



Arbitrations CAS 2015/A/3953 & 3954 Stade Brestois 29 & John Jairo Culma v. Hapoel Kiryat Shmona FC & Fédération Internationale de Football Association (FIFA), award of 30 November 2015

Panel: Mr Marco Balmelli (Switzerland), President; Mr Paul Mauriac (France); Prof. Luigi Fumagalli (Italy)

Football

Termination of a contract of employment without just cause

Essentialia negotii of an arbitration agreement

Calculation of compensation according to Article 17.1 RSTP

Criteria for imposing sporting sanctions on a player for breach of contract

Presumption of inducement to terminate a contract without just cause

Signing of the contract with the new club as relevant moment for the determination of inducement to breach the contract

1. A document that includes: i) a date, ii) the name of the parties, iii) the duration of the contract, iv) the amount of remuneration, and v) the signature of the parties is considered to include all *essentialia negotii* and is therefore a valid and binding agreement.
2. With respect to article 17.1 of the FIFA Regulations for the Status and Transfer of Players (RSTP), the compensation shall be calculated according to objective criteria. The RSTP refers to objective criteria of how to calculate compensation and therefore, there is no room to refer to Swiss labour law. CAS jurisprudence gives guidance as how to calculate the amount of compensation. The salary which the new club was willing to pay reflects the value of a player and thus the amount which the old club would have spent in order to get an equivalent player. The salary offered by the old club has to be deducted from this amount as the former club did not have to spend it.
3. A literal interpretation of Article 17.3 RSTP implies the duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: “*shall*” is obviously different from “*may*”. Consequently, if the intention of the RSTP was to give the competent body the discretion to impose a sporting sanction, it would have employed the word “*may*” and not “*shall*”. FIFA and CAS jurisprudence on this particular article 17.3 may be considered not fully consistent, mainly since the decisions are often rendered on a case by case basis. The consistent line however is that if the wording of a provision is clear, one needs clear and strong arguments to deviate from it.
4. Article 17.4 RSTP sets the presumption that a club signing a player who has terminated his contract without just cause has induced that player to commit a breach. In order to rebut this presumption, the club must establish the contrary.

5. **The question of inducement (under Article 17.4 RSTP) is evaluated on a case by case basis. The CAS jurisprudence can only give guidance as each case differs from the case at hand. The RSTP commentary refers clearly to the moment of the signing as the breach of contract. Therefore, from the interpretation of the wording “*that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach (emphasis added)*”, it is suggested that the club’s actions and knowledge at the moment of the signing are relevant, since the player terminates his contract with the old club at this moment at the latest. This interpretation meets with CAS jurisprudence insofar as in all the cases where the new club was considered to have induced the player, it was evident that the new club knew or should have known about the contractual situation of the player at the moment of signing.**

I. INTRODUCTION

1. The consolidated appeals are brought by Stade Brestois 29 (the “Appellant 1”) and John Jairo Culma (the “Player” or the “Appellant 2”) against the decision rendered by the FIFA Dispute Resolution Chamber (the “DRC”) dated 25 September 2014 (the “Appealed Decision”).

II. PARTIES

2. The Appellant 1 is a professional French football club, currently competing in the Ligue 2. The Appellant 1 is affiliated to the French Football Federation (the “FFF”), which is affiliated to FIFA.
3. John Jairo Culma is a professional Colombian football player.
4. Hapoel Kiryat Shmona FC (“Hapoel” or the “Respondent 1”) is a professional Israeli football club, currently competing in the Israeli Ligat ha’Al. Hapoel is affiliated to the Israeli Football Association (the “IFA”), which is affiliated to FIFA.
5. The Fédération Internationale de Football Association (“FIFA” or the “Respondent 2”) is the international governing body of football on a worldwide level. It is an association under Swiss law, has its registered office in Zurich, Switzerland and exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players, worldwide.

III. FACTUAL BACKGROUND

A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the parties’ written

submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence he considers necessary to explain its reasoning.

7. On 20 April 2011, the Player and Hapoel signed a "Memorandum of Agreement" (the "Hapoel Agreement"). The Hapoel Agreement was signed also by the agent Jacky Dahan (the "Agent").
8. The Hapoel Agreement reads as follows:
 1. *"Contract for two seasons: 2011-12 2012-13*
 2. *Net salary of \$ 160,000/season: \$ 80,000 of which is to be paid in cash upon signing the contract and \$ 80,000 is to be paid in the installments.*
 3. *Second season:\$ 160,000 (2012-2013): \$ 80,000 in cash and \$ 80,000 in ten installments.*
 - *Bonuses*
 - *Championship - \$ 30,000 net.*
 - *UEFA - \$ 20,000 net, 1-4.*
 - *Cup - \$ 20,000 net.*
 - * *For playing in UEFA or Cup will receive \$ 20,000.*
 - *House*
 - *Car + Petrol – NIS 2,000".*
9. On 15 June 2011, the Player signed an employment agreement with the Appellant 1, valid from 1 July 2011 until 30 June 2013 (the "Stade Brestois Agreement"). According to the Stade Brestois Agreement, the Player was entitled to a yearly remuneration in the amount of EUR 360'000.00, payable as follows:

"EUR 25'000 each month

EUR 60'000 due in July 2011

EUR 60'000 due in September 2012".
10. On 21 June 2011, Hapoel informed the Appellant 1 about its agreement with the Player, asking the Appellant 1 to refrain from further negotiation with the Player.

11. On 22 June 2011, the Appellant 1 faxed a letter to Hapoel asking for a copy of the agreement with the Player. On the same day, the French authorities issued the Player's work permit.
12. On 1 July 2011, Hapoel faxed a copy of the Hapoel Agreement to the Appellant 1 and again requested it to refrain from any negotiation with the Player.
13. On 8 July 2011 the FFF requested the delivery of the International Transfer Certificate (the "TTC") for the Player, whereas the IFA objected. The Appellant 1 informed the FFF that it disagreed with the objection of IFA and stated that the Hapoel Agreement was not an employment contract. The Appellant 1 further argued that it was not able to understand a document in Hebrew and therefore relied on the Agent's information that the Hapoel Agreement was not binding for the Appellant 1.
14. On 5 August 2011, the Single Judge of the FIFA Player's Status Committee authorized the provisional registration of the Player with the Appellant 1. The Single Judge, however, stated that his decision was without prejudice to any decision as to the substance of a potential contractual dispute between Hapoel and the Player.

B. Proceedings before the FIFA Dispute Resolution Chamber (DRC)

15. On 19 October 2011, Hapoel lodged a claim before the DRC against the Player and the Appellant 1 for breach of contract, requesting the following:

"EUR 720'000.- as compensation corresponding to the player's remuneration for 2 years in accordance with the contract concluded with Brestois;

a six-month ban from playing in official matches to be imposed on the player;

a two-year ban for registering new players either nationally or internationally to be imposed on Brestois".

16. On 25 September 2014, the DRC issued the Appealed Decision. In essence, it considered the following:
 - It is the Player's own responsibility to ensure that he understands what he is signing.
 - The Hapoel Agreement was valid since it included all *essentialia negotii* of an employment contract. As the Hapoel Agreement was valid, the Player and Hapoel were both bound for the season 2011/2012 and 2012/2013.
 - The Player never joined Hapoel and never offered his services. It is undisputed that he signed a second contract with the Appellant 1. Therefore, the Player terminated the Hapoel Agreement without just cause within the protected period. According to article 17 para. 1 of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), the Player is therefore obliged to pay compensation.
 - According to article 17 para. 2 RSTP, the Appellant 1 (in its role as the Player's new club)

is jointly and severally liable for the payment of compensation.

- As to the amount of the compensation, the DRC noted that the Hapoel Agreement did not contain any clause regarding the case of its breach. However, the value of the Hapoel Agreement was USD 360'000.00, while the value of the Stade Brestois Agreement was USD 890'000.00 (EUR 720'000.00).
- The average of those values was considered the Player's market value at that time. Therefore, the Player shall pay USD 670'000.00 to Hapoel.
- Since the Player terminated the Hapoel Agreement during the protected period, the Player must be banned from official matches for four months in accordance with article 17 para. 3 of the RSTP.
- As to the additional sanction against the Appellant 1 according to article 17 para. 4 RSTP, according to the DRC's jurisprudence and unless established to the contrary, any club registering a professional player who has terminated his previous contract without just cause is considered to have induced the professional to commit a breach.
- Relying solely on the statement of the Player to determine whether he was a free agent was not considered acting with due diligence.
- Not being able to sufficiently reverse the presumption of article 17 para. 4 RSTP, the Appellant 1 had induced the Player to breach the Hapoel Agreement and was therefore to be sanctioned with a ban for registering new Players nationally and internationally for two consecutive registration periods.

17. The operative part of the Appealed Decision reads as follows:

- “1. The Claim of the Claimant, Hapoel Kiryat Shmona FC, is partially accepted.*
- 2. The Respondent I, John Jairo Culma, is ordered to pay to the Claimant **within 30 days** as from the date of notification of this decision, compensation for breach of contract in the amount of USD 670,000.*
- 3. The Respondent II, Stade Brestois 29, is jointly and severally liable for the payment of the aforementioned compensation.*
- 4. If the aforementioned amount is not paid within the above-mentioned time limit, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
- 5. The Claimant is directed to inform the Respondent I and the Respondent II immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
- 6. A restriction of four months on his eligibility to play in official matches is imposed on the Respondent I. This sanction applies with immediate effect as of the date of notification of the present decision. The*

sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.

7. The Respondent II shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.

8. Any further claims lodged by the Claimant are rejected”.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 2 March 2015, the Appellants filed their respective statements of appeal against the Appealed Decision with the CAS in accordance with articles R47 and R48 of the Code of Sport-related Arbitration (the “CAS Code”). Requests for provisional measures seeking the stay of execution of the Appealed Decision were also lodged by the Player and the Appellant 1.
19. On 7 April 2015, the Appellants filed translations in English of their statements of appeal and, on 14 April 2015, they filed their respective appeal briefs.
20. On 16 and 17 April 2015, the Respondents filed their answers to the Appellants’ requests for stay.
21. On 5 May 2015, the President to the CAS Appeals Arbitration Division rendered an Order on Request for a Stay, granting the Appellant 1’s and dismissing the Player’s requests.
22. In accordance with article R55 of the CAS Code, FIFA filed its answer on 11 May 2015 and Hapoel submitted its answer on 1 June 2015.
23. On 16 September 2015, a hearing was held at the CAS Headquarters in Lausanne, Switzerland. The parties’ counsel made their respective opening statements and answered the questions raised by the Panel. Then, the witnesses were examined. Finally, the parties’ respective counsels made their closing statements.
24. Both at the beginning and at the end of the hearing, the parties expressly declared that they were satisfied with the way in which the proceedings had been conducted, especially with regard to this right to be heard, which was duly respected during the whole procedure. The Appellant 1 explicitly waived any rights in connection with the fact that its representatives and counsel had to leave the hearing on their own initiative (to respect some travel schedules) before it was closed.

V. SUBMISSIONS OF THE PARTIES

25. The following outline of the parties’ positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel, however, has

carefully considered all the submissions made by the parties, even if no explicit reference has been made in what immediately follows. The parties' written submissions, their verbal submissions at the hearing and the contents of the Appealed Decisions were all taken into consideration.

A. Stade Brestois 29

26. The Appellant 1 filed the following prayers for relief:

- *“Principally: the annulment of the decision of the DRC of FIFA of 9 February 2015 and the rejection of all of the claims formulated by Hapoel Kiryat Shmona FC.*
- *In the alternative: the annulment of the sporting sanction pronounced against Stade Brestois 29, namely the ban from registering any new players, either nationally or internationally, for the two next entire and consecutive registration period.*
- *In the future alternative: the annulment of the financial sanction and at the very least, its reduction to a fairer amount.*
- *In any event: the payment by the Respondents of the whole CAS administration costs and the Arbitrator's fees and the legal fees and costs of Stade Brestois 29”.*

27. The Appellant 1's submission, in essence, may be summarized as follows:

- The Player had a contract with Maccabi Haifa (“Maccabi”) until 30 June 2011. At the end of the season 2010/2011, the Appellant 1 and the Player approached each other, the Player stating that he would be free from the end of season 2010/2011.
- The Appellant 1 checked the contract with Maccabi and consulted the FIFA Transfer Matching System (the “TMS”). From the TMS it became obvious that the Player was registered with Maccabi and with no other club.
- After requesting a work-permit for the Player, the Appellant 1 entered a transfer of the Player in the TMS system under the No 30141 on 14 June 2011 and on 15 June 2011 concluded an employment contract for two seasons with the Player.
- Despite asking Hapoel for a copy of the Hapoel Agreement on 22 June 2011, Hapoel provided for such copy only on 3 July 2011 (12 days after the request by the Appellant 1) in Hebrew. The Appellant 1 confronted the Player but he assured that the Hapoel Agreement was not binding.
- After the ITC was refused by the IFA, the Single Judge of the FIFA Players' Status Committee authorized the registration of the Player in favour of the Appellant 1, arguing that the Player was only *registered with Maccabi and not with Hapoel*.
- The Hapoel Agreement shows that the Player was represented by the Agent. However,

the Player was never represented by the Agent. In fact, the Agent present was working for Hapoel, as the correspondence shows.

- The document consisting in the Hapoel Agreement does not fulfil the minimum requirements of the FIFA Circular No. 1171 dated 24 November 2008 for contracts with professional footballers. It was drafted in Hebrew – hence the Player could not understand it. In addition, the Hapoel Agreement was not registered with the IFA. For all these reasons, the Hapoel Agreement cannot be considered a valid employment contract. The fact that Hapoel did not pay the first instalment in time proves this.
- The Appellant 1 makes reference to articles 108 and 82 of the Swiss Code of Obligation (the “CO”), arguing that since Hapoel had failed to pay the signing bonus, the Player was not obliged to fulfil his end of the bargain either. Thus, it was Hapoel who terminated the Hapoel Agreement unilaterally with no just cause.
- The Appellant 1 did not induce the Player to breach the Hapoel Agreement, since it acted in good faith when believing that the Player was only registered with Maccabi and did not know about Hapoel. When signing the Stade Brestois Agreement and *by this terminating the Hapoel Agreement*, the Appellant 1 was therefore not aware of any other agreement. How should the club have known? When receiving the fax on 21 June 2011, the Appellant 1 had no reason to believe that such allegation was true. Hapoel provided for the Hapoel Agreement only on 3 July 2011. After it was aware of the Hapoel Agreement, the Appellant 1 could not terminate the Stade Brestois Agreement according to French labour law (article L.1243-1 of the French Labour Code). Hence, no sporting sanction shall be imposed on the Appellant 1.
- CAS jurisprudence has always been influenced by Swiss law. The proportionality principle is one of the core principles of Swiss law which applies also (at least by analogy) to the relationship of associations with their members when sanctioning them. According to this principle, the sanction must at least be reduced.
- Furthermore, the compensation calculated by DRC is too high as according to article 337d para. 1 CO, the employer is entitled to ¼ of a month’s salary in case the employee does not show up for work. Additional damage may only be claimed if Hapoel can prove it, which it did not.

B. Player

28. The Player filed the following prayers for relief:

“Recognize the validity of the employment contract between Stade Brestois and Mr. John Jairo Culma.

Cancel the decision of the dispute resolution chamber of FIFA dated September 25th, 2014 and notified to Mr. Jean-Jacques Bertrand, Mr. Culmas lawyer, on February 9th, 2015.

By: Principally, recognize that the “Memorandum of Understanding” between club Hapoel Kiryat Shmona FC

and Mr. John Jairo Culma is not an employment contract and cannot be considered as such.

In the alternative, recognize that the “Memorandum of Understanding” is private and consequently, declare the CAS incompetence to recognize its validity and its application.

In the further alternative, recognize that the “Memorandum of Understanding” was terminated by Hapoel Kiryat Shmona FC without just cause and in any case, that Mr. John Jairo Culma did not terminate it without adjust cause.

In the yet further alternative, annul the sportive and financial sanctions against Mr. Culma or at least adjust them.

In any event, reject all claims and counter claims made by the Hapoel Kiryat Shmona FC and FIFA.

Ad judge and declare, that the legal costs incurred by Mr. Culma and by all the parties, both before the FIFA and the CAS will be borne by Hapoel Kiryat Shmona FC and by FIFA (included costs of translation, costs of lawyers, travel expenses, etc.)”.

29. The Player’s submission, in essence, may be summarized as follows:

- The Player states that the Stade Brestois Agreement is valid, whereas the Hapoel Agreement cannot be considered an employment contract, as it lacks almost every essential term required for a binding employment contract.
- The Agent was not the agent of the Player. There was no translation of the Hapoel Agreement into Spanish.
- In case the Hapoel Agreement is considered valid, it is clear that Hapoel terminated it without just cause, as it did not pay the signing bonus.
- Hapoel did not suffer any financial or sportive damage. It won the championship 2011/2012, meaning that it did not depend on the Player. In addition, the Player did not receive the whole salary from the Appellant 1, as his employment relationship ended early in April 2013.
- The Player further refers to the same arguments as the Appellant 1.

C. Hapoel

30. Hapoel filed the following prayers for relief:

“a. The appeal filed by the appellants is dismissed and the appealed decision is upheld so that the appellants pay Hapoel immediately, jointly and severally, USD 670’000.-- + interests of 5 % p.a. as of 30th October 2014 and that the sanctions set out in the appealed decision of the player and Stade Brestois 29 are executed.

b. To order the appellants to bear all the costs of the arbitration in accordance with R.64(4) of the CAS-code.

c. To order the appellants to grant Hapoel a contribution towards its legal fees and other expenses incurred in connection with the proceedings (in accordance with R.64(5) of the CAS-code) in the amount of CHF 90'000.— as legal fees + CHF 10'000.— for the expenses incurred in respect of the attendance of the parties and their lawyers at the hearing”.

31. Hapoel's submission, in essence, may be summarized as follows:

- Hapoel approached Maccabi before entering negotiations with the Player. There is no legal requirement as to form regarding an employment agreement in Israel or within the FIFA regulations. From the content of the Hapoel Agreement it is clear that the Player and Hapoel wanted to enter an employment contract. The document containing the Hapoel Agreement is not a pre-contract.
- Hapoel then refers to the *principal of contra proferentem*, since the Player's agent drafted the agreement.
- It is undisputed that the Player entered a new contract with the Appellant 1 after signing the Hapoel Agreement. By signing the Stade Brestois Agreement, the Player effectively terminated the Hapoel Agreement without just cause. Hapoel claims that the Player had done the same thing on a previous occasion, when Hapoel tried to sign him five years earlier.
- This causes liability for the Player and for the Appellant 1. Hapoel further argues that the Stade Brestois Agreement, dated 15 June 2011, only became valid upon the granting of the work permit. Hence, it became valid as from 22 June 2011, when the Appellant 1 was already aware of the Hapoel Agreement. The Appellant 1 should have withdrawn from the Stade Brestois Agreement. By not doing so and ignoring Hapoel's request to refrain from further negotiations, it induced the Player to breach the Hapoel Agreement.
- The Appellant 1 is obliged to prove that it did not induce the Player to breach the Hapoel Agreement. Hapoel warned the Appellant 1 several times not to enter into negotiations with the Player, because he was already bound to Hapoel. It even sent the Hapoel Agreement to the Appellant 1. By deliberately neglecting the warnings of Hapoel and signing an employment contract with the Player, the Appellant 1 induced the Player to breach the Hapoel Agreement.

D. FIFA

32. FIFA filed the following prayers for relief:

“That the CAS rejects the present appeals and confirms the presently challenged decision passed by the DRC on 25 September 2015 in its entirety.

That the CAS orders the Appellants to bear all the costs on the present procedure.

That the CAS orders the Appellants to cover all legal expenses of FIFA related to the proceedings at hand”.

33. FIFA's submission, in essence, may be summarized as follows:

- The FIFA Circular is meant to give mere guidelines – it does not influence the validity of a contract.
- In order to determine whether a contract is valid, all *essentialia negotii* have to be included in it: i) the nomination of parties to the contract, ii) the duration of the employment relationship, iii) the remuneration payable by the employer to the employee, iv) the signature of the parties. The Hapoel Agreement included all those aspects and is therefore valid.
- FIFA follows a long standing jurisprudence stating that an employment contract cannot be subject to formalities (like registering the contract with the IFA) which are to be fulfilled by one party. This jurisprudence intends to protect the players from clubs which don't register their contracts in order to avoid payment to the players. *Ergo*, such protection must also be applied for the clubs.
- The Player never joined Hapoel or made any effort to do so. Hence, the fact that the signing bonus was not paid yet did not constitute a valid reason to terminate the Hapoel Agreement.
- As to the question whether the Appellant 1 induced the Player to breach the Hapoel Agreement, FIFA points out that the consultation of the TMS was not enough: the TMS is only imposed in case of international transfers. As the Appellant 1 should have considered the possibility that the Player might be transferred within the IFA, it should have taken further steps.
- The Appellant 1 did not even contact Maccabi to ask whether it was aware of any transfer. This is surprising as the Appellant 1 could learn from the contract Maccabi/Player that Maccabi had an option to extend the agreement. Furthermore, it would have been the Appellant 1's duty to contact Maccabi before entering into negotiations with the Player.
- If it had duly executed its duties to clarify the Player's contractual situation, the Appellant 1 would not have induced the Player to breach the contract. The steps taken after the signing of the Stade Brestois Agreement can be taken into account as they show the intent of the Appellant 1.
- Article 337d CO is not applicable, since the FIFA rules prevail over Swiss law if something is addressed in the RSTP. Article 17.1 RSTP clearly indicates the factors which shall be considered when calculating the compensation. The DRC's calculation was therefore correct.
- Articles 17.3 and 17.4 RSTP don't leave any scope for discretion, as DRC shall strictly apply the RSTP.

VI. JURISDICTION

34. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.

35. The jurisdiction of the CAS, which was not disputed by the parties, to hear this dispute derives from articles 66 and 67 of the FIFA Statutes, which state in particular that CAS has jurisdiction to consider appeals against decisions issued by the “legal bodies” of FIFA, such as the DRC. Therefore, the Panel considers that CAS is competent to decide over this case.

VII. ADMISSIBILITY

36. Article 67.1 of the FIFA Statutes provides as follows:

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

37. The motivated Appealed Decision was notified to the Parties on 9 February 2015. The appeals filed by the Appellants on 2 March 2015 are therefore admissible.

VIII. APPLICABLE LAW

38. It is generally accepted that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Private International Law Act (the “PILA”) is the relevant arbitration law for an arbitration pursued in Switzerland (DUTOIT B., *Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 1* on article 176 PILA; TSCHANZ P-Y., in *Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n° 1, p. 1627, ad article 186 PILA*). Article 176 para. 1 PILA provides that the provisions of Chapter 12 of PILA regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

39. CAS has its seat in Lausanne, Switzerland. Therefore, the PILA is applicable. Article 187 para. 1 of the PILA provides – inter alia – that *“the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected”*. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. In agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to article R58 of the CAS Code (CAS 2008/A/1705, para. 9 and references; CAS 2008/A/1639, para. 21 and references; CAS 2006/A/1141, para. 61).

40. 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

41. Article R58 of the CAS Code indicates how the Panel must determine which substantive rules/laws are to be applied to the merits of the dispute. This provision recognizes the pre-eminence of the “*applicable regulations*” to the “*rules of law chosen by the parties*”, which are only applicable “*subsidiarily*”. Article R58 of the CAS Code does not admit any derogation and imposes a hierarchy of norms, which implies for the Panel the obligation to resolve the matter pursuant to the regulations of the relevant “*federation, association or sports-related body*”. Should this body of norms leave a lacuna, it would be filled by the “*rules of law chosen by the parties*”.

42. Subsequently, the Parties in the present case have submitted themselves to the FIFA Statutes, including its article 66 para. 2, which provides that “[*t*]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”. Therefore, in the present case and with respect to the applicable substantive law, subject to the primacy of applicable FIFA’s regulations, Swiss law shall be applicable.

IX. MERITS

43. Taking the Parties submissions into due consideration, the main issues to be resolved by the Panel are:

- Did the Player and Hapoel conclude a valid employment agreement (the Hapoel Agreement) on 20 April 2011?
- If so, did either party breach the Hapoel Agreement without just cause?
- If so, how is the compensation to be calculated?
- If so, did the Appellant 1 induce the Player to breach the Hapoel Agreement?
- If so, do article 17 para. 3 and 4 have to be applied strictly, since the breach occurred during the protected period? Are the sanctions imposed in the Appealed Decision correct and adequate?

A. Validity of the Hapoel Agreement

44. Considering the document in question, the Panel notes that it includes: i) a date, ii) the name of the parties, iii) the duration of the contract, iv) the amount of remuneration, and v) the signature

of the parties. According to CAS jurisprudence, such text includes all *essentialia negotii* and is therefore considered a valid and binding agreement (amongst others, CAS 2013/A/221).

45. Furthermore, the Panel considered the Agent's testimony during the hearing credible, in which he explained that he acted on behalf of the Player. The Agent also stated that there was a translator present, a circumstance which was confirmed by the translator himself in his testimony. The Player or his representatives could not raise any doubts that the Agent's and the translator's testimonies were not correct. Therefore, the Panel is convinced that the Player was able to understand the content of the Hapoel Agreement during the meeting. As the Player is an experienced professional with a long international career, the Panel additionally holds that it is – in any case – the Player's own responsibility to understand the content of an agreement he is signing (CAS 2013/A/221).
46. Taking these circumstances into account, the Panel concludes that the Player and Hapoel entered into a valid and binding employment contract dated 20 April 2011.

B. Breach of the contract

47. It is undisputed that the Player entered another employment agreement with the Appellant on 15 June 2011. By signing this second contract (the Stade Brestois Agreement), the Player terminated the Hapoel Agreement (Commentary RSTP, p. 56).
48. The Appellants argue that Hapoel terminated the Hapoel Agreement first, by not paying the signing bonus. In this respect, the Panel holds that there is no proof that the Player actually expected the signing bonus to be paid prior to his arrival. The Player provided no evidence that he asked for the signing bonus or that he made any attempt to join Hapoel. Therefore, the Panel considers that the Player could not be of the opinion that Hapoel had already terminated the Hapoel Agreement when signing the Stade Brestois Agreement. Additionally, there is no proof that the Player signed a contract with the Appellant 1 because he did not receive the signing bonus before actually joining Hapoel.
49. The Panel deems it evident that the Player breached the Hapoel Agreement without just cause.

C. Amount of the compensation and liability of the Appellant 1

50. Considering that the Player terminated the Hapoel Agreement without just cause, the Panel turns its attention towards article 17.1 RSTP, stating:

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

51. With respect to article 17.1 RSTP, the compensation shall be calculated according to objective criteria. Neither party referred to Israeli law, which would be considered as the *law of the country concerned*. The Appellants hold that Swiss law should be applied in order to calculate the amount of the compensation. In this respect, the Panel notes that the RSTP refers to objective criteria of how to calculate compensation and therefore, there is no room to refer to Swiss labour law. Since the parties did not provide for further convincing arguments or evidence of how to apply the criteria lined out in article 17.1 RSTP, the Panel turns its attention to CAS 2009/A/1880-1881, at para. 99-103, which gives guidance as how to calculate the amount of compensation. The salary which the Appellant 1 was willing to pay reflects the value of the Player and thus the amount which Hapoel would have spent in order to get an equivalent player. The salary offered by Hapoel has to be deducted from this sum as Hapoel did not have to spend this money. As the salary agreed between the Appellant 1 and the Player was USD 980'000.00 for two seasons and the salary offered by Hapoel was USD 360'000.00, the Panel finds that the Player is obliged to pay USD 620'000.00 to Hapoel.
52. As to the liability of the Appellant 1, the Panel considers article 17.2 RSTP which states that the new club is jointly and severally liable for the amount of the compensation –regardless of any involvement in the termination or breach of the old contract (RSTP commentary, p. 47). Therefore, the DRC was correct by holding the Appellant 1 jointly liable for the amount of compensation.

D. Sporting sanctions

a) Regarding the Player

53. In accordance with article 17.3 RSTP, the DRC decided that the Player had to be sanctioned with a restriction of four months on his eligibility to participate in any official football match as he terminated the Hapoel Agreement during the protected period (which is not disputed). The Player alleges that article 17.3 RSTP shall not be applied strictly.
54. According to CAS jurisprudence, a literal interpretation of said provision implies the duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: “shall” is obviously different from “may”. Consequently, if the intention of the RSTP was to give the competent body the discretion to impose a sporting sanction, it would have employed the word “may” and not “shall”. FIFA and CAS jurisprudence on this particular article 17.3 may be considered not fully consistent, mainly since the decisions are often rendered on a case by case basis. The consistent line however is that if the wording of a provision is clear, one needs clear and strong arguments to deviate from it (CAS 2013/A/3221, at paras. 8.34-8.47; CAS 2009/A/1880-1881, at paras. 122-123; CAS 2008/A/1568, at paras. 6.57- 6.59; CAS 2007/A/1429 & 1442, at para. 6.23).
55. In the present case, the Panel cannot find any strong arguments which would justify not imposing the sanctions as defined in article 17.3 RSTP. The Player was internationally experienced and he failed to prove why he was not able to fulfil his contract with Hapoel for any exceptional circumstances. By signing a second contract, the Player must have been aware

of the risk of being sanctioned by FIFA. Therefore, the sanctions imposed on the Player according to article 17.3 RSTP by DRC are correct.

b) Regarding the Appellant 1

56. Article 17.4 RSTP states the following:

“In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction”.

57. The Panel notes that the RSTP sets the presumption that a club signing a player who has terminated his contract without just cause has induced that player to commit a breach. In order to rebut this presumption, the club must establish the contrary.

58. The Panel notes that in the case at hand, the Appellant 1 affirms to have considered the Player a free agent when signing him, whereas FIFA’s main accusation is focussed on the Appellant 1’s behaviour after being informed by Hapoel that the Player was already bound by a contract with Hapoel. Considering the Parties’ arguments, the Panel deems it necessary to evaluate the following questions:

- Is only the time before the signing relevant or may the inducement also take place after the signing?
- Did the Appellant 1 establish that it did not induce the Player?

59. In order to answer these questions, the Panel considers the following CAS jurisprudence:

- CAS 2005/A/916: AS Roma was considered to have induced the Player since it knew about the contractual situation with AJ Auxerre and even met with the former club to discuss the transfer.
- CAS 2007/A/1358: *“An inducement is an influence that causes and encourages a conduct”*. In this case, neither DRC nor CAS considered that Rapid had induced the player to terminate the contract since (a) at the time when Rapid concluded an agreement with the player, the player alleged to have a contract with a club in Cameroon; (b) Rapid concluded a transfer agreement with this club in Cameroon; (c) an ITC was rendered and Rapid was not obliged to doubt the validity of such ITC by the Football Association of Cameroon. Therefore, Rapid was completely clueless that the player was bound by a valid contract with FC Pyunik Yerevan.
- CAS 2013/A/3093: FC Nantes faced sporting sanctions because it was well aware of the

player's contractual situation with his former Club. Nantes did not conclude any transfer-agreement before signing an employment contract with the player, although it was aware of the contract and the transfer fee asked by Al Nasr.

- CAS 2010/A/2196: Al Qadsia was considered to have induced the player to breach his contract with Kazama (inter alia) because (a) since Al Qadsia played in the same league as Kazama, it was well aware of the contractual situation of the player with Kazama; (b) Kazama had approached Al Qadsia as soon as it heard rumours about a transfer of the player to Al Qadsia and informed that the player still had a contract with Kazama.
 - CAS 2008/A/1568: In this case, CAS overruled the DRC's decision, declining an inducement by Wil although Wil was informed by Naftex *before* signing a contract with the player. CAS took into account that Wil made investigations through its lawyer with respect to the contractual situation. Furthermore, CAS considered that a sport management firm was involved which made the situation very complicated for Wil. In conclusion, CAS held that Wil did not induce the player to breach the contract.
 - CAS 2008/A/1453: Mainz was not considered to have induced the player who was at the time of signing registered with an Ecuadorian club and not with Once Caldas (Colombian club) with whom the player still had an ongoing employment contract. CAS held that there was no evidence at the time of signing the contract with the player and Mainz was only informed about a possible breach by the player after it had signed the contract with him. Mainz furthermore tried to resolve the situation. CAS considered that Mainz was caught up in a dispute which it did not cause.
60. Considering these cases carefully, the Panel holds that the question of inducement is evaluated on a case by case basis. Therefore, the cited jurisprudence can only give guidance as each case differs from the case at hand.
61. As to the question, if only the actions taken by a club before the signing can be relevant, the Panel holds that from a formal point of view, the Player terminated the Hapoel Agreement *when signing* the contract with the Appellant 1 on 15 June 2011 (RSTP commentary, p. 56, which refers clearly to the moment of the signing as the breach of contract – following the note that the role of the second club with respect to this breach must be ascertained). Therefore, from the interpretation of the wording “*that any club **signing** a professional who **has terminated his contract** without just cause has induced that professional to commit a breach (emphasis added)*” it is suggested that the club's actions and knowledge at the moment of the signing are relevant, since the Player terminates his contract with the old club at this moment at the latest. This interpretation meets with CAS jurisprudence insofar as in all the cases where the new club was considered to have induced the player, it was evident that the new club knew or should have known about the contractual situation of the player at the moment of signing (CAS 2005/A/916, CAS 2010/A/2196, CAS 2013/A/3093).
62. On the other hand, the Panel takes into account CAS 2008/A/1453, where the effort to solve the issue after becoming aware of the situation after the new club had already signed the player was considered by CAS. In this case, the new club successfully claimed that it did not know and

could not have known about the real contractual situation.

63. With respect to the wording of Article 17.4 RSTP and the CAS jurisprudence, the Panel deems it appropriate to focus on the Appellant 1's actions and knowledge before the Stade Brestois Agreement was signed.
64. Establishing the timeline before the signing of the Stade Brestois Agreement, the Panel considers that the Appellant 1 checked the TMS which held that the Player was still registered with Maccabi and the contract was about to expire. The Hapoel Agreement was not registered yet (neither with TMS nor within the IFA) and the Player presented himself as a free agent. As the contract with Maccabi was about to expire within the next six months, the Appellant 1 was not obliged to inform Maccabi in order to negotiate (and sign) a contract with the Player. Furthermore, the Panel may not presume that Maccabi would have known and would have informed the Appellant 1 about the Hapoel Agreement. Additionally, the Panel holds that the Appellant 1 answered to Hapoel the day after Hapoel had sent the fax to the Appellant 1, asking for the respective agreement. However, it took Hapoel until 1 July 2011 to send the Hapoel Agreement to the Appellant 1 in Hebrew, which made it likely for the Appellant 1 not to pursue Hapoel's allegation.
65. The Panel therefore concludes that the Appellant 1 could not have known about the Hapoel Agreement at the time of signing the Stade Brestois Agreement. The Appellant 1 established that it did not induce the Player. The Panel deems it evident that the Player never intended to join Hapoel and was therefore solely responsible for the breach without just cause by signing the contract with the Appellant 1. Hence, the Panel upholds the appeal by the Appellant 1 in this respect and sets aside the decision of the DRC in the portion in which sporting sanctions were imposed on the Appellant 1.

E. Conclusion

66. In conclusion, the Panel holds that:
 - Hapoel and the Player entered a valid employment agreement on 20 April 2011.
 - By signing another employment agreement with the Appellant 1 on 15 June 2011, the Player terminated the Hapoel Agreement without just cause during the protected period.
 - Therefore, the Player shall pay compensation in the amount of USD 620'000.00. The Appellant 1 is jointly liable for such payment.
 - As the Player terminated the Hapoel Agreement within the protected period, he shall be sanctioned with a ban of four months of playing in any official game.
 - Under all circumstances, the Panel deems it established that the Appellant 1 did not induce the Player to breach the Hapoel Agreement.
67. The Panel therefore partially upholds the appeals as the amount of the compensation is reduced

to USD 620'000.00 and the sporting sanctions against the Appellant 1 are set aside. All other prayers for relief by the Appellants are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeals filed by Stade Brestois 29 and John Jairo Culma on 2 March 2015 concerning the decision of the FIFA Dispute Resolution Chamber dated 25 September 2014 are partially upheld.
2. Paragraph 2 of the decision of the FIFA Dispute Resolution Chamber dated 25 September 2014 is replaced by the following: John Jairo Culma is ordered to pay to Hapoel Kiryat Shmona FC the amount of USD 620'000.00. Stade Brestois 29 is jointly and severally liable for the payment of such compensation.
3. Paragraph 7 of the decision of the FIFA Dispute Resolution Chamber dated 25 September 2014 is set aside.
4. All other paragraphs of the decision of the FIFA Dispute Resolution Chamber dated 25 September 2014 are confirmed.
- (...)
9. All other motions or prayers for relief are dismissed.