Arbitration CAS 2013/A/3444 S.C. FC Brasov S.A v. Renato Ferreira Da Silva Alberto, award of 29 October 2015

Panel: Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Football
Termination of employment contract without just cause
Inadmissibility of counterclaims in CAS Appeal proceedings
Forum options with respect to employment-related disputes of international dimension under article 22 FIFA RSTP
Applicable law according to Article 66 para. 2 of the FIFA Statutes
Right to be heard
Conduct implying an intent
Full power of a CAS panel to assess evidence taken

1. **According to constant jurisprudence of the CAS and following *e contrario* from article R55 of the CAS Code which provides that the answer of a respondent is limited to the appeal, counterclaims are not admitted during CAS appeals procedures. Rather, any party not satisfied with the outcome of a first instance decision has to lodge an appeal itself.**

2. **Article 22 of the FIFA Regulations on the Status and Transfer of Players (RSTP) offers the parties involved in employment-related disputes of an international dimension two different forum options. A party may either lodge its claim before a civil court, or, alternatively, FIFA is competent to hear such dispute. If the forum of FIFA is chosen and the decision by FIFA is appealed to CAS, article 66 para. 2 of the FIFA Statutes regulates the procedure applicable to the CAS proceedings and the law applicable to the merits.**

3. **Article 66 para. 2 of the FIFA Statutes refers to the procedural norms of the CAS Code and also regulates the applicable substantive law in a procedure before CAS. It follows that article 66 para. 2 of the FIFA Statutes does not leave room for the application of article R58 of the CAS Code.**

4. **Pursuant to article 182 para. 3 of the Swiss Federal Code on Private International Law the panel has to guarantee the parties' right to be heard. The right to be heard includes amongst others the right to submit evidence motions. However, the panel is not obliged to admit every request for evidence. If the arbitral tribunal could already form its opinion on the proofs raised and, if it can hypothesize that its opinion would not be changed by the new request for evidence the panel is authorized to reject such a motion (so called anticipatory consideration of evidence).**

5. The default of a party during a FIFA procedure should not be interpreted as an acceptance of the counterparty's factual allegations during the relevant FIFA procedure. This is because a procedure held before FIFA bodies is to be qualified as an internal procedure of a Swiss association, governed by private substantive Swiss law, and not by Swiss procedural law. According to private substantive Swiss law, a conduct implying an intent is assumed only in exceptional circumstances, in the cases where the particular nature of the transaction or the circumstances are such that express acceptance cannot reasonably be expected (art. 6 of the Swiss Code of Obligations). In all other cases an implied conduct is not to be interpreted as a declaration of intent. A "particular nature of the transaction or the circumstances" is fulfilled in the case of silence of one of the parties after the declaration of a purely favourable offer of the other party, in the case of a (long-)existing bond of trust between the parties or in the case of advanced party negotiations.

6. According to article R57 para. 1 of the CAS Code, the panel has full power to review the facts, i.e. it may form its opinion based on a free assessment of the evidence taken. Free assessment of evidence signifies the obligation for an independent assessment of evidence without being bound by abstract, cut and dried evaluation patterns. The panel is thus free to award each piece of evidence its appropriate significance but is however obliged to exercise this power according to his best judgement. While evaluating an expertise according to its best judgement the panel is not simply allowed to adopt the expert's opinion. It is obliged to evaluate it even though it needs good reason to deviate from the expert's opinion, for example a clear contradiction to scientifically acknowledged standards. In regard to technical expert opinions there is consequently only little margin for the panel to deviate from the expert's conclusions. Nevertheless, this does not relief the panel to evaluate independently the conclusion of the expert's opinion.

I. Parties

1. S.C. Fotbal Club Brasov S.A. ("FC Brasov" or the "Appellant") is a Romanian football club with seat in Brasov, Romania, affiliated to the Romanian Football Federation, which is a member of the FIFA.

2. Renato Ferreira Da Silva Alberto ("Kanu", the "Respondent" or the "Player") is a Brazilian football player, born on 27 October 1985.

II. FACTUAL BACKGROUNDS

3. On 1 July 2011, the Player signed a *"Contract Individual de Munca, Nr. 531"* (the "Contract") with the Appellant. Pursuant to the Contract, the parties agreed, *inter alia*, on the following:

"J. SALARY

1. The basic monthly salary is of: 740 RON lei out of which

a) increases

b) indemnities

c) other rises".

…

N. FINAL PROVISIONS

The provisions of this individual work contract shall be completed considering the stipulations of Law no. 53/2003 – Labour Code and of the applicable collective work contract concluded at the employer's / group of employers'/subsidiaries/national level, registered under no … … at the General Department for Work and Social Solidarity of county … … Ministry of Work and Social Solidarity.

…

O. The conflicts related to the conclusion, execution, deference or ceasing of this individual work contract will be solved by the court of law materially and territorially responsible, according to the law".

4. On the same date, the parties concluded an addendum to the contract No. 531 / 01.07.2011 (the "Addendum") which, *inter alia*, provides as follows:

"1. Contract duration will be 24 months starting on 01/07/2011 until 30/06/2013. Player signing fee bonus is 10.000 euro.

2. Club player assumes the obligation to pay 72.000 euros net distributed in monthly payments from July 2011 to June 2012 of 6'000 euros per month. Club player assumes the obligation to pay 80.000 euros net distributed in monthly payments from July 2012 to June 2013 of 6,667 euros per month.

3. Club player (sic) has an option at 01.05.2013 to extend the contract for a third year with a payment 20,000 euros to the player. If the club execute the option, the salary for the third year will be 80,000 euros, distributed in monthly payments of 6,667 euros per month.

4. The club will provide the player with a rental house or apartment worth 250 Euro / month.

5. Player's Club will provide three flights on the route of Brasil – Bucharest – Brasil, as follows: two adults and an air ticket for a minor child.

6. In case of an eventual transfer to another club, the player will be entitled to receive the 15% from the total transfer amount.

7. Obligations player listed in the contract to be signed and the Regulations of the Club".

5. It is undisputed between the parties that the Player stayed in Brasov from 1 July 2011 until 17 December 2011 and participated at 11 games. On 17 December 2011, the Player flew to Brazil for the Winter break and did not return thereafter. The reason of the non-return of the Player is vague and disputed between the parties.

III. Proceedings before the FIFA Dispute Resolution Chamber

6. On 24 July 2012, the Player lodged a complaint with FIFA Dispute Resolution Chamber (the "FIFA DRC") as he considered that the Club had breached the employment contract on several accounts. In his claim, the Player requested that FIFA orders the Club to pay the amount of EUR 163, 837 corresponding to the following:

- EUR 5,000 as half of the signing-on fee;
- EUR 24,000 as monthly salary as from September until December 2011 (EUR 6,000 x 4 instalments);
- EUR 42,000 as monthly salary as from January until July 2012 (EUR 6,000 x 7 instalments);
- EUR 73,337 as monthly salary as from August 2012 until June 2013 (EUR 6,667 x 11 instalments);
- EUR 1,500 as rent allowance as from January until June 2012 (EUR 250 x 6 months); and
- EUR 18,000 as damages.

7. On 30 August 2013, the FIFA DRC ordered the Appellant to pay the Respondent an amount of EUR 29,000 plus interest of 5% *p.a.* as of 24 July 2012 until the date of effective payment as outstanding salaries and a compensation for breach of contract of EUR 100,000 plus interest of 5% *p.a.* as of 30 August 2013 until the date of effective payment (the "Appealed Decision").

8. In the Appealed Decision, the FIFA DRC pointed out that the Club, in spite of having been invited to do so, did not present any reply to the Player's claim. On this account, the DRC deemed the allegations of the Player as accepted by the Club.

9. The FIFA DRC consequently based its decision on the following allegations of the Player:

- On 11 December 2011, the Player left Romania for Brazil during the Winter break. It was agreed that the latter would return to Romania on 9 January 2012.
- However, the Player alleges that the Club failed to provide him with the flight tickets to return to Romania and that, no longer being interested in his services, sent him a proposal for the cancellation of the Contract, according to which the Club would pay him the total amount of EUR 22,000.

- The Player did not accept the Club's proposal for cancellation and requested to be provided with the air tickets to return to Romania.

- On 17 July 2012, the Player put the Club in default of his contractual obligations and, in order to settle this matter in an amicable way, requested that the Club paid to him the amount of EUR 33,000.

10. Based on these facts, the FIFA DRC came to the following legal conclusions:

- By not complying with its contractual obligation of purchasing an air ticket in order for the Player to return to the club, the Club no longer wished to make use of the Respondent's services.

- In addition, a considerable part of the Player's remuneration had fallen due and remained outstanding at the time the latter was to return to render his services to the Club in January 2012. Consequently, the Club had seriously neglected its contractual obligations towards the Player. Such conduct clearly constitutes a breach of contract. The Club, on 9 January 2012, thus had produced the premature termination of the Contract and the Addendum without just cause.

- Therefore, in accordance with the legal principal of *pacta sunt servanda*, the FIFA DRC decided that the Club is liable to pay to the Player the remuneration which was outstanding under the contract at the moment of termination, *i.e.* the total amount of EUR 29,000, corresponding to half of the signing-on fee (EUR 5,000), as well as salaries as from September 2011 until December 2011 (EUR 24,000).

- Besides, the FIFA DRC decided to award default interest at a rate of 5% *p.a.* over the amount of EUR 29,000 as of 24 July 2012 until the date of effective payment.

- Finally, the FIFA DRC also obligated the Appellant to pay the Respondent of EUR 100,000 as a compensation for breach of contract and an interest at the rate of 5% *p.a.* over the amount of compensation, as from 30 August 2013 until the date of effective payment.

IV. Proceedings before the Court of Arbitration for Sport

11. On 18 December 2013, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (the "CAS"). It was directed against the Respondent with respect to the decision rendered by the FIFA DRC on 30 August 2013 (grounds communicated to the Appellant on 5 December 2013).

12. By letter issued on 15 January 2014, the CAS Court Office, in accordance with the Respondent's agreement, extended the deadline for the Appellant to file its appeal brief.

13. On 15 January 2014, the Appellant filed its appeal brief. On 25 February 2014, the Respondent filed its answer. Together with his answer, the Respondent filed a request for provisional and

conservatory measures, considering that the appeal to the CAS should not have a suspensive effect and that the Appellant be ordered to respect the FIFA-decision appealed against and to pay the Respondent the sum determined therein.

14. By letter of 27 February 2014, the parties were informed that Mr Patrick Lafranchi, attorney-at-law in Bern, Switzerland, was appointed as Sole Arbitrator in the present matter.

15. On 28 March 2014, the CAS Court Office asked the parties, *inter alia*, to provide CAS with the relevant content of substantive Romanian law for the present case in the event it should be applicable.

16. On 7 April 2014, the Appellant provided the CAS Court Office with the requested content of substantive Romanian law.

17. On the same date, the Respondent took position on the applicable substantive law. It considered that Romanian law would only be applicable regarding the provisions of individual employment matters such as working hours, right of holidays etc. For other aspects, primarily the FIFA Regulations and subsidiarily Swiss law should apply. The Respondent renounced on representing its point of view on the content of Romanian law.

18. By order on provisional and conservatory measures issued on 9 May 2014, the Sole Arbitrator dismissed the Respondent's request for provisional measures filed in its answer.

19. On 13 May 2014, the representative of the Appellant, Ms Marina Daniela Zlatcu, signed the Order of Procedure. The Respondent did not return the relevant Order of Procedure.

20. A hearing took place on 20 May 2014 at the CAS Headquarters in Lausanne, Switzerland. The Appellant was represented by Mr Josep F. Vandellos and Ms Marina Daniela Zlatcu, Counsel. The Respondent was represented by Mr Nilo Effori, Counsel. At the end of the hearing the Sole Arbitrator and the parties agreed that the final pleadings should be handed in written form after the hearing.

21. At the outset of the hearing the parties confirmed that they had no objection as to the appointment of the Sole Arbitrator. Upon query of the Sole Arbitrator, each party further affirmed that it had received a full and fair hearing, that it was treated equally and that there were no additional matters or requests that it wished to raise.

22. On 4 June 2014, in view of an issue raised concerning the authenticity of the Respondent's signatures and upon request of the Sole Arbitrator, the Respondent filed a copy of the employment contract signed with his present club, an analyses of the receipt issued on 5 December 2011 and a page containing ten of his signatures.

23. On 16 June 2014 the parties were informed about the suggestion of the Sole Arbitrator to appoint Ms Deborah Boegli as handwriting expert. The parties did not raise any objection thereto wherefore Ms Deborah Boegli was appointed as an independent judicial expert.

24. On 16 July 2014, the Sole Arbitrator asked the Respondent to provide it with the originals of

the sent documents in order to submit them to the expert together with the payment slips issued 5 December 2011. The originals were sent by the Respondent on 22 July 2014.

25. By letter of 29 July 2014, upon request of the Sole Arbitrator, the Appellant again took position on the applicability and the relevant content of Romanian Law. The Respondent on the other hand, by letter of the same date, reserved its right to take position on the content of Romanian Law for the case that the Sole Arbitrator should deem Romanian Law as applicable.

26. On 3 December 2014, CAS provided the parties with the expert opinion report of Ms Deborah Boegli.

27. On 12 December 2014, the Respondent informed the CAS Court Office that he did seek a second opinion to the expert report of Mrs Boegli. According to Mr Orlando Gonzalez Garcia, an expert consulted by the Appellant, both the conclusion and methodology of Ms Boegli would be incorrect. Therefore, the Appellant asked to formally instruct and fund Mr Orlando Gonzales Garcia to produce a second expert report.

28. By letter of 16 December 2014, the Appellant disagreed with the request of the Respondent and asked to reject the Respondent's request.

29. By interim order issued on 19 December 2014, the Sole Arbitrator rejected the motion of evidence of the Respondent based on an anticipatory consideration of evidence.

30. On 13, respectively, 16 February 2015, the parties submitted their final pleadings in written form, as it was agreed at the end of the hearing.

V. The Parties' Positions

31. The following outline of the parties' positions is illustrative only. However, the Sole Arbitrator indeed has carefully considered the challenged decision and all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

a. The Position of the Appellant

32. In its appeal, the Appellant requests the Sole Arbitrator:

"-To set aside and annul the Decision of the Dispute Resolution Chamber of 30 August 2013.

-To fix a sum, to be paid by the RESPONDENT to the Appellant, in order to pay its defence fees and costs in a sum of 6.000 EURO".

33. The Appellant rejects the FIFA decision in its entirety. The Appellant agues, *inter alia*, the following:

<u>As to the facts:</u>

- During the FIFA procedure, it did not submit any statement of defence due to a

professional negligence of a member of the administrative staff.

- The Sole Arbitrator has full power to review the facts and law. The present case is therefore to be heard *de novo*.

- Contrary to the allegations of the Player, ever since the beginning of the Contract, the Appellant fulfilled its obligations towards the Respondent. This results from the payment slips proving the payments of the monthly salaries, the signing-on fee and other allowances to the Respondent. The payment slips thus contradict the allegations raised by the latter during the FIFA proceedings.

- On 9 January 2012, after the Winter break, the Appellant's first squad gathered and restarted training. The Respondent was however not present and never returned to Romania. He failed to resume duties and ceased his professional activities with no authorization of the Appellant.

- Once the Appellant realized that the Player had not come back on time, on 15 January 2012, it bought a flight ticket for the Player to return to Romania.

- The Respondent did play nine games in Romanian League 1 and two games in the Romanian Cup for the Appellant. All those games took place during the first round of the season 2011/2012. Consequently, the Respondent was an important player for the team of the Appellant.

As to the law

- In the present case the parties agreed in Art. N of the Employment Contract no. 531 issued on 1 July 2011 that *"the provisions of individual work contract shall be completed considering the stipulations of Law 53/2003 – Labour Code and of the applicable collective work contract concluded at the employer's / group of employers / subsidiaries / national level (…)"*. The parties therefore chose Romanian law as being the applicable law to govern the employment contract.

- Furthermore, as the Respondent and the Appellant were members of the Romanian Football Federation at the time the dispute arose, the provisions of the FRF Statutes and Regulations (the "RTSP-FRF"), in particular the FRF Regulations on the Status and Transfer of Football Players (Ed. 2011), are also of application unless otherwise provided.

- The absence of the Respondent after the Winter break constitutes a breach of contract and a unilateral termination without just cause. The conditions for a unilateral termination with just cause as set forth by article 18.10 of the RTSP-FRF are not fulfilled in the present case.

- As it results from the payment breakdown in Annex 2 to the appeal, at the moment of terminating the Contract, all due salaries corresponding to the 2011-2012 season were paid to the Respondent.

- The conditions for an early termination with just cause are not met even if the Sole Arbitrator would consider that the matter at stake is to be decided in accordance with FIFA Regulations.

b. The Position of the Respondent

34. In its answer the Respondent asked CAS for the following reliefs:

"(i) The present appeal must be dismissed.

(ii) The DRC decision must be upheld save for the quantum of the financial order against the Appellant which the Respondent now claim should be increased to EUR 184,750 in accordance with 5.2.17-5.2.24.

(iii) Order that the sanction (as set out in paragraph 5.3) should be imposed against the Appellant.

(iv) Order that the sum of EUR 184,750 should be paid to the Respondent in accordance with the Decision to be made within 30 days.

(v) Order the Appellant to pay the legal costs in connection with this proceeding".

35. In support of his requests, the Respondent presents *inter alia* the following arguments:

<u>As to the facts:</u>

- Although the Respondent was fulfilling his side of the contract, the Appellant failed to pay half of the stipulated sign-on fee, *i.e.* EUR 5,000 out of EUR 10,000. The Respondent was informed on a number of occasions that the outstanding sum should be paid to him but no such payment was ever received.

- During the mid-season Winter break, the Respondent went on holidays to Brazil. At that time, the Respondent had neither received his salaries from September to December 2011 in the sum EUR 24,000, nor 50% of the sign-on fee in the sum of EUR 5,000.

- The Respondent paid the rent for his accommodation for the entire period he stayed in Romania. However, as set within the Addendum to the Contract, the Appellant was responsible for paying the Respondent's rent. The Appellant is thus liable to the Respondent for the payment of EUR 1,250.

- In accordance with Clause 5 of the Addendum, the Respondent was also entitled to receive three return flight tickets Romania – Brazil – Romania for him, his wife and his son. In December 2011, the Respondent received one single flight ticket from Romania to Brazil without the return flight from Brazil to Romania.

- The Respondent flew to Brazil on 17 December 2011, expecting to receive the flight

tickets to return to Romania and resume his duties on 9 January 2012. During the first weeks of January 2012, the Appellant completely ignored the Respondent.

As to the law:

- It is incorrect to say that the parties have agreed to resolve any disputes according to Romanian law. The Contract may only be determined by Romanian law regarding the provisions of individual employment contract such as work hours, right of holiday, etc. CAS must firstly apply the FIFA Regulations on the Status and Transfers of Players to the present matter and, only if necessary, apply Swiss law as a subsidiary and the laws of Romania being the country where the contract was enforced.

- Since the Appellant no longer required the Respondent's services, it admitted the debts owed to the latter and was keen to pay all overdue amounts up until 31 December 2011 as set out within the correspondence referred to.

- The Respondent confirms for the record that he neither received any payments after September 2011 (related to the salary of August 2011) nor did he sign any receipt on 5 December 2011. The Appellant therefore has not fulfilled its financial obligations towards the Respondent.

- The Respondent, on the other hand, was fulfilling his obligations with the Appellant because he was continuing to train and play for the Appellant. This despite the fact that he was not being paid since August 2011.

- If referred to Swiss law, the Respondent had just cause to discontinue his employment with the Appellant.

- The damage occurred to the Respondent in total was EUR 184,750.

- Ultimately, the Respondent asks the Sole Arbitrator to sanction the Appellant for breaching the contract with the Respondent.

VI. Jurisdiction

36. Article R47 of the Code of Sports-related Arbitration (the "Code") provides as follows:

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

37. The jurisdiction of CAS, which is not disputed, derives from article 67 (1) of the FIFA Statutes (2014 edition) which reads:

"Appeals 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".

38. The Sole Arbitrator notes that the Appellant signed and returned the Order of Procedure on 13 May 2014, while the Respondent failed to do so.

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

40. Under article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

VII. Admissibility

41. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

42. The Sole Arbitrator notes that pursuant to article 67(1) of the FIFA Statutes, the time limit to file an appeal is 21 days of notification of the Appealed Decision.

43. The Sole Arbitrator notes that the grounds of the Appealed Decision were notified to the parties on 5 December 2013. As the Statement of Appeal was filed on 18 December 2013, which is within the 21 days deadline, the appeal was timely submitted and is therefore admissible.

44. In the Appealed Decision, the Appellant was obliged to pay the Respondent an amount of EUR 29,000 plus interest of 5% *p.a.* as of 24 July 2012 until the date of effective payment and a compensation for breach of contract in the amount of EUR 100,000 plus interest at 5% *p.a.* as of 30 August 2013 until the date of effective payment that is in total an amount of EUR 129,000 plus interest.

45. In its answer of 25 February 2014, the Respondent however asks for a total amount of EUR 184,750 and therefore for a payment way higher than the one granted within the Appealed Decision. The Respondent in other words lodges a counter-claim. According to constant jurisprudence of the CAS and based on article R55 of the Code – such legal provision provides *e contrario* that the answer of a Respondent is limited to the appeal – counterclaims are not admitted during a CAS appeals procedure. Rather, the Respondent would have had to lodge an appeal itself if he was not satisfied with the outcome of the Appealed Decision.

46. Consequently, the counterclaim lodged by the Respondent on 25 February 2014 is therefore not admissible.

VIII. Applicable Law

47. The question of the presently applicable law is to be decided by the Sole Arbitrator in accordance with the provisions of the CPIL.

48. Pursuant to article 187 para. 1 CPIL,

49. *"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the law with which the case is most closely connected".*

50. The wording of article 187 para. 1 CPIL, to the extent it states that the parties may choose the *"rules of law"* to be applied, does not limit the parties' choice to the designation of a particular national law. It is in fact generally agreed that the parties may choose to subject the dispute to a system of rules which is not the law of a State and that such a choice is consistent with article 187 of the CPIL, such as the statutes, rules or regulations of a sporting governing body (cf. amongst others DUTOIT, Droit international privé suisse, Basel 2005, p. 657 and RIGOZZI, Arbitrage international en matière de sport, § 1178 *et seq.*).

51. For the resolution of the present dispute, article 22 of the RSTP offers the parties two different ways. Indeed, on the one hand, a party in an employment-related dispute between a club and a player of an international dimension is able to seek redress before a civil court. On the other hand, FIFA is alternatively competent to hear such a dispute.

52. If the *forum* of FIFA is chosen and the FIFA's decision is appealed with the CAS, article 66 para. 2 of the FIFA Statutes regulates the procedure and the applicable law in the merits with CAS.

53. According to article 66 para. 2 of the FIFA Statutes *"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. While interpreting article 66 para. 2 of the FIFA Statutes, the Sole Arbitrator notes the following:

55. Article 66 para. 2 of the FIFA Statutes refers to the Code as long as procedural norms are concerned (*"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings").* However, the applicable substantive law in a procedure before the CAS is also regulated by article 66 para. 2 of the FIFA Statutes which provides that *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".* Article 66 para. 2 of the FIFA Statutes consequently does not leave room for the application of article R58 of the Code and designates Swiss law as the law applicable to the merits of the present case.

56. Hence, from a substantive point of view, CAS shall primarily apply the various FIFA regulations and Swiss Law on a subsidiary basis (cf. for the interpretation of article 66 para. 2 of the FIFA Statutes amongst others HAAS U., Football Disputes between Players and Clubs before the CAS, in: Sport Governance, Football Disputes, Doping and CAS Arbitration, Editions Weblaw, Berne 2009, p. 218 – 223, p. 221 with further reference to CAS jurisprudence).

57. Presently, the parties, in cipher N of the Contract, chose Romanian law to be applicable for a possible dispute. Consequently the relationship between the contractual choice of law of the parties (*i.e.* Romanian Law) and article 66 para. 2 of the FIFA Statutes has to be examined. To be accurate, the Sole Arbitrator has to ask itself if the parties, while accepting the alternative *forum* of FIFA and CAS instead of the *forum* of a civil court, did implicitly modify their choice of law with the one contained in article 66 para. 2 of the FIFA Statutes.

58. In the doctrine and the jurisprudence, it is generally accepted that a choice of law can be taken explicitly or tacitly and that parties can modify their choice of law at any time, even during a proceeding. In order to determine if a choice of law was taken implicitly, one has to examine the circumstances of the relevant case (cf. amongst others HEINI A., Zürcher Kommentar zum IPRG, N 11 to Art. 187 CPIL and BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2010, N 1273).

59. Presently, both parties agreed to submit their dispute before FIFA and CAS and not before the equally competent civil courts. Due to the fact that the parties were both represented by attorneys-of-law and therefore conscious about the alternative *forum* and the content of article 66 para. 2 of the FIFA Statutes, the Sole Arbitrator consequently comes to the conclusion that the parties, while choosing respectively not obstructing to the *forum* of FIFA and CAS modified their original choice of law for the choice of law incorporated in article 66 para. 2 of the FIFA Statutes.

60. Hence, the various FIFA regulations and subsidiary Swiss law shall rule on the present case.

61. Last but not least, the Sole Arbitrator agrees with the DRC that the dispute, submitted to FIFA by the Respondent on 24 July 2012, based on article 26 para. 1 and para. 2 RSTP, is subject to the 2010 edition of the RSTP.

62. The provisions set in the RSTP which appear to be relevant in this arbitration are the following:

Article 13, which provides as follows:

"A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement".

Article 14, which provides as follows:

"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".

Article 17, which provides as follows:

"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 Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any

other objective criteria. These criteria 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 a protected period.

2. Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

3. In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. These sporting sanctions shall take effect immediately once the player has been notified of the relevant decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs. This suspension of the sporting sanctions shall, however, not be applicable if the player is an established member of the representative team of the association he is eligible to represent, and the association concerned is participating in the final competition of an international tournament in the period between the last match and the first match of the next season. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.

4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two registration periods.

5. Any person subject to the FIFA Statutes and regulations (club officials, players' agents, players, etc.) who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned".

63. The cited articles of the RSTP do not leave room for the applicability of Swiss labour law. This because the RSTP regulates the present case in a concluding manner as can be seen in the subsequent considerations.

IX. Denial of Respondent's late request for evidence

64. On 12 December 2014, following to the expert report submitted to the CAS by Mrs Bögli, the Respondent requested to appoint Mr Orlando Gonzales Garcia as handwriting expert.

65. By letter of 19 December 2014, the Sole Arbitrator has denied such request for the following reasons:

- Pursuant to article 182 para. 3 of Switzerland's Federal Code on Private International Law the arbitral tribunal has to guarantee the parties' right to be heard. The right to be heard includes amongst others the right to submit evidence motions (cf. BGer 4A_526/2011, consideration 2.1).

- However, the arbitral tribunal is not obliged to admit every request for evidence. If the arbitral tribunal could already form its opinion on the proofs raised and, if it can hypothesize that its opinion would not be changed by the new request for evidence the arbitral tribunal is authorized to reject such a motion (so called anticipatory consideration of evidence; cf. for references the abundant jurisprudence of the Swiss Federal Tribunal, amongst others indicated in BGer 4A_526/2011, consideration 2.1).

- Presently, it was the Respondent that asked for an independent expertise (cipher 4.2.6 of the Answer). The Sole Arbitrator granted the motion and instructed Mrs Bögli to analyse the signatures in question. Mrs Bögli's independency and technical qualification were assured and not reprehended by the parties previous to the expertise. And after considering the expertise of Mrs Bögli the Sole Arbitrator does not have any reasonable doubts to question the work done by Mrs Bögli. This due to the fact that it was executed in accordance with scientifically approved methods and that it seems stringent and clear.

- Further, the value of an expertise that would be made by Mr Orlando Gonzales Garcia is a lot less than the one made by Mrs Bögli. The report of Mrs Bögli was commissioned by the Sole Arbitrator and is therefore an independent judicial one, while a possible expertise produced by Mr Orlando Gonzales Garcia would have to be qualified as a party opinion. As it is generally known and reflected in constant jurisprudence that the probative value of a party opinion is worth a fraction of the one of a judicial expertise (cf. amongst others BGer 8C_264/2014, consideration 2.2; BGer 4A_505/2012, consideration 3.5).

- Finally, the value of the expert opinion of Mr Orlando Gonzales Garcia would even be more reduced because Mr Orlando Gonzales Garcia, according to the Respondent's letter issued on 12 December 2014, before elaborating his report, already came to the conclusion that Mrs Bögli's expertise was incorrect. There would hence be significant doubts on the quality of the survey of Mr Orlando Gonzales Garcia due to prejudice.

X. MERITS

66. Primary, it has to be determined if a procedure of taking evidence is required with regard to undisputed facts. Neither the Code, nor an agreement of the parties answer this question. In order to resolve this issue, the Sole Arbitrator, based on article 182 para. 2 CPIL, deems the applicability of the Swiss Procedural Code (hereafter referred to as "SPC") as appropriate.

67. According to article 150 SPC, evidence is required to prove facts that are legally relevant and disputed in a substantiated way. *E contrario*, no evidence is required for undisputed facts. They do not have to be proven but are accepted as formally true (cf. amongst others HASENBÖHLER F. in: SUTTER-SOMM/HASENBÖHLER/LEUENBERGER (Hrsg.), Kommentar zur

Schweizerischen Zivilprozessordnung (ZPO), 2013, N. 4 zu Art. 150 ZPO and HAUSHEER/WALTER, Berner Kommentar zum ZGB, 2012, N 58 to Art. 8 ZGB).

68. Presently, it is especially questionable if factual circumstances brought forward by one party and not contested by the other shall be qualified as not disputed in the sense of article 150 para. 1 SPC. Generally and in regard of the principle of production of evidence (*"Verhandlungsmaxime"*, cf. article R44.1 of the Code), evidence of not contested circumstances is not required. It should only be demanded in exceptional cases that is *"only if serious doubts exist as to the truth of an undisputed fact"* (article 153 para. 2 SPC).

1. Burden of proof and burden of allegation

69. The party who bears the burden of proof for a certain fact has to allege it in a substantiated way, *i.e.* in a way that a procedure of taking evidence can be executed (cf. article R51 and R56 of the Code in conjunction with article 182 para. 2 CPIL in conjunction with article 150 para. 1 and article 221 para. 1 lit. d SPC; cf. further also KILLIAS L., Berner Kommentar, ZPO, 2012, N 22 to article 221 SPC).

70. On the other hand, the party exempted from proving a certain fact is obliged to dispute the facts presented by the counterparty in a substantiated manner. Otherwise the alleged facts by the counterparty are deemed as approved. Thereby, a global contradiction of the counterparty's allegation is not sufficient and is treated equally with a non-contest of the relevant fact (cf. amongst others DÜRR R., Schweizerische Zivilprozessordnung (ZPO), Stämpflis Handkommentar, 2010, N 4 to article 222 SPC).

71. Except an agreement would provide otherwise, the burden of proof is determined according to the applicable *lex causae*, *i.e.* the applicable substantive law (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2010, N 1203).

72. As has been determined above, the applicable rules of law are primary the relevant FIFA Regulation, especially the articles of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), and subsidiary Swiss law. However, neither the RSTP nor another presently applicable regulations contain a rule on the burden of proof for the present case. In particular article 12 para. 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber according to which *"Any party claiming a right on the basis of an alleged fact shall carry the burden of proof"* does not apply because, pursuant to article 1 para. 1 of said regulation, it only applies to procedures of the Players' Status Committee and the DRC, however not with CAS.

73. Therefore and based on article 66 para. 2 of the FIFA Statutes, Swiss law shall apply to determine the burden of proof. Pursuant to Swiss law, article 8 of the Swiss Civil Code states that *"unless a provision provides otherwise, the burden of proving the existence of an alleged fact shall rest on the party who derives rights from that fact"*. Presently, as will be seen subsequently, no such *lex specialis* is applicable. Consequently, article 8 of the Swiss Civil Code shall apply wherefore the party who derives rights from a fact has to prove it.

74. Article 8 of the Swiss Civil Code also determines the consequences of a lack of evidence. If a relevant fact remains unproven and the applicable law does not provide otherwise the case has to be decided against the party who seeks to derive its right from the existence of the fact in question (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2010, N 1203).

2. Consequences of the default of the Appellant during the FIFA proceedings

75. Presently, it is questionable if the Appellant - while being in default in the proceedings before FIFA – acknowledged, respectively, accepted the factual allegations brought forward by the Respondent during the FIFA proceedings or if the Appellant's contradiction of the Respondent's factual contentions in the statement of appeal with CAS is still on time. It therefore has to be examined if the silence of the Appellant during FIFA proceedings has to be qualified as a concession to the facts presented by the Respondent.

76. The Sole Arbitrator is of the opinion that the default of a party during a FIFA procedure should not be interpreted as an acceptance of the counterparty's factual allegations during the relevant FIFA procedure. This out of the following reasons:

77. A procedure held before the FIFA bodies is to be qualified as an internal procedure of a Swiss association, governed by private substantive Swiss law and not by Swiss procedural law. According to private substantive Swiss law, a conduct implying an intent (*"konkludente Willenserklärung"*) is assumed only in exceptional circumstances that is in the cases enumerated in article 6 of the Swiss Code of Obligation (the "CO"). In all other cases an implied conduct is not to be interpreted as a declaration of intent. Article 6 CO formulates the following:

"Where the particular nature of the transaction or the circumstances are such that express acceptance cannot reasonably be expected, the contract is deemed to have been concluded if the offer is not rejected within a reasonable time".

78. A *"particular nature of the transaction or the circumstances"* are at hand in the case of silence of one of the parties after the declaration of a purely favourable offer of the other party, in the case of a (long-)existing bond of trust between the parties or in the case of advanced party negotiations (cf. amongst others Berner Kommentar, KRAMER/SCHMIDLIN, N 1 *et seq.* to article 6 OR).

79. Presently, no such constellation is apparent. To the contrary, in a situation as the present, it could have been reasonably expected that the Appellant would declare explicitly if wanting to recognize the facts presented by the Respondent during the FIFA proceeding. This due to the negative consequences of such an acknowledgment for the outcome of the FIFA and a subsequent CAS proceeding. The Appellant did therefore not declare to acknowledge the facts presented by the Respondent during FIFA proceedings.

80. In consequence, the facts brought forward by the Respondent during the FIFA proceeding cannot be qualified as undisputed. Rather, the undisputed and disputed facts have to be discerned based on the parties' submissions.

3. The alleged non-payments by the Appellant of 50% of the sign-on fee and of the salaries between September and December 2011

81. The Player asked before FIFA for the payment of the salaries for the months from September 2011 to December 2011 and for 50% of the stipulated sign-on fee (EUR 5,000 of EUR 10,000). The Respondent based his claims on the addendum of the contract.

82. Article 13 of the RSTP anchors the principle *"pacta sunt servanda"*. Based on the addendum of the contract, the Player thus has a right to claim the stipulated sign-on fee and the salaries between September and December 2011 if they have not been paid yet.

83. On a factual basis, it was established that the Appellant paid to the Respondent an equivalent of total EUR 46,038.95. This amount confronts the stipulated debts owed to the Player between July and December 2011. The salary owed between July and December 2011 added up to EUR 36,000. (6 x EUR 6,000) and the owed sign-on fee to EUR 10,000. The total sum owed to the Player consisting of the salary from July to December 2011 and the sign-on-fee (EUR 10,000) therefore added up to EUR 46,000. This debt was cancelled by the total payment of EUR 46,038.95 to the Respondent. Consequently, the Appellant met its burden of proving that the Respondent was not entitled to ask for 50% of the sign-on fee (EUR 5,000) and for the payment of the salaries for the months of September to December 2011.

84. The Appellant alleges that the amount of EUR 36,000 (paid Romanian currency) was paid in three instalment, *i.e* on 27 August 2011, 15 September 2011 and on 5 December 2011. However, the Respondent disputes to have signed the payment slip corresponding to the amount paid on 5 December 2011 and claims that his signature was forged.

85. Due to the request brought forward by the Respondent in its answer and in accordance with the agreement taken by the parties during the hearing the Sole Arbitrator commissioned Deborah Boegli as an independent graphologist expert in order to examine the signature on the payment slip allegedly signed by the Player on 5 December 2011.

86. In her expertise Ms Deborah Boegli came to the following conclusion:

"Following the examination and observations made on the documents provided, the undersigned is able to provide the following opinion in her appointed assignment:

The signature on the back of the receipt dated 5 December 2011 corresponds to the reference signatures of Mr. Renato Ferreira Alberto da Silva.

Beyond a reasonable scientific doubt and bearing in mind that certain reference documents are photocopies, the questioned signature was, in the opinion of the undersigned, very probably placed by Mr. Renato Ferreira Alberto da Silva. It appears that an imitator would, probably, have chosen a simpler signature specimen".

87. According to article R57 para. 1 of the Code, the Sole Arbitrator has full power to review the facts. He therefore forms his opinion based on a free assessment of the evidence taken.

88. Free assessment of evidence signifies the obligation for an independent assessment of evidence

without being bound by abstract, cut and dried evaluation patterns. The Sole Arbitrator is thus free to award each piece of evidence its appropriate significance but is however obliged to exercise this power according to his best judgement (so called "pflichtgemäss ausgeübtes Ermessen", cf. NETZLE, S., N 17 to Art. 375 SPC and HASENBÖHLER, F., N 5 seq. to Art. 157 SPC, both in: Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), SUTTER-SOMM/HASENBÖHLER/LEUENBERGER (ed.), 2013).

89. While evaluating an expertise according to his best judgement ("pflichtgemäss ausgeübtes Ermessen") the Sole Arbitrator is not simply allowed to adopt the expert's opinion. He is obliged to evaluate it even though it needs good reason to deviate from the expert's opinion; such as a clear contradiction to scientifically acknowledged standards for example. Otherwise, the arbitral tribunal's evidence evaluation would be arbitrary. In regard to technical expert opinions there is consequently only little margin for the arbitral tribunal to deviate from the expert's conclusions. Nevertheless, this does not relief the arbitral tribunal to evaluate independently the conclusion of the expert's opinion (cf. WEIBEL, T., in: Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), SUTTER-SOMM/HASENBÖHLER/LEUENBERGER (ed.), 2013, N 6 seq. to Art. 187 ZPO).

90. Last but not least, the Sole Arbitrator has to determine the applicable standard of proof in the present arbitration. The latter is neither regulated by the Code nor by an agreement of the parties. The Sole Arbitrator therefore refers to Article 375 ZPO to define the *in casu* applicable standard of proof. Pursuant to Article 375 ZPO the ordinary standard of proof is the one of strict evidence. This standard is rendered if the Sole Arbitrator is convinced that a factual conclusion is true. An absolute certainty of the Sole Arbitrator is not requested (Art. 182 Para. 2 CPIL in conjunction with Art. 375 ZPO; cf. NETZLE, S., in: Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), SUTTER-SOMM/HASENBÖHLER/LEUENBERGER (ed.), 2013, N 17 to Art. 375).

91. Presently, Ms Boegli examined if the signature on the receipt issued on 5 December 2011 and was handed in by the Appellant was the one of the Respondent. In order to answer this question Ms Boegli examined five reference signatures of the Player. According to Ms Boegli they would all be suitable to serve as references because of their number, diversity and of the time span they were produced by Player. Pursuant to Ms Boegli this time span covers also the production of the signature issued on 5 December 2011.

92. Thereupon Ms Boegli proceeded to the comparison of the signature dated 5 December 2011 with the five reference signatures. She compared the general appearance and the special characteristics of the signatures in question. Thereby, Ms Boegli came to the conclusion that the comparison of the shape and method in forming the letters between the signature in question and the referenced signatures showed similarities and a "natural" variation, but no significant difference.

93. In consequence Ms Boegli came to the conclusion that the signature on the back of the receipt dated 5 December 2011 corresponds to the reference signatures of Mr. Renato Ferreira Alberto da Silva.

94. The Sole Arbitrator deems the methodology and the conclusions drawn by Ms Boegli as stringent and logical. The detailed comparison between the different variations and similarities of the signatures in question, such as the personalised, slightly rounded first capital R, the "confusion of strokes", the spontaneously and continuous flow of all the signatures and the personalised handwriting convinced the Sole Arbitrator to base its decision on the expert opinion of Ms Boegli.

95. Therefore, the Sole Arbitrator comes to the conclusion that the payment slip dated 5 December 2011 was beyond any reasonable and significant doubt signed by the Respondent.

96. In a next step the Sole Arbitrator has to appreciate the payment slip signed by the Respondent on 5 December 2011 in order to establish what amount of money the Respondent received from the Appellant.

97. The *in casu* applicable FIFA Regulations do not contain a rule of how to evaluate quittances. Hence, in accordance with Art. 66 Para. 2 of the FIFA Statutes Swiss law shall apply concerning this matter. Pursuant to Swiss law, a quittance has to be evaluated as a simple document ("Urkunde"). Thereby, a natural presumption exists telling that the sum attested on the quittance was paid to the signee.

98. The Respondent does not produce any proof that would refute this presumption. Consequently, the Sole Arbitrator does not have to decide the conflict in Swiss doctrine if a quittance has to be refuted by a counter-evidence ("Gegenbeweis") or a proof of the contrary ("Beweis des Gegenteils") – while a counter-evidence is regarded as adduced if it provokes significant doubt on the existence of the main evidence ("Hauptbeweis"), the proof of the contrary is qualified a full main evidence that has to convince the Sole Arbitrator beyond any reasonable doubt (cf. the BGer 5A_316/2009, judgment of the Federal Tribunal issued on 2 July 2009, cipher 4.1 *et seq.* with further references). This because the Respondent didn't produce any proof to refute this presumption. Consequently, the presumption is confirmed and it is regarded as established that the Player received the money indicated on the payment slip signed on 5 December 2011.

99. In view of the above, and in view of Ms Boegli's methodology and conclusion, the Sole Arbitrator is satisfied that the Respondent signed the payment slip dated 5 December 2011 and, as result, duly received the total amount of EUR 46,038.95 as set out in paragraph 83 of the present award.

4. Rents paid by the Respondent

100. Additionally, the Player asked before FIFA for the payment of his rental costs between July and December 2011.

101. According to the addendum the Appellant was obliged to provide the Respondent with a rental house or apartment worth EUR 250 a month. However, as it was established, the Appellant did not pay the Respondent any such rental contribution. Based on the aforementioned principle *"pacta sunt servanda"*, the Appellant is therefore obliged to pay the Respondent a monthly sum of EUR 250 respectively a total of EUR 1,500 (6 months x EUR 250).

5. Flight tickets

102. The Respondent further claimed before FIFA EUR 2,500 from the Appellant for the flight tickets he bought for his wife and child while returning to Brazil on 17 December 2011.

103. According to cipher 5 of the addendum, the Appellant was obliged to provide the Respondent with three round trips Brazil – Romania – Brazil consisting of two tickets for adults and one for a minor child. Presently, it is established that the Appellant provided the Respondent only with one flight ticket for an adult while the Player bought a flight ticket for an adult (his wife) and a minor child (his child) on his own. The costs for those two flight tickets added up to EUR 2,500.

104. In view of the above, the Appellant is therefore obliged to pay to the Respondent the amount corresponding to the flight tickets, *i.e.* EUR 2,500.

6. The non-return of the Player after the winter break

105. In order to establish the presently relevant facts, the Sole Arbitrator appreciates the following circumstances:

- In his answer, the Respondent attached an email with the following content:

On 23 November 2011, Camelia Chivorchian, from Ag. De Turism Speedex Tours SRL in Bucharest, sent the Appellant the flight tickets (Bucharest to Sao Paulo via Rome on 17 December 2011) of the Respondent to the email-address fcbrasov2007@yahoo.com. Thereby, Camelia Chivorchian wrote the following (translated from Romanian to English by the Appellant during the hearing):

"Good morning, I attach the return tickets of the passenger".

Afterwards, this email was forwarded by the Appellant to the Player. The Player again forwarded the email to his lawyer, Mr Nilo Effori. The email had the following subject:

"FW: passage de volta para o BRASIL" signifying *"return ticket to Brazil".*

Out of these emails, one can conclude that the Player, at the beginning of the contract in summer 2011 flew from Brazil to Romania and, on 17 December 2011, used the return ticket of the purchased round trip. This also corresponds with the subsequent facts:

- In cipher 5 of the addendum, the Appellant obliged itself to pay the Player three flights on the route Brazil – Romania – Brazil. The starting and ending point of the round trip route is hence Brazil.

- The return flight of the round trip tickets documented in annexe A3 of the appeal brief (outgoing flight on 15 January 2012 from Sao Paulo via Amsterdam to Bucharest, return flight on 15 May 2012 from Bucharest via Amsterdam to Sao Paulo) also depart from Bucharest to Sao Paulo.

- The Sole Arbitrator is therefore of the opinion that the Player, as he returned from Bucharest to Sao Paulo on 17 December 2011, used the return ticket of a purchased round trip Brazil – Romania - Brazil.

- Against this background, the Appellant's position at least seems stringent. Due to the fact that the Player seemed unhappy in Romania the parties could have been negotiating to terminate the contract at the moment the Player returned to Brazil on 17 December 2011. It is consequently possible that the Appellant waited to buy the next round trip flight ticket (Brazil – Romania – Brazil) for the Player in order to see if the contractual relationship would continue for the second half of the season 2011 / 2012 or not.

106. However, based on the available and existing facts the Sole Arbitrator is not able to establish to the necessary certainty out of what reason the Player did not return to the Appellant after the winter break 2011 / 2012. Rather, the intentions of the parties and their communication about a contract termination between December 2011 and 25 January 2012 remain unclear.

107. The consequences of this lack of evidence have to be borne by the Respondent because he derives the right of a compensation out of this fact and therefore bears the burden of proof for it.

7. Did the breaches of the contract by the Appellant concerning the rents and the flight tickets constitute a sufficient ground for the Respondent to terminate the contract with just cause?

108. The Sole Arbitrator finds that this question is to be answered by the negative.

109. Indeed, the Sole Arbitrator refers to article 17 para. 1 of the RSTP which reads as follows:

"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity for 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 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".

110. Further, to define the term "just cause", the Sole Arbitrators refers to the constant jurisprudence of the CAS and of the FIFA DRC which provides the following:

"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. The following examples explain the application of this norm".

111. In relation with the present matter, the Sole Arbitrator also consulted other CAS case-law which

has also considered that continuous breaches by the employer of its duty to comply with its financial commitments towards the player can constitute just cause for termination. In case CAS 2006/A/1180, the panel ruled:

"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 the 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.)".

112. In the present case, and as set out above, the Sole Arbitrator finds that the Respondent had no just cause to terminate the Contract with the Appellant. Indeed, as mentioned in paragraphs 79 *et seq*. of the present arbitral award, the Sole Arbitrator found that the salaries from September 2011 to December 2011 and for 50% of the stipulated sign-on fee (EUR 5,000 of EUR 10,000).

113. Furthermore, as explained in paragraph 81 of the present award, the Sole Arbitrator has established that the Appellant paid to the Respondent an equivalent of a total amount of EUR 46,038.95. This amount confronts the stipulated debts owed to the Player between July and December 2011. The total sum owed to the Player consisting of the salary from July to December 2011 and the sign-on-fee (EUR 10,000) therefore added up to EUR 46,000. This debt was cancelled by the total payment of EUR 46,038.95 to the Respondent. Consequently, the Appellant met its burden of proving that the Respondent was not entitled to ask for 50% of the sign-on fee (EUR 5,000) and for the payment of the salaries for the months of September to December 2011.

114. Even if the Appellant would have lately paid the aforementioned amounts, the Sole Arbitrator did not find from the file any evidence pursuant to which the Respondent had reminded the Appellant to do so, neither found out any element giving notice to the Appellant to pay these amounts. Indeed, during the winter break, the Respondent requested several times a return flight ticket from Brazil to Romania but did not formally put the Appellant in default to pay his outstanding salaries and sign-on fee.

115. Furthermore, although the Appellant utterly failed to provide the Respondent with return flight tickets and therefore did not comply with its contractual obligations, the Sole Arbitrator notes that the Respondent did nothing to return to Romania by his own and request the reimbursement of his travel expenses at his arrival.

116. Although the Sole Arbitrator concludes from the above that both parties adopted a reckless behaviour and created this situation, it did not allow the Respondent to not come back to Romania and the latter can therefore not argue that the non-payment of the return flight ticket and of the rent as sufficient grounds to terminate the Contract.

117. In light of the above, the Sole Arbitrator finds that the Respondent is not entitled to any financial compensation as set out by article 17 para. 1 of the FIFA RSTP.

8. Respondent's request for Sporting sanctions

118. The Sole Arbitrator also notes that the Respondent requested that sporting sanction be imposed on the Appellant. The Sole Arbitrator reminds the terms of article 17 para. 4 of the RSTP, which is the legal basis to impose sporting sanctions on clubs:

"In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of the exception and the provisional measures stipulated in article 6 paragraph 1 of these regulations in order to register players at an earlier stage".

119. The Sole Arbitrator refers to the constant jurisprudence of the CAS which provides that:

"[a] disciplinary sanction does not concern the contractual relationships between the (direct or indirect) members of the association but it concerns the hierarchical relationship between FIFA and its (direct or indirect) members" (see M. Baddeley, L'association sportive face au droit, Bâle, 1994, p. 220: "la relation entre la société et ses membres repose sur un rapport hiérarchique"), with the consequence that the disciplinary sanctions provided by FIFA rules could be ordered by the CAS only if FIFA were summoned as a respondent. In other terms, given that FIFA is a third party vis-à-vis the case CAS 2014/A/3489, the Panel is prevented from ordering FIFA to impose, or from overruling FIFA in imposing, disciplinary sanctions on indirect members of FIFA such as Panathinaikos and the Player." (CAS 2014/A/3489 & CAS 2014/A/3490).

120. In light of the above, particularly paragraph 46 of the present award, and, on a subsidiary basis, because FIFA was not summoned up as a party in the present matter, the Sole Arbitrator will not examine the Respondent's request to impose sporting sanctions on the Appellant as counter-claims are inadmissible in a CAS appeals procedure. .

9. Default Interest

121. The Respondent, in its answer, does not ask for default interests. Due to the principle *"ne ultra petita"* (*"Dispositionsmaxime"*) – a principle presently applicable based on Art. 182 Para. 3 CPIL in conjunction with Art. 58 Para. 1 SPC (*"The court may not award a party anything more than or different from what the party has requested, nor less than what the opposing party has acknowledged".*) - the

Sole Arbitrator cannot award default interest to the Respondent for the sum due to him.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by S.C. Fotbal Club Brasov S.A. on 18 December 2013 against the decisions issued by the FIFA Dispute Resolution Chamber on 30 August 2013 is partially upheld.

2. The decision issued by the FIFA Dispute Resolution Chamber on 30 August 2013 is modified as follows: S.C. Fotbal Club Brasov S.A. is condemned to pay Renato Ferreira Alberto da Silva EUR 4,000.

3. The counterclaims filed by the Respondent on 25 February 2014 are inadmissible.

(…)

6. All other prayers for relief are dismissed.