC established that since the Player would have received EUR 262,000 as remuneration for the period as of 9 May 2015 until 30 June 2018, that amount would have served as the basis for determining the final compensation. It stated that it should be deducted EUR 20,000, since the Club already paid the Player that sum for outstanding remuneration (EUR 22,500 – EUR 2,500 since EUR 2,500 was not related to the outstanding remuneration).

24. Additionally, the FIFA DRC noted that the Player had found a new job with the Portuguese Club Victoria FC as of 13 August 2015 until 30 June 2018. Since this enabled the Player to *"reduce his loss of income"*, the FIFA DRC deemed right to take into consideration the remuneration yielded from that employment when working out the amount of compensation for breach of contract.

25. The FIFA DRC to render its Decision, considered that the Player was entitled to a total salary of EUR 68,415.10 for each of the seasons 2015/2016 and 2016/2017, further to a total salary of EUR 88,548 for the 2017/2018 season at the Portuguese club. Therefore, the Chamber established that the Player was entitled to a compensation amounting to EUR 34,500 in addition to an interest of 5% *p.a.* on the amount of compensation starting from the date when the claim was lodged (20 May 2015) up to the date of effective payment.

26. On 8 March 2018, following requests from the Club, the grounds of the Decision were communicated to the Parties by email.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

A. The written procedure

27. On 30 March 2018, in accordance with Art. R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), the Club filed a Statement of Appeal at the CAS against the Player challenging the decision rendered by the FIFA DRC on 23 March 2017. The Appellant also stated its preference for a Sole Arbitrator to deal with the case at stake.

28. On 10 April 2018, the Appellant filed its Appeal Brief.

29. On 18 April 2018, the CAS Court Office invited the Respondent to submit his Answer pursuant to Art. R55 of the CAS Code, within 20 days upon receipt of the letter by courier.

30. On 26 April 2018, the Player informed the CAS Court Office that he did not intend to pay his share of advance of costs due to the *"difficult financial situation brought by the club AFC Astra because of unpaid debt"*.

31. On 11 May 2018, the Respondent requested the CAS Court Office for an extension of the time limit to file its Answer until 21 May 2018. The CAS Court Office granted the request.

32. On 19 May 2018, the Respondent filed his Answer, asking the CAS to *"reject the Appellant's Appeal and to proclaim Appellant's claims as stated in VI Prayers for relief of the Appeal as unfounded"*.

33. On 25 May 2018, the Player stated its preference on having the award based solely on the Parties' written submissions.

34. By letter dated 30 May 2018, the Appellant requested a hearing to be held in the present case.

35. By letter dated 13 June 2018, FIFA informed the CAS Court Office that it *"renounced its right to request its possible intervention in the present arbitration proceedings"*.

36. On 13 June 2018, the CAS Court Office sent to the Parties a copy of the FIFA's letter dated the same day, containing a clean copy of the challenged Decision.

37. On 4 July 2018, the CAS Court Office acknowledged the Appellant's payment of advance of costs for the present procedure and informed the Parties that Mr Jacopo Tognon, Attorney-at-law in Padova, Italy, was appointed as the Sole Arbitrator in the matter in question.

38. On 13 July 2018, the CAS Court Office informed the Parties that the Sole Arbitrator – pursuant to Art. R57 of the CAS Code – had decided to hold a hearing in the matter at stake.

39. By email dated 16 July 2018, the Player asked that his lawyer and himself be excused for the hearing due to lack of financial means.

40. In reply the CAS Court Office advised the Player that *"he and his counsel may attend the hearing by telephone conference and/or videoconference, if necessary"*.

41. On 18 July 2018, the CAS Court Office informed the Parties that the hearing would be held on 21 August 2018 in Lausanne at 9:30 (Swiss Time).

42. On 7 and 9 August 2018, respectively, the parties returned to the CAS Court Office the duly signed Order of Procedure.

B. The Hearing

43. The hearing took place on 21 August 2018 at the CAS Court Office in Lausanne. Present were, in addition to the Sole Arbitrator and Ms. Carolin Fischer, Counsel to the CAS:

On behalf of the Appellant:

- Mr Claudiu Popa (legal counsel)
- Mr Bogdan Lucan (legal counsel)

On behalf of the Respondent (via telephone conference):

- Ms Matea Marija Jandras Crnalic (legal counsel)

44. At the opening of the hearing, both Parties confirmed that they had no objections to the composition of the Panel. During the hearing, the Parties made submissions in support of their respective cases. At the closing of the hearing, the Parties confirmed that they had no objections in respect of their right to be heard and that they had been given the opportunity to fully present their cases.

IV. SUBMISSIONS OF THE PARTIES

45. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every argument advanced by the Parties. The Sole Arbitrator has nonetheless carefully considered all the claims made by the Parties, whether or not there is a specific reference to them in the following summary.

A. The Appellant

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

a. On 11 June 2015, the Appellant lodged a claim before the RFF DRC requesting the termination of the Contract with the Player. As a result, the contractual relationship between the Parties ended by the Decision n. 432 issued on 2 September 2015.

b. On 19 June 2015, the Club paid the equivalent of EUR 22,500 to the Player, further to the equivalent of EUR 14,962 via bank transfer on 27 October 2015.

c. The Appeal Brief filed on 10 April 2018 was within the 21-day deadline. Indeed, 9 April 2018 was a public holiday in Romania (Orthodox Easter Monday) and if the deadline falls on an official holiday the subsequent working day shall be considered.

d. Since the Contract was signed in Romania and according to Romanian laws, Romanian Regulations should apply. Furthermore, it argues that it would be unfair to apply a foreign law, namely Swiss law.

e. According to Art. 8.2 of the Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008, the *"contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract"*. Since the job was be carried out mostly in Romania, Romanian law should apply.

f. Furthermore, according to Art. 3 of the Preamble of the RFF RSTP *"the provisions of these regulations are mandatory for all Clubs affiliated to the Romanian Football Federation"*. Art. 18 of the RFF RSTP – which set forth the possible reasons for ending a contract before the set deadline – must be taken into consideration:

"1. The individual employment contract or civil Convention shall cease in the following ways:

a) Upon the expiry of the term for which they were concluded;

b) By parties' agreement stipulated in the contract or expressed after the signing of the contract;

c) At the initiative of one of the parties, under this Regulation;

d) in other ways provided by law.

2. It is forbidden to unilaterally terminate the contract during the season (between the first and the last stage of the competition, otherwise shall be applied the penalties provided by article 18.9.

3. The finding of the contract termination due to unilateral termination is made by the FRF/LPF/AJF committee.

[…].

7. In case of dispute, the parties may address the committee of FRF, LPF or AJF, as appropriate, and until the final settlement of the dispute, the contract remain in force.

[…].

10. Players and clubs can claim just cause and sports just cause for unilateral cancellation of contracts for the following reasons:

a) Players:

- *were not used effectively in the past competitive year, in minimum 10% of the total number of official games of the club team where they are legitimated except games in which they were suspended by the club or disciplinary court or they were unable to play for medical reasons, fact following to be proved. This rule does not apply to goalkeepers. The interested player must submit a request in this regard to the competent commission, within 15 days after the last game of the season.*

- *were not paid the contractual rights for a period exceeding 90 days from the due date of the obligations. In cases of unilateral termination of contract from the player's initiative, for non-payment of contractual rights within 90 days of maturity, if from the evidence provided results that the player has received at least 75% from the due contractual rights for that season, the commission will issue a decision forcing the club to pay the outstanding amounts within 5 days from notification of the decision. For non-payment within the 5 days previously shown, the contractual relationships between club and player will stop.*

[…].

11. If the club fails to pay the player his salaries, game premiums, allowances or other entitlements or does not provide the player other conditions, as was stipulated in the contract, the player is entitled to notify the competent committee of the FRF, LPF or AJF, as appropriate.

12. The player may require the payment of the due financial rights and the termination of the contract or its continuance.

13. If the contractual relationship ends based on a final/final and enforceable decision, upon the player's request, he is entitled to receive the outstanding contractual rights and can sign a new contract with another club, subject to other regulatory provisions.

14. If the player's request regarding the club paying him the outstanding financial rights was admitted through an irrevocable/final and enforceable decision and the club has not performed the obligation, it will be proceeded as follow:

a) the defaulting club will be sanctioned under this regulation;

[…]".

g. The Appellant also explains that should the CAS Sole Arbitrator deem that FIFA Regulations trump Romanian ones, the claim of wrongful Contract termination would still stand. Indeed, according to Art. 13 of the FIFA RSTP *"a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement"*. In the case at stake none of the conditions applies. In addition, the Club notes that not even the exception set forth in Art. 14 of the FIFA RSTP would apply to this specific case.

h. Finally, the Club asks the CAS to take into consideration the payment of RON 66,389 (equivalent to EUR 14,962) made on 27 October 2015. FIFA did not do so on the basis that the Club failed to provide the document translated into one of the FIFA languages. However, the Club argues that only the part related to additional details was not translated.

47. The Appellant's Appeal Brief contained the following prayers for relief:

"- The Decision issued on 23 March 2017 by FIFA Dispute Resolution Chamber in case file 15-00901/pas is partially set aside;

- The claim lodged by the respondent against our club is dismissed and AFC Astra does not owe any money to the player;

- Should you reject the first and second claim, we request that the amount of EUR 14,962, paid on 27 Octomber [sic] 2015, to be subtracted from the amount awarded by the FIFA DRC to the player;

- AFC Astra does not owe any amount to Toni Gorupec;

- All the arbitration costs shall be borne by the respondent, who will be obliged to reimburse AFC Astra the entire amount paid as arbitration costs and legal expenses".

B. The Respondent

48. The Respondent firstly objects to the admissibility of the appeal brief, noting that 9 April 2018 is a working day in the country where the present proceedings is carried out, namely Switzerland. Hence, the Club did not meet the deadline to file its appeal brief.

49. The termination of the contract was just since the Club had not paid his salary for over three months. Furthermore, he sent a warning on 17 April 2015, prior to ending the Contract.

50. Since the Club did not pay, consequently breaching the Contract, Art. 14 of the FIFA RSTP would apply. Thus, the Player terminated the Contract with just cause.

51. The player took into consideration the FIFA Decision to apply the FIFA RSTP (edition 2016) to the matter at hand as to the substance, claiming that also in these proceedings before the CAS, Swiss law shall apply.

52. Finally, examining the system of calculation of the compensation for the breach of contract, the Respondent sustains that no procedural mistake was made and that the Decision was legitimate.

53. To sum up, the Respondent requests the CAS to *"reject Appellant's Appeal and to proclaim Appellant's claims […] as unfounded"*.

V. JURISDICTION

54. The jurisdiction of CAS, which is not disputed, derives from Art. R47 of the CAS Code which provides 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 statutes or regulations of that body"*.

55. Further to Art. 58(1) FIFA Statutes (2016 edition) as it determines that:

> *"[a]ppeals 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"*.

56. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by both Parties.

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

VI. ADMISSIBILITY

58. The appeal was filed within the deadline of twenty-one days set by Art. 58(1) FIFA Statutes. The appeal complied with all other requirements of Art. R48 of the CAS Code, including the payment of the CAS Court Office fee.

59. The Appeal Brief was due to be filed by 9 April 2018, which was the Orthodox Easter Monday in Romania and, hence, a public holiday in that country. According to Art. R32 of the CAS Code: *"*[…] *If the last day of the time limit is an official holiday or a non-business day in the location from where the document is to be sent, the time limit shall expire at the end of the first subsequent business day"*.

60. The Appeal Brief was filed on 10 April 2018, which is the first following business day.

61. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

62. The Appellant submits that Romanian law and the RFF regulations shall apply, to the exclusion of Swiss law. On the contrary, the Respondent submits that FIFA regulations apply, together with Swiss law.

63. As for the legal doctrine, the starting point for determining the applicable law on the merits is – first and foremost – the *lex arbitri*, *i.e.*, the arbitration law at the seat of arbitration. Since the CAS has its seat in Switzerland (Art. S1 and Art. R28 of the CAS Code), Swiss arbitration law applies. According to Art. 176 para. 1 of the PILA, the provisions of Chapter 12 of the PILA for international arbitration proceedings shall apply if the place of residence and/or domicile of at least one party was outside Switzerland at the time of the execution of the arbitration agreement. It is undisputed that this prerequisite is fulfilled in the case at hand.

64. Furthermore, Art. 187 of the PILA reads as follows: *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*.

65. This article underlines the principle of the party autonomy with respect to the applicable law. Indeed, the parties are free to choose the law applicable to the merits of the dispute.

66. It is undisputed that such choice of law may be made directly (by referring to a specific law) or indirectly, *i.e.* by referring to a "conflict-of-law" provision designating the applicable law to the merits (KAUFMANN-KOHLER/RIGOZZI, Arbitrage International. Droit et pratique à la lumière de la LDIP, 2nd ed., Berne 2010, p. 400). In addition, since a choice of law is not required to take a particular form, it can be entered into either expressly or tacitly (CAS 2017/A/5111 para. 73 *et seq.*).

67. In the case at stake, some provisions of the Contract refer directly to a choice of law:

- Art. 2, let. c) provides that the player undertakes the obligation *"to observe the Statutes, Regulations, Decisions and Resolutions of the management bodies of the club, FRF, LPF (Romanian Professional Football League)"*.

- Art. O states the following: *"The parties agree not to submit any litigation to the courts of justice before exhausting all the means of the jurisdiction courts of the Romanian Football Federation, Professional Football League and FIFA"*.

- Art. P, para. 1 states that: *"The provisions of this agreement are completed by the provisions of the Act no 53/2003 Labor Law and of the applicable collective agreement of employment signed by the Employer/employer's group/branch/national level"*.

68. The reference to the FIFA jurisdiction in the Litigation clause is also an implicit reference to the CAS, as an Appeal Arbitral Institution. Hence, as determined above, the CAS is the only competent body to adjudicate the present dispute.

69. In addition, the Sole Arbitrator is also eager to emphasise that, according to CAS 2014/A/3850, para. 45 *et seq.*, *"The PILA is the relevant law. … Art. 187 para. 1 of the PILA provides – inter alia – that 'the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected' …. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral tribunal. In agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, to Article R58 of the CAS Code. …"*.

70. The view held by the CAS that – in agreeing to have the dispute solved by an arbitral institution, the Parties also tacitly subject the dispute to the conflict-of-law rules for the determination of the applicable law contained in the rules of said institution – is also in line with the predominant interpretation in Swiss legal doctrine (KARRER P. A., in HONSELL/VOGT/SCHNYDER/BERTI, Basler Kommentar – Internationales Privatrecht (IPRG), 3rd ed. 2013, Art. 187 no. 124; KAUFMANN-KOHLER/RIGOZZI, op. cit., no. 618 *et seq.*; ARROYO/RIGOZZI/HASLER, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. R58 nos. 3, 7; BERGER/KELLERHALS, Domestic and International Arbitration in Switzerland, 3rd ed. 2015, no. 1393; ARROYO/BURCKHARDT, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. 187 nos. 22, 35).

71. The conflict-of-law provision in the CAS Code is to be found in Art. R58 of the CAS Code, which provides as follows:

> *"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"*.

72. Finally, the Parties have signed the Order of Procedure that makes explicit reference to Art. R58 of the CAS Code, without any reservation.

73. Bearing in mind these very clear principles, the Sole Arbitrator is of the opinion to fully adhere to the findings of CAS 2017/A/5111, which explained the following (references omitted):

> *"82. Since the various choice-of-law agreements are in conflict with each other, the Panel must decide which agreement takes precedence in the case at hand.*
>
> *83. The overwhelming view in the Swiss legal literature holds that an explicit choice of law always takes precedence over an implicit choice of law. In this regard* ARROYO/BURCKHARDT *are cited as a representative example:*
>
> *"… if the parties … [only] agree on such a set of arbitration rules, the tribunal has to apply these rules and may not revert to Art. 187 (1) PILA to determine the law with the closest connection. If, however, the parties both directly choose the applicable law and refer to a set of arbitration rules, the direct choice of law prevails and there is no room for determining the applicable law indirectly by using the provisions of the chosen arbitration rules".*
>
> *84. CAS jurisprudence for the most part does not concur with this view (CAS 204/A/3742, nos. 38 et seq.). The underlying rationale of this jurisprudence is that the CAS Code – unlike the rules of other arbitral institutions – aims at restricting the autonomy of parties. According thereto, the parties' autonomy only exists within the limits set by the CAS Code. Article R58 of the CAS Code is according to this jurisprudence mandatory (CAS 2014/A/3527, no. 57; likewise, CAS 2014/A/3850, no. 51; CAS 2013/A/3309, no. 70). This jurisprudence is to be followed. The purpose of concentrating appeals against decisions of an international sports organisation with the CAS is not least the desire to ensure that the rules and regulations by which all the (indirect) members are equally bound are also applied to them in equal measure. This can only be ensured, however, if a uniform standard is applied in relation to central issues. This is precisely what Article R58 of the CAS Code is endeavouring to ensure, by stating that the rules and regulations of the sports organisation having issued the decision (that is the subject of the dispute) are primarily applicable. Only subsidiarily, and this for good reason, Article R58 of the CAS Code grants the parties scope for determining the applicable law, and thus scope for changing the legal basis underlying the decision. To conclude, therefore, the indirect submission to the choice-of-law provision in Article R58 of the CAS Code takes precedence over any choice-of-law clause in the Contract".*

74. Moreover, the contents of Art. R58 of the CAS Code is comprehensively addressed in the same quoted award (emphasis added):

> *"85. Article R58 provides that the dispute shall be decided first and foremost according to the "applicable regulations". These "regulations" shall be applied irrespectively of the will of the parties.* ***The term "applicable regulations" within the meaning of Article R58 CAS Code refers to the rules of the association that made the first-instance decision which is being contested in the appeals arbitration procedure*** *(CAS 2014/A/3626, no. 76: "… in the present case the 'applicable regulations' for the purpose of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA …"). […]".*

75. It follows that, in the case at stake, the applicable regulations are the FIFA Regulations and in particular the FIFA RSTP.

76. The Sole Arbitrator further notes that the FIFA Statutes provide in Art. 57 para 2 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".*

77. This rule must be interpreted *stricto sensu* considering that FIFA Regulations shall be read, construed and applied under Swiss law.

78. Subsidiarily, *i.e.*, in case the *"applicable regulations"* do not provide for a solution of the dispute, Art. R58 of the CAS Code refers the arbitral tribunal to the law chosen by the parties. Consequently, the margin of application for the choice-of-law contained in the Contract is small. It only comes into play if the relevant questions of the dispute are not dealt with or covered by the *"applicable regulations"*.

79. To conclude and sum up:

- The Sole Arbitrator will, first, revert to the FIFA regulations as the *"applicable regulations"* within the meaning of Art. R58 of the CAS Code in order to resolve the dispute;
- Considering Art. 57 para. 2 of the FIFA Statutes, the Sole Arbitrator will apply Swiss law for the interpretation and construction of the respective FIFA regulations;
- Only subsequently, and for questions not covered by the FIFA regulations, the Sole Arbitrator shall consider Romanian law.

VIII. MERITS

80. In order to resolve the present dispute, the Sole Arbitrator must reply to the following questions:

a) Did FIFA have jurisdiction to adjudicate the case?

b) If yes, was the decision correct and had the player rightfully terminated the contract for just cause?

c) In case of contract termination with just cause, which are the consequences of such termination and what are those related to the breach of the contract?

A. Did FIFA have jurisdiction to adjudicate the case?

81. The Appellant submits that the FIFA Decision is wrong for three different reasons:

- First, FIFA DRC is not competent to hear the dispute, bearing in mind that this body has no jurisdiction;

- On the contrary, Romanian sports courts could have jurisdiction to adjudicate the matter. In any case, the Romanian football bodies were complying with the FIFA Circular 1010/2005;

- Also, based on the circumstance that the DRC of the Romanian FF - after a claim lodged on 11 June 2015, has terminated the contract before the FIFA decision was issued - the matter is affected by the general principle of *res judicata*.

All these submissions are groundless.

82. The Sole Arbitrator underlines that clause O of the Contract provides as follows: *"the parties agree not to submit any litigation to the Courts of Justice before exhausting all the means of the jurisdiction courts of the Romanian Football Federation, Professional Football League and FIFA".*

83. Clause O of the Contract provides for several alternative dispute resolution mechanisms. In addition, clause O of the Contract provides for the resolution of the dispute between the Parties by (the competent body of) FIFA or the RFF.

84. In case a provision specifies several possible *fora* – in case any indications to the contrary in absent – it is up to the party filing a claim to choose among the provided *fora*.

85. Once the choice is made, it will become binding on both parties. The Respondent did make his choice when filing his claim with the FIFA DRC on 20 May 2015. The Appellant, on the other hand, filed its claim before the RFF DRC on 11 June 2015, *i.e. after* the submission by the Respondent of his claim before FIFA. Thus, the FIFA DRC was competent to decide the dispute.

86. Furthermore, the Contract at the basis of the present dispute does not make clear reference to one specific national DRC in the sense of Art. 22 lit b) of the FIFA RSTP. It follows that, as correctly stated by the FIFA DRC in the appealed decision, this clause can by no means be considered as a clear arbitration clause in favour of the national deciding bodies.

87. Additionally, it is interesting to highlight that when a decision is passed by a national body – that, for the reasons above explained, was not entitled to adjudicate on this specific matter – such decision becomes irrelevant.

88. In light of the above, the Sole Arbitrator can avoid tackling the matter regarding the establishment of the RFF DRC brought forward by the FIFA DRC, claiming in its Decision that the national body is not constituted in accordance with the fundamental and explicit principle of equal representation of players and clubs. It would follow that the considered domestic Decision could not be recognised since it was passed by a deciding body in lack of jurisdiction.

89. Nevertheless, as previously stated, this argument would not change the outcome of the proceedings. As a matter of fact, even if the RFF DRC could have been competent to adjudicate the matter, the original claim was firstly submitted to another competent body. It logically

follows that the FIFA DRC, as first deciding body to which the Claim was correctly introduced, was indeed competent to resolve the dispute.

B. If yes, was the decision correct and had the player rightfully terminated the contract for just cause?

90. It is generally acknowledged that the issue whether a party to a professional player contract is entitled to terminate a contract is a matter governed by the FIFA RSTP which, according to Art. R58 of the CAS Code, are primarily applicable.

91. Art. 13 of the FIFA RSTP provides that *"[a] contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement"*. Furthermore, Art. 14 of the FIFA RSTP sets out that *"[a] contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause"*. According to the Commentary to the FIFA RSTP (N3 to Art. 16), Art. 14 of the FIFA RSTP is *lex specialis* to the principle of Art. 16 of the FIFA RSTP (*"A contract cannot be unilaterally terminated during the course of a season"*). Therefore, a binding employment contract can be unilaterally terminated by either the player or the club prior to the expiry of the employment contract with immediate effect if there is *"just cause"*.

92. As for a definition of *"Just Cause"* this Sole Arbitrator agrees, again, on the findings of CAS 2017/A/5111:

> *"101. The FIFA RSTP do not define what constitutes a "just cause". The Commentary to the FIFA RSTP (N2 to Article 14), however, provides some guidance in this respect:*
>
> *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally".*
>
> *102. According to well-established CAS jurisprudence, non-payment or late payment of a player's salary by his club may constitute "just cause" to terminate the employment contract (see, inter alia, CAS 2006/A/1180; CAS 2008/A/1589; CAS 2013/A/3165; CAS 2014/A/3643). Reference is made in this regard to CAS 2006/A/1180, no. 8.4.1, where the Panel stated as follows:*
>
> *"[…] the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of the obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee",*

The Panel further indicated that:

"[…] the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract".

103. The above interpretation of the term "just cause" is also in line with Swiss law, which – as previously mentioned – is applicable to the interpretation of the FIFA regulations. However, it also follows from the jurisprudence of the Swiss Federal Tribunal that only a particularly severe breach of an employment contract will result in the immediate dismissal of or, conversely, in the immediate abandonment of the employment position by the employee. Instead, in the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after having been warned (SFT 129 III 380, para 2.2).

104. The FIFA RSTP Commentary (N3 to Article 14) follows the above understanding. In the context of termination with "just cause" the commentary – inter alia – refers to the situation where a club has failed to pay the player's salary for more than three months, despite having been notified of its breach by the player. The FIFA RSTP Commentary points out that:

"The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

93. Bearing in mind these clear principles, the Sole Arbitrator confirms the FIFA Decision on the so called *an debeatur*.

94. The factual elements are not contested in the case at stake.

95. Indeed, according to the Contract in force between the Parties, the Club undertook to pay the Player the following monthly salaries:

- EUR 5.000 between 16 January 2015 until 30 June 2015.

96. It is undisputed that the Player was not paid. Indeed, he sent a default notice to the Club on 17 April 2015 – requesting the payment of three monthly salaries – while the termination letter was sent on the following 9 May 2015. In this precise moment, the Club was totally in breach of its principal obligation.

97. The fact that the Club decided to pay the due salary 40 days after the date of the termination letter does not affect the rightfulness of the Player's unilateral termination of the contract.

98. To conclude, the Sole Arbitrator finds that the Respondent evidently terminated the Contract with "just cause" according to the applicable regulations since he had not been paid since the beginning of the contract.

C. In case of contract termination with just cause, which are the consequences of such termination and what are those related to the breach of the contract?

99. This Sole Arbitrator, having decided that the Player had just cause to terminate the Contract, the following question is what the consequences of such termination are.

100. Indeed, because of the Respondent's unilateral termination of the Contract with *"just cause"*, the FIFA Decision holds that the Appellant is liable to pay to the Respondent a compensation for breach of contract in accordance with Art. 17 para. 1 of the FIFA RSTP.

101. The Sole Arbitrator observes that the heading of Art. 17 of the FIFA RSTP reads *"Consequences of terminating a contract without just cause"* (emphasis added) while in the present case the Respondent terminated the Contract with *"just cause"*.

102. However, the Sole Arbitrator is aware of the standing CAS jurisprudence which consistently holds that the purpose of Art. 17 of the FIFA RSTP is mainly to reinforce contractual stability, *i.e.*, to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, whether they be committed by a club or by a player (CAS 2005/A/876; CAS 2007/A/1358, no. 90; CAS 2007/A/1359, no. 92; confirmed in CAS 2008/A/1568, no. 6.37).

103. Moreover, the Sole Arbitrator recalls the FIFA RSTP Commentary (N5 and N6 to Article 14), which reads as follows:

> *"5. In the event of just cause being established by the competent body, the party terminating the contract with a valid reason is not liable to pay compensation or to suffer the imposition of sporting sanctions.*
>
> *6. On the other hand, the other party to the contract, who is responsible for and at the origin of the termination of the contract, is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed".*

104. Accordingly, although the Respondent was the one who terminated the Contract, the Appellant provoked the termination by breaching its contractual obligations.

105. The Appellant is, thus, liable to pay compensation for the damage incurred by the Respondent as a consequence of the early termination. In taking this approach, the Sole Arbitrator finds himself in line with the standing jurisprudence of the CAS (cf., *inter alia*, CAS 2012/A/3033 and CAS 2017/A/5111).

106. In the absence of any contractual provision determining the financial consequences of a unilateral breach of contract, the applicable consequences are set out in Art. 17 para. 1 of the FIFA RSTP, which states as follows:

> *"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria include, in particular, the remuneration and other benefits due*

to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".

107. Again, the Sole Arbitrator notes that the Contract does not provide for an amount to be paid to the Respondent in the event of breach by the Appellant. Hence, the compensation must be calculated in accordance with Art. 17 para. 1 of the FIFA RSTP, considering the remuneration payable to the Respondent under the Contract and according to the time remaining under the Contract.

108. The generally applicable deduction of salaries and other benefits earned by a player under any new contract signed (also to mitigate the damages sustained) would help the Sole Arbitrator to give the case a correct solution.

109. Bearing in mind these circumstances, the Sole Arbitrator agrees on the *quantum debeatur* to a certain extent and believes that the third ground of the Appeal brief is founded so that the FIFA Decision has to be set aside.

110. As correctly sustained by the Appellant, the FIFA Decision, after having deducted the salaries and the first payment made by the Club (in *parte qua*: 2.500,00 EUR were referred to the compensation up to a payment of 22.500 EUR), has rejected the second payment submitted with the following grounds:

"in this context, the DRC noted that, although having been asked to do so, the [Club] did not provide a translated version of the document dated 27 October 2015, according to which it allegedly paid Romanian New Lei (RON) 66,389 to the Player. In view of the foregoing and taking into consideration art. 9 of the Procedural Rules, the Chamber decided that it could not take into account the relevant document which was not translated into an official FIFA language".

111. The Sole Arbitrator believes that this way of reasoning is absolutely wrong.

112. By simply taking a look at the document, it is easy to verify that it is written in English and all the blanks are filled correctly. The only word that remains in Romanian is *"dr financiare"*. Yet, it is quite clear that the translation is "financial rights".

113. The phrase is inserted in a space named "additional details" so that the presence (or the absence) of such phrase should not be decisive in order to reject the Appellant's request. In other words, the payment order, for a total amount of EUR 14,962, was duly filled and signed, completed with a stamp, and the Sole Arbitrator does not have any doubts that the payment was really made by the Club.

114. Additionally, during the hearing held on 21 August 2018, the Player did not contest the payment at all. His representative brought forward vague information with reference to the payment. In the end, it was neither confirmed nor denied whether the payment was received or not.

115. To sum up: the Sole Arbitrator deems the document clear and circumstantiated. The Sole Arbitrator also believes that the behaviour of the Respondent (that did not contest nor confirm the payment) is absolutely in favour of the thesis of the Appellant.

116. In this particular context, the FIFA DRC erroneously decided not to reduce the amount due to the Player failing to take into consideration the second payment made by the Club.

117. The Sole Arbitrator firmly believes that the right compensation due to the Player is the one resulting after the deduction of the amount of EUR 14,962 from the total EUR 34,500. It means that the amount due amounts to EUR 19,538.

118. Since there is not request on the interest due, the Sole Arbitrator confirms the 5% per annum from the date of the effective payment until the day of effective payment, also according to Art. 104 of the Swiss Code of Obligations.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 April 2018 by AFC Astra against the decision issued by the FIFA Dispute Resolution Chamber on 23 March 2017is partially upheld.
2. Paragraph 3 of the operative part of the decision issued by the FIFA Dispute Resolution Chamber on 23 March 2017 is amended as follows:

    3. AFC Astra shall pay to Mr Toni Gorupec an amount of EUR 19'538 (nineteen thousand five hundred and thirty-eight Euros), plus interest at 5% per annum as of 20 May 2015 until the date of the effective payment.

(…)

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