Arbitration CAS 2017/A/5011 Eskisehirspor Kulübü v. Sebastian Andres Pinto Perurena & Fédération Internationale de Football Association (FIFA), award of 10 July 2017

Panel: Mr Hendrik Willem Kesler (The Netherlands), President; Mr José Juan Pintó (Spain); Mr Gerardo Luis Acosta Pérez (Paraguay)

Football
Termination of the employment contract with just cause by the player
Legal basis to impose sporting sanctions upon the club
Repeat offender
Absence of discretion to reduce the sanction

1. **Pursuant to the wording of article 17(4) of the FIFA Regulations on the Status and Transfer of Players (RSTP), in case a club is found to be in breach of contract during the protected period, sporting sanctions *"shall be imposed"*, *i.e.* FIFA is in principle obliged to do so. However the FIFA Commentary leaves a margin of discretion to the FIFA Dispute Resolution Chamber (DRC) as to whether or not to impose sporting sanctions as it determines that *"a club risks being prohibited from registering new players"*, *i.e.* such sanction is not imposed *ipso facto*. FIFA's policy to not necessarily impose sporting sanctions in case of a breach of contract during the protected period does not mean that FIFA cannot impose sporting sanctions in such situation. To the contrary, the legal basis to impose sporting sanctions is clearly provided for in article 17(4) RSTP.**

2. **The mere fact that there is no regulatory basis in the RSTP for the imposition of sporting sanctions in case a club can be classified as a 'repeat offender', does not entail that no sporting sanctions can be imposed. Being classified as a 'repeat offender' is decisively a very serious aggravating factor that may legitimately lead the FIFA DRC to impose sporting sanctions on a club.**

3. **Article 17(4) RSTP does not provide the decision-making body with discretion as to the severity of the sporting sanctions to be imposed (and neither does the FIFA Commentary); this provision merely determines that if sporting sanctions are to be imposed on a club, these sporting sanctions shall consist of a ban from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. There is no latitude to reduce a two-period transfer ban to a one-period transfer ban. The discretion of the CAS panel is thus limited to either confirming the two-period transfer ban or disposing of the transfer ban entirely.**

I. PARTIES

1. Eskişehirspor Kulübü (the "Appellant" or the "Club") is a football club with its registered office in Eskişehir, Turkey. The Club is registered with the Turkish Football Federation (the "TFF"), which in turn is affiliated to the *Fédération Internationale de Football Association*.

2. Mr Sebastian Andres Pinto Perurena (the "First Respondent" or the "Player") is a professional football player of Chilean nationality.

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

II. BACKGROUND

3[1]. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeals arbitration proceeding. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

4. Although the present appeal arbitration proceedings before CAS emerges from a contractual dispute between the Player and the Club that was adjudicated and decided by the FIFA Dispute Resolution Chamber (the "FIFA DRC"), the scope of the present arbitration is limited to the legality and proportionality of the two-period transfer ban imposed on the Club since the Club does not challenge the findings of the FIFA DRC in respect of the contractual dispute with the Player.

A. Background Facts

5. On 24 August 2015, the Player and the Club concluded an employment contract (the "Employment Contract"), valid from 24 August 2015 until 31 May 2018.

6. On 31 December 2015, the Player put the Club in default for three outstanding salaries in the total amount of EUR 150,000 and granted the Club a deadline of 30 days to pay said amount.

7. On 10 February 2016, in the absence of any payment received within the deadline granted, the Player unilaterally terminated the Employment Contract invoking just cause.

[1] [Kept as is in order to save numbering of original award].

B. Proceedings before FIFA's Dispute Resolution Chamber

8. On 8 August 2016, the Player filed a claim against the Club before the FIFA DRC, requesting that the Club be ordered to pay a total amount of EUR 594,000 to him, comprising of EUR 322,000 as outstanding remuneration (5 months of outstanding salary of EUR 50,000 each and EUR 72,000 as match bonuses for the first half of the 2015/2016 sporting season) and EUR 272,000 as compensation for breach of contract (EUR 200,000 as residual value of the Employment Contract and EUR 72,000 as expected match bonuses for the second half of the 2015/2016 sporting season), as well as interest at a rate of 9% *per annum*. The Player also requested sporting sanctions to be imposed on the Club.

9. In spite of having been requested to do so, the Club did not respond to the claim of the Player.

10. On 15 December 2016, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

> *"1. The claim of the* [Player] *is partially accepted.*
>
> *2. The* [Club] *has to pay to the* [Player]*, within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of EUR 272,000, plus 5% interest p.a. on said amount as from 8 August 2016 until the date of effective payment.*
>
> *3. The* [Club] *has to pay to the* [Player]*, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 162,000, plus 5% interest p.a. on said amount as from 8 August 2016 until the date of effective payment.*
>
> *4. In the event that the amounts plus interest due to the* [Player] *in accordance with the above-mentioned points 2. and 3. Are not paid by the* [Club] *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 lodged by the* [Player] *is rejected.*
>
> *6. The* [Player] *is directed to inform the* [Club] *immediately and directly of the account number to which the remittance are to be made and to notify the Dispute Resolution Chamber of every payment received.*
>
> *7. The* [Club] *shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision".*

11. On 9 February 2017, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

> - *"[…] [T]he members of the Chamber noted that the player lodged a claim against the club, maintaining that he had terminated the employment contract with just cause on 15 February 2016, after previously having put the club in default, since the club allegedly failed to pay him five monthly salaries in the amount of EUR 50,000 each. Consequently, the player asks to be awarded with his outstanding dues as well as with the payment of compensation for breach of the employment contract.*

- *The club, for its part, failed to present its response to the claim of the player, in spite of having been invited to do so. Consequently, the Chamber deemed that the club had renounced to its right of defence and, thus, had accepted the allegations of the player.*

- *As a consequence of the aforementioned consideration, the members of the Chamber concurred that, in accordance with art. 9 par. 3 of the Procedural Rules, a decision shall be taken upon the basis of the documents already on file, in other words, upon the statements and documents presented by the player.*

- *Having established the aforementioned, the Chamber deemed that the underlying issue in this dispute was to determine whether the contract had been terminated by the player on 15 February 2016 with or without just cause. The DRC also underlined that, subsequently, it would be necessary to determine the financial consequences for the party that is to be held liable for the early termination of the pertinent employment contract.*

- *[…] [T]he Chamber established that the club, without any valid reason, failed to remit to the player, until 15 February 2016, the date on which the player terminated the contract, the total amount of EUR 272,000. Consequently, and considering that the club had repeatedly and for a significant period of time been in breach of its contractual obligations towards the player, the Chamber decided that the player had just cause to unilaterally terminate the employment contract on 15 February 2016 and that, as a result, the club is to be held liable for the early termination of the employment contract with just cause by the player.*

- *In continuation, having established that the club is to be held liable for the early termination of the employment contract with just cause by the player, the Chamber focused its attention on the consequences of such termination.*

- *First of all, the members of the Chamber concurred that the club must fulfil its obligations as per the employment contract in accordance with the general legal principle of "pacta sunt servanda". Consequently, the Chamber decided that the club is liable to pay to the player the remuneration that was outstanding at the time of the termination i.e. the amount of EUR 272,000, consisting of four instalments of EUR 50,000 each and the match bonuses in the amount of EUR 72,000.*

- *Furthermore, considering the player's claim for interest and also taking into account the Chamber's longstanding jurisprudence, the Chamber ruled that the club must pay 5% interest on the amount of EUR 272,000 as from 8 August 2016.*

- *In continuation, the Chamber decided that, taking into consideration art. 17 par. 1 of the Regulations, the player is entitled to receive from the club compensation for breach of contract, in addition to any outstanding salaries on the basis of the relevant employment contract.*

- *[…] [T]he Chamber proceeded with the calculation of the compensation and in this regard, it pointed out that the player determined the residual value of the contract in the amount of EUR 200,000. In line with the above request, the Chamber decided to take into account said amount, when calculating the amount of compensation.*

- *Moreover, the members of the Chamber noted that the player also claims an additional amount of EUR 72,000 as compensation for breach of contract, since this amount corresponds to the estimated loss of match bonuses for to* [sic] *the second half of the 2015/2016 season, had the contract not been terminated. As regards to this part of the player's claim, the members of the Chamber stressed that the payment and the amount of such bonuses are linked to matches to be played in the future, i.e. after the termination of the relevant contract, and, therefore, are fully hypothetical. Consequently, the Chamber decided to reject this part of the claim and to not take into account the amount of EUR 72,000 for the calculation of the amount of compensation payable.*

- *[…] [O]n 8 September 2016, the player found employment with the Argentinian club Quilmes Atlético Club. In accordance with the pertinent employment contract the player signed with said club, valid until 30 July 2017, the player is entitled to receive a total remuneration of ARS 645,000, corresponding to approximately EUR 38,000.*

- *Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the club must pay the amount of EUR 162,000 to the player, which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter.*

- *Moreover, taking into account the player's request as well as its longstanding jurisprudence, the Chamber decided that the club must pay to the player interest of 5% p.a. on the amount of compensation as of the date on which the claim was lodged, i.e. 8 August 2016, until the date of effective payment.*

- *In continuation, the Chamber focuses its attention on the further consequences of the breach of contract in question and, in this respect, addressed the question of sporting sanctions in accordance with art. 17 par. 4 of the Regulations. The cited provision stipulates inter alia that, in addition to the obligation to pay compensation, sporting sanctions shall be imposed on a club found to be in breach of contract during the protected period.*

- *Subsequently, the members of the Chamber referred to item 7 of the "Definitions" section of the Regulations, which stipulates, inter alia, that the protected period shall last "for three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional". In this respect, the Chamber took note that the breach of the employment contract by the club, and the termination of the contract by the player, had occurred on 15 February 2016. Therefore, the Chamber concluded that, irrespective of the player's age, such breach of contract by the club had occurred within the protected period.*

- *As a result, by virtue of art. 17 par. 4 of the Regulations and considering that the player terminated the contract with the club with just cause and, consequently, the club was to be held liable for the early termination of the employment contract, the Chamber decided that the club shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision. In this regard, the Chamber emphasised that apart from the club having clearly acted in breach of the contract within the protected*

period in the present matter, the club had also on several occasions in the recent past been held liable by the Chamber for the early termination of the employment contracts with the players Sissoko (case ref. nr. 15-00886; decided on 28 January 2016), Toko (case ref. nr. 16-00767; decided on 30 September 2016) and Ben Khalifa (case ref. nr. 16-01341; decided on 24 November 2016).

- *The Dispute Resolution Chamber concluded its deliberations in the present matter by establishing that any further claim lodged by the player is rejected".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 1 March 2017, the Club lodged a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2017) (the "CAS Code"), calling both the Player and FIFA as respondents. In this submission, the Club nominated Mr José Juan Pintó, Attorney-at-Law in Barcelona, Spain, as arbitrator. The Club also applied for a stay of execution of the Appealed Decision.

13. On 17 March 2017, the Player and FIFA filed their Answers to the Club's request for stay of execution of the Appealed Decision, requesting it to be dismissed.

14. Also on 17 March 2017, the Player nominated Mr Gerardo Luis Acosta Pérez, Attorney-at-Law in Asunción, Paraguay, as arbitrator. FIFA did not object to such nomination.

15. On 20 March 2017, the Club filed its Appeal Brief, pursuant to Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the appeal. The Club challenged the Appealed Decision, submitting the following requests for relief:

"i. To uphold the present appeal of Eskisehirspor Kulübü in view of the several reasons pointed out in both Statement of Appeal and this Appeal brief. To dismiss the decision of the FIFA Dispute Resolution Chamber issued on 15 December 2016.

ii. To issue a new decision stating that the sanction in the form of prohibition to register new players for Eskisehirspor Kulübü, either nationally or internationally for two entire consecutive registration periods is dismissed.

iii. To fix a sum of 15,000 CHF to be paid by the Respondents to the Appellant, to help the payment of its legal fees costs.

iv. To condemn the Respondents to the payment of the whole CAS administration costs and the Arbitrators fee".

16. On 25 March 2017, the Player challenged the appointment of Mr Pintó as arbitrator.

17. On 27 March 2017, the President of the Appeals Arbitration Division issued an Order on Request for a Stay, with the following operative part:

"1. The request for a stay filed by Eskisehirspor Kulübü on 1 March 2017 in the matter CAS 2017/A/5011 Eskisehirspor Kulübü v. Sebastian Andres Pinto Perurena & FIFA, is dismissed.

2. The cost of the present Order will be settled in the final award or in any other final disposition of this arbitration".

18. On 27 March and 3 April 2017 respectively, upon having been invited to do so by the CAS Court Office, Mr Pintó, the Club and FIFA filed their comments in respect of the Player's challenge of Mr Pintó as arbitrator.

19. On 4 April 2017, the CAS Court Office invited the Player to state whether he maintained his challenge against the nomination of Mr Pintó as arbitrator by 11 April 2017.

20. On 6 April 2017, the Player filed his Answer, pursuant to Article R55 of the CAS Code. The Player submitted the following requests for relief:

"1. I hereby submit to your information by proxy that the claims of the plaintiff are rejected,

2. Our objections are accepted and the resolution of FIFA with reference no. 16-01405/pam is approved.

3. The counsel's fees of CHF 15.000,00 is paid to us and,

4. All litigation expenses are paid by the plaintiff club".

21. On 12 April 2017, in view of the Player's failure to indicate whether he maintained his challenge of Mr Pintó as arbitrator, the CAS Court Office granted the Player a final deadline until 19 April 2017 to provide such position, failing which an Order on Petition for Challenge would be rendered by the ICAS Board.

22. On 20 April 2017, the CAS Court Office informed the parties that the Player had not indicated whether he wished to maintain or withdraw his challenge against the nomination of Mr Pintó as arbitrator and that, in accordance with Article R34 of the CAS Code, an Order on Petition for Challenge would be rendered by the ICAS Board.

23. On 27 April 2017, the ICAS Board issued an Order on Petition for Challenge, with the following operative part:

"1. The petition for challenge the nomination or Mr José Juan Pintó filed on 25 March 2017 by Mr Sebastian Andres Pinto Perurena is dismissed.

2. The costs of the present order shall be determined in the final award or in any other final disposition of this arbitration".

24. On 9 May 2017, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the parties were informed that the arbitral tribunal appointed to decide the present matter was constituted by:

- Mr Hendrik Willem Kesler, Attorney-at-Law in Enschede, the Netherlands, as President;
- Mr José Juan Pintó, Attorney-at-Law in Barcelona, Spain; and
- Mr Gerardo Luis Acosta Pérez, Attorney-at-Law in Asunción, Paraguay, as arbitrators

25. On 16 May 2017, FIFA filed its Answer, pursuant to Article R55 of the CAS Code. FIFA submitted the following requests for relief:

> *"1. That the CAS rejects the appeal at stake and confirms the presently challenged decision passed by the Dispute Resolution Chamber* […] *on 15 December 2016 in its entirety.*
>
> *2. That the CAS orders the Appellant to bear all the costs of the present procedure.*
>
> *3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand".*

26. On 16 and 22 May 2017 respectively, upon being invited by the CAS Court Office to do so, the Club indicated to prefer a hearing to be held, whereas the Player and FIFA indicated that they did not consider a hearing necessary.

27. On 29 May 2017, upon being invited by the CAS Court Office to provide the reasons for its request that a hearing be held, the Club indicated that it still considered it necessary to hold a hearing without indicating any reasons therefore. The Club also indicated that it was preparing another request for stay of execution of the Appealed Decision and that the Panel should decide on such request before taking any final decision on the substance of the proceedings.

28. On 2 June 2017, the Player again sent its letter dated 22 May 2017 to the CAS Court Office, indicating that it did not consider a hearing necessary.

29. On 8 June 2017, the CAS Court Office informed the parties that in the absence of any reasons put forward by the Club to support its request for a hearing, the Panel had decided to render an award on the basis of the parties' written submissions only and that such decision is independent from any possible further application for a stay.

30. On 15, 16 and 21 June 2017 respectively, the Player, FIFA and the Club returned duly signed copies of the Order of Procedure to the CAS Court Office. By signing the Order of Procedure, the parties, *inter alia*, confirmed that no hearing would be held and that their right to be heard had been respected.

31. On 16 June 2017, the Club filed a renewed request for a stay of execution of the Appealed Decision.

32. On 19 June 2017, the CAS Court Office granted FIFA and the Player a period of 10 days to provide their comments on the Club's renewed request for a stay of execution of the Appealed Decision.

33. On 27 June 2017, FIFA filed its answer to the Club's renewed request for a stay of execution of the Appealed Decision. The Player failed to file any answer thereto.

34. On 30 June 2017, the CAS Court Office informed the parties that the Panel has decided not to render an Order on request for a stay in view of the fact that it has decided to render the present award. Therefore, the Club's renewed application for a stay was considered to be without object.

35. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

III. SUBMISSIONS OF THE PARTIES

36. The Club's submissions, in essence, may be summarised as follows:

- The Club maintains that the FIFA DRC only partially upheld the Player's claim. The Player was only awarded an amount of EUR 434,000 out of a requested amount of EUR 594,000. Since the Player's claim was only partially upheld it is not logic to impose a transfer ban.

- The sanction of a two-period transfer ban does not comply with the principle of proportionality established by the Swiss Constitution, in particular article 36(3) thereof.

- The Club admits that article 17(4) FIFA RSTP provides for the possibility of imposing sporting sanctions on clubs in case of breach of an employment contract during the so-called "protected period". The Club however finds that because the Player terminated the Employment Contract invoking just cause during the protected period, the FIFA DRC concluded that sporting sanctions were automatically to be imposed. With reference to recent jurisprudence of the FIFA DRC, the Club however submits that a breach during the protected period does not automatically lead to the imposition of a transfer ban and that it is therefore not a determining criterion. Also the Commentary on the Regulations for the Status and Transfer of Players (the "Commentary") indicates that there is no strict rule that a transfer ban must be imposed.

- The Club maintains that *"the decision to impose a ban on registering new players is not clearly an appropriate step of the FIFA if it wants to keep the integrity of the competition and not to provoke the possible dissolution of the club"*.

- With reference to article 64 of the FIFA Disciplinary Code, the Club argues that the imposition of a transfer ban is provided for in case of non-compliance with the rendered decision, which does not apply here.

- The Club submits that the imposition of the transfer ban must be dismissed because of the lack of guidelines to apply such sanction.

- Finally, the Club submits that the argument of 'repeated offender' is neither mentioned in the FIFA RSTP, in the Commentary or in the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules"). As such, the fact *"of several decisions taken by the deciding body is not again binding at the moment of the decision to impose the corresponding sporting sanction"*.

37. The Player's submissions read as follows in full:

- *"First of all we exactly reiterate our bill of answer sent on 17 March 2017* [*i.e.* the Player's answer to the Club's request for a stay of execution of the Appealed Decision].

- *The statements of account submitted by the plaintiff as annex 3 do not have any legal value whatsoever. The current account statement is a statement of account kept by the club in its own system and does not have the characteristics of official evidence.*

- *The decision taken by FIFA is based on legal evidence.*

- *The plaintiff club did not submit any evidence to the lawsuit with FIFA and did not even reply. Therefore we do not accept any evidence they shall submit to this lawsuit"*.

38. FIFA's submissions, in essence, may be summarised as follows:

- FIFA highlights the fact that the Club has not presented any objection whatsoever to the FIFA DRC's main finding in the Appealed Decision, according to which the Club is responsible for terminating the Employment Contract without just cause in the protected period. This has the inevitable consequence that the Club's responsibility for breach of contract as well as its obligation to pay to the Player the amount awarded as compensation cannot anymore be reviewed by the CAS (*non ultra petita*). Therefore, the scope of the present proceedings is limited to the question of whether the imposition of sporting sanctions on the Club by the FIFA DRC is justified or not.

- The *ratio legis* of the imposition of sporting sanctions for unjustified breaches of contract committed during the protected period, *i.e.* that, in order to promote the fundamental principle of maintenance of contractual stability, a breach of contract during the first two or three seasons or years (depending on the age of a player) shall be reprimanded more severely in order to provide for an important deterrent to such behaviour.

- With reference to the wording of article 17(4) FIFA RSTP, FIFA argues that whenever a club is held liable for a breach of contract without just cause during the protected period, sporting sanctions shall, in principle, be imposed on such club by the FIFA DRC. Notwithstanding the foregoing, the FIFA DRC has formed its jurisprudence in the sense of adopting a more flexible application of article 17(4) FIFA RSTP,

according to which the deciding authority, in view of the particular and specific circumstances involved in each individual case brought to its consideration, would have the possibility of renouncing to the application of sporting sanctions on a club found in breach of contract without just cause, even if such breach occurred during the protected period.

- FIFA refers to CAS jurisprudence which allegedly dictates that a party seeking the annulment of a sporting sanction imposed on it by the FIFA DRC needs to prove the existence of *"clear and strong arguments"* which can lead to the annulment of said sanction. FIFA however considers it evident that the Club's arguments are everything but *"clear and strong"*, in fact, they could not be more vague and weak.

- Contrary to the argument of the Club, in one of the FIFA DRC decisions relied upon by the Club, sporting sanctions were effectively applied to the party in breach of the contract. In the other decisions cited, the respondents at least took the effort to reply to the relevant claims putting forth, in some cases, legal arguments of a certain complexity. The Club however did not only not reply to the claim of the Player, it is not even contesting to have breached the Employment Contract.

- FIFA submits that a need for a more strict approach in respect of the application of article 17(4) FIFA RSTP was lately felt. This in view of the current situation of constant and repeated disrespect by several clubs of the contractual obligations agreed upon with their players. As a result, certain clubs constantly figure as respondents in the numerous labour disputes lodged daily in front of FIFA. Frequently, the FIFA DRC indeed holds these clubs liable for the unexcused non-payment of remuneration or for breach of contract without just cause, leading to a situation of 'repeated offence'. In order to guarantee for a better enforcement of the contractual obligations assumed by the football clubs towards their players and for a consequent reduction of contractual offences leading to the submission of labour disputes to the DRC, in recent times the latter reached the conclusion that a more strict approach in such situation is not only desirable, but extremely and urgently necessary. In order to achieve such objective, a more strict application of article 17(4) FIFA RSTP is deemed appropriate, particularly in cases involving clubs that are repeatedly found to be in a situation of breach of contract without just cause, reaching the condition of 'repeated offenders'.

- As to the Club's allegation that the sporting sanction imposed on it was disproportionate since the financial part of the Player's claim had only been partially accepted, FIFA highlights that the degree of success in respect to the claim of the player in the first instance has no influence whatsoever on the FIFA DRC's entitlement to impose sporting sanctions on the Club or on the proportionality of such measure. With reference to CAS jurisprudence, FIFA maintains that the difference between the amount of outstanding remuneration and compensation for breach of contract requested by the player and the amount effectively granted does not attenuate the fault of the club in respect to its breach of obligations.

IV. JURISDICTION

39. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) of the FIFA Statutes (2016 edition), providing that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and in accordance with Article R47 of the CAS Code.

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

41. It follows that CAS has jurisdiction to decide on the present dispute.

V. ADMISSIBILITY

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

43. It follows that the appeal is admissible.

VI. APPLICABLE LAW

44. The Club submits that *"it is evident, that Swiss Law should be applied to the procedure, FIFA regulations applied on a subsidiary basis"*.

45. The Player and FIFA did not make any submissions in respect of the applicable law.

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

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

47. Article 57(2) of the FIFA Statutes stipulates the following:

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

48. The Panel is satisfied that primarily the various regulations of FIFA are applicable to the substance of the case, in particular the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), and subsidiarily Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VII. MERITS

A. The Main Issues

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

i. Did the FIFA DRC legitimately impose sporting sanctions on the Club?
ii. Is the imposition of a two-period transfer ban on the Club disproportionate?

i. Did the FIFA DRC legitimately impose sporting sanctions on the Club?

50. Article 17(4) FIFA RSTP determines as follows:

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

51. The term "protected period" is defined as follows in no. 7 of the definitions section of the FIFA RSTP:

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

52. Article 2(3) of the FIFA Commentary on article 17 FIFA RSTP determines the following:

> *"A club that breaches a contract with a player during the protected period risks being prohibited from registering new players, either domestically or internationally, for two registration periods following the contractual breach".*

53. The Panel observes that it is not disputed that the Club breached the Employment Contract by failing to pay the Player his salary for three consecutive months. It also remained undisputed that the breach took place within the protected period, as the Employment Contract was breached in the first sporting season of the three-year term.

54. The Panel notes that, pursuant to the wording of article 17(4) FIFA RSTP, in such situation sporting sanctions *"shall be imposed"*, *i.e.* FIFA is in principle obliged to do so.

55. The Panel however observes that the FIFA Commentary leaves a margin of discretion to the FIFA DRC as to whether or not to impose sporting sanctions as it determines that *"a club risks being prohibited from registering new players […]"*, *i.e.* such sanction is not imposed *ipso facto*. This is in accordance with FIFA's submissions in the present arbitration.

56. This should not lead to any controversy as such policy does not prejudice the Club. FIFA's policy to not necessarily impose sporting sanctions in case of a breach of contract by a club during the protected period is in fact favourable to the Club.

57. Insofar the Club argues that the FIFA DRC imposed the two-period transfer ban only because the Club breached the Employment Contract with the Player during the protected period, the Panel finds that this argument is to be dismissed because the Appealed Decision clearly also refers to other circumstances that were taken into account in its decision to impose sporting sanctions:

> *"[…] [T]he Chamber emphasised that **apart from** the club having clearly acted in breach of the contract within the protected period in the present matter, **the club had also** on several occasions in the recent past been held liable by the Chamber for the early termination of the employment contracts* [of three other football players]*"* (para. II.29 of the Appealed Decision) (emphasis added by the Panel)

58. The question therefore is whether the FIFA DRC could reasonably come to the conclusion that the imposition of a two-period transfer ban on the Club was appropriate in view of the specific facts of the case at hand.

59. In the respect, the Panel notes that FIFA invokes three arguments in the present arbitration before CAS as to why the imposition of sporting sanctions on the Club is warranted:

- The Club's breach took place within the protected period;
- The Club did not defend itself in respect of the Player's claim before the FIFA DRC and in the present proceedings before CAS;
- The Club is repeatedly found to be in a situation of breach of contract without just cause, reaching the condition of 'repeated offender'.

60. The Panel finds that FIFA's policy to not necessarily impose sporting sanctions in case of a breach of contract during the protected period does not mean that FIFA cannot impose sporting sanctions in such situation. To the contrary, the legal basis to impose sporting sanctions is clearly provided for in article 17(4) FIFA RSTP.

61. The Panel considers that the fact that the Club did not defend itself in the proceedings before the FIFA DRC and CAS in respect of the merits of the case, is not necessarily an aggravating circumstance. This 'behaviour' is rather something that can potentially be taken into account in allocating the costs of the CAS proceedings between the parties.

62. As to FIFA's argument regarding the Club being a 'repeated offender', the Panel first of all observes that such policy has already been endorsed in CAS jurisprudence:

> *"[…] In the matter at stake the Appellant was not able to bring forward any convincing arguments to deviate from the Decision. To the contrary, the Appellant is a repeated offender, particularly due to the fact that it had been held liable on several occasions in the recent past by the DRC (and the CAS) for the early termination of the employment contracts with other players without just cause. In order to guarantee a better enforcement of the contractual obligation assumed by the Appellant towards its players, a strict approach is necessary. Therefore, the Sole Arbitrator confirms the Decision in application of the clear wording of Article 17 para. 4 RSTP"* (CAS 2015/A/4220, para. 87 of the abstract published on the CAS website)

63. The Panel observes that it remained uncontested by the Club that it was held liable by the FIFA DRC for the early termination of the employment contracts with three other players in the same year as the Appealed Decision was rendered:

- Sissoko (case ref. nr. 15-00886; decided on 28 January 2016);
- Toko (case ref. nr. 16-00767; decided on 30 September 2016);
- Ben Khalifa (case ref. nr. 16-01341; decided on 24 November 2016).

64. The mere fact that there is no regulatory basis in the FIFA RSTP for the imposition of sporting sanctions in case a club can be classified as a 'repeat offender', does not entail that no sporting sanctions can be imposed. The Panel has no doubt that the Club is to be classified as a repeat offender since it remained undisputed that it breached four employment contracts within one year. The Panel finds that being classified as a 'repeat offender' is decisively a very serious aggravating factor that may legitimately lead the FIFA DRC to impose sporting sanctions on a club.

65. In the absence of any clear and strong arguments submitted by the Club as to why FIFA's more strict approach would be unfair, the Panel sees no reason why such more strict approach should not be permitted, as the principle remains that, pursuant to article 17(4) FIFA RSTP and the FIFA Commentary, sporting sanctions may be imposed if a club breaches an employment contract within the protected period.

66. Consequently, the Panel finds that the FIFA DRC legitimately imposed sporting sanctions on the Club.

ii. Is the imposition of a two-period transfer ban on the Club disproportionate?

67. The Club argues that the two-period transfer ban imposed on it was disproportionate, whereas FIFA maintain that it was not.

68. The Panel observes that CAS jurisprudence determines the following in respect of the discretion of CAS panels to reduce a transfer ban imposed on the basis of article 17(4) FIFA RSTP:

"The Sole Arbitrator observes that article 17(4) of the FIFA Regulations does not provide the decision-making body with discretion as to the severity of the sporting sanctions to be imposed (and neither does the FIFA Commentary); this provision merely determines that if sporting sanctions are to be imposed on a club, these sporting sanctions shall consist of a ban from registering any new players, either nationally or internationally, for two entire and consecutive registration periods.

The Sole Arbitrator feels himself comforted in this conclusion by CAS case law determining that:

> *"Quant à la nature et la quotité de la sanction infligée, la Formation ne voit pas en quoi elle peut appliquer le principe de la proportionnalité, du moment qu'elle fait partie de règles codifies concernant le jeu au sein même de l'association. Il appartiendrait à un ou des membre (s) de cette association, voire à l'association elle-même (ou à ses sections), de modifier une telle règle s'il devait être considéré qu'elle est par trop sévère ou qu'il lui manque la possibilité d'être nuancée. En d'autres termes, la Formation ne saurait se substituer au législateur dans l'application de la règle en cause" (CAS 2006/A/1154, §19).*

Which can be freely translated as follows:

> *"Concerning the nature and the extent of the inflicted sanction, the Panel does not see how it can apply the principle of proportionality, as long as it is part of the codified rules of the game of the association concerned. It would be up to one or more members of this association, or to the association itself (or to its departments), to change such a rule should it be considered as too severe or lack the possibility of a nuanced application. In other words, the Panel cannot replace the legislator in the application of the rule in question""* (CAS 2014/A/3765, para. 76-77 of the abstract published on the CAS website)

69. The Panel fully endorses the approach reflected in the above-mentioned CAS award and notes that there is no latitude to reduce a two-period transfer ban to a one-period transfer ban. The discretion of the Panel is thus limited to either confirming the two-period transfer ban or disposing of the transfer ban entirely.

70. As to the specific arguments advanced by the Club as to why the imposition of a two-period transfer ban would be disproportionate, the Panel observes that no evidence has been submitted justifying the proposition that the transfer ban may lead to the dissolution of the Club. In any event, a transfer ban only prohibits a club from registering new players (and thus from spending money) but not from transferring players to other clubs (and thus not from earning money), and therefore most likely, at least on the short-term, does not negatively affect the Club's balance sheets, but rather its competitiveness on the field of play.

71. The Panel does not at all deny that the imposition of sporting sanctions is a severe sanction and may indeed affect the competitiveness of the Club in comparison with other Turkish football clubs. Be this as it may, the Panel finds that the Club's breach of the Player's Employment Contract within the protected period and its repeated breaches of employment contracts with its players are also very serious matters and in the matter at hand prevails over the negative consequences the imposition of this ban may have on the Club.

72. As to the Club's argument that the imposition of sporting sanctions is not warranted because the Player's claim before the FIFA DRC was only partially upheld, the Panel observes that the FIFA DRC dismissed the Player's claim in respect of three issues:

- The Player claimed to be entitled to 5 months of outstanding salary in the amount of EUR 250,000, the FIFA DRC however only awarded 4 months of outstanding salary in the amount of EUR 200,000.

- The Player claimed to be entitled to the residual value of his salary over the first sporting season of the Employment Contract in the amount of EUR 200,000, the FIFA DRC however decided that the salary the Player earned with the Argentinian club Quilmes Atlético Club in the amount of EUR 38,000 was to be deducted from the amount of EUR 200,000.

- The Player claimed to be entitled to expected match bonuses in the amount of EUR 72,000, the FIFA DRC however dismissed this claim.

73. The Panel finds that the Club's argument in respect of the proportionality of the sanction must be dismissed. The Panel observes that all of the three aspects set out above are related to the financial claim of the Player before the FIFA DRC. As FIFA rightly argued, the fact that the financial claim of the Player before the FIFA DRC was not accepted in its entirety is not even remotely linked to the conduct of the Club in respect of the circumstances related to the breach of the Employment Contract. Insofar the breach of contract is concerned, the Player's claim was fully upheld by the FIFA DRC.

74. The Panel observes that article 36(3) of the Swiss Constitution determines as follows:

> *"Any restrictions on fundamental rights must be proportionate".*

75. The Panel does not consider the sporting sanction imposed on the Club to be disproportionate in view of article 36(3) Swiss Constitution. It is in any event not made clear by the Club which fundamental rights would allegedly have been violated by such sanction.

76. As to the Club's reference to article 64 of the FIFA Disciplinary Code, the Panel finds that such provision is not applicable in the matter at hand. The Panel observes that article 17(4) provides the legal basis for the imposition of a transfer ban by the FIFA DRC. As such, article 64 and other provisions in the FIFA Disciplinary Code do not come into play.

77. The Panel feels comforted in this conclusion by article 25(4) of the FIFA RSTP, determining as follows:

> *"Disciplinary proceedings for violation of these regulations shall, unless otherwise stipulated herein, be in accordance with the FIFA Disciplinary Code".*

78. In view of all the circumstances of the present case, particularly taking into account that the Club's breach of the Employment Contract occurred within the protected period and that this was the fourth time within one year that the FIFA DRC ruled against the Club in an

employment-related dispute with a football player, the Panel finds that the imposition of a two-period transfer ban is indeed an appropriate sanction.

79. Consequently, the Panel finds that the imposition of a two-period transfer ban on the Club is not disproportionate.

B. Conclusion

80. Based on the foregoing, the Panel holds that:

i. The FIFA DRC legitimately imposed sporting sanctions on the Club.

ii. The imposition of a two-period transfer ban on the Club is not disproportionate.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 1 March 2017 by Eskişehirspor Kulübü against the decision issued on 15 December 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 15 December 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed.

3. (…).

4. (…).

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