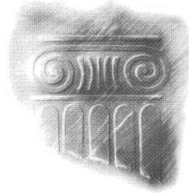

Arbitrations CAS 2015/A/4206 Hapoel Beer Sheva FC v. Ibrahim Abdul Razak & CAS 2015/A/4209 Ibrahim Abdul Razak v. Hapoel Beer Sheva FC, award of 29 July 2016

Panel: Mr Fabio Iudica (Italy), President; Mr Ken Lalo (Israel); Mr Rui Botica Santos (Portugal)

Football
Termination of a contract of employment without just cause
Prohibition of a unilateral termination of a contract during the course of a season
Contractual freedom and respect of the proportionate repartition of the rights of the parties in football contracts
Validity of a contractual clause giving undue control over the player without reward in exchange
Termination of a contract of employment with just cause and principle of good faith
Termination of a contract with just cause and previous warning
Objective criteria for the calculation of the compensation for breach of contract without just cause
Duty of mitigation and intentional failure of a player to earn from a new employment contract

1. **The fact that Article 16 of the FIFA Regulations on the Status and Transfer of Players (RSTP) provides that a contract cannot be unilaterally terminated during the course of a season does not imply that unilateral termination of a contract is allowed at the end of the relevant sporting season. On the contrary, this rule imposes a restriction in two particular situations where, exceptionally, an employment contract between a player and a club can unilaterally be terminated before its expiry, according to FIFA Regulations: a) by either party (even without just cause) after the protected period; b) by the player only, for sporting just cause. Therefore, termination in the aforementioned situation is only allowed at the end of the season.**

2. **A provision under which a club can, at any time and without financial consequences, unilaterally terminate a contract with a player clearly contrasts with articles 13 and 14 RSTP and therefore cannot be considered valid. Such provision also contravenes the general principle of proportionality and the principle of equal treatment of the parties since it blatantly provides benefits only towards a club with no corresponding reward or analogous right in favour of a player. Consistent with the well-established CAS jurisprudence, the respect of contractual freedom cannot in any way go to the detriment of the principle of a proportionate repartition of the rights of the parties.**

3. **A contractual clause under which, if the club decided to terminate the employment contract, it would have to pay the remaining contract value for the season of termination, while the player in the same situation would be obliged to pay the remaining contract value in full is invalid. With this method, a club can refuse to keep a player if the latter does not progress as expected but may retain him, should he confirm his sporting qualities and value. Such a system is clearly contrary to the general principles of contractual stability as well as of labour law as it gives the club undue control over the player, without rewarding him in exchange.**

4. According to CAS case law, only a *"material breach"* of a contract can possibly be considered as *"just cause"* in the sense of article 14 RSTP for termination without consequences of any kind. A material breach occurs when the main terms and conditions, under which it was entered into are no longer implemented. The circumstances must be such that, according to the rule of good faith, the party terminating the employment relationship cannot be required to continue it.

5. According to CAS consistent jurisprudence, a party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude.

6. According to article 17 RSTP, compensation for breach of contract shall be calculated, unless otherwise specifically provided for in the employment contract, with due consideration for some objective criteria (to be considered as non-exhaustive examples). The injured party is entitled to a whole reparation of the damages suffered pursuant to the principle of the *"positive interest"*, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled to its end.

7. According to article 337 c (2) of the Swiss Code of Obligations (SCO), the duty of mitigation is related to the rule that the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn. The wording of article 337 c (2) SCO, with reference to what the employee intentionally failed to earn, suggests that the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign the contract with worse financial conditions, in the absence of any valid reason to do so.

I. INTRODUCTION

1. These consolidated appeals are brought respectively by Hapoel Beer Sheva FC and Mr Ibrahim Abdul Razak, against the decision rendered by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (the "FIFA DRC") on 9 May 2015 regarding an employment-related dispute arisen between the parties.

II. THE PARTIES

2. Hapoel Beer Sheva FC (the "Club") is a football club with its registered office in Beer Sheva, Israel. The Club is registered with the Israeli Football Association ("IFA"), which in turn is affiliated to the Fédération Internationale de Football Association and competes in the Israeli Première League.

   Mr Ibrahim Abdul Razak (the "Player") is a professional football player born on 18 April 1983 and is a citizen of Ghana.

III. THE CHALLENGED DECISION

3. The challenged decision is the decision rendered by the FIFA DRC on 9 May 2014, on the claim filed by the Player against the Club regarding an employment-related dispute arisen between them (the "Appealed Decision").

IV. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, on the file of the proceedings before the FIFA DRC and relevant documentation produced. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in the Award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 13 January 2011, the Club signed a transfer agreement with the Israeli club Hapoel Akko by which the Player was transferred to the Club for a consideration of $ 105,000 (hereinafter referred to as the "Player's Transfer Agreement").

6. Under clause 2 of the Player's Transfer Agreement *"Akko declares and undertakes that it holds 100% of the rights of the player's card and/or any other sporting rights and/or federative rights connected with the player and that there is no third party that holds such rights as stated"*.

7. On the same date, the Club and the Player entered into an employment contract to be valid for 4 and a half sporting seasons, i.e. from January 2011, until the end of the 2014/2015 sporting season (hereinafter referred to as the "Employment Contract").

8. The Player was 28 years old at the time the Employment Contract was signed.

9. According to the Employment Contract, the Player was to receive the following monthly salaries in New Israeli Shekels (NIS):

   - NIS 26,433 for 5 months during the sporting season 2010/2011;

- NIS 28,841 for 12 months during the sporting season 2011/2012;
- NIS 31,249 for 12 months during the sporting season 2012/2013;
- NIS 33,657 for 12 months during the sporting seasons 2013/2014 and 2014/2015.

10. In addition, the Club undertook to pay the following bonus:

- Championship bonus: NIS 49,000 for each sporting season of duration of the Employment Contract;
- Cup bonus: NIS 49,000 for each sporting season of duration of the Employment Contract;
- European League appearance bonus: NIS 49,000 for each season of duration of the Employment Contract.

(The Employment Contract specified that *"In case the club will win the Championship/Cup and will appear in a European league, the player will not be entitled to double bonus"*).

11. The Player was also entitled to other bonus *"per point accumulated by the Club in the League"* to be payable every month in addition to the salary, only if he actually participated in the specific match, as follows:

- NIS 4,238 up to the first 25 points in the sporting season 2010/2011, up to a maximum of NIS 105,950;
- NIS 4,623 up to the first 50 points in the sporting season 2011/2012, up to a maximum of NIS 231,150;
- NIS 5,009 up to the first 50 points in the sporting season 2012/2013, up to a maximum of NIS 250,450;
- NIS 5,394 up to the first 50 points in the sporting seasons 2013/2014 and 2014/2015, up to a maximum of NIS 269,700.

The Player would receive 50% of the relevant bonus if he was registered for the game, or sat on the bench as substitute but did not participate in the match and he would not receive any bonus in the event he was not registered to participate in the relevant match.

12. Furthermore, for each sporting season of duration of the Employment Contract, the Club undertook to provide the Player accommodation in a rented flat, free of costs for the Player except for telephone costs, a rented car, medical insurance and a total of 3 flight tickets to Ghana for the Player, his wife and his child.

13. Article 7 of the Employment Contract stipulates that *"the Club, at its sole discretion and for every season, shall have the right to terminate this agreement at the end of every football season (by 30.6 of every year). For the avoidance of doubt, at such termination the Player shall not be entitled for any compensation and/or other payment from the Club"* (emphasis added).

14. On 29 June 2011, the Club issued a letter of termination of the Employment Contract reading as follows: *"We hereby notify you that the Club decided to terminate the agreement with you, effective as of today, 29.6.11"*.

15. On 6 July 2011, the Player lodged a claim in front of FIFA against the Club for breach of contract, claiming compensation in the total amount of NIS 4,838,196, as follows:

 - NIS 1,661,017 as the total amount of salaries due under the Employment Contract;
 - NIS 1,126,950 as *"estimated bonus that would had to be paid during the contract"*;
 - NIS 750,000 as estimated value of flight tickets, car and accommodation throughout the natural duration of the Employment Contract;
 - NIS 1,300,229 as requested penalty for the termination of the Employment Contract without just cause during the "protected period"[1].

16. In its reply before FIFA, the Club rejected the Player's claim maintaining that it had the right to unilateral termination based on article 7 of the Employment Contract.

17. Moreover and beside that, the Club alleged it had just cause to terminate the Employment Contract due to the fact that the Player's former club, Tudu Mighty Jet, had lodged a previous claim before the FIFA DRC against the Club itself, the Player and Hapoel Akko, maintaining that the Player was still bound with Tudu Mighty Jet by a valid employment contract when the Player was transferred to the Club, thus objecting to the validity of the Player's Transfer Agreement.

18. In fact, according to Tudu Mighty Jet, at the time when the Player's Transfer Agreement was signed, the Player was registered by Hapoel Akko merely on a loan basis, under an alleged oral agreement between the latter and Tudu Mighty Jet and therefore, Hapoel Akko was not entitled to transfer the Player to the Club since Tudu Mighty Jet was still *"the sole owner of the Player's Sporting Rights and Federative Rights"*.

[1] According to the FIFA Regulations, the Protected Period is a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior 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 was concluded after the 28th birthday of the Professional.

19. On this basis, Tudu Mighty Jet claimed compensation as well as the imposition of sporting sanctions on the Club for having induced the breach of the contract between Tudu Mighty Jet and the Player.

20. In such a context, the Club maintained it was forced to terminate the Employment Contract and to release the Player with just cause.

21. During the proceedings before the FIFA DRC, it emerged that, after the termination of the Employment Contract, the Player signed a new agreement with the Vietnamese club, Vissai Ninh Binh, valid as from 1 October 2011 until 30 August 2012, according to which he was entitled to a monthly salary of USD 10,000.

22. Thereafter, the Player returned to Ghana and allegedly continued playing as an amateur.

23. On 9 May 2014, the FIFA DRC rendered the Appealed Decision by which the Player's claim was partially accepted and the Club was ordered to pay to the Player compensation for breach of contract in the amount of NIS 847,000 within 30 days as from notification of the Appealed Decision.

24. The grounds of the Appealed Decision were served by DHL courier to the Club on 23 August 2015 and to the Player on 21 August 2015.

V. SUMMARY OF THE APPEALED DECISION

25. The grounds of the Appealed Decision can be summarized as follows:

26. The chamber noted that it was undisputed between the Parties that they signed the Employment Contract, valid as from January 2011 until the end of the sporting season 2014/2015 and that, on 29 June 2011 the Employment Contract was unilaterally terminated by the Club.

27. While the Player alleged that the Club was responsible for breach of contract, the Club presented a two-fold argumentation as to why it deemed having had a just cause to terminate the Employment Contract: *"(i) the Claimant had deceived them by not informing them that he had a contract with the Ghanian club Tudu Mighty Jet FC (hereinafter Tudu) valid over the same period of time and that due to this, the Respondent was facing a claim whereby it could be potentially sanctioned, as well as the Claimant himself, thus, it decided to terminate the contract due to said "conspiracy" allegedly orchestrated by Tudu, the Israeli club Hapoel Akko and the Claimant; (ii) the Respondent was in any case entitled to terminate the contract by the end of each season in accordance with art. 7 of the contract"*.

28. Therefore, the chamber established that it first had to determine whether the Club had just cause or not to terminate the Employment Contract.

29. Primarily, with regard to article 7 of the Employment Contract, the chamber did not recognize said clause *"as it clearly provides for a unilateral termination right to the sole benefit of the Respondent without any compensation due to the Claimant"*.

30. In this respect, the chamber rejected the reasoning by the Club that the relevant clause was allegedly also to the benefit of the Player, as he would equally be free to sign with other clubs with no obligations towards the Club, since the circumstance that the Player would be forced to find a new club offering the same conditions as the Club when he had signed a 4 ½ season contract just 6 months prior to the Club's termination, can only be considered as damaging to the Player rather than a benefit.

31. As a consequence, the FIFA DRC concluded that the Club could not legitimately terminate the Employment Contract based on the termination clause set forth under article 7.

32. Subsequently, the chamber considered whether the claim filed by the Ghanaian club Tudu Mighty Jet before the DRC itself against the Club, as well as against the Player and Hapoel Akko, and the alleged impending risk of sporting sanctions to be imposed on the Club could constitute a just cause to terminate the Employment Contract, as contended by the Club.

33. In this regard, the FIFA DRC emphasized that *"at the time the Respondent terminated the contract, there had been no ruling on the dispute involving Tudu, the Claimant, Akko and the Respondent (hereinafter: the original claim). In other words, nothing indicated that neither the Claimant nor the Respondent would be sanctioned in the context of the original claim. In any case, the Respondent could not provide any evidence that, by entering into an employment contract with the Respondent in January 2011, the Claimant had deliberately acted in a manner which would have hurt the Respondent's interests"*.

34. As a conclusion, the FIFA DRC decided that the Club had no just cause to terminate the Employment Contract and that therefore the Club was responsible for breach and had to pay compensation under the provision of article 17 of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "FIFA Regulations").

35. In order to determine the amount of compensation due to the Player according to article 17 of the Regulations, the chamber noted that the amount of NIS 1,528,848 (i.e. the total salaries due to the Player for the entire duration of the Employment Contract) shall serve as the basis of calculation.

36. In accordance with the general duty of mitigation of the damage, the chamber further established that the amount earned by the Player with the Vietnamese club Vissai Ninh Binh, i.e. USD 110,000 corresponding to approximately NIS 410,000, shall be deducted from the basis of calculation of the compensation for breach of contract.

37. Moreover, in view of the same principle of mitigation of damages, the chamber decided to deduct an additional amount of approximately NIS 270,000, based on the following reasoning: *"In addition, and in view of the same general principle of mitigation of the damage, the DRC took into account*

the fact that after his contract with the club Vissai Ninh Binh expired in August 2012, the Claimant did not find a new club, whilst the contract with the Respondent was due to run until the end of the season 2014/2015. Thus, the Claimant would have had opportunities, during the period between the expiry of the contract with the club Vissai Ninh Binh and the end of the season 2014/2015 to seek other employment opportunities".

38. In conclusion, the chamber decided to award the Player a total amount of NIS 847,000 as compensation for breach of contract.

39. The Player's claim with regard to "estimated bonus" under the Employment Contract in the amount of NIS 1,126,950 was rejected since *"such bonus are linked to matches to be played in the future, i.e. after the termination of the relevant contract, and therefore, are fully hypothetical"*.

40. The claim relating to estimated value of flight tickets, car and accommodation throughout the natural duration of the Employment Contract was also rejected based on the fact that the Player failed to provide any evidence supporting his request and also because there is no indication in the Employment Contract of a specific amount due to the Player in relation to those services.

41. The chamber also dismissed the Player's claim for the amount of NIS 1,300,229 as penalty to be imposed on the Club for the termination of the Employment Contract without just cause during the protected period, since the Player *"did not provide any evidence of a specific damage in this regard, and there is no contractual basis for such claim either"*.

42. Finally, the request for application of interest at the rate of 5% over the amount claimed by the Player was rejected as time barred by the statute of limitations according to article 25, par. 5 of the FIFA Regulations.

VI. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

43. On 9 September 2015, the Club filed a statement of appeal with the Court of Arbitration for Sport (hereinafter: the "CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (2013 edition) (hereinafter: the "CAS Code") against the Player and against FIFA with respect to the Appealed Decision. The Club nominated Mr Ken Lalo, attorney-at-law in Gan Yoshiyya, Israel, as an arbitrator.

44. On the same day, the Player also filed a statement of appeal with respect to the Appealed Decision against the Club and FIFA. The Player nominated Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal, as an arbitrator.

45. The Parties chose English as the language of the relevant arbitration proceedings.

46. By fax communication on 16 September 2015 and on 18 September 2015, the Parties were invited to inform the CAS Court Office whether they agree to consolidate the two appeal proceedings.

47. On 17 September 2015, further to the Club's request on 16 September 2015, the CAS Court Office granted the Club a five-day extension of its time limit to file its appeal brief in accordance with article R32 of the CAS Code.

48. On the same date, the Player informed the CAS Court Office that he had no objections to the consolidation of the two procedures and requested an extension of his time limit for filing his appeal brief until 24 September 2015, due to the supposed uncertainty with regard to the date of delivery to the CAS of his statement of appeal by courier.

49. By fax letter to the Parties on 17 September 2015, the CAS Court Office noted that since the shipment containing the Player's originals of his statement of appeal was blocked in Spain, no appeal proceedings had been initiated at that time and therefore the CAS Court Office was not in the position to accept the Player's request for an extension.

50. On 18 September 2015, the Club also informed the CAS Court Office that it agreed to the consolidation of the two procedures.

51. By fax letter to the CAS Court Office on 21 September 2015, communicated to the Parties on 22 September 2015, FIFA emphasized that since both procedures relate to a purely contractual dispute between the Club and the Player concerning an employment-related dispute, and considering that the Appealed Decision was not one of disciplinary nature, nor the appeal contains any claims against FIFA, FIFA cannot be considered as a respondent in the relevant proceedings and shall therefore be removed.

52. By fax letter dated 21 September 2015, the Club raised objections to the timeliness of the Player's statement of appeal pursuant to article R31 of the CAS Code and requested to be provided with the tracking number related to the relevant courier delivery.

53. On 22 September 2015, the Player withdrew his appeal against FIFA. On the same day, with regard to the delivery of his statement of appeal to the CAS, he informed the CAS Court Office that the relevant parcel was allegedly collected by the courier on 10 September 2015 in Càceres, as it emerged from the courier's receipt, but then, due to a supposed oversight of the local agency, it was sent to the central office in Madrid only on 16 September 2015 and therefore the delivery to the CAS Court Office was delayed. In any case, the Player remarked that since he had not received notice of the grounds of the Appealed Decision until 23 August 2015, the filing of his statement of appeal was still on time.

54. On 22 September 2015, the Player filed his appeal brief in the procedure CAS 2015/A/4209.

55. On the same date, further to the Club's request, the CAS Court Office enclosed a copy of the proof of sending of the Player's statement of appeal and invited the Player to produce the tracking number of the related shipment.

56. On 23 September 2015, the CAS Court Office invited the Club to submit its comments in respect of the Player's remarks about the time of delivery of his statement of appeal.

57. On 24 September 2015, the Club filed its appeal brief in the procedure CAS 2015/A/4206 and informed the CAS Court Office that it had no objections to FIFA's request to be removed from the proceedings.

58. By fax letter on 25 September 2015, the CAS Court Office informed the Parties that the procedure CAS 2015/A/4206 had been consolidated with the procedure CAS 2015/A/4209.

59. On 30 September 2015, the Club corroborated its objections to the timeliness of the Player's statement of appeal and requested that the procedure CAS 2015/A/4209 be terminated by the Division President pursuant to article R49 of the CAS Code.

60. On 1 October 2015, the Player was granted a seven-day deadline to submit his observations in regards to the Club' s position with respect to the date of filing of his statement of appeal.

61. On 5 October 2015, the Player filed his comments and relevant documentation claiming that he received notification of the Appealed Decision on 21 August 2015, that his statement of appeal was anticipated by fax to the CAS Court Office on 9 September 2015 and that the originals were remitted to the courier's local agency in Càceres on 10 September 2015.

62. The Club was invited by the CAS Court Office to file its reply to the Player's comments within 9 October 2015.

63. On 9 October 2015, the Club reflected that the tracking information generated by the courier's website does not corroborate that the parcel containing the originals of the Player's statement of appeal was remitted to the courier on 10 September 2015, as alleged by the Player, but rather, that the courier collected the parcel on 17 September 2015 and therefore the Player's statement of appeal is inadmissible.

64. By fax letter dated 14 October 2015, the CAS Court Office invited the Player to submit his reply to the Club's position in relation to the objected admissibility of his appeal and informed the Parties that the deadline for the Club to file its answer in the procedure CAS 2015/A/4209 remained suspended until further notice.

65. On 15 October 2015, the Player insisted that the parcel containing his statement of appeal was actually remitted to the courier on 10 September 2015 as confirmed by the certification attached to his previous correspondence.

66. By fax letter on 20 October 2015, further to the CAS Court Office's request on 14 October 2015, FIFA confirmed that since, for technical reasons, the Appealed Decision could not be notified to the Parties by fax, it was sent to the Parties on 20 August 2015 by DHL and was received by the Player on 21 August 2015.

67. On 22 October 2015, the Parties were invited by the CAS Court Office to file their comments in relation to FIFA's latest communication, by 26 October 2015.

68. On 23 October 2015, the Player insisted on the admissibility of his statement of appeal while on 26 October 2015 the Club maintained that the originals of the Player's statement of appeal were dispatched on 17 September and were received by the CAS Court Office on 18 September, thus outside the deadline of 11 September 2015 for the Player to file his appeal.

69. On 26 October 2015, the CAS Court Office informed the Parties that it would be for the President of the CAS Appeals Arbitration Division to decide on the issue of the admissibility of the Player's appeal.

70. By fax letter dated 2 November 2015, the CAS Court Office informed the Parties that, in view of the elements of the file and the different documents regarding the filing of the Player's statement of appeal, the President of the CAS Appeals Arbitration Division had decided that, *prima facie*, the appeal is admissible and that it would be for the Panel to render a final decision on the issue. Moreover, the Parties were advised that the Club's time limit to file its answer in the procedure CAS 2015/A/4209 would resume upon receipt of the said fax letter.

71. On 19 November 2015, the Club filed its answer in the procedure CAS 2015/A/4209.

72. Further to the CAS Court Office's request to the Parties, on 23 November 2015 and on 26 November 2015, respectively, the Player and the Club requested that a hearing be held in the present proceedings.

73. On 9 December 2015, the CAS Court Office informed the Parties that the Panel appointed to decide the present arbitration proceedings was constituted as follows:

- Mr Fabio Iudica, attorney-at-Law in Milan, Italy, as President;
- Mr Ken Lalo, attorney-at-law in Gan-Yoshiyya, Israel, arbitrator;
- Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal, arbitrator.

74. By fax letter on 12 January 2016, the CAS Court Office informed the Parties that a hearing would be held in the present proceedings on 16 March 2016 in Lausanne, Switzerland, and invited the Parties to submit a list with the names of all the persons who would be attending the hearing.

75. On 12 February 2016, the Club informed that Mr Asaf Rahamlm, CEO of the Club and Mr David Elhaddad, players' agent, would be present at the hearing as the Club's witnesses and requested that Ms Alona Barkat, President of the Club, could testify via video-conference.

76. By fax letter on the same date, the Player informed that, at the hearing, he would be represented by his counsel, while the President of Tudu Mighty Jet, indicated as witness, was further renounced by the Player on 19 February 2016.

77. On 14 March 2016, the CAS Court Office forwarded the Order of Procedure to the Parties.

78. On 9 March 2016, the Player informed the CAS Court Office that Mr David Elhaddad would no longer be present at the hearing.

79. On 14 and 15 March 2016, respectively, the Player and the Club returned duly signed copies of the Order of Procedure to the CAS Court Office, confirming the jurisdiction of the CAS.

80. On 16 March 2016, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, all parties confirmed that they had no objection to the constitution and composition of the Panel, nor to the jurisdiction of the CAS.

81. In addition to the Panel and Mr Fabien Cagneux, Counsel to the CAS, the following persons attended the hearing:

For the Club:
- Dr Xavier Favre-Bulle, Counsel;
- Mr Hikmat Maleh, Counsel;
- Mr Asaf Rahamim, CEO of the Club.

For the Player:
- Mr Sergio Antonio Sànchez Fernandez Counsel;

82. The Panel heard evidence from Mr Asaf Rahamim, CEO of the Club (in person), and Ms Alona Barkat, President of the Club (by Skype).

83. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their rights to be heard and to be treated equally were respected.

VII. SUBMISSIONS OF THE PARTIES

84. The following outline is a summary of the main positions of the Parties in the consolidated procedures CAS 2015/A/4206 and CAS 2015/A/4209 which the Panel considers relevant to decide the present dispute and does not comprise each and every contention put forward by the Parties. However, the Parties' written submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. The Club's submissions and requests for relief in CAS 2015/A/4206

85. The Club's submissions in the procedure CAS 2015/A/4206 are included in its statement of appeal and in its appeal brief which can be summarized as follows.

86. The Club had the right to unilaterally terminate the Employment Contract based on the provision of article 7.

87. Such provision, which expressly permits the Club to unilaterally terminate the contract at its sole discretion, at the end of each sporting season, was discussed and freely negotiated between the Parties and the Player consented to it by signing the Employment Contract. In this regard, the Club maintains that the Parties agreed on the termination clause under article 7 also taking into account the above-average salary offered to the Player.

88. The content of article 7 of the Employment Contract is not in contrast with any of the FIFA Regulations since the only restrictions set forth in FIFA Regulations are those connected with the minimum and maximum length of the contract established under article 18 and the prohibition of unilateral termination during the course of a season established under article 16. Beyond these restrictions, parties are therefore free to determine the length and terms of their employment contracts.

89. In addition, the Club maintains that Israeli law does not prohibit a fixed-term contract containing a unilateral termination option for the sole benefit of the employer and also that there is no precedent in CAS case law supporting the FIFA DRC's finding that the termination clause is invalid merely because it is unilateral.

90. On the contrary, the Club emphasizes that unilateral termination clauses should be regarded the same way as CAS panels consider unilateral extension clauses and therefore their validity should not be excluded in principle but rather be assessed on a case-by-case basis.

91. According to the Club, the termination clause under article 7 of the Employment Contract was not exercised to take advantage of the Player, since the Club had no other choice but to terminate the Employment Contract due to the claim lodged by Tudu Mighty Jet before FIFA, as mentioned above.

92. Irrespective of the alleged validity of the termination clause under article 7, the Club maintains that it had just cause to terminate the Employment Contract under the provision of article 14 of the FIFA Regulations for the following reasons.

93. As soon as the Player was included in the Club's squad, he became a key player for the Club, he never suffered any serious injury and the Club was satisfied with his performance.

94. However, on 19 April 2011, the Club was notified of a claim lodged with the FIFA DRC by the Ghanaian club Tudu Mighty Jet against the Club, the Player and the Israeli club Hapoel Akko.

95. In its claim, Tudu Mighty Jet argued that, at the time when the Player's Transfer Agreement was signed, the Player was still under contract with Tudu Mighty Jet until 31 July 2011, while Hapoel Akko had merely loaned the Player and therefore it was not entitled to transfer him to the Club.

96. As a consequence, Tudu Mighty Jet maintained that its employment contract with the Player had been breached and requested that the Player be ordered to pay compensation of USD 300,000, with Hapoel Akko and the Club being considered jointly liable for the relevant payment.

97. Moreover, the Ghanaian club also requested the imposition of sporting sanctions on the Player, as well as on Hapoel Akko and on the Club for *"having induced the Player to breach his contract with Tudu Mighty Jet"*.

98. By notifying the relevant claim to the Club, FIFA confirmed from the outset of the relevant proceedings that the loan agreement concluded between Tudu Mighty Jet and Hapoel Akko provided that Hapoel Akko *"reverts the player (…) to Tudu Mighty Jet FC at the end of the season 2009/2010"*.

99. Therefore, since the claim filed by Tudu Mighty Jet appeared *prima facie* justified, although the Club acted in good faith when signing the Player's Transfer Agreement (relying on the fact that Hapoel Akko was actually entitled to transfer the Player's rights), the Club alleges that considering the risk of being subject to sporting sanctions, and in view of the ongoing uncertainty regarding the status of the Player, it could not wait until the decision was rendered by the FIFA DRC on the relevant matter and therefore decided to terminate the Employment Contract on 29 June 2011.

100. In fact, as the Club maintains, had the FIFA DRC decided to uphold the claim filed by Tudu Mighty Jet, the Club would be liable to pay USD 300,000, it would lose the Player for several months and it would also face sporting sanctions. The fact that the relevant claim was actually dismissed by FIFA, cannot alter the legitimate perception of the situation that the Club had at that time.

101. In this respect, the Club maintains that according to CAS jurisprudence, just cause exists when the continuation of a contract cannot reasonably be expected by one party, as, allegedly, in the present case.

102. With regard to the Player's position, the Club alleges that he failed to provide reasonable grounds for being unable to find employment after the termination of the contract with the Vietnamese club.

103. Moreover, the Club expresses its surprise with regard to the fact that, in the abovementioned proceedings, Tudu Mighty Jet was represented by the same lawyer representing the Player before FIFA in the proceedings which finally led to the Appealed Decision.

104. In addition, the Player failed to disclose any information or document to the FIFA DRC about his professional activity after termination of the Employment Contract and about his efforts at finding a new club after termination of the contract with the Vietnamese club Vissai Ninh Binh.

105. In its Appeal Brief the Club submitted the following requests for relief:

- *"Make an award to annul the Decision dated 9 May 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association partially accepting the claim of the Respondent and ordering the Appellant to pay compensation to the Respondent for breach of contract in the amount of NIS 847,000;*

- *Order the Respondent to pay all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the Appellant;*

- *Dismiss any other relief sought by the Respondent;*

- *Order any such other relief as the CAS Panel may deem fair and just"*.

B. The Player's submissions and requests for relief in CAS 2015/A/4206

106. The position of the Player in the procedure CAS 2015/A/4206 is set forth in its answer and can be summarized as follows.

107. With regard to the validity of the Player's Transfer Agreement, which was contested by Tudu Mighty Jet in its claim before FIFA DRC, the Player argues that the Club was aware of the existence of an employment contract between him and Tudu Mighty Jet, as well as of the existence of a previous debt between Hapoel Akko and Tudu Mighty Jet.

108. Such a circumstance also emerged by an affidavit signed by Mr David Dada Elchadad submitted by the Club before the FIFA DRC in the proceedings against Tudu Mighty Jet. In such affidavit, Mr Elchadad, a players' agent in Israel, declares that he participated in the negotiations between Hapoel Akko and the Club in view of the signing of the Player's Transfer Agreement.

109. According to Mr Elchadad, the transfer fee agreed upon between Hapoel Akko and the Club (i.e. USD 105,000) was inclusive of a previous debt in the amount of USD 30,000 which Hapoel Akko owed to the Ghanaian club Tudu Mighty Jet as the last instalment due for transferring the Player.

110. Therefore, it was agreed between the parties that the Club would pay the entire amount of USD 105,000 to Akko, which, in turn shall transfer the amount of USD 30,000 to Tudu Mighty Jet in order to pay off its debt.

111. However, as the Club is perfectly aware, it resulted that Hapoel Akko failed to pay that amount to Tudu Mighty Jet, which fact probably gave rise to the dispute between Tudu Mighty Jet, Hapoel Akko, the Club and the Player before FIFA.

112. Moreover, the Player acted in good faith since he had no reason to doubt that Hapoel Akko was entitled to transfer him to the Club and that the Player's Transfer Agreement was valid,

which is also corroborated by the validation by the Israeli Football Federation which finally registered the Player with the Club. In any case, there is no justified reason to charge the Player with the responsibility for the alleged invalidity or irregularities connected with the Player's Transfer Agreement.

113. Moreover, the claim filed by Tudu Mighty Jet has no connection with the termination of the Employment Contract, which, in fact, happened six months later.

114. Furthermore, the Player argues that there is no conflict in the position of his legal counsel in relation to the fact that he also represented Tudu Mighty Jet before FIFA, and at the time when the Player filed his claim before FIFA against the Club, there was no reason to believe the two cases could be linked one to another, since the Club did not provide any reason for the termination of the Employment Contract.

115. Furthermore, the Player emphasizes that the claim filed by Tudu Mighty Jet against himself, the Club and Hapoel Akko was fully dismissed by the FIFA DRC as the chamber established that there had been a definitive transfer between Tudu Mighty Jet and Hapoel Akko and the dispute merely related to an outstanding amount due by Hapoel Akko in favour of Tudu Mighty Jet in relation to the transfer of the Player.

116. In regard to the termination clause, the Player avers that, irrespective of the fact that the Employment Contract was not the result of comprehensive and thorough negotiations between the Parties, as alleged by the Club, article 7 goes against FIFA's fundamental principle of contractual stability and therefore, it cannot be considered a valid clause.

117. In this respect, the Player maintains that such stipulation is clearly abusive since it does not provide for reciprocal rights but goes only to the benefit of the Club, giving the Club the right to unilaterally decide the duration of the Employment Contract without any reason thereof, while the Player has the obligation to respect the Employment Contract and would face the obligation to pay compensation and possible sporting sanctions in case of termination without just cause.

118. Irrespective of the above, article 7 of the Employment Contract is also in contrast with the provisions of articles 13 and 17 of the FIFA Regulations and also goes against the principles set forth under FIFA Circular Letter n. 1171.

119. In addition, the Player contests that the termination letter sent by the Club did not explain any reason whatsoever for terminating the Employment Contract, nor had the Player received any previous warning by the Club.

120. As a consequence, the termination of the Employment Contract by the Club is unjustified and the dispute against Tudu Mighty Jet was merely a pretext for the Club to unilaterally terminate the Employment Contract.

121. The Player also rejects the Club's argument that he allegedly failed to provide FIFA with any information about his professional activity after the termination of the Employment Contract, even if he admits that he could not disclose the contract with the Vietnamese club since he did not have a copy of the same contract.

122. With regard to the obligation to mitigate the damage, the Player contests that it is the burden of the Club to prove that the Player is liable for "lack of interest" in finding other clubs after the termination of the contract with the Vietnamese club.

123. Moreover, article 337 of the Swiss Civil Code (hereinafter referred to as the "SCO"), referred to by the Club, is not applicable to the present matter which shall be governed only by art. 17 of the FIFA Regulations.

124. In this respect, the Appealed Decision has awarded an unfair amount to the Player since the FIFA DRC did not take into account all the salaries to which the Player was entitled for the entire duration of the Employment Contract nor did it consider that the termination without just cause occurred during the protected period.

125. In his answer, the Player submitted the following requests for relief:

- *"That the appeal lodged by Hapoel Beer Sheva be rejected, and all costs derived of this file, imposed to Hapoel Beer Sheva, added to a compensation towards the legal costs incurred by the player Ibrahim Abdul Razak, on his defense.*

- *To ask for FIFA for a full copy of the file 11-02128/ifa, between Ibrahim Abdul Razak and Hapoel Beer Sheva, in order the Panel can revise all the argumentation presented by the Club, and verify the notifications from FIFA to the parties, added to the employment contract of the player Ibrahim Abdul Razak, which was incorporated to the file, but not disclosed to the parties.*

- *To ask for a copy of the employment contracts signed between Hapoel Akko and Ibrahim Abdul Razak, which the player lost, since they remained on the flat on Beer Sheva where he lived, and where he never returned, after the termination of his contract. This contract has to be requested to the Israeli Football Association".*

C. The Player's submission and requests for relief in CAS 2015/A/4209

126. The Player's submissions in the procedure CAS 2015/A/4209 are set forth in his statement of appeal and in his appeal brief which can be summarized as follows.

127. The total amount of salaries to which the Player was entitled under the Employment Contract was originally agreed in USD and then converted into NIS 1,528,848 which correspond to approximately USD 392,000 according to the current exchange rate, and to USD 450,000 according to the exchange rate at the time of termination.

128. The amount established by the FIFA DRC in the Appealed Decision as compensation due to the Player is too low and, in any event, the Appealed Decision lacks reasoning, since the DRC failed to express which criteria were applied in order to determine the final amount of NIS 847,000.

129. In particular, the Player objects that, beside the deduction of the salaries that the Player was supposed to receive from the Vietnamese club (i.e. USD 110,000, or USD 70,000 according to the Player), the FIFA DRC also deducted an additional amount of approximately NIS 270,000 from the basis of calculation without giving any explanations thereof.

130. In addition, the FIFA DRC did not take into account the fact that the breach by the Club occurred during the protected period, which fact would require an increase in the amount of compensation.

131. Moreover, with regard to his employment relationship with the Vietnamese club Vissai Ninh Binh, the Player maintains that he only received USD 70,000 out of the total amount of USD 110,000 to which he was entitled under the relevant employment contract.

132. In his appeal brief, the Player submitted the following requests for relief:

- *"To admit the present brief of appeal, to revise the case, and, at the corresponding moment, to issue an award in which, after revoke the FIFA DRC decision taken on 9 May 2014, be declared by the CAS that Hapoel Beer Sheva FC has to pay to the Appellant, Mr Abdul Ibrahim Razak, a compensation for the breach of his employment contract, on the total amount of 1,528,848 NIS*

- *Order that all the cost derived of this procedure be assumed by the Club Hapoel Beer Sheva and FIFA*

- *Order to the Respondent[s] to pay a compensation of 5,000 CHF to the Respondent* [Appellant] *as a contribution towards his legal costs".*

D. The Club's submissions and requests for relief in CAS 2015/A/4209

133. The position of the Club in the procedure CAS 2015/A/4209 is set forth in its answer and can be summarized as follows.

134. As a first argument, the Club objects to the admissibility of the appeal filed by the Player.

135. In this respect, the Club argues that the Player sent his statement of appeal to the CAS Court office on 9 September 2015 by fax only, while the originals of the statement of appeal sent by the Player by courier were received by the CAS Court Office on 18 September 2015.

136. The Club rejects the Player's allegations that he remitted the relevant parcel to the courier in Càceres already on 10 September 2015, since it also emerges from the tracking information generated by the courier company that the courier actually received the parcel only on 17

September 2015 when the delivery process started; the parcel was then delivered to the courier office in Madrid on the same day and it was received by the CAS Court Office on 18 September 2015.

137. In consideration of the fact that the Appealed Decision was served to the Player by courier on 21 August 2015, as it was also confirmed by FIFA during the present proceedings, the Club contends that the Player's statement of appeal was sent beyond 11 September 2015 which was the time limit required under article 67 of the FIFA Statutes and article R49 of the CAS Code.

138. In this respect, the copy of the receipt issued by MRW produced by the Player does not provide any evidence about what exactly was remitted to the courier on 10 September 2015 with destination of the CAS Court Office.

139. In fact, the Club contends that according to article R31 of the CAS Code, since the Player's statement of appeal was transmitted only by fax within the prescribed time limit, while the filing by courier was received on 18 September 2015, the Player's appeal shall be declared inadmissible.

140. Irrespective of and in addition to the above, with regard to the amount of compensation claimed by the Player, the Club argues that the latter failed to demonstrate the damage suffered and also did not meet his duty to mitigate the damage, according to article 337 c) of the SCO.

141. In this regard, the Club maintains that at the time when the Employment Contract was terminated, the Player *"was fit, in his best years, with a strong reputation, and free to sign for any club in the world in exchange for a signing-on fee"* and therefore the allegation that he was unable to find any other club after termination of the employment contract with the Vietnamese club, even at a lower salary, must be rejected.

142. In addition, the Player did not submit any evidence that he actually tried to enter into negotiations with other clubs.

143. Moreover, the Player did not provide any evidence with regard to the monies he alleges he actually received under the employment contract with the Vietnamese club, i.e. USD 70,000 instead of USD 110,000 as expected under the relevant employment contract.

144. In its answer, the Club submitted the following requests for relief:

- *"Declare Mr Ibrahim Abdul Razak's Statement of Appeal inadmissible and terminate the proceedings CAS 2015/A/4209 resulting from it;*

- *Alternatively, dismiss any relief sought by Mr Ibrahim Abdul Razak;*

- *In any event, order Mr Ibrahim Abdul Razak to pay all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by Hapoel Beer Sheva F.C".*

VIII. JURISDICTION

145. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes (2014 edition) as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

146. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

IX. ADMISSIBILITY

148. As mentioned above, the Appealed Decision was served to the Parties by courier. The Club was notified on 23 August 2015 and the Player on 21 August 2015.

149. The Player transmitted his respective statement of appeal in advance by facsimile to the CAS Court Office on 9 September 2015.

150. However, the admissibility of the Player's appeal is objected to by the Club since the originals of the Player's statement of appeal were delivered by courier to the CAS Court Office on 18 September 2015, which is after the time limit of 21 days set forth under article R49 of the CAS Code.

151. In this respect, the Panel refers to the provision of article R31 of the CAS Code which reads as follows: *"The request for arbitration, the statement of appeal and any other written submission, printed or saved on digital medium, must be filed by courier to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted by facsimile in advance, the filing is valid upon receipt of the facsimile by the CAS Court Office provided that the written submission is also filed by courier within the relevant time limit, as mentioned above"*.

152. While the Player affirms that he actually remitted the relevant documents to the local courier in Càceres already on 10 September 2015, i.e. within the due time limit for filing his appeal, the Club contends that from the documentation produced by the Player and from the tracking information generated by the courier company, it results that, instead, the parcel was remitted to the courier only on 17 September 2015, thus beyond the said time-limit.

153. The Panel notes that the Player has presented documentation in support of his allegations that the parcel was remitted to the courier on 10 September 2015.

154. In particular, the Panel makes reference to the copy of the courier receipt issued by MRW, the local courier in Càceres to which the Player remitted the relevant originals of his statement of

appeal, and observes that the receipt indicates that the document were collected at WorldSportAdviser's, the Player's counsel's offices, on 10 September 2015.

155. In addition, the Panel observes that the Player submitted a certification by the director of the local courier's agency in Càceres by which it is attested that the relevant parcel was collected at WorldSportAdviser's heading to the CAS, on 10 September 2015, with tracking number 900/2437982. The same tracking number appears on the subsequent tracking report informing that the parcel first reached the courier's offices in Madrid and left Spain on 17 September 2015 and finally reached the CAS Court Office on 18 September 2015.

156. In consideration of the foregoing, the Panel is satisfied that the Player remitted the originals of his statement of appeal on 10 September 2015.

157. In this context, the Panel notes that pursuant to article 67 of the FIFA Statutes which is consistent with article R49 of the CAS Code, the time limit for appeal against a decision rendered by FIFA's legal bodies shall be twenty-one days as of receipt of notification of the decision appealed against.

158. As mentioned above, as it was confirmed by FIFA, the Player received notification of the Appealed Decision on 21 August 2015 and, therefore, the time limit for appeal was 11 September 2015.

159. As it is provided by article R32 of the CAS Code, *"The time limit fixed under this Code are respected if the communication by the parties are sent before midnight, time of the location where the notification has to be made, on the last day on which such time limits expire"*.

160. In consideration of all the foregoing, the Panel finds the Player to have provided satisfactory evidence that, by remitting the originals of his statement of appeal to the local courier on 10 September 2015, he actually sent the relevant submission within the time limit for filing his appeal, within the meaning of article R32 of the CAS Code.

161. Therefore the Panel holds that the appeals were filed within the 21 days set by article 67(1) of the FIFA Statutes.

162. It follows that the appeals are admissible.

X. APPLICABLE LAW

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

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of

law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

164. Article 66 para 2 of the FIFA Statutes so provides:

"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".

165. In its appeal brief, the Club requests that *"In accordance with article R58 of the CAS Code, the present dispute be settled primarily according to the FIFA Statutes and Regulations and additionally by Swiss law".*

166. The Player agrees that the present case is governed by the FIFA Regulations.

167. In consideration of the above and pursuant to Article R58 of the CAS Code, the Panel holds that the present dispute shall be decided according to FIFA Regulations as a first choice, with Swiss law applying subsidiarily.

XI. MERITS

A. Was the Club entitled to unilaterally terminate the Employment Contract under article 7?

168. With regard to the merits of the present dispute, first of all, the Panel observes that it is undisputed between the Parties that the Employment Contract was unilaterally terminated by the Club through the "Termination notice" on 29 June 2011.

169. It is also undisputed that the "Termination notice" did not state any apparent reasons for termination of the Employment Contract.

170. What is firstly disputed is whether the Club was entitled to unilaterally terminate the Employment Contract, without restrictions, under the provision of article 7, without any consequence whatsoever.

171. As mentioned above, the said clause provides that: *"the Club, at its sole discretion and for every reason, shall have the right to terminate this agreement at the end of every football season (by 30.6 of every year). For the avoidance of doubt, at such termination the Player shall not be entitled for any compensation and/or other payment from the Club".*

172. The Club maintains that article 7 was freely negotiated between the Parties; that the Player accepted the relevant clause by signing the Employment Contract; that the clause does not contrast with any of the provisions set forth in the FIFA Regulations; that it is consistent with Israeli law and that there is no precedent in CAS case law according to which the termination clause is invalid merely because it is unilateral.

173. In addition, the Club avers that the reason why it applied article 7 was not to take advantage of the Player, since the Club had no other choice but to terminate the Employment Contract due to the claim lodged by Tudu Mighty Jet before FIFA.

174. The Player argues that, on the contrary, the stipulation set forth under article 7 of the Employment Contract goes against the fundamental principle of contractual stability and it is clearly abusive since it does not provide for reciprocal rights but only entails benefit towards the Club. In fact, the relevant clause grants the Club the right to unilaterally decide the duration of the Employment Contract without any reason thereof, while the Player has the obligation to respect the employment relationship for its entire duration and would face the obligation to pay compensation for breach and possible sporting sanction in case of termination without just cause.

175. The Player also contends that article 7 is in contrast with the provisions of articles 13 and 17 of the FIFA Regulations as well as the principles set forth under FIFA Circular Letter n. 1171.

176. For the purpose of examining the validity of article 7 in light of the contradicting positions of the Parties, the Panel recalls that according to article 13 of the FIFA Regulations *"A contract between a Professional and a club may only be terminated on expiry of the term of the contract or by mutual agreement"*.

177. The Panel notes that this provision enshrines the fundamental principle of *pacta sunt servanda* pursuant to which FIFA warns that *"Unilateral termination of a contract without just cause, especially during the so-called protected period, is to be vehemently discouraged"* (Commentary on FIFA Regulations, article 13).

178. In fact, under FIFA Regulations, a contract may only be terminated by either party without consequences of any kind in the presence of a just cause, as provided under article 14.

179. On the other hand, article 16 of the same FIFA Regulations, according to which *"A contract cannot be unilaterally terminated during the course of a Season"*, does not imply that, conversely, unilateral termination of a contract is allowed at the end of the relevant sporting season, as suggested by the Club. On the contrary, as it is also confirmed in the FIFA Commentary, this rule imposes a restriction in two particular situations where, exceptionally, an employment contract between a player and a club can unilaterally be terminated before its expiry, according to FIFA Regulations: a) by either party (even without just cause) after the protected period; b) by the player only, for sporting just cause. Therefore, *"Termination in the aforementioned situation is only allowed at the end of the season…"* (see FIFA Commentary, article 16).

180. As a consequence, the Panel holds that the provision under article 7 of the Employment Contract clearly contrasts with articles 13 and 14 of the FIFA Regulations which are mandatory at international level pursuant to article 1 par. 1 of the FIFA Regulations and therefore shall not be considered valid.

181. In addition, the Panel observes that article 7 also contravenes the general principle of proportionality and the principle of equal treatment of the parties since it blatantly provides benefits only towards the Club with no corresponding reward or analogous right in favour of the Player.

182. In this respect, the Panel notes that, consistent with the well-established CAS jurisprudence, the respect of contractual freedom cannot in any way go to the detriment of the principle of a proportionate repartition of the rights of the parties (CAS 2008/A/1517).

183. The Panel notes that in case CAS 2014/A/3707 the panel declared the invalidity of a contractual clause under which, if the club decided to terminate the employment contract, it would have to pay the remaining contract value for the season of termination, while the player in the same situation would be obliged to pay the remaining contract value in full: *"The regime which provides that if the club decides to terminate the employment contract, it shall pay the remaining contract value for the season of termination while if the player decides to terminate such contract, it shall pay the remaining contract value in full leads to a system which disproportionately favours the club, which, in practice, can establish a long-term employment relationship with a player and rescind it after one year only. With this method, the club can therefore refuse to keep the player if the latter does not progress as expected but may retain him, should he confirm his sporting qualities and value. Such a system is clearly contrary to the general principles of contractual stability as well as of labour law as it gives the club undue control over the player, without rewarding him in exchange"* (emphasis added).

184. The Panel finds that the reasoning above perfectly applies to the present case.

185. Moreover, unilateral termination of a fixed-term employment relationship, as is the contract between the Club and the Player, is also not contemplated under Swiss law. In fact, the SCO provides that only open-ended employment contract may be unilaterally terminated by either party (article 335 SCO), while fixed-term employment contract may only be terminated by one party in the presence of a "good cause", according to the provision of article 334 in combination with article 337 of the SCO.

186. With further regard to unilateral extension clauses invoked by the Club in support of the alleged validity of article 7 of the Employment Contract, the Panel observes that, likewise, according to CAS jurisprudence, the validity of such extension clauses is subject to the employment contracts, which grant the right to unilateral extension to one party, also stipulating a corresponding right or award to the other party, in order to ensure balance of rights (see CAS 2005/A/973).

187. Since the Employment Contract provides the right of termination only in favour of the Club, at its sole discretion, with no corresponding right or award for the Player nor the possibility for the Player to claim compensation, the Panel believes that this clause is abusive, to the detriment of the Player and shall not be considered valid.

188. Finally, the majority of the Panel considers that the fact that Israeli law allegedly allows the stipulation of such termination clauses as the one under article 7 of the Employment Contract is also irrelevant since Israeli law is not applicable to the present case.

189. The Panel also notes that the Club invokes Israeli law under article 18 of the FIFA Regulations: *"By virtue of the reference included in Article 18 of the RSTP, the length of the contract as freely defined by the parties should comply with national law, namely in the present case Israeli law"*.

190. The Panel emphasizes that since article 18 of the FIFA Regulations only provides that contracts of any other length with respect to the minimum and maximum length set forth thereunder shall only be permitted if consistent with national laws, the relevant provision is not consistent with the present matter. In fact, what is disputed between the Parties is not the alleged different duration of the Employment Contract compared to the standard duration according to FIFA Regulations but, rather, the validity of the unilateral termination clause set forth under article 7 of the Employment Contract.

191. In any case, even if Israeli law were applicable, derogation from the fundamental principle of contractual stability and equal treatment would still not be allowed (see CAS 2005/A/983 & 984): *"Le but du Règlement FIFA est d'instaurer des règles uniformes valant pour tous les cas de transferts internationaux et auxquelles l'ensemble des acteurs de la famille du football est soumis. Ce but ne serait pas attaint si on devait reconnaître comme applicables des règles differentes adoptées dans tel ou tel pays. Il ne serait pas conceivable que telles règles nationales puissant affecter des parties non soumises au droit de ce pays. C'est à dire qu'au moins de remettre en cause le but fundamental de règles internationales instituées par la FIFA, les arrangements ou autres dispositions de portée nationale ne peuvent trouver application que s'ils sont contraires à ces dernieres"* (English free translation: The purpose of the FIFA Regulations is to establish uniform rules applicable in all cases of international transfers and to which all members of the football family are subjected. This purpose would not be achieved if we were to consider that different national rules are instead applicable. It would not be conceivable that such national rules may affect those parties who are not related to the relevant different country. Unless we agree to question the fundamental purpose of international rules established by FIFA, regulations or other national provisions may not be applied if they are contrary to the latter).

192. In conclusion, the Panel holds that the Club could not legitimately terminate the Employment Contract under the provision of article 7.

B. Did the Club have just cause to terminate the Employment Contract, irrespective of the validity of article 7?

193. Irrespective of the validity of the stipulation under article 7 of the Employment Contract, the Club still maintains that, in any case, it had just cause to terminate the Employment Contract according to article 14 of the FIFA Regulations, allegedly consisting in the situation of legal uncertainty with regard to the Player's status deriving from the claim lodged before FIFA by Tudu Mighty Jet for breach of contract and inducement to breach of contract, as mentioned above.

194. In fact, the Club argues that, since it appeared *prima facie* from the allegations of the Ghanaian club that the Player was still bound to Tudu Mighty Jet when he was transferred from Hapoel Akko to the Club, with the consequence that the Player was in breach of contract towards Tudu Mighty Jet when he signed with the Club, the Club actually risked being considered jointly liable with the Player to pay compensation for having induced the breach, as well as the imposition of sporting sanctions, since the breach occurred during the protected period.

195. In this respect, the Panel concurs with the Appealed Decision that at the time the Club terminated the Employment Contract, there had been no ruling on the dispute brought by Tudu Mighty Jet and nothing indicated that either the Player or the Club would be sanctioned in the context of those proceedings.

196. The Panel also notes that the relevant claim by Tudu Mighty Jet was finally entirely rejected by FIFA (decision of the FIFA DRC on 9 May 2014), since the chamber found that the Ghanaian club and the Player actually agreed upon an early termination of their employment contract and the Player was not bound to Tudu Mighty Jet when he signed the Employment Contract.

197. Nonetheless, the Club insists that, in view of the circumstances as described above, at the time the claim was lodged by Tudu Mighty Jet, it could not reasonably rely on the continuation of the employment relationship with the Player and, therefore, it was forced to unilaterally terminate the Employment Contract with just cause. At the hearing both Mr Asaf Rahamim, CEO of the Club, and Ms Alona Barkat, President of the Club, indicated that they had to take precautionary measures to ensure that they were not held liable and subject to damages and the imposition of sporting sanctions.

198. The Panel is not persuaded by the Club's arguments for the following reasons.

199. According to article 14 of the FIFA Regulations, *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause"*.

200. The Commentary on the FIFA Regulations states as follows with regard to the concept of "just cause": *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case…"*.

201. Moreover, according to FIFA interpretation of article 14 of the FIFA Regulations, "just cause" is not necessarily the consequence of a violation of the contract by the other party, although it is the most common reason (see Commentary on the FIFA Regulations, under article 14, footnote 64).

202. Therefore, the Panel notes that it is possible, in general, that one party has just cause for the termination of the contract even if the other party is not responsible for the violation of the said contract, as is the present case.

203. That being said, the Panel observes that CAS jurisprudence had specified that while FIFA rules do not define the concept of "just cause", reference should be made to Swiss law, where applicable, as in the present case (CAS 2006/A/1062; CAS 2008/A/1447; CAS 2013/A/3091, 3092 & 3093; CAS 2012/A/2698).

204. In this respect, article 337 par. 2 of the SCO provides that *"any circumstances which, according to the rules of good faith, mean that the party who has given notice of termination cannot be required to continue the employment relationship, shall be deemed good reason"*.

205. According to CAS case law, only a "material breach" of a contract can possibly be considered as "just cause" for termination without consequences of any kind (CAS 2006/A/1062; CAS 2006/A/1180; CAS 2007/A/1210; CAS 2006/A/1100; CAS 2013/A/3091, 3092 & 3093). A material breach occurs *"when the main terms and conditions, under which it was entered into are no longer implemented. The circumstances must be such that, according to the rule of good faith, the party terminating the employment relationship cannot be required to continue it"* (CAS 2013/A/3091, 3092 & 3093; CAS 2012/A/2698).

206. Likewise, in the case CAS 2013/A/3237, the concept of "just cause" has been identified as *"the prevailing situation, in the presence of which the injured party cannot in good faith be expected to continue the employment relationship…… Moreover, the unilateral termination of the contract is accepted when the essential conditions under which the contract was concluded are no longer present"*.

207. Therefore, the Panel abides by the principle that the concept of "just cause" as defined in article 14 of the FIFA Regulations, must be associated to that of "good reason" within the meaning of article 337 par. 2 of the SCO as outlined above.

208. Within this legal framework, the Panel considers that the circumstances invoked by the Club for justifying the termination of the Employment Contract do not correspond to the situation where the main terms and conditions, under which the Employment Contract was entered into are no longer implemented, contrary to the Club's allegations.

209. The Panel rejects the arguments by the Club that the claim lodged by Tudu Mighty Jet on 3 March 2011 against the Club, the Player and Hapoel Akko could reasonably prevent the Club to continue the employment relationship with the Player due to the fact that the Club was subjected to the risk of being considered responsible for inducement of breach of contract.

210. The Panel considers in fact that, at the time when Tudu Mighty Jet lodged its claim before FIFA, the Player had already been transferred to the Club, with the consequence that, it would no longer be possible to prevent or even restore an hypothetical breach of the employment contract between the Player and Tudu Mighty Jet.

211. According to article 18 par. 5 of the FIFA Regulations, a player can only enter into one employment contract at a time and, if he signs a second contract, the player effectively terminates the first one. As a consequence, in the present case, if the Player was still bound to

Tudu Mighty Jet when he was transferred to the Club, *quod non*, the contract with Tudu Mighty Jet had been terminated as a result of the signing of the Employment Contract and the latter would still be valid and effective.

212. In other words, the Club's termination of the Employment Contract, at that time, could not change the outcome of the FIFA's findings. In fact, in the event that it was determined that the Player was actually still bound to Tudu Mighty Jet at the time of the Player's Transfer Agreement (which in fact is not the case), irrespective of the termination of the Employment Contract, the Club could not escape the application of the principle of the presumption of inducement set forth under article 17 par. 4 of the FIFA Regulations establishing that: *"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 Registration Periods"*.

213. In such a situation, it would be presumed (unless established to the contrary), that the Club was responsible for inducement of breach of contract and it would be responsible to pay compensation as well as subject to sporting sanctions according to the provisions of article 14 of the FIFA Regulations, with no legal effects on the employment relationship with the Player.

214. As a consequence, the Panel believes that the reasoning put forward by the Club in relation to the risks deriving from Tudu Mighty Jet's claim before FIFA cannot be a pretext to justify the termination and does not constitute a "good reason" for terminating the Employment Contract.

215. Moreover, the Panel observes that according to CAS consistent jurisprudence *"A party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude"* (CAS 2013/A/3237; CAS 2013/A/3091, 3092 & 3093).

216. In this respect, the Panel notes that the "Termination Notice" did not provide any reason for termination of the Employment Contract, nor did the Club prove that the Player was notified by a separate previous written warning. At the hearing, the witnesses called by the Club contended that before the Termination Notice was sent, there have been approaches to the Player in which the issue of Tudu Mighty Jet's claim was discussed and that the Player was therefore verbally informed of the possible Club's concerns relating to the matter. According to the witnesses' testimonies, however, the Player failed to shed light on the circumstances related to his move to Israel. In this context, the majority of the Panel is not persuaded by the testimonies of the Club's witnesses and, believes that in any case, in consideration of the prevailing arguments with respect to the absence of a "just cause" for termination, as set forth above, the content of the aforementioned testimonies is completely irrelevant in the present case.

217. In view of the foregoing, the Panel reached the conclusion that the Club had no just cause for terminating the Employment Contract and that, consequently, it committed a breach of contract and shall pay compensation to the Player pursuant to article 17 of the FIFA Regulation.

C. What amount of compensation for breach of contract is the Player entitled to receive from the Club?

218. Having established that the Club was not entitled to terminate the Employment Contract under the provision of article 7, nor that the Club had just cause for termination, and having therefore agreed with the FIFA DRC that there was a breach of contract committed by the Club, the further issue to be resolved by the Panel is what amount of compensation for breach of contract the Player is entitled to receive from the Club under the provision of article 17 of the FIFA Regulations.

219. In this respect, the Panel notes that the Player claims an amount of NIS 1,528,848, which corresponds to the total amount of salaries payable under the Employment Contract, while the Appealed Decision awarded the Player an amount of NIS 847,000.

220. The Player argues that the awarded amount is unsatisfactory and moreover, that the FIFA DRC did not indicate which criteria were applied for the calculation of the relevant amount.

221. The Club maintains that the Player failed to demonstrate the damage suffered and also breached his duty to mitigate the damage since he did not provide any evidence that he actually tried to enter into negotiations with other clubs after termination of his employment contract with the Vietnamese club, Vissai Ninh Binh. Moreover, according to the Club, when the Employment Contract was terminated, the Player was fit and there were no apparent reasons for the Player not to be able to continue his professional activity.

222. According to article 17 of the FIFA Regulations, compensation for breach of contract shall be calculated, unless otherwise specifically provided for in the employment contract, with due consideration for some objective criteria (to be considered as non-exhaustive examples) including, in particular *"the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period"*.

223. Failing any compensation clause in the Employment Contract, the FIFA DRC correctly applied the other parameters set out under article 17 of the FIFA Regulations, particularly taking into account the entire remuneration payable to the Player under the Employment Contract for the entire duration, *i.e.* the sporting seasons 2011/2012 to 2014/2015, that is to say NIS 1,528,848, as the basis for determining the amount of compensation to award to the Player.

224. In fact, consistent with the well-established CAS jurisprudence, the injured party is entitled to a whole reparation of the damages suffered according to the provisions of articles 337 b) and

337 c) of the SCO, pursuant to the principle of the *"positive interest"*, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled to its end (CAS 2012/A/2698; CAS 2008/A/1447; CAS 205/A/801; CAS 2006/A/1602).

225. Moreover, the Panel observes that article 337 c (1), (2) provides the following: *"(1) If the employer dismisses the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period. (2) The employee must permit a set-off against this amount for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn"* (the French version reads as follows: *"(1) Lorsque l'employeur résilie immédiatement le contrat sans justes motifs, le travailleur a droit à ce qu'il aurait gagné, si les rapports de travail avaient pris fin à l'échéance du délai de congé ou à la cassation du contrat conclu pour une durée determinée. (2) On impute sur ce montant ce que le travailleur a épargné par suite de la cessation du contrat de travail ainsi que le revenu qu'il a tiré d'un autre travail ou le revenu auquel il a intentionnellement renoncé"*).

226. In view of the above, the Panel is satisfied that the Player has the right to compensation, to be determined under the provisions of article 17 of the FIFA Regulations, in light of the principle of the *"positive interest"* as specified above and with due consideration of the duty to mitigate damages according to Swiss law and consistent with CAS jurisprudence (CAS 2005/A/909-910-911; CAS 2005/A/801; CAS 2004/A/587).

227. In this context, the Appealed Decision deducted the salaries the Player earned after termination of the Employment Contract, namely, the salaries received under the contract with the Vietnamese club, Vissai Ninh Binh, from 1 October 2011 until 30 August 2012, in the amount of USD 110,000, corresponding to NIS 410,000 at the time the Player signed the relevant contract.

228. In this respect, the Panel observes that although the Player maintains that he actually received USD 70,000 instead of USD 110,000 to which he was entitled under the contract with the Vietnamese club, he failed to provide any evidence thereof and, as a consequence, the Panel believes that the DRC correctly deducted the total amount of USD 110,000 (equal to NIS 410,000).

229. Up to this point, the amount of compensation would therefore amount to NIS 1,118,848, which is obtained by deducting NIS 410,000 from NIS 1,528,848.

230. Under par. 25 of the Appealed Decision, the FIFA DRC further explained that *"In addition, and in view of the same general principle of mitigation of the damage, the DRC took into account the fact that after his contract with the club Vissai Ninh Binh expired in August 2012, the Claimant did not find a new club, whilst the contract with the Respondent was due to run until the end of the season 2014/2015. Thus, the Claimant would have had opportunities, during the period between the expiry of the contract with the club Vissai Ninh Binh and the end of the season 2014/2015 to seek other employment opportunities"*.

231. As a consequence of the considerations above, the chamber finally decided to award the Player the amount of NIS 847,000 as compensation for breach of contract.

232. The Panel notes that the FIFA DRC does not express which criteria were adopted in order to calculate the final amount of NIS 847,000, which the chamber considered to be a *"fair and equitable amount given the specific circumstances of the present matter"*.

233. The Player challenges this part of the Appealed Decision in that the chamber failed to explain the grounds and the method of calculation of the further deduction. Moreover, the Player contests that the Appealed Decision did not take into account that the breach by the Club occurred during the "protected period" which would have justified an increase in the amount of compensation.

234. The Player also maintains that, after the termination of the Employment Contract, he had difficulties in finding another club, since he was already 29 years old, and he was not a high level player. That is demonstrated by the fact that he had to move to Vietnam in order to sign with a new club since he was not requested by other clubs and had no better chances at that time but to sign with Vissai Ninh Binh. After the termination of the employment contract with the Vietnamese club, the Player avers that he could not find any other opportunity to continue his activity as a professional player, and that he was forced to return to Ghana and play as an amateur.

In this context, the Club claims that the Player failed to comply with the duty to mitigate his damage, that he also failed to disclose any information or document to the FIFA DRC about his professional activity after termination of the Employment Contract and about his efforts at finding a new club after termination of the contract with the Vietnamese club Vissai Ninh Binh.

235. As already noted above, according to article 337 c (2) of the SCO, the duty of mitigation is related to the rule that the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn.

236. In the opinion of the Panel, such a rule implies that, in accordance with the general principle of fairness, the injured player must act in good faith after the breach by the club and seek for other employment.

237. The wording of article 337 c (2) of the SCO, with reference to what the employee intentionally failed to earn, suggests that the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign the contract with worse financial conditions, in the absence of any valid reason to do so.

238. In this respect, the Panel holds that in the specific case at stake, there is no evidence in the file that the Player intentionally failed to find new employment opportunities after the termination of his employment contract with Vissai Ninh Binh.

239. Moreover, the Panel observes that the Club has not demonstrated that the Player acted in bad faith or that he deliberately decided not to enter into negotiations with other clubs after the termination of his relationship with the Vietnamese club.

240. According to the principle established by CAS jurisprudence *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (…). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (e.g. CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff).

241. In fact, the Panel reminds that, pursuant to article 8 of the Swiss Civil Code, *"Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact"*.

242. The majority of the Panel holds that since the Club maintains that the Player failed to mitigate his damage, it is the burden of the Club to prove that the Player intentionally refused to sign other employment contracts or otherwise intentionally failed to reduce his damage.

243. As a result of the observations above, the Panel believes that the Player partially mitigated his damage by signing a new employment contract with Vissai Ninh Binh; the majority of the Panel holds that there is no evidence that afterwards, the Player failed to comply with his duty to mitigate his damages within the meaning of article 337 c (2) of the SCO, as specified above.

244. Moreover, the Panel notes that the Employment Contract was actually terminated without just cause during the protected period which circumstance is listed as one of the criteria to be considering in applying article 17 of the FIFA Regulations.

245. The Player argues that termination of the Employment Contract shall be assessed as an aggravating factor justifying an increase in the amount of compensation.

246. In this respect, the majority of the Panel observes that under similar circumstances, other CAS panels have awarded additional compensation to the injured party (CAS 2008/A/1519 & 1520; CAS 2012/A/2874)

247. Finally, taking into account that the Player partially mitigated his damage; that in the view of the majority of the Panel the Club provided no evidence that the Player failed to comply with his duty of mitigation and also considering that the breach by the Club occurred during the

protected period, which is considered to be an aggravating factor under article 17 of the FIFA Regulations, and also considering that the FIFA DRC completely failed to indicate which criteria were adopted in order to establish compensation in the amount of NIS 847,000, the majority of the Panel reached the conclusion that it is fair and reasonable that the Player be awarded compensation due to the Club's breach in the amount of NIS 1,118,848, corresponding to the salaries payable under the Employment Contract after deduction of the salaries due under the employment contract with Vissai Ninh Binh.

248. Lastly, the Panel notes that the Appealed Decision rejected the Player's claim for interest over all amounts submitted before the FIFA DRC on 3 March 2014, due to its admissibility pursuant to the statute of limitations (article 25 par. 5 of the FIFA Regulations). The Player did not reiterate the claim for interest before the CAS. However, the Panel considers that, according to article 104 of the SCO, interest at the rate of 5% *per annum* will fall due in case of late payment by the Club of the above mentioned amount of compensation, from the date of payment determined in this Award.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 9 September 2015 by Hapoel Beer Sheva FC against the decision issued on 9 May 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The appeal filed on 10 September 2015 by Mr Ibrahim Abdul Razak against the Decision issued on 9 May 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.

3. The decision issued on 9 May 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially set aside.

4. Hapoel Beer Sheva FC is ordered to pay to Mr Ibrahim Abdul Razak, within 30 days as from the notification of this decision, compensation for breach of contract in the amount of NIS 1,118,848 (one million one hundred eighteen thousand eight hundred forty eight Israeli Shekels), plus 5% (five per cent) interest per annum as of the end of the above-mentioned time-limit until the effective date of payment.

5. (…).

6. (…).

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