Arbitration CAS 2015/A/3999 Al Ittihad Club v. Diego de Souza Andrade & CAS 2015/A/4000 Diego de Souza Andrade v. Al Ittihad Club & Fédération Internationale de Football Association (FIFA), award of 17 March 2016

Panel: Mr Fabio Iudica (Italy), President; Mr Pavel Pivovarov (Russia); Mr Manfred Nan (The Netherlands)

Football
Compensation for early termination of employment contract with just cause
Standing to be sued of FIFA
Just cause
Non-payment of salaries as just cause
Liquidated damage clauses
Liquidated damage clauses in employment contracts
Reduction of excessive damage foreseen in liquidated damage clauses
Sporting sanctions

1. **Under Swiss law, an individual or entity has standing to be sued if it is personally obliged by the "disputed rights" at stake. Neither criticism brought against FIFA with regard to decisions rendered by FIFA dispute resolution bodies nor the fact that FIFA may have a general, abstract interest that its members behave in accordance with the applicable FIFA rules suffice to constitute an "interest at stake" for the purpose of conferring FIFA the capacity to be sued. Therefore, FIFA has no standing to be sued where it is only involved in a dispute between two parties as the adjudicating body. This is because decisions rendered by FIFA bodies acting like a court of first instance over disputes between two or more of its members cannot be considered *"resolutions"* of an association within the scope of article 75 of the Swiss Civil Code (SCC). Conversely, in cases where FIFA imposes disciplinary sanctions or in all other cases where the matter concerns a membership related decision, FIFA would have capacity to be sued, according to article 75 of the SCC, as the association which has passed the decision appealed to CAS and thereby expressed its administrative function.**

2. **An employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach a mutual agreement on the end of the contract. A valid reason is considered to be, in particular, any circumstance under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship. In this context the overall circumstances of the case have to be taken into account, in particular the nature of the breach of obligation.**

3. **The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated - constitute "just cause" for termination of the contract; for**

the employer's payment obligation is his main obligation towards the employee, in case of failure of which the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant; only relevant is whether the breach of obligation is such that it causes the confidence of the one party in future performance in accordance with the contract to be lost. However, two conditions apply. Firstly, the amount paid late by the employer may not be "insubstantial" or completely secondary, and secondly, the employee must have given a warning, *i.e.* draw the employer's attention to the fact that his conduct is not in accordance with the contract.

4. **In case the wording of a contractual clause allows the conclusion that the will of the parties was to stipulate in advance the amount of compensation for breach of contract by one of the parties, the clause in question is to be considered as liquidated damage provision. It is irrelevant whether such clauses are called "buy out-clauses", indemnity or penalty clauses, or otherwise; legally, they therefore correspond to liquidated damages provisions.**

5. **The parties to an employment contract are entitled to include liquidated damages clauses in their agreement; however the wording of such clause should leave no room for interpretation, and must clearly reflect the true intention of the parties. The respective clause may generally deviate from article 17(1) of the FIFA Regulations on the Status and Transfer of Players (RSTP). However such deviation is not always acceptable, particularly due to a possible unequal power of bargain in the negotiation of the terms of an employment contract.**

6. **In case a CAS panel considers the amount of compensation to be awarded under a liquidated damages clause to be disproportionate or excessive, the panel may consider to reduce the amount of compensation calculated on the basis of that clause under the provisions of articles 163(3) and 337(c)(2) of the Swiss Code of Obligations (SCO). A liquidated damages clause may be considered as "excessively high" under article 163(3) SCO if there is a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand. However, penalty clauses may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor insofar as the penalty clause also includes a punishment aspect.**

7. **There is a well-accepted and consistent practice of the FIFA Dispute Resolution Chamber (DRC) not to automatically apply the sanctions stipulated in article 17(3) and (4) RSTP. However, FIFA's policy in this regard has recently changed towards "repeated offenders", *i.e.* clubs in situation of constant and repeated disrespect of contractual obligations. Nevertheless, decisions that were rendered some ten years ago can in principle not be taken into account in the assessment of whether a club can be denominated as a repeated offender.**

I. PARTIES

1. Mr Diego de Souza Andrade (hereinafter: the "Appellant/Counter-Respondent" or the "Player") is a professional football player of Brazilian nationality.

2. Al Ittihad Club (hereinafter: the "First Respondent/Counter-Appellant" or the "Club") is a football club with its registered office in Jeddah, Saudi Arabia. The Club is registered with the Saudi Arabian Football Federation (hereinafter: the "SAFF"), which in turn is affiliated to the Fédération Internationale de Football Association.

3. The Fédération Internationale de Football Association (hereinafter: the "Second Respondent" or "FIFA") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental federations, national associations, clubs, officials and football players worldwide.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeal arbitration proceedings and during the hearing. This background is set out for the sole purpose of providing a synopsis of the matter in dispute.

5. On 21 July 2012, the Player and the Club concluded an employment contract (hereinafter: the "Employment Contract") for a period of three sporting seasons, *i.e.* valid from 23 July 2012 until 30 June 2015, containing, *inter alia*, the following terms:

> *"5. Remuneration, other benefits and personal situation:*
>
> *5.1 Net Annual Wage during the contract period:*
>
> *Season 2012-2013: 2,500,000 (Two Million and Five Hundred Thousand) US Dollars net of Saudi taxes and/or retainers.*
>
> *Season 2013-2014: 2,500,000 (Two Million and Five Hundred Thousand) US Dollars, net of Saudi taxes and/or retainers.*
>
> *Season 2014-2015: 3,000,000 (Three Million) US Dollars net of Saudi taxes and/or retainers.*
>
> *Payment in each season shall be as follows:*

a) A sum of 1,000,000 US Dollars as an advance payment for each of seasons 2012/2013 and 2013/14, and a sum of 1,200,000 US Dollars for season 2014-2015 to be paid on or before the 15th of September 2012 and on or before the 15th of August of the two following seasons.

b) The rest as follows: For seasons 2012/13 and 2013/14 the annual wage shall be paid in 12 (twelve) instalments of 125,000.00 US Dollars (One Hundred and Twenty Five Thousand USD) NET each, to be paid no later than 7 (seven days) of every new month in arrears.

c) For season 2014/15, the annual wage shall be paid in 12 (twelve) instalments of 150,000.00 US Dollars (One Hundred and Fifty Thousand) NET each to be paid no later than 7 (seven) days of every new month in arrears.

[…]

In case of non-payment of three consecutive installments, or five non-consecutive installments within one season, the Player will be entitled to claim them immediately through a written notice to the club. In case that the payment is not done within 5 working days of the notice, the Player shall have the right to end the contract for just cause and claim for an indemnity to the club for the remaining of his contract.

The non-payment will be configured in case the club does not pay the whole installment value (Advanced Payment and/or Annual Wage) up to the respective date. The payment of the Advanced Payments do not allow the club to retard any installment of the Annual Wage within the understanding that the proportional of Basic Wage is already paid, or any other understanding".

"8. In case of early termination of the present contract by the Player (as per art. 17 of the FIFA regulations for the status and transfer of players), without just cause, the Player shall be responsible for the payment of an indemnity of 14,000,000.00 US Dollars (Fourteen Million USD), which he shall pay immediately after the said termination and if not a 10% interest per annum will apply".

6. Between August and September 2012, the Club made two payments in cash to the Player of USD 13,333.33 each.

7. The Club maintains that, on 27 September 2012, it concluded a revised payment schedule with the Player, which was allegedly signed on the Player's behalf by Mr Marcel Belfiore, a Brazilian Attorney-at-Law. The Player however maintains that no such revised payment schedule was concluded. The payment schedule determines the following:

Date	*Payee*	*Currency*	*Amount*	*Description*
7-Oct	*Diego de Souza*	*$*	*125,000.00*	*Salary September*
7-Nov	*Diego de Souza*	*$*	*125,000.00*	*Salary October*
15-Nov	*Eduardo Uram*	*$*	*200,000*	*Commission Diego Souza#*
15-Nov	*Diego de Souza*	*$*	*500,000.00*	*Advance payment*
10-Nov	*Vasco da Gama*	*€*	*1,500,000.00*	*Transfer fee 2nd Instalment*
7-Dec	*Diego de Souza*	*$*	*125,000.00*	*Salary November*
7-Jan	*Diego de Souza*	*$*	*125,000.00*	*Salary December*
7-Feb	*Diego de Souza*	*$*	*125,000.00*	*Salary January*
15-Feb	*Vasco Da Gama*	*€*	*2,500,000.00*	*Transfer fee 3rd Instalment*
15-Feb	*Diego de Souza*	*$*	*500,000.00*	*Advance payment*
15-Jun	*Eduardo Uram*	*$*	*200,000.00*	*Commission Diego Souza#*
7-Aug	*Diego de Souza*	*$*	*125,000.00*	*Salary July 2012*
7-Aug	*Diego de Souza*	*$*	*125,000.00*	*Salary August 2012*

8. On 15 October 2012, the Player requested the Club to proceed with the payment of the advance payment in the amount of USD 1,000,000 and his salary of July, August and September (USD 125,000 each) by 22 October 2012.

9. Also on 15 October 2012, the Player opened a Saudi bank account.

10. On 18 October 2012, the Club paid the Player an amount of USD 98,000 (which together with the two payments of USD 13,333.33 amounted to USD 124,666.67, *i.e.* approximately one monthly salary) and referred to the revised payment plan whereby the Club and the Player would have rescheduled the payment of the Player's receivables as set out in the Employment Contract.

11. On 22 October 2012, the Player acknowledged receipt of the payment of USD 98,000 but disputed that a payment plan was concluded and reiterated his request of 15 October 2012, granting the Club a *"further and final term of 3 (three) days to settle the entirety of the afore-mentioned amount"*.

12. On 26 October 2012, the Player terminated the Employment Contract in writing.

13. Also on 26 October 2012, the Club allegedly deposited an amount of USD 1,250,000 on an escrow account. Mr Essam ben Adel Elmassarany, Lawyer and Legal advisor, issued a letter on the same date, informing *"to whom it may concern"* that such amount was indeed deposited and that *"[t]he amount shall be released in full to the beneficiary Diego de Souza Andrade on appearance at our office at the address above accompanied by an Ittihad official"*.

B. Proceedings before the Dispute Resolution Chamber of FIFA

14. On 29 October 2012, the Player lodged a claim against the Club with the Dispute Resolution Chamber of FIFA (hereinafter: the "FIFA DRC"), claiming payment of the amount of USD 8,750,000 and sporting sanctions to be imposed on the Club. The amount of USD 8,750,000 consisted of USD 1,277,000 as outstanding amounts, USD 6,723,000 as compensation/ indemnity for the premature termination of the employment relationship and USD 750,000 as damages in connection with the specificity of sport and because the contractual breach fell within the "protected period".

15. On 10 December 2012, the Club lodged an answer to the Player's claim, including a counterclaim. The Club claimed to be entitled to the amount of USD 14,000,000 as compensation for breach of contract by the Player and for sporting sanctions to be imposed on the Player.

16. On 1 March 2013, the Player lodged an answer to the Club's counterclaim and reduced his claim to the amount of USD 8,625,000, *i.e.* by USD 1,250,000 as outstanding remuneration, USD 6,625,000 as compensation/indemnity for the premature termination of the employment relationship and USD 750,000 as damages in connection with the specificity of sport and because the contractual breach fell within the "protected period".

17. On 18 December 2014, the FIFA DRC rendered its decision (hereinafter: the "Appealed Decision"), with the following operative part:

> *"1. The claim of the* [Player] *is partially accepted.*
>
> *2. The* [Club] *is ordered to pay to the* [Player] *within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of USD 1,250,000, plus 5% interest p.a. until the date of effective payment as follows:*
>
> *a. 5% p.a. as of 8 September 2012 on the amount of USD 125,000;*
>
> *b. 5% p.a. as of 16 September 2012 on the amount of USD 1,000,000;*
>
> *c. 5% p.a. as of 8 October 2012 on the amount of USD 125,000.*
>
> *3. The* [Club] *is ordered to pay to the* [Player] *compensation for breach of contract in the amount of USD 2,590,000, plus 5% interest p.a. as from 29 October 2012 until the date of effective payment, within 30 days as from the date of notification of this decision.*
>
> *[…]*
>
> *5. Any further claims lodged by the* [Player] *are rejected.*
>
> *6. The counterclaim of the* [Club] *is rejected.*

[…]".

18. On 5 March 2015, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"[T]he Chamber deemed that the underlying issue in this dispute, considering the respective claims of the* [Player] *and the* [Club]*, was to determine whether the contract had been unilaterally terminated with or without just cause by the* [Player] *on 26 October 2012.*

- *[…] [T]he members of the Chamber analysed the payment plan submitted by the* [Club] *to evidence the alleged amendment to the pay dates of the three instalments on the basis of the termination of the contract by the* [Player]. *Taking into consideration, inter alia, that the payment plan was not signed by any of the parties to the contract and that there is no reference in it as to an amendment to the contract, the DRC concluded that such payment plan could not validly modify the pay dates contractually agreed by the parties".*

- As to the argument raised by the Club regarding the alleged breach by the Player of article 5(1)(d) of the Employment Contract by failing to have a Saudi bank account, the FIFA DRC, as a preliminary remark, *"took into consideration that the parties to the contract did not dispute the fact that having a residence permit is a condition precedent for a foreigner in Saudi Arabia, e.g. the* [Player]*, to open a Saudi bank account.*

- *The members of the Chamber recalled that, according to arts 5.8 and 5.10 of the contract […], it was an obligation of the* [Club] *to have a residence permit issued in favour of the* [Player]. *Therefore, the members of the Chamber concluded that any delay in informing the* [Club] *of the opening of a Saudi bank account by the* [Player] *was due to the breach of the* [Club] *regarding its obligations set forth in arts 5.8 and 5.10 of the contract.*

- *The Chamber considered relevant to point out that, without prejudice of the fact that in this specific case the obligation of having a residence permit issued in favour of the* [Player] *was expressly established in the contract as an obligation of the* [Club]*, arts 5.8 and 5.10 of the contract are consistent with its long-standing and well-established jurisprudence in accordance with which the grant of a work or residence permit is the sole responsibility of the corresponding club.*

- *Furthermore, the DRC additionally bore in mind that the* [Club] *made two partial payments in cash on account of the first instalment of the annual wage of the* [Player] *for the season 2012/2013, according to the receipts for SAR (Saudi riyal) 50,000 dated 26 August 2012 and 11 September 2012 submitted by the* [Club]*, which may also* [be] *found on file. Hence, the DRC decided that, based on the previous performance of its own obligations, the* [Club] *could not validly withhold payments arguing the non-existence of a Saudi bank account, which is, as already mentioned above, a consequence of the* [Club's] *breach of an obligation of the contract.*

- *In addition to the foregoing considerations, the Chamber noted that the parties did not dispute that the* [Player] *informed the* [Club] *of the opening of his Saudi bank account on 15 September 2012.*

Based on that, the members of the DRC pointed out that the [Club] *had more than one month before the contract was terminated to make the payment of the second instalment of USD 125,000, due on 7 September 2012, and the advance payment for the season 2012/2013 in the amount of USD 1,000,000, due on 15 September 2012, by depositing the relevant sum in the Saudi bank account of the* [Player].

- *For these reasons, the Chamber decided also to reject the* [Club's] *argument as to the termination of the contract by the* [Player] *without just cause based on his alleged failure to have a Saudi bank account.*

- *For the sake of completeness of its analysis, the DRC deemed it appropriate to point out that the statement dated 26 October 2012 submitted by the* [Club] *in order to support the argument referred to […] above, by means of which it is declared that USD 1,250,000 were in escrow until the appearance of the* [Player] *in Mr Esam Al-Masarani's offices does not mean that the due amount was actually paid to the* [Player] *on the termination date.*

- *In continuation of its analysis and still bearing in mind the wording of art. 12 par. 3 of the Procedural Rules, the Chamber noted that on 15 October 2012 the* [Player] *put the* [Club] *in default, in writing, for its failure to pay the total amount of USD 1,375,000, corresponding to an advance payment and three monthly salaries. Furthermore, the Chamber noted that a second reminder dated 22 October 2012 was sent by the* [Player] *to the* [Club] *for the total amount of USD 1,250,000, corresponding still to the advance payment as well as two outstanding salaries. The DRC further noted that on 26 October 2012, as the* [Player] *terminated the contract, the amounts reiterated in the second reminder remained completely outstanding, that the* [Club] *had a reasonable time limit to pay the outstanding remuneration after being warned in writing on 15 October 2012 but did not pay in full within the relevant deadline and that it was a material default by the* [Club] *in the sense that the amount owed to the* [Player] *was significant – he should have received 15% of the value of the contract by its termination date but he actually received only 1.5%-.*

- *In view of the foregoing, and in accordance with its long-standing jurisprudence, the DRC concluded that the* [Player] *terminated the contract with just cause on 26 October 2012.*

- *For the sake of completeness of its analysis, the members of the DRC recalled the content of art. 5.1 of the contract, which provides that there is just cause for the* [Player] *to terminate it "[i]n case of non-payment of three consecutive instalments […] (Advanced Payment and/or Annual Wage) […] within 5 working days of the notice" to be sent by the* [Player] *to the* [Club], *claiming payment thereof.*

- *In this respect, the Chamber noted that the termination of the contract by the* [Player] *additionally complied with the procedure set forth in art. 5.1 of the contract, i.e. the* [Player] *sent a written notice to the* [Club] *on 15 October 2012 – the existence and receipt of which was undisputed by the* [Club] *–, claiming the payment of four consecutive instalments within five working days. The* [Club], *however, did not proceed with such payment in full and, therefore, the* [Player] *terminated the contract on 26 October 2012, after five working days had elapsed since the notice sent on 15 October 2012.*

- *Based on the foregoing, the Chamber concluded, once again, that the* [Player] *had just cause to unilaterally terminate the contract with the* [Club] *on 26 October 2014 […]".*

- As to the outstanding remuneration, *"the Chamber took into account that, as of the contract's termination date, the* [Club] *had not paid to the* [Player] *USD 1,250,000 out of the aforesaid USD 1,375,000, neither in cash, as previously done in respect of partial payments on account of the first instalment, nor via deposit in his bank account after 15 September 2012. The Chamber took also into account that the second instalment of USD 125,000 fell due on 7 September 2012, the USD 1,000,000 advance payment for the season 2012/2013 fell due on 15 September 2012 and the third instalment of USD 125,000 fell due on 7 October 2012, […].*

- *[…] In accordance with the principle pacta sunt servanda, the Chamber decided that the* [Player] *is, therefore, entitled to outstanding remuneration in the total amount of USD 1,250,000 pursuant to art. 5.1 of the contract".*

- As to the compensation for breach of contract, *"the DRC decided that it cannot apply the compensation clauses under the contract in view of the fact that they establish disproportionate rights for the parties to the contract. Consequently, the deciding body concluded that art. 5.1 of the contract […] must be disregarded in the assessment of the amount of compensation to be awarded to the* [Player].

- *Therefore, the members of the Chamber determined that the amount of compensation payable by the* [Club] *to the* [Player] *had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. […]*

- *[…] [T]he Chamber proceeded with the calculation of the receivables of the* [Player] *under the contract as from its date of termination with just cause by him, i.e. 26 October 2012, until 30 June 2015, and concluded that the* [Player] *would have received in total USD 6,625,000 as remuneration, had the contract been executed until its expiry date. Consequently, the Chamber concluded that the amount of USD 6,625,000 serves as the basis for the final determination of the amount of compensation for breach of contract in the case at hand […].*

- *[…] The Chamber recalled that, on 7 January 2013, the* [Player] *signed an employment contract with* [Cruzeiro]*, valid until 6 January 2016, in accordance with which the* [Player] *was to receive a total remuneration of Brazilian reals (BRL) 2,500,000 from 7 January 2013 until 14 July 2013.*

- *Likewise, the DRC recalled that, on 15 July 2013, the* [Player] *signed a second employment contract with the Ukrainian club, FC Metalist Kharkiv, valid until 30 June 2017, in accordance with which the* [Player] *was to receive a total remuneration of approx. USD 2,585,000 from 15 July 2013 until 31 July 2014 and from 1 January 2015 until 30 June 2015.*

- *Moreover, the Chamber recalled that, on 1 August 2012* [*rectius* 2014]*, the* [Player] *signed a third employment contract with the Brazilian club, Sport Club do Recife, valid until 31 December 2014,*

in accordance with which the [Player] *was to receive a total remuneration of BRL 450,000 from 1 August 2012* [*rectius* 2014] *until 31 December 2014.*

- *Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand as well as the* [Player's] *general obligation to mitigate his damage, the Chamber decided to partially accept the* [Player's] *claim and that the* [Club] *must pay the amount of USD 2,590,000 as compensation for breach of contract in the case at hand".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 23 March 2015, the Club lodged a Statement of Appeal with the Court of Arbitration for Sport (hereinafter: the "CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (2013 edition) (hereinafter: the "CAS Code"). The Club's appeal was directed against the Player only. In this submission, the Club nominated Mr Pavel Pivovarov, Deputy General Director of FC Zenit JSC in Saint-Petersburg, Russian Federation, as arbitrator.

20. On 26 March 2015, the Player lodged a Statement of Appeal with CAS in accordance with Article R48 of the CAS Code. The Player's appeal was directed against both the Club and FIFA. In this submission, the Player nominated Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands, as arbitrator.

21. On 31 March 2015, further to an invitation from the CAS Court Office, the Club and the Player informed the CAS Court Office that they had no objection to consolidate the two proceedings in accordance with Article R52 of the CAS Code.

22. On 15 April 2015, the Club filed its Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments. The Club challenged the Appealed Decision, submitting the following requests for relief:

> *"1. To uphold the present appeal of Al Ittihad Club, in view of the several reasons pointed out in both Statement of Appeal and this Appeal brief. To dismiss fully the decision of the FIFA Dispute Resolution Chamber in the case ref. fes 12-03024 of 18 December 2014.*
>
> *2. To issue a new decision stating that the Player Diego de Souza Andrade has terminated the employment contract with the Club without just cause and thus, is liable to pay compensation in favour of the Club amounting USD 13,750,000 (Thirteen Million Seven Hundred Fifty Thousand US Dollars) plus interest at 10% rate p.a. as of the day of unjust termination, i.e. 26 October 2012.*
>
> *3. To state that the new Club of the Player – Cruzeiro – is jointly and severally liable to pay the aforementioned compensation. In case that CAS considers itself incompetent to rule against Cruzeiro, in case that the Player would be pronounced obliged to pay compensation to Al Ittihad, we strongly insist on referring the case back to the FIFA DRC for reconsideration in part of responsibility of Brazilian club for joint payment of this compensation.*

Or Alternatively:

4. *In the unlikely scenario that the most honourable members of the Panel deem that the Player terminated his contract with just cause – ut non – it is important to recall the duty of the alleged "injured party" to duly mitigate its losses in light with previous CAS jurisprudence related hereto and as well with contractual provisions to establish the total and final amount of financial responsibility compensation of the Club as USD 500,000 being two monthly installments (USD 250,000) and pro-rata part of advance payment for the first season as per conditions of the employment contract being USD 250,000.*

But in any case:

5. *To fix a sum of 25,000 CHF to be paid by the Player to the Appellant, to help the payment of its legal fees costs.*

6. *To condemn the Player to the payment of the whole CAS administration costs and the Arbitrators fees".*

23. Also on 15 April 2015, the Player filed his Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments. The Player challenged the Appealed Decision, submitting the following requests for relief:

"I. That the present appeal shall be upheld in totum;

II. That the Appealed Decision shall be partially upheld and partially set-aside;

III. Be granted a reasonable time limit to provide the Panel with a proper calculation of all amounts he effectively received from football clubs between 27 October 2012 and today.

IV. That, once appointed, the President of the Panel requests FIFA the entire file related to the Appealed Decision in line with art. R57 of the Code;

V. Order the Club to inform in detail how it had access to Annex 25 of the Answer filed before FIFA;

VI. Order the Club to pay to the Player USD 1,250,000 (one million one hundred twenty five thousand US Dollars) as outstanding and unpaid salary;

VII. Order the Club to pay to the Player USD 6,625,000 (six million six hundred twenty five thousand US Dollars) as compensation under clause 5.1 of the Employment Contract;

VIII. Alternatively, in the event clause 5.1 is disregarded, order the Club to pay the Player an amount determined according to article 17 par. 1 of the FIFA RSTP taking into account the following head of damages:

VIII-1. USD 6,625,000 (six million six hundred twenty five thousand US Dollars) as salaries under the existing the [sic] *Employment Contract;*

VIII-2. A value corresponding to the benefits the Player would earn under the existing Employment Contract between 27 October 2012 and 30 June 2015, including a) bonuses and incentives for the Player under the term of the Club's bonus and incentive scheme (the Club should be requested [sic] *inform the amount to which the Player was entitled); b) thirty-six intercontinental business class return tickets in three years in the amount of USD 360,000.00 (three hundred sixty thousand U.S. Dollars); c) a car free of charge with insurance and service costs; d) four bedroom house fully-furnished and located on a condominium for foreign residents; e) medical insurance for the Player and his family, which shall cover any and all possible health related problems.*

VIII-3. USD 750,000.00 (seven hundred and fifty [sic] *US Dollars) or any other sum estimated by the DRC at its best discretion as damages for the specificity of sport and because the contractual breach fell within the Protected Period;*

VIII-4. A deduction of the amounts under the new employment contracts that takes into account only the amounts effectively received by the Player under such contracts;

IX. Order that legal interest at a rate of 5% p.a. be applied to the foregoing amounts from the moment when each amount became due and until effective payment is made;

X. Order FIFA to impose sporting sanctions on the Club banning it from registering any new players, either nationally or internationally, for two registration periods;

XI. Order the Club to reimburse the Player for legal expenses in the amount of CHF 25.000,00 (twenty five thousand Swiss Francs), or, in the alternative, order that legal costs be awarded ex aequo et bono; and

XII. Order the Club to bear any and all FIFA and CAS administrative and procedural costs, which have already been incurred or may eventually be incurred by the Player".

24. On 16 June 2015, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeal Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted as follows:

- Mr Fabio Iudica, Attorney-at-Law in Milan, Italy, as President;
- Mr Pavel Pivovarov, Deputy General Director of FC Zenit JSC in Saint-Petersburg, Russian Federation; and
- Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands, as arbitrators

25. On 5 June 2015, the Club filed its Answer in respect of the Player's appeal in accordance with Article R55 of the CAS Code. The Club submitted the following requests for relief:

"1. To fully dismiss the Appeal brief presented by the Player Diego de Souza Andrade due to the reasons numerated in the present Response and respective Appeal Brief of the Club.

2. To uphold the Appeal brief of the Al Ittihad Club, stating that the Player Diego de Souza Andrade breached the contract with the Club terminating it without just cause.

3. To issue a new decision dismissing the Appealed decision of the FIFA DRC stating that the Player Diego de Souza Andrade has terminated the employment contract with the Club without just cause and thus, is liable to pay a compensation in favour of the Club amounting USD 13,750,000 (Thirteen Million Seven Hundred Fifty Thousand US Dollars) plus interest at 10% rate p.a. as of the day of unjust termination, i.e. 26 October 2012.

4. To state that the new Club of the Player – Cruzeiro – is jointly and severally liable to pay the aforementioned compensation. In case that the CAS considers itself incompetent to rule against Cruzeiro, in case that the Player would be pronounced obliged to pay compensation to Al Ittihad, we strongly insist on referring the case back to the FIFA DRC for reconsideration in the part of responsibility of Brazilian clubs for joint payment of this compensation.

Or Alternatively:

5. In the unlikely scenario that the most honourable members of the Panel deem that the Player terminated his contract with just cause – ut non – it is important to recall the duty of the alleged "injured party" to duly mitigate its losses in light with previous CAS jurisprudence related hereto and as well with contractual provisions to establish the total and final amount of financial responsibility compensation of the Club as USD 500,000 being two monthly installments (USD 250,000) and pro-rata part of advance payment for the first season as per conditions of the employment contract being USD 250,000.

But in any case:

6. To fix a sum of 25,000 CHF to be paid by the Player to the Appellant, to help the payment of its legal fees costs.

7. To condemn the Player to the payment of the whole CAS administration costs and the Arbitrators fees".

26. On 29 June 2015, FIFA filed its Answer in respect of the Player's appeal in accordance with Article R55 of the CAS Code. FIFA submitted the following requests for relief:

"1. That the CAS rejects the appeal at hand and confirms the presently challenged decision passed by the Dispute Resolution Chamber (hereinafter: the DRC) on 18 December 2014 in its entirety.

2. That the CAS orders the Appellant to bear all the costs of the present procedure.

3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand".

27. On 6 July 2015, the Player filed his Answer in respect of the Club's appeal in accordance with Article R55 of the CAS Code. The Player submitted the following requests for relief:

"I. That the appeal filed by the Club be dismissed.

II. That the appeal filed by the Player shall be upheld in totum;

III. That the Appealed Decision shall be partially upheld and partially set-aside;

IV. Order the Club to inform in detail how it had access to Annex 25 of the Answer filed before FIFA;

V. Order the Club to pay to the Player USD 1,250,000 (one million one hundred twenty five thousand US Dollars) as outstanding and unpaid salary;

VI. Order the Club to pay to the Player USD 6,625,000 (six million six hundred twenty five thousand US Dollars) as compensation under clause 5.1 of the Employment Contract;

VII. Alternatively, in the event clause 5.1 is disregarded, order the Club to pay the Player an amount determined according to article 17 par. 1 of the FIFA RSTP taking into account the following head of damages:

VII-1. USD 6,626,000 (six million six hundred twenty five thousand US Dollars) as salaries under the existing the Employment Contract;

VII-2. A value corresponding to the benefits the Player would earn under the existing Employment Contract between 27 October 2012 and 30 June 2015, including a) bonuses and incentives for the Player under the term of the Club's bonus and incentive scheme (the Club should be requested inform the amount to which the Player was entitled); b) thirty-six intercontinental business class return tickets in three years in the amount of USD 360,000.00 (three hundred sixty thousand U.S. Dollars); c) a car free of charge with insurance and service costs; d) four bedroom house fully-furnished and located on a condominium for foreign residents; e) medical insurance for the Player and his family, which shall cover any and all possible health related problems.

VII-3. USD 750,000.00 (seven hundred and fifty [sic] *US Dollars) or any other sum estimated by the DRC at its best discretion as damages for the specificity of sport and because the contractual breach fell within the Protected Period;*

VII-4. A deduction of the amounts under the new employment contracts that takes into account only the amounts effectively received by the Player under such contracts;

VIII. Order that legal interests at a rate of 5% p.a. be applied to the foregoing amounts from the moment when each amount became due and until effective payment is made;

IX. Order FIFA to impose sporting sanctions on the Club banning it from registering any new players, either nationally or internationally, for two registration periods;

X. Order the Club to reimburse the Player for legal expenses in the amount of CHF 25.000,00 (twenty five thousand Swiss Francs), or, in the alternative, order that legal costs be awarded ex aequo et bono; and

XI. Order the Club to bear any and all FIFA and CAS administrative and procedural costs, which have already been incurred or may eventually be incurred by the Player".

28. On 10, 14 and 17 July 2015 respectively, the Club expressly requested a hearing to be held, whereas FIFA and the Player informed the CAS Court Office that they did not deem it necessary for a hearing to be held.

29. On 20 and 26 August 2015 respectively, upon the request of the Panel, the Club and FIFA provided the Panel with copies of all documents from the FIFA proceedings on which they intended to rely for the proceedings in CAS 2015/A/4000.

30. On 27 August 2015, the Player informed the CAS Court Office that he had already filed copies of all documents from the FIFA proceedings on which he intended to rely.

31. On 1, 2 and 8 September 2015 respectively, the Club, the Player and FIFA returned duly signed copies of the Order of Procedure to the CAS Court Office, confirming the jurisdiction of the CAS.

32. On 8 September 2015, upon the request of the President of the Panel pursuant to Article R57 of the CAS Code, FIFA provided CAS with a copy of its file related to the present matter for the proceedings in CAS 2015/A/3999.

33. On 30 September and 2 October 2015 respectively, FIFA, the Club and the Player informed the CAS Court Office of the persons attending the hearing.

34. On 1 December 2015, the Player requested that neither Mr Majid Al Malki nor the *"other representative of the Club"* will be allowed to participate to the hearing as either witnesses or experts because no witness statements were provided and because the *"other representative of the Club"* was not identified in due time. As a consequence, the Player requested that the statements eventually provided by these persons at the hearing cannot be regarded as evidence in the present dispute.

35. Also on 1 December 2015, the Club informed CAS that the Club is a party and that it has no obligation to make written statements as these are limited to witnesses and experts. The Club further informed CAS that it would be represented by one or two individuals but that only one of them could be examined by the parties and the Panel.

36. On 2 December 2015, the CAS Court Office, on behalf of the Panel, informed the parties that the Club was allowed to bring its representatives to the hearing, who can be heard as such.

37. Also on 2 December 2015, the Player insisted that the Club shall not be authorised to produce new exhibits or to specify further evidence and therefore that any statement eventually provided by its one (or two) representative(s) not be given weight of evidence, as otherwise Articles R51, R55 and R56 of the CAS Code would be breached.

38. On 3 December 2015, the CAS Court Office, on behalf of the Panel, informed the parties that the issues raised by the Player shall be dealt with at the hearing.

39. On 9 December 2015, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, all parties confirmed that they had no objection to the constitution and composition of the Panel, nor to the jurisdiction of the CAS.

40. In addition to the Panel, Mr Christopher Singer, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

For the Club:

- Mr Juan de Dios Crespo Pérez, Counsel;
- Mr Ivan Bychovskiy, Counsel;
- Dr Majed Garoub, Lawyer of the Club;
- Mr Majid Al Malki, representative of the Club

For the Player:

- Mr Marcos Motta, Counsel;
- Mr Stefano Malvestio, Counsel;
- Mr Diego de Souza Andrade, the Player

For FIFA:

- Ms Livia Silva Kägi, Counsel;
- Ms Mario Flores Chemor, Counsel

41. The Panel heard evidence from Mr Marcel Belfiore, Attorney-at-Law and witness called by the Player, Mr Majid Al Malki, representative of the Club, and the Player.

42. It was only during the hearing that the Club informed the Panel that Mr Al Malki would not testify in person, but only by telephone. Although the Panel and the Player considered it to be unfortunate that such announcement was made at such late stage, since neither of the parties formally objected, Mr Al Malki was heard by telephone.

43. At the occasion of the hearing, counsel for the Player requested to be allowed to show slides of a PowerPoint presentation during the hearing, to which the Club formally objected as it was not able to verify the content of such presentation. FIFA did not object to the use of the slides. After having heard the positions of all parties, the Panel decided not to allow the presentation of the slides, mainly because it did not consider the slides useful because it was too redundant.

44. In view of FIFA's initial objection to the exhibit filed with the Club's letter dated 20 August 2015 (*i.e.* a copy of the arbitral award in CAS 2013/A/3109) as such document was neither part of the FIFA proceedings, nor submitted with the Club's Appeal Brief or its Answer in the proceedings before CAS, the Panel invited FIFA to indicate whether it wished to maintain such objection. FIFA then stated to withdraw its objection.

45. Finally, since the Club finally did not bring any other club representatives to the hearing besides Mr Al Malki, who was heard by telephone, who was already announced as such in the Club's Appeal Brief, the Player's objection dated 2 December 2015 was deemed moot by the Panel. The weight of the evidentiary value of Mr Al Malki's witness testimony is to be assessed by the Panel. In this respect, the Panel took into account that Mr Al Malki is a representative of one of the parties, just like the Player is one of the parties, and that this shall be taken into account in weighing the evidentiary value of their testimonies. Taking into account that the Club timely informed the Panel that Mr Al Malki would attend the hearing, the Panel dismissed the Player's objection to the admissibility of Mr Al Malki's testimony.

46. Mr Belfiore, Mr Al Malki and the Player were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. All parties and the Panel had the opportunity to examine and cross-examine the witnesses. The parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

47. Before the hearing was concluded, all parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard and to be treated equally had been respected.

48. The Panel confirms that it carefully took into account in its decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

49. The Club's submissions in CAS 2015/A/3999 and in CAS 2015/A/4000, in essence, may be summarised as follows:

- The Club submits that the FIFA DRC wrongly evaluated certain facts of the case in the Appealed Decision, that it contains several *"essential mistakes which led to wrongful interpretation of the facts presented by the parties and as a consequence – to the decision taken on*

wrong grounds". The Club objects that the Player had valid and just cause to terminate the Employment Contract and that he should be condemned to pay compensation to the Club for such breach.

- The Club maintains that the Player and the Club verbally agreed to a revision of the payment schedule set out in the Employment Contract, which was agreed upon by the Player's legal representative, Mr Belfiore, on 27 September 2012, which is ascertained by his signature on the revised payment schedule and because he held a valid power of attorney at that time.

- The Club further contends that, even if the Panel would consider that no revision of the payment schedule took place, the Player did not have just cause to terminate the Employment Contract. The Club argues that *"the parties agreed to wait until the Player opens the account in Saudi Arabia to transfer money there"*, but that the Player failed to apply for a residence permit within the first 90 days upon his arrival to Saudi Arabia. The Club submits that it was responsible for the Player's visa, but not for his residence permit. Since it was the Player's obligation to obtain a residence permit and to open a bank account, the Club was not able to pay the Player's remuneration. With reference to Swiss law, the Club maintains that it was impossible for it to render performance because the Player was in default. The Player finally terminated his Employment Contract only 11 days after he had opened a Saudi bank account.

- Based on the Employment Contract, the Club submits that a 10-day delay is a term established for remedy of any default of the payments in favour of the Player and in case he does not receive the payments within the next 5 working days, to terminate the Employment Contract. The Club argues that the Player could not terminate the contract after the 10-days "remedy period", but only after the subsequent *"5-working days period for final settlement"*. As a consequence, the Club submits that the Player was responsible for the breach of contract.

- The Club maintains to have deposited the amount of USD 1,250,000 on an escrow account on 26 October 2012, but that, despite the fact that the Player only left Saudi Arabia on approximately 10 November 2012, the Player failed to withdraw the deposited amount.

- As to the amount of compensation claimed, the Club refers to article 8 of the Employment Contract, pursuant to which the Club is entitled to receive USD 14,000,000 from the Player. Two monthly instalments of USD 125,000 each should however be deducted from this amount.

- The Club avers that Cruzeiro should be held jointly liable with the Player on the basis of article 17 of the FIFA Regulations and that if CAS does not consider itself competent to do so, the Club requests CAS to refer the matter back to the FIFA DRC.

- Should CAS rule that the Player terminated the Employment Contract with just cause, the Club maintains that the Player failed to mitigate his damages, by failing to withdraw the money from the escrow account and that it should be taken into account that the employment relationship between the Player and the Club only ran for three months out of three contractual years. The Club refers to article 5(1) of the Employment Contract in arguing that all advance payments shall be deemed earned *pro rata*. As such, the advance payments shall be excluded from the calculation of the compensation due. The basis for the final determination of the compensation due is therefore not USD 6,625,000 as concluded in the Appealed Decision, but USD 3,675,000. Since the total amount of the advance payments is higher than the amount awarded by the FIFA DRC, the Player successfully mitigated his damages entirely and the Club shall not pay any compensation for breach of contract it allegedly made. The only amount the Player would be entitled to is USD 500,000 for two monthly instalments of USD 250,000 each and a *pro rata* part of the advance payment for the first season, *i.e.* USD 250,000 (3/12 of USD 1,000,000).

- As to the Player's argument that article 5(1) of the Employment Contract should be considered as an "early termination clause" or a "cancellation clause" that are not subject to reduction, the Club maintains that this contention does not correspond to the reality and well established jurisprudence of FIFA and CAS. The Club purports that it is a "liquidated damages clause" and that it is excessive.

50. The Player provided the following abstract of his Appeal Brief in CAS 2015/A/4000:

- *"The present appeal has a very specific scope. The Appealed Decision contains a good summary of the main relevant facts of the present case, and the* [Player] *also agrees with almost the totality of the considerations of the Dispute Resolution Chamber.*

- *Nevertheless, the* [Player] *deems that the DRC wrongly calculated the amount of compensation to which the* [Player] *shall be entitled. This is because the DRC concluded that two contractual clauses which would, depending on which party was in breach, allow, on the one hand, the Club to receive the fixed amount of USD 14,000,000, no matter what, and, on the other hand, allow the Player to receive an amount corresponding to an indemnity for the remaining of his contract, were disproportionate.*

- *The DRC therefore concluded that it could not apply the compensation clauses under the contract in view of the fact that they established disproportionate rights for the parties and determined that the amount of compensation payable by the Club to the Player had to be assessed in application of the other parameters set out in art. 17 par. 1.*

- [The Player] *challenges this part of the Appealed Decision because: article 5.1. is a "early termination clause" or "cancellation clause" (clause résolutoire), which may not be subject to reduction, because it expressly entitles, under certain conditions, the Player to terminate the employment contract in advance, rather than a "liquidated damages clause"; in any case, even if article 5.1. would qualify*

as a liquidated damages clause, which is denied, the amount established would not be excessive and therefore the DRC was in any case wrong in reducing it.

- *In addition,* [FIFA] *failed to impose the appropriate sporting sanctions on* [the Club]*, in breach of its own regulations.*

- *In light of the foregoing, the Player files this appeal in order to have his contractual rights restored, the entitlement to the compensation established by article 5.1. of the employment contract established and the appropriate sporting sanctions imposed to the Club".*

51. The Player provided the following abstract of his Answer in CAS 2015/A/3999:

- *"*[The Club] *appealed the decision of the FIFA Dispute Resolution Chamber in the present matter alleging that, contrary to the findings of the DRC,* [the Player] *terminated his employment contract with the Club without just cause.* [The Club] *thus requests that the CAS condemn the Player to the payment of a penalty clause established in the amount of USD 14,000,000.*

- *The appeal filed by the Club is groundless and shall be rejected by the honourable Panel. The Player undoubtedly had just cause to terminate contract with the Club: what is more, the subsequent course of the events proved how, not only the choice of terminating employment contract with the Club was the only one he had, but, even more, that choice was one of the wisest he ever made.*

- [The Club] *completely failed to respect its contractual obligations towards the Player. The allegations set forth by the Club to justify such breaches are groundless when faced with the reality.*

- *First, the Club alleges that the Brazilian attorney-at-law Mr. Belfiore had accepted to reschedule the deadline for payments on behalf of the Player. Nevertheless, i) Mr. Belfiore never provided such an acceptance and ii) in any case, he did not have authority to do so. The several notifications for payment sent by the Player should have made it clear, in any case, that no such rescheduling was ever accepted by him.*

- *Second, the Club invokes the Player's fault as a creditor as he would have failed to make the acts necessary for the Club to comply with its obligations. In particular, the Player would have failed to realize the actions necessary to obtain the Saudi IQAMA, conditio-sine-qua-non to open a bank account in Saudi Arabia. The Club's argument are not credible considering that i) it never notified the Player that the amounts would be ready for payment; ii) it never notified the Player of his alleged administrative shortfalls; iii) obtaining the IQAMA was in any case a Club's obligation both according to the contract as well as by law; iv) even when the Saudi bank account was finally opened, the Club failed to pay the outstanding amounts.*

- [The Club's] *fragile arguments are further weakened by the reality of facts. Not only it failed to respect its obligations with the Player, but it also did not pay the transfer fee agreed with Vasco da Gama for the transfer of the Player (Al Ittihad was eventually condemned by the CAS to such a*

payment) and a commission agreed with the player's agents Mr. Eduardo Uram (similarly, the Single Judge of the FIFA Players' Status Committee condemned [the Club]*. […]".*

52. FIFA's submissions in CAS 2015/A/4000, in essence, may be summarised as follows:

- FIFA endorses the Appealed Decision in its entirety. The conclusion of the FIFA DRC that the Player had terminated the Employment Contract with just cause remained undisputed in the appeal lodged by the Player. As such, FIFA did not address the correctness and rightfulness of this decision in its Answer.

- FIFA maintains that in applying article 17(1) of the FIFA Regulations it *"not only verifies whether the employment contract contains a compensation clause agreed upon by the parties, but, in the affirmative, also analyses in detail the content of such clauses. The DRC does so with a view to guaranteeing that contractual stipulations previously agreed upon by the parties in fact entail fair and just consequences for both parties, considering, in particular, their frequent unequal power of bargain in the negotiation of the terms of a contract".*

- FIFA submits that *"[a]fter carefully analyzing the different consequences of a breach on the part of either party as per clauses 5.1 and 8 of the employment contract, the DRC deliberately disregarded the contents of such clauses, in view of the fact that – considering the two compensation clauses as a whole – the employment contract did not establish proportionate rights in favour of the counterparty in case of termination without just cause by the player. In fact, compared to the situation in which the player would terminate the contract with just cause, under certain circumstances, the player would be put in a position of clear disadvantage".*

- FIFA further argues that *"while respecting the contractual freedom of the parties, like CAS, in case of multiple possible solutions, privileges the one based on the principle of the positive interest. That is, the one that allows the DRC to put the injured party in the position that it would have had if the contract had been performed properly, eliminating any hazardous consequences of the unjust breach to such party. […] [T]he compensation clauses at stake must be seen in their interaction, since they are both clearly meant to be liquidated damage clauses and not buy-out clauses. The* [Player's] *attempt to create a third group of clauses cannot be backed. The mere fact that the application of a liquidated damages clause is made dependent on the fulfilment of certain formal conditions cannot and does not alter its nature.*

- *It is evident that the two clauses do not provide for a balanced and proportionate solution. In fact, while on the basis of clause 8 of the employment contract, the club would somehow "benefit", financially, from the unjustified breach of contract at any time during the contractual relationship, with increasing benefit the longer the contract would be respected (note: this, contrary to the general and recognized principle that the club's actual damage would tend to diminish the later in the contractual duration a player commits the unjustified breach), on the basis of clause 5.1 of the employment contract the player would only "benefit", financially, from a justified termination if it happened at an early stage of the contractual relationship. It goes without saying that under such circumstances the pertinent clauses*

cannot be considered. And it would also clearly not be acceptable to apply one of them, i.e. clause 5.1, only for a certain period of time".

- As to the sporting sanctions the Player requests to be imposed on the Club, FIFA maintains that whenever a club is held liable for a breach of contract without just cause, occurred during the protected period, sporting sanctions shall, in principle, be imposed on such club by the FIFA DRC. FIFA contends that it is confirmed by CAS that it is a well-accepted and consistent practice of the FIFA DRC not to apply automatically the sanctions stipulated in article 17(3) and (4) of the FIFA Regulations. FIFA however stated that *"due to a current situation of constant and repeated disrespect of contractual obligations on the part of some specific clubs, which constantly figure as respondents in the numerous labour disputes lodged daily in front of FIFA, the DRC indeed decided to slightly modify its approach regarding the application of sporting sanctions on such "repeated offenders".*

- In application of such approach, FIFA submits that *"the DRC could rightly not determine that* [the Club] *should be qualified as a "repeated offender" and to possibly consider the application of sporting sanctions on it".*

V. JURISDICTION

53. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes (2014 edition) as it determines that *"[a]ppeals 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"* and Article R47 of the CAS Code.

54. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

55. It follows that CAS has jurisdiction to adjudicate on and decide the present dispute.

VI. ADMISSIBILITY

56. The appeals were filed within the 21 days set by article 67(1) of the FIFA Statutes. The appeals comply with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

57. It follows that the appeals are admissible.

VII. APPLICABLE LAW

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

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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".

59. The Club maintains that the parties made a clear choice of law in favour of the FIFA Regulations and that Swiss law shall be applied subsidiarily.

60. The Player submits that the various regulations of FIFA and, additionally, Swiss law shall apply to the merits of this dispute.

61. FIFA did not provide any specific submission on the applicable law.

62. The Panel is therefore satisfied to accept the primary application of the various regulations of FIFA and the subsidiary application of Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. PRELIMINARY ISSUE

A. FIFA's Standing to be Sued and the Consequences of the Club's failure to name FIFA as a Respondent

63. As a preliminary issue, the Player maintains that, pursuant to mandatory Swiss law, which is applicable through the reference under article 66 of FIFA Statutes, the Club should have directed its appeal to FIFA as a co-Respondent. Due to the Club's failure to do so, its claim would allegedly be without merit according to the most recent CAS case law, or even inadmissible, according to CAS earliest jurisprudence.

64. The Player draws the abovementioned conclusion from article 75 of the Swiss Civil Code which stipulates the following (unofficial English translation):

"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof".

65. In this respect, the Player claims that article 75 of the Swiss Civil Code has consistently been interpreted by Swiss legal doctrine and jurisprudence to mean that it is the "association" which has capacity to be sued in proceedings against a "resolution" within the scope of the relevant rule, and not members of the same association.

66. Moreover, according to the Player's arguments, the term "resolution" encompasses all final decisions of an association (as is FIFA), irrespective of the nature of the decision or the composition of the particular decision-making body.

67. As a result, the Player avers that also decisions by the FIFA DRC, as the Appealed Decision, shall be regarded as "resolutions" under the terms of article 75 of the Swiss Civil Code. Therefore, an appeal against a decision rendered by the FIFA DRC, as in the present case, shall (also) be directed at FIFA as a Respondent to the relevant CAS proceedings.

68. In order to overcome well-established CAS jurisprudence which has consistently limited the application of article 75 of the Swiss Civil Code to the so-called membership-related disputes within FIFA (while excluding inter-member disputes), the Player relies on a broader interpretation of the relevant rule so as to include disputes between indirect members of the association brought before FIFA, on the basis that the latter would not only exercise its jurisdictional function, but would also pursue interests and acts in matters of its own: *"through providing an internal dispute resolution mechanism, FIFA, of course, also pursues interests and acts in matters of its own. In that sense, a dispute between of the association which is brought before FIFA may likewise be characterized as a membership-related dispute"* (see Player's Answer, para. 10).

69. In this context, the Player refers to the reasoning provided by the panel in CAS 2008/A/1639 where, although the dispute at stake also involved individual members of FIFA (a Spanish Club, an English Club and the English Football Association), it was still considered to be a membership-related dispute, with the consequence that the panel held that FIFA had standing to be sued according to article 75 of the Swiss Civil Code: *"disputes between members of an association can, therefore, not be excluded from the outset from the membership related sphere. This is all the more true in view of the fact that an association which settles disputes between its members in application of its own rules and regulations is of course (also) pursuing goals of its own and, hence, is also acting in a matter of its own"*.

70. However, the Panel finds it necessary to mention that in the case above, the CAS was called upon to adjudicate the challenge of the decision by which the FIFA Single Judge had authorized the provisional registration of a player with a national federation, due to the failure of the former federation to grant the ITC (International Transfer Certificate). In this context, the panel expressly acknowledged that: a) the challenged decision involved an administrative function by FIFA having an impact on the right and duties of its members in the sense of article 75 of the Swiss Civil Code and, b) FIFA had an essential interest at stake in the relevant CAS proceedings, consisting in the option to accord or to refuse the issuance of an ITC (see CAS 2008/A/1639, para 33, 34).

71. Given the above, the Panel is not persuaded by the Player's arguments on the present issue for the following reasons.

72. With regard to the allegation that FIFA should have been summoned by the Club as a necessary party in the present proceedings, the Panel notes that neither the FIFA Statutes nor any other FIFA Regulations nor the CAS Code contain any specific rule defining the standing to be sued.

73. In these circumstances, CAS panels have consistently addressed the issue whether FIFA has standing to be sued in a certain CAS proceedings by referring to the meaning given to the term *"standing to be sued"* by Swiss law, affirming that an individual or an entity has standing to be sued

"if it is personally obliged by the "disputed rights" at stake" (see CAS 2006/A/1206). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (see CAS 2014/A/3690; CAS 2008/A/1517; CAS 2006/A/1189; CAS 2006/A/1192).

74. Conversely, it has been pointed out that criticism directly brought against FIFA with regard to the decisions rendered by FIFA dispute resolution bodies are not sufficient for that purpose (see CAS 2005/A/835 & CAS 2005/A/942). On the other hand, the circumstance that FIFA may have a general, abstract interest that its members behave in accordance with the applicable FIFA rules (which may, in theory, justify FIFA's intervention in a CAS proceedings according to Article R41.4 of the CAS Code), does not suffice to constitute any *"interest at stake"* for the purpose of conferring FIFA the capacity to be sued (see CAS 2014/A/3690).

75. According to the well-established CAS jurisprudence (CAS 2006/A/1192; CAS 2008/A/1517; CAS 2008/A/1708), FIFA has no standing to be sued where it is only involved in the dispute between two parties (such as a player and a club as in the present case) merely as the adjudicating body having issued the appealed decision and the parties cannot bring an actual claim against FIFA.

76. According to Swiss legal doctrine, article 75 of the Swiss Civil Code *"does not apply indiscriminately to every decision made by an association (…). Instead, one has to determine in every case whether the appeal against a certain decision falls under Art. 75 Swiss Civil Code, i.e. whether the prerequisite of Art. 75 of the Swiss Civil Code are met in a specific individual case. If, for example, there is a dispute between two association members (e.g. regarding the payment for the transfer of a football player) and the association decides that a club (member) has to pay the other a certain sum, this is not a decision which can be subject to an appeal within the meaning of Art. 75 Swiss Civil Code. (…). A dispute between two football clubs, i.e. two association members, therefore, is not a dispute which can be appealed against under Art. 75 Swiss Civil Code. The sports association taking a decision is not doing so in a matter of its own, i.e. in a matter which concerns its relationship to one of its members, rather it is acting as a kind of first decision making instance, as desired and accepted by the parties"* (BERNASCONI/HUBER, Appeals against a Decision of a (Sport) Association: The Question of the Validity of Time Limits stipulated in the Statutes of an Association, SpuRt, 2004, Nr. 6, p. 268 *et seq.*).

77. When FIFA merely exercises its jurisdictional function, under the terms of article 22 of the FIFA Regulations, adjudicating disputes between two or more of its members, there is no place for FIFA's standing to be sued pursuant to the applicable Swiss law.

78. From another point of view and according to the consistent jurisprudence of the CAS, the Panel considers that decisions rendered by FIFA bodies acting like a court of first instance over disputes between two or more of its members, cannot be considered "resolutions" of an association within the scope of article 75 of the Swiss Civil Code.

79. In this respect, in fact, the Panel observes that article 75 of the Swiss Civil Code is intended to protect members of the association from any unlawful infringement by the association itself

which is committed through "resolutions" adopted by the association in violation of the law or its bylaws. Conversely, CAS arbitration is meant to ensure a second level of jurisdiction against decisions rendered by FIFA decision-making bodies at first instance in disputes between individual members of FIFA.

80. It is within this meaning that the Panel shares the opinion of the consistent jurisprudence of the CAS that the application of article 75 of the Swiss Civil Code shall be limited to the so-called membership-related disputes. This is also consistent with Swiss legal doctrine according to which in matters covered by article 75, the party having standing to be sued is "only" the association, as pointed out by the panel in CAS 2008/A/1639, quoted by the Player.

81. In fact, CAS jurisprudence is unanimous in stating that in cases where FIFA imposes disciplinary sanctions (for example on a player or a club) or in all other cases where the matter concerns a membership related decision, FIFA would have capacity to be sued, according to article 75 of the Swiss Civil Code, as the association which passed the opposed decision.

82. Ultimately, the Panel believes that a decision by FIFA may be subject to challenge under the provisions of article 75 of the Swiss Civil Code when the relevant decision may be considered the expression of FIFA's administrative function, provided that the other requirements of article 75 are also met.

83. In consideration of the foregoing, the Panel has reached the conclusion that regarding the appeal filed by the Club, concerning a contractual dispute of employment-related nature between the Player and the Club, irrespective of any given definition of "membership-related decision", FIFA has no specific interest at stake in the sense clarified above nor is the Club seeking any judicial remedy "against" FIFA, nor does the dispute concern any administrative function by FIFA, since FIFA is only involved in the proceedings before CAS regarding the appeal filed by the Club as the adjudicating body in first instance.

84. Therefore, the Panel holds that FIFA has no standing to be sued in the arbitration proceedings regarding the appeal filed by the Club and that, as a result, the Player's relevant objections in relation to the failure of the Club to summon FIFA shall be rejected.

IX. MERITS

A. The Main Issues

85. As a result of the above, the main issues to be resolved by the Panel are:

    i. Did the Player have just cause to terminate the Employment Contract on 26 October 2012?

        a. Were the Club's payment obligations deferred because the Player consented to a revised payment schedule?

b. Was the Club prevented from paying the amounts due to the Player because the Player failed to open a bank account?

c. Did the Player comply with the procedure for termination?

d. Conclusion

ii. If so, what amount of outstanding remuneration is the Player entitled to receive from the Club?

iii. If so, what amount of compensation for breach of contract is the Player entitled to receive from the Club?

iv. If so, are any sporting sanctions to be imposed on the Club?

i. Did the Player have just cause to terminate the Employment Contract on 26 October 2012?

86. The Panel notes that it remained undisputed between the parties that the Player unilaterally and prematurely terminated the Employment Contract with the Club on 26 October 2012. The Player maintains that he proceeded with the termination because the Club failed to pay him an advance payment of USD 1,000,000 and two monthly salaries in the amount of USD 125,000 each. It remained undisputed by the Club that it indeed did not pay such amounts, however, the Club submits that it was not obliged to make such payments for several reasons.

87. The Club maintains that the Player and the Club verbally agreed to a revision of the payment schedule set out in the Employment Contract, which was agreed upon by the Player's legal representative, Mr Belfiore, on 27 September 2012, which is ascertained by his signature on the revised payment schedule and because he held a valid power of attorney at that time.

88. The Club further contends that, even if the Panel would consider that no revision of the payment schedule took place, the Player did not have just cause to terminate the Employment Contract. The Club argues that *"the parties agreed to wait until the Player opens the account in Saudi Arabia to transfer money there"*, but that the Player failed to apply for a residence permit within the first 90 days upon his arrival to Saudi Arabia. The Club submits that it was responsible for the Player's visa, but not for his residence permit. Since it was the Player's obligation to obtain a residence permit and to open a bank account, the Club was not able to pay the Player's remuneration. With reference to Swiss law, the Club maintains that it was impossible for it to render performance because the Player was in default. The Player finally terminated his Employment Contract only 11 days after he had opened a Saudi bank account.

89. Based on the Employment Contract, the Club submits that a 10-day delay is a term established for remedy of any default of the payments in favour of the Player and in case he does not receive the payments within the next 5 working days, to terminate the Employment Contract. The Club argues that the Player could not terminate the contract after the 10-days "remedy period", but only after the subsequent *"5-working days period for final settlement"*. As a consequence, the Club submits that the Player was responsible for the breach of contract.

90. Finally, the Club maintains to have deposited the amount of USD 1,250,000 on an escrow account on 26 October 2012, but that, despite the fact that the Player only left Saudi Arabia on approximately 10 November 2012, the Player failed to cash the deposited amount.

91. In respect of the Club's allegation that Mr Belfiore had accepted to reschedule the deadline for payments on behalf of the Player, the Player maintains that i) Mr Belfiore never provided such an acceptance and ii) in any case, he did not have authority to do so. The several notifications for payment sent by the Player should have made it clear, in any case, that no such rescheduling was ever accepted by him.

92. In respect of the Club's argument that the Player would have failed to make the acts necessary for the Club to comply with its obligations (the Player would have failed to realize the actions necessary to obtain the Saudi IQAMA, *condition sine qua non* to open a bank account in Saudi Arabia), the Player argues that the Club's arguments are not credible considering that i) it never notified the Player that the amounts would be ready for payment; ii) it never notified the Player of his alleged administrative shortfalls; iii) obtaining the IQAMA was in any case an obligation of the Club, both according to the Employment Contract as well as by law; iv) even when the Saudi bank account was finally opened, the Club failed to pay the outstanding amounts.

93. The Player purports that the Club's fragile arguments are further weakened by the reality of facts. Not only did it fail to respect its obligations towards the Player, but it also did not pay the transfer fee agreed upon with Vasco da Gama for the transfer of the Player (Al Ittihad was eventually condemned by the CAS to make such payment) and a commission agreed with the Player's agent, Mr Eduardo Uram (similarly, the Single Judge of the FIFA Players' Status Committee condemned the Club to make such payment).

a) Were the Club's payment obligations deferred because the Player consented to a revised payment schedule?

94. Commencing with the analysis as to whether the Player and the Club had agreed to defer the payments due on the basis of the Employment Contract by means of a revised payment schedule concluded on 27 September 2012, the Panel first of all observes that the Club did not provide any evidence in respect of the Player's alleged verbal agreement to such revised payment schedule. Rather, the Panel observes that the Club maintained the following in its submissions in the proceedings before the FIFA DRC leading to the Appealed Decision: *"The Player was the only member of the squad who refused to accept this revised payment schedule* […]*"* (c.f. para. 75 of the Club's "Response" dated 10 December 2012).

95. The Panel considers that the revised payment schedule contains the signature of Mr Belfiore, which was confirmed at the occasion of the hearing by Mr Belfiore himself. Mr Belfiore however mentioned that he only put his signature on this document in order to acknowledge receipt thereof, but that he was not legally empowered by the Player to enter into such agreement on the Player's behalf. Mr Belfiore stated that he never represented the interests of the Player directly, but that he acted for Mr Uram, the Player's agent, and that it was in this

capacity that he learned to know the Player and was involved in the negotiation of the Employment Contract, but only because Mr Uram asked him to do so.

96. The Panel found the witness testimony of Mr Belfiore credible and was not provided with any proof to the contrary by the Club.

97. In addition, the Panel finds it relevant that Mr Belfiore put his signature on the top-left corner of the document, whereas such document would normally be signed on the bottom of the page if an agreement were to be reached on behalf of the Player.

98. Consequently, the Panel finds that the Club failed to establish that the Player gave his consent to the revised payment schedule and that the financial terms of the Employment Agreement therefore remained in force.

b) Was the Club prevented from paying the amounts due to the Player because the Player failed to open a bank account?

99. Furthermore, as to the Club's contention that it was not able to pay the amounts due to the Player as the Player had failed to open a bank account in Saudi Arabia, the Panel observes that the Player maintains that he was not able to open a bank account because he did not yet obtain an IQAMA and that it was the responsibility of the Club to conduct the application process for such IQAMA.

100. The Panel observes that articles 5(1)(d) and 5(10) of the Employment Contract determine the following respectively:

> *"All the advances and monthly salaries shall be paid by the club to the Player's bank account, which name and number he will provide to the club".*
>
> *"The club undertakes the responsibility for the proper arrangements and issuance of any and all the entry/stay/exit VISA for the family, family employees and family friends, allowing free transit (entry/stay/exit in Saudi Arabia) for all of them".*

101. At the occasion of the hearing, the legal status of the document referred to as IQAMA was discussed at length. Finally, the parties agreed that an IQAMA is linked to a residence permit, but that it is in any event not a working permit.

102. According to a witness statement of Mr Khalid Mousa Ali Al Salhabi, Public Relations Officer, that was initially submitted by Cruzeiro Esporte Clube, intervening party in the proceedings before the FIFA DRC, but that was also submitted by the Player in the present appeal arbitration proceedings, an IQAMA is *"the residence permit for a non-Saudi which and proves his employment status"* and that the procedure for obtaining an IQAMA is, *inter alia*, as follows:

"1) An employment visa needs to be applied for by the employer, which the employee would collect from the Saudi Consulate/Embassy of the country where the employee is located. Such visa would then be stamped on the employee's passport;

2) Employee enters Saudi Arabia, performs a medical test, submits his passport to the employer, who then has to begin a process with the Ministry of Labour;

3) Employer is full obligated to process the IQAMA for the employee;

4) Only the employer is entitled to process the IQAMA for the employee;

5) It is not possible for the employee to process the IQAMA, for himself, on his own;

6) An IQAMA takes between two and three weeks to be issued by the competent authorities".

103. During the hearing, the Player confirmed that the Club provided assistance to him to obtain the IQAMA, although this was by means of the Player's personal assistant and driver, provided by the Club.

104. The Panel also finds that obtaining the IQAMA for the Player was an obligation for the Club that fell under article 5(10) of the Employment Contract.

105. As such, the Panel is satisfied to accept that it was indeed the responsibility of the Club to proceed with the application process for the Player's IQAMA and that the Player was not able to conduct such process in Saudi Arabia without the assistance of the Club. Since it remained undisputed between the parties that a bank account could only be opened by the Player upon receipt of the IQAMA, the Panel finds that the Player could not be blamed for failing to open a bank account and that this therefore did not release the Club of its duty to pay the Player the amounts due.

106. In any event, the Panel does not find this question decisive as it remained undisputed by the parties that the Club made two cash payments to the Player in the amount of USD 13,333.33 each between August and September 2012, *i.e.* before the Player opened a bank account on 15 October 2012. As such, the mere fact that the Player did not yet have a bank account did not necessarily prevent the Club from paying the amounts due to the Player. The acceptance of the cash payments by the Player indicates that the Club was not required to strictly follow the wording of article 5(1)(d) of the Employment Contract.

107. The Panel finds the Club's argument that the Player consented to wait with the payment until he would have a bank account unconvincing as the Player issued two notifications claiming the amounts due and accepted to receive two cash payments.

108. Moreover, when the Player finally obtained the IQAMA and opened a bank account on 15 October 2012, the Club only proceeded with the payment of an amount of USD 98,000 (which together with the two payments of USD 13,333.33 amounted to USD 124,666.67, *i.e.* approximately one monthly salary), but still failed to pay the Player the full amount he was

entitled to at that time, *i.e.* USD 1,250,000 (advance payment of USD 1,000,000 due on 15 September 2012 and his salary of August and September 2012 (USD 125,000 each).

109. The Panel does not deem it important that the Club apparently deposited an amount of USD 1,250,000 on an escrow account, since the Club failed to prove that it informed the Player that he could withdraw such amount from the escrow account. Furthermore, it is not clear to the Panel why such amount was deposited on an escrow account on 26 October 2012 while the Player opened a bank account already on 15 October 2012. In this respect, the Panel takes into account that the Club already transferred money to the Player's bank account on 18 October 2012 (*i.e.* the transfer of the amount of USD 98,000).

110. In light of the above circumstances, the Panel is not convinced that the Club was prevented from paying the amounts due to the Player because the Player failed to open a bank account in Saudi Arabia.

c) Did the Player comply with the procedure for termination?

111. As to the Club's argument that the Player was too early in terminating the Employment Contract because the Player failed to respect the procedure for termination described in the Employment Contract, the Panel considers that articles 5(1)(f) and 5(1)(para. 5) of the Employment Contract determine respectively as follows:

> *"For the purposes of this contract a maximum delay of 10 days shall not be considered a delay".*
>
> *"In case of non-payment of three consecutive installments, or five non-consecutive installments within one season, the Player will be entitled to claim them immediately through a written notice to the club. In case that the payment is not done within 5 working days of the notice, the Player shall have the right to end the contract for just cause and claim for an indemnity to the club for the remaining of his contract".*

112. The Club purports that the Player could not yet terminate the Employment Contract after the 10-days "remedy period", but only after the subsequent *"5-working days period for final settlement"*. As a consequence, the Club submits that the Player was responsible for the breach of contract.

113. The Player maintains that he complied with his contractual obligations in respect of the termination.

114. The Panel notes that the Player notified the Club of its lack of payment on 15 October 2012 and granted the Club a deadline until 22 October 2012 to proceed with the payment of the advance payment of USD 1,000,000 and the salary of the months of July, August and September 2012, *i.e.* a deadline of seven days.

115. The Panel observes that the Club only partially complied with this request as it only proceeded with the payment of USD 98,000 (which together with the two payments of USD 13,333.33 amounted to USD 124,666.67, *i.e.* approximately one monthly salary) and thereby settled the

Player's July 2012 salary. The Club thus partially complied with the Player's notification, however, the advance payment of USD 1,000,000 and the salary of August and September 2012 remained unpaid.

116. The Player then proceeded to grant the Club an ultimate deadline of three days to comply with its payment obligations on 22 October 2012. Since the amounts remained unpaid before such deadline, the Player proceeded with the termination of the Employment Contract on 26 October 2012.

117. The Panel finds the provision determining that a maximum delay of 10 days shall not be considered a delay, does not stand in the way of the application of the provision determining that if a notice is sent by the Player, this notice shall be complied with by the Club within 5 days. Therefore, as soon as the notice was sent, a deadline of 5 days had to be granted to the Club and this requirement was complied with by the Player.

118. The Panel considers that at the time of the Player's first notification (15 October 2012) four instalments were overdue (*i.e.* the Player's salaries of July (due date 7 August 2012), August (due date 7 September 2012) and September 2012 (due date 7 October 2012) and the advance payment (due date 15 September 2012)). Therefore, even if the due dates were extended with 10 days, still three instalments were overdue on 15 October 2012, only the September 2012 salary could arguably not be claimed yet.

119. Therefore, the Panel finds that the Player legitimately invoked article 5(1)(para. 5) of the Employment Contract. Although the Player only had to grant a deadline of 5 days to the Club, the Player granted the Club a total grace period of 10 days (*i.e.* 7 and 3 days respectively) and waited until the expiration of such deadlines before proceeding with the termination of the Employment Contract.

120. Consequently, the Panel finds that the Player complied with the procedure set out in the Employment Contract and was not too early in terminating the Employment Contract.

d) Conclusion

121. In view of the above, the only remaining question is whether the Club's failure to pay the Player the advance payment of USD 1,000,000 and his salary of August and September 2012 in the amount of USD 250,000 was sufficiently severe to terminate the Employment Contract on 26 October 2012.

122. The Panel considers that the Commentary to the FIFA Regulations provides guidance as to when an employment contract is terminated with just cause:

> *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or*

should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally".

123. In this regard, the Panel notes that in CAS 2006/A/1180, a CAS panel stated the following in this respect:

"The RSTP 2001 do not define when there is "just cause" to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach mutual agreement on the end of the contract (see also ATF 110 I 167; WYLER R., Droit du travail, Berne 2002, p. 323 and STAEHELIN/VISCHER, Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR, Zurich 1996, marg. no. 17 ad Art. 334, p. 479). In this regard Art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: "A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship". According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the clausula rebus sic stantibus (ATF 5 May 2003, 4C.67/2003 no. 2). According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., op. cit., p. 364 and TERCIER P., Les contrats spéciaux, Zurich et al. 2003, no. 3402, p. 496). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 127 III 351; WYLER R., op. cit., p. 364 and TERCIER P., op. cit., no. 3394, p. 495).

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

completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract (see also CAS 2005/A/893; CAS 2006/A/1100, marg. no. 8.2.5 et seq.)" (CAS 2006/A/1180, para. 25-26 of the abstract published on the CAS website).

124. The Commentary to the FIFA Regulations specifically refers to the following example of a breach with just cause:

"Example 1: A player has not been paid his salary for over 3 months. Despite having informed the club of its default, the club does not settle the amount due. The player notifies the club that he will terminate the employment relationship with immediate effect. The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent non-compliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

125. The Panel notes that article 5 of the Employment Contract provides as follows:

"In case of non-payment of three consecutive installments, or five non-consecutive installments within one season, the Player will be entitled to claim them immediately through a written notice to the club. In case that the payment is not done within 5 working days of the notice, the Player shall have the right to end the contract for just cause and claim for an indemnity to the club for the remaining of his contract".

126. The Panel observes that, immediately at the beginning of the employment relationship, the Club already failed to comply with its main contractual obligation towards the Player: the payment of salary. Although the Player's salary of July 2012 was finally paid on 18 October 2012, *i.e.* two months and 11 days late, the Club entirely failed to pay the Player the advance payment in the amount of USD 1,000,000 that fell due on 15 September 2012, his August 2012 salary that fell due on 7 September 2012 and his September 2012 salary that fell due on 7 October 2012, despite having sent two notifications in this respect. Since the Player was entitled to receive a total amount of USD 2,500,000 over the course of the 2012/2013 sporting season, at the date of termination the Player only received 5% of his yearly salary (USD 125,000 out of USD 2,500,000), whereas, at that time, he was supposed to have received 55% (1,375,000 out of USD 2,500,000). The Panel considers that the FIFA DRC made a similar observation in the Appealed Decision in respect of the overall value of the Employment Contract and reasoned as follows: *"the amount owed to the [Player] was significant – he should have received 15% of the value of the contract by its termination date but he actually received only 1.5%".*

127. The Panel has no hesitation in deciding that such serious violation of the payment obligations from the side of the Club legitimately entailed a serious breach of confidence, entitling the Player to terminate the Employment Contract with immediate effect.

128. Consequently, the Panel finds that the Player had just cause to terminate the Employment Contract unilaterally and prematurely on 26 October 2012.

129. As a consequence of the above findings, the Panel finds that the Club's arguments in respect of the joint liability of Cruzeiro and that, if CAS does not consider itself competent to make such ruling in respect of Cruzeiro, to refer the matter back to the FIFA DRC, can be left open as these arguments would only be relevant if the Panel would have come to the conclusion that the Player did not have just cause to terminate the Employment Contract, which it did not.

ii. *If so, what amount of outstanding remuneration is the Player entitled to receive from the Club?*

130. Having established that the Player had just cause to terminate the Employment Contract unilaterally and prematurely, the next question to be answered by the Panel is what amount of outstanding remuneration the Player is entitled to receive from the Club.

131. In this respect, the Panel considers that the Player claimed an amount of USD 1,250,000 as outstanding remuneration in the proceedings before the FIFA DRC and that this amount was indeed awarded in the Appealed Decision.

132. The Panel notes that the Club did not challenge this specific finding of the FIFA DRC.

133. Since the Player had only received a total amount of USD 124,666.67 from the Club until 26 October 2012 (*i.e.* the date of termination), whereas he was entitled to have received an advance payment of USD 1,000,000 and monthly salaries in the total amount of USD 375,000 (USD 125,000 regarding July, August and September 2012) at that time, the Panel finds that the Player is indeed entitled to receive an amount of USD 1,250,000 as outstanding remuneration from the Club.

iii. *If so, what amount of compensation for breach of contract is the Player entitled to receive from the Club?*

134. The Panel observes that the main object of the Player's appeal is related to this question.

135. The Player maintains that the FIFA DRC wrongly concluded that it could not apply the compensation clauses under the Employment Contract in view of the fact that these clauses established disproportionate rights for the parties and determined that the amount of compensation payable by the Club to the Player had to be assessed in application of the parameters set out in article 17(1) of the FIFA Regulations.

136. The Player challenges this part of the Appealed Decision because he finds that article 5(1) is an "early termination clause" or a "cancellation clause" (*clause résolutoire*), which may not be subject to reduction, because it expressly entitles, under certain conditions, the Player to terminate the Employment Contract in advance, rather than a "liquidated damages clause". In any case, even if article 5(1) of the Employment Contract would qualify as a liquidated damages clause, which

is denied, the amount established would not be excessive and therefore the DRC was in any case wrong in reducing it.

137. The Club maintains that, should CAS rule that the Player terminated the Employment Contract with just cause, the Player failed to mitigate his damages, by failing to cash the money from the escrow account and that it should be taken into account that the employment relationship between the Player and the Club only ran for three months out of the three sporting seasons it was supposed to last.

138. The Club refers to article 5(1)(e) of the Employment Contract in arguing that all advance payments shall be deemed earned *pro rata*. As such, the advance payments shall be excluded from the calculation of the compensation due. The basis for the final determination of the compensation due is therefore not USD 6,625,000 as concluded in the Appealed Decision, but USD 3,675,000. Since the total amount of the advance payments is higher than the amount awarded by the FIFA DRC, the Player successfully mitigated his damages entirely and the Club shall not pay any compensation for breach of contract it allegedly made. The only amount the Player would be entitled to is USD 500,000 for two monthly instalments of USD 250,000 each and a *pro rata* part of the advance payment for the first season, *i.e.* USD 250,000 (3/12 of USD 1,000,000).

139. As to the Player's argument that article 5(1) of the Employment Contract should be considered as an "early termination clause" or a "cancellation clause" that are not subject to reduction, the Club maintains that this contention does not correspond to the reality and well established jurisprudence of FIFA and CAS. The Club purports that it is a "liquidated damages clause" and that it is excessive.

140. FIFA maintains that, in applying article 17(1) of the FIFA Regulations, it *"not only verifies whether the employment contract contains a compensation clause agreed upon by the parties, but, in the affirmative, also analyses in detail the content of such clauses. The DRC does so with a view to guaranteeing that contractual stipulations previously agreed upon by the parties in fact entail fair and just consequences for both parties, considering, in particular, their frequent unequal power of bargain in the negotiation of the terms of a contract"*.

141. FIFA submits that *"[a]fter carefully analyzing the different consequences of a breach on the part of either party as per clauses 5.1 and 8 of the employment contract, the DRC deliberately disregarded the contents of such clauses, in view of the fact that – considering the two compensation clauses as a whole – the employment contrat did not establish proportionate rights in favour of the counterparty in case of termination without just ca use by the player. In fact, compared to the situation in which the player would terminate the contract with just cause, under certain circumstances, the player would be put in a position of clear disadvantage"*.

142. FIFA further argues that *"while respecting the contractual freedom of the parties, like CAS, in case of multiple possible solutions, privileges the one based on the principle of the positive interest. That is, the one that allows the DRC to put the injured party in the position that it would have had if the contract had been performed properly, eliminating any hazardous consequences of the unjust breach to such party.* […] *[T]he compensation clauses at stake must be seen in their interaction, since they are both clearly meant to be liquidated damage clauses*

and not buy-out clauses. The [Player's] *attempt to create a third group of clauses cannot be backed. The mere fact that the application of a liquidated damages clause is made dependent on the fulfilment of certain formal conditions cannot and does not alter its nature. It is evident that the two clauses do not provide for a balanced and proportionate solution. In fact, while on the basis of clause 8 of the employment contract, the club would somehow "benefit", financially, from the unjustified breach of contract at any time during the contractual relationship, with increasing benefit the longer the contract would be respected (note: this, contrary to the general and recognized principle that the club's actual damage would tend to diminish the later in the contractual duration a player commits the unjustified breach), on the basis of clause 5.1 of the employment contract the player would only "benefit", financially, from a justified termination if it happened at an early stage of the contractual relationship. It goes without saying that under such circumstances the pertinent clauses cannot be considered. And it would also clearly not be acceptable to apply one of them, i.e. clause 5.1, only for a certain period of time".*

143. The Panel considers that articles 5(1) and 8 of the Employment Contract determine respectively the following:

> *"In case of non-payment of three consecutive installments, or five non-consecutive installments within one season, the Player will be entitled to claim them immediately through a written notice to the club. In case that the payment is not done within 5 working days of the notice, the Player shall have the right to end the contract for just cause and claim for an indemnity to the club for the remaining of his contract".*

> *"In case of early termination of the present contract by the Player (as per art. 17 of the FIFA regulations for the status and transfer of players), without just cause, the Player shall be responsible for the payment of an indemnity of 14,000,000.00 US Dollars (Fourteen Million USD), which he shall pay immediately after the said termination and if not a 10% interest per annum will apply".*

144. As a first consideration, the Panel rejects the Player's contention that article 5(1) of the Employment Contract provides for an "early termination clause" or a "cancellation clause", since it is clear from the wording of the clause at issue that the will of the parties was to stipulate in advance the amount of compensation for breach of contract by the Club, which definitely suggests a liquidated damage provision (see also CAS 2014/A/3707: *"In accordance with Artide 17 para. 1 of the RSTP, the parties to an employment contract may stipulate in the contract the amount of compensation for breach of contract. Where such a clause exists, its wording should leave no room for interpretation, and must clearly reflect the true intention of the parties. Whether such clauses are called "buy out-clauses", indemnity or penalty clauses, or otherwise, is irrelevant. Legally, they correspond therefore to liquidated damages provisions"*).

145. The Panel further observes that, according to CAS jurisprudence, the concept of a liquidated damages clause *"is identical to the concept of a contractual penalty clause in Switzerland, which appears from both the German language of Article 160 of the SCO using the terms "Konventionalstrafe" and "Strafe" as well as the French language, using the terms "clause pénale" and "la peine"* (CAS 2014/A/3555, para. 57).

146. In this respect, the Panel also observes that the parties are free to include such clauses in their agreement, both according to article 17(1) of the FIFA Regulations as well as to article 160 of the SCO.

147. The Panel took due note of the arguments advanced by all three parties in this respect and observes that both article 5(1) as well as article 8 of the Employment Contract deviate from article 17(1) of the FIFA Regulations. The Panel observes that article 17(1) of the FIFA Regulations specifically entitles the parties to do so.

148. The Panel agrees with FIFA that such deviation is not always acceptable, particularly due to a possible unequal power of bargain in the negotiation of the terms of an employment contract. As such, the Panel does not find it inappropriate for FIFA to assess whether the solution reached in fact entails fair and just consequences.

149. The Panel notes that FIFA is of the view that *"the employment contract did not establish proportionate rights in favour of the counterparty in case of termination without just cause by the player. In fact, compared to the situation in which the player would terminate the contract with just cause, under certain circumstances, the player would be put in a position of clear disadvantage"* and that as a consequence thereof, both clauses should be disregarded.

150. As such, the Panel considers that the FIFA DRC in particular found the combination of liquidated damages clauses, seen as a whole, to be disadvantageous to the Player and that it therefore proceeded to set aside both clauses and applied article 17(1) of the FIFA Regulations.

151. As a general background, the Panel notes that, based on FIFA and CAS case law, if a party to an employment contract were to terminate the employment contract without just cause, this would in principle require such party to compensate the other party for the damages incurred as a consequence of such breach. The non-amortised transfer fee paid for by a club to acquire the services of the player is usually included in such calculation as this is in principle indeed a damage incurred by such club, whereas the transfer fee paid for by the club would in principle not be taken into account in the calculation of the compensation if it were the club to terminate the employment contract without just cause, as the player does not incur any damages in this respect. This is not a consequence of the behaviour of the parties, but is simply a consequence of the different types of damages incurred by clubs and players in disputes regarding breach of contract. Specific circumstances put aside, the damage of a club in case of a unilateral and premature termination of an employment contract by a player is therefore generally higher than the damage of a player in case of a unilateral and premature termination by a club. This background analysis is deemed relevant by the Panel to show that the consequences of breach of contract are generally different for players and clubs and that, in the view of this Panel, this difference shall be taken into account in the assessment as to whether the individual solution reached by the parties is balanced and proportionate.

152. Turning its attention now to the specific case at hand and articles 5(1) and 8 of the Employment Contract, the Panel finds that the calculation to determine the compensation to be paid by the Club to the Player in case of unilateral termination of contract without just cause by the Club, is, at least in theory, not disproportionate. In fact, since the amount of compensation to be paid is made subject to the time remaining under the Employment Contract and is based solely on the salary the Club would have to pay to the Player during the employment relationship, one

could say that this method of calculation is indeed *per se* proportionate, as was ruled by the CAS panel in CAS 2013/A/3374 (par. 110).

153. If article 5(1) of the Employment Contract would be applied, instead of the general provision of article 17(1) of the FIFA Regulations, the Panel observes that the compensation for breach of contract to be paid to the Player by the Club would amount to USD 6,625,000 (*i.e.* USD 1,125,000 (*i.e.* USD 125,000 x 9 months) for the remainder of the 2012/2013 sportive season, USD 2,500,000 for the 2013/2014 sportive season and USD 3,000,000 for the 2014/2015 sportive season).

154. In respect of article 5(1)(e) of the Employment Contract referred to by the Club, the Panel finds that the intention of the parties in respect of this provision (*"all advance payments shall be deemed earned pro-rata"*) is not entirely clear. However, in any event, the advance payments set out in the Employment Contract are in no event made conditional upon certain circumstances, such as being conditional upon the continuing employment of the Player by the Club. The heading of article 5(1) of the Employment Contract indeed clarifies that the advance payment is part of the Player's wage (*"Net Annual Wage during the contract period"*) and is, as such, a guaranteed payment.

155. In fact, the most important difference between the application of article 5(1) of the Employment Contract and the application of article 17(1) of the FIFA Regulations is that the Player would not be required to mitigate his damages on the basis of the former, whereas such obligation is generally applied if article 17(1) of the FIFA Regulations would be applied. Although the Panel finds that the application of article 5(1) of the Employment Contract would be more favourable to the Player than the application of article 17(1) of the FIFA Regulations, it must be noted that if article 17(1) of the FIFA Regulations were to be applied, the Player could indeed possibly claim for bonuses, incentives, business class flights, a car with insurance and service costs, a fully furnished four-bedroom house, medical insurance for the Player and his family, which were all to be provided by the Club on the basis of the Employment Contract. The Player is however prevented from making such claims, as well as to claim additional compensation on the basis of the specificity of sport, because such possibilities are not incorporated in article 5(1) of the Employment Contract.

156. The fact remains that the two clauses differ in the sense that only one of them (article 5(1) of the Employment Contract) is made subject to the time remaining under the contract, whereas the other (article 8 of the Employment Contract) sets a fixed amount that is not subject to any reduction due to the lapsing of time. The difference being that the application of article 8 of the Employment Contract results in a set amount that is not amortised over the contractual term, whereas the amount of compensation to be paid in case of application of article 5(1) of the Employment Contract reduces with time. This, in the view of the Panel, could make the amount of compensation calculated on the basis of article 8 of the Employment Contract disproportionate, particularly if the Employment Contract has been in force for a while, which, however, is not the case here.

157. In any event, the Panel does not find it justified that the Player is deprived from the application of article 5(1) of the Employment Contract for the mere fact that if an assessment were to be made of both clauses together, *"the player would be put in a position of clear disadvantage"*, under certain circumstances, in comparison with the position of the Club. In other words, because article 8 of the Employment Contract would be disproportionate, even though such clause is not applicable in the dispute at stake, article 5(1) should be disregarded according to FIFA. The Panel does not agree with this and also believes that the proportionality of clause 5(1) should be assessed individually and within the context of all the specific circumstances of the case at hand.

158. The Panel notes that article 17(1) of the FIFA Regulations does not require contractually agreed liquidated damages clauses to be reciprocal, nor is there any other source or legal doctrine, or at least no such source has been cited by any of the parties, based on which such test would have to be applied.

159. As a consequence, the Panel is not convinced that both liquidated damages clauses must be set aside for the mere fact that they are not reciprocal. In the present case, this is particularly difficult because even at this stage of the proceedings, the Club still relies on article 8 in claiming compensation from the Player and the Player still relies on article 5(1) of the Employment Contract in claiming compensation from the Club.

160. Rather, the Panel finds that the appropriate test should be whether there has been any excessive commitment from any of the contractual parties in respect of the conclusion of the applicable clause, *i.e.* in this case article 5(1) of the Employment Contract.

161. In consideration of the foregoing, the Panel finds that there has not been any excessive commitment from the side of the Club in agreeing on the content of article 5(1) of the Employment Contract. It has not been established by the Club that it was "forced" to accept such clause or that it was otherwise in a position of unequal bargaining power in comparison with the Player. Rather, the Panel finds that it must be assumed that the Club was well aware of the content of article 5(1) of the Employment Contract when it concluded such agreement with the Player and that it should have realised the potential consequences of a failure to comply with its financial obligations towards the Player.

162. The Panel notes that the parties submitted different views in respect of whether article 5(1) of the Employment Contract must be fully applied without any possibility to reduce the resulting amount of compensation, or whether the Panel has the discretion or even the duty to mitigate the amount of compensation to be awarded if it finds such amount to be disproportionate or excessive.

163. The Club argues that the amount of compensation shall be reduced on the basis of articles 163(3) and 337(c)(2) of the SCO, whereas the Player argues, with reference to CAS case law, that article 337(c) of the SCO does not belong to the category of articles from which it is not possible to derogate, according to article 361 of the SCO, and that an early termination clause

such as article 5(1) of the Employment Contract is not subject to reduction under article 163(3) of the SCO.

164. The Panel considers that article 337(c)(1) and (2) of the SCO determine respectively the following:

> *"Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration".*
>
> *"Such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work".*

165. Although these provisions only refer to termination by the employer without just cause, the CAS jurisprudence applies the same principle, by analogy, also to cases of termination with just cause by the employee, as is the case here (CAS 2006/A/1180; CAS 2008/A/1491).

166. As to the freedom of the parties to derogate from article 337(c)(2) of the SCO, the Panel notes that there are different views:

> *"In the L. case* [TAS 2008/A/1491]*, the panel cited a Swiss Supreme Court judgement (ATF 133 III 657) which confirmed that Art. 337c (1) and (2) of the CO apply by analogy to Art. 337b, but went on to say (at Para 84) that this does "… not necessarily supersede the contractual intent of the parties". This is because Art. 337c (2) does not belong to the category of Articles from which it is not possible to derogate (as more particularly detailed in Art 361 and 362 of the CO). "The parties can therefore expressly provide that the employee will not have to add to his claims any income received between the date of the breach of the contract and its expiry".*
>
> *"On the other hand, the Panel is aware that some academics question whether it is possible for a liquidated damages clause to "derogate in advance the legal provisions [of the CO] related to the compensation of damages …. Accordingly, the convention of corresponding penalty clauses is not admissible (An extract from Basler Kommentar by HONSELL/VOGT/WIEGAND, 4th ed., 2007)"* (CAS 2010/A/2202, para. 25-26 of the abstract published on the CAS website).

167. The Panel finds that article 5(1) of the Employment Contract does not expressly exclude the application of the set-off principle under article 337(c)(2) of the SCO.

168. The Panel notes that after having made the above-mentioned observations, the CAS panel in CAS 2010/A/2202 proceeded to *"review this point along with Art. 163 CO below"*. The Panel considers this to be a feasible approach. The remaining question is therefore whether the Panel shall reduce the amount of compensation calculated on the basis of article 5(1) of the Employment Contract under the provision of article 163(3) of the SCO, which reads as follows:

> *"Excessively high liquidated damages shall be reduced at the discretion of the judge".*

169. In the interpretation and application of such provision, legal commentators maintain the following:

> *"[…] there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages"* (GAUCH/SCHLUEP/SCHMID/EMMENEGGER, Schweizerisches Obligationenrecht, Allgemeiner Teil, 10th Ed. (2014), N 3828).

170. According to the Swiss Federal Tribunal, a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity (ATF 82 II 142, consid. 3).

171. However, the Panel notes that, according to the jurisprudence of the Swiss Federal Tribunal (4A 141/2008, consid. 15.1.2) as well as CAS jurisprudence (CAS 2010/A/2317), penalty clauses may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor: *"Indeed, including a punishment aspect, the penalty does not have to meet exactly the amount of damage"* (CAS 2010/A/2317).

172. Applying the above to the matter at hand, the Panel notes that after the Employment Contract was terminated, the Player found new employment with other football clubs. During the remainder of the original term of the Employment Contract, the Player was employed by Cruzeiro Esporte Clube, Metalist Kharkiv, Sport Club do Recife and again with Metalist Kharkiv respectively. According to the Appealed Decision, the Player was entitled to BRL 2,500,000 with Cruzeiro Esporte Clube between 7 January 2013 until 14 July 2014, USD 2,585,000 with Metalist Kharkiv between 15 July 2013 until 31 July 2014 and from 1 January 2015 until 30 June 2015, BRL 450,000 with Sport Club do Recife between 1 August 2014 until 31 December 2014.

173. In this respect, the Player argues that Metalist Kharkiv failed to pay him three salaries in the total amount of USD 375,000. Furthermore, the Player maintains that the FIFA DRC wrongly took into account the amount of USD 1,000,000 the Player was supposed to earn with Metalist Kharkiv from 1 January 2015 until 30 June 2015, as the Player's loan with Sport Club do Recife was extended. The Player therefore earned only BRL 50,000 per month. The Player also requested to be provided the opportunity to provide the Panel with a proper calculation of all amounts he effectively received from football clubs in the relevant period.

174. First of all, the Panel finds that the Player's argument that he only received part of the salaries he was entitled to from Metalist Kharkiv has not been proven by the Player.

175. Second, the Panel notes that the Player failed to prove that the Player's loan with Sport Club do Recife was indeed extended for another six months. As such, the Panel finds that in respect of the period from 1 January 2015 until 30 June 2015, the Player's salary with Metalist Kharkiv is to be taken into account.

176. Furthermore, the Panel notes that the Player did not insist on being allowed to present a proper calculation of all amounts he effectively received nor was it raised by the Player during the hearing. In any event, the Panel finds that the FIFA DRC rightly proceeded to deduct the amounts to which the Player was entitled on the basis of the employment contracts, rather than deducting only the amounts the Player effectively received. The Panel notes that according to Article R51 of the CAS Code, the Appeal Brief shall contain all exhibits and specification of other evidence upon which he intends to rely and, pursuant to Article R56 of the CAS Code, unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the Appeal Brief and of the Answer. Hence, in the absence of any specific circumstances being put forward by the Player, no further specification is warranted.

177. As to the amount the Player earned with Cruzeiro Esporte Clube, the Panel notes that it is not disputed by the Player that he indeed earned, or was entitled to, such amount. In the proceedings before the FIFA DRC, the Player maintained that the amount of monthly salary of BRL 400,000 is equivalent to USD 165,833, which remained uncontested by the Club (see in this respect the Player's letter to FIFA dated 6 September 2014). As such, the Panel finds that the amount of BRL 2,500,000 is equivalent to USD 1,036,456.25.

178. As to the amount the Player earned with Metalist Kharkiv, the Panel dismissed the Player's arguments as to why the amount mentioned in the Appealed Decision would not be correct. Consequently, the Panel finds that the Player indeed earned, or was entitled to, the total amount of USD 2,585,000 from Metalist Kharkiv.

179. As to the amount the Player earned with Sport Club do Recife, the Panel notes that it is not disputed by the Player that he indeed earned, or was entitled to, such amount. In the proceedings before the FIFA DRC, the Player maintained that the amount of monthly salary of BRL 90,000 is equivalent to USD 36,763, which remained uncontested by the Club (see in this respect the Player's letter to FIFA dated 6 September 2014). As such, the Panel finds that the amount of BRL 450,000 is equivalent to USD 183,815.

180. Hence, in view of the above, the Panel finds that the Player earned alternative salary in the total amount of USD 3,805,271.25 (*i.e.* USD 1,036,456.25 + USD 2,585,000 + USD 183,815) during the period the Employment Contract would have been in force should it not have been breached by the Club.

181. As such, the Panel finds that the actual damages incurred by the Player in the amount of USD 2,819,728.75 (USD 6,625,000 – USD 3,805,271.25) need to be paid to the Player by the Club in any event. The remaining question is therefore to what extent the Player is entitled to the difference between his actual damages (USD 2,819,728.75) and the compensation calculated in accordance with article 5(1) of the Employment Contract (USD 6,625,000), *i.e.* USD 3,805,271.25.

182. In examining the possible excessiveness of the liquidated damages *"at the time the violation took place"*, the Panel considers that since the termination for just cause of the Employment Contract occurred within the first year of a 3 year contract, the Player had a long period of time to find another Club and to earn alternative income under the warranty of the "penalty clause" (*i.e.* from 26 October 2012 until 30 June 2015) which is highly compensatory compared to a possible later termination. As held in CAS 2010/A/2202, para. 29 of the abstract published on the CAS website, *"a penalty clause that seeks to award the entire contract balance and award a free transfer, without any mitigation, would seem excessive for an early breach, but perhaps not so for a later breach"*.

183. Furthermore, since the application of article 337(c)(2) of the SCO has not been expressly excluded, he Panel finds that this provision is to be applied by analogy. In this respect, the Panel considers it relevant that the amount of compensation calculated on the basis of article 5(1) of the Employment Contract would almost double the amount of damages effectively incurred by the Player, *i.e.* USD 2,819,728.75 of actual damages as opposed to USD 6,625,000 of compensation on the basis of article 5(1) of the Employment Contract.

184. The Panel considers that the Player – despite the uncertainty deriving from the contractual dispute which, in theory, could have made the Player less attractive for the prospective new club – actually managed to reduce the damages and earned alternative salaries amounting to USD 3,805,271.25. In this context, the Panel notes that the Player failed to prove that the alternative salaries effectively earned after termination of the Employment Contract correspond to a lower amount than the one established by the FIFA DRC, as alleged in the Appeal Brief under para. 187 ss.

185. In the light of the above mentioned elements and taking into consideration all the circumstances of the case at hand, the Panel holds that, with respect to the principle of justice and equity in accordance with article 163(3) of the SCO, the amount of compensation calculated in accordance with the liquidated damage clause under article 5(1) of the Employment Contract is excessive and shall be reduced. However, the Panel holds that, next to the damages effectively incurred, the Player is entitled to a further amount of compensation in consideration of the punishment aspect inherent under the liquidated damages clause.

186. In view of the principle of justice and equity and in consideration of all the elements set out above, the Panel determines to award the Player the total amount of compensation of USD 4,000,000, *i.e.* USD 1.180.271 more than the damages effectively incurred.

187. Finally, the Panel observes that the Club did not object to the rate of 5% interest *per annum* that would have to be paid by the Club over the amount of compensation to be paid to the Player as was decided by the FIFA DRC in the Appealed Decision or to the conclusion that the interest shall start to accrue as from 29 October 2012.

188. Consequently, the Panel finds that the Player is entitled to compensation for breach of contract in the amount of USD 4,000,000 from the Club and that interest shall accrue over this amount as from 29 October 2012 at a rate of 5% *per annum*.

iv. *If so, are any sporting sanctions to be imposed on the Club?*

189. The Player maintains that FIFA failed to impose the appropriate sporting sanctions on the Club, in breach of its own regulations. The Player argues that the Club is a "frequent client" of both FIFA and CAS and refers specifically to four decision of FIFA and CAS that were decided against the Club as a respondent.

190. The Club submits that no sporting sanctions shall be imposed on it.

191. FIFA maintains that whenever a club is held liable for breach of contract without just cause and when such breach occurred during the protected period, sporting sanctions shall, in principle, be imposed on such club by the FIFA DRC. FIFA contends that it is confirmed by CAS that it is a well-accepted and consistent practice of the FIFA DRC not to apply automatically the sanctions stipulated in article 17(3) and (4) of the FIFA Regulations. FIFA however stated that *"due to a current situation of constant and repeated disrespect of contractual obligations on the part of some specific clubs, which constantly figure as respondents in the numerous labour disputes lodged daily in front of FIFA, the DRC indeed decided to slightly modify its approach regarding the application of sporting sanctions on such "repeated offenders".*

192. In respect of the four cases referred to by the Player, FIFA states that *"the cases mentioned in letters b) and c) refer to appeals lodged at CAS in the years 2005 and 2006, and that the one mentioned in letter d) refers to a claim lodged at FIFA in April 2007, decided in July 2009. We deem it to be quite obvious that such matters, referring to breaches occurred between ten and eight years ago, cannot be taken into account in order to qualify the* [Club] *as a frequent offender at the current moment. Furthermore, the affairs mentioned by the* [Club] *in letters a) and b) refer to outstanding transfer compensation and the one in letter d) refers to a contractual dispute between* [the Club] *and a coach. None of the aforementioned cases falls under the jurisdiction of the DRC, but rather of another FIFA deciding body, i.e. the Players' Status Committee (PSC)".*

193. The Panel considers that article 17(4) of the FIFA Regulations determines the following:

> *"In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of the exception and the provisional measures stipulated in article 6 paragraph 1 of these regulations in order to register players at any earlier stage".*

194. Although contradictory to the wording of article 17(4), the Panel notes that there is case law of CAS pursuant to which it is deemed that there is a well-accepted and consistent practice of FIFA not to apply automatically the sanctions stipulated in article 17(3) and (4) of the FIFA Regulations (CAS 2007/A/1359).

195. The Panel has sympathy for the change in FIFA's approach regarding the application of sporting sanctions on so-called "repeated offenders" in respect of article 17(4) of the FIFA Regulations.

196. Although FIFA confirmed that the Club was indeed involved in certain proceedings as a respondent before FIFA and was condemned in such cases, the Panel took note of FIFA's explanation that such proceedings related to claims lodged in 2005, 2006 and 2007 and that FIFA is of the view that such matters cannot be taken into account in order to qualify the Club as a repeated offender at the current moment.

197. The Panel agrees with FIFA that decisions that were rendered such a long time ago can in principle not be taken into account in the assessment of whether a club can be denominated as a repeated offender. The Panel finds that, in light of the circumstances mentioned by FIFA, the Club can indeed, on the basis of the evidence available, not be held to be a repeated offender at this moment.

198. However, in the absence of any concrete guidelines issued by FIFA as to when sporting sanctions shall be imposed on a club and FIFA's apparent change of policy in this respect without having informed its affiliate members, the Panel expresses the fear that this policy might lead to uncertainty among stakeholders and therefore recommends FIFA to publicly clarify its new approach. In this respect, it is for example not entirely clear to the Panel why the outcome of cases in club vs. club and club vs. coach disputes would not be relevant for denominating a club as a repeated offender and should not be taken into account in examining whether sporting sanctions shall be imposed on a club. The mere fact that club vs. club and club vs. coach disputes are handled by the FIFA PSC whereas club vs. player disputes are handled by the FIFA DRC, is not deemed to be a satisfactory answer in the view of the Panel.

199. Consequently, the Panel finds that no sporting sanctions shall be imposed on the Club.

B. Conclusion

200. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

i. The Player had just cause to terminate the Employment Contract unilaterally and prematurely on 26 October 2012.

ii. The Player is entitled to receive an amount of USD 1,250,000 as outstanding remuneration from the Club.

iii. The Player is entitled to receive compensation for breach of contract in the amount of USD 4,000,000 from the Club.

iv. No sporting sanctions are to be imposed on the Club.

201. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 23 March 2015 by Al Ittihad Club against the Decision issued on 18 December 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The appeal filed on 26 March 2015 by Mr Diego de Souza Andrade against the Decision issued on 18 December 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.

3. Al Ittihad Club is ordered to pay to Mr Diego de Souza Andrade, within 30 days as from the notification of this decision, outstanding remuneration in the amount of USD 1,250,000 (one million two hundred fifty thousand United States Dollars), plus 5% (five per cent) interest *per annum* until the effective date of payment as follows:

    a. 5% (five per cent) *per annum* as of 8 September 2012 on the amount of USD 125,000 (one hundred twenty five thousand United States Dollars);

    b. 5% (five per cent) *per annum* as of 16 September 2012 on the amount of USD 1,000,000 (one million United States Dollars);

    c. 5% (five per cent) *per annum* as of 8 October 2012 on the amount of USD 125,000 (one hundred twenty five thousand United States Dollars).

4. Al Ittihad Club is ordered to pay to Mr Diego de Souza Andrade compensation for breach of contract in the amount of USD 4,000,000 (four million thousand United States Dollars), plus 5% (five per cent) interest *per annum* as from 29 October 2012 until the date of effective payment, within 30 days as from the date of notification of this decision.

(…)

8. All other motions or requests for relief are dismissed.