Arbitration CAS 2017/A/5111 Debreceni Vasutas Sport Club (DVSC) v. Nenad Novakovic, award of 16 January 2018

Panel: Prof. Ulrich Haas (Germany), President; Mr András Gurovits (Switzerland); Mrs Petra Pocrnic Perica (Croatia)

Football
Termination of the employment contract with just cause by the player
Duty to substantiate
Relationship between various choice-of-law agreements
Choice among several alternative fora
Definition of just cause
Duty of the parties to cooperate in ascertaining the content of the law applicable to the merits

1. **The duty to substantiate and, in particular the prerequisites that a party must fulfil in order to dispose of its duty to sufficiently substantiate its submissions is intrinsically linked to the principle of party presentation and, thus, clearly is a procedural question. However there are links also to the law applicable to the merits. This is particularly true in respect of what must be submitted by a party, since the latter will be dictated by the law applicable to the merits. Furthermore, the onus of substantiation, i.e. which party has the onus of presenting and submitting the facts is linked to the law applicable to the merits, because the onus of presentation follows from the burden of proof which is governed by the law applicable to the merits. The burden of proof does not only allocate the risk among the parties of a given fact not being ascertained, but also allocates who bears the duty to submit the relevant facts before the court/tribunal. It is, in principle, the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal in a sufficient manner. Since the CAS Code does not contain any provisions with respect to the threshold of substantiation, guidance and inspiration can be taken in Swiss procedural law. Consequently, submissions are – in principle – sufficiently substantiated, if they are detailed enough (i) to determine and assess the legal position claimed; and (ii) for the counterparty to be able to defend itself. The duty to substantiate factual allegations, in principle, rests on both parties. A party that fails to sufficiently substantiate its submissions is treated as if it had failed to submit the relevant facts altogether.**

2. **The CAS Code – unlike the rules of other arbitral institutions – aims at restricting the autonomy of parties. According thereto, the parties' autonomy only exists within the limits set by the CAS Code. Article R58 of the CAS Code is mandatory. The purpose of concentrating appeals against decisions of an international sports organisation with the CAS is not least the desire to ensure that the rules and regulations by which all the (indirect) members are equally bound are also applied to them in equal measure. This can only be ensured, however, if a uniform standard is applied in relation to central**

issues. This is precisely what Article R58 of the CAS Code is endeavouring to ensure, by stating that the rules and regulations of the sports organisation having issued the decision (that is the subject of the dispute) are primarily applicable. Only subsidiarily, and this for good reason, Article R58 of the CAS Code grants the parties scope for determining the applicable law, and thus scope for changing the legal basis underlying the decision. Therefore, the indirect submission to the choice-of-law provision in Article R58 of the CAS Code takes precedence over any other choice-of-law clause.

3. **In case a provision provides several *fora* in the alternative, it is – absent any indications to the contrary – up to the party filing a claim to choose among the agreed *fora*. Once the choice is made, it will become binding on both parties.**

4. **Non-payment or late payment of a player's salary by his club may constitute *"just cause"* to terminate the employment contract. Only a particularly severe breach of an employment contract will result in the immediate dismissal of or, conversely, in the immediate abandonment of the employment position by the employee. Instead, in the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after having been warned. However, the FIFA Regulations on the Status and Transfer of Players (RSTP) allow for party autonomy. Thus, the parties to an employment contract can decide and agree on what constitutes "just cause" within the meaning of Article 14 RSTP.**

5. **In applying the principle *iura novit curia* (or *iura novit arbiter*), an arbitral tribunal having its seat in Switzerland, including the CAS, has to determine the law applicable to the merits and apply such law so determined. However, this duty of the arbitral tribunal is not unlimited. In particular, in cases where none of the members of a panel is educated under the relevant foreign law and where it would be disproportionate for the panel to investigate the pertaining rules, the panel may request the parties to cooperate in ascertaining the relevant content of the law applicable to the merits. An expression of this idea is to be found in Article 16 para. 1 PILA, which states that the court may request the assistance of the parties in establishing the law and that in case of pecuniary claims, the court may impose the burden of proof on the content of the foreign law on the parties. Even though this provision is first and foremost addressed to state courts, a CAS panel may also take guidance of its contents in arbitration proceedings.**

I. THE PARTIES

1. Debreceni Vasutas Sport Club (DVSC) (hereinafter the "Appellant" or "DVSC") is a professional football club with its registered headquarters in Debrecen, Hungary. The Appellant is registered with the Hungarian Football Association, Magyar Labdarúgó Szövetség (hereinafter the "MLSZ"), which in turn is affiliated to the Union Européenne de Football

Association (hereinafter the "UEFA") and the Fédération Internationale de Football Association (hereinafter the "FIFA").

2. Mr Nenad Novaković (hereinafter the "Respondent" or "Mr Novaković") is a former professional football player from Serbia.

II. FACTUAL BACKGROUND

3. Below is a brief summary of the main facts and allegations based on the Parties' written submissions, the CAS file and the content of the hearing that took place in Lausanne, Switzerland, on 25 September 2017. Additional facts and allegations found in the Parties' submissions, pleadings and evidence may be set out, where relevant, in other parts of this award.

4. On 31 December 2013, the Appellant and the Respondent concluded an employment contract (hereinafter the "Contract"). The Contract provides for a term from 1 January 2014 to 31 December 2017 and a monthly salary of HFU 2,150,000 in favour of the Respondent. Furthermore, the Parties agreed that for any issues not regulated in the Contract, *"the relevant provisions of Act XXII of 1992 on the Labour Code, Act I of 2004 on Sports, stipulations of the statutes of the Hungarian Football Federation and that of international associations (FIFA, UEFA) shall prevail"* (clause 25 of the Contract).

5. Still on the same day, the Appellant and the Respondent also concluded an *"Individual Bonus Agreement"* (hereinafter the "Bonus Agreement"). The Bonus Agreement provides, *inter alia*, that:

> *"13) Parties further agree that, Athlete is entitled to get: 10,000 EUR until 20th January 2014, and 10,000 EUR until 20th January 2015, and 10,000 EUR until 20th January 2016, and 10,000 EUR until 20th January 2017.*
>
> *14) Athlete further entitled to get 150,000 FT/month as rent allowance …"*.

6. On 18 April 2015, during the warm-up for the Hungarian league match between the Appellant and Paksi FC, the Respondent suddenly suffered strong pain. He was later on diagnosed with "Popliteal Artery Entrapment Syndrome" (PAES) and had to undergo surgery. Furthermore, it is undisputed that the Respondent underwent medical treatments for rehabilitation at least until the end of 2015 and did no longer participate in any games or team practices of the Appellant.

7. As of 19 April 2015, the Appellant stopped making payments under the Contract or the Bonus Agreement to the Respondent.

8. By letter of 15 September 2015, the Respondent requested the Appellant to pay outstanding salaries (for April 2015 to August 2015), rent allowances (for July 2015 to August 2015) and bonuses agreed under clause 13 of the Bonus Agreement. In addition, the Respondent claimed

the reimbursement of some of his medical costs. The Respondent set a 30-day deadline for the payment of the above amounts but the Appellant did not make any payments to the Respondent within this deadline.

9. On 17 December 2015, the Appellant replied to the Respondent's letter dated 15 September 2015. The exact dates when the letter was sent by the Appellant and when it was received by the Respondent are disputed between the Parties.

10. On 31 December 2015, the Respondent filed a claim with the FIFA Dispute Resolution Chamber (hereinafter the "FIFA DRC") against the Appellant (see for further details paras 15 *et seq* below). The Appellant was informed of the Respondent's claim by FIFA on or before 5 January 2016.

11. While the proceedings before the FIFA DRC were pending the Parties engaged in settlement discussions, *inter alia*, at a meeting on 7 January 2016. However, in the end the Parties could not agree to settle the case.

12. By letter of 23 January 2016, the Respondent replied to the Appellant's letter dated 17 December 2015. The Respondent's letter was received by the Appellant on 28 January 2016. It is disputed between the Parties whether Respondent's letter must be qualified as a termination notice (Appellant's standpoint) or whether the letter only reiterates the termination of the Contract already contained in the claim filed before the FIFA DRC (Respondent's standpoint).

13. On 17 March 2016, i.e., while the proceedings were pending before the FIFA DRC, the Appellant paid to the Respondent an amount of HUF 4,010,000. The Appellant did not inform the FIFA DRC of this payment.

14. The Respondent was unable to find a new employment as a professional football player and retired.

III. PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION CHAMBER

15. As previously stated, the Respondent filed his claim with the FIFA DRC on 31 December 2015. Therein, the Respondent requested that the Appellant pay to him as a consequence of the termination of the Contract the following amounts:

- HUF 15,295,000 for outstanding salaries from April 2015 to December 2015;
- HUF 900,000 for outstanding rent allowance from July to December 2015;
- EUR 10,000 for outstanding annual bonuses due on 20 January 2015;
- HUF 53,750,000 for compensation of breach of the Contract by the Appellant, this amount corresponding to the remaining salary from December 2015 to December 2017;

- EUR 20,000 for compensation of breach of the Contract by the Appellant, this amount corresponding to the annual bonuses due on 20 January 2016 and 20 January 2017;
- 5% interest on the above mentioned amounts.

16. Before the FIFA DRC, the Appellant disputed the Respondent's claims, except for the outstanding rent allowances (HUF 900,000) and the outstanding annual bonuses due on 20 January 2015 (EUR 10,000), which were expressly acknowledged in the Appellant´s submission of 16 March 2016 to the FIFA DRC.

17. On 19 January 2017, the FIFA DRC issued its decision in the above matter. Upon the Appellant's request, the FIFA DRC forwarded its motivated decision to the Parties by fax on 31 March 2017 (hereinafter the "FIFA Decision"). The findings of the FIFA Decision read, *inter alia*, as follows:

*"**III. Decision of the Dispute Resolution Chamber***

1. *The claim of the Claimant, Nenad Novakovic, is partially accepted.*
2. *The Respondent, DVSC Futball Szervezo, has to pay to the Claimant, **within 30 days** as from the date of notification of this decision, outstanding remuneration in the amounts of HUF 16,195,000 and EUR 10,000 plus 5% interest p.a. until the date of effective payment as follows:*
   - *a. 5% p.a. as of 21 January 2015 on the amount of EUR 10,000;*
   - *b. 5% p.a. as of 11 May 2015 on the amount of HUF 245,000;*
   - *c. 5% p.a. as of 11 June 2015 on the amount of HUF 2,150,000;*
   - *d. 5% p.a. as of 11 July 2015 on the amount of HUF 2,150,000;*
   - *e. 5% p.a. as of 11 August 2015 on the amount of HUF 2,150,000;*
   - *f. 5% p.a. as of 21 August 2015 on the amount of HUF 150,000;*
   - *g. 5% p.a. as of 11 September 2015 on the amount of HUF 2,150,000;*
   - *h. 5% p.a. as of 21 September 2015 on the amount of HUF 150,000;*
   - *i. 5% p.a. as of 11 October 2015 on the amount of HUF 2,150,000;*
   - *j. 5% p.a. as of 21 October 2015 on the amount of HUF 150,000;*
   - *k. 5% p.a. as of 11 November 2015 on the amount of HUF 2,150,000;*
   - *l. 5% p.a. as of 21 November 2015 on the amount of HUF 150,000;*
   - *m. 5% p.a. as of 11 December 2015 on the amount of HUF 2,150,000;*
   - *n. 5% p.a. as of 21 December 2015 on the amount of HUF 150,000;*
   - *o. 5% p.a. as of 21 January 2016 on the amount of HUF 150,000.*
3. *The Respondent has to pay to the Claimant **within 30 days** as from the date of notification of this decision, compensation for breach of contract in the amounts of HUF 53,750,000 and EUR 20,000, plus 5% interest p.a. as from 19 January 2017 until the date of effective payment.*

4. *In the event that the amounts due to the Claimant in accordance with the above-mentioned numbers 2. and 3. are not paid by the Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision*
5. *Any further claim by the Claimant is rejected.*
6. *The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittances are to be made and to notify the Dispute Resolution Chamber of every payment received".*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 21 April 2017, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter the "CAS") directed against the Respondent with respect to the FIFA Decision (hereinafter the "Statement of Appeal"). The Appellant nominated Mr András Gurovits as arbitrator and applied for a stay of the FIFA Decision.

19. By letter of 2 May 2017, the CAS Court Office acknowledged receipt of the Statement of Appeal and invited the Respondent to nominate an arbitrator in accordance with Article R53 of the Code of Sports-related Arbitration (the "CAS Code"). In addition, the CAS Court Office informed the Appellant that according to CAS jurisprudence a decision of a financial nature issued by a Swiss association is not enforceable while under appeal and, therefore, invited the Appellant to inform the CAS Court Office of its position on its application for a stay.

20. By further letter of 2 May 2017, the CAS Court Office invited FIFA to state whether it intended to participate as a party in the present arbitration.

21. Still on 2 May 2017, the Appellant filed its appeal brief (hereinafter the "Appeal Brief").

22. By letter of 5 May 2017, the CAS Court Office acknowledged receipt of the Appeal Brief and invited the Respondent to submit an answer in accordance with Article R55 of the CAS Code.

23. By letter of 11 May 2017, the Appellant withdrew its application for a stay of the FIFA Decision.

24. By letter of 13 May 2017, the Respondent nominated Ms Petra Pocrnic Perica as arbitrator.

25. By communication of 19 May 2017, the CAS Court Office forwarded to the parties some information disclosed by Dr András Gurovits and drew their attention to Article R34 of the CAS Code.

26. On 29 May 2017, the CAS Court Office confirmed that no challenge had been filed against Dr András Gurovits within the deadline prescribed by Article R34 of the CAS Code.

27. By email of 29 May 2017, the Respondent *inter alia* requested that the time limit to file his answer be fixed after the Appellant has made the payment of its share of the advance on costs.

28. By letter of 2 June 2017, the CAS Court Office *inter alia* informed the Parties that the time limit for the Respondent's answer was set aside and a new time limit would be fixed upon the Appellant's payment of its share of the advance on costs.

29. By letter of 15 June 2017, the FIFA informed the CAS Court Office that it renounced to its right to intervene in the present arbitration.

30. By letter of 16 June 2017, the CAS Court Office advised the Respondent that the Appellant had paid its share of the advance on costs and, consequently, fixed a new time limit for the Respondent to submit his answer.

31. By email of 20 June 2017, the CAS Court Office informed the Parties that the Panel had been constituted as follows: Prof. Ulrich Haas, President of the Panel; Dr András Gurovits and Ms Petra Pocrnic Perica, arbitrators. The Parties did not raise any objection as to the constitution and composition of the Panel.

32. On 10 July 2017, the Respondent filed his answer to the Appellant's Appeal Brief (hereinafter the "Answer").

33. By letter of 14 July 2017, the CAS Court Office acknowledged receipt of the Answer and invited the Parties to inform it whether their preference was for a hearing to be held. In addition, the Parties were advised that Dr Karsten Hofmann had been appointed as *ad hoc* Clerk in this matter. The Parties did not raise any objection to his appointment.

34. By letter of 19 July 2017, the Appellant requested a hearing to be held.

35. By letter of 21 July 2017, the Respondent informed the CAS Court Office that he left it to the Panel's discretion whether or not to hold a hearing.

36. By letters of 21, 25 and 28 July 2017, the CAS Court Office advised the Parties that the Panel had decided to hold a hearing. The hearing was fixed for 25 September 2017 at 9:30 am (CET) at the CAS headquarters in Lausanne, Switzerland.

37. On 22 August 2017, the CAS Court Office forwarded to the Parties an Order of Procedure and invited them to return a signed copy. In addition, the CAS Court Office, on behalf of the Panel, requested the Parties to provide further information and documents in preparation of the hearing.

38. On 25 August 2017, the Respondent returned a signed copy of the Order of Procedure and provided the information and documents as requested by the Panel.

39. On 28 August 2017, the Appellant returned its signed copy of the Order of Procedure and provided the information as requested by the Panel.

40. On 19 September 2017, the Appellant submitted a statement regarding the Respondent´s Answer.

41. By letter of the same date, the CAS Court Office invited the Respondent *"to express its position on the admissibility of the Appellant's observations"* of 19 September 2017.

42. On 21 September 2017, the Respondent submitted its comments and requested the Panel *"to dismiss all the observations put in the Appellant's Statement of 19 September 2017 and not to admit it in the CAS file"*.

43. By letter of 22 September 2017, the CAS Court Office informed the Parties that a decision on the admissibility of the Appellant's submissions of 19 September 2017 would be made at the outset of the hearing.

44. On 25 September 2017, a hearing was held at the CAS Court Office in Lausanne, Switzerland. The Panel was assisted by Mr Karsten Hofmann (*ad hoc* Clerk) and Mr Daniele Boccucci (Counsel to the CAS). In addition, the following persons attended the hearing:

    i. for the Appellant: Mr Géza Róka (Appellant's Managing Director); Mr Andor Léka (counsel); Mr Péter Léka (counsel); Mr Zsolt Kovács (interpreter).

    ii. for the Respondent: Mr Nenad Novaković (Respondent); Mr Davor Lazić (counsel).

45. At the opening of the hearing, both Parties confirmed that they had no objections to the composition of the Panel. During the hearing, the Parties made submissions in support of their respective cases. At the closing of the hearing, the Parties confirmed that they had no objections in respect of their right to be heard and that they had been given the opportunity to fully present their cases. In addition, the Parties waived their rights to comment on the opposite party's account of costs.

46. On 29 September 2017, both Parties submitted their account of costs.

V. THE POSITIONS OF THE PARTIES

47. The following is a summary of the Parties' written and oral submissions and does not purport to be comprehensive. However, the Panel has thoroughly considered in its discussion and deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference is made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

A. The Appellant: Debreceni Vasutas Sport Club (DVSC)

48. The Appellant has submitted, in essence, the following:

(a) The dispute between the Parties is a *"work related Hungarian legal dispute"* and, therefore, the FIFA DRC was not competent to hear the dispute. The Respondent should have filed his claim with an ordinary court in Hungary, namely the Administrative and Labour Court. Due to the lack of jurisdiction of the FIFA DRC for the present dispute, the FIFA Decision shall *"be set aside and the procedure dismissed"*.

(b) Hungarian law, in particular Hungarian labour law, applies to the legal relationship between the Parties. The Contract was executed between a Hungarian employer (the Appellant) on the one hand and an employee working in Hungary (the Respondent) on the other hand. The Contract as well as its termination are based on provisions of Hungarian law. Hungarian labour law is mandatory for all employees in Hungary and any infringements of the statutory provisions would entail serious legal penalties. The FIFA DRC completely ignored the Hungarian statutory provisions referred to in the Appellant's submissions in the first-instance proceedings. The Appellant requests that the following provisions of Hungarian law be observed and applied:

i. Act I of 2012 on the Labour Code:
- Subsection (4) of Section 15,
- Subsection (1) of Section 24, and
- Paragraph c) of Subsection (1) of Section 64;

ii. Act CXX of 2005 on Simplified Contribution to Public Revenues – "EKHO Act" – modified by Act LXXXIII of 2010:
- Subsection (7) of Section 13;

iii. Act XCIII of 1993 on Labour Safety:
- Section 87.1/A;

iv. Act LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for these Services and its implementation:
- Subsections (2) and (5) of Section 2,
- Subsection (1) of Section 7, and
- Subsection (1) and Paragraph bc) of Subsection (2) of Section 14;

v. Act LXXXIII of 1997 on the benefits of compulsory health insurances:
- Subsection (1) of Section 43, and
- Section 44 a);

vi. Act V of 2013 on the Civil Code:
- Subsection (1) of Section 6:48.

(c) The employment relationship between the Parties ceased on 28 January 2016. According to Act I of 2012 on the Labour Code, termination without notice is *"a unilateral justified legal act"*, which puts an end – without the need of the other party's consent – to the legal relationship at the time when the other party receives the termination letter. The Appellant received the Respondent's termination letter dated 23 January 2016 on 28 January 2016. Thus, the FIFA DRC erred, when it concluded that the Contract ended once the Respondent lodged his claim before FIFA on 31 December 2015.

(d) The Respondent expressly agreed to the application of Act CXX of 2005 on Simplified Contribution to Public Revenues (hereinafter the "EKHO Act"). This follows from clause 20 of the Contract and a statement by the Respondent dated 1 January 2015 regarding the 2015 tax year. The Respondent in these documents accepted and acknowledged that he wished to fulfil his tax and social security contribution obligations in accordance with the EKHO Act. The performance of tax and social security contributions under the EKHO Act is more favourable than the performance under the general regulations because the net salary of an employee is significantly higher. The consequence of performance under the EKHO Act is that, in case of incapacity for work, the employee will be entitled to "sickness benefit" based on the minimum salary only and also the employee's pension will be calculated on the basis of the minimum salary. The Respondent was aware of that risk, in particular that the "sickness benefit" would be significantly lower.

(e) The Respondent did not suffer a sports-related injury. Instead, he developed a *"disease of organic or genetic origin"* (temporary paleness of his right limb due to aortic dissection in the thigh aorta of the right limb and thrombosis in the aortas of the right lower leg) while carrying out some light exercise without any physical contact with other players. There were no other external effects during the warm-up on 18 April 2015 that could have caused the Respondent's state of health. The latter is completely independent from any sporting activities. The aortic dissection, i.e. the tear in the inside of the aorta, is a general vascular phenomenon. Thus, the fact that the Respondent's disease "developed" during his working hours was purely coincidental. There is no causal link between the Respondent's health status and his sporting activities. The above can be proven by an expert opinion once the Respondent waives confidentiality and grants access to his medical file. In such case the Appellant will contact the Clinical Centre of the University of Debrecen and request a medical opinion. In any case, a clear distinction must be drawn between a *"sport injury"* and an *"organic/genetic disease"*.

(f) During the term of the Contract, the Respondent (just like all other players) was covered by an accident insurance for sports activities provided for by the Appellant. However, the insurance did not come into play, because the incident of 18 April 2015 did not qualify as an accident. According to Section 87.1/A of Act XCIII of 1993 on Labour Safety, an accident is a one-time external effect on the human body, which occurs suddenly and causes health damage or death. Consequently, the Respondent was only entitled to "sickness benefit". The Appellant is not obliged to provide the Respondent

with an insurance for non-sport-related activities, such as damage incurred of organic/genetic diseases.

(g) The Respondent did not dispute that he was unable to perform his duties under the Contract because of his disease as of 19 April 2015. According to Paragraph (a) of Subsection (1) of Section 5 of the Act LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for these Services, *"for the purpose of this Act insured persons are persons engaged in employment under contract"* like the Respondent. According to Subsection (1) of Section 43 of the Act LXXXIII of 1997 on the Provisions of Compulsory Health Insurance, *"an employee, who suffers incapacity for work at any time during his term of insurances, is entitled to sickness benefit only"*. Thus, the Respondent was not entitled to salary but to "sickness benefit" only. "Sickness benefits" are significantly lower than the (contractually agreed) salary.

(h) The Respondent has never contested that he received "sickness benefits" during the time he was incapable to work. The Appellant by providing the respective "sick-pay slips" to the FIFA DRC in the first-instance proceedings has proven that these payments were made. Thus, the FIFA Decision is unlawful and unfounded insofar as it states that the documentary evidence submitted by the Appellant is unconvincing. In light of the foregoing, the Appellant submits a decree dated 14 September 2015 of the Haidú-Bihar County Government Office evidencing that the Respondent was an insured person entitled to "sickness benefit", that the Respondent applied for it and that the respective payments were granted.

(i) The Respondent was unable to work during the time he was treated in hospital (19 to 21 April 2015) and during the time he received "sickness benefits" (22 April 2015 until the termination of the Contract on 28 January 2016). The Appellant fully complied with Hungarian law by not paying salary to the Respondent. Consequently, the Appellant acted lawfully when it ceased to make any payments under the Contract or the Bonus Agreement as of 19 April 2015.

(j) In the meantime, the Appellant has paid to the Respondent the outstanding rent allowance in the total amount of HUF 900,000 and the further amount of EUR 10,000 for the bonuses due on 20 January 2015. This is evidenced by the respective bank certificate submitted in the present arbitration.

(k) Contrary to what is stated in Section I.18 of the FIFA Decision, the Appellant was not invited by the FIFA DRC to submit any final observations. This constitutes a serious infringement of essential procedural requirements.

(l) The FIFA DRC failed to specify the grounds for its decision to award 5% interest to the Respondent. The rules for late payment under Hungarian law are set out in Act V of 2013 on the Civil Code. In accordance with its Subsection (1) of Section 6:48, interest shall be calculated on the central bank base rate. The central bank base rate was 2.10% on 1 January 2015, 1.50% on 1 July 2015 and 1.35% on 1 January 2016. Any interest on

late payment awarded to the Respondent may only be determined pursuant to the interest rates referred to above.

49. In light of the above, the Appellant submitted the following prayers for relief in its Appeal Brief:

"4.2.1) According to the Appellant's position, the Chamber fails to have jurisdiction to consider the legal dispute set out in the Claimant´s claim, i.e. a work related Hungarian legal dispute because the Claimant may have only lodged his claim to an ordinary court of law operating in Hungary, the Administrative and Labour Court.

In case the Chamber considers the legal dispute, it may not circumvent the applicability of the Hungarian legislation, and the compulsory application of the Hungarian labour rules and other statutory rules.

Based on the foregoing, we primarily request the Honourable CAS to establish that the Chamber fails to have jurisdiction to consider a work related Hungarian legal dispute pursuant to which the decision of 19 January 2017 of FIFA Dispute Resolution Chamber, and the grounded decision thereof forwarded on 31 March 2017 be set aside and the procedure be dismissed.

4.2.2) Secondly, if the CAS fails to accept the primary request, we hereby request the Honourable CAS pursuant to the explored statement of the facts, the submitted documents, the appeal arguments being lodged now and pursuant to the evidentiary motion that:

- *the decision of 19 January 2017 of FIFA Dispute Resolution Chamber be set aside, and be overturned in a way that Nenad Novakovic's claim be rejected in its entirety;*
- *the Claimant Nenad Novakovic be obliged to pay all the costs of the Appellant arising in accordance with the procedure".*

50. In the hearing the Appellant specified that it primarily seeks that the FIFA Decision be set aside and subsidiarily that the case be referred back to the FIFA DRC for it to conduct "new proceedings taking into consideration Hungarian law".

B. The Respondent: Mr Nenad Novakovic

51. The Respondent submitted, in essence, the following:

(a) The Respondent fulfilled all of his contractual obligations. This holds even true after he got injured on 18 April 2015. He underwent surgery according to directions of the Appellant's medical staff and under the latter's supervision. The Respondent also followed all instructions by the Appellant's medical staff in relation to the medical treatments and rehabilitation measures. All of this was done with the approval and under the supervision of the Appellant. In addition, the Respondent presented himself to the Appellant during all this time on a daily basis. It was – according to the Respondent – the Appellant who fundamentally breached the Contract by failing to pay the agreed amounts to the Respondent (including the monthly rent allowance).

(b) According to Article 14 of the FIFA Regulations on the Status and the Transfer of Players (hereinafter the "FIFA RSTP"), a contract may be terminated without adverse consequences of any kind in case there is *"just cause"*. According to Article 17 para 1 of the FIFA RSTP, the Respondent is entitled to compensation for breach of contract in addition to the payment of the outstanding salaries.

(c) The FIFA DRC was competent to decide on the dispute between the Parties. According to clause 24 of the Contract, the Parties agreed, *inter alia*, on FIFA´s jurisdiction. Furthermore, the Appellant did not contest the competence of the FIFA DRC during the first-instance proceedings.

(d) The FIFA DRC considered the Appellant's submissions with regard to the applicability of Hungarian law. The issue regarding "sickness benefit" is referred to in para 9 of the FIFA Decision. The Appellant, however, fails to understand that the Parties agreed in clause 25 of the Contract, *inter alia*, on the applicability of the FIFA regulations. Moreover, the FIFA DRC correctly concluded that the Appellant is liable to pay the outstanding amounts in accordance with the general principle of *pacta sunt servanda*.

(e) Furthermore, the Respondent submits that even if Hungarian law was applicable, the Appellant's understanding of it is misleading. In particular, the Appellant omitted to refer to and correctly apply the following provisions of Hungarian law:

i. Section 6 of the Act I of 2012 on the Labour Code. According thereto *"Employment contracts shall be executed as it might be normally expected under the given circumstances"* (*Subsection (1)*). Furthermore, Appellant failed to refer to Subsection (2), according to which *"parties involved shall act in the manner consistent with the principle of good faith and fairness … and they shall not engage in any conduct to breach the rights or legitimate interests of the other party"*. Furthermore, the Respondent refers to Subsection (3), according to which *"Employers shall take into account the interests of workers under the principle of equitable assessment"*;

ii. Section 7 of the Act I of 2012 on the Labour Code. According thereto the *"[w]rongful exercise of rights is prohibited. For the purpose of this Act 'wrongful exercise of rights' means, in particular, any act that is intended for or leads to the injury of the legitimate interests of others, restrictions on the enforcement of their interests, harassment, or the suppression of their opinion"*;

iii. Section 42 (Subsection (2), lit b) of the Act I of 2012 on the Labour Code. According thereto *"the employer is required to provide work for the employee and to pay wages"*;

iv. Section 166 of the Act I of 2012 on the Labour Code. According thereto *"[t]he employer shall be liable to provide compensation for damages caused in connection with an employment relationship"*;

v. Section 167 of the Act I of 2012 on the Labour Code. According thereto *"[t]he employer shall compensate the employee for all his losses in full"* (*Subsection (1), first sentence*);

vi. Section 169 of the Act I of 2012 on the Labour Code. The section provides that *"[f]or the purpose of determining loss of income from employment, the lost wages and the cash value of the regular benefits the employee is entitled to the basis of the employment relationship in addition to his wages shall be taken into consideration, provided that such were regularly received prior to the occurrence of the damages"* (*Subsection (1)*);

vii. Finally, the EKHO Act is *"inapplicable in this case since this case does not deal with the contributions and/or public …* [and because] *the EKHO Act was not delivered to the Player nor was it given access to it before signing the …* [Contract]*"*.

(f) The FIFA DRC correctly determined that the contractual relationship between the Parties ceased on 31 December 2015. The Appellant breached the Contract as of 19 April 2015. The Respondent acted correctly in sending a notice on 15 September 2015. On 31 December 2015, the Respondent filed his claim with the FIFA DRC in order to establish that he was entitled to terminate the Contract with *"just cause"*.

(g) The Respondent suffered a "sports-related injury". This fact was also recognized by the Appellant's Director, Mr Géza Róka, in his letter of 30 June 2015 (*"to do the necessary rehabilitation after his injury"*). At no time before the commencement of the CAS proceedings did the Appellant qualify the Respondent's injury as a "disease". This argument was introduced by the Appellant for the first time in the CAS proceedings and must be qualified as one of many attempts by the Appellant to shift the blame for its own failures onto the Respondent.

(h) According to the well-established jurisprudence of the FIFA DRC (e.g. DRC 28 March 2015, no 0314132 and DRC 15 February 2008, no 28580), injuries or health conditions of a player cannot be considered a valid reason to cease the payment of a player's remuneration under the contract. Furthermore, the Appellant misleads the Panel when stating that it never received an invitation by the FIFA DRC to submit its final observations. It follows from a letter of 13 June 2016 that the FIFA DRC invited the Appellant to provide it with *"your final comments pertaining to the present affair"* by 28 June 2016. By letter of 4 July 2016, the FIFA DRC informed the Parties that the Appellant had failed to submit any comments and that the investigation-phase was thereby closed.

(i) Finally, the FIFA DRC has correctly concluded that the Respondent had *"just cause"* to unilaterally terminate the Contract. Consequently, the FIFA DRC correctly found the Appellant liable to pay to the Respondent any outstanding amounts and a compensation as awarded in the FIFA Decision.

52. The Respondent submitted the following prayers for relief in his Answer:

"Having in mind the above, pursuant to Article R55 of the Code of Sports-related Arbitration the Respondent hereby respectfully requests the honorable Panel to dismiss the Appeal and accordingly confirm the Dispute Resolution Chamber´s Decision in its totality".

53. In the hearing, the Respondent specified his requests and stated that the Appellant shall bear all costs of the proceedings and reimburse all legal fees and expenses incurred by the Respondent.

VI. JURISDICTION AND MANDATE OF THE CAS

54. The jurisdiction of the CAS derives from Article R47 of the CAS Code in connection with Article 58 para 1 of the FIFA Statutes.

55. Article R47 para 1 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".*

56. Article 58 para 1 of the FIFA Statutes reads as follows:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

57. Moreover, according to the *"Note relating to the motivated decision (legal remedy)"* on the last page of the FIFA Decision, *"this decision may be appealed against before the Court of Arbitration for Sport (CAS)"*.

58. The Appellant filed its appeal in application of the above provisions and the above "Note" to the CAS and the Respondent did not object to the jurisdiction of the CAS. Furthermore, both Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure dated 22 August 2017.

59. It follows from all of the above that the CAS has jurisdiction to decide the present dispute.

60. According to Article R57 of the CAS Code and in line with the consistent jurisprudence of the CAS, the Panel has full power to review the facts and the law. The Panel therefore deals with the case *de novo*, evaluating all facts and legal issues involved in the dispute. In light of this wide mandate of the Panel, any procedural flaws of the first-instance proceedings before the FIFA DRC can be cured in the appeal proceedings before the CAS. Thus, whether or not the Appellant had an opportunity to submit final observations in the first-instance proceedings before the FIFA DRC is irrelevant, since the Appellant was granted the unrestricted right to present its case in the present arbitration proceedings before the CAS.

VII. ADMISSIBILITY

61. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".

62. Article 58 para 1 of the FIFA Statutes provides that appeals *"shall be lodged with CAS within 21 days of notification of the decision in question"*. The same 21-day deadline is mentioned on the last page of the FIFA Decision (*"The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision* […]*"*).

63. The FIFA Decision was rendered on 19 January 2017, however, the grounds of the decision were notified to the Parties only by fax on 31 March 2017. The Appellant's Statement of Appeal was filed on 21 April 2017, i.e. before the expiry of 21 days after notification of the motivated decision. It follows that the appeal is admissible.

64. The Appeal Brief was sent to the CAS Court Office on 2 May 2017. Taking into consideration Article R32 para 1, last sentence of the CAS Code (*"If the last day of the time limit is an official holiday or a non-business day in the location from where the document is to be sent, the time limit shall expire at the end of the first subsequent business day"*.) and that 1 May 2017 was an official holiday in Hungary, the Appeal Brief was submitted within the deadline stipulated in the *"Note relating to the motivated decision (legal remedy)"* attached to the FIFA Decision, i.e. within the 10 days following the expiry of the time limit for filing the statement of appeal. Therefore, the Appeal Brief was filed in due time.

VIII. OTHER PROCEDURAL ISSUES

A. The Appellant's request for stay of execution

65. In para 5.4 of its Statement of Appeal, the Appellant requested the CAS *"to award a stay of execution"* of the FIFA Decision *"until the final decision is made pursuant to Article R37"* of the CAS Code. This request, however, has become moot, because following the CAS Court Office letter dated 2 May 2017, the Appellant withdrew its application for a stay of the FIFA Decision.

B. The admissibility of the Appellant's submissions of 19 September 2017

66. By email of 19 September 2017, the Appellant sent a letter dated 14 September 2017 to the CAS Court Office. This unsolicited statement was sent in reply to Respondent's Answer (in

particular its para 37). The CAS Court Office invited the Respondent to comment on Appellant's letter. In his letter dated 21 September 2017, the Respondent requested the Panel *"to dismiss all the observations put in the Appellant's Statement of 19 September 2017 and not to admit it in the CAS file"*. In the hearing, the Panel advised the Parties of its decision to admit the Appellant's submissions of 19 September 2017 on file.

67. The Panel finds that the Appellant's letter dated 19 September 2017 does not contain any new allegations within the meaning of Article R56 CAS Code and that, therefore, taking the letter on file neither causes injustice to the Respondent nor impacts on his right to be heard. In addition, admitting the letter on file does not lead to a delay of the proceedings. Already in its Appeal Brief, the Appellant submitted that – contrary to the FIFA Decision in para I.18 – it was not provided with the opportunity to file final comments in the first instance proceedings. In particular, in para 3.4 of its Appeal Brief, the Appellant stated that it did not receive any invitation to do so from the FIFA DRC. In para 37 of his Answer, the Respondent objected to the Appellant's submissions and referred to two letters of the FIFA DRC dated 13 June 2016 and 4 July 2016, which were attached as annexes to his Answer. The Respondent submitted that it followed from this correspondence that the FIFA DRC did in fact invite the Appellant to file final comments, but that the Appellant chose not to do so. In its unsollicited reply dated 19 September 2017, the Appellant explained that the fax number recorded on the letters attached as annexes to Respondent's Answer were wrong and that, therefore, they could not reach the Appellant. Consequently, Appellant's (unsollicited) letter dated 19 September 2017 only specified Appellant's original submission in reply to exhibits contained in the Answer and, therefore, may be admitted on file.

C. New documents

68. At the hearing, the Appellant requested that it be granted leave to file (new) documents pertaining to correspondence between the Parties *"prior to the FIFA proceedings"* and/or on *"17 January 2016"*. Respondent objected to the filing of the documents that were neither submitted as attachments to the Statement of Appeal nor to the Appeal Brief. In light of Article R56 of the CAS Code, the Panel decided not to take these documents on file. The documents could have been filed – at the latest – together with the Appeal Brief. In the Panel's view no exceptional circumstances have been put forward by the Appellant that would allow the late filing of these documents. Furthermore, admitting these documents would have led to a delay in the proceedings, since neither the Respondent nor the Arbitral tribunal had a chance to study them prior to the hearing.

D. The duty to substantiate

69. The duty to substantiate and, in particular the prerequisites that a party must fulfil in order to dispose of its duty to sufficiently substantiate its submissions is intrinsically linked to the principle of party presentation and, thus, clearly is a procedural question (KuKo-ZPO/OBERHAMMER, 2nd ed. 2014, Art. 55 N. 12; BSK-IPRG/SCHNEIDER/SCHERRER, 3rd ed. 2013, Art. 184 N 8). Consequently, Article 182 of the Swiss Private International Law Act (hereinafter the "PILA") applies in respect of the applicable law.

70. In qualifying the above question as a matter of procedure the Panel does not ignore that there are links also to the law applicable to the merits. This is particularly true in respect of what must be submitted by a party, since the latter will be dictated by the law applicable to the merits. Furthermore, the onus of substantiation, i.e. which party has the onus of presenting and submitting the facts is linked to the law applicable to the merits, because the onus of presentation follows from the burden of proof. The latter is, however, a question governed by the law applicable to the merits (cf. para. 97 *et seq*). The burden of proof does not only allocate the risk among the parties of a given fact not being ascertained, but also allocates who bears the duty to submit the relevant facts before the court/tribunal (see also CAS 2011/A/2384 & 2386, no. 249). It is, in principle, the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal in a sufficient manner (Swiss Federal Tribunal: SFT 97 II 216, 218 E. 1). The party that has the burden of proof, thus, in principle has also the burden of presenting the relevant facts to the tribunal.

71. With respect to the procedural question when a party's submission is deemed sufficiently substantiated, the Panel refers primarily to the procedural rules agreed upon by the parties (Article 182 para 1 of the PILA). Since the CAS Code does not contain any provisions with respect to the threshold of substantiation, this Panel – in application of Article 182 para 2 of the PILA – takes guidance and inspiration in Swiss procedural law. Consequently, this Panel is inspired by the jurisprudence of the Swiss Federal Tribunal, according to which submissions are – in principle – sufficiently substantiated, if:

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

- detailed enough for the counterparty to be able to defend itself (SFT 4A_501/2014, E. 3.1).

72. The duty to substantiate factual allegations, in principle, rests on both parties. Whether the parties have fulfilled their respective obligations in relation to the duty to substantiate, will be discussed where relevant below. A party that fails to sufficiently substantiate its submissions is treated as if it had failed to submit the relevant facts altogether.

IX. APPLICABLE LAW

A. The Starting Point

73. The starting point for determining the applicable law on the merits is – first and foremost – the *lex arbitri*, i.e., the arbitration law at the seat of arbitration. Since the CAS has its seat in Switzerland (Article S1 and Article R28 of the CAS Code), Swiss arbitration law applies. According to Article 176 para 1 of the PILA, the provisions of Chapter 12 of the PILA for international arbitration proceedings shall apply if the place of residence and/or domicile of

at least one party was outside Switzerland at the time of the execution of the arbitration agreement. It is undisputed that this prerequisite is fulfilled in the case at hand.

74. Article 187 para 1 of the PILA stipulates in regard to the applicable law on the merits as follows:

"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected".

75. Article 187 para 1 of the PILA enshrines the principle of party autonomy with respect to the applicable law. The parties are free to choose the law applicable to the merits of the dispute. It is undisputed that such choice of law may be made directly (by referring to a specific law) or indirectly, i.e. by referring to a "conflict-of-law" provision designating the applicable law to the merits (KAUFMANN-KOHLER & RIGOZZI, *Arbitrage International. Droit et pratique à la lumière de la LDIP*, 2[a] ed., Berne 2010, p. 400). In addition, since a choice of law is not required to take a particular form, it can be entered into either expressly or tacitly (CAS 2008/A/1517, no 13).

B. The various choice-of-law agreements

76. In the case at hand the Parties have concluded several choice-of-law agreements. One such agreement is to be found in the Contract itself. In particular clause 25 of the Contract reads as follows:

"25. As regards issues not regulated by the present contract, the relevant provisions of Act XXII of 1992 on the Labour Code, Act I of 2004 on Sports, stipulations of the statutes of the Hungarian Football Federation and that of international football associations (FIFA, UEFA) shall prevail".

77. The provision refers cumulatively to the Hungarian Labour Code, the regulations of the Hungarian Football Federation and the regulations of FIFA and UEFA.

78. An additional choice-of-law agreement has been entered into by the Parties by their submitting the present dispute to the CAS. Reference is made insofar to the CAS jurisprudence, in particular to CAS 2014/A/3850, nos. 45 *et seq.* (see also MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, Art. 58 no. 101), where the panel held as follows:

"The PILA is the relevant law. ... Art. 187 para. 1 of the PILA provides – inter alia – that 'the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected' ... According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral tribunal. In agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the CAS Code. ...".

79. The view held by the CAS, that in agreeing to an arbitral institution the parties also tacitly subject the dispute to the conflict-of-law rules for determining the applicable law contained in

the rules of said institution, is also in line with the predominant view in Swiss legal doctrine (BSK-IPRG/KARRER, 3rd ed. 2013, Art. 187 no. 124; KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2nd ed., 2010, no. 618 et seq.; ARROYO/RIGOZZI/HASLER, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. R58 nos. 3, 7; BERGER/KELLERHALS, Domestic and International Arbitration in Switzerland, 3rd ed. 2015, no. 1393; ARROYO/BURCKHARDT, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. 187 nos. 22, 35).

80. The conflict-of-law provision in the CAS Code is to be found in Article R58 of the CAS Code, which provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

81. Finally, the Parties have signed the Order of Procedure that makes explicit reference to Article R58 of the CAS Code. In the case at hand the Parties have signed the Order of Procedure without any reservation.

C. The relationship between the various choice-of-law agreements

82. Since the various choice-of-law agreements are in conflict with each other, the Panel must decide which agreement takes precedence in the case at hand.

83. The overwhelming view in the Swiss legal literature holds that an explicit choice of law always takes precedence over an implicit choice of law (BSK-IPRG/KARRER, 3rd ed. 2013, Art. 187 no. 123; BERGER/KELLERHALS, Domestic and International Arbitration in Switzerland, 3rd ed. 2015, no. 139; see also MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, Art. 58 no. 101). In this regard ARROYO/BURCKHARDT are cited as a representative example (ARROYO/BURCKHARDT, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. 187 no. 22):

> *"… if the parties … [only] agree on such a set of arbitration rules, the tribunal has to apply these rules and may not revert to Art. 187 (1) PILA to determine the law with the closest connection. If, however, the parties both directly choose the applicable law and refer to a set of arbitration rules, the direct choice of law prevails and there is no room for determining the applicable law indirectly by using the provisions of the chosen arbitration rules"*.

84. CAS jurisprudence for the most part does not concur with this view (CAS 2014/A/3742, nos. 38 *et seq.*). The underlying rationale of this jurisprudence is that the CAS Code – unlike the rules of other arbitral institutions – aims at restricting the autonomy of parties. According thereto, the parties' autonomy only exists within the limits set by the CAS Code. Article R58 of the CAS Code is according to this jurisprudence mandatory (CAS 2014/A/3527, no. 57;

likewise CAS 2014/A/3850, no. 51; CAS 2013/A/3309, no. 70). This jurisprudence is to be followed. The purpose of concentrating appeals against decisions of an international sports organisation with the CAS is not least the desire to ensure that the rules and regulations by which all the (indirect) members are equally bound are also applied to them in equal measure. This can only be ensured, however, if a uniform standard is applied in relation to central issues. This is precisely what Article R58 of the CAS Code is endeavouring to ensure, by stating that the rules and regulations of the sports organisation having issued the decision (that is the subject of the dispute) are primarily applicable. Only subsidiarily, and this for good reason, Article R58 of the CAS Code grants the parties scope for determining the applicable law, and thus scope for changing the legal basis underlying the decision. To conclude, therefore, the indirect submission to the choice-of-law provision in Article R58 of the CAS Code takes precedence over any choice-of-law clause in the Contract.

D. The contents of Article R58 CAS Code

85. Article R58 CAS Code provides that the dispute shall be decided first and foremost according to the *"applicable regulations"*. These *"regulations"* shall be applied irrespectively of the will of the parties. The term *"applicable regulations"* within the meaning of Article R58 CAS Code refers to the rules of the association that made the first-instance decision which is being contested in the appeals arbitration procedure (CAS 2014/A/3626, no. 76: *"… in the present case the 'applicable regulations' for the purpose of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA …"*). In the case at hand, the applicable regulations are the FIFA regulations, in particular the RSTP. The Panel further notes that the FIFA Statutes provide in Article 57 para 2 as follows:

> *"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"*.

86. It follows from Article 57 para 2 of the FIFA Statutes that the (primarily applicable) FIFA regulations shall be interpreted, construed and applied in light of Swiss law.

87. Subsidiarily, i.e., in case the *"applicable regulations"* do not provide for a solution of the dispute, Article R58 of the CAS Code refers the arbitral tribunal to the law chosen by the parties. Consequently, the margin of application for the choice-of-law contained in the Contract is small. It only comes into play if the relevant questions of the dispute are not dealt with or covered by the *"applicable regulations"*.

88. To conclude, the Panel will, first, revert to the FIFA regulations as the *"applicable regulations"* within the meaning of Article R58 of the CAS Code in order to resolve the dispute, and, in light of Article 57 para 2 of the FIFA Statutes, the Panel will apply Swiss law for the interpretation and construction of the respective FIFA regulations. In a second step, and only for questions not covered by the FIFA regulations, the Panel shall consider Hungarian law.

E. Scope of the applicable law, in particular the onus of proof and onus of presentation

89. The question of onus of proof is governed – as previously stated (cf. *supra* para. 68) – by the law applicable to the merits. Thus, this Panel shall, unless the parties otherwise agree, allocate the burden of proof in accordance with the rules of law governing the merits of the dispute.

90. Article 12 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber provides that any party claiming a right on the basis of an alleged fact shall carry the burden of proof. The Panel holds that even though this rule is provided for in procedural regulations (and not in the RSTP), it shall be read as a general principle that applies in all matters governed by the RSTP. In other words, in disputes between a club and a player related to a breach of contract that shall be determined in accordance with the RSTP, the FIFA regulatory framework must be understood as requesting that the party claiming the existence of a fact has the burden to prove it.

91. In this context, the Panel further notes that the FIFA rule on the burden of proof is in conformity with Article 8 of the Swiss Civil Code (hereinafter the "CC"), which reads in its English translation as follows:

> *"Unless the law provides otherwise, the burden of proving the existence of an alleged fact rests on the person who derives rights from that fact"*.

92. Given that, according to Article 57 para 2 of the FIFA Statutes, the FIFA regulations shall be interpreted, construed and applied in light of Swiss law, and further given that Article 12 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber as well as Article 8 of the CC provide the same principle, the Panel holds that in the present case each party has the burden to prove those facts from which it intends to derive its rights.

X. MERITS OF THE APPEAL

93. The Appellant challenges the FIFA Decision. The latter orders the Appellant to pay to the Respondent the following amounts:

- HUF 16,195,000 and EUR 10,000, plus 5% interest p.a. as from due dates until the date of effective payment, for outstanding remuneration and

- HUF 53,750,000 and EUR 20,000, plus 5% interest p.a. as from 19 January 2017 until the date of effective payment for breach of the Contract.

A. The Jurisdiction of the FIFA DRC

94. The Appellant submits that the FIFA Decision is wrong and must be set aside because the dispute between the Parties is a *"work related Hungarian legal dispute"* and, therefore, the FIFA

DRC was not competent to hear the dispute. The Respondent should have filed his claim with an ordinary court in Hungary, namely the Administrative and Labour Court.

95. The Panel notes that clause 24 of the Contract reads as follows:

*"The parties agree that they will attempt to settle any possible disputes between themselves by means of discussion, out of court. In the case of a failure to do so, they will turn, in accordance with the respecting Hungarian law, only to the competent body of the Hungarian Football Federation (Player Status and Transfer Committee, Disciplinary Body), __**FIFA**__, CAS __**or**__ the competent __**civil or labour court**__ for legal remedy"* (emphasis added).

96. Clause 24 of the Contract provides for several alternative dispute resolution mechanisms. In particular, clause 24 of the Contract provides for the resolution of the dispute between the Parties by (the competent body of) FIFA or state courts. In case a provision provides several *fora* in the alternative, it is – absent any indications to the contrary – up to the party filing a claim to choose among the agreed *fora*. Once the choice is made, it will become binding on both parties. The Respondent did make his choice when filing his claim with the FIFA DRC on 31 December 2015. Thus, the FIFA DRC was competent to decide the dispute. This finding is further backed by the Appellant's behaviour throughout the course of the first-instance proceedings. Furthermore, the Panel notes in this respect that the Appellant never contested the competence of the FIFA DRC during the entire first-instance proceedings. Thus, in light of the valid arbitration clause in the case at hand, it does not appear very convincing when the Appellant holds that the Hungarian courts are competent to hear the case.

97. On a side note, the Panel observes that the Parties complied also with the other prerequisite of clause 24 of the Contract, i.e. to attempt to settle the dispute through negotiations. It is undisputed that the Parties met for settlement discussions after the dispute had arisen, but failed to find a compromise. Thus, the Respondent's claim with the FIFA DRC was lodged in accordance with clause 24 of the Contract.

98. Finally, the Panel finds that the competence of the FIFA DRC not only follows from the agreement of the Parties, but also from Article 22 (b) RSTP, which reads as follows:

"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: …

b) employment-related disputes between a club and a player of an international dimension … ".

B. Termination of the Contract (with or without "just cause"?)

99. The Appellant submits that the FIFA Decision is wrong and must be squashed because it is based on the premise that the Respondent terminated the Contract *"with just cause"*. The Appellant is of the view that it was entitled to withhold the above-listed payments and that, therefore, it did not breach its contractual obligations.

(1) The applicable legal framework

100. Whether a party to a professional player contract is entitled to terminate a contract is a question governed by the RSTP. Consequently, no recourse can be had insofar to any other law, since – according to Article R58 CAS Code – the FIFA regulations are primarily applicable. Article 13 FIFA RSTP provides that *"[a] contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement"*. Furthermore, Article 14 of the FIFA RSTP provides that *"[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"*. According to the Commentary to the FIFA RSTP (N3 to Article 16), Article 14 of the FIFA RSTP is *lex specialis* to the principle of Article 16 of the FIFA RSTP (*"A contract cannot be unilaterally terminated during the course of a season"*). Therefore, a binding employment contract can be unilaterally terminated by either the player or the club prior to the expiry of the employment contract with immediate effect if there is *"just cause"*.

a) "Just Cause"

101. The FIFA RSTP do not define what constitutes a *"just cause"*. The Commentary to the FIFA RSTP (N2 to Article 14), however, provides some guidance in this respect:

> *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally"*.

102. According to well-established CAS jurisprudence, non-payment or late payment of a player's salary by his club may constitute *"just cause"* to terminate the employment contract (see, *inter alia*, CAS 2006/A/1180; CAS 2008/A/1589; CAS 2013/A/3165; CAS 2014/A/3643). Reference is made in this regard to CAS 2006/A/1180, no. 8.4.1, where the Panel stated as follows:

> *"[…] the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of the obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee"*,

the Panel further indicated that

> *"[…] the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of late*

payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract".

103. The above interpretation of the term "just cause" is also in line with Swiss law, which – as previously mentioned – is applicable to the interpretation of the FIFA regulations. However, it also follows from the jurisprudence of the Swiss Federal Tribunal that only a particularly severe breach of an employment contract will result in the immediate dismissal of or, conversely, in the immediate abandonment of the employment position by the employee. Instead, in the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after having been warned (SFT 129 III 380, para 2.2).

104. The FIFA RSTP Commentary (N3 to Article 14) follows the above understanding. In the context of termination with *"just cause"* the commentary – *inter alia* – refers to the situation where a club has failed to pay the player's salary for more than three months, despite having been notified of its breach by the player. The FIFA RSTP Commentary points out that:

"The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

b) Party Autonomy

105. The RSTP allows for party autonomy. Thus, the parties to an employment contract can decide and agree on what constitutes "just cause" within the meaning of Article 14 RSTP. In the case at hand the Parties have agreed in clause 14 of the Contract as follows:

"Employee is entitled to cancel the present contract with termination with cause in case Employer does not fulfil its obligation defined in point IV. Termination with cause may be exercised by Employee only after he demanded contractual performance from Employer in writing, with a time limit of at least 30 days, and the deadline passed without effect".

106. It follows from this provision that non-payment of the Player's salary constitutes a severe breach allowing for termination with just cause, provided that the Player has sent a warning notice to the employer and observed certain time limits.

c) Application of the above principles to the case at hand

107. According to clause 8 of the Contract, the Appellant agreed to pay to the Respondent a monthly salary of HUF 2,150,000 (about EUR 7,000) *"until the 10th day of the month following the current month"*. It is undisputed between the Parties that the Appellant stopped making payments to the Respondent under both the Contract and the Bonus Agreement as of 19 April 2015, except for one payment in the total amount of HUF 4,010,000 on 17 March 2016, i.e., while the proceedings before the FIFA DRC were pending. Therefore, when filing his claim with the FIFA DRC on 31 December 2015, the Respondent had not been paid his salary

for more than eight months, amounting to an equivalent of about EUR 56,000. The Panel finds that the amount of about EUR 56,000 is not *"insubstantial"* within the meaning of CAS 2006/A/1180 and that the delay in payment over a period of eight months constitutes a *"significant period of time"* according to the RSTP Commentary.

108. It is equally undisputed that the Player sent a warning notice to the Appellant on 15 September 2015, in which he requested payment of the outstanding amounts within a 30-day deadline. In this letter, the Respondent expressly referred to the option of terminating the Contract in application of clause 14. The letter reads in its pertinent part as follows:

> *"Consequently, please note that my client is mindful of all available legal possibilities including, inter alia, the right to terminate the present contract with the termination with cause since the club did not fulfil its obligations towards the player. Therefore, please also note the contractual time limit of 30 days, as stipulated in paragraph 14 of the Employment contract, in order to resolve the issue and to settle the current debt […]".*

(2) Justification for the Non-Payment

109. In light of the above, the termination of the Contract by the Respondent is with "just cause" unless the Appellant can avail itself of a valid ground for refusing to pay the outstanding amounts. It is the Appellant that bears the onus of proof and the onus of presentation for such valid ground. Such valid ground may, in principle, either derive from the Contract itself or from provisions of the applicable law.

110. The Contract itself does not explicitly provide if and under what prerequisites the employer may withold payment (of salary and/or bonuses) to the Respondent. Thus, the Panel must look at the law applicable to the dispute in order to decide whether or not the club's behaviour is justified.

111. As a starting point it needs to be determined whether or not the Appellant is entitled to rely on Hungarian law in order to justify the non-payment of the salary and/or bonuses. The Panel notes in this regard that Article 12bis RSTP provides as follows:

> *"(1) Clubs are required to comply with their financial obligations towards players … as per the terms stipulated in the contracts signed with their professional players …*
>
> *(2) Any club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned in accordance with paragraph 4 below … ".*

112. In light of the above the question arises whether or not the justification for non-payment must be enshrined in the Contract itself. The Panel finds that this question may be left unanswered provided that the Contract makes reference to principles or (national) provisions from which such justification for witholding payment may be derived. The Appellant argues that the justification for non-payment follows – indirectly – from the Contract. In particular, the Appellant refers to Clause 20, which reads as follows:

"20. Employee expressly states that it wishes to fulfil is [sic] *tax and contribution payment obligation in accordance with Act CXX of 2005 on Simplified Contribution to Public Revenues (as modified by Act LXXXIII of 2010) (hereinafter referred to as "EKHO Act"). Employee accepts and acknowledges that for the part of the benefit corresponding to the minimum wage, both employee and employer shall fulfil their obligations in accordance with the general tax and contribution payment and regulations of Hungary, while as regards the full benefit exceeding the current minimum wage, employee shall be responsible for a 15 % and employer for a 20 % tax and contribution payment liability, in conformity with the provisions of the act referred to above. The present statement of Employee shall be valid until revoked or until the emergence of legal excluding conditions.*

113. The Appellant submits that the Parties agreed in clause 20 of the Contract to the simplified regime on contribution to public revenues under the EKHO Act. According to the Appellant the said Act, in conjunction with Hungarian Labor law, prohibits the employer to pay the salary (agreed under the Contract) while the Respondent is on sick leave. Since, therefore, paying the salary to the Respondent as of 19 April 2015 would have constituted a breach of law, the Appellant considered itself entitled to withold payment from the Respondent.

a) Appellant's position not sufficiently substantiated

114. Whether or not it follows from the EKHO Act (and or associated provisions of Hungarian Labor law) that the Appellant is prohibited from paying the salary to the Respondent is, in principle, a legal question. It is widely acknowledged that the *iura novit curia* (or, in the present arbitration, *iura novit arbiter*) principle must be respected by arbitral tribunals having their seat in Switzerland, including the CAS. In applying this principle, an arbitral tribunal has to determine the law applicable to the merits and apply such law so determined. It is, however, also acknowledged that this duty of the arbitral tribunal is not unlimited. In particular, in cases where none of the members of a panel is educated under the relevant foreign law and where it would be disproportionate for the panel to investigate the pertaining rules the panel may request the parties to cooperate in ascertaining the relevant content of the law applicable to the merits (BERGER/KELLERHALS, Domestic and International Arbitration in Switzerland, 3rd ed. 2015, no. 1436). An expression of this idea is to be found in Article 16 para. 1 PILA, which states that the court may request the assistance of the parties in establishing the law and that in case of pecuniary claims, the court may impose the burden of proof on the content of the foreign law on the parties. Even though this provision is first and foremost addressed to state courts, this Panel finds that it may take guidance of its contents also in these arbitration proceedings.

115. That is what the Panel did because it would have been disproportionate for the Panel to investigate by itself rather complex rules of law on employment and social security und a foreign law. Therefore, the Panel, firstly, invited the Appellant (who carries the burden of proof in respect of an alleged right to wihthold payment) by letter of 22 August 2017, to provide it *"with a complete list (and the full text) of all statutory provisions of Hungarian law (name of the Act, English translation of the text of the provisions) it wishes to rely on"*. The Appellant, thereby, was invited to name and provide the provisions on which it bases its entitlement to withold

payment. And for the same reason, at the occasion of the hearing the Panel, secondly, gave the Appellant another opportunity to identify and explain to the Panel all specific rules under Hungarian law that support the Appellant's position and would have allowed the Appellant to withhold payments under the Contract. Consequently, the Appellant – having the onus of proof and, thus, the onus of presentation – was under a duty to substantiate from what provisions it derives its alleged right to withold payment.

116. In responding to the Panel's written request of 22 August 2017, the Appellant sent a letter, dated 28 August 2017, attaching a list of certain Hungarian law provisions. Such letter contained a document entitled *"Complete list of all statutory provisions of Hungarian law (the Appellant wishes to rely on)"* (hereinafter the "Hungarian law list").

117. The Hungarian law list provided, among others, one provision of the EKHO Act, namely Subsection (7) of Section 13, which, in the English translation provided by the Appellant, reads as follows:

> *"By way of the derogation provided for in this act, the provision of the Tbj Act shall apply mutatis mutandis for the insurance of the private individual paying ekho, and for the performance of the information providing, reporting, tax and contribution payment obligation relating to his insurance as well as for his entitlements".*

118. In its briefs and at the hearing the Appellant put much emphasis on the provisions of the EKHO Act. However, the Panel holds that the provision referred to by the Appellant does not allow to conclude that it would prohibit the Appellant from, or allow it to stop, making the contractually agreed payments to the Respondent. The full title of the EKHO Act, *"Act CXX of 2005 on Simplified Contribution to Public Revenues"*, already gives a first indication of what this act is about, namely, a regulation on the payment of tax and social security contributions in a "simplified" manner. At the hearing, however, the Appellant explained that the EKHO Act provides for a special taxation and social contribution system for athletes, offering them a choice between two options: either the regular taxation with regular entitlements in case of an insured event or a reduced tax and contribution scheme with lower entitlements. However, the Panel holds that such Subsection (7) of Section 13 of the EKHO Act, on which the Appellant explicitly relies, does not corroborate the Appellant's allegation that it was legally barred from, or entitled to stop, making payments to the Respondent as agreed to under the Contract while the Respondent was on sick leave and that the EKHO Act would provide that in case of a "simplified" procedure the Respondent was to receive insurance payments calculated on the basis of the statutory minimum salary only, instead of the salary agreed in the Contract as the Appellant contends.

119. Likewise, the Panel concludes that none of the other statutory provisions that the Appellant has identified on the Hungarian law list supports the Appellant's position and that none of these provisions provides, or indicates, that where an employed player has opted for a "simplified" procedure he shall only be be entitled to insurance benefits that are to be calculated on the basis of the Hungarian basic salary instead of his contractually agreed salary.

120. Further, even at the hearing where the Appellant was expressly asked by the Panel to identify and explain those Hungarian law provisions that would have required, or allowed, the Appellant to withhold payment the Appellant was not in a position to make any reference to any statutory provision under Hungarian law that would have underpinned the arguments brought forward by the Appellant and would have demonstrated that the Appellant's position is accurate from a Hungarian law perspective.

121. Considering the foregoing, the Panel finds that the Appellant's submission is not sufficiently substantiated according to the applicable standards (cf. paras. 67 *et seq.*).

b) No Agreement by the Parties

122. Even if it could be inferred from (some provision in) the EKHO Act (or any other Act under Hungarian law) that the Appellant was entitled to withold payment of the salary, it appears rather doubtful whether such provision would be a pertinent part of the agreement in the Contract that would prevent Respondent from receiving his salary when he is on sick leave or that his entitlements during such sick leave would be limited to insurance payments capped at the amount of the Hungarian mimimum wage, respectively. Clause 20 of the Contract merely describes the mechanics of paying tax and social contribution and where Clause 20 expressly refers to the minimum wage it only states that for the part of the benefit corresponding to the minimum wage, both, employee and employer, shall fulfil their obligations in accordance with the general tax and contribution payment laws and regulations of Hungary, while as regards the full benefit exceeding the current minimum wage, employee shall be responsible for a 15% and employer for a 20% tax and contribution payment liability. In the Panel's view this can by no means be understood, in good faith, that by opting for a so-called simplified procedure the Respondent would have given up his entitlement to his salary. Furthermore, the Panel took note that at the hearing the Respondent declared that the Apellant had never explained to him that Clause 20 of the Contract would have a meaning according to which he would renounce his right for salary should he choose the so-called simplified procdure. On the other hand, the Appellant did neither challenge this statement of the Respondent, nor did the Appellant submit any evidence that would establish that the Appellant had actually ever advised its employee that by choosing the "simplified" procedure he would lose his right for salary in case of his inability to play football.

123. In sum, while, according to clause 20 of the Contract, the Parties' agreement is confined to the Respondent's fulfilment of *"tax and contribution payment"* obligations, no reference is made to any waiver of salary payments in case of sickness or injury.

124. According to clause 21 of the Contract, the Appellant acknowledged the Respondent's statement under clause 20 as well as the payment method for his tax and social security contributions, i.e., by deduction from his remuneration and direct payment by the Appellant to the respective state authorities. Again, no waiver of salary payments in case of sickness may be derived from such agreement.

c) Subsdiary Arguments

125. As already stated, the Panel notes that none of the other provisions listed in the Hungarian law list serves to prove the Appellant's alleged entitlement to withold payments to the Respondent during his sick leave. The Panel, however, notes that the Appellant's reference, in para 2.7.3 of the Appeal Brief, to Subsection (1) of Section 43 of Act LXXXIII of 1997 on the benefits of compulsory health insurance (*"an employee who suffers incapacity for work at any time during his term of insurance,* ***is entitled to sickness benefit only****"*; emphasis in the original) differs significantly from the actual text of the said section which the Appellant submitted in the Hungarian law list for the same Subsection (1) of Section 43 of Act LXXXIII of 1997 on the benefits of compulsory health insurance which reads as follows: *"Any person shall be eligible for sick-pay who becomes incapable to work during the term of insurance, and obliged to pay health insurance contributions to the extent specified under Act LXXX of 1997 on eligibility to social security services and private pension, and coverage of services …"*. There is a clear contradiction between these two versions as the former would imply that the insurance payment is exclusive while the latter merely states that a sick person that has paid health insurance contributions is eligible to receive payments under such insurance. And, what is most relevant, none of these versions or provisions, respectively, indicates that the employee would receive less than his salary agreed under the employment contract. Thus, also this provision does not back the Appellant's position.

126. The Appellant's position is further undermined by its inconsistent reasoning, according to which it was prevented by law from paying the salaries, but not from paying the bonuses during the Respondent's sick leave. Appellant was unable to offer a convincing justification for such a divergence between the treatment of salary payments and of bonus payments, nor could it identify a specific provision in Hungarian law that would justify and/or back its legal position.

d) Sickness or Injury

127. According to the Appellant the EKHO Act only applies in case of sick leave, but not in case of sports-related injury. The Respondent has decidedly contested that the inability to provide his services as an employee was due to sickness. Instead, he submitted that it was the consequence of a sports-related injury. It is in fact undisputed between the parties that the "incident" that resulted in the Respondent's inability to further provide his sporting services occurred during sports practice. Thus, the onus of proof concerning the alleged sickness (and the obligation to substantiate such allegation) rests with the Appellant. The Panel finds that the Appellant did not discharge its burden of presentation with regard to whether or not the incident on 18 April 2015, which resulted in the diagnosis of "Popliteal Artery Entrapment Syndrome" (PAES), is to be considered an injury or, rather, a disease. In particular, the document presented by the Appellant as Annex 2 ("Order" of the Hajdú-Bihar County Government Office) is no proof that the Appellant's inability is due to "sickness", since it relates to *"sickness payment from 6 December 2014 until 10 December 2014"*, whereas the incident to which both the Appellant and the Respondent refer in their submissions occurred on 18 April 2015.

128. It is true that the Appellant stated in its Appeal Bried at para 2.6.2 that *"… if the … [Respondent]*[1] *fails to acknowledge that his organic disease is not related to sports activities, the Appellant shall submit his evidentiary motion with regard thereto during the procedure … "*. However, under the heading *"evidentiary motion and request for relief"* of the same Brief, no specific evidentiary request to this effect was made. Also later, when the Respondent in his Answer disputed that sickness was the cause of his inability to provide services, the Appellant – in spite of what it had announced in the Appeal Brief – did not file any evidentiary requests with this Panel. From all this the Panel can only conclude that the Appellant did indeed not intend to file a respective evidentiary request. This is all the more so considering that at the closing of the hearing, both parties expressly confirmed that they had no objections concerning their right to be heard and that they had been given the opportunity to fully present their case.

129. Finally, and most importantly, even if the diagnosted inability to play football was caused by sickness, and not by an injury, the Appellant would not have plausibly substantiated and would not have given convincing evidence that such inability would have allowed (or even obliged) it to withhold further salary payments from the Respondent.

(3) Summary

130. To conclude, the Panel finds that the Respondent terminated the Contract with *"just cause"* according to the applicable regulations.

C. Financial consequences of the termination of the Contract with "just cause"

131. As a consequence of the Respondent's unilateral termination of the Contract with *"just cause"*, the FIFA Decision holds that the Appellant is liable to pay to the Respondent the amounts which were outstanding under the Contract at the time of termination, and additionally to pay compensation for breach of contract in accordance with Article 17 para 1 of the FIFA RSTP.

132. The Panel takes note that the heading of Article 17 of the FIFA RSTP reads *"Consequences of terminating a contract without just cause"* (emphasis added) while in the present case Respondent terminated the Contract with *"just cause"*. However, the Panel is aware of the standing CAS jurisprudence which consistently holds that the purpose of Article 17 of the FIFA RSTP is basically nothing else than to reinforce contractual stability, i.e., to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, whether they be committed by a club or by a player (CAS 2005/A/876, page 17: *"[…] it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' […]"*; CAS 2007/A/1358, no. 90; CAS 2007/A/1359, no. 92: *"[…] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability […]"*; confirmed in CAS 2008/A/1568, no. 6.37).

[1] Added for better understanding.

133. Moreover, the Panel refers to the FIFA RSTP Commentary (N5 and N6 to Article 14), which reads as follows:

> *"5 In the event of just cause being established by the competent body, the party terminating the contract with a valid reason is not liable to pay compensation or to suffer the imposition of sporting sanctions.*
>
> *6 On the other hand, the other party to the contract, who is responsible for and at the origin of the termination of the contract, is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed".*

134. Accordingly, although Respondent was the one who terminated the Contract, it was the Appellant who caused and provoked the termination by breaching its contractual obligations. The Appellant is, thus, liable to pay compensation for the damage incurred by the Respondent as a consequence of the early termination. In taking this approach the Panel finds itself in line with the standing jurisprudence of the CAS (cf. CAS 2012/A/3033, no. 72: *"The Panel, however, is satisfied that the Player is, in principle, entitled to compensation because of the breach of the Employment Contracts by the Club. In this respect, the Panel makes reference to the Commentary to the FIFA Regulations on the Status and Transfer of Players (hereafter referred to as the "FIFA Commentary"). According to Article 14 (5), (6) of the FIFA Commentary, a party "responsible for and at the origin of the termination of the contract is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed". Accordingly, although it was the Player who terminated the Employment Contracts by filing a claim against the Club with FIFA, the Club was at the origin of the termination of the Employment Contracts and is thus liable to pay compensation for damages suffered by the Player as a consequence of the early termination"*).

(1) The Principles applicable to the Calculation of Compensation

135. The Panel observes that in the absence of any contractual provision determining the financial consequences of an unilateral breach of contract, the applicable consequences are set out in Article 17 para 1 of the FIFA RSTP, which reads as follows:

> *"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

136. Against the above, the Panel notes that the Contract does not provide for an amount to be paid to the Respondent in the event of breach by the Appellant. Hence, the compensation has to be calculated on the basis of the remuneration payable to the Respondent under the Contract and for the term of the Contract. The generally applicable deduction of salaries and other benefits earned by a player under any new contract signed (also to mitigate the damages sustained), does not need to be taken into account in the present case because it is undisputed

that the Respondent did not sign a new contract with another club and, therefore, did not receive further salaries or other benefits from a third person. Further, the Appellant did neither argue nor demonstrate that the Respondent would have assumed any new employment opportunity in another profession that would have allowed and/or allows him to receive any other salary that would have to be considered when calculating the compensation due to the Respondent. The Appellant did argue that the Player was entitled to sickness benefits and that the latter must be taken into account. The Appellant, however, did not submit any evidence or evidentiary requests establishing that the Respondent would have been entitled to any state benefits and, thus, fails to submit its burden of proof.

137. In respect of the calculation of compensation in accordance with Article 17 of the FIFA RSTP and the application of the principle of *"positive interest"*, the Panel follows the framework as set out by a previous CAS Panel in CAS 2008/A/1519-1520, nos. 85 *et seq* (and similarly in CAS 2005/A/801, no. 66; CAS 2006/A/1061, no. 15; CAS 2006/A/1062, no. 22; and CAS 2014/A/3527, no. 78):

> *"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*
>
> *As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.*
>
> *The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wyler, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).*
>
> *The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations".*

138. In the present case, in which the termination of the Contract was due to a breach by the club, the *"remuneration factor"*, together with *"the time remaining on the existing contract"* plays a major role. At the same time, the Panel sees no reason either to reduce or increase the amount

awarded in light of the *"specificity of sport"* given the fact that neither Party has provided any indication as to how such factor might affect the calculation of the damages to be compensated by the Appellant.

139. On the basis of the foregoing, the Panel notes that the Respondent was entitled to receive a monthly "gross" amount of HUF 2,150,000 (clause 8 of the Contract) and the amounts of EUR 10,000 each on 20 January 2014, 20 January 2015, 20 January 2016 and 20 January 2017 (clause 13 of the Bonus Agreement) plus rent allowance of HUF 150,000 per month (clause 14 of the Bonus Agreement).

(2) Deduction of Amounts already Paid

140. The Panel has taken note that the Appellant acknowledged its obligation to pay the amounts of HUF 900,000 and EUR 10,000 to the Respondent. The Appellant submits that it paid both amounts to the Respondent while the proceedings before the FIFA DRC were pending. In the annex to the Appeal Brief the Appellant provided evidence for the payment of HUF 4,010,000 to the Respondent on 17 March 2016. The Respondent submits that the Appellant's payment of HIF 4,010,00 was unrelated to the present case. Such payment – according to the Respondent – was made in relation to *"other outstanding amounts"*. However, the Respondent failed to provide any evidence for his allegation.

141. The Panel is convinced that the Appellant's payment of HUF 4,010,000 on 17 March 2016, i.e. during the proceedings before the FIFA DRC, was related to the claims filed by the Respondent before the DRC. This is clearly indicated by the fact that the amount of HUF 4,010,000 tallies with the HUF 900,000 plus EUR 10,000 which the Appellant acknowledged owing. The simple reason why such payment was not taken into account in the FIFA Decision is that the Appellant purportedly was prevented from filing final comments before the FIFA DRC (cf. supra para. 64 et seq.) and, thus, lacked the opportunity to submit that payments had been made on 17 March 2016. In order to prevent any double payments to which the Respondent is not entitled, the Panel finds that the amounts of HUF 900,000 and EUR 10,000 shall be deducted from the amounts awarded in the FIFA Decision.

(3) Taking account of Tax Obligations

142. At the hearing, the Appellant claimed that further deductions needed to be made from the amounts calculated by the FIFA DRC, in particular, with regard to the Respondent's tax obligations. The Panel notes that the Bonus Agreement is silent on whether or not the amounts due are to be qualified as net or gross. Clauses 20 and 21 of the Contract, by contrast, state that it is uncumbent upon the Respondent to pay taxes and social security contributions on his salary (clause 20: *"Employee expressly states that it whishes to fulfil is* [sic] *tax and contribution payment obligation […]"*), and that Appellant was to deduct the respective amounts from the Respondent's salary and transmit them on his behalf to the relevant authorities (clause 21: *"[…] public revenues imposed on Employer – established and deducted from employee – shall be declared and paid by Employer […]"*). However, whether any or all amounts awarded to the Respondent are subject to taxation is to be determined by the relevant tax authorities and not by the Panel in

the present arbitration. Furthermore, it is not up to this Panel to decide what obligations, if any, either Party might have under the relavant tax laws vis-à-vis the tax authorities (which are not party to these proceedings). This award is not intended to either alter or amend any tax obligations imposed on the Parties in accordance with relevant taxation laws.

(4) The calculation of interest

143. As a final issue, the Panel needs to address the interests awarded by the FIFA Decision. The Appellant submitted that the FIFA DRC failed to provide any explanation for its judgment on interest at a rate of 5% p.a. According to the Appellant, Hungarian law applies to the calculation of interests (Subsection (1) of Section 6:48 of the Act V of 2013 on the Civil Code). The Respondent only contested the applicability of Hungarian law.

144. It is true that the question of interests is not expressly covered by the RSTP. Thus, in principle, it is the law – subsidiarily – agreed to by the parties that applies in this respect (Article R58 of the CAS Code). However, it should be kept in mind that the Respondent's claim is primarily based upon damages (Article 17 RSTP) and that therefore the ancillary claim for interests should be submitted to the same law as the principle claim. Since the RSTP must be construed and interpreted according to Swiss law, the better arguments speak in favour of applying Swiss law also to the claim for interests. This view of the Panel is also in line with standing CAS jurisprudence (e.g. CAS 2008/A/1519 & 1520). Acccording thereto the Swiss statutory interest rate of 5% p.a. shall apply (Article 104 para 1 CO) unless provided otherwise in the respective contract. Since neither the Contract nor the Bonus Agreement stipulate any interest rate, the Panel finds that it shall take recourse to Article 104 para 1 CO. Moreover, the Parties did not agree on any specific provisions of Hungarian law regarding interests for late payments, in particular not on Subsection (1) of Section 6:48 of the Act V of 2013 on the Civil Code. The Contract only refers to the "Labour Code", the "EKHO Act", the "Act XCII of 2003 on the Rules of Taxation" and "Act I of 2004 on Sports" (the reference to *"the respecting Hungarian law"* in clause 24 of the Contract only relates to issues of jurisdiction) while the Bonus Agreement does not contain any reference to Hungarian law at all. Consequently, and in line with Article 57 para 2 of the FIFA Statutes, the Panel applies Swiss law with respect to the interest rate.

145. Considering that neither the Appellant nor the Respondent have found issue with the commencement dates of the interests as awarded in the FIFA Decision, and taking into consideration the Appellant's payment of 17 March 2016 regarding rent allowance in the amount of HUF 900,000 and the outstanding bonus in the amount of EUR 10,000 due on 20 January 2015, the Panel decides to award interests as follows:

a. 5% p.a. on the amount of EUR 10,000 as of 21 January 2015 until 17 March 2016;

b. 5% p.a. on the amount of HUF 245,000 as of 11 May 2015 until the effective date of payment;

c. 5% p.a. on the amount of HUF 2,150,000 as of 11 June 2015 until the effective date of payment;

d. 5% p.a. on the amount of HUF 2,150,000 as of 11 July 2015 until the effective date of payment;

e. 5% p.a. on the amount of HUF 2,150,000 as of 11 August 2015 until the effective date of payment;

f. 5% p.a. on the amount of HUF 150,000 as of 21 August 2015 until 17 March 2016;

g. 5% p.a. on the amount of HUF 2,150,000 as of 11 September 2015 until the effective date of payment;

h. 5% p.a. on the amount of HUF 150,000 as of 21 September 2015 until 17 March 2016;

i. 5% p.a. on the amount of HUF 2,150,000 as of 11 October 2015 until the effective date of payment;

j. 5% p.a. on the amount of HUF 150,000 as of 21 October 2015 until 17 March 2016;

k. 5% p.a. on the amount of HUF 2,150,000 as of 11 November 2015 until the effective date of payment;

l. 5% p.a. on the amount of HUF 150,000 as of 21 November 2015 until 17 March 2016;

m. 5% p.a. on the amount of HUF 2,150,000 as of 11 December 2015 until the effective date of payment;

n. 5% p.a. on the amount of HUF 150,000 as of 21 December 2015 until 17 March 2016;

o. 5% p.a. on the amount of HUF 150,000 as of 21 January 2016 until 17 March 2016;

p. 5% p.a. on the amount of HUF 53,750,000 as of 19 January 2017 until the date of effective payment;

q. 5% p.a. on the amount of EUR 20,000 as of 19 January 2017 until the date of effective payment.

D. Conclusion

146. In light of the foregoing, the Panel partially upholds the appeal filed by the Appellant. The FIFA Decision is amended in its point 2. The Appellant is ordered to pay HUF 15,295,000 (instead of HUF 16,195,000 plus EUR 10,000) and interest at 5% p.a. as detailed above, in para 141 *et seq*. of this Award. All other or further-reaching prayers for relief are hereby dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Debreceni Vasutas Sport Club (DVSC) on 21 April 2017 against the decision issued by the Dispute Resolution Chamber of the FIFA on 19 January 2017 is partially upheld.

2. Point 2 of the decision of the Dispute Resolution Chamber of the FIFA (19 January 2017) is set aside and Debreceni Vasutas Sport Club (DVSC) is ordered to pay to Mr Nenad Novaković an amount of HUF 15,295,000 (fifteen million two hundred and ninety-five thousand Hungarian Forint), plus interest at 5% p.a. as follows:
   a. on the amount of EUR 10,000 as of 21 January 2015 until 17 March 2016;
   b. on the amount of HUF 245,000 as of 11 May 2015 until the effective date of payment;
   c. on the amount of HUF 2,150,000 as of 11 June 2015 until the effective date of payment;
   d. on the amount of HUF 2,150,000 as of 11 July 2015 until the effective date of payment;
   e. on the amount of HUF 2,150,000 as of 11 August 2015 until the effective date of payment;
   f. on the amount of HUF 150,000 as of 21 August 2015 until 17 March 2016;
   g. on the amount of HUF 2,150,000 as of 11 September 2015 until the effective date of payment;
   h. on the amount of HUF 150,000 as of 21 September 2015 until 17 March 2016;
   i. on the amount of HUF 2,150,000 as of 11 October 2015 until the effective date of payment;
   j. on the amount of HUF 150,000 as of 21 October 2015 until 17 March 2016;
   k. on the amount of HUF 2,150,000 as of 11 November 2015 until the effective date of payment;
   l. on the amount of HUF 150,000 as of 21 November 2015 until 17 March 2016;
   m. on the amount of HUF 2,150,000 as of 11 December 2015 until the effective date of payment;
   n. on the amount of HUF 150,000 as of 21 December 2015 until 17 March 2016;
   o. on the amount of HUF 150,000 as of 21 January 2016 until 17 March 2016.

3. Point 3 of the decision of the Dispute Resolution Chamber of the FIFA (19 January 2017) is confirmed. Debreceni Vasutas Sport Club (DVSC) is ordered to pay to Mr Nenad Novaković the amounts of HUF 53,750,000 (fifty-three million seven hundred and fifty thousand Hungarian Forint) and EUR 20,000 (twenty thousand Euros), both plus interest at 5% p.a. accruing as of 19 January 2017 until the date of effective payment.

4. (…).

5. (…).

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