



**Arbitration CAS 2014/A/3568 Club Deportivo La Equidad Seguros S.A. v. Santiago Arias Naranjo & Sporting Clube de Portugal & Fédération Internationale de Football Association (FIFA), award of 27 April 2015**

Panel: Mr Stuart McInnes (United Kingdom), President; Mr Efraim Barak (Israel); Mr José María Alonso Puig (Spain)

*Football*

*Termination of a contract of employment without just cause by a player*

*Elements of calculation of the compensation for breach*

*Remuneration of the player*

*Loss of the player's services and replacement value*

*Specificity of sport*

*Sporting sanction*

- 1. If one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of art. 17 FIFA Regulations on the Status and Transfer of Players (RSTP), including all the non-exclusive criteria listed in para. 1 of said article. In applying the criteria of Article 17 para. 1, a panel has a wide margin of discretion. In accordance with previous CAS jurisprudence, each of the factors listed in Article 17 para.1 is relevant, but any of them may be decisive on the facts of a particular case. In this respect, the player's remuneration under the contract of employment, the loss of the player's services and replacement value and the specificity of sport shall be considered.**
- 2. Clubs cannot seek to profit from a situation whereby they attribute to a player's services a greater value than they are willing to pay the player in return for those services. The calculation of compensation must take account of the player's remuneration under the previous employment contract, for a period equating to the time remaining under the said contract, as also set forth in Article 17 para. 1 RSTP.**
- 3. According to CAS jurisprudence, the loss of a possible transfer and the replacement value of the player shall be compensated. However, the club claiming the loss of an opportunity has to prove the nexus between the unjustified termination of the employment contract and the lost opportunity to realize a certain profit by transferring the player to another club willing to pay a transfer fee.**
- 4. The 'specificity of sport' doctrine is an element to be taken into consideration when assessing the compensation to be paid in accordance with Article 17 para. 1 RSTP. It covers the specific nature and needs of sport, so as to attain a solution which takes into account not only the interests of the player and the club, but also, more broadly, those of the whole football community. The specific circumstances of a sports case might**

therefore lead a panel to either increase or decrease the amount of awarded compensation because of the specificity of sport. However, the concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to the other factors. Even if the early termination of the contract occurred when there was still considerable time left under the agreement and fell within the sporting season and the Protected Period, the specific circumstances may lead a panel to consider that, the principle of the specificity of sport should be used to decrease the compensation due, in view of the particular behaviour of the club, as well as its reaction after the termination. The fact that the player was not only remunerated at a very low level, but that he was also mistreated by his employer and that the club did not show an important interest in the player is relevant in this respect.

5. There is a well-accepted and consistent practice of the FIFA DRC not to apply automatically a sporting sanction as per art. 17 para. 3 RSTP.

## I. PARTIES

1. Club Deportivo La Equidad Seguros S.A. (hereinafter referred to as “La Equidad” or “the Club”) is a football club with its registered office in Bogota, Colombia. It is a member of the Colombian Football Federation (“CFF”), itself affiliated to the Fédération Internationale de Football Association.
2. Mr. Santiago Arias Naranjo (hereinafter referred to as the “Player”) is a professional football player. He was born on 13 January 1992 and is of Colombian nationality. He currently plays with the club PSV Eindhoven, Eindhoven, The Netherlands.
3. Sporting Clube de Portugal (hereinafter referred to as “Sporting”) is a football club with its registered office in Lisbon, Portugal. It is a member of the Portuguese Football Federation (“PFF”), itself affiliated to the Fédération Internationale de Football Association.
4. The Fédération Internationale de Football Association (hereinafter referred to as “FIFA”) is the worldwide governing body of Football and has its registered office in Zurich, Switzerland.

## II. THE DECISION AND ISSUES ON APPEAL

5. La Equidad appeals a decision (hereinafter referred to as the “Appealed Decision”) of the FIFA Dispute Resolution Chamber (hereinafter referred to as the “FIFA DRC”) dated 30 August 2013 imposing the payment of the amount of EUR 150,000.00 as compensation, jointly payable by Sporting and the Player to La Equidad, following the early termination by the Player of his employment contract with La Equidad. La Equidad considers that the amount of compensation

was not properly calculated by the FIFA DRC and that Sporting and the Player shall be condemned to pay an amount of EUR 3,802,821.50 as compensation for the early termination of his employment agreement by the Player without just cause, and that sporting sanctions shall be applied to Sporting and the Player, for the same reason, as the breach of contract occurred during the protected period.

### III. BACKGROUND FACTS

6. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submission and evidence it considers necessary to explain its reasoning.
7. On 26 February 2009, the Player and the Appellant signed an employment agreement valid from the date of signature until 31 December 2009 (hereinafter referred to as the "First Employment Agreement"). The agreed monthly salary according to the First Employment Agreement was COP 496,900 (approx. EUR 160.00).
8. In 2009, the Player was selected to be part of the Colombian National Team U-17, to take part in the FIFA U-17 World Cup in Nigeria.
9. On 1 January 2010, the Player and the Appellant signed an employment agreement valid from the date of signature until 31 December 2012 (hereinafter referred to as the "Second Employment Agreement"). The agreed monthly salary according to the Second Employment Agreement was COP 600,000 (approx. EUR 240.00).
10. In Colombia, the football season lasts from the month of January to the month of December.
11. In 2011, La Equidad gave permission to the Player to participate with the Colombian National Team U-20 in the Toulon Youth Festival, which took place from 1 June to 10 June 2011.
12. On 23 May 2011, the Player sent a letter to the Club terminating the Second Employment Agreement, citing as the main reason that La Equidad did not fulfil its obligations as an employer.
13. On 13 June 2011, the Club sent a letter to the Player, advising him that it contested the termination of the Second Employment Agreement and requested that the Player return to the Club in order to explain his absence and resume training. The Club also stated in the letter that it had learned that Sporting had announced signing an employment agreement with the Player.
14. The Player did not return to the Club.

15. On 21 June 2011, Sporting and the Player concluded an employment agreement valid from 1 July 2011 until 30 June 2016 (hereinafter referred to as the “Sporting Employment Agreement”). This agreement stipulated the following payments to be made by Sporting to the Player:
  - 2011/2012 season: EUR 261,120 to be paid in monthly instalments of EUR 21,760;
  - 2012/2013 season: EUR 318,000 to be paid in monthly instalments of EUR 26,500;
  - 2013/2014 season: EUR 418,400 to be paid in monthly instalments of EUR 34,865;
  - 2014/2015 season: EUR 501,696 to be paid in monthly instalments of EUR 41,808;
  - 2013/2014 season: EUR 585,600 to be paid in monthly instalments of EUR 48,800;
16. Clause 10 of the Sporting Employment Agreement set out the consequences for either party rescinding the agreement, as follows:
  - a. should Sporting rescind the agreement, it would have to pay to the Player compensation equal to the remuneration due for the remainder of the agreement, minus any salaries that the Player would receive in return for signing a new employment agreement with another club during that remaining period.*
  - b. in the event that the Player rescinds the agreement, a sum equal to the remaining salaries under the agreement and, upon joining another club, an amount of EUR 20,000.000.00 should be paid to Sporting.*
17. On August 1 2012, La Equidad submitted a claim before FIFA against Sporting and the Player, requesting the payment of compensation for the breach, by the Player, of the Second Employment Agreement.
18. On 30 August 2013, the FIFA DRC rendered the Appealed Decision. The grounds of said decision were notified to the parties on 31 March 2014.

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

19. Following the notification of the Appealed Decision, the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (the “CAS”) pursuant to Article R47 of the Code of Sports-related Arbitration (the “CAS Code”) on 21 April 2014. Within its Statement of Appeal, the Appellant nominated Mr. Efraim Barak, attorney-at-law in Tel Aviv, Israel, as arbitrator.
20. On 23 April 2014, the CAS Court Office sent a letter to the Parties, informing them on various aspects of the proceedings, in particular that unless the Respondents object within three days from receipt of said letter, all written submissions shall be filed in English and all exhibits submitted in any other language should be accompanied by a translation into English.
21. On 30 April 2014, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.
22. On 5 May 2014, the Second Respondent filed a “Brief Statement of Defence and Counterclaim”.

23. On 6 May 2014, the CAS Court Office informed the Parties that as no objection had been submitted to CAS within the stipulated deadline, the language of the proceedings would be English. The Second Respondent was also informed that as counterclaims were no longer admissible in appeals procedure under the CAS Code, it was granted a three-day time limit to advise the CAS Court Office if it wished to maintain its counterclaim, failing which it would be for the Panel, once constituted, to decide the issue.
24. On 13 May 2014, the CAS Court Office informed the Parties that the Respondents jointly nominated of Mr José Maria Alonso Puig, attorney-at-law in Madrid, Spain, as arbitrator. The Second Respondent was also informed that as it did not respond to the CAS Court Office's letter dated 6 May 2014 with regard to the withdrawal of its counterclaim, it would be for the Panel, once constituted, to decide this issue.
25. On the same day, the First Respondent's counsel informed the CAS Court Office that as all the documentation of the case was in Spanish, he would prefer to follow the proceedings in Spanish.
26. On 20 May 2014, the CAS Court Office confirmed that the language of the procedure would be English, as the Third Respondent did not agree to proceed in Spanish.
27. Following several written exchanges on the issue of the time limit for the Respondents to file their answers, the First, Third and Second Respondents respectively filed their answers on 29 May, 30 May and 16 July 2014.
28. On 23 July 2014, the Parties were informed that unless they agreed or the President of the Panel ordered otherwise on the basis of exceptional circumstances, in accordance with Article R56 of the CAS Code, the Parties were not authorized to supplement or amend their requests or their arguments, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the appeal brief and of the answer.
29. On the same day, the CAS Court Office transmitted to the Parties certain documents filed by FIFA following a request by the Appellant. In accordance with FIFA's request, the Parties were informed that such documents were to remain confidential and therefore, their clients were instructed to not divulge the documents or the information contained therein to any third parties.
30. On 4 August 2014, the CAS Court Office, noting that the First and Second Respondents asserted counterclaims in their answers, reiterated that counterclaims were no longer admissible under Article R55 of the CAS Code and that this issue would be addressed by the Panel as a preliminary issue (either in the final award and/or at the hearing (if necessary)).
31. On 23 July 2014, the Parties were informed that the Panel was constituted as follows:  
  
President: Mr. Stuart C. McInnes, Solicitor in London, United Kingdom,  
  
Arbitrators: Mr. Efraim Barak, attorney-at-law in Tel Aviv, Israel

Mr. José Maria Alonso Puig, attorney-at-law in Madrid, Spain

32. On 25 and 26 November 2014, the First Respondent respectively filed two legal opinions, in Spanish, drafted by Mr Oscar E. Moreno and Mr Carlos Francisco Gonzalez Puche, both specialized in Colombian Social Security System. It was stated that a translation into English would be provided in the next few days.
33. On 26 November, the CAS Court Office informed the First Respondent that the above-mentioned legal opinions should be translated into the language of the procedure, i.e. English. The CAS Court Office also invited the other parties to comment on the admissibility of these documents and that the Panel would address this issue as a preliminary issue at the hearing.
34. On 18, 20 and 21 November 2014, the First Respondent, Second Respondent, Third Respondent, and Appellant respectively signed the Order of Procedure.
35. On 27 November 2014, a hearing was held in Lausanne Switzerland.
36. Following the Panel's direction at the hearing, on 3 December 2014, the First Respondent filed English translations of the statements of Mr. Carlos Francisco Puche, Mr. Oscar Moreno, and Mr. Santiago Arias.
37. On 4 December 2014, the CAS Court Office granted a deadline until 11 December for the 2014 for the other parties to comment on the translations. No such comments or objections were raised.

## V. THE HEARING

38. A hearing was held on 27 November 2014 at the CAS headquarters in Lausanne. All the members of the Panel were present. At the outset of the hearing, the parties declared that they had no objection with regard to the composition of the Panel.
39. The following persons attended the hearing:
  - La Equidad was represented by Mr. Jaime Castillo, attorney-at-law;
  - Mr. Santiago Arias Naranjo was represented by Mr. Andrés Charria, attorney-at-law;
  - Sporting was represented by Mr. Hugo Vaz Serra, legal counsel;
  - FIFA was represented by Mr. Roy Vermeer and Ms. Livia Silva Kägi, Members of the FIFA's Players' Status Department.
40. Mr. Brent J. Nowicki, Counsel for CAS, and Mr. Serge Vittoz, *ad hoc* clerk, assisted the Panel at the Hearing.
41. At the beginning of the hearing, the Appellant, the Second and the Third Respondent were asked by the Panel if they had any objection against the filing of the legal opinions provided by

the First Respondent on 25 and 26 November 2014. As none of the concerned parties objected, the Panel requested the First Respondent to file translations of these documents into English within seven (7) days.

42. The following persons were heard as witnesses:

- Mr. Guilherme Pinheiro, Board Member for Sporting;
- Mr. Arie Guburek, Player's agent.

43. The Parties were afforded the opportunity to present their case, to submit their arguments, and to answer the questions asked by the Panel. The Parties explicitly agreed at the end of the hearing that their right to be heard and to be treated equally in these arbitration proceedings had been fully observed.

## VI. THE PARTIES' SUBMISSIONS

### A. *La Equidad*

44. La Equidad's submissions, in essence, may be summarized as follows:

- It is undisputed that the Player unilaterally terminated the Employment Agreement without just cause and that the behaviour of the Player in this regard is in breach of the principle of contract stability enshrined in Article 13 of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "RSTP").
- The Player should therefore be condemned to compensate La Equidad, and Sporting shall be jointly liable, for the serious sporting and financial damages suffered by La Equidad, in accordance with Article 17 RSTP.
- As there is no mention in the Employment Agreement on how the compensation in case of breach of contract should be calculated, the criteria set forth in Article 17 para. 1 shall be applied. In this regard, the judging authority has considerable discretion to determine the compensation due, in view of the particular circumstances of the case.
- The amount of EUR 150,000.00 granted by the FIFA DRC is unfairly low and the Appealed Decision is in contradiction with FIFA's own principle on the maintenance of contractual stability and to CAS jurisprudence, in particular the arbitration procedure with the reference CAS 2008/A/1519-1520.
- The award of EUR 150,000.00 does not represent the Player's value, but is also contrary to the deterrent effect and the rationale of Article 17 RSTP. The failure by the FIFA DRC to impose sporting sanctions on Sporting is also contrary to the spirit of Article 17 RSTP.
- La Equidad repeatedly requested before the FIFA DRC to be provided with the Player's New Employment Agreement, without success. La Equidad is therefore not in a position to precisely assess the amount of compensation.

- The salary paid to the Player by La Equidad cannot be compared to the salaries in Europe; it was a fair salary in view of the age of the Player. La Equidad showed good faith by increasing the Player's salary after one year, without requesting an extension of the Employment Agreement. The Panel cannot reasonably consider the salaries paid by Colombian football clubs to determine the value of players.
- As established in CAS 2008/A/1519-1520, the remuneration agreed by the Player in the New Employment Agreement should provide an indication of the value that Sporting gave to the Player, as well as an estimation of his market value. This approach shall also be followed in accordance with the Panel reasoning in the case CAS 2009/A/1880-1881.
- The value of the Player can be determined as follows. To obtain the services of the Player for five years, Sporting agreed to pay a yearly salary of EUR 416,963.20, plus an amount of EUR 920,000.00 as a signing fee. Furthermore, Sporting ceded 50% of the amount of a future transfer to the Player, meaning that Sporting valued the Player to an amount of EUR 2,084,815.00 (total salary), plus EUR 1,840,000.00 (economic value of the Player), plus EUR 31,200 (accommodation contribution), plus EUR 20,000.00 (travelling contribution) which provides an interim total of EUR 3,976,015.00, which equals a yearly cost of EUR 795,203,00.00. Taking into account the remaining length of the Employment Agreement at the time of the breach, i.e. 1 year, 7 months and 8 days, the interim value of the Player is EUR 1,276,743.00.
- The compensation shall also include the "*loss of the Player's services and replacement value*" in order to allow La Equidad to replace the Player with a player of analogous value. In this regard, the following calculation can be made: In accordance with CAS jurisprudence (see e.g. CAS 2009/A/1880-1881), in order to obtain the market value of an analogous player, the Appellant would have had to spend EUR 1,840,000.00 to hire such a player under an existing contract, EUR 669,458.00 to pay the player's salary, and EUR 15,800.00 to cover the accommodation and travelling contribution, representing a total cost of EUR 2,525.338.00.
- The Panel should reach a decision that is fair to the Appellant not only under civil law, but taking into due consideration the specific nature and needs of the football world, namely the specificity of sport. In this regard, the Panel shall take into consideration the following elements:
  - More than half of the duration of the Employment Agreement was still pending;
  - The contractual breach fell in the course of the sporting season and the Appellant had still important matches to play;
  - The contractual breach fell within the protected period;
  - The Player acted in bad faith as (a) he did not inform the Appellant before deciding to terminate the Employment Agreement, (b) he terminated the Employment Agreement although the playoffs were to about to start, (d) he was just offered a raise in his salary, and even if this raise was not substantial as such, it was voluntarily paid by the Appellant and no extension of the Employment Agreement was requested in exchange;

- Sporting also acted in bad faith as (a) it was informed that the Player was retained under a valid contract with La Equidad, and (b) Sporting did not attempt to negotiate a transfer fee.
- The sporting sanctions established in Article 17 RSTP are clearly applicable in the case at hand, and therefore, the Player and Sporting shall be sanctioned accordingly.

*B. Mr. Santiago Arias Naranjo*

45. The submissions of Mr. Santiago Arias Naranjo, in essence, can be summarized as follows:

- The Player terminated the Second Employment Agreement because La Equidad abused him by making him enter into two contracts when they started their employment relationship.
- Under the two contracts, the Player's remuneration was paid as part 'salary', and part "other suppliers of Life Insurance La Equidad Org.". As no social insurances were paid with regard to the second amount, La Equidad deprived the Player of a part of his social insurance entitlement, which is illegal not only under Colombian law, but also under Swiss Law.
- This lack of payment of social insurances in favour of the Player is a very serious breach of the Second Employment Contract and shall be considered as just cause to terminate it.
- The amount of compensation as calculated by the FIFA DRC in the Appealed Decision should not be paid by the Player to La Equidad, but, on the contrary, by La Equidad to the Player.

*C. Sporting Clube de Portugal*

46. The submissions of Sporting, in essence, can be summarized as follows:

- The Player terminated the Second Employment Agreement because La Equidad abused him by obliging him to sign two contracts at the commencement of their employment relationship.
- The 'just cause' invoked by the Player to terminate the Second Employment Agreement, i.e. non-payment of social security contributions on the Player's salary, is a very serious violation of Portuguese Law, as well as Swiss Law.
- The Player was a free agent when he was hired by Sporting, as evidenced by the Player's passport.
- La Equidad failed to demonstrate the Player's training history, in particular within its junior teams. La Equidad also failed to explain why it allowed the Player to leave the club for a friendly international competition when it was entering a very important part of the

season. This contradicts La Equidad's position that the Player was playing a key role on its A team.

- At that time, the Player was actually mainly trained by its national team.
- The constant jurisprudence of the FIFA DRC, states that the sanctions under Article 17.3 RSTP are not automatic.
- Sporting did not induce the Player to terminate the Second Employment Agreement, as confirmed by the Player himself.
- If the Player did not have any just cause to terminate the Second Employment Agreement, La Equidad would have sued him, in particular before the Colombian National Dispute Resolution Chamber.
- The Sporting Employment Agreement expressly states that the Player is a free agent and that there are no disciplinary or regulatory restrictions regarding his activity as a professional football player.
- When Sporting informed La Equidad of the registration of the Player, La Equidad requested a transfer fee, without mentioning that the Player considered that he had just cause to terminate the Second Employment Agreement.
- The ITC was finally issued, after the intervention of the FIFA Single Judge, considering in particular that La Equidad never showed any interest in the return of the Player.
- Sporting had no sporting reason to induce the Player to breach the Second Employment Agreement as it had sufficient players at the Player's position. The Player participated in only 8 games during the 2011/2012 season and was then sent to Sporting's B team for the 2012/2013 season. The level of the Player was therefore not as high as La Equidad contends.
- The FIFA DRC did not determine the amount of compensation in accordance with fixed criteria, which is contrary to the decision of the European Court of Justice issued on 16 March 2010, Olympic Lyonnais vs. Olivier Bernard and Newcastle FC.
- The level of compensation awarded by the FIFA DRC is significant and, represents 655 times the Player's monthly salary with La Equidad. Therefore, the remuneration of the Player under the Sporting Employment Agreement shall be taken into consideration when determining the compensation
- La Equidad did not incur any expenses to acquire the Player.
- La Equidad did not demonstrate that it had received financial offers for the transfer of the Player and/or that it had replaced the Player by another one at the same position. Therefore, no compensation can be granted to La Equidad for the loss of a possible transfer fee and/or the replacement costs.
- La Equidad waited more than one year before filing a claim before the FIFA DRC for the Player's alleged breach of contract. This attests to La Equidad's lack of interest to take steps to mitigate any potential damage, the lack of interest in the Player's performance and the lack of interest in receiving a transfer fee to replace the Player in the team.

- With regard to the criterion of the specificity of sport, there is a contradiction in La Equidad's behaviour as it alleges, on one hand, that the Player was very important for its team and, on the other hand, it did not offer him a generously remunerated contract and released him to take part in a friendly competition at the most crucial time of the national competition. Therefore, if the specificity of sport doctrine is taking into consideration, it would be to reduce the amount of compensation.

#### D. *FIFA*

47. The submissions of FIFA, in essence, can be summarized as follows:

- FIFA entirely endorses the Appealed Decision, which is considered to be very clear and detailed.
- The Player left La Equidad in May 2011, despite the fact that his salaries had been duly paid up to his departure. In this context, the crucial element leading the FIFA DRC to its verdict was that the Player failed to present any evidence demonstrating that he had just cause to leave La Equidad. As a consequence, the FIFA DRC rightfully considered that the Player's departure constituted an unjustified breach of the Second Employment Agreement and that he was liable to pay compensation to La Equidad.
- In accordance with Article 17 par. 1 RSTP, the amount of compensation shall be calculated in accordance with the specificity of sport doctrine and further according to a non-exhaustive list of objective criteria, including in particular the remuneration and other benefits, due to the Player, under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years as well as the fees and expenses paid or incurred by the former club (amortised of the term of the contract).
- The compensation was calculated by taking into consideration the Player's salary according to the Second Employment Agreement, the Player's salary according to the Sporting Employment Agreement and the time remaining under the Second Employment Agreement (18 months). The amount was then decreased according to the specificity of sport doctrine, as La Equidad should not benefit from paying salaries excessively lower than the apparent valuation of players' services, and then seek to profit from the fact that another club was willing to pay a salary much greater than their valuation.
- The amount of compensation of EUR 150'000 is therefore justified.
- In accordance with Article 17 par. 2 RSTP, Sporting is jointly and severally responsible for payment of the applicable amount of compensation.
- As to the sporting sanctions, Art. 17 par. 3 RSTP assigns the competent deciding body the power, but by no means, the obligation, to impose sporting sanctions on a player found to be in breach of contract without just cause during the protected period. There is consistent and well accepted CAS jurisprudence in this regard. Considering the facts of the case, the FIFA DRC was right not to impose any sporting sanctions on the Player.

## VII. THE PARTIES' REQUEST FOR RELIEF

48. The Appellant's requests for relief are the following:

*The Appellant respectfully pleads before the CAS that an award be issued granting the following:*

1. *Accept this appeal and overrule the decision of the Dispute Resolution Chamber dated 30 August 2013, identified by the DRC as case reference 12-01682/lea, specifically in regard to the consequences and sanctions established by the DRC as a result of the unilateral breach of contract incurred in by First Respondent and Second Respondent.*
2. *Issue an award ex novo condemning First Respondent and Second Respondent to compensate the Appellant for the undisputed unilateral breach of contract without just cause, by establishing an amount adequately and fairly covers the Appellant's financial and sporting damage, namely:*
  - *Valuation of lost services of the Player for the Appellant: at least EUR 2,525,338 (based on the expenses incurred in by Sporting to acquire the services of the Player); or otherwise at least EUR 1,259,739 (based on the yearly average expense incurred in by Sporting for the Player)*
  - *Specificity of sport considerations: EUR 1,177,444.50 (based on 18 months considering average monthly expense incurred in by Sporting for the Player)*
3. *Condemn First Respondent and Second Respondent to pay 5% interest per annum on the amounts established in the preceding paragraph, from the date of the contractual breach (23 May 2011).*
4. *Rule that the appealed decision is contrary to provisions contained in the FIFA Regulations on the Status and Transfer of Players in relation to sporting sanctions, and therefore impose the corresponding sporting sanctions on the Respondent, namely, suspending the Player from taking part in official matches for at least four months, and banning Sporting from registering new players, nationally or internationally, for two registration periods; or otherwise rule that FIFA must issue a decision regarding sporting sanctions in strict application of FIFA Regulations.*
5. *Condemn First Respondent and Second Respondent to the payment of all TAS administrative costs caused to the Appellant in relation to these proceedings, and which are estimated to amount to CHF 40.000.*

49. The First Respondent's requests for relief are the following:

*The first respondent pleads before the CAS that an award be issued granting the following:*

1. *Dismiss the appeal Brief presented by the Appellant in this procedure*
2. *Adopt an award to set aside the decision appealed*
3. *Upheld the arguments presented through this Statement of Defense an in their virtue **condemn the Appellant to pay SANTIAGO ARIAS a compensation of € 150.000 for the unilateral termination of the contract.***
4. *Condemn Equidad with sporting sanctions, for two registration periods without registering any new players, either nationally or internationally or if this is not within the power of CAS, to send back the case, only regarding this issue, to **FIFA** DCR for taking a proper decision on the sporting sanctions.*

5. *Condemn the appellant to the payment of the whole CAS administration costs and Panel fees.*
6. *Fix a sum to be paid by the Appellant to the player in order to cover its defense fees and costs in the amount of CHF 20,000.*

50. The Second Respondent's main requests for relief are the following:

*In light of the above, we request that the Panel decide:*

- a) *To reject the current appeal.*
- b) *If not, in case the panel decides to overrule the decision took by the Dispute Resolution Chamber (DRC), that a new award shall be rendered taking into consideration that the criteria used by the DRC led to a excessive compensation to be paid by the Appellant.*
- c) *That CAS orders the Appellant to bear all the costs of the present procedure.*
- d) *That the CAS orders the Appellant to cover all legal expenses incurred by the Second Respondent in connection with the current procedure.*

51. The Third Respondent's requests for relief are the following:

1. *In light of the above consideration, we insist that the decision passed by the DRC was fully justified. We therefore request that the present appeal be rejected and the decision taken by the DRC on 30 August 2013 be confirmed in its entirety.*
2. *Furthermore, all costs related to the present procedure as well as the legal expenses of FIFA shall be borne by the Appellant.*

## VIII. CAS JURISDICTION

52. The jurisdiction of CAS, which is not disputed, derives from Articles 60 ff. of the FIFA Statutes and Article R47 of the CAS Code. It is further confirmed by the order of procedure duly signed by the parties. It follows that the CAS has jurisdiction to decide on the present dispute.

53. Under Article R57 of the Code, the Panel has the full power to review the facts and the law.

## IX. APPLICABLE LAW

54. Article R58 of the CAS Code provides the following:

*"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".*

55. Article 66 par. 2 of the FIFA Statutes provides "[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

56. The Panel is of the opinion that the parties have not, in the Second Employment Agreement, agreed on the application of any specific national law. As a result, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily.

## **X. ADMISSIBILITY**

57. The appeal was filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. It complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court office fees.
58. It follows that the appeal is admissible.

## **XI. COUNTERCLAIMS**

59. The First and Second Respondent filed counterclaims in their answers. The First Respondent requested the CAS Panel to condemn the Appellant to pay him compensation following the early termination of the Second Employment Agreement without just cause by La Equidad and to impose sporting sanctions on the latter whereas the Second Respondent requested that the amount of compensation be amended, as being excessive.
60. In the course of the proceedings before CAS, the Parties were informed that pursuant to Article R55 of the CAS Code, counterclaims were no longer admissible in appeals procedure. The Panel confirms the position and determines that the counterclaims contained in the First and Second Respondent's Answers shall be declared inadmissible. The Panel further considers that if the First and Second Respondents wished to challenge the Appealed Decision, they should have done so by their own appeal against the Appealed Decision, brought within the stipulated deadline (see CAS 2010/A/2202). In the Panel's opinion, a party which does not appeal a decision can only seek confirmation of such decision.

## **XII. MERITS**

### *A. Preliminary Issue*

61. As a threshold issue, the Panel underlines that even if it decides the present dispute on a *de novo* basis in accordance with Article R57 of the CAS Code, it is bound by the ambit of the Appellant's requests for relief. Therefore, the issue of whether the Player had just cause to terminate the Second Employment Agreement is no longer in question before CAS, as it was not contested by an appeal. Consequently, all arguments related to this matter will be disregarded by the Panel, as irrelevant.
62. The Panel therefore confirms FIFA DRC's position in the Appealed Decision that the Player did not have just cause to terminate the Second Employment Agreement with the Appellant.

B. *The amount of compensation*

63. The first issue to be addressed is, as seen above, the calculation of the compensation be paid to the Appellant following the Player's unlawful termination of the Second Employment Agreement.

64. The relevant provision of the FIFA RSTP in this regard is Art. 17 para. 1, which reads as follows:

*“Article 17 Consequences of Terminating a Contract Without Just Cause*

*The following provisions apply if a contract is terminated without just cause:*

1. *In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period”.*

65. The Panel recalls the rationale of the rule, as debated in the written and oral submissions of the Parties. In this regard, the Panel refers to CAS 2008/A/1519-1520 which explains at length the purpose of the rule and insists on the deterrent effect of Article 17 RSTP, in particular by stating the following:

*“82. The deterrent effect of art. 17 FIFA Regulations shall be achieved through the impending risk for a party to incur disciplinary sanctions, if some conditions are met (cf. art. 17 para. 3 to 5 FIFA Regulations), and, in any event, the risk to have to pay a compensation for the damage caused by the breach or the unjustified termination. In other words, both players and club are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of art. 17 FIFA Regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in para. 1 of said article that, based on the circumstances of the single case, the panel will consider appropriate to apply”.*

66. The Panel entirely endorses this position and also considers that in applying the criteria of Article 17 para. 1, it has a wide margin of discretion. In accordance with previous CAS jurisprudence, the Panel is of the view that each of the factors listed in Article 17 para.1 is relevant, but that any of them may be decisive on the facts of a particular case (CAS 2009/A/1880-1881, para. 77).

67. The Appellant considers that it shall be compensated according to the following criteria:

- The Player's remuneration under the Sporting Agreement
- The *“loss of the Player's services and replacement value”*

- The specificity of sport.
68. First, the Appellant considers that the remuneration of the Player under the Sporting Agreement gives an indication on the value of the Player on the market, and that such element shall be the basis for the calculation of the compensation to be paid by Sporting and the Player.
  69. The Panel considers that such a simple approach cannot be followed in the context of the present case. First, Article 17 para. 1 states that the “*remuneration and other benefits due to the player under the existing contract and/or the new contract*” can be taken into consideration.
  70. In the case at hand, there is a very substantial difference between the remuneration of the Player under the Second Employment Agreement and under the Sporting Employment Agreement. This element cannot be disregarded and shall, on the contrary, be taken into consideration. In this regard, the Panel supports the position of the FIFA DRC in the Appealed Decision. Clubs cannot seek to profit from a situation whereby they attribute to a player’s services a greater value than they are willing to pay the player in return for those services.
  71. The remuneration of the Player under the Second Employment Agreement shall therefore be taken into consideration. In this regard, the Panel considers that only the value attributed in the Second Employment Agreement should be used for the calculation, and not such amounts, which were allegedly verbally agreed upon. The Panel considers that even though the Appellant may have demonstrated that it paid a higher amount to the Player in February and May 2011, it was not established that the Player and the Appellant had actually agreed on an increased salary.
  72. The Panel therefore considers that the calculation of compensation must take account of the Player’s remuneration under the Second Employment Agreement and the Sporting Employment Agreement, for a period equating to the time remaining under the Second Employment Agreement, as also set forth in Article 17 para. 1 RSTP.
  73. As demonstrated by the Appellant, and not contested by the Respondents, the time remaining under the Second Employment Agreement when the early termination without just cause occurred, was one year, seven months and eight days. During that period the Player would have earned EUR 2,880.00 (12x EUR 240.00) under the Second Employment Agreement, and EUR 261,120.00 under the Sporting Employment Agreement, the sum of these figures being EUR 132,000.00, for the first year. For the remaining seven months and eight days, the Player would have earned EUR 1,768.00 under the Second Employment Agreement and EUR 192,542.50 under the Sporting Employment Agreement, the sum of these figures being EUR 97,155.25. The total remuneration to be taken into account in the determining the appropriate compensation payable is therefore EUR 229,155.25
  74. Secondly, the Appellant relies on CAS jurisprudence to assert that it shall be compensated for the loss of a possible transfer and the replacement value of the Player.
  75. In CAS 2009/A/1880-1881, paras. 92 - 94 cited by the Appellant, the Panel considered in particular the following:

*“92. It has been debated over various CAS awards whether it is possible to consider, as part of the damage to be compensated by the player, the claim of his former club for the opportunity to receive a transfer fee that has gone lost because of the premature termination of the employment contract. This possibility was admitted in the case TAS 2005/A/902-903, at para. 136, rejected in the case CAS 2007/A/1298-1299-1300, at para. 141 ff., and left open in the case CAS 2007/A/1358, at para. 97.*

*93. In the oft-quoted CAS 2008/A/1519-1520 case, the CAS panel found as generally recognised in Swiss employment law that the loss of earnings (lucrum cessans) is a possible part of the damages caused through the unjustified termination of an employment agreement. The award, therefore, recognised that the loss of a possible transfer fee can be considered as a compensable damage heading if the usual conditions are met, i.e. in particular if it is proven the necessary logical nexus between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit (CAS 2008/A/1519-1520, at paras. 116-117).*

*94. The Panel notes that in the present case, differently from other CAS cases, there is evidence of what the club itself where the Player wanted to transfer to, i.e. FC Sion/Olympique des Alpes SA, was willing to pay as transfer fee. In this case, therefore, Al-Ably had an evident opportunity to obtain a certain fee by trading the services of the Player to the Swiss club but this opportunity was frustrated by no other cause than the unjustified departure of the Player”.*

76. In the case at hand, La Equidad did not provide the Panel with any evidence that it had received any offer from another club for acquiring the services of the Player. Therefore, La Equidad cannot prove the necessary logical nexus between the unjustified termination of the Second Employment Agreement and a lost opportunity to realize a certain profit by transferring the Player to another club which was willing to pay a transfer fee.
77. The Panel therefore considers that La Equidad is not entitled to be compensated for the loss of a transfer opportunity.
78. Furthermore, the Panel’s conclusion with regard to the alleged replacement costs of the Player is the same, as La Equidad did not provide any evidence to the Panel that it had hired a new player to replace the Player, after the early termination of the Second Employment Agreement.
79. Thirdly, the Appellant asserts that the ‘specificity of sport’ doctrine is an element to be taken into consideration when assessing the compensation to be paid in accordance with Article 17 para. 1 RSTP. This issue was summarized at paragraph 109 et seq. in CAS 2009/A/1880-1881, as follows:

*“109. Article 17.1 of the FIFA Transfer Regulations also asks the judging body to take into due consideration the “specificity of sport”, that is the specific nature and needs of sport, so as to attain a solution which takes into account not only the interests of the player and the club, but also, more broadly, those of the whole football community (CAS 2008/A/1644, at para. 139; CAS 2008/A/1568, at paras. 6.46-6.47; CAS 2008/A/1519-1520, at paras. 153-154; CAS 2007/A/1358, at paras. 104-105). Based on this criterion, the judging body should therefore assess the amount of compensation payable by a party keeping duly in mind that the dispute is taking place in the somehow special world of sport. In other words, the judging body should aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the*

*specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case (CAS 2008/A/1519-1520, at para. 155).*

*110. Taking into account the specific circumstances and the course of the events, a CAS panel might consider as guidance that, under certain national laws, a judging authority is allowed to grant a certain “special indemnity” in the event of an unjustified termination. The specific circumstances of a sports case might therefore lead a panel to either increase or decrease the amount of awarded compensation because of the specificity of sport (CAS 2008/A/1519-1520, at para. 156; CAS 2008/A/1644, at para. 139).*

*111. However, in the Panel’s view, the concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to the other factors. In particular, according to CAS jurisprudence, this criterion “is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. Furthermore, the element of the specificity of sport may not be misused to undermine the purpose of art. 17 para. 1, i.e. to determine the amount necessary to put the injured party in the position that the same party would have had if the contract was performed properly” (CAS 2008/A/1519-1520, at para. 156)”.*

80. The Panel fully endorses this position and considers that it shall analyse whether the compensation should be increased or decreased in accordance with the concept of the specificity of sport
81. The Appellant considers that the compensation shall be increased in view of the following elements:
  - The time remaining on the existing contract;
  - The contractual breach fell within the sporting season;
  - The contractual breach fell within the Protected Period;
  - The status and behaviour of the Player.
82. The Panel agrees with the CAS panel in CAS 2008/A/1519-1520 that, as a matter of principle, such elements may or may not be taken into consideration when deciding whether to apply, the concept of the specificity of sport in the context of Article 17 para. 1 RSTP.
83. It is not contested in the case at hand that the early termination of the Second Employment Agreement occurred when there was still considerable time left under this agreement and that the termination fell within the sporting season and the Protected Period. Therefore, the Panel could, in principle, use these elements to increase the compensation payable.
84. However, the specific circumstances of the present case, lead the Panel to consider that on the contrary, the principle of the specificity of sport should be used to decrease the compensation due, in view of the particular behaviour of La Equidad in the course of the Second Employment Agreement, as well as its reaction after the termination.

85. In the course of the hearing, the Panel heard evidence from Mr. Guburek, the Player's agent. The latter explained that while playing for La Equidad, the Player was not only remunerated at a very low level, but that he was also mistreated by his employer. Indeed, the witness explained that it was very difficult to live in Bogota with the salary received from La Equidad. Furthermore, the accommodation provided by La Equidad was unsatisfactory, in particular as the Player had to take four different buses and travel for a long time to reach the club's practice facilities. This situation led the Player and his agent to visit La Equidad's President to seek improve the Player's situation, without success.
86. These elements were not contested by La Equidad at the Hearing.
87. It therefore appears that La Equidad, alleges on the one hand that the Player was one of the best Colombian player of his generation and that he was a great asset to the club, but on the other hand that it did not provide him the necessary moral and/or material support.
88. Although La Equidad requested, on 13 June 2011, that the Player return to the club and resume training, it did not make any particular effort to defend its position. Furthermore, La Equidad waited more than one year before filing a claim against the Player and Sporting before FIFA, which tends to demonstrate a lack of interest in the Player by La Equidad.
89. In view of the above, Panel considers that it can use the specificity of sport doctrine as a "*correcting factor*" as set forth in the abovementioned CAS jurisprudence.
90. In view of all the above, the Panel confirms that the appropriate basis for the calculation of the compensation to be paid to La Equidad is limited to the sum of the remuneration under the Second Employment Agreement and the Sporting Employment Agreement, for the remaining time in the Second Employment Agreement, i.e. EUR 229,155.250, with no additional elements to be taken into consideration
91. The Panel further confirms that it has not found any valid criteria to be applicable in the case at hand in order to increase such compensation.
92. On the contrary, as seen above, the Panel considers that the principle of the specificity of sport shall be used to take into consideration the behaviour of La Equidad towards the Player and therefore deems that the above-mentioned figure should be reduced.
93. In this respect, the Panel finds, in majority, that the amount of EUR 150'000 awarded by the FIFA DRC is a fair amount, in view of all the circumstances of the case and taking into consideration the rationale of Article 17 para. 1, the various criteria of this provision, as well as the correcting factor of the specificity of sport. Therefore, the Panel deems, in majority, that this amount shall be confirmed.

C. *Sporting Sanction*

94. The Appellant considers that the DRC disregarded Article 17 para. 3 and 4 RSTP by not imposing a sporting sanction on the Player and Sporting. These provisions state in particular as follows:

3. *In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period [...].*
4. *In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any club found to be in breach of contract during the Protected Period or found to be inducing a breach of contract during the Protected Period. It shall be presumed, unless established to the contrary, that any club signing a Professional who has terminated his contract without just cause has induced that Professional to commit a breach [...].*

95. The Appellant considers that these provisions provides for mandatory sanctions in case of breach of contract without just cause, not only for the Player, but also for his new club, bearing in mind that there is a presumption that the latter induced the former to breach his employment agreement.

96. In this regard, CAS jurisprudence states the following (CAS 2007/A/1359):

*55. It follows from a literal interpretation of the said provision that it is a duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: “shall” is obviously different from “may”; consequently, if the intention of the FIFA Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word “may” and not “shall”. Accordingly, based on the wording of art. 17 para. 3 of the FIFA Regulations, a sporting sanction should have been imposed.*

*56. However this Panel considers that rules and regulations have to be interpreted in accordance with their real meaning. This is true also in relation with the statutes and the regulations of an association. Of course, if the wording of a provision is clear, one needs clear and strong arguments to deviate from it.*

*57. During the hearing, FIFA observed that it is stable, consistent practice of FIFA and of the DRC in particular, to decide on a case by case basis whether to sanction a player or not. Even though it is fair to say that the circumstances behind the decisions filed by FIFA to demonstrate such practice differ from case to case, the Panel is satisfied that there is a well accepted and consistent practice of the DRC not to apply automatically a sanction as per art. 17 para. 3 of the FIFA Regulations. The Panel is therefore inclined to follow such an interpretation of the rationale of art. 17 para. 3 of the FIFA Regulations which may be considered contrary to the literal interpretation, but appears to be consolidated practice and represents the real meaning of the provision as it is interpreted, executed and followed within FIFA. It is indeed noteworthy that a sporting sanction, by which the Player was suspended from playing for two years, was imposed of the Player within the ambit of FFA disciplinary proceedings.*

*58. This being so, the Appellant’s application that a sporting sanction be imposed on the Player is dismissed.*

*59. The Panel cannot refrain to invite FIFA to consider amending the wording of art. 17 para. 3 of the FIFA Regulations so to achieve a better legal certainty.*

97. In the case at hand, the Panel is of the opinion that the FIFA DRC's decision not to impose sporting sanctions upon the Player and Sporting does not deviate from established jurisprudence and its decision in this respect shall be confirmed.

### **XIII. CONCLUSION**

98. On the basis of the foregoing, the Panel, in majority, considers that:
- The counterclaims filed by the Player and Sporting shall be declared inadmissible;
  - The finding that Player terminated the Second Employment Agreement without just cause is upheld;
  - Considering the criteria of Article 17 para. 1 RSTP, the amount to be awarded to La Equidad as compensation is EUR 150'000 ;
  - Sporting is jointly and severally liable for the payment of the aforementioned amount;
  - No sporting sanctions shall be imposed neither on Sporting, nor on the Player.
99. The Panel therefore concludes that the appeal shall be dismissed.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. The appeal filed on 21 April 2014 by Club Deportivo La Equidad S.A. is dismissed.
2. The decision of the FIFA Dispute Resolution Chamber dated 30 August 2013 is upheld.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.