Arbitration CAS 2020/A/6867 Trabzonspor A.S. v. Esteban Alvarado Brown & Liga Deportiva Alajuelense, award of 26 April 2021

Panel: Mr John-Paul Mowberry (United Kingdom), President; Mr Wouter Lambrecht (Belgium); Mr Jordi López Batet (Spain)

Football
Termination of the employment contract with just cause by the player
Conclusion of a contract
Appropriate time to accept an offer

1. **In accordance with article 1 of the Swiss Code of Obligations, an agreement is a bilateral juridical act which implies the exchange of at least two expresssions of intent, being it neccessary that each party lets the other know, with all the precision required, that it wants to provoke a certain legal effect. An offer in not enough to provoke the legal effect described by the offeror, as the contract is only considered concluded if three supplementary pre-requisites are met: acceptance, reciprocity and concordance.**

2. **In case an offer is made without a clear deadline for acceptance, such offer being made either in the presence or in the absence of the other party, still said offer must be accepted to resort legal effects, and it must be accepted either immediately, when made in the presence of the other party, or within the duration of the binding effect of an offer, said duration to be assessed according to the time objectively necessary to accept or refuse said offer, which in case of an instant exchange via a cross-platform messaging service has to happen almost immediately.**

I. PARTIES

1. Trabzonspor A.S. (herein referred to as the "Club" or the "Appellant") is a professional football club based in the city of Trabzon in Turkey. It is a member of the Turkish Football Federation ("TFF") which itself is in turn affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Mr. Esteban Alvarado Brown (herein referred to as the "Player" or the "First Respondent"), a citizen of Costa Rica, is a professional football player.

3. Liga Deportiva Alajuelense (herein referred to as "Alajuelense" or the "Second Respondent") is a football club based in Alajuela, Costa Rica.

All together referred to as "the Parties".

II. FACTUAL BACKGROUND

4. The elements set out below are a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, the exhibits produced as well as the evidence examined in the course of the proceedings. Additional facts and allegations may be set out, where relevant, in connection with the ensuing legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, in its award reference is made only to the submissions and evidence the Panel considers necessary to explain its reasoning.

A. Background Facts

5. The Player and the Club entered into a first employment contract on 6 August 2015, valid until 31 May 2017 (hereinafter, the "First Employment Contract").

6. In accordance with the terms of the First Employment Contract, the Player was *inter alia* entitled to receive a fixed remuneration from the Club to the sum of EUR 550.000 net during season 2015/2016 and EUR 550.000 net during season 2016/2017.

7. Following the expiration of the First Employment Contract, the Player and Club signed a second employment contract on 17 June 2017 valid until 31 May 2019 (hereinafter, the "Second Employment Contract").

8. In accordance with the terms of the Second Employment Contract, the Player was *inter alia* entitled to receive a fixed remuneration from the Club to the sum of EUR 700.000 net during season 2017/2018 and EUR 700.000 net during season 2018/2019.

9. Special Provisions VI. letters a) and b) of the Second Employment Contract stated:

   a) In case of non-payment of two consecutive salaries in full, the PLAYER should notify the CLUB in writing. In this notification, the PLAYER shall give 30 (thirty) days to the CLUB for payment. If the CLUB does not pay the notified amount, then the PLAYER has the right to unilaterally terminate the CONTRACT.

   b) If the PLAYER fields in less than 10 official games in a season, he is entitled to terminate this CONTRACT by paying net 700.000.- € to the CLUB as buy-out. The PLAYER might only use this right during the first month of first registration period and first week of second registration period declared by TFF for 2018 – 2019 football season.

10. On 30 May 2018, the Club and the Player, after several requests for payment of overdue amounts made by the Player, concluded a Settlement Agreement in relation to such overdue payables resulting both from the First and Second Employment Contract, by which the Club undertook to pay the Player a total of EUR 550.000 in four instalments.

11. The relevant paragraphs of the Settlement Agreement read as follows:

3.1 According to the 17.06.2017 dated Professional Football Player Contract signed between Trabzonspor A.S. and Player, Player has 420.000,00-EURO as total of 7 months unpaid wages (December 2017, January February March April May 2018);

Also Player has 2016-2017 season unpaid 40.000,00-EUR living cost, for 2017-2018 season unpaid 50.000,00-EUR, for 2017-2018 season unpaid 40.000,00-EUR by game fee as total sum of 130.000,00- EUR unpaid debt owned himself.

3.2 Trabzonspor A.S. accepts to pay the abovementioned 420.000,00-EUR wage and 130.000.00-EUR other payables as total sum 550.000,00-EUR in aforementioned terms:

- *30.05.2018, 210.000,00-EURO in cash,*
- *27.08.2018 dated 110.000,00-EURO bill,*
- *27.09.2018 dated 110.000,00-EURO bill,*
- *30.10.2018 dated 120.000,00-EURO bill,*

12. On 5 November 2018, the Player, by means of his Attorney, Mr Murat Teber, served a default notice ("the Default Notice") on the Club requesting payment of an amount of EUR 490.000 broken down as follows:

- EUR 230.000 corresponding to the last two payments from the Settlement Agreement payable on 27 September and 30 October 3018,

- EUR 50.000 corresponding to living costs payable at the beginning of the sporting season 2018/19,

- EUR 210,000 corresponding to three monthly salaries payable on 31 August, 2 October and 30 November 2018.

13. In the Default Notice, the Player warned the Club that in case this amount was not paid in total within 30 days after the receipt of the letter, the Player would use all his legal rights. This Default Notice was received by the Club on 9 November 2018.

14. The Club did not reply to the Default Notice and only made the partial payment of EUR 110.000 on 22 November 2018 out of the amounts due to the Player.

15. On 15 December 2018 certain messages were exchanged via the cross-platform messaging service WhatsApp, between Mr Murat Teber, the Attorney of the Player and Mr Sinan Zengin, General Manager of the Club (hereinafter "WhatsApp Messages").

This exchange of WhatsApp Messages[1] reads as follows:

MURAT: Hi "boss", when is the soonest you'll be able to pay the money?

Sinan: I think that we could have everything wrapped up by the end of the month.

MURAT: "Man", could it be before the 24th?

Sinan: Maybe, next week the situation will be a little clearer.

MURAT: That would be good; if not, we may rescind (the contract) on the 24th.

Sinan: That would be a mistake, "presi". Esteban should be smart; he'll keep the goal area and will be able to extend the contract. I think we'll be able to solve the payment issue; it won't be a problem.

MURAT: "Man", he's very dispirited; he thinks that he is not wanted here and that everyone is hoping he goes. That's why you have to make the payment before the rescission. I could keep him entertained (in the sense of holding him off) until the 24th; afterwards, he could do whatever he wants.

Sinan: Everyone on the team loves Esteban. He's wrong.

MURAT: That's just what I told him. He says that nobody talks to him but that if he is paid, he will stay (as he considers it his duty). We'll be able to fix it later, and you'll also have peace of mind for a while.

16. On 18th December 2018, new messages were exchanged via WhatsApp between Mr Murat Teber and Mr Sinan Zenin. This exchange reads as follows:

MURAT: "Boss", our guy (Esteban) has left the city, he's asked me to rescind the contract. I just wants to let you know that I'm going to do it. We've argued a bit, but I couldn't convince him.

(Deleted message)

Sinan: Mr. Murat, as the player's attorney, you gave us your word and we organized the payment plan based on that. Therefore, we cannot accept something like this.

MURAT: "Man", I didn't promise anything.

Sinan: The messages up above are very clear, Mr. Murat; therefore, we will act accordingly.

MURAT: I said that the contract was going to be rescinded because the situation was bad. The (legal) warning expired on the ninth and we gave you extra time. What I've written here (WhatsApp)

[1] Translation into English of the original text in Turkish, made by a translations' specialized company and submitted by the First Respondent with its answer to the appeal brief. The Appellant did not challenge the accuracy of this translation prior to nor during the hearing. "XXX" has been replaced by Sinan for ease of reading.

does not mean that I've given you any extra time. If you want to read it that way, we'll handle the matter the only way we know how. You had the possibility to make payment up until today; I said that the player was going up to the 24th.

UNREAD MESSAGES

MURAT: The matter is related with the player's situation. We have to look at it from that point of view and think about what to do from here forward.

17. On the same day, the Player, by means of his Attorney Mr Murat Teber, terminated the Second Employment Contract sending a termination letter to the Club alleging just cause, claiming that the Club had failed to pay him the amounts due and reserving all other economical and legal rights.

18. It is not contested that the Club did not reply to the termination letter sent by the Player.

19. On 10 January 2019, the Player signed an employment contract with the Second Respondent, valid until the end of May 2019, by which the Player was entitled to the payment of USD 25.000.

B. Proceedings before the Dispute Resolution Chamber of FIFA

20. On 21 March 2019, the Club filed a claim against the Player and the Second Respondent before the FIFA Dispute Resolution Chamber (hereinafter the "FIFA DRC").

21. In the claim before the FIFA DRC, the Club alleged that the Player had terminated the Second Employment Contract without just cause, in order to avoid his obligations under the terms of the buy-out clause (*supra* Provision VI.b) of the Second Employment Contract) and that in line with Article 17.2 of the FIFA Regulations on the Status and Transfer of Players (hereinafter the "FIFA RTSP"), the Second Respondent was jointly and severally liable for the compensation payable by the Player as a consequence of his breach.

22. In submissions before the FIFA DRC, the Club accepted that when the Second Employment Contract was terminated, the Club owed to the Player the amount of EUR 450.000, but submitted that an agreement to extend the deadline to pay this amount had been reached with the Player via an exchange of WhatsApp Messages between the Player's attorney and the Club's General Manager.

23. The Club claimed that the Player, by terminating the employment relationship before the expiration of such new deadline of payment, was therefore due to pay the Club the sum of EUR 250.000 which corresponded to the amount of EUR 700.000 (buy-out sum as per Provision VI.b) of the Second Employment Contract) minus the EUR 450.000 outlined at paragraph 23 above. The Club claimed that it had been deprived of the *"ability of either*

negotiating a transfer or [of] having the buy-out exercised and receiving" EUR 700.000.

24. The Player, in response, lodged on 23 July 2019 a counter-claim, maintaining that he had unilaterally terminated the Second Employment Contract with just cause, claiming payment of EUR 450.000 in concept of outstanding salaries and a compensation for breach of contract in the amount of EUR 420.000, plus the relevant interest.

25. Alajuelense contested the Club's claim arguing that the Player had terminated his labour relationship with the Club with just cause before Alajuelense hired him, and that Alajuelense was not involved in such termination.

26. On 21st February 2020, the FIFA DRC rendered its decision (herein referred to as the "Appealed Decision") with, *inter alia*, the following operative part:

> *2. The claim of the Claimant / Counter-Respondent, Trabzonspor, is rejected.*
>
> *3. The counter-claim of the Respondent I / Counter-Claimant, Esteban Alvarado Brown, is partially accepted.*
>
> *4. The Claimant / Counter-Respondent has to pay to the Respondent I / Counter-Claimant outstanding remuneration in the amount of EUR 450,000 plus interest as follows:*
>
> - *5% interest p.a. on the amount of EUR 120,000 from 31 October 2018 until the date of effective payment;*
> - *5% interest p.a. on the amount of EUR 70,000 from 1 September 2018 until the date of effective payment;*
> - *5% interest p.a. on the amount of EUR 70,000 from 3 October 2018 until the date of effective payment;*
> - *5% interest p.a. on the amount of EUR 70,000 from 1 November 2018 until the date of effective payment;*
> - *5% interest p.a. on the amount of EUR 70,000 from 1 December 2018 until the date of effective payment;*
> - *5% interest p.a. on the amount of EUR 50,000 from 18 December 2018 until the date of effective payment.*
>
> *5. The Claimant / Counter-Respondent has to pay the Respondent I / Counter-Claimant compensation for breach of contract in the amount of EUR 420,000 plus 5% interests p.a. from 24 July 2019.*
>
> *6. Any further claim lodged by the Respondent I / Counter-Claimant is rejected. […].*

27. The grounds of the Appealed Decision were notified on 16 March 2020 and may be

summarized as follows:

- It is undisputed that when the termination of the labour relationship occurred, an amount of EUR 450.000 was outstanding.

- The Club was duly put in default of payment by the Player.

- The Club failed to provide substantial evidence of any contractual agreement referring to new deadlines to pay the remuneration due to the Player. The WhatsApp Messages exchange between the Player's attorney and the Club do not constitute a contractual *novum* with regards to the obligations of the Club to pay the Player's outstanding remuneration.

- Therefore, the Player had just cause to terminate his labour contract with the Club.

- The Club shall be ordered to pay to the Player:

  - The outstanding remuneration (EUR 450.000) plus interest.

  - A compensation for breach to be calculated as follows: EUR 420.000 (remaining value of the Second Employment Contract) minus USD 25.000 (sum of the labour contract signed by the Player with Alajuelense during the relevant period) plus EUR 210.000 additional compensation as per article 17.1 para. ii of the FIFA RSTP. Since the overall compensation exceeds the residual value of the prematurely terminated contract (article 17.1 para ii FIFA RSTP), the amount payable shall be EUR 420.000, plus interest.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 18 March 2020, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS") pursuant to Article R47 and R48 of the Code of Sports-related Arbitration and Mediation Rules (hereinafter referred to as the "CAS Code"). In this document the Club appointed Mr. Wouter Lambrecht as arbitrator.

29. On 30 March 2020 the First Respondent appointed Mr. Jordi López Batet as arbitrator in this case.

30. Also on 30 March 2020, the CAS Court Office invited the Second Respondent to inform by 3 April 2020 whether it agreed or not with the nomination of Mr. López as arbitrator. The Second Respondent did not respond to this invitation and thus it was considered that it agreed with such nomination.

31. On 29 April 2020, the Appeal Brief was lodged by the Appellant, pursuant to Article R51 of the Code.

32. On 4 May 2020, pursuant to Article R54 of the Code, the Parties were forwarded the Notice of Formation of a Panel on behalf of the CAS Appeals Arbitration Division, by virtue of which the Panel appointed to decide the present dispute is constituted as follows:

President: Mr John-Paul Mowberry, Attorney-at-law in Glasgow, Scotland

Arbitrators: Mr Wouter Lambrecht, Attorney-at-law in Barcelona, Spain

Mr Jordi López Batet, Attorney-at-law in Barcelona, Spain

33. On 31 May 2020, in accordance with Article R55 of the Code, the First Respondent filed its Answer to the Appeal Brief.

34. The Second Respondent failed to submit its Answer to the Appeal Brief within the granted deadline.

35. On 1 July 2020, the CAS Court Office wrote to the Parties pursuant to Article R57 of the Code to inform that the Panel, after consultation with the Parties, had decided to hold a hearing and that said hearing would take place at Barcelona, Spain on 29th October 2020.

36. On 28 August 2020, a draft Order of Procedure was shared with all Parties by the CAS Court office and this was duly signed and returned by all Parties.

37. On 14 October 2020, intimation was sent from the CAS Court Office to the Panel and all Parties confirming that the hearing of 29th October 2020 would be held by video conference due to the travel restrictions and sanitary measures in relation to the COVID-19 outbreak.

38. On 29 October 2020, the Second Respondent forwarded one page of written submissions to the offices of CAS by email, which had not previously been forwarded at any point.

39. The hearing took place on 29 October 2020 by video conference. The Panel was assisted at the hearing by Mr. Antonio de Quesada, Head of Arbitration of the CAS. The following persons attended the hearing for the Parties:

For Trabzonspor A.S.	Mr Paolo Torchetti, Attorney-at-law Mr Sinan Zegnin, General Manager
For the Player:	Mr Alberto Ruiz de Aguiar, Attorney-at-law Mr Esteban Alvarado Brown, the Player
For Liga Deportiva Alajuelense	Mr Esquire Manrique Lara Bolaños

40. At the outset of the hearing, the Parties confirmed that they had no objection to the composition and constitution of the Panel. Parties also confirmed that they were content

with all procedures adopted so far by the CAS and that the fact the hearing itself was proceeding by video conference would not form any ground of appeal.

41. One preliminary matter arose in relation to the written submissions forwarded by the Second Respondent on 29 October 2020. The Panel refused to admit that correspondence, which had been forwarded late and without justification, and informed the Parties that the test under Article R56 of the Code was not met by the Second Respondent in this regard.

42. The Parties were given ample opportunity to present their case, submit their arguments, lead evidence from the Parties and clarify same. The Parties were also given ample opportunity to answer questions raised by the Panel. Before conclusion of the case, the Parties were asked if their right to be heard had been fully respected and all Parties so agreed.

IV. OVERVIEW OF THE PARTIES' POSITIONS

43. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each contention put forward by them. However, in considering and deciding upon the Parties' claims, the Panel, has carefully considered all the submissions made and the evidence adduced by the Parties, even if there is no specific reference to those submissions in this section of the award or in the legal analysis that follows.

A. The Club

44. In its Appeal Brief, the Club submitted the following requests for relief:

1. To accept this Appeal.

2. To determine that the Player unilaterally and prematurely terminated the employment relationship without just cause.

3. To issue an award requiring the Player and/or the Second Respondent to pay the Club compensation in the amount of €250,000.

4. In the alternative, the Club requests that the amount of compensation paid ought to be the amount that was outstanding at the time of the termination - €450,000.

5. Independently of the type of the decision to be issued, the Appellant requests the Panel:

a. to fix a sum of 15,000 CHF to be paid by the Respondents to the Appellant, to contribute to the payment of his legal fees and costs; and

b. to order the Respondents to the payment of the whole administration costs and fees.

45. In summary, the Club submitted the following *inter alia* in support of its appeal:

i) that the Club accepted it did owe the Player EUR 450.000 at the date of termination of the Second Employment Contract;

ii) that the Club accepted it had indeed received a properly drafted notice of default, dated 5th November 2018;

iii) that the legal position created above by such notice was disturbed by the exchange of WhatsApp Messages between the Player's attorney and the Club's General Manager;

iv) that, based on the terms of the WhatsApp Messages the Club was entitled contractually to follow a new payment schedule, specifically meaning that the Club was permitted to make payment to the Player of the overdue payables by 24th December 2018, such pursuant to articles 1 and 5 of the Swiss Code of Obligations;

v) that when the Player then terminated on 18th December 2018, he had acted in advance of the newly agreed deadline and that the doctrine of estoppel should be applied because the Club held a reasonable belief that the debt was due by 24th December 2018;

vi) that the Player had therefore misled the Club as to the date for payment of the overdue payables and left the Club unexpectedly;

vii) that the Player could have exercised a buy-out clause terminating the Second Employment Contract during the winter transfer period for an amount payable of €700,000. Instead the Player unilaterally terminated the Second Employment Contract a week before the deadline for payment of outstanding sums that was granted. In fact, the Player terminated the Second Employment Contract in order to leave the Club without the necessity to pay this buy-out amount.

viii) that the unilateral termination was therefore premature, and in such circumstances the FIFA DRC jurisprudence determines that the Player ought to pay compensation, given that the Player had infringed the legitimate expectation of the Club and he had acted in bad faith;

ix) that the Club shall be compensated in the amount of EUR 250,000, which is the difference between the amount of EUR 700,000 that the Player would have had to pay the Club had he exercised the buy-out clause and the amount owed to the Player by 24 December 2018, being EUR 450,000.

x) that according to Article 17(2) of the FIFA RTSP, the Second Respondent should be held jointly and severally liable for the payment of the compensation.

xi) that in the alternative, if the Club's main request is not granted, the amount of compensation to be paid to the Player ought to be the amount that was outstanding at the time of the termination (EUR 450,000).

B. The Player

46. In his Answer to the appeal, the Player submitted the following requests for relief:

a. To dismiss the appeal filed by TRABZONSPOR A.Ş., confirming the decision passed by the Dispute Resolution Chamber on 21st February 2020 in the matter with reference Club Trabzonspor, Turkey / Player Esteban Alvarado Brown, Costa Rica; Club LD Alajuelense, Costa Rica, Ref. No. 19-00727/lza.

b. To fix a sum of 7.500,00 CHF to be paid by the Appellant to the First Respondent, to contribute to the payment of his legal fees and costs; and

c. To order the Appellant to the payment of the whole administration costs and fees.

47. In support of his Answer, the Player submitted *inter alia*:

i) that the WhatsApp Messages exchange held between the Player's attorney and the Club's General Manager does not constitute an agreement to extend the payment deadline. The key element of the article 1 of the Swiss Code of Obligations is the sentence "mutual expression of intent" meaning in this context, the reciprocal expression of the will to be bound or to be obliged by the agreement. Thus, the article requires such mutual expression because it has to come from both contractual sides, and this is not the case herein.

ii) that we do not need to focus on the Player or to analyse whether such WhatsApp Messages contained the expression of Player´s intent to allow the Club to pay on or before December 24th 2018. What is really relevant is if the conversation contains a real expression of Club´s intention to pay the Player on or before 24th December 2018, which was not the case herein.

iii) that the Club owed overdue payables, including unpaid salaries and unpaid payments due under the terms of the Settlement Agreement and the Second Employment Contract;

iv) that a properly drafted default notice was served on the Club at appropriate times and dates and that no payment took place within the provided deadline; that the WhatsApp Messages between the Player's attorney and the Club's General Manager did not have any legal consequences for the Player;

v) that the WhatsApp Messages did not amount to an offer to extend the payment deadline which could have any contractual effect;

vi) the Player, lacking payment, was therefore entitled to unilaterally terminate the Second Employment Contract with just cause;

C. Alajuelense

48. The Second Respondent's position expressed at the hearing is, in essence, that (i) there is no evidence that could be identified to suggest collusion between the Player and Alajuelense, (ii) it hired the Player after having terminated his previous labour relationship with just cause and (iii) it should not be held jointly and severally liable as requested by the Appellant.

V. JURISDICTION

49. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) FIFA Statutes (2018 Edition), as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"*, and from Article R47 CAS Code. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both Parties.

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

VI. ADMISSIBILITY

51. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

52. It follows that the appeal is admissible.

VII. APPLICABLE LAW

53. Art. R58 of the CAS Code reads 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

54. Furthermore, Art. 57.2 of the FIFA Statutes provides:

> *"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".*

55. Provision X.d) of the Second Employment Contract reads as follows:

> *"It is the Parties will to expressly submit any disputes related to the present CONTRACT to the FIFA's Dispute Resolution Chamber ("DRC") in first instance and in appeal to the Court of Arbitration for Sport.*

Both proceedings will follow the Swiss Legislation and the FIFA Regulations for the merits of the case as well as its own rules about the procedure enforce at any time of any possible dispute. For the avoidance of doubt, Swiss Legislation and FIFA Regulations will be the only Laws and Regulations applicable to any possible dispute between the Parties. Both parties expressly renounce the submission of any dispute to any other body different from FIFA and the CAS. This clause constitutes an essential and determining factor of this CONTRACT, without with it the present document would not have been executed by the Parties".

56. In line with the aforementioned provisions, both the Club and the Player call in their submissions for the applicability of the FIFA Regulations and Swiss Law to this dispute. At the hearing, the Second Respondent did not object the application of such laws and regulations to this case.

57. Taking into account the aforementioned, the Panel considers that the present dispute shall be resolved according to the FIFA regulations and, in particular, to the FIFA RSTP, and additionally according to Swiss Law for matters not provided for in the FIFA RSTP.

58. Moreover, pursuant to article 26 paras 1 and 2 of the FIFA RSTP and keeping in mind that the claim in front of FIFA was filed on 21 March 2019, the June 2018 edition of the FIFA RSTP applies to the matter at hand

VIII. MERITS OF THE CASE

59. The Panel notes that the object of the dispute between the Parties may be summarized as follows: the Club contends that the Player terminated the Second Employment Contract without just cause and thus both the Player and his new club (the Second Respondent) are obliged to pay compensation to the Club, while the Player holds that he terminated such contract with just cause and that the Appealed Decision shall be thus confirmed. The same request for confirmation is made by the Second Respondent.

60. The Panel shall take article 14bis FIFA RSTP as starting point to deal with this dispute. Paras. 1 and 2 of this article read as follows*:*

1. In the case of a club unlawfully failing to pay a player at least two monthly salaries on their due dates, the player will be deemed to have a just cause to terminate his contract, provided that he has put the debtor club in default in writing and has granted a deadline of at least 15 days for the debtor club to fully comply with its financial obligation(s). Alternative provisions in contracts existing at the time of this provision coming into force may be considered.

2. For any salaries of a player which are not due on a monthly basis, the pro-rata value corresponding to two months shall be considered. Delayed payment of an amount which is equal to at least two months shall also be deemed a just cause for the player to terminate his contract, subject to him complying with the notice of termination as per paragraph 1 above.

61. The main issues to be resolved by the Panel in this case are the following:

i. Did the Club owe to the Player overdue payables sufficient to satisfy the article 14bis FIFA RSTP requirements of just cause?

ii. Did the Player serve correct notices on the Club?

iii. Did the WhatsApp Messages between the Club's General Manager and the attorney of the Player create any legal consequences to disturb the application of just cause as defined at article 14bis FIFA RSTP?

iv. Did the Player terminate with just cause in terms of article 14bis FIFA RSTP?

v. In the affirmative, which are the financial consequences of such a termination with just cause?

i. Did the Club owe to the Player overdue payables sufficient to satisfy the article 14bis RSTP requirements of just cause?

62. The Club accepted in its submissions before the FIFA DRC and in its written submissions and oral pleadings before the CAS that EUR 450.000 were owed to the Player when the Second Employment Contract was terminated, including salaries and unpaid Settlement Agreement amounts.

63. Therefore, being the existence of such a debt an undisputed fact, the Panel can only conclude that indeed, the failure of payment by the Club in the terms of article 14bis FIFA RSTP exists, being unnecessary to enter into further discussions in this respect.

ii. Did the Player serve correct notices on the Club?

64. The Panel points out in this respect that:

- The Player put the Club in default concerning the amounts due under the Settlement Agreement and the Second Employment Contract by virtue of a letter dated 5 November 2018, in which the Player granted the Club a 30-day term to make the relevant payment as established in Provision VI of the Second Employment Contract.

- The Club did not contest having received this Default Notice nor did it reply to this letter.

- The 30-day term granted in the letter to make the full payment of the total amount due expired without the Club having settled such amount, allowing the Player to terminate the Second Employment Contract with just cause as of 31st day following receipt of said default letter by the Club (i.e. as of 10 December 2018)

65. It is thus clear for the Panel that the form and contents of the referred Default Notice and the notice of termination shall be found to be correct and effective in terms of article 14bis

FIFA RSTP.

iii. Did the WhatsApp Messages between the Club's General Manager and the Attorney of the Player create any legal consequences to disturb the application of just cause as defined at article 14bis FIFA RSTP?

66. According to the Panel, as of 10 December 2018, the Player was fully entitled to terminate his employment relationship with the Club with just cause and the Club had fully assumed such possibility not having replied to the Default Notice nor having made the full payment of the outstanding amount.

67. However, when the Player finally terminated the Second Employment Contract on 18 December 2018, the Club submits that the Player was not entitled to do so since the deadline to pay the outstanding payments had been extended until 24 December 2018 by virtue of an exchange of WhatsApp Messages held between the Player's attorney Mr. Teber and the Club's General Manager Mr. Zengin.

68. As submitted by the Club, on 15 December 2018, the Player, via his Attorney, and without being solicited, unilaterally offered to extend the payment deadline until 24 December 2018 and the Club accepted such offer, implying that the unilateral termination by the Player on 18 December 2018 breached the agreement reached between the Parties, breached the legitimate expectations of the Club, violated the legal principle of *estoppel* and amounted to an abuse or right.

69. The Player for his part rejects the contentions of the Club, submits that the WhatsApp Messages should be qualified as an informal conversation held without the Player's knowledge from which no legal consequences can be drawn, that there was no intent on the side of the Player to grant a new deadline, and that if there was an offer, it was made in the presence of the Club and the later did not accept it.

70. The Parties referred to articles 1, 4 and 5 of the Swiss Code of Obligations ("SCO") in their submissions. Said articles read as follows:

Art. 1 A. – Conclusion of the contract / I. Mutual Expression of intent
1. The conclusion of a contract requires a mutual expression of intent by the parties.
2. The expression of intent may be express or implied.

Art. 4 A. – Conclusion of the contract / II. Offer and acceptance / 2. Offer without time limit / a. In the parties' presence
1. Where an offer is made in the offeree's presence and no time limit for acceptance is set, it is no longer binding on the offeror unless the offeree accepts it immediately.
2. Contracts concluded by telephone are deemed to have been concluded in the parties' presence where they or their agents communicated in person.

Art. 5 A. Conclusion of the contract / II. Offer and acceptance / 2. Offer without time

limit / b. In the parties' absence
1. Where an offer is made in the offeree's absence and no time limit for acceptance is set, it remains binding on the offeror until such time as he might expect a reply sent duly and promptly to him.
2. He may assume that his offer has been promptly received.
3. Where an acceptance sent duly and promptly is late reaching the offeror and he does not wish to be bound by his offer, he must immediately inform the offeree.

71. Following the line of argumentation of the Parties, the Panel needs to assess and analyse whether the constitutive elements were met in order for the Whatsapp Messages to be considered an actual bi-lateral agreement and/or creating the legitimate expectations for the Club that it had until 24 December 2018 to pay the Player the outstanding amount.

72. In making this assessment, it should be reminded that (i) pursuant to article 8 of the SCO, the burden of proof thereto lies with the Club since it is the Club that invokes and wishes to rely on said alleged bi-lateral agreement (THEVENOZ/WERRO, *Code des obligations I, Art 1-529 CO,* 2nd éd.*,* Basle 2017, Art. 1 N 116)[2] and (ii) in accordance with article 1 SCO, an agreement is a bilateral juridical act which implies the exchange of at least two expresssions of intent, being it neccessary that each party lets the other know, with all the precision required, that it wants to provoke a certain legal effect. An offer in not enough to provoke the legal effect described by the offeror, as the contract is only considered concluded if three supplementary prerrequisites are met : acceptance, reciprocity and concordance (THEVENOZ/WERRO, *Code des obligations I, Art 1-529 CO,* 2nd éd.*,* Basle 2017, Art. 1 N 78 & 84)[3].

73. In trying to meet its burden of proof, the Club, referring to the relevant articles in the SCO, stated that a bi-lateral agreement to extend the payment deadline was reached since there was a mutual expression of intent with an offer being made and accepted. As such, the Club submits that the necessary constitutive elements were met for a bi-lateral agreement to spring to life between the Parties. The Panel shall thus analyse whether this is indeed the case and whether such constitutive elements were actually met.

74. In making this assessment, the Panel had particular regard to:

a) the terms of the WhatsApp Messages;

b) the evidence of the Player;

c) the evidence of the Club's General Manager;

---

[2] *N116:* ***B. La preuve de la conclusion du contrat :*** *Conformément à CC 8, c'est en principe à la partie que se prévaut d'un contrat qu'incombe le fardeau de la preuve des faits dont on peut déduire la réalisation de toutes les conditions de la conclusion du contrat. Si cette preuve est apportée, l'autre partie supporte le fardeau de la contre-preuve de l'inexistence du contrat.*

[3] *N78* : *Le contrat est un acte juridique bilatéral qui suppose l'échange d'au moins deux manifestations de volonté soumises à reception […] if faut que, sur un plan externe, chaque partie fasse savoir à l'autre, avec toute précision requise, qu'elle desire provoquer un certain effet juridique. […] N84 : L'offre ne suffit pas pour provoquer le résultat juridique décrit par son auteur, puisque le contrat n'est pas conclu que si trois conditions supplémentaire sont réalisées (l'acceptation, la réciprocité et la concordance).*

d) the surrounding circumstances;

e) the Swiss Code of Obligations.

75. In this respect, the Panel fully assessed the exact terms of the WhatsApp Messages and did not find that they contained any clear expressions of intention, neither on behalf of the Club nor on behalf the Player, to extend any payment deadline. No explicit offer from the Player to extend the payment deadline until 24 December 2018 may be found therein (expressions like *"Could it be before the 24th? or "That would be good" or "If he is paid he will stay […]. We'll be able to fix it later, and you'll also have peace of mind for a while"*. confirm such understanding), and even if the Player's expression of intent in the WhatsApp Messages could be qualified as an offer (*quod non*), it is patent that no clear acceptance of such an offer by the Club took place (expressions like *"I think that we could have everything wrapped up by the end of the month…" or "Maybe next week the situation will be a little clearer" or "I think we will be able to solve the problem"* so reveal). Therefore, in light of this lack of expression of mutual intent by the Parties, with no offer from the Player and no acceptance from the Club, it is the Panel's view that the Player was not estopped from terminating the contract.

76. In addition, the Panel did not find either that such messages created any reasonable expectation on behalf of the Club, and the Panel did find that the Club at no point in time committed itself to pay the outstanding amount by the 24 December 2018. If anything, lacking a clear extension being granted, and in case the Club had doubts, it could have clarified them and it could proactively have sought confirmation of the same from the Player's Attorney. In coming to this conclusion, the Panel also drew inferences from the fact that the Club failed to send an official reply to the official Termination Letter, challenging the termination based on the arguments set out in its claim before FIFA and in this Appeal Brief. In similar fashion, the Club did not submit any additional documents, such as for example: emails, internal orders, exchanges with its bank or cashflow statements, to corroborate that they had in fact organized a payment plan based on the new payment date, as indicated by Mr Sinan Zegnin in the Whatsapp messages with the Player's Attorney on 18 December 2018. Neither was such payment deposited with a notary for the Player to collect upon confirming the continuation of the employment relationship.

77. In this respect, the Panel wishes to underline that in case an offer is made without a clear deadline for acceptance, such offer being made either in the presence or in the absence of the other party, still said offer must be accepted to resort legal effects, and it must be accepted either immediately, when made in the presence of the other party, or within the duration of the binding effect of an offer, said duration to be assessed according to the time objectively necessary to accept or refuse said offer, which *in casu* due to the nature of the instant exchange via the cross-platform messaging service WhatsApp would have had to happen almost immediately according to the Panel. No acceptance of what the Club considered to constitute an offer (*quod non*) took place, neither expressly, tacitly nor by means of conclusive acts.

78. Since the Panel considers that there was (i) no novation of the payment deadline, (ii) no intention on behalf of the Player to extend the payment deadline, (iii) in any case no

acceptance by the Club of what it considered constituted an offer by the Player (iv) nor could the Club, according to the Panel, in good faith have considered that the deadline was extended, it concludes that there are no elements at hand which could somehow disturb the application of the article 14bis FIFA RSTP.

79. In conclusion, the Panel did not find that sufficient factual support for the Club's legal submissions could be made out by reference to the WhatsApp Messages. There being no mutual expression of intent established therein, any further findings under reference to articles 4 and 5 SCO were therefore unnecessary.

80. The Panel therefore concluded that the WhatsApp Messages amounted to informal exchanges which held no clearly identifiable expressions of intentions, and as such they do not have any legal effect on the subjects of this appeal.

iv. Did the Player terminate with just cause?

81. The test set out at article 14bis FIFA RTSP is therefore met for the reasons explained above and the Panel finds that Player terminated unilaterally with just cause due to the non-payment of overdue payables by the Club, supported by a properly timed, drafted and served default notice and notice of termination.

v. What are the financial consequences?

82. Finally, the Panel examined the financial consequences of the termination with just cause in the Appealed Decision.

83. The FIFA DRC calculated the amount of the compensation arising out of such termination considering the following parameters foreseen in article 17.1 FIFA RSTP:

Remaining value of the Second Employment Contract: EUR 420.000

– Remuneration of the labour contract signed by the Player with Alajuelense until 31 May 2019: USD 25.000

\+ Additional compensation as per article 17.1 para. ii FIFA RSTP: EUR 210.000 (monthly salary -EUR 70.000- x 3)

Since this overall compensation (EUR 630.000 – USD 25.000) exceeds the residual value of the prematurely terminated contract (EUR 420.000), the FIFA DRC, in application of article 17.1 para ii FIFA RSTP, decided that the amount payable by the Club shall be EUR 420.000, plus interest of 5% per annum from 24 July 2019.

84. The Panel has checked this calculation and finds no reason to deviate from it, as it is clearly in line with article 17.1 FIFA RSTP. Therefore, the grant for compensation and interest on it made in the Appealed Decision is confirmed.

85. The Panel also confirms that in addition to the above amount, the Club shall be also ordered to pay to the Player the outstanding remuneration and interest in the terms foreseen in para. 3 of the Appealed Decision's operative part, which the Panel finds correct and in any event, has not been contested by the Appellant.

IX. CONCLUSION

86. As a result, the Appealed Decision is upheld in its entirety and the Club is to make to the Player the payments stipulated therein.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Trabzonspor A.S. against the decision rendered by the FIFA Dispute Resolution Chamber on 21 February 2020 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 21 February 2020 is confirmed.

3. (…).

4. (…).

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