Arbitration CAS 2006/A/1180 Galatasaray SK v. Frank Ribéry & Olympique de Marseille, award of 24 April 2007

Panel: Prof. Ulrich Haas (Germany), President; Mr José Pintó (Spain); Mr Jean-Jacques Bertrand (France)

Football
Applicable law
Contract of employment
Breach of contract with just cause

1. **The voluntary and express submission of an employment dispute to the FIFA dispute-resolution mechanism, despite the option to proceed before the national courts, constitutes a choice by the parties for the dispute to be decided in accordance with the FIFA Statutes and Regulations. The application of Swiss law stipulated in Art. 60 para. 2 of the FIFA Statutes is limited. The latter only applies in the alternative and, more particularly, if there is a gap in the FIFA regulations. However, where the FIFA regulations conclusively regulate a legal question there is basically no scope for having recourse to Swiss law.**

2. **The early termination of the Contract cannot be based on every breach of obligation by the contract partner. Rather, the breach of contract must have a certain seriousness in order to justify "just cause". When the specification of "just cause" made by the parties in the Contract is either void or incomprehensible, then the general principles apply. The RSTP 2001 do not define when there is "just cause" to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". The non-payment or late payment of remuneration by an employer does in principle – and particularly if repeated – constitute "just cause" for termination of the contract. The employer's payment obligation is his main obligation towards the employee.**

The Appellant, Galatasaray SK ("the Appellant") is a Turkish football club with its seat in Istanbul in Turkey. The Appellant is affiliated to the Turkish Football Federation, which in turn is a member of the Féderation Internationale de Football Association (FIFA). FIFA is the international sports federation governing the sport of football worldwide. FIFA is an association established in accordance with Art. 60 of the Swiss Civil Code and has its seat in Zurich (Switzerland).

Mr Frank Ribéry ("the Player") is a football player of French nationality. He was born on 7 April 1983 in Boulogne-sur-Mer in France.

Olympique de Marseille (OM) is a football club with its seat in Marseille in France. It is affiliated to the French Football Federation, which in turn is a member of FIFA.

On 1 February 2005 the Player and the Appellant signed an employment contract ("the Contract") valid from the date of signature until 30 June 2008. The English translation of the Contract – originally signed by the Appellant and the Player in a Turkish and a French version – submitted to the Panel provides *inter alia*:

> *"…*
>
> *3.18. Professional football player shall not get in touch with any other club either directly or indirectly for any transfer in future along the validity period of this contract. Professional football player shall notify his club, which desires to negotiate transfer of professional football player but he shall never conduct a personal negotiation.*
>
> *…*
>
> *4.2.1. Relation between Club and Professional football player starts as of 1st of February 2005.*
>
> *4.2.2 Basic Wage:*
>
> *Club undertakes to pay 400.000 EUR to Professional football player. It undertakes to pay fix transfer fee in sum 200.000 EUR in between 1st of February 2005 – 28th February 2005. Remainder shall be paid as following: an amount in sum of 40.000 EUR per month until 1st of July 2005. Furthermore he will be paid up bonus in sum of 5.000 EUR per each time he would be taken in official 18-player staff. If the player would have played 10 matches then he will be paid a premium sum of 75.000 €.*
>
> *1) Club undertakes to pay a fix transfer fee in sum of 708.000 EUR to Professional football player during the period between 1st of July 2005 and 31st of June 2006. This payment shall be realized as following: an amount in sum of 300.000 EUR shall be paid on 31st of August 2005 and the remainder shall be paid in monthly instalments in sum of 34.000 EUR until 1st July 2006.*
>
> *Club undertakes to pay transfer fee in sum of 7.500 EUR per each match Professional football player, which would be variable, along this period.*
>
> *If the player takes place in the basic staff of the team he would be paid 100% of the fee, if he would be included in match later on then he would be paid 50% of the fee, and if he would not play despite of that he had been taken in staff then he would be paid 25% of the fee.*
>
> *2) Club undertakes to pay a fix transfer fee in sum of 708.000 EUR to Professional football player during the period between 1st of July 2006 and 31st of June 2007. This payment shall be realized as following: an amount in sum of 300.000 EUR shall be paid on 31st of August 2006 and the remainder shall be paid in monthly instalments in sum of 34.000 EUR until 1st July 2007.*
>
> *Club undertakes to pay transfer fee in sum of 7.500 EUR per each match Professional football player, which would be variable, along this period.*
>
> *If the player takes place in the basic staff of the team he would be paid 100% of the fee, if he would be included in match later on then he would be paid 50% of the fee, and if he would not play despite of that he had been taken in staff then he would be paid 25% of the fee.*

3) Club undertakes to pay a fix transfer fee in sum of 904.000 EUR to Professional football player during the period between 1st of July 2007 and 31st of June 2008. This payment shall be realized as following: an amount in sum of 400.000 EUR shall be paid on 31st of August 2007 and the remainder shall be paid in monthly instalments in sum of 42.000 EUR until 1st July 2007.

…

5.1. In the event that Club would be responsible of permanently violating the provisions and conditions of this contract, professional football player, after having utilized his rights specified in article 5.5 hereof, shall give a written notice within 3 days then shall be able to terminate this contract. Club, may oppose against such termination under the provisions of the articles 42 and 43 of the new regulation of FIFA related to statutes and transfers of professional football players.

5.2 In any case, Club reserves its irrevocable rights related to damage and loss specified in the article 22 of the new regulation of FIFA related to statutes and transfers of professional football players as well as its rights specified in article 13 of the same regulation.

5.3. Should professional football player be found guilty of unfair and inconvenient attitude, if he violated training and discipline rules or had an attitude inconsistent with law or he did not comply with the conditions of this contract, Club may apply fine with amount less than fix fee of two weeks or penalty of sending away for a period shorter than 14 days professional football player. Club shall communicate such decision and describe the reasons resulting in such decision to Professional football player. All such information shall be registered in the records of Club.

5.4. Should Club delay to make payments longer than 90 days with bad faith, professional football player shall have the right to give notice stating such situation (misuse) under the provisions of article 42.1.a of the new regulation of FIFA related to statutes and transfers of professional football players.

5.5. Should the player have any demand concerning his job he would have to follow the procedures below:

- *He first shall notify the Club manager of his complaint*
- *He may give written notice of his complaint to Club manager if:*
- *Subject matter would not have been solved to satisfaction of professional football player within 10 days, player may lodge at the Board of Directors or Committee of Club and present claim in writing to committee or sub-committee or secretariat. The matter shall be taken in consideration and the Board or Committee shall convene and investigate the case within 2 (two) weeks after receipt of the notice.*

5.6. Parties agree and accept all rules, regulations and/or decrees of FIFA, Turkish Football Federation or other institutions mentioned herein together with any modifications thereon.

…

6.1. Should professional football player desire to enter into a contract with another club during period of this contract, he would be able to terminate this contract unilaterally any time only after having paid an amount in sum of 10.000.000 EUR to Club. However, he would have to be bound with notice periods specified by administrative organs (these organs would be FIFA or Turkish Football Federation depending on the case). After such a payment would have done, Professional football player shall notify Club of payment having been made and Contract having been terminated with registered mail.

…

> *7.1. This contract shall be governed by Turkish Law and any dispute concerning the contract shall be settled under the provisions of the article 42 of the new regulation of FIFA related to statutes and transfers of professional players. This article is an arbitrating article and avoids the player to refer to any provision other than those of the article 42 of the new regulation of FIFA related to statutes and transfers of professional players".*

In the period between 1 February 2005 and 13 June 2005 the Player played 17 matches for the Appellant. The threshold of 10 matches under Art. 4.2.2 of the Contract was achieved in April 2005.

On 13 June 2005 the Player sent a letter to the Appellant's President that reads, *inter alia*, as follows:

> *"… As of the present, since the signature of the agreement, I could not receive any of the amounts that are necessary to be paid to my party as regards my salary and participation premiums!!!*
>
> *In other words, I have received neither my salary nor my contractual premiums for 4 months.*
>
> *The amount that is necessary to be paid to my party as of today is 262.000 EUR and the remaining of the collective premiums (the salary of the next month June has to be added to the same).*
>
> *My agent […] served to your party warning notices for many times for the payment of my salaries and premiums (Letters dated 2nd of May, 13th of May, 19th of May and 30th of May). The referred warning notices have been inconclusive and payment has still not been made to my party.*
>
> *My agent in his last letter of 30th May, notified your party that if payment is not effected to my party within 48 hours, I will terminate the agreement and make an application to FIFA due to the material breach of your contractual liabilities.*
>
> *As of today, I have ascertained that you have not answered to the warning notices served by my agent to your party via both fax and registered mail with return receipt.*
>
> *The subject matter situation causes my party to suffer from significant and unacceptable loss.*
>
> *My trust has completely been broken and under these circumstances, I cannot take the risk to play in your Club in the new season.*
>
> *For the referred reason, as prescribed by FIFA and art. 5.1 of the agreement concluded between us, I have decided to terminate the agreement with just cause. …".*

On 14 June 2005 the Player referred the matter to FIFA's Dispute Resolution Chamber (hereinafter referred to as "DRC").

It is not disputed between the parties that the Appellant paid to the Player an amount of EUR 307,143 on 14 June 2005.

On 15 June 2005 the official website of OM announced that the Player had joined its club and that an employment contract had been signed between the respective parties.

Following an investigation of the matter, the DRC issued its decision on 30 May 2006 ("the Decision"). In its Decision, the DRC came to the conclusion that the Appellant had breached the Contract without just cause. Therefore, the Appellant's claims against the Player and OM were

rejected. As far as OM's claims for outstanding remuneration are concerned, the DRC concluded that no payments are outstanding from the Appellant. Furthermore, the DRC decided that no compensation for breach of contract without just cause is due by the Appellant to the Player. This Decision was communicated to the parties on 16 November 2006.

By letter dated 4 December 2006 the Appellant filed with CAS its statement of appeal against the Decision.

In its appeal brief the Appellant put forward, *inter alia,* the following requests to the CAS:

a) that "*sport sanctions specified in articles 21, 22 and 23 of the FIFA Regulations for the Status and Transfer of Players be imposed against* [the Player] *due to his unjust termination of the Contract and misbehaviour in breach of the Contract and FIFA regulations"*;

b) that "*the sports sanctions specified in the FIFA Regulations for the Status and Transfer of Players against* [OM] *due to its inducement on the Player for the termination of his Contract*" be enforced;

c) that the Player "*be compelled to pay EUR 10.000.000,00 as a penalty as per article 6.1 of the Contract due to his breach of the said clause by making negotiations with another club when the Contract was still in force and effect between the parties*";

d) that the Player "*be ordered to compensate the Respondent for the expenses incurred by the Respondent in relation to the employment of another player to replace* [the Player]*;*

e) that "*the decision of the FIFA Dispute Resolution Chamber dated 30 May 2006*" be reversed.

f) that the Player "*be ordered to compensate the Respondent for all expenditures related to this dispute resolution*" and

g) that OM "*be held jointly and severally liable with"* the Player *"for the payment of the amounts requested*" in c), d) and f).

In the oral hearing of 15 March 2007 the Appellant - at the Panel's instigation - clarified his application under d) und f) that he was seeking compensation for the "Appellant" (and not for the "Respondent").

In his answer dated 30 January 2007 the Player requests the CAS to

a) "*hold that the contract was justly terminated by the Player due to the exclusive fault of the* [Appellant];

b) "*find and hold that no disciplinary or financial sanction shall be ordered against the Player*" and

c) "*order* [the Appellant] *to pay an amount covering the costs incurred before the FIFA Dispute resolution Chamber (attorney's fees, translations and travel costs) and to order* [the Appellant] *to bear all of the expenses of the arbitration*";

In addition, in his answer dated 30 January 2007, the Player filed a counterclaim requesting CAS to – *inter alia*

a) "*order* [the Appellant] *to pay the amount of EUR 40,000 in salary, together with interest at the rate of 5 % as from 28 February 2005*";

b) "*order* [the Appellant] *to pay the collective bonuses for matches that remain due to him, i.e. the amount of EUR 32,597, together with interest at the rate of 5% as from 30 June 2005*" and

c) "*order* [the Appellant] *to pay the amount of EUR 1,228,500 in damages to compensate the loss suffered due to the early termination of the contract".*

In its answer dated 2 February 2007 OM requests the CAS to

a) "*confirm the decision of the Dispute Resolution Chamber in all its provisions*";

b) "order [the Appellant] *"to pay* [OM] *a sum to cover the costs that it incurred in order to defend itself before the FIFA Dispute Resolution Chamber and the CAS*" and

c) that "[the Appellant] *be ordered to pay all costs of the arbitration*".

LAW

Jurisdiction and Mission of the Panel

1. Art. R27 of the Code provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement. *In casu* the jurisdiction of CAS is based on Art. 60 *et seq.* of FIFA Statutes and is confirmed by the signature of the order of procedure. Moreover, in their correspondence with the CAS, the parties have at no time challenged the CAS's general jurisdiction.

2. The mission of the Panel follows from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Admissibility of Appeal and Counterclaim

3. The statement of appeal filed by the Appellant was lodged within the deadline provided by Art. 60 of the FIFA Statutes, namely 21 days from notification of the Decision. It further complies with the requirements of Art. R48 of the Code. The counterclaim by the Player complies with the requirements of Art. R55 of the Code and is, therefore, admissible.

The Applicable Law

4. The question of what law is applicable in the present arbitration is decided by the Panel in accordance with the provisions of Chapter 12 of the Swiss Private International Law Act (Swiss PIL), the Court of Arbitration for Sport being an international arbitral tribunal having its seat in Switzerland within the meaning of Article 176 of the Swiss PIL (*cf.* CAS 2005/A/983 & 984, marg. no. 61).

5. According to Article 187 para.1 of the Swiss PIL, *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*. Article 187 para.1 of the Swiss PIL constitutes in itself the entire private international law or conflict of laws system applicable to arbitral tribunals, which have their seat in Switzerland, and its provisions confirm that the type of conflict of laws rules contained in Swiss private international law are not applicable to the determination of the applicable substantive law in international arbitrations (KAUFMANN-KOHLER/STUCKI, *International Arbitration in Switzerland*, Zurich 2004, p. 116; RIGOZZI A., *L'arbitrage international en matière de sport*, Basle 2005, marg. no. 1166 et seq.).

6. The wording of Article 187 para.1 of the Swiss PIL, which 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 generally agreed by academics and commentators that the parties may choose to subject the contract 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 Swiss PIL (Rigozzi A., *op. cit.*, marg. no. 1177; DUTOIT B., *Droit international privé suisse*, Basle 2005, p. 657; LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, p. 392 *et seq.*; KARRER P., in HONSELL/VOGT/SCHNYDER (publ.), *Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht*, Basle 1996, ad Art. 187, marg. no. 69 *et seq.*; see also CAS 2005/A/983 & 984, marg. no. 64 *et seq.*). The relevant statutes, rules or regulations of a sporting governing body may therefore be designated by the parties as the applicable rules of law for the purposes of Article 187 para.1 of the Swiss PIL (RIGOZZI A., *op. cit.*, marg. no. 1178 *et seq.*).

7. However, the parties' freedom to agree a non-state law also has its limits, which derive from public policy. This results, not least, from the fact that even an arbitration court which has been authorized to decide *ex aequo et bono* is bound by these limits (*cf* DUTOIT B., *op. cit.*, p. 658; CAS 2005/A/983 & 984, marg. no. 70). However, it must hereby be taken into account that this extreme outer limit of the freedom of choice of law is not a matter of domestic Swiss or a particular foreign public policy. Rather, the relevant criterion is an international or universal *order* public policy. The Swiss Federal Court specified this – for arbitral jurisdiction – more precisely in a recent decision and stated (ATF 8 March 2006, 4P.278/2005, marg. no. 2.2.2) that what was concerned were *"… basic values or values, which are still recognized, which according to the understanding of the law that prevails in Switzerland, should form the basis of every legal system" ["… valeurs essentielles et largement reconnues qui, selon les conceptions juridiques prévalant en Suisse, devraient constituer le fondement de tout ordre juridique"]*.

8. This far-reaching freedom of the choice of law in favour of the parties, for which the door has already been opened by Art. 187 para. 1 of the Swiss PIL, is specified more precisely in Art. R58 of the Code. The application of this provision follows firstly from the fact that the parties submitted the case to the CAS. Art. R27 of the Code stipulates that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. On the other hand, the order of procedure provides in point 7 that the law applicable to the case shall be determined according to Art. R58 of the Code. Said provision provides that:

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

9. In the present case the *"applicable regulations"* for the purposes of Art. R58 of the Code are, indisputably, FIFA's regulations because the appeal and the counterclaim are directed against a decision by FIFA, which was passed applying FIFA's rules and regulations. More specifically, the regulations concerned - apart from the FIFA Statutes - are particularly the FIFA Regulations for the Status and Transfer of Players 2001 ("RSTP 2001"). Although the latter were replaced by the FIFA Regulations for the Status and Transfer of Players 2005 ("RSTP 2005") with effect from 1 July 2005 (see Art. 29 of the RSTP 2005), pursuant to Art. 26 para.1 of the RSTP 2005, all cases that *"have been brought to FIFA"* before 1 July 2005 are to be decided according to the former rules, i.e. according to RSTP 2001. Since, in the present case, the Player instituted the action before the DRC on 14 June 2005, the *"applicable regulations"* for the purposes of Art. R58 of the Code are the RSTP 2001.

10. What is questionable is whether the parties – in addition to the regulations of FIFA – made a choice with regard to the applicable law. Such a choice of law could be found in the Contract between the Appellant and the Player. However, it could also have been agreed at some later point in time. Here, account must be taken of the fact that the parties' agreement regarding the choice of law is not required to take a particular form and can, therefore, be concluded either expressly or tacitly (CAS 2006/A/1024, marg. no. 6.5).

11. Art. 7.1 of the Contract contains a choice of law clause, according to which the Contract between the Player and the Appellant is to be governed by Turkish law. However, this choice of law only applies subject to limitations, for Art. 5.6 of the Contract stipulates that the parties, *"accept all rules, regulations and/or decrees of FIFA … with any modifications thereon"*. Therefore, the Contract itself expresses that, where they apply, the rules and regulations of FIFA are to take precedence over Turkish law. The precedence of the FIFA Statutes and Regulations compared with Turkish law is also expressed in the wording of Art. 7.1 of the Contract, pursuant to which, *"any dispute concerning the contract shall be settled under the provisions of the article 42 of the new regulation of FIFA related to the statutes and transfers of professional players"*. Basically, the parties are free in whether to submit a particular dispute arising out of an employment contract to the national courts of Turkey or to the DRC for resolution (see also Art. 42 RSTP 2001: *"without prejudice to the right of any player or club to seek redress before a civil court …"*). However, the Player and the Appellant in this case chose to refer the dispute to the

DRC. This voluntary and express submission of an employment dispute to the FIFA dispute-resolution mechanism, despite the option to proceed before the Turkish courts, constitutes a choice by the parties for the dispute to be decided in accordance with the FIFA Statutes and Regulations.

12. What is now questionable is whether the parties subsequently deviated from the provision in Art. 7.1 of the Contract, pursuant to which Turkish law is to apply, at least in the alternative, in addition to the rules and regulations of FIFA. This could have happened by submitting the present case to the CAS. For, the FIFA Statutes provide a choice of law clause if an appeal against a final decision passed by FIFA's legal bodies is filed with the CAS. Pursuant to Art. 60 para.2 of the FIFA Statutes the CAS shall *"primarily apply the various regulations of FIFA and, additionally, Swiss Law"*. With this choice of law clause, the FIFA Statutes take into account an important characteristic of international sport. For, the latter is a global phenomenon which demands globally uniform standards. Only if the same terms and conditions apply to everyone who participates in organised sport, are the integrity and equal opportunity of sporting competition guaranteed. This need to ensure uniform legal standards was recently aptly described by a CAS Panel as follows (CAS 2005/A/983 & 984, marg. no. 68):

"La formation arbitrale considère à cet égard que le sport est par nature un phénomène transcendant les frontières. Il est non seulement souhaitable, mais indispensable que les règles régissant le sport au niveau international aient un caractère uniforme et largement cohérent dans le monde entier. Pour en assurer un respect au niveau mondial, une telle réglementation ne doit pas être appliquée différemment d'un pays à l'autre, notamment en raison d'interférence entre droit étatique et réglementation sportive. Le principe de l'application universelle des règles de la FIFA … répond à des exigences de rationalité, de sécurité et de prévisibilité juridique".

13. In the present case it can be assumed that the parties agreed a "subsequent" choice of law; for they submitted to Art. 60 para. 2 of the FIFA Statutes. The agreement on Turkish law in Art. 7.1 of the Contract is subject to the proviso that the regulations of FIFA take precedence. The latter provide that in the event that CAS has the competence to decide the case, the case is to be decided, in the alternative, according to Swiss law. Besides, the fact that the parties are bound by Art. 60 para. 2 of the FIFA Statutes also follows from the "capacity" of those involved, for all of the parties are - at least indirectly - affiliated to FIFA. It follows that they are not only bound by the rules and regulations of the respective national associations; rather, in their capacity as - indirect - members of the "FIFA family", the parties are also obliged to comply with FIFA's rules and regulations (RIEMER H. M., *Berner Kommentar ad Art. 60-79 ZGB*, marg. no. 511 and 515; *cf.* CAS 2004/A/574; CAS 2005/A/983 & 984, marg. no. 82). In addition the parties have also submitted to Art. 60 para. 2 of the FIFA Statutes by having brought the dispute to the CAS in accordance with the provisions of Arts. 60 *et seq.* of the FIFA Statutes and have therefore given one to understand that they wish to be bound by the rules of FIFA and of CAS [Finally, the parties also signed the order of procedure of 28 February 2007, pursuant to which the jurisdiction of CAS *in casu* is based on Arts. 60 *et seq.* (see no. 1).]

14. The application of Swiss law stipulated in Art. 60 para.2 of the FIFA Statutes is limited. The latter only applies in the alternative and, more particularly, if there is a gap in the FIFA

regulations, in particular RSTP 2001. However, where the FIFA regulations conclusively regulate a legal question there is basically no scope for having recourse to Swiss law (see CAS 2005/A/983 & 984, marg. no. 93).

As to the Merits

15. At the centre of the present proceedings are three questions: (A.) whether the Player terminated the Contract with just cause within the meaning of Arts. 21 *et seq.* RSTP 2001, (B.) whether the Player is obliged to pay the Appellant EUR 10,000,000 pursuant to Art. 6.1 of the Contract and (C.) whether the Player's counterclaim is well-founded.

A. Termination of the Contract by the Player

16. The Player indisputably concluded a contract with the Appellant for a fixed term, namely from 1 February 2005 until 30 June 2008. The Player terminated said Contract by letter to the Appellant's President of 13 June 2005. Under Art. 21 para.1 RSTP 2001 the question arises as to whether the Player had "just cause" to terminate the Contract early.

17. The Player justifies the early termination of the Contract with the argument that the Appellant did not comply with its payment obligations under the Contract, or did not do so in due time. It is indisputable that the Appellant breached its payment obligations under the Contract. Under Art. 4.2.2 of the Contract the Appellant was obliged to pay – in addition to the *"fix transfer fee"* of EUR 200,000 – a further EUR 200,000 in monthly instalments of EUR 40,000 each for the period until 1 July 2005. In addition the Appellant is obliged to pay the Player a *"bonus"* of EUR 5,000 each, whenever the Player is included in the team. Finally, the Appellant undertook to pay a *"premium sum"* of a further EUR 75,000 whenever the Player has played in ten matches. Unlike in the case of the *"fix transfer fee"*, the Contract does not stipulate when the monthly fee and the various bonuses become due.

18. The monthly remuneration of EUR 40,000 is intended to remunerate the Player for having provided his services to the Appellant. It must therefore be assumed that said remuneration becomes due, at the latest, upon the expiry of the period, for which the Player provided his services. Since the Player provided his services to the Appellant with effect from 1 February 2005, the first monthly instalment in the amount of EUR 40,000 became due upon the expiry of 28 February 2005, i.e. on 1 March 2005. The Appellant is opposing this interpretation of the Contract with the argument that the month of February was already paid for by the *"fix transfer fee"*. However, this interpretation is not supported by the Contract. Rather, the latter stipulates that the EUR 200,000 are to be paid by 1 July in monthly instalments of EUR 40,000 each, i.e. in five equal monthly instalments. This suggests that the payments always became due at the same point in time. The fact that the last monthly payment of EUR 40,000 is not intended as remuneration for the month of July 2005 follows from the fact that July 2005 already falls in the "2005/2006" season, for which the Contract provides an

independent remuneration provision. Therefore, EUR 160,000 had become due in monthly instalments by 13 June 2005.

19. It is undisputed that the Player took part in 17 matches for the Appellant up until 13 June 2005. The Appellant is therefore obliged to pay EUR 85,000 in *"bonuses"* and EUR 75,000 in *"premium sums"*. There is no need to answer the question whether the *"premium sums"* or the *"bonuses"* became due on the day of the respective match or at the end of the month, in which the match took place, because it is undisputed that the Player played his last match on 29 May 2005. On 13 June 2005, the Appellant was therefore under an obligation to pay – in addition to the monthly instalments in the amount of EUR 160,000 – a further EUR 160,000. Altogether, therefore, at the time of termination, the Appellant owed the Player – regardless of the *"fix transfer fee"* – EUR 320,000.

20. Which payments the Appellant had made by 13 June 2005 in discharge of said debt is disputed between the parties. The Appellant claims it had by then made payments in the amount of EUR 60,000. The Player submits that by 13 June 2005 he had only received EUR 56,000. There is no need to decide whose submissions, those of the Appellant or those of the Player, are to be agreed with, for it can, in any event, be held that the Appellant had fallen into arrears with a substantial portion of its payment obligations.

21. Early termination of the Contract cannot be based on every breach of obligation by the contract partner. Rather, the breach of contract must have a certain seriousness in order to justify "just cause". The question is whether this threshold was crossed by the late payment by the Appellant. In principle, the parties can specify in the contract when there is "just cause". This follows, not least, from Art. 22 para.1 of the RSTP 2001. For if, pursuant thereto, the parties are free to arrange in the Contract the method of compensation for breach of contract, then, in principle, the same must apply to specifying when there is "just cause".

22. Art. 5.4 the Contract stipulates that the Player can institute an action pursuant to Art. 41 para.1 lit.a RSTP 2001 before the DRC only if the Appellant is late with its payment obligations by more than 90 days. In the view of the Panel such clause disadvantages the Player considerably. For, while the Player has to render his contractual obligations immediately when due, the Contract allows the Appellant - without any corresponding consideration - a long payment period of 90 days. This appears as a one-sided and serious prejudicial treatment of the Player, which seems no to be accordant to the autonomy granted to the parties in Arts. 21 *et seq.* RSTP 2001. It is doubtful to the Panel that an employee may waive his basic rights in advance in favour of the employer. The clause might well circumvent Arts. 21 *et seq.* RSTP 2001 because it could make the obligation to respect the contractual stability grossly one-sided to the detriment of the Player.

23. In any event, even assuming that the clause in Art. 5.4 of the Contract were valid, this does not prevent the Player from bringing the matter before the DRC. Indeed, the period of 90 days was at least exceeded for the first monthly instalment in the amount of EUR 40,000, for, as has been explained above, such instalment became due on 1 March 2005 at the latest. More than 90 days had therefore elapsed by 13 June 2005. Although the Appellant claims it made

part payments, in particular on 7 and 12 April 2005, at that time not only was the first monthly instalment was due, but so was the second monthly instalment. Furthermore, by then *"bonuses"* of at least EUR 35,000 had become due. However, if more than one debt is due, the question arises as to how the part payments are to be applied. From the summary submitted by the Appellant itself, in which the payments actually made are set out against the payment obligations, it follows without doubt that by 13 June 2005 the Appellant had not made any payment towards the first monthly instalment.

24. The Appellant further claims that the termination is void because the Player did not comply with the "procedure" provided in the Contract. This is governed in Arts. 5.1 and 5.5 of the Contract. Said clauses have been sloppily drafted and, in the Panel's opinion, are simply incomprehensible. This applies to both the translation into English submitted to the Panel and to the signed French version of the Contract. Thus, entire parts of a sentence are missing in Art. 5.5. This is particularly obvious in the case of the paragraph following the first dash. This reads that the Player, *"may give notice to Club manager if"* but the sentence has then not been completed. However, in other respects also the "procedure" is incomprehensible. It is particularly unclear whether this is a prerequisite for valid termination of the Contract or not. Thus Art. 5.1 of the Contract speaks of the procedure regulated in Art. 5.5 being a "right of the Player", not an obligation. In Art. 5.5 the paragraphs after the first dash also do not speak of an obligation on the part of the Player either. Rather, it is stipulated there that the Player *"may give written notice"* or *"may lodge at the Board of Directors…"*. Therefore, if the terms of the procedure, which the Player must comply with, cannot be inferred by interpreting the Contract, the clauses in Arts. 5.1 and 5.5 of the Contract cannot be used against the Player.

25. It follows that, as the specification of "just cause" made by the parties in Art. 5 of the Contract is either void or incomprehensible, then the general principles apply. The RSTP 2001 do not define when there is "just cause" to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach mutual agreement on the end of the contract (see also ATF 110 I 167; WYLER R., *Droit du travail*, Berne 2002, p. 323 and STAEHELIN/VISCHER, *Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR*, Zurich 1996, marg. no. 17 ad Art. 334, p. 479). In this regard Art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: *"A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship"*. According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the *clausula rebus sic stantibus* (ATF 5 May 2003, 4C.67/2003 no. 2). According to Swiss law, only a breach which

is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., *op. cit.*, p. 364 and TERCIER P., *Les contrats spéciaux*, Zurich et al. 2003, no. 3402, p. 496). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 127 III 351; WYLER R., *op. cit.*, p. 364 and TERCIER P., *op. cit.*, no. 3394, p. 495).

26. The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute "just cause" for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non-public award of 6 August 2004); for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract (see also CAS 2005/A/893; CAS 2006/A/1100, marg. no. 8.2.5 *et seq.*).

27. In the present case, both prerequisites are met. The Appellant failed to comply with a major part of its payment obligation. Furthermore, the Player's agent, Mr. H., warned the Appellant several times about the breach of obligation. The Panel has been provided with letters in this regard of 2 May, 19 May, 24 May and 30 May 2005. The letters point out not only the Appellant's breach of obligation but also quite clearly and unambiguously state that the Player is not prepared to tolerate said breaches of obligation in the future. In the last letter of 30 May 2005 the Appellant is finally once again given one last deadline to settle the outstanding debts. In this regard the letter expressly states: *"I give you final formal notice one last time to pay …* [the Player] *within 48 hours the amount which is unquestionable due of EUR 262,000 that you owe him in the absence of which the player reserves the right to file a complaint with the competent body of the FIFA for serious breach of the contractual obligations and give notice of termination of the contract that binds you".*

28. The Player's agent warned the Appellant in the name and on behalf of the Player. The Panel has been provided with a Player's agent contract between the agent and the Player which has a term of two years commencing on 15 April 2005. The contract bears the signature of both the agent and of the Player. Furthermore, the agent sent the Player's agent contract between him

and the Player to the Appellant by letter of 24 May 2005. The Appellant could not, therefore, have been in any doubt that it had been warned by the Player by virtue of said letters.

29. It is questionable whether in the present case termination of the Contract by the Player constitutes an abuse of a legal right.

30. In this regard the Appellant claims that termination without notice of a fixed-term contract can always only be a last resort. According to the Appellant, the Player ought to have tried, prior to the termination without notice, to have the outstanding payments satisfied out of the so-called "Fund for Television Rights" at the Turkish Football Federation. The Panel cannot agree with these submissions by the Appellant. The payment obligation under the Contract is an obligation which is incumbent solely on the Appellant. The Player only has to hold the Appellant to account. The Player cannot reasonably be expected to turn to a third party who is not his contract partner for his claims.

31. The Appellant is also claiming that the Player's agent breached FIFA's Player's Agents Regulations (hereinafter referred to as "PAR"). It would appear that the agent did breach the obligations in the PAR. For instance, Art. 14 lit.c PAR provides that an agent should not contact a player with the aim of persuading him to terminate his contract prematurely. It would appear that it is quite likely that the agent H. did precisely this. Firstly, he is a friend of the President of OM and, secondly, he admitted in the oral hearing that he had discussed the Player with OM's President "in general terms" whilst the Player was still under contract with the Appellant. Finally, it must not be overlooked that the agent receives a fee only if the Player is transferred to another club. Furthermore, Art. 14 lit. d PAR provides that an agent may always only represent the interests of one party when negotiating a transfer. In the present case, Mr H. is indisputably the Player's agent. Nevertheless, the contract concluded between the Player and OM reads: *"The football player does not have any recourse to the sportive agency services. Club has recourse to the sportive agency services: Mr. H."*.

32. Contrary to the Appellant's opinion, the breaches of the PAR by the agent do not make the warnings given by him in the Player's name void. Said breaches of the PAR also do not have the consequence that the Player's termination of the Contract was an abuse of a legal right. Rather, a strict distinction must be made here between the legal position of the agent and that of the Player. Even if the agent breaches the rules in the PAR, this does not alter the fact that, in the present case, the Player exercised a right to terminate the Contract early, which was a right to which he was entitled. Whether or not the above circumstances can cause FIFA to institute proceedings against the agent for breach of the PAR and to impose sanctions on him in accordance with Art. 15 para. 1 and para. 2 PAR can be left unanswered here, since neither FIFA nor the agent are parties to the present proceedings.

33. The Appellant is also asserting that termination of the Contract by the Player was an abuse of a legal right because the Player also acted contrary to the terms of the Contract. Pursuant to Art. 3.18 of the Contract, the Player was not permitted *"to get in touch with any club either directly or indirectly for any transfer along the validity of this contract"*. The Player breached this obligation. Irrespective of whether a breach of Art. 3.18 of the Contract by the Player can excuse the late

payments by the Appellant, the Appellant has failed to make conclusive submissions on the matter, for the Appellant has not submitted when and how the Player is specifically supposed to have breached Art. 3.18 of the Contract. From the press releases submitted by the Appellant of May 2005, according to which the OM is supposed to have expressed its interest in the Player, one cannot in any event infer any breach by the Player of his contractual obligations. The fact that after termination of the Contract OM and the Player quickly "came to an agreement" also does not necessarily suggest any breach of Art. 3.18 of the Contract by the Player.

34. Finally, the termination could, in some circumstances, be an abuse of a legal right if the Player gave the Appellant the impression that he would accept late payment; for if an employee gives the impression that he will accept late payment, then there is an absence of the breach of confidence that is required for termination without notice, which would make continuation of the employment relationship unreasonable (CAS 2005/A/893; CAS 2006/A/1100, marg. no. 8.2.5 *et seq.*). If the employee nevertheless bases the termination without notice on the breach of obligation accepted by him, then his own conduct is contradictory and he is therefore abusing a legal right. In the present case, the Player did not give the Appellant any reason to believe that he would accept the breaches of obligation committed by the Appellant without consequence. In the light of the clear letter from the agent, the Panel is of the opinion that the requirements to be met by any such tacit consent by the Player must be set high. If there is any doubt, an expressly declared intention always takes precedence over consent expressed tacitly. Insofar as the Appellant submits that in the press the Player always made positive comments about the Appellant and, when asked in player meetings, even confirmed to the President that "everything was O.K"., this – in view of the Player's special situation, namely the fact that he is a young player in a foreign country, whose language he cannot speak – is not sufficient to give rise to any confidence on the part of the Appellant meriting protection. Ultimately, the Appellant's confidence that the Player would not terminate the Contract was based not so much on the Player's conduct as on the Appellant's erroneous assumption that the Player did not have any right of termination anyway under Art. 5 of the Contract. This erroneous assumption by the Appellant does, however, not in any way merit protection.

35. To summarize, therefore, the Player terminated the Contract with "just cause". Consequently, the Appellant's requests a), b) and d) are to be dismissed.

B. Claim in the amount of EUR 10,000,000

36. The Appellant is seeking payment of EUR 10,000,000 from the Player. In so doing it is invoking Art. 6.1 of the Contract, according to which the Player is authorized to terminate the Contract in order to transfer to another club only against making a payment of EUR 10,000,000. The provision, of course, only makes sense if the Player terminates the Contract without "just cause". For only in that case can the termination of the Contract be made dependent on the payment of a kind of "contract penalty". However, since, in the present case, the Player terminated the Contract with "just cause", Art. 6.1 of the Contract

does not apply from the outset. Therefore, the Appellant's requests c) and e) are also to be dismissed as unfounded.

C. Counterclaim

37. By way of a counterclaim, the Player is demanding from the Appellant outstanding payments under Art. 4.2.2 of the Contract, outstanding "collective bonuses" and compensation for breaching the Contract.

38. According to the Contract, up until termination on 13 June 2005, the Player was entitled to:

-	fix transfer fee:	EUR 200,000
-	match bonuses:	EUR 85,000
-	premium:	EUR 75,000
-	monthly salary pro rata for 13 days in June:	EUR 17,333
		EUR 537,333

It is not disputed that by 14 June 2005 the Appellant had paid the Player EUR 203,000 and EUR 307,143. What is disputed between the parties is whether the Appellant paid a further EUR 56,000, as alleged by the Player or EUR 60,000, as submitted by the Appellant. The payment made by the Appellant to the Player is therefore a minimum of EUR 566,143 and a maximum of EUR 570,143. Altogether, therefore, the payment made by the Appellant to the Player is in any event more than the amount owed according to the Contract. However, in that case, the Player does not have any claim to outstanding payments according to the Contract, with the consequence that the counterclaim must therefore be dismissed.

39. Insofar as the Player is demanding the payment of so-called "collective bonuses" from the Appellant by way of a counterclaim, this request must also be dismissed. In this regard the Player has not provided any substantiated submissions on the basis of any such claim. The obligation to pay "collective bonuses" does not in any event ensue from the Contract; for they are not even mentioned in the Contract. Likewise, no such payment obligation can be inferred from the summary of payments, which the Appellant submitted in this case. Irrespective of the fact that the summary only speaks of "bonus", not of "collective bonuses", this also does not constitute any acknowledgement of a payment obligation by the Appellant.

40. Finally, the Player's counterclaim for payment of compensation based on Art. 22 RSTP 2001 must also be dismissed. Art. 22 RSTP 2001 stipulates that the party that has breached the contract shall pay compensation to the other party. The question is how this compensation is to be calculated. As far as this is concerned Art. 22 RSTP 2001 stipulates:

"Unless specifically provided for in the contract, and without prejudice to the provisions on training compensation laid down in Art. 13 ff, compensation for the breach of contract (whether by the player or the club), shall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case, such as:

(1) Remuneration and other benefits under the existing contract and/or the new contract,

(2) Length of time remaining on the existing contract (up to a maximum of 5 years),

(3) Amount of any fee or expense paid or incurred by the former club, amortised over the length of the contract,

(4) Whether the breach occurs during the periods defined in Art. 21.1".

41. Art. 22 RSTP 2001 therefore closely follows the rule in Art. 337b CO. According to this, if the just cause for termination without notice lies in the conduct of one of the parties in breach of contract, then the latter must pay "full compensation" taking into account all claims arising out of the employment relationship. For calculating the compensation Art. 337c para. 2 CO applies *mutatis mutandis*. According to this, the employee's claim for compensation is reduced by everything *"which he saved as a consequence of the termination of the employment relationship and which he earned or intentionally failed to earn through other work"*. This corresponds to Art. 22 para. 1 RSTP 2001, which provides that the remuneration under the new contract shall be taken into consideration for the calculation of the compensation. The amount of such compensation must therefore be determined by comparing two financial situations: The Player's hypothetical financial situation without the Appellant's breach of contract and the financial situation as it is following the breach of contract by the Appellant. The relevant situations for this comparison are the situations at the time of the oral hearing before the Panel.

42. As a matter of principle, whoever asserts a claim for compensation must prove the existence and the extent of the damage. The Player has submitted the contract between him and OM, which shows that the Player's contractual terms and conditions have indisputably improved compared to those of the Contract. The Player earns a higher salary today, although the Player has not submitted any specific and verifiable figures in that respect. It follows that the Player has not suffered any actual damage further to the breach of the Contract by the Appellant and that, pursuant to Art. 22 para. 1 RSTP 2001 and to Art. 337c para. 2 CO, the Player is not entitled to any compensation accordingly. As a consequence, the counterclaim shall be dismissed.

The Court of Arbitration for Sport rules:

1. The appeal by the Club Galatasaray SK against the decision issued on 30 May 2006 by the FIFA Dispute Resolution Chamber is dismissed.

2. The counterclaim by Mr Frank Ribéry against the Club Galatasaray SK is dismissed.

3. The decision issued on 30 May 2006 by the FIFA Dispute Resolution Chamber is confirmed.

4. (…).