Arbitration CAS 2016/A/4826 Nilmar Honorato da Silva v. El Jaish FC & Fédération Internationale de Football Association (FIFA), award of 23 August 2017

Panel: Prof. Ulrich Haas (Germany), President; Mr Michele Bernasconi (Switzerland); Prof. Massimo Coccia (Italy)

Football
Termination of the employment contract with a settlement agreement
Invalidation of a settlement agreement concluded with a straitened party
Conditions for the qualification of a party's straitened state
Criteria for the validity of a liquidated damages clause
Applicable interest rate
Monopoly of FIFA to impose the sanctions set forth in art. 17 RSTP

1. **According to art. 21 of the Swiss Code of Obligations (SCO), where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other party's straitened circumstances, inexperience or thoughtlessness, the injured party may declare within one year that it will not honour the contract and demand restitution of any performance already made. The one-year period commences on conclusion of the contract.**

2. **For art. 21 SCO to apply, the injured party must have been in straitened circumstances when concluding the contract, the party entitled to benefit from the contract must have exploited the other party's vulnerability and a clear disparity between performance and consideration is required.**

3. **Pursuant to art. 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP), parties to a contract are free to stipulate a liquidated damages clause as a basis to calculate the compensation to be paid for breach of contract. Any such clause shall take precedence over the application of the other criteria set forth in said article. Let alone the point that it is not required that said clauses be reciprocal, they may validly set forth a disparity between the amounts stipulated therein, for the damage suffered by one club in case of a termination of contract without just cause by one player is different, and generally higher, than the damage suffered by one player in case of a termination of contract without just cause by one club. A CAS panel shall take this difference into account while assessing whether the parties' solution is balanced and proportionate. Furthermore, it might well be that a disparity with respect to the liquidated damage clause is compensated by other more favourable provisions in the employment contract to the benefit of the player, such as a particularly high remuneration. Any substantive review by a CAS panel can therefore not be limited to comparing the liquidated damage clauses only, but instead must look at the overall contract in order to determine whether there is a disparity.**

4. According to article 104(1) SCO, a debtor in default of payment of a pecuniary debt must pay default interest of 5% *per annum* even where a lower rate of interest was stipulated by contract.

5. No rule of law, either in the FIFA Regulations or elsewhere, allows the player or the club victim of a termination of contract without just cause to request that sporting sanctions as foreseen in art. 17 of the FIFA RSTP be imposed upon the party/parties at fault. In other words, said player or club has no legally protected interest in such matter and only FIFA has the power to impose such sanction(s).

I. PARTIES

1. Mr Nilmar Honorato da Silva (the "Appellant" or the "Player") is a professional football player of Brazilian nationality.

2. El Jaish FC (the "First Respondent" or the "Club") is a football club with its registered office in Doha, Qatar. The Club is registered with the Qatar Football Association ("QFA"), which in turn is affiliated to the *Fédération Internationale de Football Association*.

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

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings and at the hearing. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the legal discussion.

A. Background facts

5. On 23 January 2014, the Player and the Club concluded an employment contract (the "Employment Contract"), valid as from the date of signature until 31 July 2016.

6. The Employment Contract determines that the Player is entitled to EUR 1,672,730 for the 2013/2014 sporting season, EUR 3,300,000 for the 2014/2015 sporting season, and EUR 3,400,000 for the 2015/2016 sporting season. Additionally, the Employment Contract contains the following relevant clauses:

"10.7 If the [Club] *terminated the contract unilaterally, the* [Player] *is entitled to receive salary of Two months.*

10.8 Disciplinary Act:

In case the player terminated the contract from his side only, he has to pay a disciplinary act as per the following:

First year termination: The [Player] *shall pay for the* [Club] *an amount of Euro 1,672,730* […].

Second year termination: The [Player] *shall pay for the* [Club] *an amount of Euro 3,300,000* […].

Third year termination: The [Player] *shall pay for the* [Club] *an amount of Euro 3,400,000* […].

[…]

Bonuses:

EUR 100,000 (One thousand euros) [sic]
To win Crown Prince Cup".

7. On 29 July 2014, the Club sent an email to the Player enclosing a document titled "Termination Letter" and dated 23 July 2014 (the "Termination Letter"). The Club argues in the email that the Player refused to receive the Termination Letter by hand and that it therefore proceeded to notify him by email. The Termination Letter reads as follows:

"Subject: Termination Letter

Dear [Player],

[The Club] *would like to thank you for your sincere efforts during your employment as professional football player at the club.*

1. *We regret to inform you that your employment contract will be terminated, effectively on 27th of July 2014, according to paragraph No. 7 of article No. ten of the concluded contract between you and* [the Club]. *The mentioned paragraph states that if the* [Club] *terminated the contract unilaterally, the* [Player] *is entitled to receive a salary of Two months.*

We also would like to thank you for your cooperation and dedication during your employment period at the club".

8. On 1 August 2014, the Player returned to Brazil.

9. On 20 August 2014, the Player rejected the contents of the Termination Letter and claimed EUR 100,000 net from the Club for the title in the Prince Cup and compensation for breach of contract in the amount of EUR 6,700,000 net. The Player informed the Club that if it failed to pay this amount by 28 August 2014 he would commence legal proceedings before the Dispute Resolution Chamber of FIFA (the "FIFA DRC") in order to claim the same amount plus interest and for sporting sanctions to be imposed.

10. On 16 September 2014, the Player and SC Internacional ("Internacional"), a football club with its registered office in Porto Alegre, Brazil, entered into an employment contract, valid as from the date of signing until 31 December 2017, pursuant to which the Player was to earn a monthly salary of Brazilian Real ("BRL") 220,000 (equivalent at the time to approximately EUR 72,500).

11. Also on 16 September 2014, Internacional uploaded the necessary information and documentation to the FIFA Transfer Matching System ("FIFA TMS"). FIFA TMS showed the following "exception validation" for the issuance of the International Transfer Certificate ("ITC"):

> *"September 17, 2014 9:26pm*
>
> *There are validation issues that need to be resolved before the transfer can proceed.*
> *# Player out of contract transferring prior to next registration period*
>
> *Responsible: FIFA Player's Status".*

This information was accompanied by the following observation:

> *"*Issues under the responsibility of FIFA's Player's Status will only be dealt with upon receipt of a formal (written) request for intervention in accordance with art. 9 par. 1 of the Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber".*

12. On 18 September 2014, Internacional informed the CBF of the above-mentioned notifications in FIFA TMS and requested the CBF as follows:

> *"[W]e hereby request that you ask the Player's Status Committee to remove the aforementioned validation exemption, immediately authorizing the continuation of the procedure initiated via TMS for the player's transfer.*
>
> *We must emphasize the urgency of the matter, in view of the proximity to the deadline to register new athletes seeking their participation in the Brazilian Championship underway (which ends on October 3, 2014), which is why processing this application requires agility.*
>
> *Given the short period of time described above,* [Internacional] *and the player understand that the decision of the Player's Status Committee on the matter (i.e., the simple unlocking of the transfer process or, in more*

technical words, the removal of the validation exemption pointed out by the TMS), at this stage, should be processed inaudita altera pars since it only aims at the continuation of the proceedings in the TMS. We emphasize that the adoption of a decision at this stage of the transfer procedure without hearing the other party is justified because of its urgency and the damage that will entail if the player cannot be registered in time to participate in the Brazilian Championship; on the other hand, it is also justified by the fact that it rigorously does not cause any harm to the player's former club, since this club expressly and publicly recognized its sole responsibility in relation to the early termination of the player's previous contract".

13. On 19 September 2014, the CBF forwarded the documents submitted by the Club to FIFA Players' Status, requesting it to intervene in the validation exemption.

14. On 22 September 2014, FIFA Players' Status informed the CBF as follows:

"From the content of your correspondence as well as the information contained in the [FIFA TMS]*, we took due note that your association was not able to request the* [ITC] *from the* [QFA] *for the player concerned, at the latest on the last day of the registration period fixed by your association, i.e. 13 August 2014. In particular, we understand that your federation therefore requests a special exemption from the "validation exemption" in the TMS.*

[…]

[S]ince the document uploaded in the relevant transfer instruction as "employment contract" appears to have been submitted in the original language only, we kindly invite you to provide our services with a translation of the aforementioned documents into one of the four FIFA languages (English, French, Spanish or German)".

15. On 24 September 2014, the CBF provided FIFA Players' Status with the relevant documents.

16. On 26 September 2014, referring to a letter dated 24 September 2014, FIFA informed the CBF as follows:

"We have observed that your association was not able to request the relevant electronic [ITC] *for the* [Player] *from the* [QFA] *in the TMS at the latest on the last day of the relevant registration period fixed by your association, i.e. 1 September 2014. In particular, we understand that therefore your association requests a special exemption from the current "validation exception" in the TMS.*

[…]

In this regard we kindly refer you to art. 6 par. 1 of the Regulations on the Status and Transfer of Players [the "FIFA RSTP"]*, according to which players may only be registered during one of the two annual registration periods fixed by the relevant association.*

However, in accordance with art. 6 par. 1, in fine, of the [FIFA RSTP]*, FIFA may take provisional measures in cases where the contract with the previous club has been terminated with just cause, in order to avoid abuse. The aim of this provision is to protect players from remaining unemployed until the opening of*

the next registration period following the conclusion of a new employment contract, in case they had become unemployed after having felt compelled to unilaterally terminate an existing contract for reasons to be solely attributable to the club. Consequently, such an interpretation should also be extended to circumstances whereby the player's previous contract was terminated unilaterally by the club, without just cause.

In this regard, we have observed that, according to the documentation provided, it would appear that the player's previous contract was unilaterally terminated by [the Club] *on 27 July 2014* […]. […] [W]*hile emphasising that if need be, it will remain the sole competence of the deciding authority having jurisdiction to hear a potential contractual dispute possibly arising between the parties concerned to establish any responsibility for the early termination of the contractual relationship in question, prima facie, it would appear clear from the documentation provided that the player's previous contract was terminated by the club through no fault of the player.*

As a result, in particular, in consideration of the apparent clarity of the relevant circumstances, on a very exceptional basis only, we deem that provisional measures in the sense of art. 6 par. 1 of the [FIFA RSTP] *may be taken, despite the absence of a decision of the competent authority confirming that the unilateral termination by the club occurred without just cause.*

Consequently, in view of all the above, we would like to inform you that based on the documentation provided and the information at our disposal, we are able to grant your request for the special exemption from the "validation exception" in the TMS".

17. On 30 September 2014, the Player and Mr F., TMS Manager and in-house lawyer of Internacional, travelled to Qatar in order to obtain the Player's ITC, which the Club allegedly only wanted to release under the condition that a settlement agreement would be concluded containing the personal signature of the Player. The matter was urgent for the Player since Chapter III of the 2014/A Series Brazilian Championship REC – Specific Regulations of the Competition (the "CBF Competition Regulations) determines that contracts can be filed and registered with the CBF only until 3 October 2014.

18. On 1 October 2014, the Player and the Club signed an agreement titled "Amicable Professional Football Player Contract Termination And Financial Settlement" (the "Settlement"), determining, *inter alia*, as follows:

"Since the two Parties agreed to terminate the contract between them amicably according to the following terms:

1. *The* [Player] *acknowledges and declares that he had received all his financial entitlements from the* [Club] *and he shall not demand any further financial entitlements after signing this agreement.*

2. *The* [Club] *acknowledges and declares that they do not have any further demands from the* [Player] *after signing this agreement.*

3. *This agreement is a final financial settlement between the two parties and neither party shall violate the provisions and terms of this agreement.*

4. *The* [Club] *undertakes to send the ITC of the Player immediately after signing this agreement to the club desirous of Transferring the Player.*

5. *Both parties undertakes to respectively inform the related authorities in the Brazilian and Qatari football associations with the contents of this agreement and send them an original copy of the same.*

6. *Any dispute that may arise due to this agreement shall be reported to the* [FIFA DRC] *to decide on it".*

19. Also on 1 October 2014, the Player, Mr F, and Mr Y, a friend of the Player in Doha, Qatar, jointly declared, *inter alia*, the following before the Brazilian Embassy in Qatar:

> *"Even though the* [Employment Contract] *has been terminated unilaterally by* [the Club] *without cause as provided in such "Termination Letter", the* [Player] *and* [Internacional] *were surprised at the decision of* [the Club] *not to authorize the issuance and submission of the international transfer certificate by* [the QFA] *unless the* [Player] *signed a "Settlement Agreement" in person.*
>
> *On September 30, 2014, the* [Player] *and DECLARANT* [Mr F] *travelled from the City of Porto Alegre, State of Rio Grande do Sul, Brazil, to Doha, Qatar, for the purposes of performing the procedures required by* [the Club]. *On the date hereof (October 1, 2014), the* [Player] *and the DECLARANTS personally appeared at the headquarters of* [the Club] *to take the required measures, as stated above. The* [Player]*, however, was surprised at the terms and conditions of said "Settlement Agreement" stipulating that the authorization for the issuance and submission of the* [ITC] *was subject to the waiver from receiving any compensation, remuneration and awards under the* [Employment Contract] *as terminated unilaterally by* [the Club] *without cause, in accordance with the provisions of the "Termination Letter".*
>
> *With no option against the threat of not being allowed to exercise his profession as a whole before* [Internacional] *for the next months, the* [Player] *was coerced by the representative of* [the Club]*,* [Mr M]*, into signing the "Settlement Agreement", otherwise he would not take the required measures to complete the international transfer of the* [Player]*, in accordance with FIFA Regulations which provide for the matter at hand.*
>
> *Finally, the DECLARANTS hereby expressly declare before this Embassy that the foregoing reflects the full, correct and unchanging truth and chronology of the facts, and the declarants are at the disposal of any legal authority, ordinary court or arbitration tribunal to confirm the contents and provisions herein.*
>
> *The Brazilian Embassy in Doha, Qatar, without judging the contents of this declaration, hereby certifies that the undersigned DECLARANTS, as identified above, personally appeared on the date hereof at this Embassy".*

20. Also on 1 October 2014, the QFA delivered the ITC to the CBF.

B. Proceedings before the Dispute Resolution Chamber of FIFA

21. On 18 September 2015, the Player lodged a claim in front of FIFA against the Club for breach of contract, requesting the following:

- EUR 100,000, plus 5% interest as of 26 April 2014, as outstanding bonuses for winning the Crown Prince Cup 2014;

- EUR 6,700,000, plus 5% interest as of 29 July 2014, as compensation corresponding to the residual value of the contract;

- Sporting sanctions to be imposed on the Club.

22. The Club disputed the Player's allegations and requested the claim to be dismissed.

23. On 26 May 2016, the Dispute Resolution Chamber of FIFA (the "FIFA DRC") rendered its decision (the "Appealed Decision"), with the following operative part:

"The claim of the [Player] *is rejected".*

24. On 20 September 2016, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"[T]he members of the Chamber acknowledged that the* [Player] *and the* [Club] *signed an employment contract valid as from 23 January 2014 until 31 July 2016 and that, on 29 July 2014, the* [Club] *terminated the contractual relationship with the* [Player] *in accordance with art. 10.7 of the contract. The DRC further observed that on 1 October 2014, the* [Player] *and the* [Club] *signed a settlement agreement.*

- *The Chamber then reviewed the claim of the* [Player]*, who maintains that "he entered into the* [settlement agreement] *under duress" and therefore requests it to be deemed null and void and the* [Club] *to be held liable for the termination of the contract without just cause on 29 July 2014. In particular, the Chamber took note of the* [Player's] *allegation that the* [Club] *took advantage of the fact that the registration period for the 2014 Brazilian Championship was about to expire on 3 October 2014, and made the release of the ITC through TMS* [*i.e.* the "Transfer Matching System"] *by the QFA subject to the signature of the settlement agreement.*

- *At this stage, the members of the DRC turned their attention to elements put forward by the* [Player] *in support of his assertion that he was coerced to sign the settlement agreement. In doing so, the DRC first observed that the* [Player] *submitted a joint statement made in front of the Brazilian Embassy by him, a friend of him and his new club's legal counsel. In this regard, the Chamber deemed it fit to outline that the interests that the declarants have in the dispute put in doubt the impartiality of their statements and therefore, after making reference to art. 12 par. 3 and par. 6 of the Procedural Rules, according to which any party claiming a right on the basis of an alleged fact shall carry the burden of proof and the evidence shall be considered with free discretion respectively, concluded that said statement was not likely to demonstrate that the* [Player] *had signed the settlement agreement under duress. In this respect, the*

Chamber was eager to point out that the Brazilian Embassy certified the relevant statement "without judging the merits of the contents of this declaration".

- *In continuation, the Chamber focussed on the* [Player's] *argument as to the restrictive rules regarding the* [Player's] *registration in Brazil. In this respect, after recalling the regulatory framework established by FIFA regarding the provisional registration of players, the DRC deemed it important to emphasise that the* [Player] *did not even attempt to request the urgent intervention of FIFA prior to taking the initiative of signing the settlement agreement, thereby showing a complete lack of diligence and taking a risk, the consequences of which he has to bear.*

- *Moreover, the Chamber was eager to emphasise that a party signing a document of legal importance without knowledge of its precise contents, as a general rule, does so on its own responsibility.*

- *Furthermore, and for the sake of completeness, the members of the Chamber highlighted that the* [Player] *had waited for almost one year before lodging a claim in front of FIFA, apparently manifesting by doing so his satisfaction with the situation.*

- *In view of the above, and referring to art. 12 par. 3 of the Procedural Rules, the Chamber deemed that the* [Player] *had not presented any documentation which would demonstrate the nullity of the settlement agreement and, consequently, concluded that said document constituted a valid and binding document by means of which the* [Player] *waived any claim he might have or have had against the* [Club].

- *On account of the above, the Chamber decided to reject the claim of the* [Player] *in its entirety".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 11 October 2016, the Player lodged a Statement of Appeal with the Court of Arbitration for Sport ("CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (2016 edition) (the "CAS Code"), challenging the Appealed Decision. The Player nominated Mr Michele Bernasconi, Attorney-at-Law in Zurich, Switzerland, as arbitrator.

26. On 26 October 2016, 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 submitted the following requests for relief:

"FIRST – To dismiss in full the Appealed Decision;

SECOND – To accept in full the present appeal;

THIRD – To confirm that the Settlement Agreement is null since the Player signed it under duress (cf. Art. 29 et seq. of the Swiss CO);

FOURTH – To confirm that the settlement agreement signed between the Player and the Club on 1 October 2014 is null (in addition) because the issuance of an ITC shall occur free of charge and without any condition whatsoever, in particular, in case of an null Settlement Agreement (cf. Art. 9, par. 1 of the FIFA RSTP);

FIFTH – To confirm that the Club unilaterally terminated the Employment Contract without just cause during the so-called "protected period" (cf. definition 7 of the FIFA RSTP);

SIXTH – To order the Club to pay to the Player the overdue bonuses of EUR 100,000 for the winning of the Crown Prince Cup 2014, plus default interest at a rate of 5% p.a. as from 26 April 2014 until the date of effective payment;

SEVENTH – To order the Club to pay EUR 6,700,000 due as compensation, plus default interest at rate of 5% p.a. as from the date in which the Employment Contract was terminated unilaterally and without just cause, i.e. 29 July 2014 (cf. Art. 17, par. 1 of the FIFA RSTP);

EIGHT – To impose sporting sanctions on the Club for having breached the Employment Contract (cf. Art. 17, par. 4 of the FIFA RSTP); and

NINTH – To confirm that the FIFA TMS was misused and as such, submit the file of the case at hand to the FIFA Disciplinary Committee together with a request for the commencement of disciplinary proceedings against the Club (cf. Art. 25, par. 5, in combination with Art 9 of Annexe 3 of the FIFA RSTP)".

27. On 31 October 2016, the Club and FIFA jointly nominated Mr Massimo Coccia, Attorney-at-Law and Professor of Law in Rome, Italy, as arbitrator.

28. On 12 December 2016, in accordance with Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

- Prof. Ulrich Haas, Professor of Law in Zurich, Switzerland, as President;
- Mr Michele Bernasconi, Attorney-at-Law in Zurich, Switzerland; and
- Mr Massimo Coccia, Attorney-at-Law and Professor of Law in Rome, Italy, as arbitrators.

29. On 3 January 2017, the CAS Court Office informed the parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, would act as *Ad hoc* Clerk.

30. On 9 January 2017, the Club filed its Answer, in accordance with Article R55 of the CAS Code. The Club submitted the following requests for relief:

"I. To fully reject the Appellant's appeal and to fully confirm the DRC Decision passed by the FIFA DRC on 26 May 2016;

II. For the effect of the above, to state that the Appellant shall be condemned to pay any and all costs of the present proceedings including, without limitation, attorney fees, travel and accommodation costs, as well as any eventual further costs and expenses for witnesses and experts, if any".

31. On 10 January 2017, FIFA filed its Answer, in accordance with Article R55 of the CAS Code. FIFA submitted the following requests for relief:

> *"1. That the CAS rejects the present appeal and confirms the aforementioned challenged decision passed by the Dispute Resolution Chamber (hereinafter also referred to as: the DRC) on 26 May 2016 in its entirety.*
>
> *2. That the CAS orders the Appellant to bear all the costs of the present proceedings.*
>
> *3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the appeal proceedings at hand".*

32. On 17 and 18 January 2017 respectively, the Club informed the CAS Court Office that its preference was for an award to be issued solely on the basis of the parties' written submissions, the Player indicated to prefer a hearing to be held, and FIFA indicated to be of the opinion that the holding of a hearing was not necessary.

33. On 30 January 2017, the CAS Court Office informed the parties that the Panel had decided to hold a hearing.

34. On 31 January 2017, the CAS Court Office, on behalf of the Panel, invited the Club to complete an attached "Redfern Schedule" with respect to its request for production of documents as set out in its Answer.

35. On 6 February 2017, the Club provided the CAS Court Office with a filled-in "Redfern Schedule", requesting the Panel to order the Player to produce a copy of the CBF correspondence to FIFA dated 24 September 2014, explaining why this document was likely to exist and how its existence became known, and the relevance of the document sought.

36. On 16 February 2017, the Player provided the CAS Court Office with a filled-in "Redfern Schedule", declaring that the document exists and that it appears to be a correspondence from CBF to FIFA dated 18 September 2014, and provided the CAS Court Office with part of the documentation sought. The Player maintained that the additional documentation sought was not in his possession.

37. On 16 March 2017, FIFA provided the CAS Court Office with a filled-in "Redfern Schedule" and submitted the remaining letters that were exchanged between the CBF and FIFA following the Club's request for a validation exemption.

38. On 7 April 2017, upon being invited by the Panel to do so, the Club filed its observations in respect of the documents produced. The principal conclusion of the Club being that, in confirmation to the Club's comments in its Answer, the Player and/or Internacional did not exhaust all possible options in order to ensure the delivery of the ITC before 3 October 2014.

39. On 25 April 2017, upon being invited by the Panel to do so, the Player filed his comments in respect of the Club's observations, maintaining that the Club's observations were only a mere repetition of the position in its Answer and that no additional or relevant information was provided by the Club. FIFA did not file any comments within the deadline granted.

40. On 1, 2 and 3 May 2017 respectively, the Club, FIFA and the Player returned duly signed copies of the Order of Procedure to the CAS Court Office.

41. On 5 May 2017, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.

42. In addition to the Panel, Mr Fabien Cagneux, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

For the Player:

- Mr Breno Costa Ramos Tannuri, Counsel;
- Mr André Ribeiro, Counsel;
- The Player.

For the Club:

- Mr Ettore Mazzilli, Counsel;
- Mr Konstantinos Antoniou, Counsel;
- Mr Saoud Abdulaziz Al Jassim, Players' Affairs official of El Jaish FC.

For FIFA:

- Mr Gauthier Bouchat, Legal Counsel of the Players' Status Department;
- Mr Antoine Bonnet, Legal Counsel of the Players' Status Department.

43. The Panel heard evidence from the following persons, in order of appearance:

- Mr F., TMS Manager and in-house lawyer of Internacional, witness called by the Player, in person;
- The Player, in person.

44. Each party and the Panel had the opportunity to examine and cross-examine the witness and the Player in person.

45. Although the Player initially also called Mr R., Director of Registration and Transfer at the CBF, and Mr Y., friend of the Player in Doha, Qatar, as expert witness/witness, and the Club initially called Mr O., Sports Manager of the Club, as witness, these persons finally did not appear before the Panel.

46. During the hearing, the Club sought leave from the Panel to show a video where the Player was allegedly shown to be celebrating the conclusion of the Settlement.

47. Following an objection from the Player, the Panel decided not to allow the Club to present the video as evidence. Even if the video came to the attention of the Club only on 30 April 2017, *i.e.* after filing the Answer, the Panel found that the Club should have advised the Panel and the other party straight away that it wished to produce new evidence and should have sought leave from the Panel to do so.

48. Following the conclusion of the evidentiary phase of the hearing, the parties informed the Panel that they were close to reaching a settlement. The parties requested the Panel to terminate the hearing and grant them a time limit of two weeks to inform the Panel whether a settlement was reached. In case no settlement were reached, the parties requested to be granted a simultaneous deadline of two weeks to file post-hearing briefs to substitute for their final pleadings at the hearing. In addition, both 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 be treated equally had been respected.

49. On 19 May 2017, the Club informed the CAS Court Office that no settlement had been reached.

50. On 1 and 2 June 2017 respectively, the Club, the Player and FIFA filed their post-hearing briefs with the CAS Court Office.

51. The Panel confirms that it carefully heard and 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

52. The Player's Appeal Brief, in essence, may be summarised as follows:

- The FIFA DRC failed to set out the *"reasons for the findings"* and *"the outcome of the evaluation of evidence"* in violation of article 5(8), 14(4)(f) and (g) of the FIFA Procedural Rules, because it failed to take into account any of the factual questions raised by the Player during the investigation phase. More specifically, the FIFA DRC failed to*, inter alia,* take into account the letter of the Player dated 20 August 2014, the statement given to the Brazilian Embassy in Doha, Qatar, that the Club informally refused to issue the Player's ITC, and that it was not possible for the Player to apply for a provisional ITC since there was no sufficient time available considering that the issuance of a decision in this respect usually takes between 15 and 25 days. For this reason the Appealed Decision must be dismissed in full.

- The Settlement is null and void, since it is undisputed that the Player signed it under duress. Since the validity of a contract signed under duress is not an issue governed by the FIFA RSTP, one has to resort to Swiss law. The fact that the Club exercised duress

follows from the fact that it does not make any sense for the Player to waive all his claims under the Employment Contract, particularly in light of the correspondence exchanged on 20 August 2014. The only scenario capable of explaining the Player's change of mind is the threat voiced by the Club to block the issuance of the ITC. With reference to article 29(1) and 30(1) of the Swiss Code of Obligations (the "SCO") and jurisprudence of the Swiss Federal Tribunal (the "SFT"), the Player submits that the concept of "duress" according to Swiss law contains four main elements: i) a threat; ii) a founded fear; iii) the intention of the author to determine the recipient to make a declaration of will; and iv) a causal connection between the fear and the consent. The Player submits that all these elements are fulfilled in the case at hand and that this is a typical case of duress.

- The Club (illegally) misused FIFA TMS for illegitimate purposes. Because the behaviour of the Club is contrary to the spirit of the system regarding transfers of players developed and applied by FIFA, it is undisputed that the Settlement is null and void.

- As a consequence, *"it is necessary to place the Club and the Player to the moment in which the former decided to breach the Employment Contract and consider from that moment on the consequences of such decision"*.

- It is not in dispute between the parties that the Club breached the Employment Contract without just cause. The Club shall therefore pay compensation for breach of contract to the Player. Because the breach took place during the "protected period", sporting sanctions shall be imposed on the Club.

- With respect to the calculation of the compensation for breach of contract, the Player submits that clause 10(7) of the Employment Contract shall not be taken into account, because its content is ambiguous and because the clause is unfair and violates the principle of equality. As a consequence, the Panel shall disregard this provision and apply article 17(1) of the FIFA RSTP. Considering that the Club acted in bad faith and that the breach occurred during the protected period, the Player claims to be entitled to an amount of EUR 6,800,000 as compensation for breach of contract.

- Finally, the Panel shall order FIFA to revert the matter to the FIFA Disciplinary Committee in order for disciplinary sanctions to be imposed on the Club for the misuse of FIFA TMS.

53. The Club's Answer, in essence, may be summarised as follows:

- The Appealed Decision is of utmost correctness concerning both its reasoning and its findings. The Player's allegations in respect of the members of the FIFA DRC for breaching *"formal and procedural requirements of the various regulations of FIFA"* are baseless.

- With respect to the execution of the Settlement, the Club submits that it was the Player's decision to come personally to Qatar at the end of September 2014 in order to exercise pressure on the Club and acquire the consent and agreement of the latter for the

immediate delivery of his ITC to the CBF but also in order to settle other personal issues during his stay in Qatar. It was the Player's exclusive choice to sign an employment contract with Internacional, despite having offers from other clubs outside Brazil, for which the Club cannot be held accountable, and while being fully aware of all the relevant regulatory requirements concerning his registration.

- The parties only signed the Settlement after finalising the negotiations and after a proper and careful review of the content and wording of the document. As a consequence of the Settlement, the Club "issued" the Player's ITC and the Player was able to be registered for Internacional by the CBF before 3 October 2014. No pressure or coercion was exercised by the Club on the Player in order to sign the Settlement. The Player did not discharge the required burden of proof in order to establish with cogent evidence all the unfounded allegations made in the Appeal Brief.

- Although the Club does not object to the various elements of "duress" under Swiss law referred to by the Player, it disputes that these elements are complied with. The Player's allegations that he *"did not have* […] *any offer from club located in other countries"*, that *"*[Internacional] *was only good official offer the Player really received"* and that *"a good offer from Europe or Middle East* […] *never arrived"* are misleading. Their sole purpose is to allegedly demonstrate that that the Player had no other alternative but to sign with Internacional. Furthermore, the Player was not dependent on the Club in order to be registered with Internacional. Instead, he had several options at his disposal. He could have requested FIFA for a provisional registration pursuant to article 8(2)(6) and (7) of Annexe 3 to the FIFA RSTP. He could also have requested the QFA, FIFA TMS or FIFA to intervene. There was no threat against and no significant and imminent danger for the Player.

- Should the Panel decide that the Settlement was signed under duress, the Club subsidiarily submits that this does not render the Settlement null and void. The Player – according to the Club – has failed to declare vis-à-vis the Club, within one year from the execution of the Settlement, that he rejects the contract and that he does not intend not to honour it. Nor did the Player seek restitution for the performance given that the Player had already enjoyed the benefits of such Settlement whereas the Club had already performed the obligation imposed on it by the Settlement, *i.e.* the immediate delivery of the ITC from the QFA to the CBF.

- Furthermore, the Club refers to the fundamental legal principle of *venire contra factum proprium*. With reference to CAS jurisprudence, the Club submits that the Player's allegations are in clear contradiction with his previous behaviour. This position is also governed by the basic legal principle of *cuius commoda, eius et incommode"*, pursuant to which the one who seeks and obtains a benefit must also take the possible burdens coming with that benefit.

- In case the Panel should decide that the Player is entitled to a compensation, the Club submits that such compensation is limited by clause 10(7) of the Employment Contract, which is a fully valid and enforceable contractual provision. The latter qualifies as a

"liquidated damages" clause under Swiss law. The Club finds it "surprising" that the Player has not submitted a copy of his employment contract with Al Nasr. Such contract has been entered into by the Player at the end of July 2015. It covers two sporting seasons. Any sums earned by the Player during the term specified in the Employment Contract should be deducted from the respective compensation, if any.

- As to the Player's request for sporting sanctions to be imposed on the Club, with reference to CAS jurisprudence, the Club submits that such right is conferred only upon the competent bodies of FIFA. Such request should, therefore, be dismissed.

54. FIFA's Answer, in essence, may be summarised as follows:

- The contents of the Appealed Decision is correct, valid, perfectly justified and fully endorsed by FIFA.

- As to the conclusion of the Settlement, FIFA considers that the Player's arguments are still not corroborated by any conclusive evidence permitting such allegations to be considered as reliable. There is a persisting absence of precision in the Player's description of the circumstances surrounding the alleged communication by the Club through the QFA to Internacional that the Player had to come in person to Qatar to sign the Settlement.

- According to FIFA little weight shall be given to the declarations made before the Brazilian Embassy in Qatar. Given the identity of the persons that made the declarations (the Player, a member of his entourage and the lawyer of his new employer) and their obvious roles and interests in the case at stake, the reliability and conclusiveness of these statements must be assessed with care. Should the DRC have *"to consider null and void contracts / agreements / settlements / waivers (etc.) on the sole basis of a posterior unproven statement of one of its his signee or his connections that he was forced to sign the document at stake, no legal certainty would be sustainable and the pacta sunt servanda principle, which the* [Player] *relies onto in his own argumentation, would become an empty shell"*.

- According to FIFA the Panel shall also take into account the fact that almost a year elapsed between the signing of the Settlement (1 October 2014) and the filing of the claim with FIFA (18 September 2015). Such behaviour is all the more peculiar, since there is no reason for such delay. In particular, the Player did not submit any argument or document in the proceedings before FIFA that was not be available to him already during the weeks following 3 October 2014.

- The burden of proof in respect of "duress" is high and requires *"very strong and quasi-irrefutable premises, arguments and evidences"*. Yet, the Player has failed to meet this threshold.

- Even if the Player was under duress, such situation was not solely provoked by the Club. Instead, it was the Player himself and Internacional who are responsible for this situation. Despite the fact that the Player already signed an employment contract with Internacional

on 16 September 2014, the CBF only submitted a request for a "validation exception" on 24 September 2014, which was subsequently granted on 26 September 2014.

- It was undisputedly the Player's own decision / risk to sign the Settlement on 1 October 2014 and to not wait until the 7th day of said ITC's request pending before the QFA, *i.e.* until 3 October 2014, to possibly ask for FIFA's urgent advice / intervention.

- Furthermore, article 4 of the Settlement does not set forth a condition for the issuance of the Player's ITC by the QFA, but rather indicates a chronology of actions.

- As to the Player's claim for compensation on the basis of article 17(1) of the FIFA RSTP, FIFA submits that it is unable to elaborate on what the FIFA DRC's interpretation of article 10.7 of the Employment Contract would have been. With reference to the employment contract concluded between the player and Al Nasr Football on 3 August 2015 (submitted as evidence by FIFA), FIFA submits that the remuneration for the 2015/2016 sporting season in the latter contract is superior to the Player's entitlement under the terms of the Employment Contract.

- Finally, as to the sporting sanctions, and with reference to CAS jurisprudence, FIFA submits that a party has no right to request the application of sporting sanctions on the other party as only FIFA would be entitled to do so.

55. The Player's post-hearing brief, in essence, may be summarised as follows:

- It was the Club that made the execution of the Settlement a condition for issuing the ITC. This follows from the testimony of Mr F. The latter provided evidence as an expert witness as well as an eyewitness. The Club, on the contrary, has not provided any evidence for its allegations. The witness initially announced by the Club (Mr O, Sports Manager of the Club) finally did not appear before the Panel. The Club did not provide any explanation as to why an employee that initially claimed a large compensation from its former employer suddenly, *i.e.* a few weeks later, waives all amounts due in a settlement agreement.

- Players do not have a say in relation to the procedure for the issuance or refusal of an ITC. A club that has unilaterally terminated a contract based on a so-called "buy-out clause" has no legitimate interest to reject or delay the issuance of an ITC. This is all the more true, considering that the Club never claimed that the Employment Contract remained valid after having terminated it. On the contrary, there was never any controversy regarding the fact that the Player was free and entitled to enter into a new employment contract with another football club after he had received the Termination Letter from the Club. The allegation of the Club that it was going to reject the issuance of the ITC if the parties did not conclude the Settlement simply confirms the Club's bad faith vis-à-vis the Player. There was no reason whatsoever to refuse or delay the ITC. All of this is proof that the Club by obstructing the issuance of the ITC sought to obtain an illicit advantage.

- Article 9(1) FIFA RSTP provides that *"the ITC shall be issued free of charge without any conditions or time limit"*. The addressees of this provision are not only football associations. Instead, the provision contains a general principle that applies to and is recognized by all actors and stakeholders in football. Everyone knows that whether or not a national federation issues an ITC depends on the former football club's consent or refusal. It follows from article 9(1) FIFA RSTP that no one involved in the process shall (mis-)use its position to extract benefits from the player in its favour. Article 9(2) Annexe 3 FIFA RSTP determines that a club shall (or should) be punished *"for having misused the TMS for illegitimate purpose"*.

- Contrary to what the Club submits, the Player could not have been registered by Internacional after 3 October 2014, since the domestic rules in Brazil do not permit registration after 3 October 2014.

- Article 21(1) SCO deals with the situation in which one contracting party exploits the weaker position of the other party to its financial benefit. This presupposes that there is a clear disparity between performance and consideration. The Player submits that this is the case. The club's approval of the issuance of the ITC is no benefit awarded to the Player by the Club that is worth any consideration. Instead, the Club is under a duty not to oppose the issuance the ITC in case the contract has been terminated. Pursuant to the principle of good faith, which is applicable to both clubs and football associations involved in the FIFA transfer system, a club that terminates a contract unilaterally and without just cause is barred from obstructing the issuance of the ITC. In case where there is no valid contract between the former football club and the player the right to free movement of the player and his right to make living by providing football related services always take precedence over any interests of the former club. Thus, the Club had no justification for misusing its procedural position in the context of the ITC proceedings.

- According to the Player, clause 10(7) of the Employment Contract is not a buy-out clause, but a liquidated damages clause. It is true that liquidated damages clauses do not need to be reciprocal in accordance to Swiss law. However, in case the respective interests of the contractual partners are protected in a hugely disproportionate manner, this is contrary to the general principles of contractual stability as well as of Swiss labour law. In case the Player would have breached the Employment Contract, the Club would have been entitled to at least EUR 1,672,730. This is grossly disproportionate. Thus, clause 10(7) of the Employment Contract must be disregarded and the damage shall be calculated according to article 17 FIFA RSTP. According thereto the Player shall receive any outstanding remuneration as well as a compensation of all damages suffered. In addition, the Club's bad faith and the fact that the breach occurred within the "protected period" shall be taken into account.

56. The Club's post-hearing brief, in essence, may be summarised as follows:

- The Club regrets that two of the witnesses initially announced by the Player (Mr R., Director of Registration and Transfer at the CBF, and Mr Y., friend of the Player in Doha, Qatar) finally decided to not appear before the Panel.

- The Club submits that it does not follow from Mr F's evidence that a registration of the Player was impossible after 3 October 2014. It is, thus, not excluded that an eventual rejection of the Player's registration by the CBF could have been successfully appealed if the ITC had been delivered to the CBF after the respective deadline. Furthermore, Internacional failed to upload a translation of the Player's employment contract into FIFA TMS on 18 September 2014. This is evidence of Internacional's negligence throughout the whole process. If the relevant translation had been submitted timely, there would have been sufficient time to apply for the FIFA exception (granted on 26 September 2014 only). Furthermore, the Club notes that no official communication took place between Internacional and the Club and/or the QFA concerning the delivery of the ITC.

- The Club reiterates that the Player's argument in relation to duress is moot pursuant to article 31 SCO. In the Player's first written submission to FIFA dated 18 September 2015, the Player did not base any of his requests for relief on duress. Only within his second written submission of 8 December 2015 (which was submitted more than 14 months upon conclusion of the Settlement), did the Player seek to invalidate the Settlement on the grounds of duress.

- Both Mr F and the Player confirmed that during the execution of the Settlement at the Club's premises, the Player was legally assisted by his counsel, a fact that had been deliberately concealed in the Player's written submissions. Thus, the Player was not in a weaker position and was not coerced to execute the Settlement. Furthermore, the Club notes that the Player did not protest against the alleged behaviour of the Club either before or after the execution of the Settlement.

- The Player has admitted in the hearing that he could have been registered – in any event – in the next transfer window, *i.e.* as of 2 January 2015. Consequently, it is not true – as alleged by the Player in the hearing – that without obtaining the ITC before 3 October 2014 his career would be interrupted for six to seven months. On the contrary, the Player only needed to wait for another three months in order to be eligible to play. The non-registration of the Player on 3 October 2014, thus, would not have caused irreparable harm to his career as he i) would be able to participate in any case in the trainings of Internacional; ii) would still be entitled to receive his salary from Internacional; and iii) would be able to register on 2 January 2015.

- The Club maintains that no issue of duress arises in this case. The Player executed the Settlement consciously and wilfully and with the help of his counsel. In addition, the deal contained in the Settlement is perfectly reasonable. On the one hand, the Player receives the ITC by 3 October 2014, whereas, on the other hand, the Player waives the compensation due to him under clause 10(7) of the Employment Contract. There is no evidence for a manifest disproportion between performance and consideration. The Club

did not obtain an unjustified advantage, since in turn for the Player's waiver it took over an obligation, *i.e.* to "issue" the ITC without having any legal obligation to do so according to the applicable rules and regulations. The Player was not in a weaker position, since he was not dependent on the Club's consent to issue the ITC. Instead, there were several alternatives at his disposal in order to achieve his registration with the CBF. Neither was the Player exploited by the Club, since the Player was and is an experienced football player, had been involved in several international transfers, had the professional support of an experienced counsel and was accompanied by the Head of the Legal Department of Internacional.

- The Club considers important the Player's behaviour before and after the conclusion of the Settlement. Before signing he claimed to be entitled to a compensation of EUR 6,800,000, whereas he remained completely silent for almost a year upon conclusion of the Settlement.

- With respect to the calculation of the compensation for breach of contract, the Club argues that the Player was finally successful in securing a new employment contract in the Middle East with Al Nasr on 3 August 2015, where he signed a contract worth EUR 4,000,000 net without bonuses for the 2015/2016 sporting season, and EUR 3,000,000 net without bonuses for the 2016/2017 sporting season.

57. FIFA's post-hearing brief, in essence, may be summarised as follows:

- FIFA finds that the Player's argument that the Settlement must be declared invalid on the basis of article 341(1) SCO, is to be dismissed, because the Employment Contract was terminated on 29 July 2014, *i.e.* more than two months before the signature of the Settlement. In view of the strict deadline of one month set out in this provision, the Player's argument must be rejected from the outset.

- FIFA finds that the *"uncomfortable situation"* the Player found himself in was the result of his own actions. The Player did not provide any evidence to corroborate his allegation that he made *"huge efforts"* to find a new club between July and October 2014. On the contrary, the evidence shows that the Player turned down many offers made by clubs which cannot be considered as second-tier clubs. The Player's decision to refuse these offers and to remain unemployed must be held against him. FIFA submits that signing the Employment Contract with Internacional on 15 September 2014 implied a risk, as it was signed outside of the registration period. Instead of opting for a contract in a country where the registration period was still open, the Player decided to enter into a contract with a Brazilian club even though the registration period had already closed. When starting the negotiations with Internacional, the Player was also aware that his registration was subject to the compliance with the restrictive deadline established by the CBF.

- FIFA also submits that, irrespective of the Club's behaviour, the Player might have been registered with the CBF before 3 October 2014, as the ITC request referred to in article 8.2 of Annexe 3 FIFA RSTP must be deemed made when the special exemption from

the validation exemption is granted. If the ITC would have been requested by no later than 18 September 2014, the Player could have been registered pursuant to article 8.2(1) of Annexe 3 FIFA RSTP. In case the Club would have refused to issue the Player's ITC on or before 22 September 2014, the Player could have been registered pursuant to article 8.2(2) of Annexe 3 FIFA RSTP. Thus, had the CBF, Internacional and the Player not wasted time in submitting an incomplete request, the special exemption from the validation exemption would have been granted earlier.

- Even if the ITC could not have been delivered before 3 October 2014, the Player would not have been precluded from playing football. Instead, the Player could have been registered in one of the countries where the registration period was still open after 3 October 2014. As a consequence, FIFA submits that the Player has never been under any duress since the alleged state of duress in essence resulted from his own behaviour and will and not from the Respondent.

V. JURISDICTION

58. The jurisdiction of CAS, which is not disputed, derives from article 58(1) of the FIFA Statutes (2016 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.

59. The jurisdiction of CAS is further confirmed by the parties by means of their signatures on the Order of Procedure.

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

VI. ADMISSIBILITY

61. The appeal was filed within the deadline of 21 days set by article 58(1) of the FIFA Statutes. The appeal complies with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

62. It follows that the appeal is admissible.

VII. APPLICABLE LAW

63. The Player maintains that, pursuant to Article R58 of the CAS Code, article 66(2) of the FIFA Statutes, article 25(6) of the FIFA RSTP, article 2 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules") and clause 4 of the Employment Contract, CAS should apply the various regulations of FIFA and, additionally, Swiss law.

64. The Club submits that article R58 of the CAS Code and article 57(2) of the FIFA Statutes are applicable and that, in the light of the lack of choice of law by the parties concerned in the Settlement, the present dispute shall be decided in accordance with all relevant and applicable FIFA regulations, in particular the 2015 edition of the FIFA RSTP, and only subsidiarily by Swiss law.

65. FIFA did not express any specific views with respect to the regulations and the law to be applied.

66. 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

67. Article 57(2) of the FIFA Statutes determines the following:

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

68. Clause 4 of the Employment Contract determines as follows:

> *"Including that the* [Club] *desires to sign a contract and employ the* [Player]*, as a professional football player in accordance with the terms of this contract, the Company statutes, the Association's regulations and FIFA's Regulations, the two parties have acknowledged their eligibility to contract, and that agreed on the following:* […]*".*

69. The Settlement does not contain any choice-of-law clause.

70. In view of the parties' agreement, the Panel is satisfied to accept the application of the various regulations of FIFA primarily, in particular the FIFA RSTP, and subsidiarily Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

A. The Main issues

71. The main issues to be resolved by the Panel are:

i) Is the Settlement valid?
ii) In case the Settlement is not valid, what consequences derive from this?
iii) Are any sporting sanctions to be imposed on the Club?

i. Is the Settlement valid?

72. Whereas the Player argues that the Settlement is null and void due to duress (Article 29 SCO *et seq.*) or due to an unfair advantage (Article 21 SCO), the Club and FIFA maintain that the Settlement was validly entered into.

a. The legal framework

73. The Panel observes that the FIFA RSTP do not contain any provisions on when a contract is invalid due to duress or due to an unfair advantage. Thus, in order to fill this *lacuna*, the Panel must resort to the law that is subsidiarily applicable, *i.e.* Swiss law.

74. The parties have discussed, in particular, the application of the following rules from the SCO:

Article 21 SCO

> *"(1) Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the injured party may declare within one year that he will not honour the contract and demand restitution of any performance already made.*
>
> *(2) The one-year period commences on conclusion of the contract".*

Article 29 SCO

> *"(1) Where a party has entered into a contract under duress from the other party or a third party, he is not bound by that contract.*
>
> *(2) Where the duress originates from a third party and the other party neither knew nor should have known of it, a party under duress who wishes to be released from the contract must pay compensation to the other party where equity so requires".*

Article 30 SCO

> *"(1) A party is under duress if, in the circumstances, he has good cause to believe that there is imminent and substantial risk to his own life, limb, reputation or property or to those of a person close to him.*
>
> *(2) The fear that another person might enforce a legitimate claim is taken into consideration only where the straitened circumstances of the party under duress have been exploited in order to extort excessive benefits from him".*

Article 31 SCO

> *"(1) Where the party acting under error, fraud or duress neither declares to the other party that he intends not to honour the contract nor seeks restitution for the performance made within one year, the contract is deemed to have been ratified.*
>
> *(2) The one-year period runs from the time that the error or the fraud was discovered or from the time that the duress ended.*
>
> *(3) The ratification of a contract made voidable by duress or fraud does not automatically exclude the right to claim damages".*

75. Article 21 and Articles 29 SCO *et seq.* are closely related. According to the majority view in jurisprudence and legal literature, Articles 29 SCO *et seq.* are not applicable when a party takes advantage of an existing predicament (SFT 5A_468/2008, E. 2.1; BSK-OR/SCHWENZER, Art. 29 N. 6). However, Article 21 SCO may be applicable in such case (SFT 5A_468/2008, E. 3.1). The Panel will start its analysis, therefore, by looking at Article 21 SCO.

b. Prerequisites of Article 21 SCO

76. In order for Article 21 SCO to apply, i) the injured party must have been in straitened circumstances when concluding the contract; ii) the party entitled to benefit from the contract must have exploited the other's vulnerability: and iii) a clear disparity between performance and consideration is required; (HONSELL (ed.), Obligationenrecht, 2014, p. 106-109).

aa) Was the Player in straitened circumstances when signing the Settlement?

77. The Panel finds that the Player was in straitened circumstances when signing the Settlement, because:

- He had signed a contract with Internacional on 16 September 2014. The contract foresaw that the Player had to provide his sporting services in return for a monthly salary. Consequently, the Player could only claim remuneration under the condition that he was eligible to play. The latter, however, is subject to registration with the CBF.

- The Player was not only in an uncomfortable position from a financial point of view, but also from a sporting point of view. The Player had a history with Internacional as it was his childhood club, where he also played professional football for the first time. After signing with Internacional, the Player was presented to the supporters of the club. According to the Player's testimony a great number of supporters was present. In case the registration with CBF failed, a lot of supporters of Internacional would be disappointed. Consequently, the Player was under considerable public pressure.

- It is undisputed that in 2014, the CBF only permitted clubs to register new players until 19:00 hour of 3 October 2014 at the latest and that in order for the Player to be registered

for Internacional an ITC from his previous association was required, *i.e.* from the QFA. In case the registration with CBF failed, the next transfer window in Brazil would only open on 2 January 2015. Thus, the Player, who had already been unemployed for a couple of months, would have been prevented from playing for three more months. Even though this period is shorter than that alleged by the Player, the Panel nevertheless finds that three months without playing is a considerable lapse of time that can adversely affect a Player's career. In particular, the Panel finds that the Player's market value would have suffered in case he ceased playing for three months.

- At the time of the execution of the Settlement, there was no other alternative available to the Player to obtain the ITC other than signing the Settlement. In particular, the Panel finds that it could not reasonably be expected from the Player to request the urgent intervention of FIFA at this stage. The Player had to be registered within the next two days. FIFA's intervention could not be obtained within that timeframe.

78. The Respondents claim that the Panel, when assessing whether or not the Player was in straitened circumstances, must also take into account the fact that it was the Player that manoeuvred himself into this situation by failing to act diligently. The Panel is not inclined to follow this argument:

- The Panel firstly notes that article 21 SCO does not require that the other party be responsible for the straitened circumstances. The fact that the Player contributed to his straitened circumstances does not prevent the application of article 21 SCO, since this provision is also applicable in case the contractual partner takes (undue) advantage of the thoughtlessness or inexperience of the other party (HONSELL (ed.), Obligationenrecht, 2014, p. 108, with further reference to VON TUHR/PETER, OR AT, 344). Secondly, even with only a few days left in the registration period, the Player could legitimately expect that his former Club would behave and act in conformity with the rules and in good faith (see below), *i.e.* it would issue the ITC on short notice in a case that was clear and where there could be no doubt that the Player was entitled to the ITC. Thus, whether or not Internacional could have saved some additional time, if it had provided the translation of the Player's employment contract into FIFA TMS earlier, is – in the view of the Panel – immaterial. Whatever the Player might have done to contribute to the straitened circumstances, it did not impact on the Club, *i.e.* did not make the latter's task of evaluating the legal situation and to act accordingly any more difficult or more burdensome.

- The Panel is equally not prepared to follow the Respondents' plea to dismiss the existence of straitened circumstances because the Player was allegedly able to play in other countries that had different registration deadline. First, the Respondents did not adduce any evidence that the Player could have played with a specific foreign club. Secondly, and more importantly, the Player was free to decide for which club he wanted to play after his Employment Contract with the Club had been ended by the Club. It is not for the former club of a player to indirectly restrict the Player's autonomy to decide where to play next.

79. Consequently, the Panel finds that the Player was indeed in a straitened situation when signing the Settlement.

bb) Did the Club exploit the straitened circumstances?

80. The Panel is also of the view that the Club exploited the straitened circumstances of the Player. In particular, the Panel notes that:

- The Club was in complete control of the ITC process. Although the QFA was – formally speaking – in charge of issuing the Player's ITC, in practice a national association only grants the ITC upon approval of the player's former club. The Club, therefore, was in control of whether the Player's ITC would be issued timely enough for him to be registered with Internacional by 3 October 2014. The fact that the Club was in charge of whether and when the ITC would be issued by the QFA is corroborated by the fact that the Player's ITC was released by the QFA almost immediately upon the Player's signing of the Settlement. This is also backed by the testimony of Mr F, who stated that the representative of the QFA informed him that *"it was* [the Club's] *position not to issue the ITC"*.

- The Club was also in complete control of the "negotiations" that took place at the Club's premises. It was the Club who convened the Player and his entourage to Qatar. The Player had no reason to come to Qatar other than to obtain the ITC. Upon arrival of the Player, the Club did not leave any room for negotiations. The Player and his entourage were instructed to report to the Club's premises immediately. This was in the middle of the night, at 1:00 am. After leaving their luggage at their hotel, the Player and his entourage (Mr F., Mr Breno Costa Ramos Tannuri, and Mr Y.) arrived at the Club at around 2:00 am, where they were met by a representative of the Club (Mr M) and a security guard. Mr M informed the Player that if he wanted to continue playing football, he had to sign the Settlement. The Club had prepared the document entitled Settlement already upon arrival of the Player. In addition, the Settlement was already signed by a representative of the Club who did not attend the meeting. Mr M was not authorized to re-negotiate or amend the content of the Settlement. Furthermore, there was no other representative of the Club present with whom the Player could lead negotiations. Thus, the Club's proposal had a "take it or leave it" character.

- It is clear for the Panel from the evidence before it that the Club made the issuance of the Player's ITC conditional upon the execution of the Settlement, and, thus, conditional upon the Player's waiver of his entitlement to claim compensation for breach of contract against the Club. In the view of the Panel there is no justification for such behaviour. In particular, the Panel notes that:

    - Article 9(1) FIFA RSTP prohibits to make the issuance of an ITC dependent upon *"any conditions"*.

- Annexe 3 FIFA RSTP refers to certain circumstances under which an ITC shall not be issued:

  Article 8(2)(4)(b) Annexe 3 FIFA RSTP

  "Within seven days of the date of the ITC request, the former association shall, by using the appropriate selection in TMS, either:

  […]

  reject the ITC request and indicate in TMS the reason for rejection, which may be either that the contract between the former club and the professional player has not expired or that there has been no mutual agreement regarding its early termination".

  Article 8(2)(7) Annexe 3 FIFA RSTP

  "The former association shall not deliver an ITC if a contractual dispute on grounds of the circumstances stipulated in Annexe 3, article 8.2 paragraph 4 b) has arisen between the former club and the professional player. In such a case, upon request of the new association, FIFA may take provisional measures in exceptional circumstances. If the competent body authorises the provisional registration (cf. article 23 paragraph 3), the new association shall complete the relevant player registration information in TMS (cf. Annexe 3, article 5.2 paragraph 6). Furthermore, the professional player, the former club and/or the new club are entitled to lodge a claim with FIFA in accordance with article 22. FIFA shall then decide on the issue of the ITC and on sporting sanctions within 60 days. In any case, the decision on sporting sanctions shall be taken before the delivery of the ITC. The delivery of the ITC shall be without prejudice to compensation for breach of contract".

- The Panel understands from the wording of article 8(2)(4)(b) Annexe 3 FIFA RSTP, that the issuance of an ITC may only be rejected in two situations. This derives from the wording of the provision, which refers to *"either* […] *or"*. The FIFA RSTP do not provide for any other circumstances under which the issuance of an ITC may be rejected or withheld.

- Although a dispute may have existed between the Player and the Club about the amount of compensation to be paid to the Player for the early termination of the Employment Contract, this is no valid reason for the Club to prevent the Player from registering with a new club. It was clear that the Player would not continue his career with the Club. The termination as such was also never disputed by the Player. The rules regarding the issuance of an ITC enacted in the FIFA RSTP are not designed to hinder a player's right to find new employment in case the employment contract has been terminated unilaterally by a club.

- Besides the obligation of the Club to act in good faith pursuant to the FIFA RSTP, the Panel also finds that the Club – in light of the Employment Contract – had

obligations *post contractum* vis-à-vis the Player not to hinder his right to find new employment.

81. Considering all of the above, the Panel finds that the Club not only acted in bad faith when obstructing the issuance of the ITC, but that the Club indeed exploited the straitened circumstances of the Player in a despicable manner by forcing the Settlement upon him in the middle of the night for its sole benefit.

82. The Club argues that it was under no obligation to release the Player's ITC before the deadline of seven days set out in article 8(2)(4)(b) Annexe 3 FIFA RSTP expired. This is obviously wrong. The Club did not have any rights over the Player and, therefore, was not entitled to decide whether to "release" the Player's ITC or not. In addition, the deadline referred to in the above provision is a maximum period, within which the national federation (and the respective former club) shall assess the contractual situation and take the decision either to grant or to reject the issuance of the ITC. However, in case the legal situation is clear before the expiry of said deadline – as is the case here given that the Employment Contract had been unilaterally terminated by the Club – the relevant club is under an obligation not to obstruct the player's search for a new employment. The deadline provided for in article 8(2)(4)(b) Annexe 3 FIFA RSTP is evidently not intended to give the former club the opportunity to block at will the *post contractum* free movement of a player. In the case at hand it was the Club that terminated the contract. Therefore, the Player was obviously entitled to the ITC. To arrive at this obvious conclusion was neither complicated nor time-consuming, but only fair. There remained, therefore, abundant time for the Club to properly process the ITC request forwarded to it by the QFA. Instead of enabling the Player to timely register with his new club, as was the Club's duty pursuant to the FIFA RSTP and its obligations *post contractum*, the Club exploited the Player's straitened circumstances by conditioning the issuance of the ITC on the Player's waiver of his financial claims against the Club.

83. Consequently, the Panel finds that the Club exploited the Player's straitened circumstances.

cc) Is there a clear disparity between performance and consideration in the Settlement?

84. The Panel also finds that there is a clear disparity between performance and consideration in the Settlement, since:

- The Settlement was in the sole interest of the Club. While the Player waived his financial claim against the Club, the Club did not give anything in return to the Player. The Player only received the ITC to which he was entitled according to the FIFA RSTP and the Club's obligations *post contractum*. Unlike the Player, the Club did not give up any legal position.

- The Club took advantage of the timeline and exploited a formal position without any justification. Article 3(1) of Annexe 3 FIFA RSTP requires that all parties involved in the FIFA TMS act in good faith. Furthermore, article 9(1) FIFA RSTP provides that *"[t]he ITC shall be issued free of charge without any conditions or time limit"* and that *"[a]ny provisions to*

the contrary shall be null and void". It follows from the above that the Club's behaviour was illicit.

85. To conclude, the Panel finds that the Settlement was indeed unbalanced and that there is an obvious and clear disparity between performance and consideration in the Settlement.

c. Are the procedural prerequisites of Article 21 SCO complied with?

86. The Respondent submits that the Player did not provide sufficient evidence to prove the prerequisites of article 21 SCO and that the onus of proof rests with the Player. This is – in the Panel's view – a fundamental misconception, since evidentiary issues and the question of burden of proof only arise if the facts presented by the Claimant are effectively contested by the other parties.

87. The Player has submitted a detailed account of the facts of what happened prior and during his visit in Qatar. This account of facts is consistent with the declaration before the Brazilian Embassy in Qatar and with the written submissions as well as the oral evidence during the hearing. Of course, the Panel does not ignore when assessing and weighting the submissions of the Player that he has an interest in the outcome of the case. However, the same applies to the Club. The Player's account of facts is corroborated by the testimony of Mr F. Furthermore, the account of facts as submitted by the Player and backed by evidence is sufficiently substantiated. Since the CAS Code does not contain any provisions with respect to the threshold of substantiation, this Panel – in application of article 182(2) of Switzerland's Private International Law Act (the "PILA") – takes guidance in Swiss Procedural law. In this context the Panel refers to the jurisprudence of the Swiss Federal Tribunal, according to which submissions are substantiated, if:

- They are detailed enough to determine and assess the legal position claimed (BGer 4A_42/2011, 4A_68/2011, E. 8.1); and

- Detailed enough for the counter-party to be able to defend itself (BGer 4A_501/2014, E. 3.1).

88. The Panel finds that both conditions are clearly fulfilled in the case at hand.

89. The duty to substantiate factual allegation not only rests on the Claimant, but also on the Respondents. The Panel notes, however, that the Club and FIFA have limited themselves to a very large extent to simply deny the facts submitted by the Player. The Club, *e.g.*, did not call any witnesses. In particular, the Club did not make available any person that either was present at the meeting with the Player in Qatar or drafted the Settlement. Even though the Club had access to such evidence, it preferred not to make any of this evidence available and, in particular, did not present a detailed account of facts of what actually occurred from its point of view at that meeting. The few facts that were submitted proved to be mere speculation. Examples of this are – *inter alia* – the Club's contention that the Player did not come to Qatar solely in order to talk about the settlement, but that he had other issues to settle in Qatar, that the Settlement

was the result of true negotiations that took place at the Club's premises and that the Player freely and voluntarily entered into the Settlement. All of these allegations were not substantiated.

90. Again, absent any provisions in the CAS Code as to the requirements for validly contesting the presentation of facts by the opposing party, the Panel – in application of article 182(2) PILA – seeks guidance in Swiss procedural law. According to the jurisprudence of the Swiss Federal Tribunal, the requirements for validly contesting the allegations of a counterparty depend on the degree with which the facts have been substantiated by the latter. The more substantiated the submissions of a party are, the more substantiated the other party must react to this if it wishes to contest such account of facts (BGer 4A_299/2015, E. 2.3).

91. In light thereof, the Panel finds that the Club and FIFA have not effectively contested the detailed account of facts submitted by the Player and that, consequently, no evidentiary issues or issues related to the burden of proof arise here. Instead, absent any substantiated objection by the Respondents, the presentation of facts by the Claimant must stand and be qualified as uncontested. Consequently, the Panel finds that – contrary to the Respondents' view – the procedural prerequisites of Article 21 SCO are complied with in the case at hand.

d. Was the deadline set out in Article 21 SCO complied with?

92. Pursuant to Article 21 SCO, *"the injured party may declare within one year that he will not honour the contract and demand restitution of any performance already made"*.

93. The Panel finds that the Player observed this deadline. The Settlement was concluded on 1 October 2014, while the Player lodged his claim against the Club with FIFA on 18 September 2015, *i.e.* before the expiry of one year.

94. The Club challenges this finding and suggests that the one-year deadline was not complied with because the Player did not specifically invoke "duress" in his (initial) submissions before FIFA on 18 September 2015, but only in his submission dated 8 December 2015. The Panel does not share this argument, because it clearly follows from the Player's submission dated 18 September 2015 that he does not wish to honour the Settlement. Whether the Player specifically invoked "duress" or "unfair advantage" is irrelevant. Consequently, the Panel finds that the one-year deadline set out in Article 21 SCO has been complied with.

e. Conclusion

95. In view of all of the above, the Panel finds that both the procedural as well as the substantive requirements of Article 21 SCO are met and that, as a result, the Settlement is invalid.

ii. In case the Settlement is invalid, what are the consequences?

96. If the Settlement is invalid, then the Player has not waived his rights under the Employment Contract. Consequently, the Panel is put to the task of assessing the consequences of the early

termination of the Employment Contract by the Club, in particular the financial claims of the Player against the Club arising thereof.

97. The Player claims – in essence – to be entitled to:

- Damages because of breach of contract and
- To a bonus in the amount of EUR 100,000.

a. Is the Player entitled to damages?

98. It is undisputed that the Club unilaterally terminated the Player's Employment Contract without just cause on 29 July 2014. Since the employment relationship between the Player and the Club commenced on 23 January 2014, the Club's termination without just cause clearly took place within the "protected period", which is defined as follows in the FIFA RSTP:

> *"[A] period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional".*

99. Article 17(1) FIFA RSTP determines as follows:

> *"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria".*

100. Pursuant to this provision, parties may deviate from the application of Article 17(1) FIFA RSTP as a basis to calculate the compensation to be paid for breach of contract and that any such clause shall take precedence over the application of Article 17(1) FIFA RSTP.

101. The Panel observes that the parties in the matter at hand indeed included such liquidated damages clause in clause 10.7 of the Employment Contract:

> *"If the* [Club] *terminated the contract unilaterally, the* [Player] *is entitled to receive salary of Two months".*

aa) Is clause 10.7 of the Employment Contract valid?

102. The Player, in principle, admits that liquidated damage clauses are admissible and that they do not need to be reciprocal for both parties to the contract. The Player submitted that *"it is correct to affirm that liquidated damage clauses do not have to be reciprocal in accordance to Swiss law"*. However, the Player submits that clause 10.7 of the Employment Contract is invalid because it is grossly disproportionate compared to the liquidated damage clause contained in the Employment

Contract in favour of the Club (clause 10.8) and that such disparity is contrary to general principles of contractual stability as well as Swiss labour law.

103. The Panel notes 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 of the abstract published on the CAS website). Thus, in principle, there is room for judicial control of substance with respect of such clauses, as set out and within the limits of Article 163 para. 2 and 3 of the SCO.

104. In the context of such judicial control the Panel – on the basis of the evidence before it – is not prepared to accept that the disparity between the clauses 10.7 and 10.8 of the Employment Contract leads to the invalidity of one or both clauses. In coming to this conclusion, the Panel notes that – generally speaking – the amount of damages incurred by players and clubs in case of a breach of contract can differ. The Panel subscribes to the view expressed by another CAS panel, in an award referred to by the Player in his written submissions:

> *"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 type 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"* (CAS 2015/A/3999 & CAS 2015/A/4000, para. 151).

105. If, however, there is disparity between the amount of damages to which players and clubs are entitled from the very outset, then it is not clear why as a matter of principle a disparity between liquidated damage clauses in favour of the Club and the Player shall lead to their invalidity. This is all the more true, considering that the FIFA RSTP neither establish a principle of reciprocity nor a prohibition of disparity, but instead simply refer to the autonomy of the parties.

106. Furthermore, it might well be that the disparity with respect to the liquidated damage clause is compensated by other more favourable provisions in the Employment Contract to the benefit of the Player (*e.g.* a particularly high remuneration). Thus, any substantive review undertaken by this Panel cannot be limited to comparing the liquidated damage clauses only, but instead must

look at the overall contract in order to determine whether there is disparity. It has not been submitted and on the face of the evidence before the Panel it does not appear that there is such (overall) disparity.

107. Furthermore, there is no evidence on file that the autonomy of the parties to which article 17(1) FIFA RSTP refers was somehow impaired in the case at hand, be it because one of the parties had superior bargaining power or that one of the parties exercised undue influence or pressure on the other party. Absent any such indications, there is no reason to discard clause 10.7 of the Employment Contract which is the result of the parties' freedom to contract.

108. The Player also argues that clause 10.7 of the Employment Contract does not constitute a liquidated damage clause, because it is not clear whether reference is made to the Player's salary in the first, the second or the third season, the Panel finds that this argument is to be dismissed. The amount of compensation to be awarded is subject to interpretation, but this does not prevent the clause from being a liquidated damage clause or that such clause be declared invalid.

109. In view of the above, the Panel finds that clause 10.7 of the Employment Contract is valid and that the Player's claim in case of unjustified unilateral termination of the Employment Contract by the Club shall be calculated in light thereof.

bb) Duty to mitigate?

110. The Panel observes that the Club requests that the amount of compensation due according to clause 10.7 of the Employment Contract is reduced. More specifically, the Club submits that the salary the Player earned with other clubs during the term of the Employment Contract would have to be deducted from the amount of compensation awarded on the basis of clause 10.7 of the Employment Contract.

111. As set out above already, clause 10.7 of the Employment Contract determines as follows:

> *"If the* [Club] *terminated the contract unilaterally, the* [Player] *is entitled to receive salary of Two months".*

112. The provision clearly provides that the Player is not entitled to the full (future) remuneration for the whole term of the Employment Contract, but only for two months. Consequently, any duty to mitigate could – from the very outset – only come into play, if the Player had received any remuneration from another club in the two months following the termination of the Employment Contract. This, however, is not the case. Furthermore, the purpose of the duty of mitigation is to avoid an undue enrichment of the other party, here the Player. The latter shall – as a consequence of the unjustified termination of the Employment Contract – not be put in a better financial position than in case the Club would have honoured its obligations. However, no issues of undue enrichment arise here. Consequently, no duty of mitigation shall be applied in the case at hand.

cc) What is the amount equivalent to "Two months"?

113. Clause 10.7 of the Employment Contract determines that "*the* [Player] *is entitled to receive salary of Two months*" as compensation for breach of contract. However, the question arises as to what amount the term "Two months" refers to, since the monthly salary of the Player was different for the first (EUR 124,675 per month), the second (EUR 150,000 per month) and the third sporting season (EUR 154,545 per month). Thus, the question arises on what basis the amount due to the Player shall be calculated.

114. The Panel is of the view that the term "Two months" refers to the monthly remuneration of the season in which the breach of contract occurred. The Panel observes that the Employment Contract was terminated by the Club on 29 July 2014. Pursuant to the definition of "season" in the FIFA RSTP, a season starts *"with the first official match of the relevant national league championship and ending with the last official match of the relevant national league championship"*. Although the breach thus formally fell in between two seasons, the Panel finds that the breach should be allocated to the 2014/2015 sporting season (*i.e.* the second season under the Employment Contract) as winter sporting seasons are generally perceived to end on 30 June and to start on 1 July of each year. It is also considered relevant by the Panel that, according to the Player, the breach occurred when he had already spent his summer holidays in Brazil following the conclusion of the 2013/2014 sporting season in May 2014 and when the preparations for the 2014/2015 sporting season were already ongoing for at least three weeks, which remained undisputed by the Club. Consequently, the Panel finds that the Player is entitled to EUR 300,000 (= 2 x 150,000) as a compensation for the breach of the Employment Contract.

115. On the basis of the information and the evidence provided by the parties, the Panel is satisfied that such amount is not excessive in the meaning of Article 163 of the SCO. Accordingly, the Panel sees no reason to reduce such amount.

b. Is the Player entitled to the bonus?

116. The Player also claims an amount of EUR 100,000 net in bonuses, because the Club's team won the Crown Prince Cup in 2014. The Panel notes that, pursuant to the Employment Contract, the Player is entitled to a bonus of EUR 100,000 net if the Club wins the Crown Prince Cup. It remained undisputed that the Club indeed won the Crown Prince Cup in 2014 and that the Club did not pay the Player the bonus he was entitled to.

117. Although the Player did not establish when the final of the Crown Prince Cup took place, the Panel finds that it is in the public domain that the final of the Crown Prince Cup was played on 26 April 2014.

118. The only question remaining, thus, is whether the bonus in the amount of EUR 100,000 net falls under clause 10.7 of the Employment Contract, *i.e.* whether the Player's claim for the bonus is superseded by clause 10.7 of the Employment Contract. The Panel finds that this is not the case. Clause 10.7 of the Employment Contract is intended to deal with the damage arising from an (unjustified) early termination of the Employment Contract. However, there is no causal link

between the early termination of the Employment Contract and the bonus, because the bonus was earned by the Player long before the Club terminated the Employment Contract. Consequently, the claim for the bonus does not fall within the scope of application of clause 10.7 of the Employment Contract and is not affected by it.

c. Is the Player entitled to interests?

119. The Player claims interests at a rate of 5% *p.a.* on the outstanding amounts. Neither the Employment Contract nor the FIFA RSTP regulate the question of interest. Thus, this Panel falls back on Swiss law that is subsidiarily applicable in the case at hand. In order to prevent undue enrichment, Swiss law provides in article 104(1) SCO for a statutory rate of 5% *p.a.* to be paid by the debtor. The provision reads as follows:

> *"A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract".*

120. The Panel applies this provision as of the day on which the Club is in array of payment. Consequently, the Player is entitled to 5% *p.a.* on the principal amount of EUR 300,000 as of 29 July 2014 until payment and to 5% *p.a.* on the principal amount of EUR 100,000 as of 26 April 2014 until payment.

iii. Are sporting sanctions to be imposed on the Club and/or should the present matter be submitted to the FIFA Disciplinary Committee?

121. With reference to the wording of Article 17(4) FIFA RSTP, the Player submits that sporting sanctions shall be imposed on any club found to be in breach of contract during the protected period and that sporting sanctions shall therefore also be imposed on the Club. The Player also maintains that because the Club misused FIFA TMS, the matter shall be referred to the FIFA Disciplinary Committee.

122. As set out above, it remained undisputed that the Club breached the Employment Contract within the "Protected Period" as determined by the FIFA RSTP.

123. The Panel is conscious of consistent CAS jurisprudence with respect of the standing of a party to request sporting sanctions to be imposed on the party that was responsible for the breach:

> *"[I]t is uncontroversial that the DRC did not impose any sanction upon the Player or his new club. The only party to the present arbitration proceedings to disagree with the DRC findings with regard to the absence of disciplinary sanction is the Appellant. The question, which arises, is whether the Appellant has the standing to require that a sanction be imposed upon the Player and/or Raja Club.*
>
> *In this regard, the Panel endorses the position articulated by DUBEY J-P, Counsel to the CAS (The jurisprudence of the CAS regarding Article 17 para. 3 of the FIFA regulations on the status and transfer of players, in CAS Bulletin, 1/2010, page 40):*

> *"(…) the Panel in the Mexès case found that the duration of a suspension regarding a player who is not anymore part of its roster had no effect on this player's former club. Therefore, the latter had no legally protected interest to require that a sanction be imposed on the player or that the sanction be aggravated [TAS 2004/A/708, para. 78].*
>
> *The CAS confirmed this orientation in a later case in which the Panel stated that no rule of law, either in the FIFA Regulations or elsewhere, was allowing the club victim of the breach of contract to request that a sanction be pronounced. Indeed, the system of sanctions laid down rules that applied to the FIFA, on the one side, and to the player or to the club that hired the player, on the other side. A third party had no legally protected interest in this matter [TAS 2006/A/1082 & 1104, para. 103]""* (CAS 2014/A/3707, para. 168).

124. The Panel fully agrees with this view. The Player does not have standing to request that sporting sanctions be imposed on the Club. It is solely within FIFA's prerogative to determine whether the imposition of such sporting sanctions is warranted in a concrete case or not. The Panel finds that the same applies in relation to the Player's request to order FIFA to refer the present matter to the FIFA Disciplinary Committee. Without judging whether such referral would be appropriate, and thus also without preventing FIFA to possibly do so in the future, the Panel finds that the Player has no standing to make such request as any disciplinary sanctions being imposed on the Club for misusing FIFA TMS, in any event, is within the sole prerogative of FIFA.

125. Consequently, the Panel finds that the requests of the Player to impose sporting sanctions on the Club and to order FIFA to refer this matter to the FIFA Disciplinary Committee shall be dismissed, because the Player lacks standing to make such requests.

B. Conclusion

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

i) The appeal is partially upheld.
ii) The Settlement is invalid.
iii) The Player is entitled to receive an amount of EUR 100,000 net from the Club as outstanding bonus plus interest at 5% *per annum* from 26 April 2014 until the date of payment.
iv) The Player is entitled to receive compensation for breach of contract from the Club in an amount of EUR 300,000 net plus interest at 5% *per annum* from 29 July 2014 until the date of payment.
v) The other requests of the Player shall be dismissed because of lack of standing of the Player to make such requests.

127. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 11 October 2016 by Mr Nilmar Honorato da Silva against the decision issued on 26 May 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision issued on 26 May 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is set aside.

3. El Jaish FC is ordered to pay to Mr Nilmar Honorato da Silva an amount of EUR 100,000 (one hundred thousand Euro) net as outstanding bonus plus interest at 5% (five per cent) *per annum* from 26 April 2014 until the date of payment.

4. El Jaish FC is ordered to pay to Mr Nilmar Honorato da Silva an amount of EUR 300,000 (three hundred thousand Euro) net as compensation for breach of contract plus interest at 5% (five per cent) *per annum* from 29 July 2014 until the date of payment.

5. (…).

6. (…).

7. All other and further motions or prayers for relief are dismissed.