Arbitration CAS 2015/A/4177 Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber, award of 20 April 2017

Panel: Prof. Martin Schimke (Germany), Sole Arbitrator

Football
Termination of an employment contract without just cause
Prohibition of counterclaims and of the reformatio in pejus
Presumption of authenticity of physical records
Review by the CAS panel of expert evidence and place of such evidence in the panel's final adjudication
Player's remuneration
Specificity of sport

1. **A request of higher compensation payments than those awarded by the appealed decision contained in the answer to an appeal is to be rejected due to the very clear wording and intention of Art. R55 of the CAS Code. By removing the passage *"any counterclaim"* from Art. R55, the Court made it clear that in the future, counterclaims could not be filed in appeal proceedings anymore. The rationale behind this was to prevent respondents from having, in effect, more time for their "appeal" than the appellant did. This intention would be undermined if solely counterclaims, which are not related to the decision under appeal, were excluded. In any case, such a request is also to be rejected in application of the prohibition of *reformatio in pejus*.**

2. **Art. 178 of the Swiss Civil Procedure Code constitutes a presumption of proof/a deviation from the general principle that each party has to prove the facts upon which it is relying insofar as it presumes the authenticity of a private certificate as long as it is not substantially disputed by the opposing party. In other words, in order to rebut the presumption of authenticity of physical records, it does not suffice to simply dispute the authenticity of the documents; the disputing party must rather give adequate grounds for its claim, for example by submitting the opinion of its own "expert" disputing such authenticity.**

3. **A CAS panel lacking of expertise in handwriting analysis, shall limit its examination of the expert report to a review of whether the expert had considered the correct issues and exercised his/her expertise in a manner which did not appear to be arbitrary or illogical. Basically, the CAS panel must determine whether the expert's opinion is soundly based on the primary facts and whether the expert's process led to a sound conclusion derived from those facts. However, expert opinions are only one kind of evidence. While they usually are a very valuable auxiliary means for a CAS panel to establish its opinion, it is in no way restricted to the expert's report as the sole base of its decision-making. On the contrary, within the scope of its adjudication, the CAS panel is free and equally obligated to take into consideration all provided evidence and all the circumstances of**

the specific case at hand in order to come to a just and sound judgment.

4. **With regard to the criterion of the player's remuneration, the damage incurred following the termination of the employment agreement must be calculated by determining the positive interest; *i. e.* the injured party is to be put in the same position as if the contract had been performed properly, without such contractual violation to occur. In other words, the damage consists of the difference between the current financial status and the hypothetical state of the assets without the harmful event, and not the average of both remunerations. The difference between the sums due under both contracts reflects the increase value of the player since the last contract negotiations until the signing of the new contract.**

5. **The concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to the other factors. In particular, this criterion is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. Leaving a club only one month after having signed a long-term contract is particularly detrimental to the main objective of RSTP, which is the contractual stability within the world of football. This should be taken into consideration on the basis of the specificity of sport criterion and as an aggravating circumstance, in the assessment of the compensation due. As the issuance of an International Transfer Certificate (ITC) before the validation of a player's transfer is a necessary condition according to the RSTP, the fact that a club did not request the issuance of the ITC before hiring a player is also to be taken into consideration in the assessment of the compensation due.**

I. PARTIES

1. Hapoel Haifa FC ("Hapoel" or the "First Appellant") is a professional Israeli Football Club with its registered office in Haifa, Israel. It is a member of the Israel Football Association ("IFA"), itself affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Mr Ali Khatib (the "Player" or the "Second Appellant") is a professional football player. He was born on 18 March 1989 and is of Israeli and Palestinian nationality. He currently plays with the club Maccabi Ahi Nazareth, based in Nazareth, Israel.

3. Football Club Jabal Al Mukabber (the "Respondent" or "Jabal") is a professional Palestinian football club with its registered office in East Jerusalem, Israel. It is a member of the Palestinian Football Association ("PFA"), itself affiliated with the FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the main relevant facts as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings. This background is presented 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 discussion.

5. According to the IFA player passport, the Player's Israeli registration history is the following:

Season	Club	Age Group	Status	Remark
2001/2002	Maccabi Shefaram	U13	Amateur	-
2002/2003 to 2007/2008	Hapoel Haifa	U14 to U19	Amateur	-
2008/2009	Hapoel Haifa	-	Professional	-
2008/2009	Maccabi Irony Shlomi Nahariya	-	Amateur	On loan from Hapoel Haifa since 05/11/08
2008/2009	Maccabi Ironi Tamra	-	Amateur	On loan from Maccabi Irony Shlomi Nahariya since 02/02/2009
2009/2010	Hapoel Haifa	-	Professional	
2009/2010	Hapoel Shefaram	-	Amateur	Transfer from Hapoel Haifa on 10/09/09
2010/2011 to 2011/2012	Hapoel Shefaram	-	Amateur	-
2011/2012	Hapoel Haifa	-	Professional	Transfer from Hapoel Shefaram on26/01/12
2012/2013	Maccabi Netanya	-	Professional	Transfer from Hapoel Haifa on 08/07/12

6. Although not apparent from the IFA's registration history, it is undisputed that on 25 May 2009, the Player and Jabal signed an employment agreement for a period of one year (the "First Employment Contract").

7. On 26 May 2010, the Player and Jabal signed a second employment agreement for another period of one year (the "Second Employment Contract"). The Player played with Jabal until the end of the season 2010/2011.

8. Also not apparent from the IFA list but undisputed between the Parties, the Player started the season 2011/2012 with the Palestinian club Hilal Al-Quds and played eight games with this team.

9. After there had been disagreements concerning the payment of the Player's salary, the Player returned to Jabal and played at least one game (according to the Respondent even three games) in January 2012.

10. Allegedly, on 31 December 2011, the Player and Jabal signed an agreement (the "Disputed Agreement") that would bind the Parties until 30 May 2016. The authenticity of the Player's signature is contested by the Appellants.

11. At the end of January 2012, Hapoel contacted the Player, who left Jabal for Hapoel on 25 January 2012.

12. On 26 January 2012, the Player signed an employment agreement with Hapoel, valid for a period of four months in accordance with which the Player would earn a monthly salary of NIS 15,248 as well as NIS 1,749 per point, limited to a maximum of 20 points.It is disputed whether the figures refer to a gross or to a net amount (the "Hapoel Agreement").

13. On 31 January 2012, an urgent hearing took place at the District Court of Tel Aviv (the "District Court"), after Jabal filed an urgent motion against Hapoel and the IFA, objecting to the Player's registration with Hapoel. Upon recommendation of the District Court, the Parties reached an understanding according to which the IFA agreed to not file a complaint against Jabal before FIFA (for invoking a civil court in this matter) while Jabal agreed to withdraw its motion filed with the District Court.

14. On 8 July 2012, and thus at the end of the 2011/2012 season, the Player was definitely transferred to Maccabi Netanya F. C.

B. Proceedings before the FIFA Dispute Resolution Chamber

15. On 12 April 2012, Jabal filed a claim with the FIFA Dispute Resolution Chamber (the "FIFA DRC") against the Player and Hapoel, requesting in substance the following:

- that the Player and Hapoel be ordered to pay an amount of NIS 1,272,736 for breach of contract;

- that Hapoel be ordered to pay an amount of EUR 62,500 for training compensation; and

- that sporting sanctions be imposed on Hapoel.

16. On 13 March 2013, the Player and Hapoel submitted their Statement of Defence in accordance with the FIFA Regulations Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules", Edition 2008), requesting in substance the following:

- a declaration that no agreement existed between Jabal and the Player;

- a declaration that if the Player's signature is to be found authentic, the agreement is illegitimate, illegal and therefore is to be considered null and void;

- alternatively, if the agreement is considered valid, that the compensation awarded not be higher than NIS 140,000;

- a declaration that Hapoel is not responsible and therefore not liable;

- that no sporting sanctions be imposed on the Player and Hapoel.

17. On 4 April 2013, Jabal submitted his Response in accordance with the FIFA Procedural Rules.

18. On 2 August 2013, Hapoel and the Player submitted their comments to Jabal's Response in accordance with the FIFA Procedural Rules.

19. On 18 December 2013, a handwriting examination took place at FIFA's headquarters in Zurich, Switzerland, based on which both parties submitted their own graphology reports to the FIFA. The graphologist appointed by Hapoel came to the conclusion that the Player had not signed the Disputed Agreement, the one appointed by Jabal came to the opposite result.

20. On 19 February 2015, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

"1. The claim of the Claimant, Jabal Al Mukabber, is partially accepted.

2. The first Respondent, Ali Khatib, has to pay to the Claimant, within 30 days as from the date of notification of the present decision, compensation for breach of contract in the amount of NIS 450,000 plus 5% interest p. a. *on said amount as from 26 April 2012 until the date of effective payment.*

3. The second Respondent, Hapoel Haifa, is jointly and severally liable for the payment of the aforementioned amount.

4. In the event that the amount due to the Claimant is not paid within the stated time limit, 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 Claimant is rejected.*

6. *The Claimant is directed to inform the first* Respondent *and the second* Respondent, *immediately and directly, of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".*

21. On 20 July 2015, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"After thorough analysis of the aforementioned documents, in particular, comparing the relevant signature and contract dated 31 December 2011 to the previous contracts, the DRC concluded that for a layman the player's signatures on the various documents available, including the challenged employment contract dated 31 December 2011, seem to be alike and genuine. […]*

- *In view of all of the above, and based on the documentation at its disposal, the DRC came to the conclusion that the employment contract dated 31 December 2011 is to be considered valid and shall, thus, be taken into consideration. As a result, the DRC concluded that the player and Jabal had concluded an employment contract valid as from 31 December 2011 until 30 May 2016.*

- *The direct consequence of the above-mentioned consideration is that the player, by signing a contract with Haifa on 26 January 2012, signed two employment contract* [sic] *for an overlapping period of time and therewith breached his contract with Jabal. As a result, the Chamber determined that the player terminated the contract with Jabal without just cause on 26 January 2012.*

- *In this framework, the DRC wishes to clarify that all the arguments raised in relation to the registration of the player and the ITC of the player do not have any effect on the validity of the contract between the player and Jabal. Although the Chamber agrees with the respondents that in accordance with art. 9 par. 1 of the* Regulations, *a player registered at one association may only be registered at a new association once the latter has received an ITC from the former association, it is well-established jurisprudence of the Chamber that the issuance of the ITC and the registration of a player are administrative formalities which cannot invalidate an employment contract. In other words, and bearing in mind art. 18 par. 4 of the* Regulations, *the Chamber considered that the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player.*

- *Thus, the Chamber does not agree with the respondents that the registration affects the contract between a player and club, yet these circumstances may be taken into consideration when calculating the amount of compensation for breach of contract".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 6 August 2015, the Appellants filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Art. R48 of the CAS Code of Sports-related Arbitration (edition 2016) (the "CAS Code"), challenging the Appealed Decision and

requesting the matter to be submitted to a sole arbitrator. Together with their Statement of Appeal, the Appellants requested an extension until 15 September 2015 to file the Appeal Brief.

23. On 15 September 2015, the Appellants filed their Appeal Brief in accordance with Art. R51 of the CAS Code.

24. On 12 November 2015, the Respondent filed its Answer in accordance with Art. R55 of the CAS Code.

25. On 9 December 2015, the CAS Court Office informed the parties that Prof Dr Martin Schimke, attorney-at-law in Dusseldorf, Germany, had been nominated as Sole Arbitrator.

26. On 4 March 2016, the CAS Court Office informed the parties that the Sole Arbitrator had decided to appoint an independent handwriting expert to analyse the disputed signature placed on the Disputed Agreement. In this respect, after consulting the parties, the Sole Arbitrator appointed Dr. Audrey Giles as an independent handwriting expert.

27. On 31 March 2016, the Parties were informed that the hearing in the case at hand would be held on 6 May 2016 at the CAS Headquarters in Lausanne, Switzerland. Following a request from the Appellants, the hearing was postponed to 16 June 2016, as confirmed by the CAS Court Office in its letter dated 26 April 2016.

28. On 7 June 2016, the Parties were provided by the CAS Court Office with the independent handwriting expert report of Dr Giles and were informed that the expert would be available for questioning in the course of the hearing.

29. On 12 June and 13 June 2016, respectively, the Appellants and the Respondent returned duly signed copies of the Order of Procedure to the CAS Court Office.

30. On 16 June 2016, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.

31. In addition to the Sole Arbitrator and Mr Brent J. Nowicki, Counsel for CAS, the following persons attended the hearing:

For the Appellants:

- Mr Ron Feldheim (First Appellant's representative);
- Mr Ali Khatib (Second Appellant);
- Mr Eldad Aharoni (as Counsel);
- Mr Shachar Greenberg (as Counsel);
- Mr. Barak Matzkevich (interpreter)

For Jabal Al Mukabber:

- Mr Mohamed Zhaeka (CEO of Jabal al Mukabber);
- Mr Nir Inbar (as Counsel);
- Dr. Roy Levy (as Co-Counsel);
- Mr Samir Isa (witness)
- Mr. Djamel Benkoribi (interpreter)

32. Mr Serge Vittoz, appointed *Ad Hoc* Clerk, was absent with a valid excuse.

33. The appointed expert graphologist Dr Giles was questioned during the hearing via teleconference.

34. Before the hearing was concluded, both parties expressly stated that they did not raise any objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

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

IV. SUBMISSIONS OF THE PARTIES

A. Hapoel Haifa FC & Ali Khatib

36. The Appellants' submissions, in essence, may be summarized as follows:

- The Player's signature on the Disputed Agreement was forged as confirmed in a handwriting expert opinion and therefore the Player was not contractually bound to Jabal when he enrolled with Hapoel.

- As the expert opinions filed by the Parties before the FIFA DRC were contradictory, the latter should have ordered an independent expert opinion.

- The scenario described by the Respondent is already unrealistic as there are no logical reasons why the Player, who had up to that point only been offered short term contracts, would breach an employment agreement that would safeguard him for more than four years, an opportunity he had always waited for. On the contrary, it is quite surprising that Jabal would all of a sudden change its engagement policy and sign the Player for such a long period of time.

- The Disputed Agreement, if considered to be authentic, is illegitimate and illegal and therefore should be considered as null and void.

- The FIFA DRC considered that the issuance of an International Transfer Certificate ("ITC") and the registration of a player are only "administrative formalities", which is erroneous. The issuance of an ITC is a fundamental and essential matter in accordance with the FIFA Regulations.

- In the case at hand, when the Respondent registered the Player with the PFA, the Player was already registered with Hapoel Shefaram, which is a club affiliated with the IFA. The legal consequences are therefore that the Respondent was not entitled and had no legitimate right to register the Player.

- In such circumstances, any such violated parallel registration should be considered null and void and *non est factum*.

- The legal validity of a professional football contract is directly linked to the Player being properly registered in the concerned federation.

- Art. 20 of the Swiss Code of obligations ("CO") reads as follows: *"A contract is void if its terms are impossible, unlawful or immoral"*. Therefore, not requesting the ITC of the Player resulted in the impossibility of the fulfilment of the main obligations stated in the Disputed Agreement, allegedly signed by the Player. According to Swiss law, such an agreement is in every way null and void.

- Moreover, even if – despite the violation of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations") – the Disputed Agreement was to be found valid, FIFA should not have granted any legal assistance nor should it have awarded compensation for the alleged breach of contract, since as a matter of principle, the Respondent should have borne the consequences of its unlawful conduct and its total disregard of the FIFA Regulations. The principle *ex turpi causa non oritur actio* is a well-established legal doctrine and states that a claimant is unable to pursue a legal remedy if it arises in connection with his own illegal act.

- In 2012, the IFA requested the PFA to act against the uncontrolled transfers of players from clubs affiliated with the IFA to clubs affiliated with PFA, although the IFA had never been asked by the PFA, neither through the FIFA Transfer Matching System (TMS) system nor by ITC, to release any players to clubs affiliated with the PFA. This request was never answered by the PFA.

- On 22 November 2012, in this particular matter the FIFA responded as follows to the IFA:

> *"[…] any player who is registered with a club that is affiliated to one association shall not be eligible to play for a club affiliated to a different association unless an ITC has been created/issued by the former association and received by the new association. […] In this context, we kindly inform you that any possible violation of the above mentioned principles would be subject to disciplinary proceedings"*.

- FIFA, as the governing body of football worldwide, should state loud and clear that any club or association that breaches its rules and disregard its requirements will not be entitled to seek relief from FIFA in the event of a breach of an agreement that was signed (in this case allegedly signed) in violation of the FIFA regulations.

- Furthermore, the matter of the registration of the Player with Hapoel was discussed at the District Court in Tel Aviv (based on a motion filed by the Respondent against the IFA, in total disregard of the FIFA regulations), a piece of information that was deliberately concealed by the Respondent from the FIFA DRC.

- On 31 January 2012, an urgent hearing took place before the District Court. At the end of the hearing, the parties agreed that the Respondent would withdraw its motion and that the IFA would not file a complaint against the Respondent to FIFA.

- The withdrawal of the civil claim by the Respondent was a further confirmation for Hapoel that there was no legal impediment for the Player to be registered with it.

- As to the compensation, the Appellants consider that the FIFA DRC decision violated the *"fundamental principal of tort law"*, according to which *"no bigger damages are to be granted in compensation than those that were actually incurred"*. As the Respondent failed to prove in the proceedings that it suffered any damage as a result of the alleged breach of contract by the Player, it should not be granted any compensation.

- Alternatively, the compensation should be calculated in accordance with Art. 337d para. 1 of the Swiss Code of Obligations (CO), which states that the employer is entitled to compensation equivalent to one quarter of the monthly wage of the employee. The calculation in the case at hand leads to an amount of NIS 104,000 (NIS 8,000 x 0.25 = NIS 2,000 per month) for a total of 52 months.

- Alternatively, the calculation made by the FIFA DRC is also wrong due to a lack of information (*i.e.* the real salary of the Player), a fact that was ignored by the FIFA DRC. Additionally, the amount that was deducted in consideration of the Respondent's behaviour ought to have been higher than NIS 150,000, as determined by the FIFA DRC.

- Alternatively, the calculation should be based on the Player's salary with the new club (Hapoel) and the deduction of the salaries that the old club (Jabal) was spared and the total compensation should not exceed the amount of NIS 208,000.

- The Appellants requested, in essence, the following relief:

    1. *the decision of FIFA's Dispute Resolution Chamber be dismissed;*

    2. *a declaration that the Player's signature on the Disputed Agreement was forged and the contract thus void;*

3. *if the signature is considered authentic, a declaration that the Disputed Agreement is null and void due to a violation of the FIFA Regulations concerning the proper registration of a player;*

4. *alternatively, a reduction of the amount of compensation due by the Player to no more than NIS 208,000;*

5. *a declaration that the First Appellant is not liable in this matter.*

B. Football Club Jabal Al Mukabber

37. The Respondent's submissions, in essence, may be summarised as follows:

- The Respondent finds that the FIFA DRC, which had two handwriting expert opinions at its disposal, correctly addressed the issue of the alleged forgery of the Player's signature on the Disputed Agreement and that its position must be followed.

- The concluding of the Disputed Agreement is also demonstrated by a picture that was taken on 31 December 2011 and which shows the Player signing the contract. The existence of the contract is further supported by the fact that the Player actually played with the Respondent and received remuneration.

- The FIFA DRC was right not to doubt the Respondent's motivation to offer the Player a long-term contract. The Player had developed well over the past years and was on the rise in the Palestinian national team, so signing him for a longer term was indeed/in fact a very logical decision of the Respondent.

- The FIFA DRC was correct to consider that all arguments raised in relation to the registration of the Player and the Player's ITC do not have any effect on the validity of the Disputed Agreement between the Player and the Respondent.

- The Player was playing under a contract with the Respondent, was duly registered in the FIFA TMS, and even played in official competitions organised by the Asian Football Confederation.

- Aside from the fact that the Player never signed a contract with Shefaram, his registration as an amateur with the IFA had in any event been terminated according to Art. 4.1 FIFA Regulations as the last game he played within the IFA was more than 30 months earlier.

- The long-standing conflict between Israel and Palestine makes it complicated to move players between PFA and IFA, which led the FIFA to intervene by putting in place a special task force whose duty is to inspect and guarantee that IFA respects the rights of PFA. The Respondent is not to blame for the political complexity of the situation and it must not affect the validity of an agreement that was mutually agreed upon by a player and a club and that was not contested by a third party.

- The well-established jurisprudence of FIFA and CAS show that "administrative formalities" cannot invalidate an employment contract must be followed.

- By signing an employment agreement with Hapoel on 26 January 2012, the Player terminated the contract prematurely and without just cause. This new agreement was more favourable to the Player as it entitled him to a higher salary and enabled him to play in a wealthier league.

- The Appellants acted in bad faith as they knew that there was an existing employment contract between the Respondent and the Player and should therefore at least have sought clarification from the FIFA before entering into an employment agreement.

- As to the compensation, the FIFA DRC should have awarded the amount of NIS 1,897,636 to the Respondent, corresponding to the average monthly salary earned by the Player with Hapoel (NIS 36,493) multiplied by 52, which were the number of months remaining according to the Disputed Agreement when the Player left Jabal. In addition to this amount, the Respondent should also have been awarded the benefits received by Hapoel when the Player was transferred to Maccabi Netanya and/or the amounts reflecting the positive developments he experienced by playing and training with the Respondent's team.

- The Respondent, in essence, submitted the following requests for relief:

  1. *that the decision taken by the FIFA Disciplinary Committee on 19 February 2015 insofar as the Player was sentenced to pay compensation for breach of contract and as Haifa was held severally and jointly liable be confirmed;*

  2. *that the Appellants be ordered to reveal the agreement between Haifa and Maccabi Netanya concerning the Player's transfer in 2012 in order to be able to recalculate the due compensation payment;*

  3. *that the Appellants be ordered to pay the Respondent the average amount of NIS 1,897,636 in addition to the amount equivalent to the benefits received by Haifa related to the Player's transfer to Maccabi Netanya and/or the amounts reflecting the Player's development (training compensation);*

  4. *that the Respondent be granted an interest rate of 5%* p. a. *as from the day of breach on the compensation payment and increased legal costs including legal fees and arbitral costs in both court instances in the amount of at least CHF 50,000.*

V. JURISDICTION AND ADMISSIBILITY

38. Pursuant to Art. R47 of the Code, *"[a]n appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal*

remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

39. The jurisdiction of CAS to hear this dispute derives from Art. 66 and 67 of the FIFA Statutes, which state in particular that CAS has jurisdiction to consider appeals against a decision of the FIFA DRC.

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

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

42. Furthermore, Art. 67.1 of the FIFA Statutes provides as follows: *"Appeals against final decision passed by FIFA's legal bodies and against decisions passed by the Confederations, Members or League shall be lodged with CAS within 21 days of notification of the decision in question".*

43. In the case at hand, the grounds of the Appealed Decision were communicated to the Appellant on 20 July 2015. Therefore, the Statement of Appeal submitted on 6 August 2015 was filed within the prescribed deadline, and shall be declared admissible.

VI. APPLICABLE LAW

44. As to the applicable law on the merits, Art. R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and 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".

45. Art. 66 para. 2 of the FIFA Statutes provides *"[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

46. The Sole Arbitrator is of the opinion that the parties have not agreed on the application of any specific national law on the merits. As a result, subject to the primacy of the applicable FIFA regulations, Swiss law shall apply complementarily.

47. The Sole Arbitrator notes that, with regard to procedural law, the above-mentioned provision of the FIFA Statutes refers to the applicability of the provisions of the Code, which is therefore primarily applicable. However, if certain aspects of the procedure are not addressed by the Code, *i. e.* if there is *lacuna*, the Sole Arbitrator shall determine the procedure, to the extent necessary, either directly or by reference to a law or to arbitration rules (Art. 182.2 of the Swiss Federal Act on International Private Law, PILA). Considering (i) that the seat of the arbitral tribunal in and of the federation which rendered the decision are in Switzerland and (ii) that Swiss substantive law is complementarily applicable to the merits of the present case,

the Sole Arbitrator decides to apply the rules of the Swiss Civil Procedural Code (the "CPC") in the case at hand, where/if there is a *lacuna* in the CAS Code and if it deems appropriate.

VII. PRELIMINARY ISSUE

A. Admissibility of Counterclaim

48. The Sole Arbitrator noted that while the Respondent did not lodge an independent appeal against the Appealed Decision, it did request in its Answer to the Appeal Brief higher compensation from the Appellants in comparison with the compensation awarded to the Respondent in the Appealed Decision. In para. 42 of its Statement of Defence, the Respondent requests CAS *"to oblige Appellants to pay Respondent the average amount of NIS 1,897,636, together with the amount equivalent to the benefits received by Haifa from Maccabi Netanya and/or the amounts reflecting its development within Respondent's [sic]"*.

49. At the hearing, the Sole Arbitrator inquired about the parties' positions in this regard.

50. The Sole Arbitrator notes that legal writers have commented as follows in this respect:

> *"It must be noted that, since 2010, counterclaims are no longer possible in appeal procedures. This means that, if a potential respondent wants to challenge part or all of a decision, it must file an independent appeal with the CAS within the applicable time limit for appeal"* (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 488, with further references to CAS 2010/A/2252, para. 40; CAS 2010/A/2098, paras. 51-54; CAS 2010/A/2108, paras. 181-183; see also MAVROMATI/REEB, p. 249, and CAS 2013/A/3432 paras. 54-57 with reference to a decision of the Swiss Federal Tribunal).
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> *"Further to the 2010 revision of the Code, Art. R55 no longer provides that the respondent's answer should set out 'any counterclaims', meaning that it is no longer possible to file counterclaims in CAS appeals procedures"* (RIGOZZI/HASLER, Article R55 CAS Code, in: ARROYO (Ed.), Arbitration in Switzerland, p. 1031; with the later note, however, that this *"should be applied only to counterclaims that are not related to the decision under appeal"*).

51. The Sole Arbitrator finds that the Respondent's Answer does contain a classic counterclaim insofar as it seeks compensation payments from the Appellants higher than those awarded by the Appealed Decision.

52. The Sole Arbitrator considers it unnecessary to deviate from CAS practice of rejecting counterclaims in appeal proceedings. The Sole Arbitrator points in this regard to the very clear wording and intention of Art. R55 of the Code. By removing the passage *"any counterclaim"* from Art. R55, the Court made it clear that in future, counterclaims can only be filed in ordinary proceedings, since the respective regulation (Art. R39 of the Code) on this remained unchanged, but not in appeal proceedings. The rationale behind this was to prevent respondents from having, in effect, more time for their "appeal" than the appellant did. This intention would be undermined if solely counterclaims, which are not related to the decision under appeal, were excluded.

53. Notwithstanding the above, admitting the Respondent's request of higher compensation payments would, if granted, lead to an infringement of the prohibition of *reformatio in pejus*, a legal doctrine that is also acknowledged in Swiss law.

54. This principle states the following:

"C'est le principe de la prohibition de la reformatio in pejus, selon lequel la juridiction de recours ne peut modifier le jugement attaqué qu'à la mesure de l'intérêt de l'auteur du recours, jamais à son préjudice"

(PIQUEREZ G., L'Interdiction de la Reformatio in Pejus en Procédure Civile et en Procédure Pénale, in: Mélange Assista Genève 1989, p. 495 ss)

and can be translated:

"According to the principle of the prohibition of the reformatio in pejus, the appeal body can modify the decision that is contested only in the interest of the appellant, without prejudice to him".

55. The justification of this principle is the following:

In any judicial proceeding, the decision that concludes the litigation generates a myriad of effects on the parties. The parties must be able to rely on the absence of error in the evaluation of facts and in the application of the law. It is, therefore, incumbent upon the system to afford the parties the opportunity of requesting a further review of the subject matter of their dispute in order to minimize the risk of injustice (CAS 2002/A/432 para. 53).

56. There are many exceptions to this principle; the exception mostly relevant for the instant case states that if the appeal body must rule on the application of statutory laws, applicable *ex officio*, that body will be bound to deliver a decision that complies with the applicable law. The decision which is rendered might result in more prejudice to the appellant than the one which was rendered by the first instance judge.

57. Yet, regardless of whether the provisions of the respective and applicable FIFA regulations may be considered as statutory law, they do not allow for the filing of counterclaims or cross-appeals anyway.

58. Therefore, as no exception to the defence of *reformatio in pejus* has been met, the Sole Arbitrator does not consider itself to have the authority to award compensation higher than that imposed by the FIFA DRC.

59. Finally, also the argument of possible misuse, as indicated by RIGOZZI/HASLER, p. 1032, is not convincing due to a number of reasons. First, in order for such a *"pre-emptive appeal"* to be admitted by the Panel, there are still various requirements that have to be met, e. g. observation of the deadline and, above all, the payment of the CAS Court Office fee, which amounts to CHF 1,000. Depending on the status and financial capability of the potential appellant, this sum itself can already act as a deterrent that induces the potential appellant to refrain from appealing. Second, making use of an instrument that is provided for by the Code (in this case: the appeal) cannot be considered a misuse in itself. The risk of misuse (or even abuse) is

inherent in every authority and every instrument, yet the realisation of this risk depends on the user and the supervisor, in this case the Sole Arbitrator.

60. The Sole Arbitrator does not see any indications of misuse of the appeal in this case, so that there is no need to deviate from the principle of inadmissibility of counterclaims in appeal proceedings.

61. Consequently, the Sole Arbitrator finds that the Respondent's requests for relief are inadmissible insofar as they seek compensation from the Appellants that is higher than the compensation awarded by the FIFA in the Appealed Decision.

VIII. MERITS

62. As a result of the above, the main issues to be resolved by the Sole Arbitrator are:

i. Did the Player and Jabal conclude a valid employment contract on 31 December 2011?

ii. If so, is the injured party entitled to any compensation?

i. Did the Player and Jabal conclude a valid employment contract on 31 December 2011?

63. The Sole Arbitrator notes the existence of a (written) agreement dated 31 December 2011, the Disputed Agreement, the authenticity of which the parties disagree on. While the Respondent claims the contract to be valid as the signatures in and at the bottom of it were written by the Player, the Appellants refute the authenticity of the signature and therefore claim the contract to be forged and thus void.

64. According to well-established CAS jurisprudence (see, most recently, CAS 2015/A/4237 para. 68) and Art. 8 of the Swiss Civil Code, unless the law provides otherwise, each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence. Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court/tribunal. It is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal (ATF 97 II 216, 218 E. 1; BSK-ZGB/SCHMID/LARDELLI, 4th ed., 2010, Art. 8 no. 31; DIKE-ZPO/GLASL, 2011, Art. 55 no. 15).

65. Art. 178 of the Swiss Civil Procedure Code (CPC) stipulates that *"[t]he party invoking a physical record must prove its authenticity if this is disputed by the opposing party; the opposing party must give adequate grounds for disputing authenticity"*.

66. Art. 178 CPC constitutes a presumption of proof/a deviation from the general principle that each party has to prove the facts upon which it is relying insofar as it presumes the authenticity of a private certificate as long as it is not substantially disputed by the opposing party. In other words, in order to rebut the presumption of authenticity of physical records, it does not suffice

to simply dispute the authenticity of the documents; the disputing party must rather give adequate grounds for its claim.

67. The Sole Arbitrator notes that by mandating their own "expert" and submitting this graphologist's opinion, the Appellants gave adequate grounds for disputing the authenticity of the signature, which therefore switched the burden of proof to the Respondent.

68. The Sole Arbitrator observes that in pursuit of their respective claims, not only the Respondent but also the Appellants consulted and nominated their own handwriting expert in the course of the FIFA proceedings.

69. According to the graphologist consulted by the Appellants, *"[t]he football player Ali Kahtib* [sic] *did not sign the contract with Jabal Al-Mukaber* [sic] *team, dated of December 31, 2011 […]".*

70. The graphologist who was consulted by the Respondent came to the opposite result, concluding that *"there is no room for doubt that all the signatures were made by Ali Khatib".*

71. In short, the parties' graphologists came to opposite conclusions regarding the authenticity of the signature.

72. The Sole Arbitrator finds he was competent to appoint an expert in graphology as the requirements of Art. R44.3 of the Code were met. Art. R44.3 (2) of the Code reads as follows:

> *"If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time […] appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts".*

73. Previous CAS jurisprudence (see CAS 2012/A/2957, at para. II.4.3. with further reference) has taken into account the following three considerations in determining that a handwriting expert was necessary:

- one of the main issues of the case is whether the Player's signature on the litigious documents was genuine;
- it is impossible for the untrained observer to detect a forged signature;
- a handwriting evidence evaluation takes into consideration several different variables, such as the type of printed material present, the paper, the handwriting and the shape of handwritten characters and also requires training, experience and specific tools and skills.

74. The validity of the Agreement depends on the authenticity of the signature whose genuineness cannot be detected by the untrained observer. If the signature is found to be forged, there would have been no contract that could have been breached by the Appellants, thus the appealed FIFA decision would have to be dismissed.

75. The Sole Arbitrator found that these considerations – combined with the existence of two opposing "expert" opinions produced by the Parties – weighed in favour of appointing an expert for the hearing. Consequently, pursuant to Art. R44.3 (2) of the Code and overruling/despite the Respondent's objection put forward on 4 January 2016, on 24 March 2016 the Sole Arbitrator appointed an expert in graphology, Dr Audrey Giles, who specializes in the scientific examination of documents and handwritings and is the head of the Giles Document Laboratory in London as well as member of several leading learned organisations in the field.

76. The appointed expert was asked to compare the uncontested signatures of Mr Ali Khatib from sixteen different documents partly undated, partly dated between 2009 and 2016 and the ten specimen signatures dated 12 April 2016 provided by the Appellants with the signatures on the originals of the Disputed Agreement.

77. First, Dr Giles examined the signatures on the Disputed Agreement using a Video Spectral Comparator, which allows the ink of the signatures to be viewed in infra-red light and also under conditions that cause fluorescence at different wavelengths. The use of these techniques makes it possible to detect and examine features of the signatures that are not visible to the unaided eye. Then the expert also examined the questioned signatures with obliquely directed light, which allows impressions in the surface of the paper to be visualized. She further examined the detail of the signatures using low power stereomicroscopy.

78. According to Dr Giles, the purpose of this method is to find possible marks that are occasionally found in simulated signatures, *e.g.* pencil guide lines. Likewise, as stated by the expert, producing guide lines by tracing a genuine signature and following the resulting impressions with a pen line was one way of attempting a simulation. In addition, overwriting, retraces and hesitation were commonly symptomatic of laborious copying and incorrect interpretation of structure in simulated signatures.

79. In a second step, Dr Giles classified the provided undisputed signatures by Mr Ali Khatib into five different categories of style, depending on their individual structure in order to have suitable comparison groups.

80. Finally, Dr Giles examined each of the pages of the Disputed Agreement dated 31 December 2011 using the technique of Electrostatic Detection (ESDA) in order to be able to detect possible impressions of handwriting left on a document as a result of writing on another document which at the time of writing was overlying the first one.

81. Given the Sole Arbitrator's lack of expertise in handwriting analysis, previous CAS jurisprudence (CAS 2010/A/2240; CAS 2012/A/2957) requires the Sole Arbitrator to limit his examination of the expert report to a review of whether the expert had considered the correct issues and exercised his/her expertise in a manner which did not appear to be arbitrary or illogical. Basically, the Sole Arbitrator must determine whether the expert's opinion is soundly based on the primary facts and whether the expert's process led to a sound conclusion derived from those facts. Thus, like in CAS 2012/A/2957 II.4.7., the Sole Arbitrator will take

into consideration, *inter alia*, the expert's standing, experience, and cogency of her evidence in analysing her report.

82. Dr Giles delivered the expert opinion. She is a Bachelor of Science, a Doctor of Philosophy and a Member of the Chartered Society of Forensic Sciences. Dr Giles has nearly 40 years of experience in all areas of the scientific examination of documents and handwriting and has wide experience in presenting evidence in court. Her report was clear and was based on the samples provided. It convincingly explains how she reached her conclusions. Therefore, the Sole Arbitrator finds that Dr Giles' opinion is credible and reliable.

83. In her written report, Dr Giles, whose expertise is neither contested by the Parties nor by the Sole Arbitrator, came to the conclusion that *"[b]ased on the material provided for my examination, my findings are inconclusive. It is not possible to determine whether the signatures on the questioned Jabal Al-Mukabber Club Agreement dated 31st December 2011 […] were written by Mr Ali Khatib or by another person"*. It was equally possible that the Player signed the contract, that somebody else signed the contract and even that different individuals signed the contract.

84. The Sole Arbitrator notes in her written report, as well as when asked during the hearing, the two main reasons why she could not come to a conclusive result in the matter at hand.

85. First, Dr Giles pointed out that she did not have sufficient suitable comparison material from the relevant time period (p. 8 of the report). As everyone's signature varies from day to day and over time, it is crucial to have a sufficient specimen signatures that date from the same time period as the signature in dispute. In the matter at hand, most of the provided specimen signatures date from 2015 or 2016, respectively, while the contested signature dates from December 2011.

86. Second, the provided signatures from the period 2009 to 2012 were made in a variety of different styles so that the expert was unable on the basis of the comparison signatures provided for her examination to establish the precise form of signature used by the Player at the relevant time (p. 7 of the report).

87. Therefore, the expert was not able to clearly determine whether the signatures on the questioned agreement were written by the Player or any other person.

88. Notwithstanding the above, the Sole Arbitrator notes that the expert also stated that she had not found any guidelines associated with the contested signatures or any other impressions which could have been used as guidelines. Besides, according to the expert, the questioned signatures were fluently written without any sign of overwriting, retraces or hesitation.

89. The Sole Arbitrator further notes that the expert found no impressions on the top page of the Agreement but discovered impressions of handwritings and signatures that include impressions of the questioned signatures from the previous pages on the subsequent pages of the document. The presence of these impressions indicates that the pages of the Agreement were signed in order while resting on top of the other.

90. Therefore, the Sole Arbitrator concludes that while the expert's examination was unable to determine with any certainty either the authenticity or the forgery of the signature, it did produce some indications that the Sole Arbitrator will duly take into account when deciding upon the issue at stake.

91. However, expert opinions are only one kind of evidence. While they usually are a very valuable auxiliary means for the Sole Arbitrator to establish his opinion, he is in no way restricted to the expert's report as the sole base of his decision-making. On the contrary, within the scope of his adjudication, the Sole Arbitrator is free and equally obligated to take into consideration all provided evidence and all the circumstances of the specific case at hand in order to come to a just and sound judgment. This includes not only the various documents and arguments submitted by the Parties but particularly the Player's testimony during the course of the hearing.

92. After having taken into consideration and in view of all relevant evidence, the Sole Arbitrator is satisfied and convinced that the Player signed the Agreement dated 31 December 2011 and was thus contractually bound to the Respondent's club when signing with Hapoel Haifa FC in January 2012.

93. As the Player undoubtedly is the central figure in this case, the Sole Arbitrator deemed it decisive to allow him to speak and offer him the chance to report on the issue at stake from his perspective, particularly to clarify whether he signed the Agreement or not and/or whether he felt contractually bound to the Respondent.

94. The Player denies having signed the disputed Agreement with the Respondent's club on 31 December 2011 and argues that his signature must have been forged. But he neither calls the alleged forger(s) by name nor adduces reasons why someone should have done so and in whose interest.

95. Before considering the evidence in depth, the Sole Arbitrator considers it important to note that the Player not only denies having signed the Disputed Agreement dated 31 December 2011 but claims that even in the past he had never had a written contract with the Respondent. While it is undisputed between the Parties that the Player had played for Jabal from 2009 to 2011 (with interruptions) and that he had been duly paid for his services, the Player maintains that there had always only been some sort of handshake understanding between him and the Respondent and never a written contract. The Sole Arbitrator notes that, notwithstanding the actual existence of a written agreement, the Player obviously still felt contractually bound to the Respondent's club during that period of time.

96. The Sole Arbitrator further takes due note of the fact that the Player conceded to having played one match for the Respondent's club in January 2012 yet claimed that he had not been paid for his appearance.

97. After the examination of the Parties, the Sole Arbitrator is satisfied that when the Player signed the contract with Hapoel Haifa FC on 26 January 2012, a valid contract existed between him and the Respondent. The Sole Arbitrator found the Player's answers and statements to be

partly incomplete, partly evasive or even contradictory and thus not convincing in proving the Appellants' points. The Sole Arbitrator's conviction is primarily based on the following reasons:

98. The Sole Arbitrator observes a rather high discrepancy between the written submissions (especially the Player's written witness statement, Exhibit 8A to the Appeal Brief) and the Player's testimony rendered in the course of the hearing. While at first the Player claimed not knowing of a written witness statement at all, he later conceded to agree with its contents but denied having signed such a statement. He initially explained this with his inability to read and write (with the exception of his own signature), a fact that had not been brought to the Sole Arbitrator's attention until the hearing. The Player further specified that he knew how to write his full name in Arabic but was unable to sign with his full name in Hebrew.

99. The Sole Arbitrator takes due note of the fact that the Player's answers to a majority of the questions were that he could not remember or he simply did not know about the circumstances in question. This alleged ignorance is even more surprising when the questions regarded circumstances that were addressed in the Player's written witness statement, which he maintains to fully approve of (see *supra* para. 101). The Sole Arbitrator did not overlook the fact that when asked during the hearing whether he had received money from the Respondent in 2012, the Player promptly claimed that he had not, although para. 8 of the witness statement reads as follows:

> *"I confirm that the only two payments that were payed to me, are the payments in in the amounts of NIS 3,000 paid by means of cheque no. 1277, and of NIS 2,799 paid by means of cheque No. 1278. I deny having been paid any other payments* [sic]*".*

100. When confronted with a payment voucher for housing in the amount of USD 9,500 dated 15 January 2012 and allegedly signed by the Player, he answered that he could not remember if he had received such a sum. The Sole Arbitrator is sufficiently surprised by this answer. In view of the considerably smaller amounts the Player had received for his services up until then, one would expect him to remember the receipt of such a high sum, even more so when paid in the currency of USD.

101. The Sole Arbitrator is satisfied that a great part of the Player's answers were mere assertions of protection as it seems unlikely that he really has no or only little remembrance of the time around an incident that had such far reaching consequences for his life. After all, he accuses the Respondent of having forged his signature in order to prevent him from transferring to Hapoel Haifa FC. The incredibility of his ignorance is further supported by the fact that the Player's transfer and his registration with the IFA were even subject to a hearing before the District Court of Tel Aviv on 31 January 2012, a hearing that the Player himself attended in person.

102. The Sole Arbitrator notes that the Player was not able to give a satisfying answer when he was shown a picture that shows him in a shirt of the Respondent's club, sitting at a table and allegedly signing a piece of paper while being surrounded by Jabal officials. Even when confronted with the suggestion that it is considered common to arrange a scene like this on

occasion of the conclusion of an important contract, the Player claimed to not remember when and why this picture had been taken. Although the Player himself confirmed that one of the present officials in the photo only began working for the Club in 2011 (and later became the Coach), he could not give a satisfactory explanation for Mr Issah's presence.

103. Another indication for the conclusion of a (written) contract between the Player and Jabal Al Mukabber is the fact that the Palestinian Football Association (PFA) was in possession of a copy of the Player's passport, which had only been issued by the Palestinian state authorities on 27 June 2010, therefore after the conclusion of the last undisputed agreement between the Player and the Respondent in May 2010. Whenever a club signs a new player, it is necessary to submit a valid passport or other identity card in order to register the player with the federation (see Annex 3, art. 8 of the FIFA Regulations on the Status and Transfer of Players). This rule also applies to registrations with the PFA as it is a member of FIFA and therefore, according to art. 14 para. 1 of the FIFA Statutes, bound to its regulations. When asked how the PFA could get its hands on a copy of his recently issued passport, the Player once again reacted with alleged ignorance and claimed that the passport itself had never been in his possession. While the Sole Arbitrator is willing to believe that the Player was never concerned with any formalities relating to his transfers, he is honestly surprised with the Player's claim of never having been in possession of his own passport.

104. When evaluating the evidence, the Sole Arbitrator also took into account all factual circumstances that he deemed relevant in this particular case, such as the Player's concession that his father had signed a number of contracts in his name, that he is not familiar with the written language and the special relationship between the Player and the Respondent's club officials. The Sole Arbitrator finds it important to note that the Player spoke of Mr Mohamed Zahaika, the CEO of Jabal Al Mukabber, as "baba", since the latter played a father-like role in the Player's life. The Sole Arbitrator thus observes that the Player's business was often taken care of by others and that his father occasionally signed contracts on his behalf and with his authorization.

105. This, however, does not prompt a different evaluation of the Player's testimony. His answers were either evasive or inconsistent or beside the point. Very often, the Player simply denied the assertion or claimed not to remember the details or anything at all. Sometimes he did not answer the question at all but would simply state that the signature in question was not his own although the question was aimed at a different topic. Most notable, however, is the fact that the Player could not produce any convincing reason why Jabal's CEO, his "surrogate father", would cause to deceive him and forge or allow somebody else to forge the Player's signature in order to obstruct his further sportive development. Altogether, the Sole Arbitrator considers the majority of the Player's testimony at the hearing to be unconvincing.

106. The Sole Arbitrator is satisfied to note that the Player played at least one official match for Jabal in January 2012 and that he received remuneration for his services. In today's professional football, it would be more than unusual for an athlete to play without an existing valid contract, which does not only contain obligations for the Player but above all entitles him to a number of rights and other – also legal – amenities. The hearing has shown to the

satisfaction of the Sole Arbitrator that a written contract existed between the Player and Jabal, which bound the Parties for the time period from 31 December 2011 to 30 May 2016.

107. The Sole Arbitrator's conclusion is additionally supported by Dr Giles' expert report. Notwithstanding the fact that Dr Giles was unable to determine whether the signature was written by the Player or by some other individual, her observations concerning the lack of guide lines and other symptoms of simulation (such as overwriting, retraces and hesitation) still have an indicative effect in that they speak rather against an attempted forgery.

108. Furthermore, the examination of the Parties has revealed new facts that affect the interpretation of the expert's opinion and therefore need to be taken into account. First, the revealed information that the Player has trouble writing helps explain why the expert observed such a great variety between the single signatures on the Disputed Agreement. Second, the Player conceded that his father had signed some of his contracts in the past, which hints at a conclusion that his father may have signed the Player's name with (or perhaps without) his authorization. While this does not affect the validity of the signed agreements, it could indeed be another indication to help understand why the expert could not find significant similarities between the disputed signatures and those on these earlier agreements and, moreover, explain the Appellants' eagerness to submit these documents to an independent graphology expert.

109. The Appellants on the other hand did not succeed in convincing the Sole Arbitrator that the signatures on the Disputed Agreement were forged. The Sole Arbitrator took due note of the Appellants' argument that it would be highly unreasonable and illogical if a player, who had always waited for a long term employment, would decline the opportunity to sign a 5-year contract just to conclude another short term contract. And, what is more, by doing so running the risk of being held responsible for breach of contract. While the arguments brought forward by the Respondent – arguing that the Player was a youngster who was on the rise and steadily maturing and that it was actually him who refused a long term contract – seem equally sound, it is not the job of the Sole Arbitrator to investigate what led to the obvious discord in the formerly amicable relationship between the Player and the Respondent.

110. In conclusion, the Sole Arbitrator finds that the Player had concluded the Agreement of 31 December 2011.

111. Contrary to the Appellants' arguments, the Agreement is not void because the Respondent failed to request the Player's International Transfer Certificate (ITC). In accordance with the FIFA DRC, the Sole Arbitrator finds that a missing ITC is an administrative formality whose violation/negligence does not automatically lead to the invalidity of a concluded contract. In fact, this aspect can be taken into account when considering the possibility of contributory negligence on the part of the Respondent.

112. Consequently, the Sole Arbitrator is convinced – not only on a balance of probability but indeed to his comfortable satisfaction – that the signature at the bottom of the Disputed Agreement dated 31 December 2011 was written either by the Player himself or by his father on his behalf and with his authorization and that therefore a valid contract between the

Respondent and the Player was concluded for the time from 31 December 2011 to 30 May 2016.

ii. If so, is the injured party entitled to any compensation?

113. As the Sole Arbitrator observes that a valid agreement has been concluded between the Player and the Respondent and that the Appellants did not argue the existence of any other just cause or sporting just cause for the Player to terminate this agreement, the Sole Arbitrator concludes that the Disputed Agreement was terminated without just cause. The Sole Arbitrator is therefore now to consider the question whether the Respondent is entitled to any compensation.

114. The Appellants maintain that the decision imposed upon them by the FIFA DRC in the Appealed Decision (the payment of NIS 450,000 to the Respondent in compensation) is disproportionate for various reasons. Before examining whether the decision imposed upon the Appellants were adequate, it is necessary to determine whether they are liable at all.

115. As already exposed, the present dispute is primarily governed by the FIFA Regulations. In case of breach of contract, the FIFA Regulations provide for financial compensation as well as sporting sanctions.

116. Art. 17.1 of the FIFA Regulations sets the principles and the method of calculation of the compensation due by a player or a club because of a breach or unjustified unilateral termination of a football employment contract.

117. Before addressing the various criteria of Art. 17.1 FIFA Regulations, the Sole Arbitrator would like to address two specific arguments raised by the Appellants.

118. First, the Appellants consider that the compensation should be a maximum of NIS 104,000, in application of the rule of Art. 337d CO, which states in particular that where the employee leaves without notice and without just cause, the employer is entitled to compensation equal to one-quarter of the employee's monthly salary.

119. The Sole Arbitrator agrees that this provision could in principle be applicable. However, the Respondent fails to mention that this same provision reserves the possibility for the employer to claim damages for further losses (*"dommage supplémentaire"*).

120. Where the employer claims *"damages for further losses"*, he shall prove their principle, their nature and their extent, in accordance with Art. 8 of the Swiss Civil Code (GLOOR W., in Commentaire du contrat de travail, Bern 2013, ad Art. 337d CO, N 13).

121. The Sole Arbitrator considers that the criteria of Art. 17.1 FIFA Regulations are guidance in this regard.

122. The Appellants also consider that for the calculation of the compensation due, the net amounts due as salaries shall be taken into consideration, and not the gross amounts. Indeed,

as tax rates differ from country to country and, more basically, in any playing contract, the club's obligation is to pay the whole contract sum, and the tax liability is the player's (CAS 2010/A/2145, 2146 & 2147, para. 44), unless otherwise agreed between the parties.

123. Turning to the analysis of Art. 17.1 FIFA Regulations, the Sole Arbitrator observes this provision sets forth the principle of the primacy of the contractual obligations concluded by a player and a club: *"[…] unless otherwise provided for in the contract […]"*. The same principle is reiterated in Art. 17.2. Therefore, the Sole Arbitrator must preliminarily verify whether there is any provision in the employment contract between the Player and Hapoel that does address the consequences of a unilateral termination of the contract by either of the parties. Such kinds of clauses are, from a legal point of view, liquidated damages provisions (see, among others, CAS 2009/A/1880 & 1881, at paras. 72 & 73; CAS 2007/A/1358, at para. 87; CAS 2008/A/1519-1520, at para. 68).

124. With regard to such criteria, the Sole Arbitrator notes that in the Disputed Agreement the parties have not agreed a contractual remedy for the breach. As a result, the actual measure of the damages sustained by the Appellants should be assessed on the basis of the other factors indicated by Art. 17.1 FIFA Regulations.

125. According to Art. 17.1 FIFA Regulations, the primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. In case the parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for:

- the law of the country concerned;
- the specificity of sport,
- any other objective criteria, including in particular:
  - the remuneration and other benefits due to the player under the existing contract and/or the new contract,
  - the time remaining on the existing contract up to a maximum of five years,
  - the fees and expenses paid or incurred by the former club (amortised over the term of the contract), and
  - whether the contractual breach falls within a protected period.

126. The Sole Arbitrator notes that there have been a number of previous awards rendered by CAS panels on the issue of the determination of damages in accordance with Art. 17 FIFA Regulations (CAS 2007/A/1298, 1299 & 1300; CAS 2007/A/1358 and CAS 2007/A/1359; CAS 2008/A/1519 & 1520; CAS 2009/A/1880 & 1881; and CAS 2010/A/2145, 2146 & 2147, to mention a few where the breach was on the part of the player). Such precedents

provide indeed a useful guidance for the Sole Arbitrator, even if there is no specific reference to them in this award.

127. The Sole Arbitrator further notes that Art. 17.1 FIFA Regulations is an attempt by FIFA to give some directions on how to calculate the damage suffered. Accordingly, the calculation of the compensation due under Art. 17 FIFA Regulations *"shall be diligent and there is no power for the judging authority to set the amount due in a fully arbitrary way"* (CAS 2008/A/1519 & 1520, at para. 89).

128. However, the Sole Arbitrator wishes to emphasize that when determining the amount of compensation due, the judging authority has a wide margin of appreciation (*"a considerable scope of discretion"* according to CAS 2008/A/1519 & 1520, at para. 87). In particular, the Sole Arbitrator is of the view that each of the factors listed in Art. 17.1 is relevant, but that any of them may be decisive on the facts of a particular case.

129. Indeed, Art. 17.1 FIFA Regulations does not require the judging authority – be it the FIFA DRC or the CAS – to necessarily evaluate and give weight to any and all of the factors listed therein. Depending on the particular circumstances of each case and on the submissions of the parties, any of those factors may be relevant or irrelevant to the final decision, influencing or not the discretionary assessment of the compensation due. Therefore, it is up to each party to stress the factors which it believes could be in its favour in order to discharge its burden of persuasion. In particular, as the Code sets forth an adversarial system of arbitral justice and not an inquisitorial one, a CAS panel has no duty to analyse and give weight to any specific factor listed in Art. 17.1 if the parties do not actively substantiate their allegations with evidence and arguments based on such factor.

130. Therefore, in line with other CAS panels, in its analysis of the relevant criteria the Sole Arbitrator does not feel bound to give weight to all of the listed criteria or to follow exactly the order by which those criteria are set forth by Art. 17.1 FIFA Regulations.

131. The Sole Arbitrator also remarks that given that the compensation to be granted derives from a breach or unjustified termination of a valid contract, it will be guided in calculating the compensation due by the principle of the so-called "positive interest" or "expectation interest"; accordingly, the Sole Arbitrator will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if no contractual breach had occurred (see CAS 2008/A/1519 & 1520, at para. 86; CAS 2006/A/1061, at para. 40; see also the decisions of the Swiss Federal Tribunal ATF 97 II 151, ATF 99 II 312; in the legal literature, see STREIFF/VON KAENEL, Arbeitsvertrag, Art. 337b no. 4 and Art. 337d no. 4; STAEHLIN A., Zürcher Kommentar, Art. 337b no. 7 and Art. 337d no. 7; WYLER R., Droit du travail, 2nd ed., p. 522).

a) The law of the country concerned

132. Art. 17.1 FIFA Regulations requires the judging body to take into consideration the *"law of the country concerned"*.

133. The law of the country concerned is the law governing the employment relationship between the player and his former club. This is the law with which the dispute at stake has the closest connection. This will be under ordinary circumstances the law of the country of the club whose employment contract has been breached or terminated (cf. CAS 2008/A/1519 & 1520, at para. 144; CAS 2007/A/1298 & 1299 & 1300, at para. 89). The Commentary to the FIFA Transfer Regulations published by FIFA (the "FIFA Commentary") confirms that the provision is referring to the law of the country *"where the club is domiciled"* (cf. FIFA Commentary, fn 74).

134. In the case at hand, the Sole Arbitrator finds that none of the parties have made any submissions or produced any evidence to the effect that the law of a specific country/region could have an impact on the calculation of the compensation due. On the contrary, both parties referred to Swiss law in their written and oral arguments. Thus, the Sole Arbitrator finds that this criterion is not relevant for the determination of the compensation due to the Respondent.

b) Other objective criteria

135. Art. 17.1 FIFA Regulations allows the Sole Arbitrator to take into consideration *"any other objective criteria"*, not limiting its evaluation to those which are expressly specified. Indeed, as this FIFA provision uses the meaningful language *"include, in particular"*, the Sole Arbitrator is of the opinion (comforted by unanimous CAS jurisprudence) that the list of objective criteria set out therein (*"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 […] and whether the contractual breach falls within a protected period"*) is illustrative and not exclusive. The Sole Arbitrator feels thus unrestrained in resorting, if needed in light of the specific circumstances of this case, to other objective criteria.

136. The Sole Arbitrator considers that the following criteria shall be taken into consideration in the case at hand.

1. Player's remuneration

137. With regard to the Player's remuneration, the Sole Arbitrator agrees with the FIFA DRC, which considered that the remuneration of the Player under the Disputed Agreement for the whole duration of the latter amounted to the total amount of NIS 416,000, which corresponds to 52 monthly payments of NIS 8,000. Furthermore, the Player would earn with Haifa the amount of NIS 15,248 per month. Calculating this monthly remuneration over the same period of time that the Player had a contract with the Respondent, *i.e.* 52 months, this amounts to NIS 792,896.

138. The FIFA DRC, in the Appealed Decision, assessed the compensation to be paid by Haifa to the Respondent on the basis of the average of the annual fixed remuneration payable to the Player under the Disputed Agreement and the Hapoel Agreement for the period remaining in the Disputed Agreement after the early termination (NIS 600,000).

139. The Sole Arbitrator cannot agree with this conclusion. Rather, he agrees with another CAS Panel (CAS 2014/A/3707, para. 137), which recalled that the damage incurred by the Appellant following the Player's termination of the employment agreement must be calculated by determining the positive interest; *i. e.* the injured party is to be put in the same position as if the contract had been performed properly, without such contractual violation to occur (CAS 2008/A/1519 & 1520, para. 86). In other words, the damage consists of the difference between the current financial status and the hypothetical state of the assets without the harmful event (VALLONI/WICKI, Compensation in case of breach of contract according to Swiss law, European Sports Law and Policy Bulletin, 1/2011, p. 154), and not the average of both remunerations.

140. In this regard, according to another CAS Panel: *"It is a recurrent practice of the FIFA DRC and CAS to value the loss of services of a player on the basis of the total amount of remuneration to be received by the player under the new employment contract, minus the total amount of remuneration that the player would have received under his old employment contract should this contract not have been terminated prematurely"* (CAS 2014/A/3491).

141. The Sole Arbitrator considers that the difference between the sums due under both contracts reflects the increase value of the player since the last contract negotiations until the signing of the new contract (VALLONI/WICKI, Compensation in case of breach of contract according to Swiss law, European Sports Law and Policy Bulletin, 1/2011, p. 154).

142. In view of the above, the Sole Arbitrator concludes that the amount to be taken into consideration with regard to the criteria of the "Player's remuneration" is NIS 376,896 (NIS 792,896 – NIS 416,000).

143. The value of the services of a player, however, is only partially reflected in the remuneration which a club would be willing to pay, since the club has to sustain expenses to obtain such services (CAS 2013/A/3411, para. 109). Therefore, in order to determine the full amount of the value of the services lost, the Sole Arbitrator has to take into account also the amount that the club would have to spend to acquire them.

2. Fees and expenses paid or incurred by the former club

144. Within the other objective criteria, Art. 17.1 FIFA Regulations provides for the criterion relating to the non-amortised part of the fees and expenses possibly paid by the former club for the acquisition of a player's services.

145. However, in the case at hand, the Respondent did not allege let alone demonstrate that it paid any fees or incur in any expenses when it obtained the services of the Player in 2009. The Respondent is therefore not entitled to any compensation in this regard.

3. Loss of the Player's services and replacement value

146. It has been debated over various CAS awards whether it is possible to consider, as part of the damage to be compensated by the player, the claim of his former club for the opportunity to

receive a transfer fee that has gone lost because of the premature termination of the employment contract. This possibility was admitted in the case TAS 2005/A/902 & 903, at para. 136, rejected in the case CAS 2007/A/1298 & 1299 & 1300, at paras. 141 *et seq.*, and left open in the case CAS 2007/A/1358, at para. 97.

147. In the oft-quoted CAS 2008/A/1519 & 1520 case, the CAS panel found as generally recognised in Swiss employment law that the loss of earnings (*lucrum cessans*) is a possible part of the damages caused through the unjustified termination of an employment agreement. The award, therefore, recognised that the loss of a possible transfer fee can be considered as a compensable damage heading if the usual conditions are met, *i. e.* in particular if it is proven the necessary logical nexus between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit (CAS 2008/A/1519 & 1520, at paras. 116-117). The Panel in this case also considered that one may take into consideration for instance whether an offer made by a third party was accepted or not by the original club and/or by the player, but the transfer finally failed because the unjustified departure of the player to another club (CAS 2008/A/1519 & 1520, at para. 118).

148. The Sole Arbitrator agrees with the CAS Panel in CAS 2010/A/2145, 2146 & 2147 (para. 23) that for the compensation to be due in such instances there must be the logical nexus between the breach and the loss claimed. The loss of the transfer fee was awarded in CAS 2009/A/1880 & 1881, where the new club and the old club had been directly negotiating a fee at the time of the breach (*"it appears to the Panel that, as a consequence of the early termination of the Player's employment contract, Al-Ahly was deprived of the opportunity to obtain a transfer fee of USD 600,000"*, CAS 2009/A/1880 & 1881, at para. 221).

149. In the present case, Maccabi Netanya paid an amount of USD 25,000 to Haifa four months after the latter hired the Player. The Respondent deems that this amount shall be taken into consideration when assessing the compensation due.

150. However, the Sole Arbitrator does not consider that there is a necessary logical nexus between transfer of the Player from the Respondent to Maccabi Netanya and the unjustified departure of the Player to the Respondent, in application of the above mentioned principles set by CAS jurisprudence. The Sole Arbitrator therefore considers that the amount paid by Maccabi Netanya to the Respondent cannot be taken into consideration to assess the compensation due.

4. Time remaining on the existing contract

151. The *"time remaining on the existing contract up to a maximum of five years"* is a factor whose rationale is to be found in the circumstance that a club or a player should be able to rely on the stability of the employment relationship – the club in terms of technical continuity of the team's roster and the player in terms of steadiness and serenity of his football career and personal life – all the more so if the contract still has a substantial duration before its natural termination (CAS 2009/A/1880 & 1881, at para. 104).

152. In the present case, the Sole Arbitrator observes that the Player and Hapoel had signed an employment contract with a duration of four and half years (31 December 2011 until 30 May 2016). The Player terminated this contract at the end of January 2012 when signing the employment contract with Haifa, *i. e.* only one month after the start of the contractual relationship and with more than four years remaining in the contract.

153. The remaining time under the Disputed Agreement with the Respondent was therefore important, as the maximum of five years set forth in Art. 17 FIFA Regulations was still to be executed by the parties.

154. Accordingly, the Sole Arbitrator will take into due consideration as an element to establish the amount of the compensation due that the Player terminated the contractual relationship with four seasons remaining to the Disputed Agreement.

5. Occurrence of the contractual breach within the protected period

155. Another factor which could be taken into consideration is whether the breach or unjustified termination occurred during the so-called *"protected period"*. The FIFA Regulations define it as *"a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional"* (FIFA Regulations, Definitions, no. 7).

156. In the present case, the Player's unjustified unilateral termination occurred indisputably within the protected period. In principle, the Panel is of the view that the fact that a breach or unjustified termination of contract occurs during the protected period should be taken into consideration as an aggravating factor when assessing the compensation due.

157. Accordingly, the Sole Arbitrator when establishing the compensation due will consider that the unilateral, premature termination occurred within the Protected Period, so the compensation due could be increased on the basis of this particular criterion.

6. The Specificity of Sport

158. Art. 17.1 FIFA Regulations also asks the judging body to take into due consideration the *"specificity of sport"*, that is the specific nature and needs of sport, so as to attain a solution which takes into account not only the interests of the player and the club, but also, more broadly, those of the whole football community (CAS 2008/A/1644, at para. 139; CAS 2008/A/1568, at paras. 6.46-6.47; CAS 2008/A/1519 & 1520, at paras. 153-154; CAS 2007/A/1358, at paras. 104-105). Based on this criterion, the judging body should therefore assess the amount of compensation payable by a party keeping duly in mind that the dispute is taking place in the somehow special world of sport. In other words, the judging body should aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case (CAS 2008/A/1519 & 1520, at para. 155).

159. Taking into account the specific circumstances and the course of the events, a CAS panel might consider as guidance that, under certain national laws, a judging authority is allowed to grant a certain "special indemnity" in the event of an unjustified termination. The specific circumstances of a sports case might therefore lead a panel to either increase or decrease the amount of awarded compensation because of the specificity of sport (CAS 2008/A/1519 & 1520, at para. 156; CAS 2008/A/1644, at para. 139).

160. However, in the Sole Arbitrator's view, and in line with CAS jurisprudence, the concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to the other factors. In particular, according to CAS jurisprudence, this criterion *"is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. Furthermore, the element of the specificity of sport may not be misused to undermine the purpose of art. 17 par. 1, i. e. to determine the amount necessary to put the injured party in the position that the same party would have had if the contract was performed properly"* (CAS 2008/A/1519 & 1520, at para. 156).

161. The Sole Arbitrator considers that by leaving the Respondent only one month after having signed a long-term contract is particularly detrimental to the main objective of the FIFA Regulations, which is the contractual stability within the world of football. This should be taken into consideration on the basis of the specificity of sport criterion and as an aggravating circumstance, in the assessment of the compensation due.

162. However, the Sole Arbitrator also notes that the Respondent's behaviour is not exempt of any fault, as it never requested the issuance of an ITC before hiring the Player. The issuance of an ITC before the validation of a player's transfer is, as mentioned before, a necessary condition according to the FIFA Regulations. The Respondent's explanation with regard to the political context between Palestine and Israel and, in particular, between the PFA and IFA is not convincing to exonerate it from any responsibility in this regard. The Sole Arbitrator therefore considers that the FIFA DRC, in the Appealed Decision, was right to take this element into consideration in the assessment of the compensation due.

7. Interim conclusion

163. The Sole Arbitrator considers that the basis for the calculation of the amount of compensation due to the Respondent for the unilateral breach by the Player of the Disputed Agreement is the criterion of the "Player's remuneration", *i.e.* NIS 376,896, which is the difference between the sums due under the Disputed Agreement and the Hapoel Agreement, for the time remaining on the former.

164. The Sole Arbitrator determined that the Respondent could not claim any amount with regard to the fees and expenses paid or incurred to acquire the Player, and for the loss of the Player's services and the replacement value.

165. The Sole Arbitrator also considers, on one hand, that the following aggravating circumstances shall be taken into consideration:

- there was more than four years remaining on the Disputed Agreement;

- the breach occurred within the protected period;

- the Player left the Respondent only one month after having signed a long-term employment contract ("specificity of sport" criterion).

166. On the other hand, the Sole Arbitrator considers the fact that the Respondent did not request an ITC before transferring the Player as a mitigating circumstance, which allows the Sole Arbitrator to decrease the amount of compensation due in accordance with the criterion of the specificity of sport.

167. In view of all the above mentioned increasing as well as decreasing factors, the Sole Arbitrator concludes that the amount of compensation granted by the FIFA DRC, *i.e.* NIS 450,000, is just and fair in the case at hand, even though the FIFA DRC's reasoning to reach this amount was, in the Sole Arbitrator's opinion, not correct.

168. The Sole Arbitrator notes that the Appellants contested the conclusion of the FIFA DRC with regard to the joint liability of Hapoel to pay the compensation. This prompts the Sole Arbitrator to point to Art. 17.2 FIFA Regulations, which reads the following: *"If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment"*. As the Player's obligation to pay compensation has been established and Hapoel was the Player's new club in terms of Art. 17.2 FIFA Regulations, they are jointly and severally liable. The Sole Arbitrator thus deems that the FIFA DRC rightfully addressed the element of liability as well as the (not contested) calculation of the interests due on the amount of compensation and therefore confirms the Appealed Decision in this regard as well, without further consideration.

169. The Appealed Decision shall therefore be confirmed.

170. The Sole Arbitrator also recalls that he is limited by the parties' requests for relief: in other words, had he come to the conclusion that the Respondent would be entitled to compensation in a measure larger than the one awarded in the Appealed Decision, no such compensation could have been granted, and the amount of compensation set by the FIFA DRC would have also been confirmed. The Sole Arbitrator recalls in this regard that the counterclaim filed by the Respondent shall be declared inadmissible (see *supra* para. 48 *et seq.*).

IX. CONCLUSION

171. In light of the above, the Panel considers that :

- The counterclaim filed by the Respondent together with its Answer is inadmissible;

- The Disputed Agreement was validly concluded between the Player and the Respondent, as the Player's signature was not forged;

- The amount of compensation to be paid by the Appellants to the Respondent is NIS 450,000, plus 5% interest *p. a.*

- The appeal is dismissed and the Appealed Decision is therefore confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed on 6 August 2015 by Hapoel Haifa FC and Ali Khatib is dismissed.

2. The counterclaim filed by Football Club Jabal Al Mukkaber on 12 November 2015 is inadmissible.

3. The decision of the FIFA Dispute Resolution Chamber dated 19 February 2015 is upheld.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed