



**Arbitrations CAS 2016/A/4495 Hakan Calhanoglu v. Trabzonspor FC & Fédération Internationale de Football Association (FIFA) & CAS 2016/A/4535 Trabzonspor FC v. Hakan Calhanoglu, award of 2 February 2017**

Panel: Mr Mark Hovell (United Kingdom), President; Mr Michael Gerlinger (Germany); Mr Hendrik Willem Kesler (The Netherlands)

*Football*

*Termination of the employment contract without just cause by the player*

*Applicable law*

*Status of the player*

*Application of Art. 17 and 18 RSTP to minors*

*Validity of a contract tacitly approved by the parents of a minor*

*Validity of a contract concluded for a term in excess of the maximum allowed duration*

*Validity of a contract containing an excessive penalty clause*

*Validity of a contract containing the requirement of a medical check-up*

*Factors to consider a penalty clause as “excessive”*

1. **Article 187 para. 1 of the Swiss Private International Law Act (“PILA”) establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA. The choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. As a matter of principle, in agreeing to arbitrate a dispute according to the CAS Code, the parties submit to the conflict-of-law rules contained therein, in particular to Article 58 of the CAS Code. An indirect choice of law is – in principle – always superseded by a direct choice of law. The reason why is that – generally speaking – the rules of the arbitral institutions do not wish to limit the parties’ autonomy in any respect. This, however, is not true in the context of appeals arbitration procedures before the CAS. It follows from Article R58 of the CAS Code that the “*applicable regulations*” are applicable to the dispute irrespective of what law the Parties have agreed upon. The Parties cannot derogate from this provision if they want their dispute to be decided by the CAS. Therefore, Article R58 of the CAS Code takes precedence over any tacit choice-of-law that should result in a national law being applicable and, thus, the “*applicable regulations*” apply primarily.**
2. **If the travel expenses of a player, his accommodation and board and his business related expenses are all covered by a club, in addition to the basic payments received each month and the bonuses earned for playing football, then the player is paid more for his footballing activity than the expenses he effectively incurs. If, in addition, the player is under a written contract with the club, the player is a professional.**
3. **Unlike Article 19, which is particular to minors, Articles 17 and 18 of the FIFA**

**Regulations on the Status and Transfer of Players (RSTP) are intended to apply to any professional player, whether a minor or an adult.**

4. **If two contracts have the same contents but the parents of a minor player only signed one of them, and it appears from the circumstances of the case that they were aware of the contents of the other contract, Article 19a (1) of the Swiss Civil Code providing that the legal representative of a minor may approve tacitly in advance a contract entered into by the minor finds application and the other contract is not rendered invalid as a result of the non-signing by the parents.**
5. **A contract concluded for a term in excess of the maximum 3 years prescribed by Article 18.2 RSTP for minors is not entirely invalid; only the clause in the contract dealing with the duration of the contract is. However, if such clause was effectively struck out, then the contract would have no duration. The intention of Article 18.2 could not be for such a contract to then run for longer, possibly in perpetuity. The logical effect of Article 18.2 RSTP, is therefore to reduce the term to the maximum allowed and for the contract to remain legally valid.**
6. **A preliminary contract is a binding contract in its own right. Under Swiss law (Article 163 CO), the parties are free to agree upon the level of a penalty clause to be included in such contract. However, if a court determines that this amount is excessive, it may reduce the amount. This does not, however, render the contract invalid.**
7. **The effect of Article 18.4 RSTP that forbids a club to subject the validity of a contract to a successful medical examination is not to render the entire contract invalid. Only the clause containing the medical check condition precedent is to be disregarded.**
8. **There is no definition in Swiss law as to what is “excessive” for a penalty clause. However, jurisprudence suggests that panels should consider such matters as the degree of fault and the economic situation of the parties, the nature and duration of the contract and the lack of reciprocity.**

## **I. PARTIES**

1. **Hakan Çalhanoğlu (the “Player”) is a professional football player currently playing for Bayer Leverkusen in Germany.**
2. **Trabzonspor FC (“Trabzonspor”) is a football club with its registered office in Trabzon, Turkey. Trabzonspor is currently competing in the Super Lig. It is a member of the Turkish Football Federation (“TFF”), which in turn is affiliated to Fédération Internationale de Football Association.**

3. Fédération Internationale de Football Association (“FIFA”) is the governing body of world football and has its registered office in Zurich, Switzerland.

## II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.
5. On 30 April 2009, the Player, the Player’s father and the German club, Karlsruher Sport-Club (“Karlsruhe”) concluded a concluded a three-year employment contract entitled “Fördervertrag” (the “Development Contract”) and an annex, both valid as of 1 July 2009 until 30 June 2012. The Development Contract also included an option to extend the term for a fourth year. The extension option stated as follows:

*“Club and player commit to continue this contract with the current contractual terms for one more year (maximum two), if the other party wishes to do so. Club and player must declare in writing if they wish to exercise the option before 30 April of the year of the expiry of the contract. If neither the club nor the player declares said will within the time limit the contract ends on the date mentioned-above in point 2” [translated from the original German].*

6. In accordance with the Development Contract, Karlsruhe agreed to pay to the Player the following amounts:
  - EUR 250 per month for the 2009/2010 season;
  - EUR 300 per month for the 2010/2011 and 2011/2012 seasons;
  - EUR 400 per month for the 2012/2013 season, if the option was exercised;

In addition to his basic monthly salary, the Player was entitled to EUR 150 per month for transportation expenses, plus variable bonus payments based on individual participation and team performances.

7. On 30 April 2011, the Player, the Player’s parents, and Trabzonspor signed a document (the “Preliminary Agreement”) which, *inter alia*, stated:

*“Parties wishes to sign a Professional Football Contract with the Player in order to register him as Trabzonspor’s player before the Turkish Football Federation; beginning from 2012-2013 1st Transfer until 31.05.2017” [translated from the original Turkish].*

8. In accordance with Article 2 of the Preliminary Agreement, Trabzonspor undertook to pay the Player the following amounts:
  - EUR 320,000 for the 2012/2013 season. EUR 100,000 was to be payable *“in one month after signing of this agreement”*, EUR 100,000 was payable *“in June”* and EUR 120,000 was payable in 12 monthly instalments between June 2012 and June 2013;
  - EUR 144,000 for the 2013/2014 season;
  - EUR 168,000 for the 2014/2015 season;
  - EUR 192,000 for the 2015/2016 season;
  - EUR 216,000 for the 2016/2017 season.
9. Article 3.1 of the Preliminary Agreement stated that the validity of the said agreement *“shall end when the Professional Football Player’s Contract, which will define the parties’ all rights and obligations, is registered to TFF”*.
10. Article 3.3 of the Preliminary Agreement stated:

*“If the Player would not sign the agreement which is going to be registered at Turkish Football Federation at the beginning of the 2012-2013 season and/or signs another employment contract which will register him to another Club, then the Player accepts and undertakes to pay 1.000.000.-Euro (one million Euro) (The down payment which is going to be paid after signing of this Preliminary Agreement is also included and this penalty clause is valid only if this down payment is made) penalty clause and irrevocably declares that this amount is not excessive”*.
11. Article 4 of the Preliminary Agreement stated:

*“This contract is in form of a preliminary agreement, the remuneration which is undertaken to be paid in this contract shall be valid only if the Player passes through a check-up and the signature of Professional Football Player Contract in 4 copies to be submitted and registered to Turkish Football Federation”*.
12. On 2 May 2011, Trabzonspor and Mr. Bektas Demirtas (the “Player’s Agent”), signed a document entitled “Standardvertrag für Spielervermittler” (English translation: Standard contract for players’ agents) to negotiate a transfer of the Player to Trabzonspor (the “Agent Agreement”), including the following clause:

*“To be entitled to receive the commission it is sufficient that the talks and negotiations were conducted by the player’s agent. It is no requirement that the parties sign a professional footballers contract and that the player will be registered with Trabzonspor”* [translated from the original German].
13. On an unknown date, the Player and Trabzonspor signed an employment contract (the “Trabzonspor Contract”), valid from 1 July 2012 until 31 May 2017, which included the salary arrangements of the Preliminary Agreement.

14. The Trabzonspor Contract contained the following clause:

*“7 D) In case the player signs a contract in order to be registered in any other club before the 1<sup>st</sup> transfer period of 2012-2013 season or in this period, he unconditionally and irrevocably accepts and agrees to pay a penal sum of 1.000.000.- € to Trabzonspor. Moreover he also accepts and agrees that this is not an excessive penalty”.*

15. On 10 March 2012, the Player and Karlsruhe signed an employment contract (the “Karlsruhe Contract”) valid as of 1 July 2012 until 20 June 2016.
16. On 13 August 2012, Karlsruhe and the German club, Hamburger SV (“Hamburg”), concluded a transfer agreement for the definitive transfer of the Player. On the same date, these two clubs also concluded a loan agreement, whereby the Player was loaned back from Hamburg to Karlsruhe as of 13 August 2012 until 31 December 2012, with an option to extend the loan until 30 June 2013.
17. On 13 August 2012, the Player signed a new employment contract with Karlsruhe, covering the loan period from 13 August 2012 until 30 June 2013. The contract included a monthly salary of EUR 250 plus significant performance bonuses (EUR 2,500 for every victory and EUR 750 for every draw).
18. On that same day, the Player also signed an employment contract with Hamburg, which was suspended for the period of the loan of the player to Karlsruhe, from 13 August 2012 until 30 June 2016. The contract included a monthly salary of EUR 35,000.
19. On 4 July 2014, the Player was transferred from Hamburg to Bayer Leverkusen. The Player signed an employment contract with Bayer Leverkusen, from 1 July 2014 until 30 June 2019. That contract included the following monthly salaries:
- EUR 180,000 for the period of 1 July 2014 until 30 June 2016;
  - EUR 200,000 for the period of 1 July 2016 until 30 June 2019.

### **Proceedings before FIFA**

20. On 2 April 2013, Trabzonspor lodged a claim against the Player and Karlsruhe before the FIFA Dispute Resolution Chamber (the “FIFA DRC”). Trabzonspor alleged that the Player was in breach of contract without just cause and further alleged that Karlsruhe induced the Player to breach the contract. The following prayers for relief were requested:

*“- to order the Player to refund EUR 100,000 corresponding to a “down payment” made by Trabzonspor to the Player on 2 June 2011, plus 5% interest p.a. as of 2 June 2011;*

*- to order the Player to pay EUR 1,000,000 corresponding to the “penalty clause” agreed upon in the Preliminary Agreement and in the Trabzonspor contract;*

- to declare that Karlsruhe is jointly and severally liable for the payment;
- to impose “a six-months sporting sanction” on the Player;
- to impose a ban on Karlsruhe to register players for two registration periods;
- to condemn both the Player and Karlsruhe to bear the costs of the proceedings”.

21. On 28 January 2016, the FIFA DRC rendered a decision (the “Appealed Decision”) as follows:

- “1. *The claim of the Claimant, Trabzonspor Futbol, is rejected.*
2. *The Respondent I, Hakan Çalhanoglu, is found to have terminated the employment contract with the Claimant without just cause within the protected period.*
3. *A restriction of four months on his eligibility to play in official matches is imposed on the Respondent I. This sanction applies with immediate effect as of the date of notification of the present decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs”.*

22. On 14 March 2016, the parties were notified on the grounds of the Appealed Decision.

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

23. On 15 March 2016, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”), the Player filed a Statement of Appeal against Trabzonspor and FIFA challenging the Appealed Decision at the Court of Arbitration for Sport (the “CAS”). The matter was given the reference CAS 2016/A/4495. The Player also filed a request for provisional measures.
24. As a provisional measure, the Player requested that the four-month ban on playing contained in the Appealed Decision be stayed, pending the outcome of the proceedings at the CAS.
25. On 16 March 2016, FIFA wrote to the CAS Court Office stating that they did not object to the Player’s request to stay the Appealed Decision.
26. On 16 March 2016, the CAS Court Office wrote to the Parties to confirm that the Appealed Decision would be stayed pending the outcome of the proceedings at the CAS.
27. On 28 March 2016, in accordance with Articles R47 and R48 of the CAS Code, Trabzonspor filed a Statement of Appeal against the Player at the CAS, also challenging the Appealed Decision. The matter was given the reference CAS 2016/A/4535.

28. On 7 April 2016, the CAS Court Office wrote to the Parties informing them that two Statements of Appeal had been filed in relation to the Appealed Decision, and asked the parties if they agreed, in accordance with Article R52 of the CAS Code, to consolidate the procedures CAS 2016/A/4495 and CAS 2016/A/4535.
29. On 9 April 2016, Trabzonspor wrote to the CAS Court Office agreeing to consolidate the procedures.
30. On 11 April 2016, FIFA wrote to the CAS Court Office agreeing to consolidate the procedures.
31. On 11 April 2016, pursuant to Article R51 of the CAS Code, Trabzonspor submitted its Appeal Brief with the CAS, in the matter of CAS 2016/A/4535. The Appeal Brief contained the following prayers for relief:
  1. *to declare the Appeal admissible and founded.*
  2. *to set aside the FIFA DRC decision of III.1.*
  3. *to declare that the Player shall pay 100.000.-Euro plus interest of 5% p.a. accrued from 03.06.2011 until its effective date of payment.*
  4. *to declare that Trabzonspor AS is entitled to receive 1.000.000-Euro of compensation*
  5. *to condemn the respondent party to pay the costs of the proceedings as well as the court office fee.*
  6. *To condemn the respondent party to pay the legal costs which is fixed ex aequo et bono at CHF 10.000”.*
32. On 12 April 2016, the CAS Court Office informed the Parties that the procedures had been consolidated.
33. On 13 April 2016, pursuant to Article R51 of the CAS Code, the Player submitted his Appeal Brief to the CAS Court Office, in the matter of CAS 2016/A/4495. The Appeal Brief contained the following prayers for relief:

*“The appealed decision is therefore incorrect and must be set aside upon the Appeal”.*
34. On 3 May 2016, pursuant to Article R55 of the CAS Code, the Player submitted his Answer to the CAS Court Office, in the matter of CAS 2016/A/4535, requesting the following prayers for relief:
  1. *The Appeal of Trabzonspor FC is dismissed.*
  2. *Trabzonspor FC is ordered to pay the costs of the CAS procedure to contribute to the Respondent’s legal costs with an amount of at least 10.000,00 CHF”.*

35. On 9 May 2016, pursuant to Article R55 of the CAS Code, Trabzonspor submitted its Answer to the CAS Court Office, in the matter of CAS 2016/A/4495, requesting the following prayers for relief:

*“1. to declare the Appeal inadmissible and reject the claims of the Appellant.*

*2. to condemn the Appellant party to pay the costs of the proceedings as well as the court office fee.*

*3. to condemn the respondent party to pay the legal costs which is fixed ex aequo et bono at CHF 10.000”.*

36. On 9 May 2016, pursuant to Article R55 of the CAS Code, FIFA submitted its Answer to the CAS Court Office, in the matter of CAS 2016/A/4495, requesting the following prayers for relief:

*“1.1. In light of the above considerations, we insist that the decision passed by the DRC was fully justified. We therefore request that the present appeal be rejected and the decision taken by the DRC on 28 January 2016 be confirmed in its entirety.*

*1.2. Furthermore, all costs related to the present procedure as well as the legal expenses of the Second Respondent shall be borne by the Appellant”.*

37. On 11 May 2016, pursuant to Article R54 of the CAS Code and on behalf of the deputy president of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to these cases was constituted as follows:

President: Mr. Mark A. Hovell, Solicitor in Manchester, United Kingdom

Arbitrators: Dr. Michael Gerlinger, Attorney-at-law in Munich, Germany

Mr. Hendrik Willem Kesler, Attorney-at-law in Enschede, Netherlands

38. On 22 September 2016, Mr Lars Kupper (“Mr Kupper”), the head of the legal department at Bayer Leverkusen, wrote to the CAS Court Office requesting to attend the hearing.

39. On 22 September 2016, the Player wrote to the CAS Court Office noting that he did not object to the presence of Mr Kupper at the hearing.

40. On 27 September 2016, Trabzonspor wrote to the CAS Court Office noting that it did not object to the presence of Mr Kupper at the hearing, however, on the same day, FIFA wrote to the CAS Court Office objecting to the presence of Mr Kupper at the hearing.

41. On 29 September 2016, the CAS Court Office sent the Order of Procedure to the Parties.

42. On 30 September 2016, the CAS Court Office wrote to the Parties informing them that both the Player and Trabzonspor had duly signed the Order of Procedure.

43. On 3 October 2016, the CAS Court Office wrote to the Parties informing them that FIFA had duly signed the Order of Procedure.
44. A hearing was held on 5 October 2016 at the CAS Court Office in Lausanne, Switzerland. The Parties did not raise any objection as to the composition of the Panel. The Panel were all present and were assisted by Mr. Daniele Boccucci, CAS Counsel. The following persons also attended the hearing:
- i. For the Player: Dr. Joachim Rain, Counsel;
  - ii. For Trabzonspor: Ms. Anil Gürsoy Artan, Head of Legal and Ms. Aysin Karahasanoğlu, Director of Football Administrative Affairs;
  - iii. For FIFA: Mr. Patrick Schmidiger and Mr. Mario Flores Chemor, both Legal Counsel at FIFA.
45. At the beginning of the hearing, the Player's Counsel noted that the procedures had been consolidated, but that FIFA was not a party to CAS 2016/A/4535, so any submissions it made in that matter should be disregarded by the Panel.
46. The Player's Agent was also present at the hearing, as a witness for the Player. Mr. Kraycher, Karlsruhe's former Sports Director, attended by telephone as a witness for the Player. They both gave evidence before the Panel and were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses. The Parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. After the Parties' final, closing submissions, the hearing was closed and the Panel reserved its detailed decision to this written award.
47. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present award.

#### **IV. SUBMISSIONS OF THE PARTIES**

48. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

## **A. The Player's Submissions**

In summary, the Player submitted the following in support of his Appeal and in Answer to the Appeal of Trabzonspor.

### ***i. The Player's status as a professional or amateur***

49. The Player submitted that he was a professional, rather than an amateur player, from the time he signed the Development Contract on 3 July 2009. The Player referred to his FIFA Player Passport, as well as a document from the Deutsche Fußball Liga ("DFL") in support of his argument.
50. The registered status of a player is the most decisive criterion when determining whether that player is a professional or an amateur. The FIFA Player Passport as well as the document from the DFL confirmed that the Player was registered as a professional with Karlsruhe from 3 July 2009.
51. Article 2.2 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") states as follows:  
  
*"A professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs. All other players are considered to be amateurs".*
52. At the time Trabzonspor approached the Player, the Player was earning a basic gross monthly salary of EUR 300, receiving full accommodation and board, and an additional EUR 150 per month as a contribution to traveling costs. The Player submitted that this compensation package was more than the expenses he incurred.
53. The Player submitted that under Article 2 of the FIFA RSTP, it was not necessary that a player make his living from what he earns from the salary contained in his football contract or that the salary received corresponds to what an average employee may earn in the respective country. Rather, it was simply enough that a player earns more than he needs to cover his football-related expenses. As the Player's expenses were already covered by Karlsruhe before factoring in his monthly salary, it is clear that the Player was a professional.

### ***ii. The Preliminary Agreement and the Trabzonspor Contract are null and void***

54. The Player submitted that the FIFA DRC failed to differentiate between the Preliminary Agreement and the Trabzonspor Contract and that each agreement must be examined individually in order to determine their validity, or as the Player submits, the lack thereof.
55. As it is uncontested that the Player signed the Preliminary Agreement when he was seventeen years old and a minor, the Preliminary Agreement violates Article 18.2 of the FIFA RSTP, which states:

*“Players under the age of 18 may not sign a professional contract for a term longer than three years. Any clause referring to a longer period shall not be recognised”.*

56. The Preliminary Agreement was clearly not a final and binding employment contract, and the Player submitted several reasons in support of its argument:

*“- It is named a “preliminary agreement”*

*- According to its Article 3.1, its validity shall expire once a (separate and final) professional football player’s contract is registered*

*- Its Article 3.3 explicitly includes the possibility, that the Appellant does not sign a further, separately required contract and therefore is not bound to the Respondent*

*- Its Article 3.4 includes the condition of a successful medical examination, which is not only a condition that prevents the contract from being final and binding, but by the way also another violation of the relevant regulations by the Respondent, this time of Article 18.4 FIFA RSTP that explicitly prohibits such conditions”.*

57. The Player submitted that Trabzonspor issued the Preliminary Agreement and the Trabzonspor Contract on the same day, and that this indicates that Trabzonspor *“does not regard the preliminary agreement as a final and binding contract (if so, the Respondent could have easily waited to have the Appellant sign the ‘contract’ at a later stage when the Appellant was no longer a minor)”*.

58. The Player submitted that Trabzonspor Contract was *de facto* null and void on the premise that the Player signed the Trabzonspor Contract when he was still a minor. The Player points to German and Turkish law in support of his argument that *“contracts concluded by minors (defined to be younger than 18) without explicit approval by their parents are null and void”*. The Trabzonspor Contract was not signed by the Player’s parents.

***iii. The Player did not breach his contract***

59. The Player submitted that there are *“thousands of cases ... every year”* in which players enter into employment contracts with new clubs while they are currently under contract with existing clubs and these contracts contain provisions that the validity of the employment contract with the new club is subject to the old and new clubs concluding a transfer agreement for the player. The Player admitted that no such provision was included in the Trabzonspor Contract, but that the inclusion of this provision was a standard practice. The Player noted that it was Trabzonspor that drafted the Trabzonspor Contract, and submitted that it was Trabzonspor’s responsibility to include this *“necessary and usual”* provision.

60. The Player cited Trabzonspor’s submission before the FIFA DRC dated 17 October 2014 and marked as “Exhibit 6”, which states:

*“The representative of the player stated that Trabzonspor A.S should have known the risk of not completing the transfer. The client was fully aware of that risk ...”.*

61. Trabzonspor, referring to itself as *“the client”*, admitted that it *“was fully aware of the risk”*, and the Player submitted that this is proof that Trabzonspor was aware of the possibility that the transfer may not be completed as a result of failing to reach a transfer agreement with Karlsruhe for the Player. It naturally followed, therefore, that Trabzonspor was aware that the Trabzonspor Contract could only be executed if Karlsruhe agreed to transfer the Player to Trabzonspor. Of course, Karlsruhe never agreed to transfer the Player to Trabzonspor and therefore the Player could not have breached his contract with Trabzonspor.
62. The Player submitted that he could not have breached his contract with Trabzonspor simply by complying with his existing contract with Karlsruhe, which pre-dated the Trabzonspor Contract. The contract between the Player and Karlsruhe ran from 30 April 2009 through at least 30 June 2012 (with an additional bilateral option for a further year). The Preliminary Agreement and Trabzonspor Contract were signed by the Player on 30 April 2011, more than a year before the Karlsruhe Contract was set to expire.
63. The Player further submitted that *“an intention to breach a contract is obviously a precondition to impose the severe sanctions provided in Art. 17 RSTP”*. As the Player lacked the intent to breach his contract with Trabzonspor, the FIFA DRC erred in imposing sporting sections on the Player under Article 17 of the FIFA RSTP.
64. In the event that the Panel finds that a breach occurred, the Player submitted that it would be the Karlsruhe Contract that was breached and it was only because Trabzonspor induced the Player to breach his contract with Karlsruhe.

***iv. The Player does not owe Trabzonspor compensation***

65. The Player submitted that the FIFA DRC correctly ruled that he was not liable to pay any compensation to Trabzonspor.
66. The Player submitted that even if the Panel finds that there had been a valid contract in place and that the Player breached this contract, both of which the Player denies, that the compensation clauses included in the Trabzonspor Contract *“are obviously unilateral penalty or liquidate damages clauses in the sense of Article 17.2 RSTP”*. Generally, unilateral penalty and liquidated damages clauses are void because they grant significant damages to a club in circumstances where, if the situation was reversed, the club would not suffer any consequences for the same behaviour.
67. In the unlikely event that the Panel finds that compensation is owed to Trabzonspor, the Player submitted that the requested amount of EUR 1,000,000 is disproportionately excessive to the circumstances of the matter at hand.

68. Additionally, the Player submitted that Trabzonspor was not entitled to claim reimbursement in the amount of EUR 100,000 already paid to the Player.

**v. *Sporting sanctions***

69. The Player submitted that the FIFA DRC erred in issuing him a four-month ban. The Player cited Article 17.1 of the FIFA RSTP, which states:

*“In all cases, the party in breach shall pay compensation”.*

70. The Player also cited Article 17.2 of the FIFA RSTP, which states:

*“In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period”.*

71. The Player submitted that the wording of Article 17, and specifically the “*in addition*” qualifier in Article 17.3, clearly shows that if a player is not liable to pay compensation, he cannot have sporting sanctions imposed on him. Sporting sanctions can only be considered in cases where the FIFA DRC found it appropriate to impose the obligation to pay compensation. As the FIFA DRC did not find the Player liable to pay compensation, it should not have imposed sporting sanctions on the Player.

72. The Player submitted that the FIFA DRC also erred in holding that a four-month suspension was the mandatory minimum sporting sanction that can be imposed on a player for breach of contract during the protected period. The Player cited CAS 2007/A/1359 in support of this argument, in which that panel found:

*“The Appellant considers that the DRC disregarded Article 17 par. 3 of the FIFA regulations by not imposing a sporting sanction on the player. The said provision states that ‘sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period’. In this respect, the DRC decision considered that the above mentioned provision gives the competent body the power to decide to impose a sporting sanction on a player found to be in breach of contract during the protected period, but not the obligation to do so”* [emphasis added by the Player].

73. The Player also referred to FIFA’s own Commentary on the FIFA RSTP (“FIFA Commentary”). The FIFA Commentary on Article 17 states:

*“A player who breaches his contract during the protected period risks a restriction ...”.*

74. The Player submitted that the language used, i.e. “*risks*”, implied that such a restriction may be imposed, but it was certainly not mandatory, as the FIFA DRC stated in the Appealed Decision.

75. The FIFA DRC should have exercised its discretion as to whether or not to impose sporting sanctions and decided not to sanction the Player, taking into account the fact that the Player was a minor when he signed both the Preliminary Agreement and the Trabzonspor Contract.
76. The Player referred to the FIFA Commentary once again in support of his argument that in general, a restriction on a player's eligibility to play for his new club shall start from the first match of the championship of the new club in the new season. The Player submits that "*new club*" refers to "*the club that is the next club after the club whose contract with the player had been breached*". The Player submitted that Bayer Leverkusen is the Player's "*current club*" rather than his "*new club*".
77. The FIFA DRC failed to take into account that Bayer Leverkusen would be indirectly punished by the imposed sanction on the Player, despite not being liable in any regard. The intention of Article 17 was to deprive a player's new club of the player's services as the new club is regularly presumed to have induced the player to breach his contract. In the present case, Bayer Leverkusen was not involved at all and therefore, this sporting sanction should not have been imposed.
78. The alleged breach of contract dates back to the 2011/2012 season. The Player submitted that "*it is a general principle in criminal law, but for example also in doping cases, that the period expired between the alleged violation of a rule and the sanction for such violation is a criterion to be considered as well. After four, respectively five years and two subsequent moves to other clubs (from Karlsruhe SC to Hamburger SV, from Hamburger SV to Bayer 04 Leverkusen), it is not adequate to impose any sportive sanction anymore ...*".
79. For the reasons listed above, the Player submitted that the FIFA DRC erred when imposing sporting sanctions on the Player.

## **B. Trabzonspor's Submissions**

In summary, Trabzonspor submitted the following in support of its Appeal and in Answer to the Appeal of the Player.

### ***i. The Player's status as a professional or amateur***

80. Trabzonspor submitted that the Player was an amateur when he was playing with Karlsruhe under the Development Contract.
81. Trabzonspor submitted that the primary purpose of development contracts "*is to keep the child more focused on academic studies than footballing activity but to keep them playing football in case the child decides to choose football as a professional job*". Development contracts are not designed for professional players, but rather for amateur players who are undecided as to whether to pursue a professional career in football.

82. Trabzonspor submitted that the Player's remuneration under the Development Contract was too low to satisfy the criteria under Article 2 of the FIFA RSTP that a player is a professional when he has a written contract with a club and is paid more than the expenses he incurs. Trabzonspor pointed out that the monthly salaries and transportation contributions are in gross amounts. Trabzonspor submitted that the net amounts would be much less.
83. Trabzonspor submitted that the minimum wage in Germany was between EUR 1,000 and EUR 1,300 per month for the years 2010, 2011, and 2012. Trabzonspor further submitted that in light of the minimum wage being at least EUR 1,000 per month, it is impossible to call a player a professional if he is earning approximately EUR 400 in gross salary and compensation.
84. Trabzonspor submitted that in order to determine the Player's status as an amateur or professional, the Player's age, club, and a comparison between the terms of the Development Contract and the Player's subsequent contracts with Trabzonspor and Hamburg are enough to decide on his status. There was no need for the FIFA DRC to examine the wording of the Development Contract.
85. Once Trabzonspor identified the Player as a talented youngster they wanted to sign, Trabzonspor submitted that they searched for the Player's status, contacted the Player's Agent, and asked the Player's Agent about the Player's legal status and whether the Player would be available to transfer to Trabzonspor in accordance with the FIFA RSTP. Trabzonspor further submitted that the Player's Agent informed Trabzonspor that the Player was available for transfer and playing as an amateur for Karlsruhe.
86. Trabzonspor submitted that in 2011, they asked an official at the TFF for help in confirming the Player's status. That TFF official contacted a colleague at the DFL and verbally confirmed that the Player was an amateur. This was confirmed again in 2012 via e-mail.
87. Trabzonspor submitted that when the Player's Agent offered his services to Trabzonspor in respect of the Player's transfer, Trabzonspor refused because the Player's Agent was representing the Player and to be paid by Trabzonspor would violate the "*Player Agent's Regulations of FIFA*". Only when the Player's Agent informed Trabzonspor that he terminated his representation contract with the Player did Trabzonspor enter into a representation contract with the Player's Agent.
88. Trabzonspor agreed to pay the Player's Agent EUR 175,000 for his services. Trabzonspor paid an initial EUR 100,000, but have refused to pay the remaining EUR 75,000 as the Player did not complete the transfer. There is a pending case before FIFA on this matter between Trabzonspor and the Player's Agent.
89. Trabzonspor exercised due diligence to inform itself of the Player's playing and contractual status. Trabzonspor approached the Player's Agent and was informed by him that the Player and his family were eager to sign with Trabzonspor, that he was an amateur player, and that he

was not playing for Karlsruhe's first team. Additionally, Trabzonspor sought confirmation from the TFF and asked for the Player's Passport and confirmation from the DFL.

90. For the reasons stated above, Trabzonspor submitted that the FIFA DRC erred in finding that Trabzonspor failed to exercise due diligence regarding the Player's status and contractual situation.

**ii. Payment of EUR 100,000 under the Preliminary Agreement**

91. Under Article 3.4 of the Preliminary Agreement, Trabzonspor was to pay the Player EUR 100,000 as an advance payment of the Player's receivables for the 2012/13 season. Article 3.4 stated as follows:

*"3.4 [Free Translation] The Player irrevocably agrees that the 100.000.-Euro down payment which is made on the signature date of this agreement has been paid as a part of his 2012-2013 receivables".*

92. The payment was made in full on 2 June 2011. The Player has never denied that he received this payment nor has the Player made any comment on this payment during the proceedings before the FIFA DRC. However, the FIFA DRC held that since there was no clause in the Preliminary Agreement regarding reimbursement, Trabzonspor was not entitled to recover the payment. Trabzonspor submits that this was an untenable interpretation.
93. The Player knew that the payment was made specifically as an advance on his future services, he refused to reimburse Trabzonspor after refusing to complete the transfer from Karlsruhe to Trabzonspor. This was a case of unjust enrichment, which is foreseen under Article 62 of the Swiss Code of Obligations ("CO").
94. As the Player never rendered his services to Trabzonspor, he has no just claim to the payment. Trabzonspor is entitled to reimbursement under Article 65 CO.
95. For the reasons stated above, Trabzonspor requested that the Panel orders the Player to reimburse Trabzonspor in the amount of EUR 100,000 plus interest of 5% p.a. from 2 June 2011 until the date of effective payment.

**iii. Additional compensation**

96. The Development Contract did not grant the Player professional status, and as a result, Trabzonspor did not violate any part of the FIFA RSTP. As the Player clearly breached the Trabzonspor Contract, Trabzonspor has a valid claim to receive compensation.
97. Trabzonspor submitted that even if the Player was a professional, Trabzonspor would still be entitled to receive compensation. Article 3.3 of the Trabzonspor Contract clearly states that the Player must pay EUR 1,000,000:

*“3.3 If the Player would not sign the agreement which is going to be registered at Turkish Football Federation at the beginning of the 2012-13 season 1<sup>st</sup> Transfer Period and/or signs another employment contract which will register him to another Club, then the Player accepts and undertakes to pay 1.000.000.-Euro (onemillion Euro) (The down payment which is going to be paid after signing of this Preliminary Agreement is also included and this penalty clause is valid only if this down payment is made) penalty clause and irrevocably declares that this amount is not excessive”.*

98. Trabzonspor submitted that since the Player did not honour the Preliminary Agreement and instead signed another employment contract with Hamburg for the 2012-2013 season, the Player must pay Trabzonspor EUR 1,000,000 as compensation. Trabzonspor also referred to Article 17 of the FIFA RSTP in support of its claim.
99. For the reasons stated above, Trabzonspor submitted that the FIFA DRC erred in failing to award Trabzonspor compensation in the amount of EUR 1,000,000.

### **C. FIFA’s Submissions**

100. In summary, FIFA submitted the following in support of its defence of the Player’s Appeal.

#### ***i. The validity of the Preliminary Agreement and the Trabzonspor Contract***

101. FIFA firstly submitted that the Player did not raise any relevant or cogent new arguments within the present appeal procedure, and as a result, the decision of the FIFA DRC should be upheld.
102. FIFA noted that the Trabzonspor Contract does not bear any date and the assumption that it was signed simultaneously with the Preliminary Agreement was merely based on declarations from the Player, the Player’s Agent and a lawyer who was apparently involved. The Player has not provided any documentary confirmation or evidence to support this assumption. FIFA submitted that the probative value of personal testimonials is low, and are not considered to be sufficient evidence that the Player signed the Trabzonspor Contract on 30 April 2011.
103. FIFA submitted that the Trabzonspor Contract was signed between 30 April 2011 and 7 February 2012 (while the Player was 17 years old) or between 8 February 2012 and 9 March 2012 (after the Player turned 18 years old). One timeframe was no more plausible than the other.
104. However, even if the Player did sign the Trabzonspor Contract while he was still 17 years old, FIFA submitted that *“this has absolutely no impact on the right conclusion reached by the DRC that the employment contract is valid and binding for both signing parties”*.
105. FIFA noted the Player’s reference to German law to support its argument that contracts concluded by minors without the explicit approval of their parents are null and void. However, FIFA refers to Article 66.2 of the FIFA Statutes, which states, in relevant part:

*“The provisions of the CAS Code of Sport-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.*

106. As the Trabzonspor Contract does not contain any choice of law mutually agreed upon by the Parties, the applicable law in the present appeal was therefore Swiss law. FIFA referred to CAS jurisprudence to support its position, specifically CAS 2013/A/3309, CAS 2013/A/3444, and CAS 2014/A/3848. Additionally, FIFA submitted that the Player’s German nationality had absolutely no influence on the determination of the applicable law.

107. FIFA referred to Articles 19.1 and 19a.1 of the Swiss Civil Code, which state:

*“art. 19 par. 1: Persons who are capable of judgment but lack the capacity to act [i.e. are not yet 18] may only enter into obligations or give up rights with the consent of their legal representative”*

*“art. 19a par 1: Unless the law provides otherwise, the legal representative may consent expressly or tacitly in advance or approve the transaction retrospectively” [emphasis and bracketed commentary added by FIFA].*

108. FIFA also referred to Articles 11.1 and 11.2 CO, which state:

*“art. 11*

*(1) The validity of a contract is not subject to compliance with any particular form unless a particular form is prescribed by law.*

*(2) In the absence of any provision to the contrary on the significance and effect of formal requirements prescribed by the law, the contract is valid only if such requirements are satisfied”.*

109. According to Swiss law, in principle, a minor does need the consent of his or her legal representative in order to enter into a contract. However, this consent does not need to be explicit nor does it need to be given prior to the conclusion of the contract. The validity of a contract does not depend on the execution of formal pre-requisites.

110. As the Player claimed that the Preliminary Agreement and the Trabzonspor Contract were signed on the same date, it was clear that even though the Trabzonspor Contract does not bear the signature of the Player’s parents, the Player’s parents would have undoubtedly consented to the Player entering into a professional relationship with Trabzonspor. This was proven by the Player’s parents signing the Preliminary Agreement, in which they gave their express consent to this professional relationship, especially considering that the Preliminary Agreement and Trabzonspor Contract were exactly the same with respect to the duration and financial conditions of the relationship.

111. FIFA also referred to the Player’s Appeal Brief, in which the Player mentioned that “... upon instruction of his father signed both the preliminary agreement and the contract [...] at the same time” [emphasis added by FIFA].

112. FIFA averred that German law does not apply to the present matter, but even if it did, the statutes the Player cited in support of his argument that the contract was null and void were misquoted and do not actually support the Player's argument. FIFA cited additional provisions of German law in support of its position that the Trabzonspor Contract would be valid and binding even if German law applied.
113. FIFA rejected the Player's argument that the Trabzonspor Contract violated Article 18.2 of the FIFA RSTP, and was therefore invalid. FIFA submitted that Article 18.2 is clear on the point that when a minor player signs an employment contract with a club for a term longer than three years, the clause stipulating the excessive duration of the contract shall individually be disregarded, and all other contractual terms will remain valid for a period of time limited to three years. FIFA cited CAS 2008/A/1739 in support of its position.
114. FIFA also rejected the Player's argument that the Trabzonspor Contract should be considered invalid as a result of Trabzonspor breaching Article 18.3. FIFA submitted that Trabzonspor's infringement of Article 18.3 has no impact on the validity of the Trabzonspor Contract nor did it annul the Player's own infringement of Article 18.5.
115. FIFA rejected the Player's argument that the Preliminary Agreement was invalid. FIFA submitted that the Preliminary Agreement, "*is a complete agreement, containing all the essential terms of the parties' future employment relationship, which can be separately considered as a fully valid and binding agreement between the parties, without the need of any further confirmation or ratification*".
116. In particular, the fact that the Preliminary Agreement contained an allegedly excessive penalty clause by no means invalidated the remaining terms of the agreement, which were still valid and binding, as voluntarily and rightfully agreed between the parties.
117. FIFA further rejected the Player's argument regarding the invalidity of the Preliminary Agreement based on a clause conditioning the agreement upon the completion of a successful medical exam in violation of Article 18.4 of the FIFA RSTP. It was only the specific clause that would be deemed invalid and the only way this would be invoked is where the club claimed the invalidity of a contract because a player did not pass a medical exam. FIFA submitted that the Player asserting this argument is completely illogical and undermines the purpose of the FIFA RSTP.
118. For the reasons listed above, FIFA submitted that both the Preliminary Agreement and the Trabzonspor Contract were valid and enforceable.

***ii. The Player's breach of contract***

119. FIFA rejected the Player's argument that it was impossible to breach any contract concluded with Trabzonspor, since, by remaining with Karlsruhe, the Player was merely complying with his previous employment contract with Karlsruhe. FIFA further rejected the Player's argument that Articles 17 and 18 of the FIFA RSTP are not applicable to minors.

120. FIFA submitted that according to well-established jurisprudence by the FIFA DRC, which has been confirmed by the CAS, “*unilateral extension options of contracts in favour of one party only are invalid as they violate the principle of parity of the parties and lead to an unjustified disadvantage of one of them*”. However, FIFA submitted that the option contained in the Development Contract was not a unilateral option, but rather an option dependent on the will of both parties, and therefore this principle does not apply.
121. The wording of the extension option contained in the Development Contract clearly showed that the option could only be executed if both parties declared in writing their wish to exercise it. Therefore, the Player did have the option of refusing to extend his contract with Karlsruhe and was by no means forced to extend his employment relationship with Karlsruhe. Additionally, the Player subsequently voluntarily entered into another employment contract with Karlsruhe – the Karlsruhe Contract – after he, according to the Player himself, had already signed the Preliminary Agreement and the Trabzonspor Contract.
122. For the reasons listed above, FIFA submitted that the Player’s argument that he could not have breached any contract with Trabzonspor since he was simply complying with his previous employment contract with Karlsruhe is illogical in addition to lacking any legal ground.
123. FIFA submitted that the restrictive interpretation by the Player that Articles 17 and 18 of the FIFA RSTP do not apply to minors artificially limits the scope of an essential principle of the FIFA RSTP, namely the protection and maintenance of contractual stability between professionals and clubs. FIFA further submitted that the Player’s assertion that Articles 17 and 18 do not apply to minors finds no support in either the FIFA RSTP or the relevant jurisprudence.

**iii. Sporting sanctions**

124. FIFA submitted that the sporting sanctions imposed upon the Player by the FIFA DRC were in line with Article 17.3 of the FIFA RSTP and were fully justified.
125. The wording of Article 17.3 clearly indicates that whenever a player is held liable for a breach of contract without just cause and occurring during the protected period, sporting sanctions shall, in principle, be imposed on such player by the FIFA DRC.
126. However, FIFA acknowledged that in practice, the FIFA DRC has adopted a more flexible application of Article 17.3 and takes the specific circumstances involved in each individual case brought to its consideration and leaves open the possibility of not applying sporting sanctions on a player found to be in breach of contract without just cause, even if such breach occurred during the protected period.
127. FIFA submitted that the well-established jurisprudence of the FIFA DRC assigned the competent body the “*power*”, but not the “*obligation*” to impose sporting sanctions on a player – or a club, for that matter – in these circumstances. The imposition of sporting sanctions is left

to the free discretion of the FIFA DRC. FIFA cited CAS 2007/A/1359 as confirmation of this position, as the panel found that this interpretation of the FIFA RSTP “*represents the real meaning of the provision as it is interpreted, executed and followed within FIFA*”.

128. FIFA rejected the Player’s argument that the FIFA DRC would not be allowed to apply sporting sanctions on a player simply because compensation was not additionally awarded to the club. The intention of Article 17.3 was to establish two possible consequences of a breach of contract on the part of the player, namely the payment of compensation to the damaged club and the imposition of sporting sanctions.
129. Considering that the FIFA DRC has discretion to decide on a case-by-case basis whether these consequences shall apply to a certain dispute, the FIFA DRC, taking into account the specific circumstances of each case, was free to decide whether these consequences apply together, separately, or if they even apply at all.
130. FIFA submitted that the FIFA DRC took into account the particular circumstances of the present matter and specifically as a result of Trabzonspor’s behaviour, deemed that no compensation would be payable. However, this by no means restricted the possibility of the FIFA DRC to decide for the application of sporting sanctions on the Player based on his own behaviour. FIFA noted that the Player’s decision to enter into more than one employment contract for the same period of time was a violation of Article 18.5 of the FIFA RSTP. Such a violation was considered by the FIFA DRC to be a particularly severe breach of contract on the part of the Player.
131. The FIFA DRC fully exercised its discretion in not granting Trabzonspor any compensation while also imposing sporting sanctions on the Player in the form of a four-month restriction on playing in official matches. Such discretion was within the FIFA DRC’s regulatory and jurisprudential limits, as it established very specific consequences to this particular breach of contract committed by the Player without just cause. These consequences were fair and adequate with regard to the present matter and proportionate to both the severe breach committed by the Player and the reproachable behaviour of Trabzonspor.
132. Regarding the Player’s argument that the FIFA DRC erred in “*assuming that the four months suspension is a minimum sanction to be applied mandatorily*”, FIFA submitted that Article 17.3 of the FIFA RSTP does not grant the FIFA DRC the discretion to reduce or prolong the period for which a player should be suspended from playing official matches beyond extending the four-month restriction on playing to a six-month suspension in the event of aggravating circumstances.
133. FIFA noted that Bayer Leverkusen was negatively affected by the Player’s suspension, even though it was not involved in the contractual dispute between the Player and Trabzonspor. However, FIFA rejected the Player’s argument that the imposition of a sporting sanction upon the Player is inappropriate as a result of the sanction negatively affecting Bayer Leverkusen.

134. FIFA submitted that the Player is not in charge of defending Bayer Leverkusen and is not permitted to invoke the alleged interests of a third party to defend his own position and interests. FIFA cited TAS 2015/A/4178 in support of its position.
135. For the reasons listed above, FIFA submitted that the FIFA DRC's decision to impose a four-month suspension on the Player was the correct application of the FIFA RSTP and a proportionate and justified conclusion, considering the facts of the case and the Player's own behaviour.

## V. JURISDICTION OF THE CAS

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

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

137. The jurisdiction of the CAS, which is not disputed, derives from Article 67.1 of the FIFA Statutes (2015 edition) as it determines that:

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

138. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the parties.
139. It follows that the CAS has jurisdiction to decide on the present disputes.

## VI. ADMISSIBILITY

140. The Appeals were filed within the 21 days set by Article 67.1 of the FIFA Statutes (2015 edition). The Appeals complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.
141. It follows that the Appeals are admissible.

## VII. APPLICABLE LAW

142. The Panel notes that the parties failed to agree on the law applicable to the dispute at hand. The Player cited German law, whereas FIFA argue that its Regulations should prevail, with Swiss law subsidiarily. Trabzonspor, at the hearing, submitted that Swiss law should apply.

143. Article 187 para. 1 of the Swiss Private International Law Act (“PILA”) provides – inter alia – that *“the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected”*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA (CAS 2014/A/3850, para. 48).
144. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. As a matter of principle, in agreeing to arbitrate a dispute according to the CAS Code, the parties submit to the conflict-of-law rules contained therein, in particular to Article 58 of the CAS Code (see CAS 2014/A/3850, para. 49; CAS 2008/A/1705, para. 9; CAS 2008/A/1639, para. 21). Whether such indirect choice of law can be accepted here is supported by the lack of any direct choice-of-law clause in favour of German law.
145. According to the predominant view in the legal literature, an indirect choice of law is – in principle – always superseded by a direct choice of law (see BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3<sup>rd</sup> edition, Bern 2015, No. 1393; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage International*, 2<sup>nd</sup> edition, Bern 2010, No. 618; see also BSK-IPRG/KARRER, 3<sup>rd</sup> edition, Basel 2013, Art. 187 No. 123: *“Häufig wird das anwendbare Recht gewählt, gleichzeitig aber auch eine Schiedsordnung. In den meisten Schiedsordnungen steht etwas über das anwendbare Recht [...] Die direkte Rechtswahl durch die Parteien muss, da diese spezieller ist, der Rechtswahlbestimmung der gewählten Rechtsordnung vorgehen [...]”*). However, this Panel (like others before it – see CAS 2015/A/4197) finds that this principle shall not apply here. The reason why the predominant view in the legal literature holds that a direct choice of law always takes precedent over an indirect choice of law contained in the rules of the arbitral institution is that – generally speaking – the rules of the arbitral institutions do not wish to limit the parties’ autonomy in any respect (BSK-IPRG/KARRER, 3<sup>rd</sup> edition, Basel 2013, Art. 187 No. 123). This, however, is not true in the context of appeals arbitration procedures before the CAS.
146. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS, the *“Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”*.
147. It follows from this provision that the *“applicable regulations”*, i.e. the statutes and regulations of FIFA, as the sports organisation that issued the decision are applicable to the dispute irrespective of what law the Parties have agreed upon. In the Panel’s view the Parties cannot derogate from this provision if they want their dispute to be decided by the CAS. To conclude, therefore, this Panel finds that Article R58 of the CAS Code takes precedent over any tacit choice-of-law that the Player submitted should result in German law being applicable and that, thus, the FIFA Rules and Regulations apply primarily, most notably the FIFA RSTP.

148. Article 66 para. 2 of the FIFA Statutes provides that in proceedings before the CAS, “*the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law*”. The provision makes it clear that the FIFA rules and regulations have been drafted against the backdrop of a certain legal framework, *i.e.* Swiss law. Thus, whenever issues of interpretation arise with respect to the FIFA Rules and Regulations, the Panel will resort to Swiss law. Consequently, the Panel will apply the rules and regulations of FIFA and Swiss law insofar as matters are at dispute relating to the application or interpretation of the FIFA RSTP and other FIFA rules and regulations.

## VIII. LEGAL DISCUSSION

### A. Merits

149. As a general comment, the Panel notes that Trabzonspor, the Player and the Player’s Agent seem to have all breached part of the FIFA RSTP. While Trabzonspor has advanced its arguments for the due diligence it undertook before signing the Preliminary Agreement and the Trabzonspor Contract, it failed to contact the Player’s then-current club, Karlsruhe, which it could easily have done. Further, Trabzonspor appears to have asked a minor to sign a contract for a 5 year period, but left the same undated, to date and register once the player was of age. The Player’s Agent admitted at the hearing that he had already offered the Player to another Turkish club before Trabzonspor, that he temporarily resigned as the Player’s agent, so he could get paid by Trabzonspor, that he then acted again in the Player’s moves to Hamburg and to Bayer Leverkusen, again switching sides when it suited him. The Player signed the Preliminary Agreement and the Trabzonspor Contract, whilst he knew he was still under contract with Karlsruhe, only then to sign another contract with Karlsruhe after he had signed two contracts with Trabzonspor. The Player’s parents also signed the Preliminary Agreement. If the Player wanted to go to Trabzonspor, then the Player’s Agent should have sought permission from Karlsruhe and sought to negotiate a transfer, as FIFA’s transfer system anticipates. The Player’s Agent did at least attend the hearing, but he was not a party to these proceedings and the claims for compensation or facing any sporting sanctions, yet he appeared to be the author of this dispute. None are without blame, yet each blames the other.
150. There are two consolidated Appeals before the Panel, however, it appears that the following issues need to be considered collectively:
- a) Was the Player an amateur or professional while at Karlsruhe?
  - b) Are the Preliminary Agreement and/or the Trabzonspor Contract invalid for any reason?
  - c) If not, did the Player breach either or both contracts with Trabzonspor, without just cause?
  - d) If so, should the EUR 100,000 payment be repaid, with or without interest?
  - e) What compensation should be paid, if any, by the Player to Trabzonspor?

f) Should the sporting sanctions on the Player be maintained?

**a) *Was the player an amateur or professional while at Karlsruhe?***

151. Trabzonspor argued that the Player was an amateur, and as such, the provisions of Article 18.3 (which imposes an obligation upon a new club signing a professional player to inform his current club) and Article 18.5 (which forbids a professional player from signing contracts with 2 clubs covering the same period) of the FIFA RSTP are not relevant to the case in hand. The Player, while having signed the Preliminary Agreement and the Trabzonspor Contract with Trabzonspor, now claims that, as he was a professional at the time, these breaches of Article 18 of the FIFA RSTP act to invalidate those contracts.
152. The Panel notes the conflicting player passports and the conflicting position taken by the German Federation and the DFL in relation to the status of the Player; the submissions of Trabzonspor relating to the minimum wage in Germany; whether, by the time tax was deducted from the payments the Player received each month from Karlsruhe, the Player would have no money over and above what was required for his expenses; and that the Player's Agent told Trabzonspor that the Player was amateur. However, the Panel can also see that the main expenses of the Player (his travel up to EUR 150 per month, his accommodation and board at the KSC boarding school and his business related expenses) were all covered by Karlsruhe, in addition to the basic payments he received each month and the bonuses he could earn for playing football, as set out in the Development Agreement. The test is as set out in Article 2 of the FIFA RSTP – "*a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs*". The Panel is satisfied that the Player was under a written contract with Karlsruhe (the Development Agreement) and that his remuneration was more than the expenses he incurred, especially as most of these were already covered for him. Ergo the Panel finds: the Player was a professional.
153. Trabzonspor additionally stated that Articles 17 and 18 of the FIFA RSTP do not apply to minors, however the Panel concurs with the position of FIFA on this point, in that these Articles are intended to apply to any professional player, whether a minor or an adult. The FIFA RSTP contains Article 19, which is particular to minors, but Articles such as 17 and 18 refer to professional players, regardless of their age.

**b) *Are the Preliminary Agreement and/or the Trabzonspor Contract invalid for any reason?***

154. The Panel notes that many arguments were advanced by the Player in an attempt to nullify the Preliminary Agreement and/or the Trabzonspor Contract.
155. Firstly, at the time the Trabzonspor Contract was signed by the Player, he was a minor. Unlike the Preliminary Agreement, his parents did not countersign it. Indeed, the Player's Agent stated at the hearing, that there were two separate signing sessions. At the first, the Player's Agent was

with the Player's parents alone and they just signed the Preliminary Agreement; but later, the same day, the Player signed both the Preliminary Agreement and the Trabzonspor Contract, when he was with the Player's Agent, but not his parents.

156. The Panel notes that the first time these separate signing sessions were mentioned were by the Player's Agent at the hearing. These separate signing sessions were not mentioned in either of the statements the Player's Agent had filed with the CAS Court Office, nor in any of the Player's submissions. In fact, the Player's Appeal Brief, at page 5, refers to the Player's father instructing him to sign both documents at the same time. The Panel has serious doubts in relation to credibility of the Player's Agent, but ultimately, it does not matter if there were separate signing sessions or whether the Player's parents were with him when he signed the Preliminary Agreement and the Trabzonspor Contract. His parents signed the Preliminary Agreement, which was, for all intents and purposes identical to the Trabzonspor Contract (admittedly for a shorter period, but without any condition precedents and with all financial details being the same). The Panel determines that the Player's parents were therefore aware of the contents of the Trabzonspor Contract and gave their tacit approval of such terms when they signed the Preliminary Agreement. Much as the Player argued that under German law, such tacit approval would not suffice, the Panel has already determined that the appropriate law applicable to the case at hand is Swiss law. The Panel notes the position under Article 19a (1) of the Swiss Civil Code regarding the parents' tacit approval and as such concludes that the Trabzonspor Contract is not rendered invalid as a result of the non-signing by the parents.
157. Secondly, the Player argued that the Trabzonspor Contract was for a term in excess of 3 years, the maximum prescribed by FIFA for minors, so that contract should be rendered invalid pursuant to Article 18.2 of the FIFA RSTP. FIFA, on the other hand, submitted that this Article simply meant that the period over the 3 years should not be recognised, rather than invalidating the entire contract. To support this position, FIFA relied upon the jurisprudence in CAS 2008/A/1739.
158. The Panel notes the wording of Article 18.2 of the FIFA RSTP: "*Any clause referring to a longer period shall not be recognised*". It does not stipulate that the entire contract should not be recognised. However, if the clause in the contract dealing with the duration of the contract was effectively struck out, then the contract would have no duration. The intention of Article 18.2 could not be for such a contract to then run for longer, possibly in perpetuity. The Panel agrees with FIFA that the logical effect of Article 18.2 of the FIFA RSTP, is to reduce the term to the maximum allowed and for the contract to remain legally valid.
159. Thirdly, the Player argued that the Preliminary Agreement is a pre-contract, which contains an excessive penalty clause and further contained a condition precedent (the requirement of a medical check-up) in breach of the FIFA RSTP, and should therefore render that contract invalid. In any event, the condition precedent was never satisfied, so that contract is not enforceable.

160. The Panel notes that FIFA disputed this. Whatever the contract is called, it contains the *essentia negotii* of an employment agreement; even if the penalty clause was excessive, it would not invalidate the entire contract, just that clause, potentially; and, whilst the inclusion of the condition precedent is in contradiction to Article 18.4 of the FIFA RSTP, the effect is that the condition precedent is invalid, not the entire contract.
161. The Panel, largely concurs with FIFA's position on this issue. The Preliminary Contract is a binding contract in its own right. Under Swiss law (Article 163 CO), the parties are free to agree upon the level of the penalty, as Trabzonspor and the Player have when executing the Preliminary Agreement. However, if a court determines that this amount is excessive, it may reduce the amount. This does not, however, render the contract invalid. Additionally, the Panel notes that the effect of Article 18.4 of the FIFA RSTP is not to render the entire contract invalid, just the clause containing the medical check condition precedent.
162. The Panel is prepared to apply Article 18.4 and to disregard the condition precedent. However, the penalty clause remains valid. As detailed below, the Panel does regard the penalty as excessive.
163. However, the Panel notes that the Preliminary Agreement contained a second condition precedent, one that did not offend Article 18.4 of the FIFA RSTP. That condition precedent was that the contract needed to be registered with the TFF. The Player submitted that as the condition precedent was never satisfied, the contract is not enforceable. The Panel notes that there was no evidence to show that the Preliminary Agreement was registered, but also that Trabzonspor made a payment under the Preliminary Agreement, which the Player kept. Trabzonspor and the Player may therefore be seen to have waived this condition precedent and the Player cannot now seek to claim the contract has not come into effect, when he has already received a substantial benefit under it.
164. Finally, the Player has argued that the Preliminary Agreement and/or the Trabzonspor Contract were subject to a transfer being negotiated between Karlsruhe and Trabzonspor. Karlsruhe had an option to extend the Development Agreement by an additional season. As such, "everybody knew" that the only way to avoid having two contracts that covered the same period, was for Trabzonspor to negotiate the transfer of the Player, or else its contracts would fall away. The Player noted that Trabzonspor acknowledged that it was "aware of the risk" in its written submissions.
165. The Panel notes with interest that the Player's Agent included a clause in the Agent Agreement that ensured he got paid by Trabzonspor regardless of whether a transfer actually took place. The Player's Agent stated that his goal was to "protect my pay". However, he failed to add any conditionality into the contracts with Trabzonspor and left his client exposed to having signed two agreements that would run concurrently. Either the Development Contract would have ran on for another year and when the Trabzonspor Contract became effective, there would be the two concurrent contracts; or, if Karlsruhe and the Player entered into a new contract (as they

did), then that new agreement ran concurrently with the Preliminary Agreement and the Trabzonspor Contract.

166. The Panel notes that the Player has to shoulder some responsibility for the choice of agent he and his parents made. The Panel cannot, however, agree with the Player to imply a condition that a transfer between Karlsruhe and Trabzonspor must take place else the Preliminary Agreement and the Trabzonspor Contract both fall away. There was nothing ambiguous or unclear in those contracts that would require the Panel to determine there was such an implied contractual term.
167. In summary, the Panel finds the Preliminary Agreement and the Trabzonspor Contract valid.

**c) *Did the Player breach either or both contracts with Trabzonspor, without just cause?***

168. The Panel notes that at the beginning of March 2012 Karlsruhe and the Player signed the Karlsruhe Contract, which came into force on 1 July 2012. As such, the Player had two valid employment contracts running from that date, in violation of Article 18.5 of the FIFA RSTP.
169. In addition, the Player only rendered his services to one club, i.e. Karlsruhe. He never fulfilled any of the terms of the Trabzonspor Contract. Therefore, the Panel notes that this contract was breached by the Player, without just cause, in accordance with Article 14 of the FIFA RSTP. Additionally, the Preliminary Agreement was breached at that stage.

**d) *Should the EUR 100,000 payment be repaid, with or without interest?***

170. The Panel notes that pursuant to the Preliminary Agreement, the Player was paid EUR 100,000 by Trabzonspor. This was labelled as a “down payment”, on account of part of his first year’s remuneration with Trabzonspor.
171. The Player kept the money, yet never provided any services to Trabzonspor and breached the contracts with Trabzonspor. Much as Trabzonspor has claimed that the Player has been unjustly enriched, the appropriate way of dealing with this payment is by way of a breach of contract claim.
172. The penalty clause in the Preliminary Agreement stated:  
*“If the Player ... signs another employment contract which will register him to another Club, then the Player accepts and undertakes to pay 1.000.000.-Euro (one million Euro) (The down payment which is going to be paid after signing of this Preliminary Agreement is also included and this penalty clause is valid only if this down payment is made) penalty clause and irrevocably declares that this amount is not excessive”* [emphasis added].
173. The Panel considers that the claim for the return of the EUR 100,000 is in with the claim for the EUR 1,000,000 penalty and is not separate claim.

**e) *What compensation should be paid, if any, by the Player to Trabzonspor?***

174. Having established that the Player is in breach of the Preliminary Agreement and the Trabzonspor Contract without just cause, Article 17.1 of the FIFA RSTP is triggered.
175. The Panel notes that compensation is payable by the Player taking into account the various factors mentioned in Article 17.1, unless the parties have provided otherwise in their contracts. In the case at hand, the parties have inserted a penalty of EUR 1,000,000 in case of breach of the contracts.
176. As stated above, under Swiss law (Article 163.3 CO), the Panel may review this amount, if they feel it is excessive. The Player submitted that it would take the Player 5 years to earn that sum under the contracts with Trabzonspor, so the penalty was excessive. The Panel notes that there is no definition in Swiss law as to what is “excessive”. However, jurisprudence suggests that panels should consider such matters as the degree of fault and the economic situation of the parties (CAS 2015/A/4057), the nature and duration of the contract (CAS 2010/A/2202) and the lack of reciprocity (CAS 2015/A/4144).
177. In the case at hand, the Panel notes that Trabzonspor should not have considered the Player as an amateur and could have contacted Karlsruhe as part of their due diligence process; that Trabzonspor produced two contracts, in an attempt to extract a 5 year term from a minor; the penalty clause was solely in favour of Trabzonspor; the Player was a minor, but was represented by the Player’s Agent and his parents; and the Player kept the EUR 100,000. Balancing these factors up, the Panel has determined to reduce the penalty to EUR 100,000, which the Player shall pay to Trabzonspor as compensation for breach of contract without just cause.

**f) *Should the sporting sanctions on the Player be maintained?***

178. The Panel notes that the Player has argued that any sporting sanctions shall only be “*in addition to*” compensation for breach of contract and that the FIFA DRC did not award any compensation. However, the Panel has, in dealing with this matter on a *de novo* basis now awarded Trabzonspor compensation, rendering this argument moot.
179. The Player expressed that it was difficult to understand the system for sporting sanctions as operated by FIFA in practice. Article 17.4 of the FIFA RSTP states that sporting sanctions “*shall*” be imposed on any club that either induces a breach of contract by the player or cannot rebut the presumption of such inducement. However, in practice “*shall*” means “*may*”. Whereas, when looking at Article 17.3 of the FIFA RSTP, whereby players face sporting sanctions, “*shall*” means “*shall*”.
180. The Panel notes that in the vast majority of cases, the CAS has upheld sporting sanctions issued by the FIFA DRC on players, especially when any breach of contract was in the protected period. Unless there are aggravating circumstances, the standard ban for a player is 4 months. The Panel is aware of CAS 2014/A/3221 where a CAS panel determined not to impose any

sanction upon the player. As such, the options for any judging authority are a 6 month ban, a 4 month ban, or, in one case a 0 month ban. The Panel is not able to effectively “rewrite” the FIFA RSTP. The FIFA RSTP allow for a 4 or 6 month ban and one CAS panel has in extreme circumstances reduced the ban to zero.

181. The Panel notes that the FIFA DRC did not believe that aggravating circumstances existed. The Panel agrees with that finding. As such, the question is whether the circumstance of the matter at hand are closer to the “norm” or to the facts of CAS 2014/A/3221?
182. The Panel here is facing different facts from those in that other case. The player in the other case had waited for over 5 years for his case to be determined by the FIFA DRC. By that time the player had moved from the next club to register him to a third club. In that case the third club would suffer the loss of the player’s services.
183. In the case at hand, there is also a third club, Bayer Leverkusen. That noted, the Player’s case was with the FIFA DRC for less than 3 years. The Panel also notes the jurisprudence in CAS 2014/A/3739 where a wait of around 2½ years, was not atypical, in the way that 5 years was.
184. An additional difference was that the Player’s Agent stated at the hearing that he had made Bayer Leverkusen aware of the proceedings before the FIFA DRC, so they were aware of the risk of sporting sanctions before they signed him. It should be noted that Bayer Leverkusen had asked to be present at the hearing, however, FIFA objected to such request. No party challenged the evidence of the Player’s Agent in this regard.
185. On balance, while the Panel has taken into account the age of the Player when he signed the various contracts along with the fact that his parents and the Player’s Agent were all involved in advising him at that time; the Panel determines that there is no reason not to apply Article 17.3 of the FIFA RSTP and the standard 4 month ban in the Appealed Decision is confirmed against the Player.

## **B. Conclusion**

186. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel finds that:
  - a) In relation to CAS 2016/A/4535, the Appeal is rejected and the Player’s 4 month ban in the Appealed Decision is confirmed; therefore, the stay of the Appealed Decision granted by Order of 16 March 2016 shall be lifted and the sanction shall be applied with immediate effect as of the date of notification of the present award; and
  - b) In relation to CAS 2016/A/4495, the Panel has determined that the Player shall pay EUR 100,000 to Trabzonspor as compensation for breach of contract without just cause.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed on 15 March 2016 by Hakan Çalhanoglu against the Decision issued on 14 March 2016 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.
2. The appeal filed on 4 April 2016 by Trabzonspor FC against the Decision issued on 14 March 2016 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially allowed; as a consequence, such Decision is amended as follows:
  - 1) Hakan Çalhanoglu, is found to have terminated the employment contract with the Claimant without just cause within the protected period.
  - 2) Hakan Çalhanoglu shall pay EUR 100,000 to Trabzonspor FC as compensation for breach of contract without just cause.
  - 3) A restriction of four months on his eligibility to play in official matches is imposed on Hakan Çalhanoglu. This sanction applies with immediate effect as of the date of notification of the present award. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.