Arbitration CAS 2017/A/5256 Alexandre Ludovic Ribeiro Pereira v. Football Club Zimbru Chisinau, award of 23 March 2018

Panel: Prof. Jacopo Tognon (Italy), Sole Arbitrator

Football
Termination of player's contract by Termination Agreement
Exclusion of evidence under Article R57 para. 3 CAS Code and de novo power of review
Validity of two contract versions signed on consecutive days

1. **Under Article R57 para. 1 CAS Code, the Panel has full power to review the facts and the law, meaning that the Panel deals with the case *de novo*, evaluating all facts and legal issues involved in the dispute. The Panel's inherent discretion to exclude certain evidence under Article R57 para. 3 CAS Code should be construed in accordance with the principle of *de novo* review. Therefore, the standard of review should not be undermined by an overly restrictive interpretation of Article R57 para. 3 CAS Code. As such, the discretion to exclude evidence should be exercised with caution, *e.g.* in situations where a party may have engaged in abusive procedural behavior or in any other facts or circumstances where the Panel might, in its discretion, consider it either unfair or inappropriate to admit new evidence. If in case an appellant attempted to collect certain evidence during FIFA proceedings, and filed that evidence with delay in the FIFA proceedings, provided that the respective documents are in line with the arguments presented in the FIFA file, the filing of the respective documents in the CAS proceedings may not seem to represent an abusive procedural behaviour; in that case it would not be unfair or inappropriate to admit this "new" evidence at the stage of the CAS proceedings.**

2. **In circumstances where two versions of a practically identical contract are signed on two consecutive days it is not necessarily the version signed last/second that is valid. Rather the contract signed first may be considered the valid one in case the signature on the later signed contract does not resemble to the signatories signature or/and where the later signed version is drafted in a language unknown to the alleged signatory.**

I. PARTIES

1. Mr. Alexandre Ludovic Ribeiro Pereira (the "Player" or the "Appellant") is a professional football player of Portuguese nationality.

2. Football Club Zimbru Chisinau (the "Club" or the "Respondent") is a Moldovan football club affiliated with the Football Federation of Moldova (the "FMF"), itself a member of FIFA

(Fédération Internationale de Football Association, the international governing body of football).

II. FACTUAL BACKGROUND

A. Background Facts

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

4. On 21 January 2016, after a "contract offer" allegedly signed some days before, the Player and the Club entered into an employment contract beginning as of the date of signature and ending on 31 December 2017. The Parties signed two documents, namely: (i) a "contract offer", pursuant to which the Player was entitled to receive a monthly salary of EUR 4,000 plus bonuses and (ii) a "contract", registered with the FMF (the "Contract"), according to which the Player was entitled to a monthly gross salary of MDL 5,050.

5. According to the Player, on 31 May 2016, the Parties executed an agreement (the "First Termination Agreement"), mutually terminating the Contract. Pursuant to the Termination Agreement, the Club undertook to pay the Player the amount of EUR 14,000 on the following instalments: EUR 4,000, by 31 July 2016; EUR 5,000, by 31 August 2016; EUR 5,000, by 30 September 2016.

6. The Club denies that the Parties ever entered into or executed the First Termination Agreement.

7. According to the Club, the Parties executed an "Additional Agreement" to the Contract (the "Second Termination Agreement") on 1 June 2016, which - according to its English translation - provided in particular as follows:

> *"1. (…) from the moment of become effective,* [such agreement] *eliminate any invocation by both PARTIES about any other previous verbal agreement concluded present agreement.*
>
> *2. The parties have come to a mutual agreement to early terminate* [the Contract]*, starting on the date 01.06.2016.*
>
> *3. Player confirm the fact, with the present agreement, that all salary rights or other remuneration rights related to his activities as a player of the CLUB was totally paid. The parties confirm with the present agreement that they do not have any financial or other claims to each other.*
>
> *4. The present additional agreement come into force from the date of signing.*

5. The present additional agreement is made up in 3 original copies, that must be registered by the Club at Football association of Moldova, that keeps one copy in original. Another 2 original copies are distributed to Employee and Employer".

8. The Player denies that the Parties ever entered into or executed the Second Termination Agreement.

9. On 23 January 2017, the Player sent a letter to the Club, by which he noted that none of the instalments of the First Termination Agreement had been paid and requested the payment of the whole amount to which he was entitled - according to such agreement - within ten (10) days. The Club did not pay any amount to the Player.

B. The proceedings before the Dispute Resolution Chamber of FIFA

10. On 30 March 2017, the Player lodged a claim before the Dispute Resolution Chamber of FIFA (the "FIFA DRC") against the Club, claiming the outstanding amount of EUR 14,000, in accordance with the First Termination Agreement.

11. The Club was invited by the FIFA DRC to draft a reply to the Player's claim. The Club submitted that the Parties had never entered into the First Termination Agreement, which was (according to the Club) forged, and filed the Second Termination Agreement, requesting that the Player's claim be dismissed in its entirety.

12. The Player was then invited to add his comments to the Club's reply, which the Player did only after the time limit granted by the FIFA DRC. That is why the FIFA DRC decided not to consider such comments.

13. According to the Player, the failure to comply with the time limit set by the FIFA DRC was due to a number of circumstances not attributable to him and was, in any case, not in breach of the relevant regulations and practice of the FIFA DRC.

14. According to the comments at issue, the Player had submitted that the Second Termination Agreement was a forged document and that the Parties exchanged the First Termination Agreement via an e-mail sent on 3 July 2016 even if such agreement was dated 31 May 2016.

15. On 7 July 2017, the FIFA DRC found as follows (the "Appealed Decision"):

"The claim of the Claimant, Alexandre Ludovic Pereira, is rejected".

16. By the Appealed Decision, FIFA DRC held that the Parties had entered into both the First and the Second Termination Agreement and that, as a consequence, no amount was due from the Club to the Player, considering that the Second Termination Agreement had been entered into and executed one day later than the First Termination Agreement.

17. The grounds of the Appealed Decision were notified to the Parties on 11 July 2017.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 27 July 2017, in accordance with Articles R47 *et seq.* of the Code of Sports-related Arbitration ("the Code"), the Player filed his statement of appeal against the Club and FIFA before the Court of Arbitration for Sport ("the CAS"), requesting that the dispute be submitted to a sole arbitrator.

19. On 9 August 2017, FIFA sent a letter to the CAS Court Office, stating that, in the proceedings before the FIFA DRC, it had merely acted in *"its role as the competent deciding body of the first instance and was not a party to the dispute"* and requested, therefore, to be excluded from the proceedings. The Player was invited to comment on such request on the same day.

20. Also on 9 August 2017, the Player filed his appeal brief in accordance with Article R51 of the Code.

21. On 11 August 2017, the Player withdrew his appeal against FIFA.

22. On 17 August 2017, the Club informed the CAS Court Office of its agreement that the present dispute be submitted to a sole arbitrator.

23. On 2 September 2017, the Club requested that the time limit to file its answer be set after the payment by the Player of his share of the advance of costs, pursuant to Article R55, para. 3, of the Code. Such request was granted by the CAS on 4 September 2017.

24. On 25 September 2017, the CAS Court Office set a new deadline for the filing of the answer by the Club, pursuant to Article R55, para. 3, of the Code, and informed the Parties that Mr. Jacopo Tognon, Professor and Attorney-at-law in Padua, Italy, had been appointed as Sole Arbitrator in this procedure.

25. On 16 October 2017, the Club filed its answer in accordance with Article R55 of the Code.

26. On 17 October 2017, the Parties were invited to inform the CAS Court Office whether they preferred a hearing to be held or the Sole Arbitrator to issue an award based solely on their written submissions. Only the Player provided his preference, requesting a hearing to be held.

27. On 16 November 2017, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing and different dates were suggested. The Parties were further informed that FIFA had been requested to provide the complete case file relating to the proceedings between the Parties before the FIFA DRC.

28. On 18 and 20 November 2017, respectively, the Respondent and the Appellant requested that the hearing be held on 12 December 2017. The Respondent, in particular, confirmed that its General Director, Mr. Sevastian Botnari, would attend the hearing on its behalf.

29. On 21 November 2017, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that the hearing would be held on 12 December 2017, *i.e.* on the date they had requested.

30. On 23 November 2017, the CAS Court Office sent to the Parties the Order of Procedure.

31. On 28 November 2017, the CAS Court Office informed the Parties that the Sole Arbitrator, having considered their position on the issue, had decided to authorize the hearing of the witnesses indicated by the Player in his appeal brief, without prejudice to any further decision on the relevance of their statements.

32. On 29 November 2017, the Player returned the signed Order of Procedure. The Club, despite having been requested twice, failed to return a signed copy of the Order of Procedure, instead.

33. On 4 December 2017, FIFA sent the complete case file relating to the proceedings between the Parties before the FIFA DRC to the CAS Court Office.

34. On 12 December 2017, a hearing was held at the CAS Court Office, in Lausanne, Switzerland. Besides the Sole Arbitrator, the following attended: the Player, Mr. José Duarte Reis (the Player's counsel) and Mr. Sergio Guedes (witness) (the "Agent"). The Club did not attend the hearing. On the same date of the hearing, indeed, the Club sent a letter informing the CAS Court Office that it would not attend the hearing and requested the Sole Arbitrator to dismiss the appeal in its entirety and confirm the Appealed Decision.

35. At the outset of the hearing, the Player and his counsel confirmed that they had no objection to the appointment of the Sole Arbitrator and at the conclusion of the hearing they also confirmed that the right to be heard had been fully respected.

36. The Agent, during his witness examination, confirmed that the Player had received only one month of the salary due according to the Contract. He also confirmed that the Player returned to Portugal in mid May 2016, hence he did not sign the Second Termination Agreement in any case. As for the First Termination Agreement, the Agent stated that it was sent by the Club by an e-mail dated 2 July 2016. After the signature by the Player, the agreement was sent to the Club attached to an e-mail dated 3 July 2016.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

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

A. The Appellant

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

- The Player confirmed that he filed its replica before FIFA DRC after the time limit set by the Chamber had elapsed. In particular, the written submissions were submitted on 5 July 2017 while they were expected to be filed by 21 June 2017.

- This late filing, however, was caused by a "misunderstanding", due to an administrative error made by the secretary of the law firm, Mrs. Marta Silveira. Furthermore, the Club's answer before the FIFA DRC contains a "fake document" (the Second Termination agreement) so that the time limit fixed was in any case too short in order to reply.

- Since the CAS has full power to review a decision appealed against, Article R57 of the Code applies, while para. 3 of the same provision does not apply. The Appellant quoted scholars together with CAS 2014/A/3518 that, under the Player perspective, ruled in its favor.

- As for the facts and evidence of the case, the Appellant declared that it would be impossible for him to sign a document in Chisinau (the Second Termination Agreement), since he was already in Portugal. Furthermore the document was drafted in a language unknown to him.

- The exchange of the First Termination Agreement occurred via email respectively sent on 2 and 3 July 2016 and the document was dated 31 May 2016. Moreover, the Second Termination Agreement was false and the signature forged. This was easy to detect by comparing the different signatures of the Player in all the documents available (included the "Power of Attorney").

39. In his appeal brief, the Appellant makes the following requests for relief:

"1. The annulment of the Decision dated 7 July 2017 passed by FIFA – Dispute Resolution Chamber;

2. The issuance of a new decision ordering the Respondent to pay the Appellant the total amount of € 14.000,00 (fourteen thousand Euros) as well as interest at a rate of 5%;

3. To order the Respondent to pay the costs of the Appeal;

4. Given that the Respondent was assisted in the present procedure by a professional legal adviser, to order the Respondent to contribute towards its costs".

B. The Respondent

40. The Respondent's submissions, in essence, may be summarized as follows:

- First, the Club requested the CAS to strictly apply Article R57, para. 3, of the Code. For the Respondent, it was the Player's fault to have belatedly submitted the replica to the FIFA DRC, so that in any case these allegations and documents cannot be taken into account in the FIFA file, upon the clear rules contained in Article 9.3 and 9.4 of the FIFA procedural rules governing the FIFA DRC.

- Second, the Appellant was trying to find and to invoke new submissions and evidences (*i.e.* documents contained in the replica of 5 July 2017) which must be rejected being belatedly filed.

- In any case:
  - the Appellant's submissions related to the facts and evidence are unfounded;
  - The witnesses' statements are without any sort of logical reason and made by persons certainly not independent and impartial;
  - The First Termination Agreement was fabricated and does not exist;
  - There are only two official documents: the Labor agreement n. 02/16-Z1 dated on 21 January 2016 and registered at FA of Moldova on 25 January 2016 (*i.e.* the Contract) and the mutual termination of the Labor agreement dated 1 June 2016 and registered at FA of Moldova on 27 July 2016 (*i.e.* the Second Termination Agreement).

41. In its answer, the Respondent makes the following requests for relief:

> *"1. To reject (dismiss) integrally the Appeal lodged by Football Player Alexandre Ludovic Ribeiro Pereira, Portugal, against the Decision of the FIFA Dispute Resolution Chamber dated 7th July 2017 (…);*
>
> *2. To maintain the Decision of the FIFA Dispute Resolution Chamber dated 7th July 2017 (…)".*

V. JURISDICTION

42. Article R47 of the Code provides as follows:

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

43. Article 58, para. 1, of the FIFA Statutes grants the Player a right of appeal to CAS from a decision of the FIFA DRC.

44. The CAS, therefore, has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

45. Article 58, para. 1, of the FIFA Statutes states:

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

46. The grounds of the Appealed Decision were notified to the Parties on 11 July 2017.

47. The Player lodged his Statement of Appeal on 27 July 2017, within the time limit stipulated by the joint reading of Article R49 of the Code and Article 58, para. 1, of the FIFA Statutes.

48. The Player also complied with the time limit stipulated by Article R51 of the Code, as he filed his appeal brief on 9 August 2017.

49. The appeal is therefore admissible.

VII. APPLICABLE LAW

50. Article R58 of the Code provides as follows:

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

51. Article 57, para. 2, of the FIFA Statutes provides as follows:

> *"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".*

52. Consequently, the Sole Arbitrator will decide the present dispute primarily in accordance with the FIFA Regulations and, subsidiarily, Swiss law.

VIII. PROCEDURAL ISSUES

53. The Sole Arbitrator must address the issue of whether the written submissions and the exhibits annexed to the Replica dated 5 July 2017 (and attached as for the exhibits to the Appeal Brief) are admissible in light of Article R57, para. 3, of the Code.

54. Article R57 of the Code provides as follows:

> *"The Panel has full power to review the facts and the law (…). The Panel has the discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered (…)".*

55. Under Article R57, para. 1, of the Code, and in line with the consistent jurisprudence of the CAS, the Sole Arbitrator has full power to review the facts and the law. The Sole Arbitrator therefore deals with the case *de novo*, evaluating all facts and legal issues involved in the dispute. However, this *de novo*-mandate only applies to the matter in dispute that has been brought before this Sole Arbitrator. The matter in dispute is defined by the requests of the Parties and the facts of the case.

56. In this regard, the Sole Arbitrator considers that his inherent discretion to exclude certain evidence under Article R57, para. 3, should be construed in accordance with the fundamental principle of the *de novo* power or review, as specified above, which is well established in a long standing CAS jurisprudence.

57. Therefore, the standard of review should not be undermined by an overly restrictive interpretation of this rule. As such, the discretion to exclude evidence should be exercised with caution, for example in situations where a party may have engaged in abusive procedural behavior or in any other facts or circumstances where the Sole Arbitrator might, in his discretion, consider either unfair or inappropriate to admit new evidence.

58. It is the Sole Arbitrator's understanding that, as also confirmed by the Respondent, the Appellant attempted to collect these evidences during the FIFA proceedings, even though they were filed with delay. Notwithstanding the above, these documents are completely in line with the arguments presented in the FIFA DRC file so that their filing in these proceedings does not seem to represent an abusive procedural behavior. In other words, the Sole Arbitrator does not consider unfair or inappropriate to admit the "new" evidences at this stage since they were known to FC Zimbru Chisinau before the first instance proceedings were terminated.

59. Moreover, the Respondent had the full opportunity to discuss these evidences and to comment on them so that no violation of the right to be heard occurred in the case at stake.

60. Therefore, all the annexes attached to the Appeal Brief and belatedly submitted in front of FIFA DRC are admissible.

IX. MERITS

61. The questions to be addressed by the Sole Arbitrator are the following:

    (a) *Which is/are the termination agreement(s) that came into force between the Parties*?

    (b) *Which are the consequences of the application of the Termination Agreement*?

(a) Which is the termination agreement that came into force between the Parties?

62. It is not necessary to discuss the issue of the existence of the "Contract Offer" (which is denied by the Respondent), as the signature of the Contract is uncontested between the Parties. The only question that must be answered is, thus, which of the two termination agreements is to be considered valid and binding for the Parties.

63. On the one hand, in fact, there is an agreement signed on 31 May 2016 (the First Termination Agreement) according to which the Club recognizes that the Player owes EUR 14,000; on the other hand there is an agreement dated 1 June 2016 according to which no sum is due to the Player.

64. According to the Appealed Decision, and bearing in mind that the FIFA DRC had not admitted the Player's Replica of 5 July 2017, since the Second Termination Agreement was signed one day after the First, it follows that the second one is to be considered in force so that nothing is due to the Player.

65. The Sole Arbitrator, having evaluated the evidence in the file, disagrees with this finding.

66. First, it should be noted that there is no obligation to register the Agreements so that this argument could not be opposed in this case in order to reject the First Termination Agreement.

67. In addition, it is precisely from a careful analysis of the two Termination Agreements that the Sole Arbitrator believes, with reasonable certainty that only the First Termination Agreement has been signed between the Parties.

68. Indeed:

- When analysing the signatures of the various agreements, it can be clearly noted that the only signature which completely differs from the others (as reported in the Contract Offer, the power of attorneys and in the First Termination Agreement) is that of the Second Termination Agreement, dated 1 June 2016. Therefore, if there is a signature that seems different (and could be forged) it is exactly the one reported in the Second Termination Agreement.

- The Second Termination Agreement, moreover, is done in the Moldovan language. It is not only very unlikely that the Player has placed his signature on an agreement in a language unknown to him exactly the day after he had reached an agreement to be paid EUR 14,000; it is simply unbelievable.

- What is more, the Agent confirmed in full at the hearing that the First Agreement in question had been sent by email on 2 July 2016 from the Club, bearing the date of 3 July 2016. The documents produced (and admitted at this stage before the CAS) together with the witness evidence, confirm that the Club's proposal was accepted by the Player and that the Club wanted to keep the date of 31 May 2016 as the end date of the First Agreement.

- In any case, the absence of Respondent at the hearing prevented the introduction of the matter during the hearing itself: and this certainly did not support the Club's allegations in this regard.

- Moreover, it has to be underlined that the main evidence that could have been opposed by the Club is completely missing. In fact, in order to "paralyze" the First Termination Agreement, it would have been sufficient to produce the evidence of the payments made or, in any case, the evidence of salary payments. What emerges from the evidence on record is that no payment was made, so that it is even more strange and far-fetched that at the end of a labour contract in which nothing has been paid

(considering that, in any case, the payments by the Club has not been proven), the Player would have declared to have been totally paid.

69. It follows that the First Termination Agreement turns out to be the valid and mandatory one for the Parties.

(b) Which are the consequences of the application of the Termination Agreement?

70. Bearing in mind that the Club did not fulfil the obligation included in the First Termination Agreement, FC Zimbru Chisinau has to pay the total amount of EUR 14.000,00.

71. As per Article 104 of the Swiss Code of Obligations, the Respondent has to pay the Appellant a 5% annual interest rate on the amount due. In the case at stake, the interest will be calculated from the expiry of the individual instalments until the date of the effective payment.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Alexandre Ludovic Ribeiro Pereira on 27 July 2017 against the decision issued by the Dispute Resolution Chamber of FIFA on 7 July 2017 is upheld.

2. The decision issued by the Dispute Resolution Chamber of FIFA on 7 July 2017 is set aside.

3. FC Zimbru Chisinau is ordered to pay to Alexandre Ludovic Ribeiro Pereira the amount of EUR 14.000,00 due in force of the Termination Agreement dated 31 May 2016, plus 5% interest *p.a.* from the expiry of the individual instalments until the date of the effective payment.

(…)

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