Arbitration CAS 2015/A/4042 Gabriel Fernando Atz v. PFC Chernomorets Burgas, award of 23 December 2015

Panel: Mr Manfred Nan (The Netherlands), Sole Arbitrator

Football
Termination of a contract of employment with just cause
Criteria for determining the termination of a contract with just cause according to Article 14 of the FIFA Regulations
Non-payment or late payment of remuneration by an employer as "just cause" for termination of the contract
Purpose of Article 17 (1) of the FIFA Regulations
Principle of positive interest for the compensation for the breach of a valid contract
Adjustment of the amount of compensation pursuant to the "specificity of sport"

1. **Article 14 of the FIFA Regulations provides that a contract can be terminated by either party without consequences where there is just cause. The burden of proof in this respect lies with the party invoking just cause. The Commentary to the FIFA Regulations provides that the definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence. Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted.**

2. **The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated - constitute "just cause" for termination of the contract. 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 obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. However, 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.**

3. **Article 17 (1) of the FIFA Regulations determines the financial consequences of a premature termination of an employment contract. The purpose of Article 17 of the FIFA Regulations is basically nothing more than 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, be it breaches committed by a club or by a player.**

4. **In case of compensation for the breach of a valid contract, the judging authority shall**

be led by the principle of the so-called positive interest (or *"expectation interest"*), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of *in integrum restitutum*, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred. The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence.

5. The criterion of specificity of sport shall be used by a CAS panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football.

I. PARTIES

1. Mr Gabriel Fernando Atz (the "Appellant" or the "Player") is a former professional football player of Brazilian nationality.

2. PSFC Chernomorets Burgas (the "Respondent" or the "Club") is a football club with its registered office in Burgas, Republic of Bulgaria. The Club is registered with the Bulgarian Football Union (the "BFU"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings and the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On 14 January 2010, the Player and the Club entered into an employment contract (the "Employment Contract"), valid from 14 January 2010 until 30 June 2012. The Employment Contract was signed by both parties in both the Bulgarian and the Portuguese language.

5. The Employment Contract – in a free translation into English provided by the Player that was not disputed by the Club – contains, *inter alia*, the following relevant terms:

> *"III. REMUNERATION AND PAYMENT FORM*
>
> *III.1.1 To play soccer as a profession, the CLUB pays the PLAYER a monthly amount of EUR 12,000.00 until the 30th day of the following month. The net amount is agreed and the club shall additionally pay on its own account taxes and social security contributions mandatory to the PLAYER.*
>
> […]
>
> *III.1.3 Payment of remunerations shall be made in money or through wire transfer, as expressly determined by the PLAYER.*
>
> *IX. CONTRACT ASSIGNMENT*
>
> […] *The contract between the CLUB and the PLAYER may be interrupted:*
>
> […]
>
> *IX.1.7 For CLUB's fault, for non performance of financial obligations toward the PLAYER.*
>
> […]
>
> *Settlement of financial obligations is evidenced with a certificate with the PLAYER signature notarized or signature of a representative. Settlement can be evidenced by a certificate of the amount deposited in bank in favour of the PLAYER.*
>
> *For non compliance with financial obligations is considered payment default of two monthly remunerations after date scheduled for payments".*

6. Following an injury incurred by the Player, the Club suspended the payment of the Player's salaries. The Player's salary was, however, apparently paid by the Bulgarian state authorities between July and December 2010.

7. After the Player recovered from his injury, the Club resumed the payment of the Player's salary, with the first payment being made on 17 January 2011. After this first payment, the Club, however, allegedly ceased to pay the Player's salaries.

8. On 27 April 2011, the Player, by means of his counsel, informed the Club, *inter alia*, as follows:

> *"We have been instructed by the PLAYER to inform you that the CLUB currently owes him EUR 24,000 (twenty four thousand Euros) net due as outstanding salaries for the last two months (i.e. February 2011 and March 2011)".*

9. On 13 May 2011, the Player, by means of his counsel, informed the Club, *inter alia*, as follows:

> *"We are afraid to inform you that until the present date my client,* [the Player]*, has not received the outstanding remuneration regarding the last three months.*
>
> *It is undisputable, therefore, that* [the Club] *failed to fulfil with its obligations towards the employment contract signed on January 14th, 2010 once again.*
>
> *In this context, we are disappointed to inform you that the employment contract in casu is from now on unilaterally terminated with just cause (cf. Art. 14 of the FIFA Regulations on the Status and Transfer of Players)".*

10. On 1 November 2011, the Player signed an employment contract with SER Caxias do Sul, a Brazilian football club, valid from 1 November 2011 until 10 May 2012, under which the Player received the total amount of 25,000 Brazilian reals (hereinafter: "BLR"). The payment of this amount remained uncontested by the Player.

B. Proceedings before the Dispute Resolution Chamber of FIFA

11. On 23 November 2011, since the Player's salaries allegedly remained unpaid by the Club, the Player lodged a claim with the FIFA Dispute Resolution Chamber (the "FIFA DRC") against the Club requesting the payment of EUR 276,000, plus interest of 5% *p.a.* and sporting sanctions to be imposed on the Club. In particular, the Player claimed:

- EUR 48,000 as outstanding remuneration;
- EUR 156,000 as compensation;
- EUR 72,000 as additional compensation pursuant to Article 337(c)(2) of the Swiss Code of Obligations (the "SCO"), corresponding to six monthly salaries.

12. The Club rejected the claim lodged by the Player, alleging that the Club had paid the salaries for the months of February, March and April 2011, enclosing three copies of salary slips allegedly signed by Player. The Club further argued that because the Player was injured, remuneration for the claimed period was not due according to the Bulgarian Labour Code and that the Player was entitled to compensation for temporary disability under the Bulgarian Social Security Code. In addition, the Club filed a counterclaim against the Player alleging that the Player had terminated the Employment Contract without just cause, requesting the payment of:

- EUR 171,125 corresponding to the Player's salaries from February until April 2011;
- BGN 9,493.55, corresponding to *"the excess of the permissible limit for rent payment"*;
- Legal expenses.

13. On 21 January 2015, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

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

2. *The* [Club] *is ordered to pay to the* [Player] *outstanding remuneration in the amount of EUR 5,032, plus 5% interest p.a. as from 23 November 2011 until the date of effective payment, within 30 days as from the date of notification of this decision.*

3. *In the event that the amount due to the* [Player] *in accordance with the above-mentioned number 2., plus interest, is not paid by the* [Club] *within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

4. *Any further claims lodged by the* [Player] *are rejected.*

5. *The counterclaim of the* [Club] *is inadmissible.*

[…]*".*

14. On 30 March 2015, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"*[…] *[T]he Chamber deemed that the underlying issue in this dispute, considering the respective claims of the* [Player] *and the* [Club]*, was to determine whether the contract had been unilaterally terminated with or without just cause by the* [Player].

- *In view of the above, the DRC first of all took into consideration the content of art. 14 of the Regulations, which provides 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".*

- *The Chamber stressed that the definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case.*

- *In this sense, the members of the DRC recalled the content of art. IX.1.7 of the contract* […]*, which provides that there is just cause for the* [Player] *to terminate the contract if two monthly remunerations are not paid within the due dates.*

- *In continuation, the members of the DRC took due note that the* [Player] *based the termination of the contract with just cause on the non-payment of his salaries of February and March 2011, while the* [Club] *asserts that those salaries were actually paid.*

- *At this point, the members of the Chamber deemed it appropriate to refer the parties to art. 12 par. 3 of the Procedural Rules, which stipulates that "any party claiming a right on the basis of an alleged fact shall carry the burden of proof".*

- *In this context, the members of the Chamber analysed the salary slips that may be found on the file* […]*, submitted by the* [Club] *to evidence the payment of the* [Player's] *salaries of February and March 2011, on the basis of the termination of the contract by the* [Player].

- *Taking into consideration that it appears that the* [Player] *signed the abovementioned payment slips and the fact that he did not contest their authenticity, the DRC concluded that the salaries of February*

and March 2011 were paid to the [Player] *and decided that he did not have just cause to unilaterally terminate the contract on 13 May 2011.* […]

- *Having established that the* [Player] *had not had a just cause to terminate the contract on 13 May 2011 and that the counterclaim of the* [Club] *is inadmissible due to the fact that it is time-barred, the Chamber held that it still had to address the issue of any unpaid remuneration at the moment the contract was terminated by the* [Player].

- *Indeed, in his claim, the* [Player] *alleges that outstanding salaries in the amount of EUR 48,000, corresponding to his monthly salaries of February to May 2011 were due at the time he terminated the contract. Bearing in mind the content of art. 12 par. 3 of the Procedural Rules, the Chamber drew its attention to the fact that the* [Club] *evidenced the payment of the salaries of February, March and April 2011* […].

- *In this regard and without prejudice of the fact that each monthly salary was to fall due on the "30th day of the following month"* […]*, the Chamber took into account that the* [Club] *did not pay to the* [Player] *the remuneration corresponding to the days he worked during May 2011, which was, in any case, not disputed by the* [Club].

- *In accordance with the principle pacta sunt servanda, the Chamber decided that the claim of the* [Player] *is partially accepted and that the* [Club] *is to be held liable to pay him outstanding remuneration in the total amount of EUR 5,032 pursuant to the contract* […].

- *In addition, taking into account the* [Player's] *request as well as the constant practice of the Dispute Resolution Chamber in this regard, the members of the Chamber decided to award the* [Player] *interest at the rate of 5% p.a. on the outstanding amount of EUR 5,032 as of 23 November 2011 until the date of effective payment.*

- *The Dispute Resolution Chamber concluded its deliberations in the present matter by establishing that any further request filed by the* [Player] *is rejected".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 16 April 2015, the Player lodged a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (2013 edition) (the "CAS Code"). In this submission, the Player requested that the present case be submitted to a Sole Arbitrator.

16. On 4 May 2015, the Player filed his Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of facts and legal arguments. The Player challenged the Appealed Decision, submitting the following requests for relief:

FIRST – To dismiss (partially) the contents of the Appealed Decision since it fails to interpret the terms and conditions as set out in the employment contract signed between the Appellant and the Respondent.

Consequently, except for the resolution in which the members of the FIFA DRC ordered the Respondent to pay the Appellant EUR 5,032 net the Appealed Decision shall be fully disregarded;

SECOND – To fully ignore the terms and conditions of the Appealed Decision where which considered that the Appellant had no factual nor legal basis to unilaterally terminate the Employment Contract signed with the Respondent with just cause (cf. Art. 14 of the FIFA RSTP);

THIRD – To uphold that the Employment Contract was unilaterally terminated with just cause by the Appellant, since the Respondent failed to comply with its obligations, in particular, the payment of the remuneration set out in the employment contract;

FOURTH – To order, therefore, the Respondent to pay to the Appellant EUR 12,000 net due in February 2011, plus interest at a rate of 5% p.a. as from February 2011 until the date of effective payment;

FIFTH – To order the Respondent to pay to the Appellant EUR 12,000 net due in March 2011, plus interest at a rate of 5% p.a. as from March 2011 until the date of effective payment;

SIXTH – To order the Respondent to pay to the Appellant EUR 12,000 net due in April 2011, plus interest at a rate of 5% p.a. as from April 2011 until the date of effective payment;

SEVENTH – To confirm that the Respondent has to pay to the Appellant EUR 5,032 net due in May 2011, plus interest at a rate of 5% p.a. as from May 2011 until the date of effective payment;

EIGHT – To also order the Respondent to pay to the Appellant EUR 162,980 due as compensation (cf. Art. 17, par. 1 and par. 2 of the FIFA Regulations on the Status and Transfer of Players) plus interest at a rate of 5% p.a. as from 13 May 2011, i.e. date in which the Appellant addressed the termination letter to the Respondent;

NINETH – To also condemn the Respondent to also pay to the Appellant EUR 72,000 (cf. Art. 337c, par. 3 of the Swiss Code of Obligations);

TENTH – To condemn the Respondent to the payment of the legal expenses incurred by the Appellant during the ongoing arbitration, at least in the amount of EUR 20,000 (twenty thousand Euros); and

ELEVENTH – To establish that the costs of this arbitration procedure before CAS shall fully borne by the Respondent".

17. On 6 May 2015, FIFA renounced its right to request its possible intervention in the present arbitration proceedings.

18. On 29 May 2015, the Club filed its Answer in accordance with Article R55 of the CAS Code. The Club submitted the following requests for relief:

> *"31. In view of the abovementioned, please do not change the decision of DRC of FIFA that is appealed before you.*

32. Please, order the other party to pay all costs to the amount of EUR 15 000.00.

33. Please, sentence the appellant to reimburse all costs incurred by CAS for these proceedings".

19. On 8 June 2015, the Player informed the CAS Court Office that he preferred and understood that having a hearing held is more than necessary. The Club did not provide the CAS Court Office with its position in this respect.

20. On 12 June 2015, the Club informed the CAS Court Office to have no objection against the appointment of a Sole Arbitrator.

21. On 22 July 2015, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted by:

- Mr Manfred Peter Nan, Attorney-at-Law in Arnhem, the Netherlands, as Sole Arbitrator

22. On 7 August 2015, further to the request of the Sole Arbitrator pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the present matter.

23. On 18 August 2015, the Club informed the CAS Court Office that due to its extremely difficult financial situation, the Club was not able to send a representative to the hearing.

24. On 21 August 2015, the Player, in view of the lack of financial means, requested the Sole Arbitrator to authorise the Player, Mr Ricardo André Duarte Pires and Mr Reginaldo Tirotti, to be heard by video-conference or teleconference.

25. On 31 August 2015, the CAS Court Office, pursuant to Article R57 par. 4 and Article R44.3 par. 2 of the CAS Code, and on behalf of the Sole Arbitrator, informed the parties that the Player's request to hear the Player, Mr Pires and Mr Tirotti by video-conference was granted. However, the Player was advised that the Sole Arbitrator would indeed prefer to have him and Mr Tirotti attend the hearing in person in order for the latter to be in a position to examine the originals of the documents in question with his own eyes. In addition, the parties were requested to produce and provide the CAS Court Office with the originals of the salary slips of February, March and April 2011 and all payment slips and bank statements regarding payments made to the Player over the entire duration of his contract with the Club at the hearing at the latest.

26. On the same date, the CAS Court Office requested the parties to return, within seven days, a signed copy of the Order of Procedure.

27. On 3 September 2015, the Player informed the CAS Court Office that he never received the original form of the salary slips of February, March and April 2011 and that the copies analysed by Mr Tirotti were the copies addressed by the Club to the FIFA general secretariat. The Player informed CAS that his and Mr Tirotti's attendance would *"make much more sense if the*

Respondent would confirm presence of one of its representatives in the hearing, as well as that the latter would also bring the original form of said salary slips to be in loco examined" and therefore requested the CAS Court Office to address one more letter to the Club in order to confirm whether one of its representatives will attend the hearing, as well as bring the documentation requested.

28. On 4 September 2015, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that the originals of the salary slips of February, March and April 2011 and all payment slips and bank statements regarding payments made to the Player over the entire duration of his contract with the Club shall be produced. The Club was also granted a deadline to inform the CAS Court Office whether it would attend the hearing. Finally, the parties were advised that, pursuant to Article R64.5 of the CAS Code, a party's conduct in the proceedings is taken into account with regard to the amount to be awarded as contribution to the prevailing party's legal costs and expenses.

29. On 16 September 2015, further to the request of the Sole Arbitrator, the Player filed *"the first part of the bank statements payments made by the Respondent during the period in which the employment contract was valid, duly translated into English"*. The Club did not file any documents.

30. On 22 September 2015, a hearing was held in Lausanne, Switzerland. The Club did not attend the hearing. At the outset of the hearing, the Player confirmed not to have any objection as to the constitution and composition of the Panel.

31. In addition to the Sole Arbitrator and Mr Christopher Singer, Counsel to the CAS, the following persons attended the hearing:

    a) For the Player:

        1) The Player (by video-conference);
        2) Mr Breno Tannuri, Counsel;
        3) Mr Ramy Abbas Issa, Counsel;
        4) Mr Ciro Tavares, Interpreter;
        5) Mr Reginaldo Tirotti, Expert

    b) The Club did not attend the hearing

32. The Sole Arbitrator heard evidence from the Player (by video-conference) and Mr Reginaldo Tirotti, Expert in Criminalistics and Forensic Sciences and expert called by the Player.

33. Mr Tirotti was invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury. The Player and the Sole Arbitrator had the opportunity to examine Mr Tirotti. The Player then had ample opportunity to present his case, submit his arguments and answer the questions posed by the Sole Arbitrator.

34. Before the hearing was concluded, the Player expressly stated that he did not have any objection with the procedure adopted by the Sole Arbitrator and that his right to be heard had been respected.

35. On 10 November 2015, the Player finally returned a duly signed copy of the Order of Procedure to the CAS Court Office. To date, the Club failed to return a duly signed copy of the Order of Procedure.

36. The Sole Arbitrator confirms that he carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

37. The Player's submissions, in essence, may be summarised as follows:

- The Player insists that the Club did not pay him his salaries for the months of February and March 2011, despite having addressed a formal warning to the Club on 27 April 2011, which remained unanswered. Therefore, and in accordance with Article IX.1.7 of the Employment Contract, the Player terminated the Employment Contract with just cause on 13 May 2011.

- The Player denies having signed the payroll slips submitted by the Club and argues that the signatures on these slips are forged. In this context, the Player relies on a report of Mr Tirotti, where the following conclusion is drawn:

  "The questioned calligraphic entry related to the signature of Mr Gabriel Fernando Atz, in three receipts on behalf of PSF Chernomorets Burgas, dated on February, March and April 2011 were not made from the wrist of Mr Gabriel Fernando Atz".

- In addition, the Player submitted a copy of his bank statements regarding the period between 2 January 2010 and 14 June 2011 and maintains that the Club has to pay him his overdue salaries regarding February, March, April and May 2011, amounting to EUR 41,032.

- Regarding the consequences of the termination of the Employment Contract with just cause, the Player stresses that pursuant to Article 17 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations"), he is entitled to compensation corresponding to the residual value of the Employment Contract, which amounts to EUR 162,980.

- Finally, the Player points out that he incurred clear losses and damages due to the Club's *"outrageous and unacceptable behaviour",* because *"he was not able to sign a new employment contract with another club in Europe, was obliged to return to Brazil, and remained more than 7 months unemployed".* The Player maintains that this justifies a further compensation of 6 months salary, amounting to EUR 72,000, based on Article 337(c)(3) of the SCO, in conjunction with the *"specificity of sport".*

38. The Club's submissions, in essence, may be summarised as follows:

- The Club insists that the Player was fully paid in accordance with the Employment Contract, except for the remuneration for the month of May 2011. The Club relies on the salary slips signed by the Player. The Club purports that it conducted an internal investigation and found that the Player's monthly remunerations were *"incorrectly paid in their full amount for which the respective payment documents were found in the Club's accounting department"*. The Club maintains that the Player therefore terminated the Employment Contract without just cause on 13 May 2011.

- The Club also maintains that at the moment of the termination of the Employment Contract, the salary for April 2011 was not payable yet.

- Further, the Club submits that the expert report of Mr Tirotti is *"untrue and incompetent"*, arguing that this report *"is prepared without examination of the original documents and the conclusion is even based on copies sent by fax"*. The Club maintains that the report *"was prepared by a private party and was ordered by the Appellant so it must not be considered valid evidence in this case"*.

- Finally, the Club stresses that there is no reason whatsoever for the Player to be entitled to any compensation or benefit. In this context, the Club points out that the Player did not suffer any real damages because of his unemployment as he was employed by a Brazilian club after termination of the Employment Contract, adding that *"no damages* [are] *suffered by the appellant are mentioned and there is no evidence for the amount of possible damages that have to be compensated"*.

V. JURISDICTION

39. The jurisdiction of CAS, which is not disputed, derives from Article 67(1) of the FIFA Statutes 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 Article R47 of the CAS Code.

40. The Sole Arbitrator observes that Article I.3 of the Employment Contract determines as follows:

> *"This agreement was elaborated in accordance with labour and safety laws of the Republic of Bulgaria, normative regulation in force at BSUR, club regulations and requirements according to FIFA and UEFA"*.

41. The Sole Arbitrator observes that Article XIII.3 of the Employment Contract determines as follows:

> *"Disputes between parties for reason of performance and interruption of this contract, shall be decided in written between them.*
>
> *Should an agreement is not reached* [sic]*, disputes shall be submitted to the Bulgarian Soccer Federation Arbitration Court"*.

42. In view of the fact that the latter arbitration clause appears to confer jurisdiction on the "Bulgarian Soccer Federation Arbitration Court" as opposed to the FIFA DRC, the Sole Arbitrator deems it necessary to dedicate some considerations to the competence of the FIFA DRC in the matter at hand.

43. The Sole Arbitrator observes that the Swiss Federal Tribunal (the "SFT") considered the following in respect of the legal concept of *Einlassung*:

> *"Pursuant to Art. 186 (2)* [of Switzerland's Federal Code on Private International Law]*, the jurisdictional defense must be raised before any defense on the merits. This applies the principle of good faith embodied at Art. 2 (1)* [of the Swiss Civil Code]*, which applies to all areas of law, including arbitration. Stated differently, the rule of Art. 186 (2) PILA implies that the arbitral tribunal in which the defendant proceeds on the merits without reservation, acquires jurisdiction from this fact only. Hence the party addressing the merits without reservation (Einlassung) in an arbitral procedure dealing with a matter capable of arbitration, acknowledges by this concluding act that the arbitral tribunal has jurisdiction and definitively loses the right to challenge the jurisdiction of the aforesaid tribunal (ATF 128 III 50 at 2cc/aa and the references)"* (AFT 4A_628/2012, §4.4.2.1).

44. Consequently, since the Club did not object to the jurisdiction of FIFA or CAS before addressing the merits of the dispute, the Sole Arbitrator is satisfied that CAS has jurisdiction to adjudicate and decide on the present dispute.

45. In any event, the Sole Arbitrator finds that the FIFA DRC rightly accepted jurisdiction in the present matter because the Club did not dispute the competence of the FIFA DRC and since the FIFA DRC is in general competent to adjudicate and decide employment-related disputes between a club and a player of an international dimension, on the basis of Article 22(b) of the FIFA Regulations, determining as follows:

> *"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:*
>
> […]
>
> *b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement".*

VI. ADMISSIBILITY

46. The appeal was filed within the 21 days set by Article 67(1) of the FIFA Statutes (2014 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

47. It follows that the appeal is admissible.

VII. APPLICABLE LAW

48. Article R58 of the CAS Code provides the following:

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

49. The Player argues that *"CAS should apply the various regulations of FIFA and subsidiary Swiss law, whilst taking into account the BFA and the Bulgarian law (if applicable) as well as the specificity of sport".*

50. The Club objects to the application of Swiss law *"[a]s for the performance, failure to perform and legal consequences for the contract concluded between the parties, they were regulated by the laws valid in 2011 in the Republic of Bulgaria. This conclusion is based on the fact that the employment contract is concluded in Bulgaria pursuant to local laws as well as on the fact that the contract explicitly stipulates that all issues unsettled in the contract shall be regulated by the provisions of valid statutory acts of the Bulgarian Football Union and Bulgarian laws (art. XIII.2.3 of the contract)".*

51. The Sole Arbitrator observes that Article I.1.3 and XIII.2 of the Employment Contract determine as follows:

> *"This agreement was elaborated in accordance with labour and safety laws of the Republic of Bulgaria, normative regulation in force at BSUR, club regulations and requirements according to FIFA and UEFA".*
>
> *"For all questions not agreed herein, the regulation of order in force of the Bulgarian Soccer Federation and Bulgarian Legislation shall apply".*

52. The Sole Arbitrator finds that primarily the various regulations of FIFA shall be applied since this is a dispute of an international nature. The Sole Arbitrator is satisfied that, since the parties referred to the *"requirements according to FIFA"* in the Employment Contract and since the competence of FIFA and CAS remained undisputed, the parties elected for the various regulations of FIFA to be applied to resolve the dispute.

53. The Sole Arbitrator observes that Article 66(2) of the FIFA Statutes stipulates 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".*

54. As such, the Sole Arbitrator is satisfied to primarily apply the various regulations of FIFA and subsidiary the application of Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

55. However, the Sole Arbitrator will take due note of the relevant laws of the Republic of Bulgaria and the relevant regulations of the BFU insofar these laws and regulations are relied upon by

the parties and insofar relevant for the adjudication of the present appeal arbitration proceedings.

VIII. MERITS

A. The Main Issues

56. As a result of the above, the main issues to be resolved by the Sole Arbitrator are:

i. Did the Player terminate the Employment Contract with just cause?
ii. What amount of outstanding salary is the Player entitled to receive from the Club?
iii. What amount of compensation for breach of contract is the Player entitled to receive from the Club?
iv. Is any amount to be awarded under the "specificity of sport"?

i. Did the Player terminate the Employment Contract with just cause?

57. The Sole Arbitrator observes that it remained undisputed that the Player terminated the Employment Contract by means of the termination letter dated 13 May 2011, invoking just cause.

58. The Sole Arbitrator observes that Article 14 of the FIFA Regulations determines the following:

> *"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".*

59. As such, the first issue to be addressed in the present matter is whether the Player had just cause to terminate the Employment Contract. The burden of proof in this respect lies with the Player.

60. The Player puts forward that he had just cause to unilaterally terminate the Employment Contract, because the salaries of February and March 2011 (totalling to an amount of EUR 24,000) remained outstanding, despite the fact that the Player notified the Club of these overdue payables by letter dated 27 April 2011.

61. The Club, however, submits that there were no outstanding salaries to be paid at the time and refers to three signed bank slips that were allegedly signed by the Player, proving that the Player received the salaries of February, March and April 2011.

62. The Sole Arbitrator observes that the Commentary to the FIFA Regulations provides guidance as to when a contract is terminated with just cause:

> *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, 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 for 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".

63. In this regard, the Sole Arbitrator notes that in CAS 2006/A/1180, a CAS panel stated the following in this respect:

"The RSTP 2001 do not define when there is "just cause" to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach mutual agreement on the end of the contract (see also ATF 110 I 167; WYLER R., Droit du travail, Berne 2002, p. 323 and STAEHELIN/VISCHER, Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR, Zurich 1996, marg. no. 17 ad Art. 334, p. 479). In this regard Art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: "A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship". According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the clausula rebus sic stantibus (ATF 5 May 2003, 4C.67/2003 no. 2). According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., op. cit., p. 364 and TERCIER P., Les contrats spéciaux, Zurich et al. 2003, no. 3402, p. 496). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 127 III 351; WYLER R., op. cit., p. 364 and TERCIER P., op. cit., no. 3394, p. 495).

The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute "just cause" for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non-public award of 6 August 2004); for 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 continue 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 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. However, 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 (see also CAS 2005/A/893; CAS 2006/A/1100, marg. no. 8.2.5 et seq.)"* (CAS 2006/A/1180, para. 25-26 of the abstract published on the CAS website).

64. The Commentary to the FIFA Regulations specifically refers to the following example of a breach with just cause:

> *"Example 1: A player has not been paid his salary for over 3 months. Despite having informed the club of its default, the club does not settle the amount due. The player notifies the club that he will terminate the employment relationship with immediate effect. 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 non-compliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".*

65. The Sole Arbitrator observes that Article IX of the Employment Contract provides as follows:

> *IX. CONTRACT ASSIGNMENT*
>
> […] *The contract between the CLUB and the PLAYER may be interrupted:*
>
> […]
>
> *IX.1.7 For CLUB's fault, for non performance of financial obligations toward the PLAYER.*
>
> […]
>
> *For non compliance with financial obligations is considered payment default of two monthly remunerations after date scheduled for payments".*

66. As such, this provision, in principle, entitles the Player – by way of derogation from the principle enshrined in the Commentary to the FIFA Regulations that a player in principle has the right to terminate his contract if his salaries have not been paid for a period of three months – to unilaterally terminate the Employment Contract in case the Club does not pay two consecutive remunerations within 30 days after the due date of the second unpaid remuneration as provided for in Article III.1.1. of the Employment Contract.

67. First of all, the Sole Arbitrator observes that the Club did not contest the Player's argument that the consecutive non-payment of two months salary would in principle be a sufficient legal basis for termination of the Employment Contract with just cause, as provided for in Article IX.1.7 of the Employment Contract.

68. Furthermore, the Sole Arbitrator considers this provision to be a deviation from the general principles enshrined in the FIFA Regulations. The Sole Arbitrator finds that, in principle, nothing prevents parties from defining when and under which circumstances a party may

terminate the Employment Contract with just cause. For if the parties are free to arrange in the employment contract the method of compensation for breach of contract, then, in principle, the same must apply to specifying when there is "just cause" (CAS 2006/A/1180). Such deviation may in principle not be potestative, *i.e.* the conditions for termination may not be unilaterally influenced by the party wishing to terminate the contract (an example of a potestative clause would be the situation where a contract provides that it can be unilaterally terminated by the club if the player does not play in a certain percentage of matches, for the decision to field the player may be influenced by the club). As maintained by a legal scholar, *"[i]n relation to the substance of the unilateral option clause, parity of termination rights is no longer to be taken as a benchmark for public policy, since (as shown) a disparity of termination rights has to be accepted as such; instead the question to be answered here is how great the disparity may be. The limit of contractual freedom in this respect is formed by the prohibition of excessive self-commitment, as laid down in Swiss law, for example, at Art.27(2) of the Swiss Civil Code"*, adding in a footnote that *"[n]o person can alienate his personal liberty nor impose any restrictions on his own enjoyment thereof which are contrary to law and morality"* (PORTMANN, Unilateral option clauses in Footballer's contracts of employment: An assessment from the perspective of International Sports Arbitration, ISLR 2007, p. 6-16).

69. The Sole Arbitrator finds that, applying the above-mentioned test to the matter at hand, Article IX.1.7 of the Employment Contract, determining that the Player is entitled to terminate the Employment Contract unilaterally if the Club fails to comply with its financial obligations towards the Player if two monthly remunerations have remained outstanding is not an excessive commitment from the side of the Club and is not invalid. In this respect, the Sole Arbitrator considers it important that the Player was already entitled to his remuneration on the basis of the Employment Contract and this specific contractual clause does not create new obligations for the Club. The Sole Arbitrator is not convinced that the Club and the Player had unequal bargaining powers on the basis of which the Club was "forced" to accept such clause. Under these circumstances, the Sole Arbitrator finds that the relevant clause does not constitute an excessive commitment from the side of the Club.

70. The Sole Arbitrator feels comforted in this conclusion by the decision of a previous CAS panel in CAS 2010/A/2202 where clause determining that *"[I]n the case of late payment of salary and/or bonuses and/or signing on fee, later than 45 days of the agreed date, by the club of the player, the player has to his choice, the right of a free transfer without any compensation payable to the club whatsoever"* was considered valid.

71. As such, the question to be answered is whether, at the time of termination, two monthly remunerations were due to the Player, *i.e.* whether the Club indeed failed to pay the Player his salaries for February and March 2011 as per the relevant dates. The Sole Arbitrator finds that the burden of proof to establish that these salaries were indeed paid lies with the Club.

72. The Sole Arbitrator observes that the Club solely relies on the copies of the salary slips of February and March 2011, allegedly signed by the Player, in order to prove that the Player's salaries were paid and that the Player denies to have signed these slips and denies to have received his February and March 2011 salaries. No arguments were advanced by the Club that could potentially justify the lack of payment. Despite the fact that, according to the relevant

provisions in the Employment Contract, the Player was not required to notify the Club before proceeding with the termination, the Player notified the Club.

73. Turning his attention to the parties' conflicting positions regarding the salaries paid by the Club to the Player, the Sole Arbitrator carefully studied the documentary evidence provided by the Club and the Player before the hearing, and decided to invite the parties to produce and provide the original salary slips of February, March and April 2011 as only copies of these documents were included in the case file. The Sole Arbitrator also invited the parties to produce and provide all payment slips and bank statements regarding payments made to the Player over the entire duration of the Employment Contract.

74. The Sole Arbitrator notes that, on the one hand, the Player submitted his bank statements regarding the period from 1 February 2010 until 14 June 2011. On the other hand, the Club did not file any document.

75. Having closely examined the bank statements submitted by the Player, the Sole Arbitrator observes that the Club paid the Player his salaries by bank transfer between 1 February 2010 and 14 June 2011, except for the period when the Player was injured and in the months of February, March and April 2011.

76. In continuation, the Sole Arbitrator observes that Mr Tirotti concluded the following in his expert report regarding the signatures on the bank slips:

> *"The questioned calligraphic entry related to the signature of Mr. Gabriel Fernando Atz, in three (3) receipts on behalf of PSFC Chernomorets Burgas, dated on February, March, and April 2011, WERE NOT MADE FROM THE WRIST OF MR. GABRIEL FERNANDO ATZ".*

77. At the hearing, Mr Tirotti informed the Sole Arbitrator about his professional background, his qualifications and experience as a handwriting expert. Further, he explained his technical method of examination and stated that although he only had copies of three salary slips regarding the months of February, March and April 2011 to examine, it was without a doubt that the person who had signed the slips did not have knowledge of the western alphabet. Mr Tirotti explained that it was his professional opinion that the hypothesis that the Player had signed the mentioned salary slips was not supported by the evidence of handwriting that he had examined. On the contrary, Mr Tirotti stressed that in his professional opinion he had no doubt that the Player did not sign the slips.

78. The Sole Arbitrator observes that the Club did not try to refute the facts and circumstances as described and evidenced by the Player in these proceedings, nor did it file – although explicitly requested by the Sole Arbitrator – the original salary slips or any other documents or witness statements to refute the assertions made by the Player, nor did it take the opportunity to cross-examine Mr Tirotti.

79. Although the Sole Arbitrator cannot deny having some doubts about the possibility to draw such explicit conclusion as Mr Tirotti did (*i.e. "The questioned calligraphic entry* […] *WERE NOT MADE FROM THE WRIST OF MR. GABRIEL FERNANDO ATZ"*), while he only had

copies of bank slips at his disposal, the Sole Arbitrator finds the expert report of Mr Tirotti to be a credible document that must be given considerable weight in the issue at stake. Particularly because, despite being explicitly requested to provide the original payment slips, the Club failed to provide these original documents and did not inform the Sole Arbitrator of any reason that might have justified the absence of such original documents.

80. In view of the foregoing, the Sole Arbitrator finds that the Player did everything that could have been reasonably expected from him. As a consequence, the Sole Arbitrator is not convinced that the Player signed the relevant salary slips.

81. As such, since the salary slips were the only evidence relied upon by the Club to prove that it paid the Player his salaries for February and March 2011, the Sole Arbitrator finds that the Club failed to establish that the relevant salaries were paid.

82. Consequently, the Sole Arbitrator finds that the Player had just cause to unilaterally and prematurely terminate the Employment Contract on 13 May 2011.

ii. What amount of outstanding salary is the Player entitled to receive from the Club?

83. The Sole Arbitrator observes that the FIFA DRC decided to award the Player EUR 5,032 as outstanding salary in the Appealed Decision, corresponding to the outstanding salaries regarding the days he worked during May 2011 at the time of the termination, with 5% interest *p.a.* as from 23 November 2011 (*i.e.* the date the Player lodged his claim with FIFA), until the date of effective payment.

84. The Sole Arbitrator observes that the Club does not dispute the amount of EUR 5,032 as outstanding salaries at the time of the termination.

85. In view of the fact that the Sole Arbitrator decided above that the Club did not prove that the salaries of February, March and April 2011 were paid, the Sole Arbitrator considers that the Player is entitled to outstanding remuneration in the total amount of EUR 41,032 (EUR 12,000 for February, March and April 2011 each and EUR 5,032 for May 2011).

86. The Sole Arbitrator observes that the Player claims interest over the outstanding salaries as from the respective months until the date of effective payment.

87. Article 104 of the SCO provides as follows:

> *1 A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract.*
>
> *2 Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.*

> *3 In business dealings, where the normal bank discount rate at the place of payment is higher than 5%, default interest may be calculated at the higher rate.*

88. The Sole Arbitrator accepts that the Player is entitled to interest on his successful claims, at a rate of 5% *per annum*.

89. Article 102 of the SCO provides as follows:

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

90. The Sole Arbitrator finds that the interest shall only start to accrue as from the respective due dates of the salaries (*i.e. "the CLUB pays the PLAYER a monthly amount of EUR 12,000.00 until the 30th day of the following month"*) pursuant to Article 102 para. 2 SCO.

91. Consequently, the Sole Arbitrator finds that the Player is entitled to receive outstanding salary from the Club in the amount of EUR 41,032, with interest accruing as follows:

- EUR 12,000, with 5% interest *p.a.* as from 30 March 2011;
- EUR 12,000, with 5% interest *p.a.* as from 30 April 2011;
- EUR 12,000, with 5% interest *p.a.* as from 30 May 2011;
- EUR 5,032, with 5% interest *p.a.* as from 30 June 2011.

iii. What amount of compensation for breach of contract is the Player entitled to receive from the Club?

92. Having established that the Club is to be held liable for the early termination of the Employment Contract, the Sole Arbitrator will now proceed to assess the consequences of the unilateral breach by the Club.

93. The Sole Arbitrator observes that CAS jurisprudence determines the following in respect of a unilateral termination with just cause by a player because of a breach of contractual obligations by a club:

> *"Although the Panel has established that the Player had just cause to terminate his Employment Contracts with the Club, this provision does not specifically determine that the Player is entitled to any compensation for breach of contract by the Club.*
>
> *The Panel, however, is satisfied that the Player is, in principle, entitled to compensation because of the breach of the Employment Contracts by the Club. In this respect, the Panel makes reference to the Commentary to the FIFA Regulations on the Status and Transfer of Players (hereafter referred to as the "FIFA Commentary"). According to Article 14 (5), (6) of the FIFA Commentary, a party "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". Accordingly, although it was the Player who terminated the Employment Contracts by filing a claim against the Club with FIFA, the Club was at the origin of the termination of the Employment Contracts and is thus liable to pay compensation for damages suffered by the Player as a consequence of the early termination" (CAS 2012/A/3033, §71-72).

94. In establishing the amount of compensation to be paid, the Sole Arbitrator observes that Article 17 (1) of the FIFA Regulations determines the financial consequences of a premature termination of an employment contract:

> *"The following provisions apply if a contract is terminated without just cause:*
>
> 1. *In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annex 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 shall include, in particular, the remuneration and other benefits due to the Player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within the protected period".*

95. The Sole Arbitrator observes that the parties did not adopt a provision in the Employment Contract determining the consequences of a possible future breach. As a consequence, the amount of compensation shall be established on the basis of the other parameters of Article 17(1) of the FIFA Regulations.

96. There is ample CAS jurisprudence on the application of Article 17(1) of the FIFA Regulations. The vast majority of this jurisprudence establishes that the purpose of Article 17 of the FIFA Regulations is basically nothing more than 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, be it breaches committed by a club or by a player (CAS 2012/A/3033, §74; CAS 2012/A/2874, §128, CAS 2012/A/2932, §84, CAS 2008/A/1519-1520, §80, with further references to: CAS 2005/A/876, §17: *"*[…] *it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability'* […]*"*; CAS 2007/A/1358, §90; CAS 2007/A/1359, §92: *"*[…] *the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability* […]*"*; confirmed in CAS 2008/A/1568, §6.37).

97. Regarding the calculation of compensation and the application of the principle of "positive interest", the Sole Arbitrator observes that CAS jurisprudence sets out the following:

> *"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*

As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitutum, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.

The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehlin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wyler, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).

The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations" (CAS 2008/A/1519-1520, §80 *et seq.*).

98. The Sole Arbitrator finds that the legal framework set out above and the principle of positive interest are applicable to the present case. Against this background, the Sole Arbitrator will proceed to assess the Player's objective damages before applying his discretion in adjusting this amount based on the "specificity of sport" and other objective criteria as set out in Article 17 of the FIFA Regulations.

99. The Sole Arbitrator observes that the Club does not dispute the remaining value of the Employment Contract, nor does it dispute the amount of remuneration of the Player with SER Caxias do Sul. The Club however argues that *"a compensation's purpose is to correct a damage as it is stated there were damages. However, no damages suffered by the appellant are mentioned and there is no evidence for the amount of possible damages that have to be compensated"*. The Club also submits that *"we must take into consideration the presented by the Player employment contract with football club SOCIEDADE ESPORTIVA E RECREATIVA CAXIAS DO SUL, I.e. he was employed after termination of his employment contract with Professional Sports Football Club Chernomoretz Burgas JSC and so he has not suffered real damages because of unemployment"*.

100. The Sole Arbitrator finds, in application of the principle of positive interest, that the Player was in principle entitled to receive a total salary in the amount of EUR 165,968 [the remaining salary of May 2011 that was not already awarded as outstanding compensation (EUR 9,968 (EUR 12,000 – EUR 5,032)) and the salary of June 2011 until June 2012 (EUR 156,000 (EUR 12,000 x 13))] with the Club from the moment of termination until the expiration of the Employment Contract. Since the responsibility for the termination lies with the Club, the Club

prevented the Player from receiving this salary. The Sole Arbitrator finds that the financial damage incurred by the Player is thereby established.

101. The Sole Arbitrator, however, observes that the Player mitigated his damages by concluding an employment contract with the Brazilian football club SER Caxias do Sul, for the period between 1 November 2011 and 10 May 2012.

102. The Sole Arbitrator observes that it remained uncontested that the Player earned a total amount of BLR 25,000 with SER Caxias do Sul and finds that this amount shall be deducted from the amount of EUR 165,968 to which the Player is in principle entitled, as set out above.

103. The Sole Arbitrator, however, observes that the parties did not make any submissions on the value in Euro of the amount of BLR 25,000. Consequently, the Sole Arbitrator felt obliged to establish the value himself based on publicly available exchange rates at the relevant due dates. Based on this information, the Sole Arbitrator finds that the amount of BLR 25,000 equals EUR 10,428.08, based on the following calculation:

- November 2011 salary: EUR 1,650.08 (BLR 4,000 x 0,41252 (the exchange rate of 1 December 2011));
- December 2011 salary: EUR 1,659 (BLR 4,000 x 0,41475 (the exchange rate of 1 January 2012));
- January 2012 salary: EUR 1,752.28 (BLR 4,000 x 0,43807 (the exchange rate of 1 February 2012));
- February 2012 salary: EUR 1,751.40 (BLR 4,000 x 0,43785 (the exchange rate of 1 March 2012));
- March 2012 salary: EUR 1,637.40 (BLR 4,000 x 0,40935 (the exchange rate of 1 April 2012));
- April 2012 salary: EUR 1,583.72 (BLR 4,000 x 0,39593 (the exchange rate of 1 May 2012));
- May 2012 salary: EUR 394.20 (BLR 1,000 x 0,39420 (the exchange rate of 1 June 2012)).

104. Finally, the Sole Arbitrator observes that the Player requested interest at a rate of 5% *p.a.* over the amount of compensation, as from 13 May 2011, *i.e.* the date of termination of the Employment Contract, until the date of effective payment.

105. Article 339 par. 1 of the SCO provides as follows:

> *When the employment relationship ends, all claims arising therefrom fall due.*

106. The Sole Arbitrator finds that the rate of interest is indeed 5% p.a. pursuant to Article 104 SCO (cited above) and that, since Article 339 SCO provides that all claims arising from the employment relationship shall become due upon the termination of the contract, the compensation to which the Player is entitled became due on that same day, *i.e.* 13 May 2011.

107. Consequently, the Sole Arbitrator finds that the Player is in principle entitled to compensation for breach of contract in the amount of EUR 155,539.92 (EUR 165,968 - EUR 10,428.08) from the Club, with interest at a rate of 5% *p.a.* accruing as from 13 May 2011, until the date of effective payment.

iv. Is any amount to be awarded under the "specificity of sport"?

108. Above, the Sole Arbitrator considered all objective damages incurred by the Player. Below, the Sole Arbitrator will assess whether there are any reasons that should lead the Sole Arbitrator to decide that such amount should be amended in light of his discretion to adjust this amount pursuant to the "specificity of sport" or other objective criteria.

109. In this respect, the Player maintains that the Club *"acted with extreme bad-faith when illegally fabricating and forging evidence"*, which behaviour *"brought clear losses and damages"* to the Player. The Player maintains that *"in January 2011, he was returning from a period of injury"* and the breach of contract by the Club impaired *"the well-being of his family"* and *"sent an equivocated and implicit message, in particular, to the European clubs, i.e. that the Appellant had not recovered from his injury and as such was not able to play professional football in high level again"*. The Player, referring to Article 337(c)(3) of the SCO and the *"Lex Sportiva"*, argues that these *"aggravating circumstances"* justify an additional compensation equalling six months salary, *i.e.* EUR 72,000 (6 x EUR 12,000).

110. The Club maintains that the Player is not entitled to any compensation whatsoever and purports that the Player did not suffer *"real damages because of unemployment"*.

111. The Sole Arbitrator adheres to the reasoning of a previous CAS panel in CAS 2008/A/1519-1520, where the following was considered regarding the application of Article 337(c)(3) of the SCO:

> *"*[…] *[T]he specific circumstances of a case may lead a Panel to increase the amount of the compensation, by letting itself inspire, mutatis mutandis, by the concept of fair and just indemnity foreseen in the art. 337c para. 3 and art. 337d para. 1 Swiss Code of Obligations, without applying the strict quantitative limits foreseen in such rules.* […]*"* (CAS 2008/A/1519).

112. The Sole Arbitrator also adheres to the reasoning of a previous CAS panel in CAS 2007/A/1358, where the following was considered regarding the "specificity of sport":

> *"*[…] *The criterion of specificity of sport shall be used by a Panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football"* (CAS 2007/A/1358).

113. In view of the fact that it has been established that the Player did not sign the bank slips (although this in itself did not cause any additional damage to the Player), the Sole Arbitrator finds that this is an aggravating circumstance that shall be taken into account and justifies an

increase of the compensation to be awarded on the basis of his discretion to reach a fair and just indemnity.

114. In addition, the Sole Arbitrator finds the fact that the Player terminated the Employment Contract with just cause within the "protected period" because the Club violated its obligations under the Employment Contract to be another aggravating circumstance that shall be taken into account and justifies an increase of the compensation to be awarded on the basis of his discretion to reach a fair and just indemnity.

115. Having established the above, the Sole Arbitrator finds that these circumstances justify an increase of the amount of compensation to be awarded to the Player. In this respect, the Sole Arbitrator finds it reasonable and fair that the Player is awarded additional compensation in the amount of one month salary (*i.e.* EUR 12,000).

116. Consequently, the Sole Arbitrator finds that the Player is entitled to receive a total amount of compensation for breach of contract in the amount of EUR 167,539.92 (EUR 155,539.92 + EUR 12,000) from the Club.

B. Conclusion

117. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Sole Arbitrator finds that:

i. The Player had just cause to unilaterally and prematurely terminate the Employment Contract on 13 May 2011;
ii. The Player is entitled to receive outstanding salary from the Club in the amount of EUR 41,032;
iii. The Player is entitled to compensation for breach of contract in the amount of EUR 167,539.92 from the Club.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 16 April 2015 by Mr Gabriel Fernando Atz against the Decision issued on 21 January 2015 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.

2. PSFC Chernomorets Burgas shall pay to Mr Gabriel Fernando Atz the amount of EUR 41,032 (forty-one thousand and thirty-two Euro) as outstanding remuneration, with interest at a rate of 5% (five per cent) per annum until the effective date of payment, as follows:

   5% (five per cent) interest p.a. as from 30 March 2011 on the amount of EUR 12,000 (twelve thousand Euro);

   5% (five per cent) interest p.a. as from 30 April 2011 on the amount of EUR 12,000 (twelve thousand Euro);

   5% (five per cent) interest p.a. as from 30 May 2011 on the amount of EUR 12,000 (twelve thousand Euro);

   5% (five per cent) interest p.a. as from 30 June 2011 on the amount of EUR 5,032 (five thousand thirty-two Euro).

3. PSFC Chernomorets Burgas shall pay to Mr Gabriel Fernando Atz the amount of EUR 167,539.92 (one hundred sixty-seven thousand five hundred thirty-nine Euro and ninety two cent) as compensation for breach of contract, with interest at a rate of 5% (five per cent) per annum as from 13 May 2011, until the date of effective payment.

(…)

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