Arbitration CAS 2014/A/3626 Carmelo Enrique Valencia Chaverra v. Ulsan Hyundai Football Club, award of 23 April 2015

Panel: Prof. Luigi Fumagalli (Italy), President; The Hon. Michael Beloff QC (United Kingdom); Mr Michele Bernasconi (Switzerland)

Football
Termination of a contract of employment with just cause
"Just cause" under Swiss law
Circumstances considered to be "valid reasons" for the termination of an employment contract
Provision applicable in a situation where both parties contributed to the breach of the employment contract

1. **The existence, or not, of "just cause" to justify the termination of a contract of employment between a player and a club does not detract from a termination letter, as a result of which such contract came to an end. Under Swiss law, the employer, as well as the employee, may for valid reasons ("just cause") at any time terminate the employment relationship without notice. In addition, a termination without notice generally brings an employment contract to an end with immediate effect even if the termination was in the absence of a valid reason. As a result, the existence of valid reasons (or "just cause"), or their absence, has an impact only on the financial consequences of the termination.**

2. **According to Swiss law and the RSTP, as confirmed by the CAS jurisprudence, valid reasons (or "just cause") for the termination of an employment contract between a club and a football player are 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.**

3. **Article 17 RSTP only provides for some criteria for the quantification of damages in the event a contract is terminated because of (or through) a breach by one of the parties. In a case where both parties equally contributed to the breach, but nevertheless the termination was with just cause as the terminating party could in good faith and objectively believe that the continuation of the employment relationship was not possible, the provisions of the RSTP, and chiefly Article 17, are not of direct assistance and Article 337b para. 2 of the Swiss Code of Obligation must apply. In accordance with the latter, the CAS panel has to decide in its discretion on the financial consequences of the termination without notice, taking into account all circumstances of the case.**

1. BACKGROUND

1.1 The Parties

1. Mr Carmelo Enrique Valencia Chaverra (hereinafter referred to as the "Player" or the "Appellant") is a professional football player of Colombian nationality born in Tutunendo (Colombia) on 13 July 1984.

2. Ulsan Hyundai Football Club (hereinafter referred to as "Ulsan", the "Club" or the "Respondent") is a football club, with seat in Ulsan, Republic of Korea. Ulsan is affiliated to the Korea Football Association (*Daehan Chukgu Hyeophoe*), the governing body of football in Republic of Korea (hereinafter referred to as "KFA"). KFA is a member of the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

1.2 The Dispute between the Parties

3. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence given in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

4. On 12 January 2010, the Player and the Club signed an employment contract (hereinafter referred to as the "Contract"), under which the former was to provide to the latter his services as a professional football player for a term starting on 1 January 2010 and ending on 31 December 2012.

5. The Contract contained, *inter alia*, the following provisions[1]:

Article 3 *"Term and Annual Compensation (including taxes)"*

"…

② The annual base compensation (the "Annual Compensation") shall be a combination of all monies paid in connection with performance of this Contract, as follows:

1. During the Term of this Contract stated above, within the amount of the Annual Compensation calculated during [1st January 2010] to [31st December 2012] shall be the following amounts:

a. Basic Annual Compensation: USD 204,000 (USD 17,000/ Month-Gross

b. Playing Based Compensation _____/Game

c. Winning Based Compensation _____/Game

d. Playing/Winning Based Compensation: if plays equal to or more than 45 minutes USD

[1] Reference is made to the English version of the Contract, which was signed by the parties in both English and Korean texts. In light of Artide 15 of the Contract (see it at § 5 of this award), the Player filed in these proceedings another English translation of the Contract, which was prepared on the basis of a Portuguese translation of the Korean original. The Panel however remarks that – if not for differences of wording – the two English versions do not materially differ, and that no issue arose between the parties as to the meaning of specific contractual dauses.

2,000 / less than 45 minutes USD 1,000/Game-Gross

2. *Other special benefits: 1. Each one goal or assist USD 1,000-Gross 2. Housing 3. Vehicle 4. two round economy class tickets once a year".*

Article 4 *"The Club's Obligations"*

"The Club shall agree to perform the following obligations:

① *The Club shall comply with the Code of Ethics and the Articles of Incorporation, regulations, decisions etc. and all other rules and regulations of the K-League, the Association, the AFC, and FIFA.*

② *The Club shall immediately provide an appropriate doctor's examination and treatment regarding the Player's injuries and/or illness arising out of performance of this Contract and shall cover the expenses incurred from such injuries or illness; provided, however, that if such injuries and/or illness have arisen as a result of a cause attributable to the Player, the Player shall undertake all responsibility and expense therefore. …".*

Article 5 *"Player's Obligations"*

"The Players agrees that the following obligations shall be duly performed:

① *The Player shall comply with the game rules and Code of Ethics, the Articles of incorporation, and all others rules and regulations, and determination of the Club, the K-League, the Association, the AFC, and FIFA.*

② *The Player shall participate in all games designated by the Club and shall make best efforts to play at his/her best during the games.*

③ *The Player shall attend all training, training camps, meetings/sessions, and game preparations.*
…

⑤ *The Player shall participate in health examinations, disease prevention, and treatment designated by the Club.*

⑥ *If the Club demands the results of the health examination, the Player shall submit the results of such health examination. …".*

Article 7 *"Health Maintenance"*

"① After executing this Contract, the Player shall promptly notify the Club of any changes to his/her body, including any illness or injury, and such body changes shall be properly treated based on advice from the physician in charge of the Club. The Club shall internally report and manage any injuries sustained by the Player (including injuries sustained during national team games) and any information regarding the Player's injuries shall be kept confidential.

② *If the Player's illness or/and injury requires treatment while the Player is participating in the Player Activities or Non-Player Activities, such illness or injury shall be treated at the hospital specified by the Club. In case there is any difference in the medical expenses incurred by a hospital other than the hospital specified by the Club, the Player shall pay the difference. The Club, however, shall not pay medical expenses arising from any injuries or illness due to reasons attributable to the Player, or any activities other than the Player Activities and Non-Player Activities which are stipulated by the Club.*

③ *Upon executing this Contract, the Club shall purchase an insurance policy in order to prepare for*

a situation where the Player may suffer injury or death in connection with the performance of this Contract.

④ *The Club may demand that the Player to submit to regular health checks and treatment, in order to maintain the best physical condition of the Player".*

Article 11 *"Cancellation of Contract or Termination"*

"① *The Club and the Player may cancel or terminate the whole or a part of this Contract by written notice in the event the other party fails to perform the obligation as prescribed in this Contract.*

② *The Club shall immediately cancel or terminate the whole or a part of this Contract by written notice in the event any of the events stated below occur without first providing reasonable notice; provided, however, that while the Player is participating in the Player Activities or Non-Player Activities, if the Player suffers any illness or injury due to reasons other than those attributable to the Player, and as a result the Contract is cancelled or terminated due to the inability of the Player to continue the Player Activities on a permanent basis, the Club shall pay the expenses required for treatment for such illness or injury up to the amount of the Basic Annual Compensation under Article 3 herein:*

1. *Where a crime has been committed;*
2. *Where it is impossible to continue the Player Activities due to illness or injury;*
3. *Where more than six (6) months' disciplinary suspension is imposed;*
4. *Where the Player intentionally refuses to apply sufficient skill and technical ability as a member of the Club; or*
5. *Where the bylaws of the Club have been materially violated.*

③ *In the event this Contract is terminated due to reasons attributable to the Club, the remainder of the Basic Annual Compensation prescribed in this Contract shall be paid to the Player. In the event the Contract is terminated due to the reasons attributable to the Player, the Club shall pay the Basic Annual Compensation such that for the month the date of termination (the "Month") the days the Month plus the remaining number of days after the Basic Annual Compensation is paid in the month immediately preceding to the Termination Month shall be calculated basis. (i.e., Annual Compensation payable for the Termination Month and the month immediately preceding to the Termination Month, pro-rated over all the relevant number of days)".*

Article 14 *"Dispute Resolution"*

"In the event any dispute arises between the Club and the Player with respect to interpretation or performance of this Contract, such dispute shall be resolved as follows (provided, however, that an arbitration decision by the K-League, the Association, the AFC, FIFA, and Court of Arbitration for Sport ("CAS") which has been accepted by the parties to the Contract shall be deemed to be a final decision, which shall not be open for appeal):

① *Resolution of the dispute between the Club and the Player;*

② *In the event that the dispute is not resolved within ten (10) days after either the Club or the Player is first notified of a request for resolving the dispute, the K-League shall intervene;*

③ *If the K-League is unable to resolve the dispute, then the Association shall intervene;*

④ *If the Association is unable to resolve the dispute, then FIFA shall intervene; and*

⑤ *If FIFA is unable to resolve the dispute, then the CAS shall intervene".*

Article 15 *"Language and Governing Law"*

"This Contract shall be interpreted and governed by Korean law. In case of a foreign player, the English version and Korean version of the Contract shall be executed; provided, however, that the Korean version shall be used for the interpretation thereof".

6. In September / October 2010[2], the Player clashed into an opposing player during a training session with the Club. As a result of the incident, the Player indicated to the Club that he was feeling a pain in his right knee.

7. On or about 12 October 2010, the Player underwent magnetic resonance imaging (MRI) at the Ulsan University Hospital under the supervision of the Respondent's medical staff. According to the Respondent, the MRI result was that *"There was no objective physical finding on his right knee and MRI of his right knee showed minor chondral lesion and subchondral cyst on anterior aspect of the medial femoral condyle"*. In the Respondent's opinion, based on that result the pain, which the Player was feeling, was due to a tendinitis in his right knee. The Respondent's medical staff accordingly recommended that the Player be treated with a "conservative" therapy, consisting in rehabilitation training and exercise to improve muscle strength in the knee region.

8. In the period starting on or about 20 October 2010 and ending on or about 21 November 2010 (end of the Korean football season) the Player took part in the Club's activities, taking part in training sessions and official matches, although he reports that he was always feeling pain in his right knee.

9. On 3 January 2011, after a vacation period in his home country (Colombia), the Player joined the Club for pre-season training taking place in the territory of Guam.

10. On or about 8 January 2011, the Player indicated that he still had problems with his right knee. He was therefore allowed not to train with the Respondent's team.

11. On 14 January 2011, the Respondent's doctor, Dr Sung-Do Cho, examined the Player. The Respondent states that its doctor found that the knee pain was recurring because, due to the long period of rest in the vacation's period, muscle weakness had developed. Therefore, Dr Sung-Do Cho recommended the Player to strengthen the muscles around the knee joint.

12. The Player states that he was dissatisfied with the Respondent's doctor's prescription, since the pain was unbearable. He therefore requested to return to South Korea.

13. On 15 January 2011, the Respondent authorized the Player to return to South Korea. The Respondent, however, claims that the Player was also requested to join the team again on 19 January 2011, when also the team was expected to return to South Korea, so that he could be examined again by the Respondent's doctor.

14. On 17 January 2011, the Player decided to undergo a second MRI examination, which was conducted at the Ulsan University Hospital without involvement of the Respondent's medical

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2 The exact date is controversial: the Club indicated 6 October 2010 to be the date of the injury of the Player; the Player referred to a day in September 2010. The difference is however irrelevant and the point can therefore be left open.

staff. The Respondent bore the cost of such examination, and transmitted its results to a Colombian doctor, Dr Edgar A. Muñoz.

15. In a mail of 19 January 2011, Dr Edgar A. Muñoz declared the following:

"I've revised Mr. Carmelo Valencia MRI of his right knee. He presents an important osteochondral lesion on the medial femoral condyle. In this condition he can't practice soccer and any other sport that involve jogging. It's necessary to practice under arthroscopic surgery an osteochondral autograft (mosaycoplasty). After surgery he need a period of rehabilitation and incapacity of about 6 months. (…)".

16. On 22 January 2011 such email was forwarded by the Player to the email address "mallsun2@hotmail.com", which is accepted to be the email address of Ms Mal Soon Lee, at the time Manager of the International Department of the Club.

17. On 22 January 2011 the Player sent an email, in the Spanish language, to the address "navalecar@hotmail.com" and "mallsun2@hotmail.com". Such message reads in English translation as follows:

"Messrs. from the Ulsan Hyundai Football Club,

I … hereby inform you that I shall not be travelling to the city of Jeju with the delegation that is going to such destination to carry on with the pre-season works, for I have an injury to my right knee, which prevents me from performing my work as a professional soccer player. Furthermore, I have had such issue for 4 months and have been assessed by a doctor from the institution by means of an X-ray and magnetic resonance imaging (MRI), and the doctor informed me that my knee had no injury to prevent any performance in the field. I requested a new magnetic resonance test on January 17, 2011, to be seen by my doctor in Colombia and the club denied it, arguing that if I wanted to get a magnetic resonance imaging (MRI) I would have to pay for it out of my own pocket, when my agreement contains a clause that states that the club is to be liable for all medical tests and treatments that I may need in case of an injury or illness imputable to the club. Notwithstanding that, I went to the university hospital and was told to undergo a new magnetic resonance and to send it to my doctor in Colombia, Dr. Edgar Muñoz. The doctor immediately examined the magnetic resonance imaging (MRI) and informed me that I have a knee injury, and osteochondral injury in the inner condyle of my right knee, and that under such conditions I cannot practice any sport that needs me to jog, run, etc. He also said that it is necessary to perform an arthroscopic surgery and an osteochondral autograft (mosaicplasty) and after the surgery I need a period of rehabilitation and rest of 6 months. You at the Ulsan Hyundai Football Club were made aware of this by means of a written notice sent by my doctor, Edgar Muñoz, and have ignored all arguments I am giving you to get my treatment. The technical team was also made aware of it and they argued that I had nothing, except for mental problems, and that all I wanted was to leave the club. Due to that, I request that we settle this matter as soon as possible, for me to be able to start my recovery. I have attached the medical report from doctor Edgar Muñoz and the resonances taken from my right knee, and I am willing to let my right knee be examined by any other doctor specialized in this area".

18. On 25 January 2011, Dr Sung-Do Cho, team physician of the Club, sent to the Player, writing from the email address "mallsun2@hotmail.com", a message as follows:

"I have seen Mr. Carmelo Valencia since he complained of his right knee pain in October 2010. At that time, there was no objective physical finding on his right knee and MRI of his right knee on October 12, 2010 showed minor chondral lesion and subchondral cyst on the anterior aspect of the medial femoral condyle. After a short

period of rehabilitation, he returned to play soccer games without any problem as far as I know.

After the season 2010 he returned to his home country for 1 month's vacation with no specific complaint on his right knee. The winter training camp started on January 2, 2011, and he complained of some peripatellar pain again without swelling or effusion on his right knee. MRI of his right knee on January 17, 2011 showed similar small osteochondral lesion less that 5mm in diameter on the anterior aspect of the medial femoral condyle.

Conservative treatment with rehabilitation was recommenced since the osteochondral lesion is small (less than 5mm in diameter) and in non-weight bearing portion. In addition, there was neither effusion or mechanical symptom such as catching, crepitus or giving away.

So, just doing a surgery for the MRI finding (small osteochondral lesion) may not fully improve his symptoms.

Since he had been doing well at the end of the last season, I think rehabilitation will improve his symptom.

Close observation of his symptoms and physical findings would be mandatory".

19. On 25 January 2011 the Club imposed a fine on the Player *"for having been absent during pre-season training and behaving in an inappropriate manner, not complying with the instructions from the technical team".*

20. On 27 January 2011, Dr. Raul J. Naranjo, answering a request of the Player, wrote the following message to the Player:

"I have examined in detail your resonance and I have observed in it an osteochondral lesion, with a greater impact on the cartilage, in a very small region of the medial femoral condyle, at the patellar sliding area, not in the femorotibial joint support area, which causes the prognostic to be better. I also saw inflammation at the lateral area, around the lateral collateral ligament and the articular capsule, but I do not believe that this will pose a problem, although the clinical examination will determine if there is any change to the lateral stabilizers. The anterior and posterior cruciate ligaments are very well, just as the meniscuses, to which I found no damage.

In summary, I am of the opinion that this is an injury to the cartilage of the medial femoral condyle, which would be in agreement with the mechanism that produced it, a direct trauma to that region. Due to the place where it is located, the prognostic is better than for other areas, but since there is no improvement with the treatments applied and the pain persists, it merits the conduction of an arthroscopy. This is my opinion. …".

21. On 1 February 2011, the Player sent to the Club the following letter, containing his termination of the Contract (hereinafter referred to as the "Player's Termination Letter") as follows (English translation):

"I hereby inform you of my decision to deem the EMPLOYMENT CONTRACT FOR A DEFINITE TERM that binds me to the club to be terminated with cause, which decision shall go into force on the date hereof, which determination is substantiated by Article 4, Item 2, of the binding agreement entered into between the parties for considering that the employer USLAN HYUNDAY FOOTBALL CLUB has committed a serious violation, by virtue of failing to comply with its obligations, which it was legally bound to fulfill.

Such noncompliance has posed a serious risk to my integrity and my family's livelihood, which violations ULSAN HYUNDAY FOOTBALL CLUB has incurred in since my employment bond with such sports team started, contractual procedures and usage that are in detriment to my rights as a worker/professional soœr player, infringements which are against fundamental rights such as health and life and which I intend to list below.

1. ULSAN HYUNDAY FOOTBALL CLUB, on the date of this notice, has not solved the inconvenienced related to my knee injury that I have had for some time and which has been demonstrated to the

club, at several opportunities, without them having sent me, by the date of this letter, a reputable expert to assist with my recovery from the injury caused during the exercise of my profession, and they also oddly adduced that there is nothing wrong with me, and that I have mental problems.

2. Furthermore, I requested them to have another test made to my knee (magnetic resonance, MRI), or have it examined by a doctor I trusted, and the answer was that if I wanted to get another test I would have to pay for it with my own money, when there is a clause in my contract that states that the club is to bear all expenses entailed by a lesion or illness, and they also said that there was no engagement for said test, with the result that they did not arrange for my medical test and did not provide me with a translator, knowing that this was a country with a difficult language. I have demonstrated to them with such test that the injury exists and has been acknowledged by other doctors, of which I informed them, but until the date hereof I have not received any reply.

3. I hereby state to you that since the date of my entry into the club I have not been included in any healthcare plan, which caused serious inconveniences for me to enjoy, together with my family, from the benefits to which I am entitled, of basic healthcare, due to which I was forced to cover said medical bills.

4. Since said entry, I have worked with all of my sports and physical conditions, exercising my occupation in said club and got injured during the provision of my services, without the club having taken responsibility, until the date hereof, for the injury caused during the exercise of my occupation, leaving me totally unassisted in relation to my injury, and the institution is, based on Article 4, item 2, of the employment contract, in charge of covering the expenses entailed.

5. I informed them in writing that I could not travel to the island of Jeju to continue with the pre-season work, due to the fact that my knee needed a treatment different from that which they were implementing, which I was advised by my doctor to do, and I let them know by e-mail because they did not want to take my letter, and they intended for me to train with pain in my body and with no social security. On January 29th, I got a letter by mail in which they informed me that I was being fined at the amount of ten million (10,000,000) Won, due to disobedience to the technical team's instructions and misbehavior. And, not caring about everything I was going through, they withheld a month of salary from me, equivalent to the month of January, which was due on the 31st day of that same month.

Due to the noncompliance listed above, I consider such violations to be serious and imputable to the employer, and constitute a fair cause for the unilateral termination of the employment contract that binds me to the institution and, consequently, for me to retain my player's license".

22. On or about 1 February 2011, the Player left South Korea and returned to Colombia.

23. On 7 February 2011 the Player underwent surgery in Medellin (Colombia). The operation description issued by the clinical centre reads *inter alia* as follows:

"Finding:	*Chondral lesion, grade 4 in the upper anterior region of the medial condyle, medial trochlear area, but in contact with the medial border of the patella, elongate, approximately 1,8 x 0,8 cm and another injury, grade 3, approximately 1,0 x 0,3 cm below the previous one, not together, without compromising support area femorotibial. Meniscus and crossed ligaments healthy. Extensive reactive synovitis, with significant inflammatory changes in the anterior capsular and suprapatellar pouch. Two fragments of loose cartilage in the lateral gutter and in the suprapatellar pouch, one of them elongated of 0,7 cm.*
Procedures:	*Arthroscopic, partial synovectomy, removal of loose bodies and chondroplasy*

by multiple microfractures in the area of injury.

Description: *An additional Portal for superior medial parapatellar chondroplasty was performed".*

24. On 28 February 2011, counsel for the Club addressed to the Player a letter requesting him to return to South Korea:

"In our capacity of legal representatives of the Korean club Ulsan Hyundai Football Club ("Ulsan"), we revert to the employment contract entered by and between you and our client on 12 January 2010, according to which the parties agreed to establish a football professional employment relationship entering into force as from 1st January 2010 until 31st December 2012.

In this regard, on 30 January 2011 our client received an e-mail whereby you informed that the employment contract was unilaterally terminated with a supposedly just cause imposed to Ulsan.

However, due the fact that Ulsan has complied with the terms and conditions of the employment contract as well as with FIFA Regulations and its principles which guides the employment relationships between clubs and players, Ulsan strongly objects the termination of the employment contract with a just cause unfounded alleged by your side.

Therefore, this is to put you on notice and requesting you to return to Korea within 5 (five) days from the receipt of the present notification in order to rejoin the club's squad since the employment contract is still valid and binding.

We take the opportunity to inform you that in case you do not return in Korea within the time limit given the present case will be submitted to the competent FIFA bodies for a decision regarding the breach of the employment contract by you all based and strong legal basis and without any prior notice.

Lastly please inform, within 72 (seventy two) hours as from receipt of the present correspondence, flight details that suits you better in order to comply with the above-mentioned request".

25. In a letter dated 10 March 2011 (hereinafter referred to as the "Club's Termination Letter"), the Club terminated the Contract as follows:

"Reference is made to our previous letter dated 28 February 2011, by means of which we requested you to return to Korea in order to rejoin club's squad since the employment contract was still valid and binding between the parties.

However, despite the fact the Ulsan Hyundai has complied in full with the terms and conditions of the employment contract as well as with FIFA regulations, also trying by all means to avoid the collapse of the contractual relationship, you insist in the violation of your duties freely assumed with our Client without a just cause.
In view of the above and considering the crass breach of the employment contract by your side, this is to TERMINATE any and all contractual relationship existing between the parties, without prejudice to any further legal action to be promptly taken before FIFA competent body".

26. On 8 March 2011, the Player lodged a claim with FIFA indicating that the Club had breached the Contract, and requesting payments in the amount of USD 408,000, plus COP 5,500,000, for outstanding salaries, compensation and reimbursements.

27. On 3 May 2011, the Club lodged a claim with FIFA against the Player, stating that he had breached the Contract and requesting disciplinary sanctions as well as compensation in the total

amount of USD 1,368,175, plus interest.

28. On 15 July 2011, the Argentinean football club Atlético Newell's Old Boys (hereinafter referred to as "Newell") signed an employment contract with the Player. In the course of the FIFA proceedings Newell was invited to present, and thereafter, presented its position with respect to the matter in hand.

29. On 4 October 2013, the FIFA Dispute Resolution Chamber (hereinafter referred to as the "DRC") issued a decision (hereinafter referred to as the "Decision"), holding as follows:

"1. The claim of the 1st Claimant / 2nd Respondent, Carmelo Enrique Valencia Chaverra, is rejected.

2. The claim of the 2nd Claimant / 1st Respondent, Ulsan Hyundai Football Club, is partially accepted.

3. The 1st Claimant / 2nd Respondent, Carmelo Enrique Valencia Chaverra, has to pay to the 2nd Claimant / 1st Respondent, Ulsan Hyundai Football Club, within 30 days as from the date of notification of the present decision, compensation for breach of contract in the amount of USD 400,000 plus 5% interest p.a. on said amount as from 4 October 2013 until the date of effective payment.

4. The intervening Party, Atlético Newell's Old Boys, is jointly and severally liable for the payment of the aforementioned amount.

5. In the event that the amount due to the 2nd Claimant / 1st Respondent, Ulsan Hyundai Football Club, is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

6. Any further claim lodged by the 2nd Claimant / 1st Respondent, Ulsan Hyundai Football Club, is rejected.

7. The 2nd Claimant / 1st Respondent, Ulsan Hyundai Football Club, is directed to inform the 1st Claimant / 2nd Respondent, Carmelo Enrique Valencia Chaverra and the Intervening Party, immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

30. On 20 May 2014 the Decision was notified to the Appellant, together with the grounds supporting it.

31. In the Decision, the DRC first found that the 2010 edition of the Regulations on the Status and Transfer of Players (hereinafter referred to as the "RSTP") was applicable to the merits of the dispute. The DRC, next, in support of the Decision, and after an analysis of the facts of the case, stated the following:

"7. … the underlying issue in this dispute, considering the conflicting positions of the parties, is to determine whether the employment contract had been prematurely and unilaterally terminated with or without just cause by one of the parties. … if it were found that the employment contract was breached by one of the parties with or without just cause, it would be necessary to determine the consequences of such breach.

8. In continuation, the Chamber, first and foremost, acknowledged that it has remained undisputed that the player was absent from the club as from February 2011.

9. Subsequently, the Chamber noted that the player maintains that he did not receive the suitable medical

treatment and that, apparently, his injury was not serous y considered by the doctors of Ulsan Hyundai. Therefore, he decided to leave the country and terminate the contract due to the breach of Ulsan Hyundai of its contractual obligations, in particular, due to the non-compliance and negligence of Ulsan Hyundai in treating the player's injury and in providing him with the adequate health services.

10. *Ulsan Hyundai, on the other hand, stated that the player breached the relevant employment contract by leaving the club and the country without authorization and by following a different medical treatment from the one prescribed by the doctors appointed by Ulsan Hyundai.*

11. *At this stage, the members of the Chamber deemed appropriate to remark the general principle that the contracts are concluded to be respected, otherwise, consequences have to be assumed by the relevant party.*

12. *Furthermore, the Chamber emphasised that only a breach or misconduct which is of a certain severity justifies the termination of a contract. In other words, only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence if there are more lenient measures which can be taken in order for an employer to ensure the employee's fulfilment of his contractual duties, and vice versa, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only ever be an ultima ratio measure.*

13. *With due consideration to the above, the members of the Chamber acknowledged that, essentially, the player and the club had divergent position on how the injury of the player had to be treated. In this context, it was for the Chamber to examine whether the decision of the player to leave South Korea was justified, considering the circumstances of the present matter. More specifically, the Chamber had to examine whether the club had violated its contractual obligations, as alleged by the player, and, in the affirmative, whether the violations of the contract were that severe that the player had a just cause to terminate the contract.*

14. *The Chamber was well aware that, in order to answer the above-mentioned questions, it had to consider all the relevant circumstances of this specific matter. In doing so, the Chamber first turned its attention to the drafting of the employment contract and took note of its clause 7.2, by means of which it is stipulated that in case the player would need medical treatment due to injuries or illnesses, he should be treated at the hospital appointed by Ulsan Hyundai and that the extra medical expenses derived from a treatment in a different hospital than the one appointed by Ulsan Hyundai, would be covered by the player.*

15. *Furthermore, the Chamber noted that it could be established from the information and documentation on file that the player had started complaining about pain in his knee on 6 October 2010. Following said complaints, the club immediately scheduled a physical examination by the club's doctor. Notwithstanding that the club's doctor did not detect an injury during such examination, the club scheduled a MRI following which an injury was found. Thereafter, the player underwent a short period of rehabilitation and he returned to his normal activities. The Chamber concluded that the club's actions in October 2010 were in compliance with the contract, i.e. it had provided the necessary medical assistance to the player.*

16. *As to the events occurring in January 2011, the Chamber recalled that the player complained again about pain in his knee in the beginning of January following which another MRI was performed. The Chamber duly acknowledged that whereas Ulsan Hyundai's doctor believed that the injury was small and that no surgery was necessary, the personal doctor of the player held that the player needed a surgery and could not play for 6 months. As a result, the player held that the doctor of Ulsan Hyundai did not seriously consider the injury and that the club had not provided suitable medical treatment and therefore terminated the contract invoking just cause.*

17. *After a thorough examination of all the given circumstances, the Chamber did not concur with the conclusion of the player. In particular, the Chamber deemed that the sole fact that the doctor of the club and the doctor of the player had a different medical opinion does not lead to the conclusion that the club's doctor had not taken the injury serious; the club's doctor simply had a different opinion on how to treat the player's injury. As a result, the player's decision to leave the club and terminate the contract was considered by the Chamber as a disproportionate measure in light of the circumstances.*

18. *Hence, the Chamber deemed that, based on the documentation contained in the file, it could not be established that Ulsan Hyundai neglected its contractual obligations with regard to the medical treatment of the player. In fact, Ulsan Hyundai offered the player a medical treatment following the recommendations of the doctor appointed by it and, by supporting the position that the player's injury did not need surgery, Ulsan Hyundai only put forward a different point of view on how to deal with the injury.*

19. *On account of the above and, in particular, considering that Ulsan Hyundai complied with its contractual obligations with regard to its financial duties as well as regarding the medical assistance, and taking into consideration that the player left Ulsan Hyundai and the country without authorisation, the Chamber decided that terminating the contract was a disproportional reaction of the player. The Chamber finds that Ulsan Hyundai was not in breach of the terms of the employment contract and determined that the player had no valid reason not to appear at the work place. Therefore, the Chamber concluded that the player had terminated the employment contract without just cause on 1 February 2011 and that, consequently, the player is to be held liable for the early termination of the employment contact without just cause.*

20. *Having established that the player is to be held liable for the early termination of the employment contract without just cause, the Chamber focused its attend on the consequences of such termination. Taking into consideration art. 17 par. 1 of the Regulations, the Chamber decided that Ulsan Hyundai is entitled to receive from the player an amount of money as compensation for breach of contract. Furthermore, in accordance with the unambiguous contents of article 17 par. 2 of the Regulations, the Chamber established that the new club of the player, Atlético Newell's Old Boys, shall be jointly and severally liable for the payment of compensation.*

21. *Having said that, the Chamber focussed its attention on the calculation of the amount of compensation for breach of contract payable by the player and Atlético Newell's Old Boys to Ulsan Hyundai in the case at stake. In this respect, the members of the Chamber firstly recapitulated that, in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further 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, the fees and expenses paid or incurred by the club (amortised over the term of the contract), and depending on whether the contractual breach fall within the protected period. The DRC recalled that the list of objective criteria is not exhaustive and that the broad scope of criteria indicated tends to ensure that a just and fair amount of compensation is awarded to the prejudiced party.*

22. *In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the pertinent employment contract contains a provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the Chamber established that no such compensation clause was included in the employment contract in relation to the situation in which the player was found to have terminated the*

contract without just cause.

23. *Bearing in mind the foregoing, in order to calculate the amount of compensation due to Ulsan Hyundai in the present case, the Chamber firstly turned its attention to the remuneration and other benefits due to the player under the existing contract and the new contract(s), which criterion was considered by the Chamber to be essential. In this context, the members of the Chamber deemed it important to emphasize that the wording of art. 17 par. 1 of the Regulations allows the DRC to take into consideration both the existing contract and the new contract(s) in the calculation of the amount of compensation, thus enabling the Chamber to gather indications as to the economic value attributed to a player by both his former and his new club(s).*

24. *In this regard, the DRC established, on the one hand, that the employment contract between the player and Ulsan Hyundai, signed on 12 January 2010, provided for the player a monthly remuneration of USD 17,000 payable until 31 December 2012. Therefore, and considering that the contract was terminated as of 1 February 2011, the members of the Chamber deemed that the total value of the player's employment agreement with Ulsan Hyundai for the remaining contractual period of twenty-three months resulted in the amount of USD 391,000.*

25. *In continuation, the Chamber noted that in accordance with the pertinent employment contract signed between the player and Atlético Newell's Old Boys, valid as of 15 July 2011 until 30 June 2012, the player was entitled to receive a monthly salary of ARS 41,990, corresponding to approximately USD 10,000 as well as a signing fee in the amount of USD 189,000. Consequently, the Chamber established that the value of the new employment contract concluded between the player and Atlético Newell's Old Boys for the corresponding period as from July 2011 and including December 2012 amounted to USD 419,000.*

26. *Taking into account the preceding paragraphs, the Chamber concluded that the average total salary for the remaining period of time of the two employments contract corresponded to an amount of approximately USD 405,000.*

27. *Having stated the above, the DRC recalled that the player was unemployed for the period of six months, as of 1 February 2011 until 15 July 2011. In this regard the Chamber was of the opinion that it should take into consideration the loss of salary during this period of time and decided to deduct the amount of USD 60,000, resulting in an aggregate amount of USD 345,000.*

28. *In continuation, and referring to art. 12 par. 3 of the Procedural Rules, bearing in mind that Ulsan Hyundai had specifically included these costs in its claim, the Chamber established that Ulsan Hyundai had provided enough evidence of the fees and expenses paid or incurred by Ulsan Hyundai for the acquisition of the player and that, therefore and, whereas according to article 17 par. 1 of the Regulations such fees and expenses may be included as one of the criteria to be taken into account in the calculation of compensation, the Chamber should take into account the non-amortised amount of the transfer fee paid by Ulsan Hyundai to the player's former club for his acquisition. In this respect, the Chamber determined that these expenses, after amortization, corresponded to USD 479,167 as rightly claimed by Ulsan Hyundai.*

29. *The Chamber further noted that in its calculation of the amount of compensation, Ulsan Hyundai had included costs relating to the acquisition of a new substitute player that allegedly replaced the player. In this regard, the Chamber concluded that it had not been proven to its satisfaction that these expenses should be included in the calculation of the amount of compensation for breach of contract.*

30. Finally, the Chamber established that it was undisputed that the player's salary for January 2011 in the amount of USD 17,000 had not yet been paid by Ulsan Hyundai, another element that should be taken into consideration.

31. At this point, the members of the Chamber agreed that, given the very specific particularities of the matter at hand, attenuating circumstances are applicable taking into consideration the health situation of the player and the opinion of the player's doctor that he indeed needed surgery. For these reasons, the Chamber decided to set the compensation for breach of contract at the total amount of USD 400,000, which is considered by the Chamber to be a fair and justified amount of compensation for breach of contract in the present matter.

32. All in all, on account of the aforementioned consideration, the Chamber decided that the player is liable to pay compensation for breach of contract to Ulsan Hyundai in the amount of USD 400,000. Furthermore, in accordance with art. 17 par. 2 of the Regulations, Atlético Newell's Old Boys is jointly and severally liable for the payment of the relevant compensation.

33. In addition, taking into account Ulsan Hyundai's request as well as the constant practice of the Dispute Resolution Chamber, the Chamber decided that Ulsan Hyundai is entitled to interest of 5% p.a. on the amount of compensation as of 4 October 2013".

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

32. On 10 June 2014, the Appellant filed a statement of appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the "Code") against the Respondent to challenge the Decision. The statement of appeal, accompanied by 4 exhibits, contained the appointment of The Hon. Michael J. Beloff M.A. Q.C. as arbitrator.

33. On 20 and 25 June 2014, the Secretary General of CAS granted the Appellant extensions of the deadline to file his appeal brief.

34. In a letter dated 26 June 2014, the Respondent appointed Mr Michele A.R. Bernasconi as arbitrator.

35. In a letter of 27 June 2014, FIFA indicated to the CAS Court Office that it renounced its right to intervene in the arbitration proceedings started by the Player.

36. On 27 June 2014, the Appellant lodged with CAS his appeal brief, together with 9 exhibits, pursuant to Article R51 of the Code.

37. On 28 July 2014, the Respondent lodged with CAS its answer in accordance with Article R55 of the Code. The Respondent's answer had attached 7 exhibits.

38. By communication dated 4 November 2014, the CAS Court Office informed the parties on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; The Hon. Michael J. Beloff

M.A. Q.C. and Mr Michele A.R. Bernasconi, arbitrators.

39. On 8 January 2015, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the "Order of Procedure"), which was accepted and countersigned by the parties.

40. On 25 February 2015, on the basis of the notice given to the parties in the letter of the CAS Court Office dated 7 January 2015, a hearing was held. The Panel was assisted at the hearing by Mr Antonio de Quesada, Counsel to CAS. The following persons attended the hearing:

    i. for the Appellant: Mr Breno Costa Ramos Tannuri, counsel;

    ii. for the Respondent: Ms Mal Soon Lee, Deputy General Manager of the Club, Mr Bichara Abidão Neto and Mr Fernando Guitti, counsel.

41. At the opening of the hearing, both parties confirmed that they had no objections with respect to the composition of the Panel. The Respondent, however, objected to the hearing of a witness, requested by the Appellant in a letter of 16 January 2015, as such witness had not been indicated in the appeal brief. The Panel, after hearing the Appellant, noted that no exceptional circumstances had been proved, or actually existed, to enable it to hear a witness not indicated in the appeal brief: it therefore declared the deposition of the witness to be inadmissible pursuant to Article R56 of the Code.

42. Then, the Panel heard testimony given by the Player and by the witnesses. Those of them who had signed a written statement confirmed it. In addition:

    i. Ms Mal Soon Lee declared, *inter alia*, that the Player, upon his return to South Korea after his vacations at the end of 2010, had a conversation with the head coach of the Club, which she attended as a translator, and requested to be released from the Contract, since he was not playing in the first team, had cultural problems in adapting to life in Korea, and his salary was too low. At the same time, she confirmed that other (Brazilian) players were allowed to receive medical treatment in their home country, as this proved to help faster recovery. However, such players received an express authorization to travel home, and treatment was based on an agreement with the Club;

    ii. Dr Sung-Do Cho, the Club's head doctor, stated, via Skype connection, that when he examined the Player, in October 2010 and January 2011, he was of the opinion that conservative treatment, with rehabilitation, was the best solution for the Player's problems. In addition, he indicated that the symptoms declared by the Player, which changed over the time, did not correspond to the MRI's findings;

    iii. the Player, heard by telephone, went through the history of his injury, emphasizing that after the impact during training with another player he was taken to hospital and that much blood was drawn off his right knee. Even though, in the days after the incident, he was feeling pain, he was told that it was only a matter of inflammation. Therefore, he was requested to train and play, notwithstanding his suffering. At the beginning of January 2011, during the pre-season camp in Guam, when training sessions became heavy, he felt unbearable pain. However, no treatment was indicated by the respondent's medical staff..

He therefore decided, and was authorized, to return to South Korea, where he sought additional medical advice and underwent a second MRI: he also requested Ms Mal Soon Lee to accompany him to the hospital, but she refused. Finally, he underlined that he was forced to terminate the Contract as the Club was obliging him to play even though he was injured, and denied having requested to be released for any cultural, economic or sporting reasons;

iv. Dr. Raul J. Naranjo, also heard on the phone, confirmed the content of his email to the Player of 27 January 2011. He declared that in October 2010 conservative treatment, without surgery, was a reasonable option. However, the evolution of the lesion, and the absence of improvement in the Player's conditions, had to be recognized, and because of that surgery became the best treatment: without an operation the Player's career as a footballer was at risk.

43. At the conclusion of the hearing, the Panel granted deadlines for the parties to file post-hearing briefs, and to deal with a possible applicability in this case of Article 337b para. 2 of the Swiss Code of Obligations (hereinafter referred to as the "CO"). The parties, finally, expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

44. On 12 March 20015 post-hearing briefs were filed by the parties. On 26 March 2015, then, each of the parties lodged with CAS replies to the other party's post-hearing brief.

2.2 The Position of the Parties

45. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

a. The Position of the Appellant

46. In his statement of appeal, the Player requested the CAS:

"FIRST – To fully dismiss the contests of the Appealed Decision since it prima facie ignored the facts surrounding the matter, the laws and regulations applied to the matter, as well as the terms and conditions set out in the "Professional Football Player Contract – For Foreign Players" signed on 12 January 2010;

SECOND – To confirm that the Appellant unilaterally terminated, with just cause, the "Professional Football Player Contract – For Foreign Players" signed on 12 January 2010 (cf. Art. 14 of the FIFA Regulations on the Status and Transfer of Players);

THIRD – To uphold that the Appellant shall be entitled to receive from the Respondent the outstanding salary of January 2011 and, additionally, a compensation for the breach by the Appellant of the "Professional Football Player Contract – For Foreign Players" signed on 12 January 2010 (cf. Art. 17, par. 1 of the FIFA Regulations on the Status and Transfer of Players);

FOURTH – To condemn the Respondent to pay the costs of the surgery which the Player had to undergo, pursuant to the provisions set out in the "Professional Football Players Contract – For Foreign Players" signed on 12 January 2010;

FIFTH – To uphold that the Appellant shall have also the right to receive an additional compensation for the period of time in which was unable to exercise his profession because of the injury sustained while providing services provided to the Appellant (cf. Art. 337c, par. 3 of the Swiss Code of Obligations);

SIXTH – To condemn the Respondent to the payment of the legal expenses incurred by the Appellant during the ongoing arbitration; and

SEVENTH – To establish that the costs of this arbitration procedure before CAS shall fully borne by the Respondent.

Subsidiary and only in the event the above is rejected,

EIGHTH – To confirm that the "Professional Football Players Contract – For Foreigner Players" signed on 12 January 2010 was breached by the Appellant but that the compensation indicated in the Appealed Decision was erroneously calculated and without any legal grounds (cf. Art. 17, par. 1 of the FIFA Regulations on the Status and Transfer of Players). Notwithstanding anything to the contrary, nothing herein is to be construed as an admission by the Appellant that the "Professional Football Players Contract – For Foreign Players" was breached by the Appellant and/or terminated by the Appellant without just cause;

NINETH – To condemn the Respondent to the payment of the legal expenses incurred by the Appellant during the ongoing arbitration; and

TENTH – To establish that the costs of this arbitration procedure before CAS shall fully borne by the Respondent".

47. In the appeal brief, then, the Appellant confirmed his request for relief in the following terms:

"FIRST – To set aside the Appeal Decision since clearly defaults the provision as set out in the Employment Contract, the various regulations of FIFA, in particular, the FIFA RSTP and, additionally, the applicable laws;

SECOND – To confirm that the Appellant unilaterally terminated the Employment Contract with "just cause" (cfr. Art. 14 of the FIFA Regulations on the Status and Transfer of Players);

THIRD – To uphold that the Appellant shall be entitled to receive from the Respondent the outstanding salary of January 2011 and, additionally, a compensation of USD 204,000 (two hundred and four thousand dollars) based upon the principle of the primacy of the contractual obligations towards the terms and conditions as freely agreed between the parties in Article 11 of the Employment Contract (cf. Art. 17, par. 1 of the FIFA RSTP);

FOURTH – To condemn the Respondent to pay COP 10, 500,000 (ten thousand and five hundred Colombian pesos) due as costs of the surgery and treatment which the Appellant had to undergo, pursuant to the provisions set out in the Employment Contract;

FIFTH – To uphold that the Appellant shall have also the right to receive an additional compensation of USD 102,000 (one hundred and two thousand dollars) for the period of time in which was unable to exercise his profession because of the injury sustained while providing services to the Appellant (cf. Art. 337 c, par. 3 of the Swiss Code of Obligations);

SIXTH – To also condemn the Respondent to the payment of 5% p.a. interest to be calculated over the amounts indicated above as calculation from 1 February 2011 until the date of effective payment.

SEVENTH – To condemn the Respondent to the payment of the legal expenses incurred by the Appellant during the ongoing arbitration, at least in the amount of EUR 20,000 (twenty thousand Euros); and

EIGHTH – To establish that the costs of this arbitration procedure before CAS shall fully borne by the Respondent.

Subsidiary and only in the event the above is rejected:

NINETH – To confirm that the Employment Contract was breached by the Appellant but that the compensation indicated in the Appealed Decision was erroneously calculated and without any legal grounds (cf. Art. 17, par. 1 of the FIFA Regulations on the Status and Transfer of Players). Therefore, in accordance to the principle of the primacy of the contractual obligations set out in Article 11, par. 3 of the Employment Contract, the Appellant is entitled to receive USD 17,000 (seventeen thousand dollars);

TENTH – To condemn the Respondent to the payment of the legal expenses incurred by the Appellant during the ongoing arbitration, at least EUR 20,000 (twenty thousand Euros); and

ELEVENTH – To establish that the costs of this arbitration procedure before CAS shall fully borne by the Respondent".

48. In his submissions, at the outset the Appellant contends, with respect to the rules applicable to the merits of the dispute, that this Panel should apply *"the various regulations of FIFA and Swiss law, whilst taking into account the well-established "specificity of sport" and where appropriate Korean law".*

49. According to the Appellant, then, the main issue to be determined in this arbitration is whether he was entitled to unilaterally terminate the Contract for *"just cause"* according to the RSTP and *"the current lex sportiva".*

50. In that regard, the Appellant submits, by reference also to CAS precedents and Swiss law, that an employment contract can be terminated unilaterally by a party invoking a *"just cause"*, if the following general conditions are met:

"(i) if the violation of the contract persist for a long time or if many violations be cumulated over a certain period of time;

(ii) if the terminating party can in good faith not be expected to continue the employment relationship;

(iii) the nature of the breach of obligation;

(iv) when the essential conditions under which the contract was concluded are no longer present; and

(v) serious breach of confidence".

51. The Appellant's view is that such conditions were satisfied in his case and therefore that his termination of the Contract was with *"just cause"*. In fact:

i. the Respondent provided inadequate medical assistance and treatment and put pressure on the Player to return to *"his normal activity"*, notwithstanding the pain the Player was suffering. In addition, the Respondent refused to accept the results of the new

examinations (and chiefly the MRI of January 2011) as evidence that surgery was required, and refused to accept the suggestion made by the Player to obtain a third medical opinion. As a result, the Respondent committed numerous violations of the Contract in the period between October 2010 and January 2011, and namely of:

- Article 4.2, *"when ignoring the request made by the Appellant for a new set of medical examinations"*,
- Article 4.6, by not respecting the *"human rights"* of, and discriminating against, the Player,
- Article 7.2, by denying payment of the medical costs incurred by the Player;

ii. the Respondent did not take the Player's injury seriously, did not pay for the Player's medical expenses and insisted on treatment that had failed. As a result, it could not be reasonably expected that the Player would continue to render his services to the Respondent under the Contract;

iii. the career of the Player was at risk; however, the Respondent ignored the importance of the matter, and therefore *"compromised … the Appellant's personality rights. i.e. to practice football at a level that accorded with his abilities of professional football player"*. Therefore, the nature of the breaches of the Contract was serious enough to justify the decision of the Player to terminate it;

iv. as a result of the Respondent's behaviour, the essential conditions by reference to which the contract was concluded were no longer present;

v. the Respondent's behaviour brought about a breach of confidence, since the Respondent treated the Player's medical problem with *"inadmissible and unforgivable negligence"*, while the Player *"never used the problem in his knee as an excuse to unilaterally terminate the … Contract and … sign a new contract with a third club"*. In fact, the Player had a serious problem and, after having terminated the Contract for *"just case"*, actually underwent surgery, *"exactly as he always sustained and tried to convince the Respondent about such necessity"*.

52. Moreover, according to the Appellant:

- *"it is not comprehensible that a top professional football club from Korea travels for a pre-season camp without any doctor"*;
- *"it is not admissible to prescribe treatments to players by phone or insist on a treatment which has not presented any good results in the last 4-5 months, and which has caused the pain to worsen"*;
- *"it is unacceptable that a player is left waiting for a whole week* [during the January 2011 pre-season camp] *without a proper examination from any doctor whatsoever, and to stand idly by while such player goes to a hospital without any assistance or support"*.

53. In light of the foregoing, the Appellant submits, in the post-hearing brief of 12 March 2015, that *"medical malpractice took place"*, since *"Dr. Cho's insistence on applying the same conservative treatment was a serious error"*. Indeed, according to the Appellant, Dr. Cho *"clearly misinterpreted"* the findings of both MRI exams, and did not consider them together with the *"historical development of the symptoms"*. The Appellant further underlines that Article 328 CO requires the employer to

respect the personal integrity of the employees and to take the necessary measures to protect their rights and submits that the Respondent's failure to take such measures and Dr. Cho's negligence amount to a breach of such obligation.

54. In the Appellant's opinion, all the above not only justifies the termination of the Contract: it entitles the Appellant to receive compensation according to the principles set in Article 17 RSTP.

55. According to the Appellant, Article 11.3 of the Contract contains a *"liquidated damages"* clause, valid under Swiss law: such clause reproduces the real intention of the parties, was drafted by the Respondent and does not violate the principles of proportionality and public order. As a result, the Appellant is entitled to receive the outstanding salary of January 2011 (USD 17,000), as well as the remainder of the Basic Annual Compensation (USD 187,000) for a total of USD 204,000.

56. In addition, the Appellant incurred expenses, to be reimbursed by the Respondent, for hospital costs, medical fees and physiotherapy sessions for a period of treatment following surgery of approximately 6 months, in an amount of COP 10,500,000 corresponding to USD 5,581.

57. Finally, the Appellant submits that the Respondent has to pay an amount corresponding to six months' salary in accordance with Article 337c para. 3 of the Swiss Code of Obligations (CO), since he could not exercise his profession for a period of six months because of the negligent behaviour of the Respondent. Such amount equals to USD 102,000.

58. As a result, in the Appellant's opinion, the Respondent should be ordered to pay the aggregate amount of USD 347,581 (corresponding to USD 204,000 + 5,581 + 102,000).

59. Subsidiarily, the Appellant submits that, should the Panel find that the Contract was terminated without *"just cause"*, Article 11.3 of the Contract should be applied. Such provision, in fact, contrary to the DRC's conclusion, provides for the amount to be paid in the event the Contract is terminated for reasons attributable to the Appellant. Therefore, he should in principle be entitled to receive only the amount therein stipulated, corresponding to the *"pro rata amount calculated taking into consideration the date in which he was paid the last salary by the Respondent until the termination date"*. However, since the Contract was terminated on 1 February 2011, no amount is due for February 2011, and the only payment to be made to the Player is the outstanding salary of January 2011.

60. Ultimately, in his post-hearing brief of 12 March 2015, the Appellant refers to the criteria, set by Swiss law and the RSTP, to be applied *"assuming but not admitting that the Appellant terminated the employment relationship with the Respondent with just cause but somehow violated the terms and conditions set out in the Contract and, in addition IF the members of the Panel deem that paragraph 3 of clause 11, in particular, its second section, is not valid"*. In that regard, according to the Appellant, no compensation should be awarded to the Respondent, since the early termination of the Contract by the Appellant caused the Respondent more savings than losses, and the Respondent had a sportive advantage, since it was allowed to substitute the departing Appellant with another player who was part of the *"first eleven"*.

61. In the reply to the Respondent's post-hearing brief, then, the Appellant objects to the Respondent's request for a finding against Newell (§ 68 below), and seeks its dismissal.

b. The Position of the Respondent

62. In its answer, the Respondent requested the CAS to:

> *"a) dismiss all the allegations put forward by Mr. Carmelo Enrique Valencia Chaverra in his appeal brief;*
>
> *b) upheld in totum the decision rendered by the FIFA DRC on 04.10.2013, communicated to the Parties on 20.05.2014; and*
>
> *c) based on the principle of eventuality, in case this Panel understands that Mr. Carmelo Enrique Valencia Chaverra terminated the Contract with just cause:*
>
> *c.i) Respondent shall not be considered liable to pay the amount of USD 102,000 (one hundred and two thousand Dollars) related to the period of 6 (six) months the Player was unable to play football because of the surgery he was submitted in his knee; and*
>
> *c.ii) regarding the salary of January 2011, Respondent shall only pay the amount of USD 7,240 (seven thousand and two hundred forty dollars) as the amount of the fine imposed on Appellant (and never paid) shall be considered in the calculation.*
>
> *c.iii) the excessive amount of EUR 20,000 (twenty thousand Euros) requested as legal costs shall be reduced.*
>
> *d) order that Mr. Carmelo Enrique Valencia Chaverra shall bear with all arbitration and legal costs incurred by Ulsan Hyundai Football Club".*

63. With respect to the law applicable to the merits, it is the Respondent's contention that *"although article 15 of the Contract states that Korean law shall govern and interpret the Contract, … Korean law shall be applied only when appropriate, given the international dimension of this matter (Colombian player against a Korean club) and the well-established principle of specificity of sport)"*. In addition, the Respondent underlines that the Contract contains several reference to the FIFA regulations. Therefore, *"FIFA Regulations and, subsidiary, Swiss Law shall be applied over this matter. Korean Law shall be applied only when appropriate"*.

64. In the merits, the Respondent submits, *"after analyzing the sequence of fact, … that there is not any just cause that justifies the termination of the Contract"*. In fact:

> i. *"Appellant's argument that the Contract was violated for a long period of time is untrue, unproved and incorrect"*, since *"the Respondent has always dealt diligently, legally and in good faith"* in relation to the Appellant's injury, and *"put its medical staff in his entire disposal"*, in line with Article 4.2 of the Contract. The fact, then, that *"Appellant diverged from the treatment prescribed by Respondent does not legitimate him to unilaterally terminate the Contract"*. Actually, the *"Appellant relied on the opinion of his personal doctor to assume that the treatment prescribed by Respondent was inadequate. Nevertheless, any doctor is independent to judge what is the best treatment for his patient, considering the highest standards of professional conduct"*. In any case, even Dr Naranjo, *i.e.* the Appellant's personal doctor, confirmed that the Club was not negligent, as also shown by the attitude and the care of the Club towards its employees, always provided with the best

medical treatment;

ii. the Respondent was expecting the normal continuation of the employment relationship, and if the Appellant had acted in good faith, the Contract would not have been terminated. Actually, the Respondent did not leave the Player without any medical assistance: the Club had arranged for new medical examination on 19 January 2011 upon return to South Korea of the medical staff. The Player had the freedom to go to the hospital during the period he was not with the Club, but such behaviour could be seen to be a violation of Article 7 of the Contract, where it provides that *"body changes"* shall be treated *"on advice from the physician in charge of the club"* and that *"illness or injury shall be treated at the hospital specified by the Club"*;

iii. the fact that the Club did not agree with the necessity of surgery does not mean that the Player was denied any treatment, and did not rule out the possibility that if the conservative treatment prescribed by the Club's doctor had not been effective, surgery could be recommended: this option of the Club was removed by the Player himself, who terminated the Contract *"just few weeks after a second doctor opinion"*;

iv. the termination of the Contract by the Appellant was *"not proportional, fair and expected"*. The Respondent's doctor, in fact, did not take real issue the Player's personal's doctor's opinion; since in point of fact , he himself did not rule out surgery, as he recommended rehabilitation and observation of its effects, in order to consider further treatment in light of its outcome;

v. the real *"reasons/intentions behind the unilateral termination"* of the Contract might be explained by the Player's request to be released by the Club, for the reasons he expressed to the coach of the Club in a meeting he had, with Ms Mal Soon Lee acting as a translator, at the end of December 2010;

vi. the Appellant's contention that the confidence between the parties was breached by the Respondent is *"absurd"*. In fact, the Club provided medical treatment, albeit conservative and thereby continued to fulfil its obligations towards the Player. The Player never warned, in his correspondence with the Club, that, according to his understanding, the Club was breaching the Contract, and never communicated that he had any intention to terminate the Contract. The Player had the obligation, under Swiss law, the FIFA regulations and the CAS jurisprudence, to notify the Club of its intention to terminate the Contract if the alleged violation had not been remedied.

65. In light of the foregoing, it is the Respondent's contention that the Contract was breached by the Appellant and not by the Respondent. Therefore, the Appellant is not entitled to receive any compensation. In any case, the amount of compensation was correctly calculated by the DRC, which has already taken into account relevant mitigating factors, and therefore should not be further reduced by the Panel. In addition, in the Respondent's opinion, Article 337b CO does not apply, since the RSTP take precedence over Swiss law, and, with respect to the second paragraph, because the *"other eventualities"* (such as *force majeure*) therein contemplated do not occur in the present case, in which the Player himself breached the Contract. Likewise Article 11.3 of the Contract does not apply, since it does not contain a liquidated damages clause: and does not provide for the amount to be paid by the Player in the event he breaches the Contract.

It therefore does not correspond to the principle, enshrined in the RSTP, according to which the party in breach must l pay compensation, and not the other way round.

66. In any case, Appellant cannot claim compensation for the period in which he was not able to perform his professional activities due to the injury, as the Player was injured when playing football, and the period of inactivity was due to the surgery: therefore, in both cases, by events not caused by the Respondent. In addition, the Respondent is not liable to reimburse the cost of surgery, since it was the Player's (and not the Club's) decision to undergo the operation.

67. Finally, with respect to the salary of January 2011, the Respondent underlines that on 25 January 2011 a fine (equivalent to USD 9,760) was imposed on the Player pursuant to Article 7(E) and (F) of the Club's Internal Regulations, because he had refused to train and had left South Korea without authorization. Therefore, should the Panel hold that the salary of January 2011 has to be paid, account should be taken of the fine, and its corresponding amount should be deducted from any payment ordered.

68. In the post-hearing brief of 12 March 2015, the Respondent drew the Panel's attention to the fact that the Decision found also the joint and several liability of Newell, and that Newell had not filed any appeal against the Decision. As a result, the Decision became final in that respect. Therefore, the Respondent requested the CAS in any case to *"state that the part of the … Decision where the FIFA DRC condemned the Argentinean club to pay to Respondent USD 400,000 plus 5% interest p.a. as from 4 October 2013 until the date of the effective payment, has become res judicata"*.

3. LEGAL ANALYSIS

3.1 Jurisdiction

69. CAS has jurisdiction to decide the present dispute between the parties.

70. In fact, the jurisdiction of CAS is not disputed by the parties, has been confirmed by the Order of Procedure, and is contemplated by the Statutes of FIFA as follows:

Article 66

"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

2. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

Article 67

"1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. […]".

3.2 Appeal Proceedings

71. As these proceedings involve an appeal against a decision rendered by FIFA, brought on the basis of rules providing for an appeal to the CAS, in a dispute relating to a contract, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, within the meaning, and for the purposes, of the Code.

3.3 Admissibility

72. The admissibility of the appeal is not challenged by the Respondent. The statement of appeal was filed within the deadline set in Article 67.1 of the FIFA Statutes. No further internal recourse against the Decision is available to the Appellant within the structure of FIFA. Accordingly, the appeal is admissible.

3.4 Scope of the Panel's Review

73. According to Article R57 of the Code,

"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. … ".

3.5 Applicable Law

74. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

75. Pursuant to Article R58 of the Code, the Panel is required to 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".

76. In the present case the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA's rules and regulations. More precisely, the Panel agrees

with the DRC that the regulations concerned – apart from the FIFA Statutes – are particularly the RSTP in their 2010 edition, in force since 1 October 2010, as the petition to FIFA was received on 8 March 2011.

77. The Panel notes that, pursuant to Article 66.2 of the FIFA Statutes,

"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

78. At the same time, the Panel remarks that the Contract at the heart of the dispute is governed by Korean law, pursuant to its Article 15. However, both parties requested the Panel to apply, and made submissions with respect to, Swiss law. In addition, no party led any evidence of the content of relevant Korean law, or contended if, and, if so, how, it differed from Swiss law in any relevant way. Indeed the Panel was not asked to consider or apply any provision of Korean law.

79. As a result, in addition to the FIFA's regulations, the Panel shall apply Swiss law to the merits of the dispute.

3.6 The Dispute

80. The object of these proceedings is the Decision, which ordered the Appellant to pay to the Respondent the amount of USD 400,000, plus 5% interest p.a. as from 4 October 2013 until the date of effective payment, for breach of the Contract. The Decision, in fact, is challenged by the Appellant and defended by the Respondent: the former wants it to be set aside; the latter requests it to be confirmed.

81. In the Decision, the DRC found that the Player had breached the Contract and that compensation had to be paid. More specifically:

i. as to the first point, it was held that:

- the Player terminated the Contract on 1 February 2011, and
- there was no *"just cause"* for termination, since the Club had complied with its obligations under the Contract with respect to its financial duties and the medical assistance;

ii. as to the second point, the DRC concluded that:

- compensation has to be established on the basis of the criteria set by Article 17 RSTP,
- in the absence of a *"compensation clause"* in the Contract, the application of those criteria, including the applicable *"attenuating circumstances"*, leads to the amount of EUR 400,000.

82. The points so listed mark the issues that this Panel has to examine for the determination of the dispute. More specifically, the Panel has to answer the following main questions:

i. did the Player terminate the Contract with or without *"just cause"*?

ii. what are the financial consequences of the Panel's answer to the first question?

83. Finally, in its post-hearing brief of 12 March 2015, the Respondent raised another issue, concerning the joint liability of Newell for the payment of the amount ordered by the DRC, as found in the Decision. In that respect, the Respondent requested from the Panel a declaration confirming that the portion of the Decision concerning Newell is *res judicata*. The Appellant invites the Panel to dismiss this request

84. The Panel shall answer each of those questions separately.

i. Did the Player terminate the Contract with or without "just cause"?

85. The first question to be addressed by the Panel concerns the finding of the DRC that the Player breached the Contract. According to the Decision, such breach was committed by the Player on 1 February 2011, when he declared the termination of the Contract, which the DRC held to be *"without just cause"*. As a result, the Appellant sought to show, in this CAS arbitration proceedings, that he actually had a *"just cause"* for the termination of the Contract. In the Appellant's submission, such *"just cause"* consisted mainly in the Respondent's failure to properly deal with the injury the Player had sustained while training in September/October 2010: the Respondent, according to the Appellant, provided inadequate medical assistance, insisted on ineffective treatment, disregarding the opinion expressed by the Player's personal doctors, and failed to pay the medical expenses incurred by the Player. As a result, the conditions for the continuation of the employment relations under the Contract had ceased to exist when the termination was declared.

86. In light of the foregoing, the question to be addressed is whether the attitude taken by the Respondent with respect to the Player's injury justified the Player's reaction resulting in the termination of the Contract. In other words, whether it gave a *"just cause"* for termination.

87. In that respect, the Panel notes that:

i. according to Article 8 of the Swiss Civil Code, any party wishing to prevail on a disputed issue must discharge its "burden of proof", *i.e.* it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. As a result, it was the burden of the Player to adduce evidence to prove the existence of a *"just cause"* for the termination of the Contract: the point is not even disputed by the parties;

ii. the existence, or not, of *"just cause"* to justify the termination declared by the Player does not detract from the effect of the Player's Termination Letter, as a result of which the Contract came in any case to an end. Under Swiss law (not contradicted on the point by the RSTP), pursuant to Article 337 CO, the employer, as well as the employee, may for valid reasons (*"just cause"*) at any time terminate the employment relationship without notice. In addition, it is well recognised under Swiss law that, except for certain cases which do not apply in this case, a termination without notice brings an employment

contract to an end with immediate effect even if the termination was in the absence of a valid reason. As a result, the existence of valid reasons (or *"just cause"*), or their absence, has an impact only on the financial consequences of the termination (issue which is dealt with further below: §§ 101-103);

iii. since the employment relationship between the Player and the Club under the Contract had come to an end as a result of the Player's Termination Letter, there is no reason to examine whether the Contract could thereafter be terminated by the Club because, when the Club's Termination Letter was sent, the Contract was no longer in force;

iv. according to Swiss law and the RSTP, as confirmed by the CAS jurisprudence, valid reasons (or *"just cause"*) for the termination of an employment contract between a club and a football player are 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 (Article 337 para. 2 CO): also this point is not controverted in this arbitration, as the parties only dispute whether in the given circumstances the Player could (or could not) be expected in good faith to continue the employment relation with the Club;

v. the existence of such circumstances is decided by the judge in his own discretion (Article 337 para. 3 CO).

88. The Panel notes that it is undisputed between the parties that, in September/October 2010, the Player had an accident while training with the Club, and that, as a result of such accident, he indicated to be suffering from pain in his right knee. In the same way, it is undisputed that following a MRI examination and some rehabilitation treatment, the Player finished the 2010 season playing for the Club in several occasions. For that period, the only argument between the parties in this arbitration concerns the Player's claim that, while playing, he was still suffering from the pain in his right knee, and that he was playing under the Club's pressure. In that latter regard, however, the Panel notes that no contemporary evidence (*i.e.*, dating October/November 2010) is offered by the Player to substantiate his claim that at the end of the 2010 season he was still suffering.

89. At the same time, it is undisputed that, at the beginning of the 2011 pre-season camp with the Club in Guam, the Player, after some days of training, complained again about a pain in his right knee, and that he was recommended, when examined by the Club's doctor, to continue a rehabilitation treatment in order to strengthen the muscles around the knee joint. It is also undisputed that the Club allowed the Player to leave Guam and return to South Korea, with the indication that he would be examined again by the Club's doctor on 19 January 2011.

90. What on the other hand, is disputed is the nature and importance of the lesion occurred to the Player, as well as the treatment suitable to deal with it.

91. Indeed, in its submissions, the Respondent, while not openly maintaining that the severity of the lesion was overstated by the Player, indicated that the Player was willing to terminate the Contract for reasons (of sporting, cultural and financial nature) other than the injury (of minor importance) he had suffered. While offering in this arbitration the deposition of one of its employees (Ms Mal Soon Lee) to confirm that the Player had requested at the end of December

2010 to be released, the Club is not relying on any direct evidence dating December 2010/January 2011 to support its claim. In addition, the fact that soon after the termination of the Contract the Player underwent an operation, which reported the presence of a rather extensive *"chondral lesion"*, shows, to the Panel's satisfaction, that the Player was not inventing a problem while he was still with the Club, since such lesion actually existed. As a result, there is no reason to doubt the Player's good faith in claiming that he had a physical problem, at least in January 2011.

92. The main question however concerns the treatment of such physical problem: the Player, in fact, submits that it had to be treated by way of surgery, and that the Club had taken a wrong approach to his problems; the Club indicates that its doctor had taken a different (conservative), but reasonable approach and that surgery, which at the time did not appear necessary, had not been absolutely ruled out.

93. The Panel had the benefit of listening to the deposition of two doctors at the hearing, who discussed the approach to be taken with respect to the lesion affecting the Player, as it appeared in the period from October 2010 to January 2011 on the basis of the two MRI examinations conducted on the Player's right knee.

94. On the basis of such depositions, the Panel finds that in October 2010, the *"minor chondral lesion"* reported by the first MRI did not require any surgery: the conservative treatment recommended by the Club's doctor was proper. Indeed, there is no evidence, as indicated above (§ 88), that, while playing at the end of the 2010 season, the Player was still suffering from pain.

95. In January 2011, however, (*i*) the Player claimed again that he had a physical problem, and (*ii*) the second MRI showed that the *"chondral lesion"* was still present. In such situation, the Colombian doctors contacted by the Player recommended surgery, while the Club's doctor insisted on *"rehabilitation"* to treat the *"symptoms"*, and, at the same time, indicated that *"close observation"* of such symptoms and physical findings was mandatory.

96. The Panel finds that the Player has not adduced sufficient evidence to substantiate his claim that the attitude of the Club's doctor was unreasonable. In that respect, contrary to the Player's submission, the Panel notes that:

    i. in the period October/December 2010, the *"conservative"* treatment had apparently worked to deal with the Players *"symptoms"*, since there is no evidence that the Player in such period reported any suffering, or that the Club put on the Player any pressure not to report any such suffering;

    ii. when in January 2011 the Player again complained about a pain in his right knee, it appeared reasonable to recommend again the *"conservative"* treatment, which had apparently worked at the end of the 2010 season: since such treatment was based on *"muscle's building"*, the Club's doctor, when examining the Player before the second MRI, could reasonably attribute the *"symptoms"* to a lost muscle strength. Therefore, at that stage, the Club's doctor could reasonably consider that further examination (let alone surgery) was not necessary;

iii. when the second MRI's findings were examined, the Club's doctor did not rule out surgery: he deemed it not to be decisive to solve the Player's problems (*"may not fully improve his symptoms"*); but at the same time mandated close observation of the effects of rehabilitation. In that respect, therefore, it appears to the Panel that the indications of the Club's doctor were possibly from an *ex post* view not fully appropriate, but they were not unreasonably diverging from the Player's contention that the evolution of his lesion, and the failure of conservative treatment to solve his problems, should have led to immediate surgery as the only available option to treat the lesion. The attitude of Dr. Choo cannot be described to amount to *"medical malpractice"*.

97. At the same time, however, the Panel notes that:

i. as found above (§ 91), the Player was not pretending a problem while he was still with the Club, since such lesion actually existed;

ii. the Player's doctors' indications that surgery had to be conducted to treat the lesion was also not unreasonable – actually, with hindsight, it may well have been necessary and even more appropriate to effectuate surgery as it was done by the Player's doctors (although of course it is not possible to know what would have happened if the course of treatment contemplated by the Club doctor had been pursued);

iii. on the basis of the opinions expressed by his doctors, the Player could in good faith believe that, in the absence of proper treatment, his career as footballer was in danger;

iv. in addition, the Player, independently on the position taken by the Club, may in good faith have felt (whether correctly or not) abandoned by the Club, when he decided to undergo the second MRI examination without the Club's assistance;

v. in an email of 22 January 2011, after the second MRI, the Player requested the Club to arrange for the examination of his knee by another doctor: such request was left by the Club without an answer, and the Player may in good faith have felt the absence of an answer to be unreasonable;

vi. on 25 January 2011, the Club imposed a fine on the Player for his absence during the pre-season training and for his behaviour: such fine, not anticipated by any warning, and in light of the circumstances of the case then existing (the Club well knowing that the reasons of the Player's absence were not a whim), does not seem completely warranted and has certainly contributed to an exacerbation of the tensions between the Player and the Club.

98. In other words and in summary, the Panel finds that both parties' behaviour led to the situation in which the termination of the Contract was declared by the Player:

i. the parties had, both in good faith, different views as to the treatment for the Player's injury;

ii. the Club disregarded the Player's request for a new medical examination and unreasonably imposed a fine;

iii. the Player felt in good faith that the Club was not taking care of him and that the treatment

recommended by the Club was not helping improve his physical condition. However, he somehow "rushed" to the termination of the Contract only four days after that the opinion of Dr Naranjo insisting for the surgery had been received by the Club, without any advance notice and without giving the Club the possibility to answer, in a situation where no real reasons of urgency existed;

iv. *"cultural"* reasons may have also influenced the parties' reciprocal attitude at the time of the termination of the Contract.

99. In light of the foregoing, the Panel finds that the provision of Article 337b para. 2 CO applies in this case: the Panel, in the exercise of its discretion, holds in fact that the termination of the Contract was justified, *i.e.* that it was for *"just case"*, since the Player could in good faith and objectively believe that the continuation of the employment relationship was not possible (Article 337 para. 2 CO), but that such *"just cause"* does not consist solely in a Respondent's breach of the Contract – as it was the result of a unique, objective situation to which both parties equally contributed.

100. In summary, the Panel does not agree with the Decision's conclusion: on 1 February 2011, the Player terminated the Contract with *"just cause"*, even though in a very unusual situation.

ii. What are the financial consequences of the answer to the first question?

101. As a result of the foregoing, in accordance of Article 337b para. 2 CO, the Panel has to decide in its discretion on the financial consequences of a termination without notice, taking into account all circumstances of the case. In that respect, the provisions set forth by the RSTP, and chiefly its Article 17, are not of immediate assistance, as they provide for some criteria for the quantification of damages only in the event a contract is terminated because of (or through) a breach by one of the parties, *i.e.* in a situation which does not correspond to the present case.

102. In the exercise of such discretion the Panel notes the following:

i. with respect to the position of the Player that:

- the salary for the month of January 2011, *i.e.* accrued before the termination of the Contract, was not paid, as it is conceded also by the Club. Therefore the Player should be entitled to receive USD 17,000 in that respect;
- under Article 11.3 of the Contract, the parties agreed on the measure of compensation to be paid to the Player in the even of termination of the Contract for reasons attributable to the Player, by reference to the *"remainder of the Basic Annual Compensation"*. As such *"Basic Annual Compensation"* was defined to correspond to USD 204,000, at the end of January 2011, the amount of compensation which the Player could have claimed, if the termination had been attributed to the Club, corresponded to USD 187,000;
- the Player claims reimbursement of some medical expenses, roughly corresponding to USD 6,000, which, he maintains, would have been borne by the Club, if the Contract had been correctly performed; however
- as a result of the Contract's termination, the Player was enabled to sign a new

employment contract with Newell, effective as of 15 July 2011, for a monthly salary roughly corresponding to USD 10,000, with a signing fee of USD 189,000;

ii. with respect to the position of the Club that:

- because of the Player's early departure, the Club, as determined by the DRC, was left with unamortized costs for the acquisition of the Player's services in an amount roughly corresponding to USD 480,000;
- as a result of the Contract's termination, the Club lost the services of the Player; however
  - √ for a period lasting at least until 30 June 2011, even if the Contract had not been terminated, as a result of the surgery the Player could not be fielded by the Club;
  - √ the Club saved the salary it had to pay to the Player until 31 December 2012 (in an amount of USD 391,000), as well as all the other payments for bonuses and benefits which it was bound to pay under the Contract;
  - √ the Club had the sporting opportunity to hire a new player, able to be fielded also in the period in which, had the Contract not been terminated, the Player could not play, because of the surgery.

103. All in all, the Panel finds that both for the Player and for the Club the "prejudice" deriving from the Contract's termination matches the "benefit" it produced to each of them. As a result, the Panel finds it proper to order only the payment by the Club to the Player of the amount corresponding to the monthly salary for January 2011, *i.e.* USD 17,000, which was actually earned by the Player before the termination of the Contract, without any deduction for the unwarranted fine imposed by the Club. Interest shall accrue on that amount at the rate of 5% p.a. starting on 1 February 2011, date on which that amount became due pursuant to Article 339 para. 1 CO, to the date of final payment. On the other hand, no payment is to be ordered with respect to the financial consequences of the termination of the Contract.

iii. What is the position of Newell?

104. As mentioned, the Respondent, in its post-hearing brief of 12 March 2015, drew the Panel's attention to the fact that the Decision found also the joint and several liability of Newell, and that Newell has not filed any appeal against the Decision. Therefore, the Respondent requested this Panel in any case to *"state that the part of the … Decision where the FIFA DRC condemned the Argentinean club to pay to Respondent USD 400,000 plus 5% interest p.a. as from 4 October 2013 until the date of the effective payment, has become res judicata"*. The Appellant requested that such claim be dismissed.

105. The Panel finds such request to be inadmissible, for at least two compelling reasons:

i. Newell is not a party to this arbitration. Therefore, no request for relief against it can be entertained by this Panel;

ii. according to the Article R56 of the Code, new claims are not admissible, in the absence of an agreement between the parties or an authorization by the President of the Panel,

based on exceptional circumstances. In this case, the Appellant did not agree to the filing of that request; and authorization by the President of the Panel was not even sought.

106. As a result, the Panel dismisses the Respondent's request to make a finding with respect to Newell.

3.7 Conclusion

107. In light of the foregoing, the Panel holds that the appeal brought by the Player is to be partially upheld and the Decision to be modified so that the Respondent is ordered to pay to the Appellant an amount of USD 17,000, plus interest at the rate of 5% p.a. starting on 1 February 2011 until the date of full payment. All other prayers for relief are to be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 10 June 2014 by Mr Carmelo Enrique Valencia Chaverra against the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 4 October 2013 is partially upheld.

2. Ulsan Hyundai Football Club is ordered to pay to Mr Carmelo Enrique Valencia Chaverra the amount of USD 17,000 (seventeen thousand US Dollars), plus interest at the rate of 5% (five percent) p.a. starting on 1 February 2011 until the date of full payment.

3. (…).

4. (…).

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