FIFA FOOTBALL TRIBUNAL

Decision of the Players Status Chamber

passed on 24 October 2023

regarding a contractual dispute concerning the match agent Evgeni Marinov

BY:

Louis EVERARD (Netherlands), Single Judge

CLAIMANT:

Evgeni Marinov, Bulgaria
Represented by Georgi Gradev

RESPONDENT:

Federación Venezolana de Fútbol, VEN - Venezuela
Represented by Oscar Cunto André

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I. Facts of the case

1. On 25 January 2023, the Bulgarian Match Agent, Evgeni Marinov (hereinafter: *the Claimant*), and the Venezuelan association Federación Venezolana de Fútbol (hereinafter: *the Respondent*) signed a match agent contract (hereinafter: *the Contract*) for the Respondent's participation in a friendly tournament organized by the Claimant in Alanya, Turkey between 13 and 22 February 2023 (hereinafter: *the Tournament*).

2. Under clause 1.1. of the Contract, the Respondent agreed to participate in the Tournament with its Women's National Team (hereinafter: *the Team*).

3. Under clause 2 of the Contract, the Claimant undertook, inter alia, to arrange *"three matches during the Tournament with FIFA referees (...)"* for the Team on behalf of the Respondent.

4. Under clause 3.2 in conjunction with clause 4.1 of the Contract, the total amount due to the Claimant under the Contract was EUR 37,080 (hereinafter: *the Contract Fee*) payable in two equal instalments:

   (i) EUR 18,540 payable "*within 4 days after signing the contract*"; and

   (ii) EUR 18,540 payable "*by no later than February 10, 2023*".

5. Clause 6.1 of the Contract provides the following:

   "*This contract cannot be prematurely, unilaterally terminated without just cause before the expiry of its term, save for the following cases:*

   a) by mutual consent;

   b) due to force majeure, as detailed in clause 7 below."

6. Clause 6.2 of the Contract establishes the following penalty clause (hereinafter: *the Penalty Clause*):

   "In case or premature, unilateral termination of this contract without just cause, the party in breach shall immediately pay compensation to the injured one, amounting to EUR 26,000 (twenty six thousand Euros). The compensation shall be paid on a net basis, free of any taxation (including any VAT). The Parties explicitly agree that no adjustment shall apply. An interest rate of 15% per year shall apply in case of payment delay. The injured party must issue an invoice. Claims for damages based on other legal grounds (e.g., if the injured party is no longer in a position to fulfil its obligations towards third parties due to the breach) remain reserved."

7. Clause 7.1 of the Contract provides the following:

> *"[Respondent] may terminate this agreement with immediate effect upon notice to the Match Agent if there is an event of force majeure (for example, fire, explosion, earthquake) that prevents the staging of the match".*

8. On 28 January 2023 the first instalment of the Contract Fee became due and was not paid by the Respondent.

9. On 6 February 2023, an earthquake hit the south-eastern part of Turkey (hereinafter: *the Earthquake*).

10. On 7 February 2023, the Claimant inquired with the Turkish Football Federation (hereinafter: *the TFF*) about the consequences of the Earthquake on the Tournament.

11. On the same day, the TFF replied that it will be withdrawing its team from the Tournament but that the Claimant *"(...) can continue with the tournament organization. The referee appointments are made and the details will be sent soon."*

12. On 8 February 2023, the Respondent formally informed the Claimant that the Team will not be participating in the Tournament due to the *"(...) unfortunate events that recently occurred in Turkey and Syria, countries that were hit by a strong earthquake that still continues to leave losses and consequences in the population."*

13. On the same day, the Claimant informed the Respondent of the following via a letter:

    (i) pursuant to clause 4.1 of the Contract, it is obliged to pay *"50% of the contract fee by the 1st of February 2023";* and

    (ii) should it insist on terminating the Contract, pursuant to the Penalty Clause, it is obliged to pay *"the penalty in the amount of €26,000 (twenty-six thousand euros), plus 15% annual interest".*

14. Continuing the correspondence on the same day, the Respondent notified the Claimant via a letter (hereinafter: *the Termination Letter*) that it is unilaterally terminating the Contract with immediate effect pursuant to clauses 6.1 and 7 of the Contract due to *"unsafe environment to our players and staff"*.

II. Proceedings before FIFA

15. On 20 April 2023, the Claimant filed the claim at hand before FIFA. A brief summary of the position of the parties is detailed in continuation.

a. Position of the Claimant

16. According to the Claimant, the Earthquake was not to be considered as a *force majeure* event on the basis of which the Respondent can terminate the Contract with just cause.

17. In view of the Claimant, the Contract can be terminated on the basis of its contractual *force majeure* clause 7.1 where the Respondent *"(...) may terminate this agreement with immediate effect upon notice to the Match Agent if there is an event of force majeure (for example, fire, explosion, earthquake) that prevents the staging of the match"*.

18. However, the Claimant argued that pursuant to established CAS jurisprudence in CAS 2021/A/7816, para. 67 for *force majeure* to exist, there must be an objective (rather than personal) impediment beyond the control of the "*obliged party*" that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible.

19. Further, the Claimant referred that under article 13 paragraph 5 of the Procedural Rules Governing the Football Tribunal (hereinafter: *the Procedural Rules*), a party that asserts a fact must prove it, i.e. any party deriving a right from an alleged fact shall carry the burden of proof.

20. In the view of the Claimant, the Respondent did not prove that the Earthquake in a different region from the Tournament constitutes a *force majeure* event as there was no objective impediment beyond the control of the Respondent that was unforeseeable, that could not be resisted, and that rendered the participation or the staging of the matches impossible or provided an unsafe environment to the Respondent's Team, i.e. players and staff.

21. In relation to the Tournament and its location not being affected by the Earthquake, the Claimant presented the following facts and evidence:

    (i) on 7 February 2023, i.e., one day after the Earthquake, the TFF stated that the Claimant "*can continue with the tournament organisation*";

    (ii) Adana (the westernmost affected city by the Earthquake) and Alanya, i.e. location of the Tournament, are 300 kilometres apart from each other; and

    (iii) the Tournament took place in Alanya between 15 and 23 February 2023 with the participation of seven national teams which returned home without any issues.

22. According to the Claimant, the Earthquake did not fulfil the conditions of a *force majeure* event which prevented the staging of the matches at the Tournament or provided an unsafe environment to players and staff, as argued by the Respondent in the Termination Letter. As a consequence, the Respondent should bear the legal consequences as agreed with the Claimant in the Contract via the Penalty Clause.

23. Concerning the interest agreed in the amount of 15% p.a. the Claimant quoted the following articles of the Swiss Code of Obligations (hereinafter: *the CO*), the Contract, Court of Arbitration for Sport (hereinafter: *the CAS*) jurisprudence and a legal article:

    (i) article 104.2 of the CO: *"Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.";*

    (ii) article 160.1 of the CO: "*Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty*";

    (iii) article 161.1. of the CO: "(...) *the penalty is payable even if the creditor has not suffered any damage*";

    (iv) article 163.1 of the CO: "*The parties are free to determine the amount of the contractual penalty*"; and

    (v) clause 6.2. of the Contract: "*In case or premature, unilateral termination of this contract without just cause, the party in breach shall immediately pay compensation to the injured one, amounting to EUR 26,000 (twenty-six thousand Euros). The compensation shall be paid on a net basis, free of any taxation (including any VAT). The Parties explicitly agree that no adjustment shall apply. An interest rate of 15% per year shall apply in case of payment delay."*

    (vi) in accordance with CAS jurisprudence in *CAS 2019/A/6568* and *CAS 2014/A/3664*, the sole arbitrator stressed that *"(...) nothing prevents an adjudicatory body from awarding both interest and a penalty fee, as is also clearly established in the CAS jurisprudence (see, inter alia, CAS 2014/A/3664."*; and

    (vii) the article *"Minimizing the risks of untimely payments by means of instruments of financially punitive and/or compensatory nature"* published in ASSER's *The International Sports Law Journal 2013*, the author Eugene Krechetov in point 3.2 argues the following: *"The jurisprudence of the Swiss Federal Tribunal states that default interest may apply together with penalties. (...)"*

24. Finally, the Claimant argued that the Respondent had terminated the Contract without just cause on 8 February 2023 and, therefore, the principle of *pacta sunt servanda* has to be protected.

25. The requests for relief of the Claimant, were the following:

    (i) EUR 18,540 as first instalment as per clause 4.1 if the Contract plus interest of 15% *p.a.* as of 29 January 2023 based on clause 6.2 of the Contract;

    (ii) EUR 26,000 as a penalty fee as per the Penalty Clause plus interest of 15% *p.a.* as of 8 February 2023.

b. Position of the Respondent

26. According to the Respondent, the Contract should be declared null and void as it was not concluded in accordance with article 18 of the Match Agents Regulations, i.e. it lacks the mandatory provisions for such contracts to be valid and referred to FIFA Players Status Committee jurisprudence in *FPSD-4464 Brahmi vs. Sierra Leone Football Association* where it was established that considering the lack of mandatory provisions a match agent contract could not be considered valid.

27. Further, in relation to the Penalty Clause and the communication between the Claimant and the TFF that the Tournament should proceed, the Respondent felt that it acted in line with the principle of *ultima ratio* putting the safety of the Team above all else. In that sense, the Respondent argued that the principle of contractual stability should be dismissed, since it was ultimately used as a last resort in relation to the Earthquake.

28. In relation to the organisation of the Tournament, the Respondent argued that the Claimant acted in bad faith as follows:

    (i) by informing the Respondent on 6 February 2023 that the Earthquake will not affect the Tournament before even contacting the TFF about their position on 7 February 2023; and

    (ii) by not sending the communications between the Claimant and the TFF to the Respondent therefore *"(...) making it impossible for the Respondent to know about the current state of the Tournament".*

29. The Respondent also addressed the Claimant's arguments concerning the CAS jurisprudence by stating that CAS jurisprudence in *CAS 2015/A/3909* had established that *force majeure* must be *"(...) narrowly interpreted and that it implies an objective impediment beyond the control of the obliged party."*

30. Further to this argument that the Earthquake should be considered as a *force majeure* event, the Respondent informed that three associations/teams withdrew from the competition in total.a

31. Concerning the payment of the first instalment of the Contract Fee, the Respondent argued that the signatory on behalf of the Respondent *"(...) fell out of line with the hierarchy of the Respondent; the appropriate and competent organisms (sic!) of the [Respondent] were unaware of such a deadline to make the first payment for 50% of the full value of the contract."*

32. In relation to the interest in the amount of 15% p.a. requested by the Claimant, the Respondent argued that the requested interest rate would incur a disproportionate interest claim, especially considering that the Claimant did not send a default notice to the Respondent stating that the payment was due until the withdrawal from the Tournament.

33. The requests for relief of the Respondent, were the following:

    (i) to reject the Claimant's claim in entirety and declare the Contract null and void; and

    (ii) in the alternative, to decide that only the first instalment of the Contract Fee is due and that no penalty clause should be imposed on the Respondent because of *force majeure*.

III. Considerations of the Players Status Chamber

a. Competence and applicable legal framework

34. First of all, the single judge of the Players Status Chamber (hereinafter also referred to as *the Single Judge*) analysed whether he was competent to deal with the case at hand. In this respect, he took note that the present matter was presented to FIFA on 20 April 2023 and submitted for decision on 11 October 2023. Taking into account the wording of art. 34 of the March 2023 edition of the Procedural Rules, the aforementioned edition of the Procedural Rules is applicable to the matter at hand.

35. Subsequently, Single Judge referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 22 par. 1 of the Match Agents Regulations (hereinafter: *the Regulations*), the Players Status Chamber is competent to deal with the matter at stake, which concerns a contractual dispute with an international dimension between a Bulgarian match agent and a member association from Venezuela.

36. Subsequently, the Single Judge analysed which regulations should be applicable as to the substance of the matter. In this respect, he confirmed that (hereinafter: *the Regulations*) are applicable (2003 edition) as to the substance.

b. Burden of proof

37. The Single Judge recalled the basic principle of burden of proof, as stipulated in art. 13 par. 5 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. Likewise, the Single Judge stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which it may consider evidence not filed by the parties, including without limitation the evidence generated by or within the Transfer Matching System (TMS).

c. Merits of the dispute

38. Its competence and the applicable regulations having been established, the Single Judge entered into the merits of the dispute. In this respect, the Single Judge started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, the Single Judge 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.

i. Main legal discussion and considerations

39. The foregoing having been established, the Single Judge moved to the substance of the matter, and took note of the fact that the Claimant disputes that a *force majeure* event took

place while the Respondent disputes the validity of the Contract and insists on a *force majeure* event providing just cause to terminate the Contract.

40. In this context, the Single Judge acknowledged that his task was to first establish whether the Contract is valid pursuant to the requirements in the Regulations and to establish whether or not the Earthquake was a *force majeure* event in the context of the Tournament.

41. First, in consideration of the Contract, the Single Judge noted that it was signed and stamped by both parties, i.e. the Claimant and the Respondent.

42. Second, the Single Judge found that the Respondent's arguments that the signatory on behalf of the Respondent acted above their authorisations should be dismissed as the Claimant concluded the Contract in good faith and was reasonably convinced that the signatory on behalf of the Respondent had full authorisation to do so given the fact that an official stamp had been produced. The Respondent did not challenge the validity of the said authorisation and it bears full responsibility to be aware of the contents of the Contract it had entered to, including the obligations from it.

43. Third, the Single Judge recalled the provisions of article 18 paragraph 1 of the Regulations which regulate the mandatory parts of a contract concerning match agent services (hereinafter also referred to as *Mandatory Provisions*):

    (i) *"expenses for travel, board and basic living costs of the contractual parties";*

    (ii) *"the total net indemnification (after deduction of all charges, levies or taxes) due to the contractual parties";*

    (iii) *"the conditions that shall apply if a match is (or matches are) cancelled in the case of force majeure";*

    (iv) *"the conditions that shall apply if a player who was due to have been fielded under the terms of the contract does not appear in the team (including reasons of force majeure)"; and*

    (v) *"the fact that the parties concerned shall be aware of these regulations and undertake to observe the provisions therein".*

44. Further, the Single Judge recalled that par. 2 of art. 18 of the Regulations states very clearly the following: *"Contracts that do not include one or more of the above provisions shall be null and void."*

45. Therefore, the Single Judge turned to identifying the relevant Mandatory Clauses in the Contract and established that all of them are present in the Contract except the clause containing the compensation conditions for a specific player's non-appearance. However,

the Single Judge concluded that such clause is not required as the parties to the Contract did not require any specific players to appear in the Tournament so the validity of the Contract cannot depend on a Mandatory Clause which is not applicable to all contracts as per the Regulations, as it can be seen from the contractual intent of the partes.

46. Having considered all the argumentation put forward by the Respondent that the Contract is not valid and should be considered null and void, the Single Judge found that the Claimant and Respondent concluded the Contract on 25 January 2023 which is fully compliant with the Regulations.

47. Next, the Single Judge turned to the consideration of the Earthquake and it potentially being considered as a *force majeure* event in the context of the Tournament and the Contract and noted that the Respondent did not pay the 1st instalment of the Contract Fee to the Claimant as per the Contract even before the alleged *force majeure* event took place.

48. The Single Judge observed that both parties do not dispute the fact that the Respondent did not participate in the Tournament which still took place in Alanya between 15 and 23 February 2023 with the participation of seven national teams which returned home without any issues after the Tournament had concluded. Taking into account the geographical distance of the Tournament from the area affected by the Earthquake and evidence presented by the Claimant, the Single Judge found that the *force majeure* alleged by the Respondent in its Termination Letter does not exist and therefore neither the just cause to terminate the Contract.

49. Indeed, the Single Judge recalled that according to CAS jurisprudence, for force majeure to exist, there must be an objective (rather than personal) impediment beyond the control of the "obliged party" that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible. Further, the Single Judge noted there were no obstacles for the Respondent to independently contact the TFF for any reassurances concerning the safety of the Team before proceeding with the Termination Letter.

50. Consequently, the Single Judge reached a position that the Claimant and the Respondent entered into a Contract for the Tournament but the Respondent failed to pay the 1st instalment of the Contract Fee and terminated the Contract without just cause. This follows from the clear evidence on file where the Respondent clearly manifested its will to cancel its participation in the Tournament.

ii. Consequences

51. Having stated the above, the Single Judge turned his attention to the question of the consequences of such unjustified breach of contract committed by the Respondent.

52. Subsequently, in accordance with clause 6.2. of the Contract, the Respondent is liable to pay compensation to the Claimant for breach of the Contract, both in terms of the 1st

instalment of the Contract Fee which was due before the Termination Letter as well as the penalty fee as per the Penalty Clause established in the said Contract.

53. Having noted the above, the Single Judge concluded that the amount of compensation for the breach of Contract needs to be calculated and, in doing so, the amount of compensation shall be calculated, as provided for in the Contract at the basis of the dispute, or, where absent of such disposition, in line with the jurisprudence and practice of the Players Status Chamber.

54. In addition, the Single Judge recalled that the Contract contains a Penalty Clause by which the contractual parties have agreed on a penalty fee in advance for the termination of the Contract without just cause in the amount of EUR 26,000 and 15% interest p.a. Further, article 4.5 of the Contract mentions a 15% interest p.a. for all delayed payments, including the 1st instalment of the Contract Fee due on 28 January 2023.

55. As a consequence, and in accordance with the general legal principle of *pacta sunt servanda*, the Single Judge decided that the Respondent is liable to pay to the Claimant the amount which was outstanding under the Contract at the moment of the termination, i.e. EUR 18,540.

56. Further in line with the general legal principle of *pacta sunt servanda,* the Single Judge decided that the Respondent is also liable to pay to the Claimant the amount which was set as the penalty fee in the Contract as the compensation for the breach of the said contract, i.e. EUR 26,000.

57. In addition, taking into consideration the Claimant's request for the interest rate of 15% p.a. to be awarded in relation to the amounts above as from 28 January 2023 on EUR 18,540 and as from 8 February 2023 on EUR 26,000, the Single Judge decided to reject the Claimant's request and award interest at the same rate but calculated as from the date of the submission of the claim, i.e. 20 April 2023, until the date of effective payment.

iii. Compliance with monetary decisions

58. Therefore, bearing in mind the above, the Single Judge decided that the Respondent must pay the full amount due (including all applicable interest) to the Claimant within 30 days of notification of the decision, failing which, at the request of the Claimant, the present matter shall be submitted to the FIFA Disciplinary Committee.

59. The Respondent shall make full payment (including all applicable interest) to the bank account provided by the Claimant in the Bank Account Registration Form, which is attached to the present decision.

d. Costs

60. The Single Judge referred to art. 25 par. 1 of the Procedural Rules, according to which *"Procedures are free of charge where at least one of the parties is a player, coach, football agent, or match agent".* Accordingly, the Single Judge decided that no procedural costs were to be imposed on the parties.

61. Likewise, and for the sake of completeness, the Single Judge recalled the contents of art. 25 par. 8 of the Procedural Rules, and decided that no procedural compensation shall be awarded in these proceedings.

62. Lastly, the Single Judge concluded his deliberations by rejecting any other requests for relief made by any of the parties.

IV. Decision of the Players Status Chamber

1. The Football Tribunal has jurisdiction to hear the claim of the Claimant, Evgeni Marinov.

2. The claim of the Claimant, Evgeni Marinov, is partially accepted.

3. The Respondent, Federación Venezolana de Fútbol, must pay to the Claimant the following amount(s):

   - EUR 18,540 as outstanding amount plus 15% interest *p.a.* as from 20 April 2023 until the date of effective payment; and

   - EUR 26,000 as compensation for breach of contract without just cause plus 15% interest *p.a.* as from 20 April 2023 until the date of effective payment.

4. Any further claims of the Claimant are rejected.

5. Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.

6. In the event that the amount due, plus interest as established above, is not paid by the Respondent within 30 days, as from the notification of this decision, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee.

7. This decision is rendered without costs.

For the Football Tribunal:

Emilio García Silvero
Chief Legal & Compliance Officer

FIFA FOOTBALL TRIBUNAL

NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 57 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision.

NOTE RELATED TO THE PUBLICATION:

FIFA may publish this decision. For reasons of confidentiality, FIFA may decide, at the request of a party within five days of the notification of the motivated decision, to publish an anonymised or a redacted version (cf. article 17 of the Procedural Rules Governing the Football Tribunal).

CONTACT INFORMATION

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