

# Decision of the Dispute Resolution Chamber

passed in Zurich, Switzerland, on 12 March 2015,

in the following composition:

**Geoff Thompson** (England), Chairman

**Takuya Yamazaki** (Japan), member

**Santiago Nebot** (Spain), member

**Mohamed Mecherara** (Algeria), member

**Guillermo Saltos Guale** (Ecuador), member

on the claim presented by the player,

**Player A**, country B,

*as Claimant*

against the club,

**Club C**, country D

*as Respondent*

regarding an employment-related dispute arisen between the parties

## **I. Facts of the case**

1. The player from country B, Player A (hereinafter: *player* or *Claimant*), and the club from country D, Club C (hereinafter: *club* or *Respondent*), signed an employment contract valid as from 8 July 2009 until 31 May 2013.
2. On 8 August 2012, the player and the club signed a termination agreement (hereinafter: *the agreement*), by means of which the parties agreed to terminate the contract by mutual consent. The termination agreement stipulates that the club has to pay to the player the amount of EUR 800,000 net of all taxes (hereinafter: *agreed amount*) in two instalments, as follows: EUR 400,000 within 21 days as of signature of the termination agreement and EUR 400,000 on 20 December 2012.
3. According to the agreement, the player had previously lodged a claim in front of FIFA against the club for breach of contract based on unpaid salaries and the player agreed to settle this dispute amicably by signing the agreement and withdrawing his claim in front of FIFA.
4. The agreement further states that if the club fails to make any of the payments in the agreed time and manner, and if the club continues to do so after the player has given the club a 21 days' notice in writing, the agreed amount shall immediately become due. Furthermore, in that case, the club undertook to pay to the player a penalty of EUR 500,000 in addition to the agreed amount.
5. On 5 February 2013, the player lodged a claim before FIFA against the club claiming the total amount of EUR 500,225 relating to the termination agreement and interest of 5% *p.a.* The claimed amount is composed as follows: EUR 500,000 as penalty according to the termination agreement, EUR 120 regarding a shortfall of the first payment and EUR 105 regarding a shortfall of the second payment.
6. According to the player, he agreed to settle the dispute with the club concerning breach of contract for an amount less than half the amount he was initially claiming in front of FIFA, because the club agreed to pay him the agreed amount by not later than 20 December 2012.
7. Further, according to the player, the club had failed to pay the first instalment of EUR 400,000 within 21 days as of the date of signature. On 7 September 2012, the player notified the club of its failure to pay the first instalment. Subsequently, on 17 September 2012, the club paid the amount of EUR 399,880 to the player. Upon the club's request, the player accepted that the club would pay the shortfall of EUR 120 together with the payment due on 20 December 2012, but according to the player, the club failed to pay the amount due by 20 December 2012.

8. On 21 December 2012, the player notified the club that it had failed to pay the amount of EUR 400,000 on 20 December 2012 and requested immediate payment of said amount. On 14 January 2013, the player sent another letter to the club, stating that 21 days had passed since his notice and that the club had failed to pay the outstanding amount. Therefore, the player requested payment of the outstanding amounts as well as of the penalty of EUR 500,000 as agreed upon in the termination agreement. According to the player, on 17 January 2013, the club paid the amount of EUR 399,895.
9. The club, for its part, rejects the claim of the player. As regards the first instalment, the club argued that it transferred the amount of EUR 400,000 and that the amount of EUR 120 was collected by the bank of the player.
10. Regarding the second instalment, the club acknowledges having received the player's default notice on 21 December 2012. The club explained that due to a calculation mistake of the 21-day deadline, it believed that the deadline would expire on 16 January 2013. Thus, the club transferred the amount of EUR 400,000 on said date, *i.e.* six days after the deadline. The club pointed out that it transferred the full amount of EUR 400,000 to the player and that the amount of EUR 105 was collected by the player's bank.
11. The club further states that the penalty of EUR 500,000 is disproportionate, by arguing that this amount would equal an interest rate of approximately 7,600% *p.a.* Further, the club held that the Dispute Resolution Chamber is competent to reduce the penalty. The club specified that in the case at hand, the claimed penalty was disproportionate *in abstracto* and *in concreto*. The club stated that the penalty equalled 125% of the amount owed and that it had not intended to breach the termination agreement. Furthermore, according to the club, the degree of its negligence is very low, as it only miscalculated the deadline for the second payment. Finally, the delay for the payment was only of six days.

## **II. Considerations of the Dispute Resolution Chamber**

1. First, the Dispute Resolution Chamber (hereinafter also referred to as *Chamber* or *DRC*) analysed whether it was competent to deal with the matter at hand. In this respect, it took note that the present matter was submitted to FIFA on 5 February 2013. Consequently, the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2012; hereinafter: *Procedural Rules*) are applicable to the matter at hand (cf. art. 21 of the Procedural Rules).

2. Subsequently, the members of the Chamber referred to art. 3 par. 1 of the Procedural Rules and confirmed that in accordance with art. 24 par. 1 in combination with art. 22 lit. b of the Regulations on the Status and Transfer of Players (edition 2014) the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a player from country B and a club from country D.
3. Furthermore, the Chamber analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (edition 2014), and considering that the present claim was lodged on 5 February 2013, the 2012 edition of said regulations (hereinafter: *Regulations*) is applicable to the matter at hand as to the substance.
4. The competence of the Chamber and the applicable regulations having been established, the Chamber entered into the substance of the matter. In this respect, the Chamber started by acknowledging all the above-mentioned facts as well as the arguments and the documentation submitted by the parties. However, the Chamber emphasised that in the following considerations it will refer only to the facts, arguments and documentary evidence, which it considered pertinent for the assessment of the matter at hand.
5. The Chamber started with a careful examination of the content of the termination agreement concluded between the Claimant and the Respondent on 8 August 2012. In this respect, it noted that said agreement provided for the Claimant to receive from the Respondent the amount of EUR 800,000 net of all taxes in two instalments of EUR 400,000 each, the first being within 21 days as of signature of the termination agreement and the second instalment falling due on 20 December 2012. The Chamber further noted that the termination agreement was signed in the context of the Claimant's previous claim in front of FIFA against the Respondent, which claim he undertook to withdraw in the light of the parties having signed the agreement.
6. Furthermore, the Chamber observed that in case of non-compliance of the aforementioned payments within the relevant deadlines, the Respondent undertook to pay to the Claimant "*€500,000 (Five Hundred Thousand Euros) net of all taxes as penalty payment and compensation for the default (the Penalty Amount) by International Bank Transfer to the Player's nominated bank account in addition to the balance of the Agreed Amount*" (hereinafter: *the penalty clause*).

7. In continuation, the Chamber noted that the Claimant requested the payment of the amounts of EUR 120 and EUR 105, since he had only received the amount of EUR 399,880 and of EUR 399,895 from the Respondent respectively. The Chamber took further note that the Claimant requested to be awarded the amount of EUR 500,000 on the basis of the penalty clause, arguing that the Respondent had not paid the two instalments of the agreed amount on the respective due dates.
8. Turning its attention to the first part of the claim of the Claimant, the Chamber took into account that the agreement clearly stipulates that the Respondent has to pay the total amount of EUR 800,000 net of all taxes to the Claimant. The Chamber further noted that the Respondent apparently transferred in total the amount of EUR 800,000 to the Claimant, but that allegedly part of the agreed amount, EUR 225, was collected by the bank of the Claimant.
9. In this regard, the Chamber was of the opinion that the fact that costs were charged for the transfer of said amount could not be held against the Claimant, who had no influence whatsoever on this process. Further, the relevant contractual clause clearly stipulates that the amount due is net of all taxes. As a consequence, and in accordance with the general legal principle of *pacta sunt servanda*, the Respondent must fulfil its obligations as per the agreement and, consequently, is liable to pay the outstanding amount of EUR 225 to the Claimant.
10. Subsequently, with the above-mentioned considerations in mind, the Chamber focussed its attention on the penalty clause in light of the Respondent having paid the two instalments of EUR 400,000 each after the respective deadlines for payment had fallen due and the Claimant's pertinent request.
11. The Chamber acknowledged the arguments of both parties in respect of the penalty clause and referred to its constant jurisprudence, in accordance with which penalty clauses may be freely entered into by the parties and may be considered acceptable, in the event that the pertinent written clause meets certain criteria, such as proportionality and reasonableness. In this respect, the Chamber further highlighted that in order to determine as to whether a penalty clause is to be considered acceptable, the specific circumstances of the relevant case brought before it shall also be taken into consideration.
12. In the specific case at hand, the members of the Chamber took into account the business experience of the Respondent, the interest of the Claimant by timely receiving the outstanding amounts and the financial situation of the Respondent. The Chamber concluded that, with regard to these criteria, the Respondent did not present any evidence that could lead to the conclusion

that the Respondent had valid reasons for the late and partial payment of the agreed amount.

13. On the other hand, the members of the Chamber particularly took note that the Respondent was not more than 6 days late with the payment of the main part of the second instalment and that the shortfall in the payment of the relevant instalments was of EUR 225 only, i.e. 0.03% of the total amount.
14. Taken into account the severity of the breach, as well as the degree of failure of the Respondent, the Chamber noted that there are grounds for limiting the total penalty fee of EUR 500,000.
15. In view of the foregoing, the Chamber considered that the penalty clause contained in the agreement concluded between the parties was disproportionate and not reasonable. Therefore, it decided to reduce the penalty to the amount of EUR 300,000.
16. With regard to the Claimant's request for interest of 5% per year on the amount owed, the members of the Chamber referred to the jurisprudence of the Chamber in similar cases and concluded that the Claimant's request for default interest on the penalty fee must be rejected.
17. In addition, the Chamber decided that the Respondent has to pay 5% interest *p.a.* on the outstanding amount of EUR 225 as of the date on which the claim was lodged in front of FIFA.
18. Finally, the Chamber established that any further claim lodged by the Claimant is rejected.

### **III. Decision of the Dispute Resolution Chamber**

1. The claim of the Claimant, Player A, is partially accepted.
2. The Respondent, Club C, has to pay to the Claimant the amount of EUR 300,000 within 30 days as from the date of notification of this decision. In the event that this amount is not paid by the Respondent within the stated time limit, 5% interest *p.a.* falls due on this amount as of expiry of said 30 days' time limit until the date of effective payment.
3. The Respondent has to pay to the Claimant, within 30 days as from the date of notification of this decision, the amount EUR 225 plus 5% interest *p.a.* as from 5 February 2013 until the date of effective payment.

4. In the event that the amounts due to the Claimant in accordance with the above-mentioned numbers 2. and 3. are not paid by the Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.
5. Any further claim lodged by the Claimant is rejected.
6. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.

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**Note relating to the motivated decision** (legal remedy):

According to art. 67 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, a copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS (cf. point 4 of the directives).

The full address and contact numbers of the CAS are the following:

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Avenue de Beaumont 2  
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For the Dispute Resolution Chamber:

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Jérôme Valcke  
Secretary General

Encl. CAS directives