Arbitrations CAS 2016/A/4550 Darwin Zamir Andrade Marmolejo v. Club Deportivo La Equidad Seguros S.A. & Fédération Internationale de Football Association (FIFA) and CAS 2016/A/4576 Újpest 1885 FC v. FIFA, award of 24 November 2016

Panel: Mr Fabio Iudica (Italy), President; Mr Mark Hovell (United Kingdom); Mr Rui Botica Santos (Portugal)

Football
Consequences of termination without just cause by professional football player of his employment contract
Choice of law according to Article 66 par. 2 FIFA Statutes
Buy-out clauses and contractual clause foreseeing payment of "damages"
Article 17 par. 1 Regulations on the Status and Transfer of Players (RSTP)
Liquidated damages clauses
Sporting sanctions under Article 17 par. 3 and par. 4 RSTP
Rebuttable presumption of inducement to breach a contract under Article 17 par. 4 RSTP
Succession of sporting clubs

1. **Article 66 par. 2 of the FIFA Statutes contains an election of Swiss law, which is deemed to be applicable in addition to the FIFA Regulations. Under the literature and CAS jurisprudence, such a choice of law, by reference to the FIFA Regulations, is both admissible and binding on the parties.**

2. **It follows from the definition of buy-out clauses contained in the FIFA Commentary on the Regulations on the Status and Transfer of Players (RSTP) that the parties, while entering into a contract, may agree that at a certain (or at any) moment one of the parties (normally, the player) may terminate the contract, by simple notice and by paying a stipulated amount. In other words, one of the parties (ordinarily, the club) accepts in advance that the contract may be terminated: as a result, when the contract is effectively terminated, such termination can be deemed to be based on the parties' (prior) consent. Therefore, no breach occurs, and the party terminating the contract is not liable for any sporting sanction. It is only bound to pay the stipulated amount – which represents the "consideration" (or "price") for the termination. In summary, the parties to the contract agree that one party (usually the club) shall grant the other party (usually the player) an option to prematurely terminate the contract, upon serving notice and payment of the agreed option price. A contractual clause foreseeing that a player shall pay a certain amount as *"damages"* following his termination of his employment contract without just cause does not constitute a buy-out clause; this is because the term *"damages"* is inconsistent with a buy-out clause, since any payment to be made by the player would not be *"damages"*, but the consideration for the exercise of a contractual right or the option price.**

3. **The principles and the method of calculation of the compensation due by one party**

because of a breach or unilateral and premature termination of a contract are stipulated in Article 17 par. 1 RSTP. According to Article 17 par. 1 RSTP, the primary role is played by the parties' autonomy insofar as the criteria set in that article apply *"unless otherwise provided for in the contract"*. Only if the parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for the elements listed in Article 17 par. 1 RSTP.

4. **A contractual clause qualifies as a contractual penalty or "liquidated damages" clause ("clause pénale" or "Konventionalstrafe") under Swiss law (Article 160 of the Swiss Code of Obligations if it contains the following necessary elements: (i) the parties bound thereby are mentioned, (ii) the kind of penalty has been determined, (iii) the conditions triggering the obligation to pay it are set, (iv) its measure is identifiable.**

5. **According to CAS jurisprudence sporting sanctions under Article 17 par. 3 and 17 par. 4 RSTP do not apply mandatorily, but the situation has to be analysed on a case-by-case basis, according to the specific circumstances of the case, verifying in each case in particular if some general principles of law have been respected; in this context the burden lies on the offender to demonstrate that it does not deserve any sanction, in particular in light of a possible violation of general principles of law. "Repeated offenders" however shall be treated with severity and be systematically sanctioned according to Article 17 par. 3 or 17 par. 4 RSTP; this does however not imply that players or clubs that are not to be considered as "repeated offenders" shall automatically be exempted of any sanction.**

6. **Article 17 par. 4 RSTP foresees that inducement by a club to breach a contract is sanctioned with a ban on registration of new players for at least two "transfer windows"; Article 17 par. 4 RSTP further stipulates that it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. In other words, Article 17 par. 4 RSTP establishes a rebuttable presumption: the new club is subject to sanction if it does not prove that it has not induced the breach.**

7. **A club is a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it. Thus, the obligations acquired by any of the entities in charge of the club's administration in relation with its activity must be respected. The identity of a club is constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc. that allow it to distinguish from all the other clubs. Hence, the prevalence of the continuity and permanence in time of the sporting institution in front of the entity that manages it has been recognised, even when dealing with the change of management companies completely different from themselves.**

I. PARTIES

1. Mr. Darwin Andrade Marmolejo (the "Player") is a Colombian football player, born on 11 February 1991.

2. Club Deportivo La Equidad Seguros S.A. ("La Equidad") is a football club with its registered office in Bogotà, Colombia. It is an affiliated member of the Colombian Football Federation ("CFF"), which is itself affiliated with the Fédération Internationale de Football Association ("FIFA").

3. Újpest 1885 FC ("Újpest 1885") is a football club with its registered office in Budapest, Hungary. It is an affiliated member of the Hungarian Football Federation ("HFF"), which is itself affiliated to FIFA.

4. FIFA is the international governing body of football, with its registered office in Zurich, Switzerland.

II. THE DECISION APPEALED AGAINST

5. The challenged decision was rendered by the FIFA Dispute Resolution Chamber (the "FIFA DRC") on 18 February 2016 on the claim filed by La Equidad against the Player and Újpest 1885 (the "Appealed Decision"). Having established that the Player terminated the Player's employment contract with La Equidad without just cause, the FIFA DRC imposed on Újpest – the Player's new club – a ban from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods, according to the provision of Article 17 par. 4 of the FIFA Regulations on the Status and Transfer of Players ("RSTP"), as well as a four-months restriction on the Player on playing in official matches.

III. BACKGROUND FACTS

6. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence considered necessary to explain its reasoning.

7. On 5 February 2013, the Player concluded an employment contract (the "Employment Contract") with La Equidad, valid from 1 February 2013 until 31 December 2015.

8. The Employment Contract included, *inter alia*, the following clause (translation provided by the FIFA DRC in the Appealed Decision):

"SECOND (…)

PARAGRAPH TWO: The parties mutually agreed that, in accordance with the provisions of Article 64 of the Labour Code, the termination [of the Agreement] *without just cause by the employee before the expiration date of the contract end will cause the employee to be liable and to pay to the EMPLOYER all resulting damages, which the parties have in advance valued in the amount of one hundred thousand dollars".*

9. On 17 January 2014, a loan transfer agreement (the "Loan Agreement") was concluded in order to transfer the Player to the Colombian Club Millonarios FC ("Millonarios"), on a loan basis, as from 18 January 2014 until 31 December 2014.

10. The Loan Agreement included, inter alia, the following clauses (translation provided by the FIFA DRC in the Appealed Decision):

"SECOND: Millonarios will pay to the Club Equidad the following amounts during the year 2014 for the loan: USD 50,000, on 15 February, USD 50,000 on 31 May, USD 50,000, on 31 August and USD 50,000 on 30 November 2014. Millonarios will deduct the amount paid for the loan from the value of the purchase of the Player's right if this option is executed.

THIRD: the sum of ONE MILLION AND FIVE HUNDRED DOLLARS (USD) is settled as a buy-out clause for the rights of the Player".

11. In addition, the Player concluded an employment agreement with Millonarios (the "Millonarios Contract"), valid from 18 January 2014 until 31 December 2014.

12. On 28 January 2014, the Player informed La Equidad that he unilaterally terminated the Employment Contract, in application of Clause 2 par. 2 of the latter.

13. On the same day, the Player signed an employment contract with the Belgian First Division club Sint Truidense VV ("Truidense").

14. On 5 February 2014, the Player paid an amount of USD 100,000 to La Equidad.

15. On 11 February 2014, Truidense requested the Player's International Transfer Certificate (ITC) through the FIFA Transfer Matching System ("TMS").

16. On 18 February 2014, the Single Judge of the FIFA Players' Status Committee (the "Single Judge") rejected Truidense's request, as the latter was made outside of any contract transfer period.

17. On the same day, the Player and the Hungarian Club Újpest FC Kft ("Újpest FC") signed an employment contract.

18. On 21 February 2014, the HFF requested the Player's ITC through the TMS, for its affiliated club, Újpest FC. According to the information on TMS, it was indicated that the Player was *"out of contract"*.

19. On 14 March 2014, the Player concluded an employment contract with Újpest 1885.

20. On 25 March 2014, the Player informed Újpest FC that he terminated his employment contract with the club, as the latter was under a judicial liquidation procedure.

21. On 27 March 2014, Újpest FC went under a judicial liquidation procedure.

22. On 28 March 2014, the Single Judge authorized to provisionally register the Player with Újpest FC. However, according to the information contained in the TMS, the status of the transfer remained as *"awaiting confirmation of provisional registration"*, since 28 March 2014.

23. On 30 June 2014, the HFF requested the ITC for the Player, in order to register him with its affiliated club, Újpest 1885 on the basis of the employment contract signed between the latter and the Player on 14 March 2014.

24. On 2 July 2014, the CFF rejected the relevant ITC request of the HFF through the TMS, stating that the employment contract between its affiliated club, La Equidad, and the Player had not expired.

25. On 15 July 2014, the Single Judge authorized to provisionally register the Player with Újpest 1885, which occurred on 17 July 2014.

26. On 3 March 2015, La Equidad lodged a claim before FIFA against the Player and Újpest FC for unilateral breach of contract without just cause, by the Player, and inducement to the breach, by Újpest FC.

27. On 18 February 2016, the FIFA DRC rendered the Appealed Decision, which grounds were notified to the Parties on 11 April 2016.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS 2016/A/4550)

28. Following the notification of the Appealed Decision, the Player filed a Statement of Appeal before the Court of Arbitration for Sport (the "CAS"), pursuant to Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), on 12 April 2016. Together with its Statement of Appeal, the Player filed an application for the stay of the Appealed Decision.

29. On 15 April 2016, the CAS Court Office informed the Parties, *inter alia*, that FIFA was granted a deadline until 20 April 2016 to provide its position on the application for a stay filed by the Player.

30. On 20 April 2016, FIFA consented to the Player's application for a stay of the Appealed Decision, in particular in view of CAS constant jurisprudence *"according to which requests for stay of execution in case of sporting sanctions imposed on players in football-related matters are basically accepted without*

exception". FIFA further stated that these considerations did not in any way constitute an adherence or a recognition by FIFA to any arguments exposed by the Player.

31. On 21 April 2016, the President of the CAS Appeals Arbitration Division rendered its decision on the Player's application, which was granted.

32. On 5 May 2016, the Player requested an extension of the deadline to file his appeal brief *"for at least 15 days"*, *"considering the complexity of the case and due to some agenda problems"* both for the Player and his legal counsel.

33. On 6 May 2016, La Equidad and FIFA were granted a deadline until 10 May 2016 to state whether they agreed with the Player's request for a 15-day extension to file his appeal brief.

34. On 11 May 2016, the CAS Court Office informed the Parties that the Player's request for the above-mentioned extension had been granted, as La Equidad and FIFA had not objected within the prescribed deadline.

35. On 12 May 2016, the CAS Court Office informed the Parties that Újpest 1885 had also filed an appeal against the Appealed Decision, and granted them a deadline of 17 May 2016 to state whether they agreed to the consolidation of both proceedings, with reference CAS 2016/A/4550 and CAS 2016/A/4576.

36. On 17 May 2016, the Player and FIFA informed the CAS Court Office in particular that they accepted the consolidation of both pending proceedings.

37. On 31 May 2016, the Belgian football club Royal Standard de Liège ("Standard de Liège") requested to intervene *"as a third party"* in both pending procedures with references CAS 2016/A/4550 and CAS 2016/A/4576. The basis for such request was in particular the following:

> *"Mr Andrade Marmolejo is currently employed by the club R. STANDARD DE LIEGE (Belgium). The player was transferred from the club ÚJPEST FC on . (sic!) STANDARD DE LIEGE paid in this context a considerable transfer fee of 1.000.000 € (APPENDIX 1). The club also grant the player with professional contract.*
>
> *The potential decision of suspending the player for several months would have direct and important consequences for the club of R. STANDARD DE LIEGE on a sportive and financial point of view".*

38. On 27 April 2016, the Player filed his Appeal Brief.

V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS 2016/A/4576)

39. Following the notification of the Appealed Decision, Újpest 1885 filed a Statement of Appeal, serving as Appeal Brief, before the CAS, pursuant to Article R47 ff. of the CAS Code, on 29

April 2016. Together with its Statement of Appeal, Újpest 1885 requested an expedited procedure.

40. On 11 May 2016, FIFA objected to Újpest 1885's request for an expedited procedure. Furthermore, FIFA also noted that the Player had also filed a Statement of Appeal against the Appealed Decision and requested to be provided with such document, requesting that the time limit to file its answer be suspended and be re-set as from the date of reception by FIFA of a copy of the Player's Appeal Brief.

41. On 12 May 2016, the CAS Court Office granted Újpest 1885 a deadline until 17 May 2016 to state whether it agreed that FIFA's deadline to file its answer be filed after the receipt of the Player's Statement of Appeal in the case with reference CAS 2016/A/4550. The Parties were also requested to inform the CAS Court Office whether they would agree to consolidate the cases with references CAS 2016/A/4550 and CAS 2016/A/4576.

42. On 17 May 2016, in view of FIFA's objection to an expedited procedure, Újpest 1885 filed an application for a stay of the execution of the Appealed Decision until the end of the upcoming registration period starting on 9 June 2016 and ending on 31 August 2016. Újpest 1885 further objected to the extension of the deadline for FIFA to file its answer and to the consolidation of the above-mentioned procedures.

43. On 18 May 2016, the CAS Court Office informed the Parties that FIFA was granted a deadline until 24 May 2016 to provide its position on the request for a stay of the Appealed Decision filed by Újpest 1885.

44. On 24 May 2016, FIFA stated that according to Article R48 par. 1 of the CAS Code, a request for a stay needs to be submitted along with the appellant's appeal brief, which was not done in the present case by Újpest 1885. FIFA therefore considered that the request for a stay filed by Újpest 1885 on 17 May 2016 was inadmissible.

45. On 25 May 2016, the CAS Court Office informed the Parties that in view of the constant CAS jurisprudence, an application for provisional measures may be filed at any stage of the proceedings and therefore stated that FIFA's request was considered without object. FIFA was therefore again invited to provide its position on the request for a stay filed by Újpest 1885 until 26 May 2016.

46. On 26 May 2016, FIFA filed its answer to the Újpest 1885's request for a stay of the Appealed Decision, requesting CAS to reject such request.

47. On 27 May 2016, Újpest 1885 informed the CAS Court Office about alleged new facts which, according to it, had to be taken into consideration regarding the upcoming decision with regard to its request for provisional measures.

48. On the same day, the CAS Court Office stated that, as previously expressed, the Parties should refrain from filing further comments with respect to Újpest 1885's application for a stay. However, considering the new elements brought by the latter, FIFA was granted a deadline until 30 May 2016 to state whether it still objected to Újpest 1885's application.

49. On 30 May 2016, the CAS Court Office informed the Parties that the deadline for FIFA to file its answer had been suspended.

50. On the same day, FIFA confirmed its objection to Újpest 1885's application for a stay of the Appealed Decision.

51. On 31 May 2016, the Belgian football club Royal Standard de Liège (the "Standard de Liège") requested to intervene "as a third party" in both pending procedures with references CAS 2016/A/4550 and CAS 2016/A/4576.

VI. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (AFTER CONSOLIDATION)

52. On 2 June 2016, the Parties were informed that the President of the CAS Appeals Division had decided to consolidate the procedures with references CAS 2016/A/4550 and CAS 2016/A/4576. The Parties were also provided with all the documents related to both procedures, and in particular the following deadlines were set:

- 20 days to La Equidad to file its answer to the Player's Appeal Brief; and
- 20 days to FIFA to file its answer in both procedures;
- 7 days to the Parties to state whether they agreed on the intervention of Standard de Liège in the procedure.

53. On 8 June 2016, the Player informed the CAS Court Office that he did not have any objection with respect to the intervention of Standard de Liège in the procedure.

54. On 9 June 2016, FIFA informed the CAS Court Office that it did not have any objection with regard to intervention *"as a third party"* in the concerned proceedings, subject to the fact that it should only be admitted to present arguments on its own and not be admitted to act in the interest of any other parties to the pending proceedings.

55. On 13 June 2016, the President of the CAS Appeals Arbitration Division rendered its decision on Újpest 1885's application for a stay of the Appealed Decision. Such application was rejected.

56. On the same day, Újpest 1885 filed a new application for a stay of the Appealed Decision, based on alleged new elements.

57. Still on 13 June 2016, Újpest 1885 objected to Standard de Liège's request for intervention.

58. On 17 June 2016, La Equidad requested a 15-day extension to file its answer.

59. On 20 June 2016, the CAS Court Office informed the Parties and Standard de Liège that the latter's request for intervention had been denied by the President of the CAS Appeals Division, but that such decision was without prejudice to the decision of the Panel on the same matter.

60. On 21 June 2016, FIFA requested a 5-day extension of the deadline to file its answer. Such request was granted on the same day.

61. On 22 June 2016, the Player informed the CAS Court Office that he agreed with the request filed by La Equidad on 17 June 2016.

62. On the same day, the CAS Court Office informed the Parties that the deadline for La Equidad to file its answer had been extended by 15 days.

63. On 23 June 2016, FIFA filed its answer to the new application for a stay filed by Újpest 1885, requesting that such application be rejected.

64. On 28 June 2016, the Parties were informed that Újpest 1885's new application for a stay had been denied by the President of the CAS Appeals Division.

65. On the same day, FIFA filed its answer.

66. On 15 July 2016, the Parties were informed that pursuant to Article R54 of the CAS Code, the Panel has been constituted as follows:

President:	Mr. Fabio Iudica, attorney-at-law in Milan, Italy
Arbitrators:	Mr. Mark A. Hovell, solicitor in Manchester, United Kingdom
	Mr. Rui Botica Santos, attorney-at-law in Lisbon, Portugal.

67. On 15 July 2016, the Parties were in particular informed that La Equidad had failed to file its answer within the prescribed deadline, but stated that according to Article R55 of the CAS Code, if the Respondent failed to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award. The Parties were further informed that, in accordance with Article R56 of the CAS Code, unless the Parties agree or the President of the Panel orders otherwise on the basis of exceptional circumstances, the Parties shall not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submissions of the Appeal Brief and of the answer.

68. On 27 July 2016, Újpest 1885 filed unsolicited written submissions, including several exhibits, as a reply to FIFA's answer.

69. On 29 July 2016, Újpest 1885 filed a new application for a stay of the execution of the Appealed Decision.

70. On 3 August 2016, FIFA requested that Újpest 1885's written submissions dated 27 July 2016 be declared inadmissible, on the basis of Article R56 of the CAS Code.

71. On 8 August 2016, FIFA filed its answer to Újpest 1885's new application for a stay, requesting that the latter be rejected.

72. On the same day, the Parties were informed that the hearing in the case at hand would be held on 15 September 2016 at the CAS Headquarters in Lausanne.

73. On 9 August 2016, the Parties were notified with the operative part of the Order on Provisional Measures issued by the Panel, rejecting Újpest 1885's request for a stay of the Appealed Decision.

74. All the parties signed and returned the Order of Procedure for the above-referenced matters.

VII. THE HEARING

75. A hearing was held on 15 September 2016 at CAS Headquarters in Lausanne, Switzerland. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the Panel, nor to the jurisdiction of the CAS. The Panel was present and assisted by Mr. William Sternheimer, Deputy Secretary General and Counsel to the CAS and Mr. Serge Vittoz, attorney-at-law in Lausanne Switzerland, serving as *ad hoc* Clerk in the present matter.

The following persons attended the hearing:

For the Player:	the Player was not present but was represented by his legal counsels, Messrs. Juan de Dios Crespo, Enric Ripoll Gonzalez and Arjun Savant
For Újpest 1885:	Mr. Roderick Duchâtelet, president, owner and managing director, Ms Eszter Gyarmati Visontai, managing director, assisted by their legal counsel, Mr. Csongor Visontai
For FIFA:	Messrs. Andrés Redondo Oshur and Antoine Bonnet, members of the Players' Statute and Governance Department.

76. La Equidad was neither present, nor represented at the hearing.

77. In the course of the hearing, the Panel heard the Player, via telephone conference, and Mr. Roderick Duchâtelet, as Újpest 1885's representative.

78. The Parties 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.

79. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their right to be heard and that they had been treated equally in these arbitration proceedings.

VIII. THE PARTIES' SUBMISSIONS

80. The following outline is a summary of the main positions of the Parties in this procedure which the Panel consider relevant to decide the present dispute and does not comprise each and every contention put forward by the Parties. However, the Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. Mr. Darwin Zamir Andrade Marmolejo

81. The Player's submissions, in essence, may be summarized as follows:

a. In accordance with the most consistent jurisprudence of FIFA and CAS, buy-out clauses and their execution are valid.

b. According to CAS jurisprudence:

"Article 17 para. 1 of the FIFA Regulations sets the principles and the method of calculation of the compensation due by a party because of a breach or a unilateral termination of contract" […]. *"First, the provision states 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 para. 2 of the FIFA Regulations"* (CAS 2008/A/ 1519 & 1520).

"According to CAS jurisprudence, a buy-out clause included in an employment agreement of a professional football player is a clause "that determines in advance the amount to be paid by a party in order to terminate prematurely the employment relationship" (CAS 2013/A/3417).

c. According to CAS jurisprudence, the requirements for a buy-out clause to be valid are the following:

- There is an agreement between a club and a player;
- A concrete amount shall be established that allows the player to terminate the employment contract; and
- Such right may be enforced even when there is no just cause.

d. Clause 2 par. 2 of the Employment Contract is a buy-out clause *"as it can easily be noticed, the PARTIES, agreed to establish an AMOUNT to be paid BY THE PLAYER in case of TERMINATION, therefore, far from what FIFA has considered in its decision, clause 2 of the contract is exactly what FIFA considers a buy-out clause"*, in accordance in particular with CAS jurisprudence.

e. The Player legally terminated the Employment Contract by his letter dated 28 January 2014 and paid the agreed amount of USD 100,000 on 5 February 2014. By doing so, the Player merely executed his legal (Article 64 Colombian Civil Code, ("CCC")) and contractual (Clause 2 par. 2 of the Employment Contract) right.

f. FIFA DRC was wrong in the Appealed Decision to consider that Clause 2 of the Employment Contract is not a buy-out clause but a compensation for liquidated damages in case of breach of contract.

g. The Commentary of the RSTP states the following on the interpretation of Article 17 RSTP:

> *"The parties may, however, stipulate in the contract the amount that the player shall pay to the club as compensation in order to unilaterally terminate the contract (a so-called buyout clause). The advantage of this clause is that the parties mutually agree on the amount at the very beginning and fix this in the contract. By paying this amount to the club, the player is entitled to unilaterally terminate the employment contract. With this buyout clause, the parties agree to give the player the opportunity to cancel the contract at any moment and without valid reason, i.e. also during the protected period, and as such, no sporting sanctions may be imposed on the player as a result of the premature termination".*

h. Furthermore, the footnotes of the Commentary use Spanish Law RD 1006 as the example of buy-out clause, that in its Article 16, reads as follows:

> *"The termination of the contract by the will of the professional athlete without cause imputable to the club will grant the latter the right, if so, to a compensation that in the absence of an agreement will be established by the Labour Courts taking into consideration the sporting circumstances, prejudices caused to the company, reasons for breach and other elements that the judge may consider estimable".*

i. The Spanish law provision, used as an example by FIFA, has the exact same content as the relevant clause of the Employment Contract in the case at hand.

j. Therefore, in the case at hand, the Player did not breach the Employment Contract during the protected period, but only exercised his right according to the buy-out clause of Clause 2 par. 2 of the Employment Contract.

k. The Player should in any circumstances not be sanctioned, as he cannot be considered as a "repeated offender" (CAS 2014/A/3765).

B. Club Újpest 1885 Futball Kft

82. Újpest 1885's submissions, in essence, may be summarized as follows:

a. The facts of the case demonstrate that there was absolutely no contact between Újpest 1885 and the Player at the period when the Player terminated his contract with La Equidad.

b. Indeed, two other clubs, Truidense, on 11 February 2014, and Újpest FC, on 21 February 2014, requested an ITC for the Player.

c. Újpest 1885 is therefore only the third club to have requested, on 28 June 2014, the issuance of an ITC from FIFA, which was provisionally granted on 17 July 2014.

d. Furthermore, on 28 March 2014, Újpest FC went into liquidation. After the liquidation, the Player sent a notice letter in which he announced the termination of the Employment Contract due to the liquidation. He therefore became a free agent.

e. On 28 March 2016, in accordance with the Hungarian "Law on sport" and after consultation with UEFA, the HFF accepted that the new legal entity, Újpest 1885, resumed the remaining of the on-going football season under the name "Újpest FC" in the place of Újpest FC Kft.

f. Újpest 1885, under the name Újpest FC, won the Hungarian Cup this season. However, due to the discontinuity between Újpest FC Kft. and Újpest 1885, the latter was not allowed by UEFA to take part in the Europa League for the following season.

g. Újpest FC and Újpest 1885 are not to be considered as the same club, and therefore Újpest 1885 cannot be held liable of any wrongdoing, if any, committed by Újpest FC.

h. The Appealed Decision shall therefore be set aside.

C. FIFA

83. FIFA's submissions, in essence, may be summarized as follows:

a. A "buy-out clause" is generally understood as a clause which unequivocally confers one of the parties to an employment contract (in general the player) the right to prematurely terminate the contractual relationship at any time against the payment of a clearly fixed and predetermined amount stipulated in the contract. The parties must have clearly indicated in the contract that by means of the unconditional payment of the relevant amount, their relation will be definitely terminated without further conditions or additional claims for damages. The party making use of such contractual right does not need to invoke a valid reason for putting an end to the contract, provided that said party pays the agreed sum without reservation or objection. Furthermore, the consequence of making use of such contractual right is that the party will not be imposed any sporting sanction.

b. Clause 2 par. 2 of the Employment Contract, as rightfully determined by the FIFA DRC in the Appealed Decision, does not constitute a "buy-out clause" and thus the Player did not have a contractual right to prematurely terminate the Employment Contract against

the payment of a certain sum. As a result, he unilaterally terminated the Employment Contract without just cause.

c. The different translations provided by the Parties unequivocally demonstrate that Clause 2 par. 2 clearly stipulates the following elements:

- The existence of a mutual agreement between the Parties;
- That in case of premature termination of contract without just cause by the Player;
- The Player is obliged to pay damages to La Equidad;
- The Parties agreed to a predetermined amount of USD 100,000

d. It is therefore clear, that, contrary to the Player's position, that the clause entitled him to terminate the contractual relationship with La Equidad at any time against the payment of a determined amount, the clause at hand solely provides that the Parties mutually agreed that in case of the contract is prematurely terminated by the Player without just cause, a condition, which is undisputed, the latter will have to pay "damages" for his breach of contract to La Equidad, in the amount of USD 100,000.

e. The aforementioned analysis and conclusions fully matches the approach the CAS itself adopted when confronted with a similar clause and the question of its qualification as "buy-out clause", for instance in its award CAS 2013/A/3411 (par. 84 to 87).

f. The FIFA DRC was therefore correct to determine, in the Appealed Decision, that the Player terminated the Employment Contract without just cause.

g. In the Appealed Decision, the FIFA DRC also rightfully determined, in light of Article 17 par. 4 of the RSTP, that Újpest 1885 induced the Player to unilaterally terminate the Employment Contract without just cause, and consequently imposed a ban on Újpest 1885 from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods that follows the notification of the Appealed Decision.

h. Within the scope of its Appeal Brief, Újpest 1885 is no longer claiming that it is a different club from Újpest FC.

i. Article 17 par. 4 RSTP sets for a *iuris tantum* presumption. In particular, said article unequivocally states that *"it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach"*.

j. The argument in accordance with which Újpest 1885 allegedly is only the third club having been interested in the Player's recruitment does not in itself rebut the aforementioned presumption.

k. Furthermore, Újpest 1885 is the first and only club with whom the Player moved away from La Equidad, was fully implemented and executed, i.e. an employment contract was

signed and the Player was provisionally registered for Újpest 1885 following a respective decision by the Single Judge on 15 July 2014.

l. It is important to also underline that contrary to the content of Újpest 1885's report of the chronology of the Player's (attempted) transfers, and according to the information available in the TMS, Truidense, which could not register the Player, was involved in an instruction to proceed the transfer of the Player from it to Újpest 1885. Such move was planned to occur immediately after the Player would be registered for Truidense. Újpest 1885 cautiously omitted to mention this fact.

m. However, said instruction was cancelled on 20 February 2014, since Truidense could not proceed to the Player's registration from La Equidad in the first place. It is also important to note that the employment contract concluded between Truidense and the Player was signed on 28 January 2014, which is the exact same date on which the Player terminated his contract with La Equidad.

n. It is also very telling that, on 20 February 2014, the ITC request made by Truidense was cancelled in the TMS, while, on the same day, Újpest FC requested the Player's ITC, which demonstrates that both clubs collaborated in the course of the events at stake.

o. This collaboration is even more visible when, based on information collected from media sources, it appears that both Truidense and Újpest 1885 have close links to the family of the Belgian club-owner, Mr. Roland Duchâtelet. In particular, it is a fact that the club Truidense was owned by Mr. Roland Duchâtelet and that at the current date, he is still a member of its Management Board.

p. Simultaneously, it is also an information available in the public domain that the president of Újpest 1885 is the son of Mr. Roland Duchâtelet, i.e Mr. Roderick Duchâtelet. Mr. Roland Duchâtelet has also been the owner of Standard de Liège, which currently employs the Player.

q. It shall therefore be concluded that from the very beginning, the only envisaged destination of the Player was Újpest 1885.

r. In this respect, the FIFA DRC rightfully took into account that the contract apparently signed between the Player and Truidense, as available, in the TMS, never came into force, and that the related envisaged transfer never occurred.

s. As a consequence, Újpest 1885's behaviour clearly amounted to induce the Player's unjustified breach of contract and it shall bear the consequences for said inducement, in accordance with Article 17 par. 4 RSTP.

t. It is further clear that the unjustified breach of contract occurred within the protected period. Therefore sporting sanctions shall be applied to the Player. In this regard, the four-month restriction on his eligibility to participate in any official football match shall be imposed.

u. Finally, the Appealed Decision shall also be confirmed in the sense that it imposed, in application of Article 17 par. 4 RSTP, a ban on Újpest 1885 from registering any new

players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the respective decision.

IX. THE PARTIES' REQUESTS FOR RELIEF

84. The Player's requests for relief are the following:

"The Appellant requests the Panel to:

1. *Accept this Statement of Appeal against the decision enclosed as Annex 2.*
2. *Adopt an award to set aside the decision Appealed and confirming the amount paid as compensation and cancel the sporting sanctions imposed on the Player.*
3. *Condemn the Respondent to the payment of the whole CAS administration costs and Panel fees.*
4. *Fix a sum to be paid by the Respondents to the Club in order to cover its defence fees and costs in the amount of CHF 15,000".*

85. Újpest 1885 did not file any formal requests for relief, but stated the following conclusions:

1. *"As there is absolutely no contact between Appellant and the player even close to the period the player broke his contract with this club, and there were two other clubs requesting the ITC of the player before the Appellant did, it is totally absurd to put this sporting sanction on Appellant.*
2. *As the decision made on 18th February 2016 by FIFA, was only sent to our federation on April 11th, two months were lost to clarify this situation, we are now very close to the opening of our transfer window, causing additional problems over the ones made by this sanction. Again, as we are playing in the Hungarian Cup final, we are eligible for Europa League, but as the Hungarian federation and UEFA established discontinuity, we cannot take our place in the Europa League this season.*
3. *Appellant started their youth academy only in the current season. Therefore, it is not an option for us to work with own trained players yet. Due to the expiring contract and the closeness of the end of the season, our team would not be able to properly participate in the upcoming championship year. This sentence will harm the club enormously".*

86. FIFA's requests for relief are the following:

1. *"In conclusion of all the above, we request that the CAS rejects the present appeals and confirms the decision passed by the Dispute Resolution Chamber on 18 February 2016 in its entirety.*
2. *Furthermore, we ask that the CAS orders the Appellants to bear all costs incurred with the present procedure, and to cover all legal expenses of FIFA related to the proceedings at hand".*

X. CAS JURISDICTION

87. Pursuant to Article R47 of the CAS Code:

"An 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".

88. The jurisdiction of the CAS to hear this dispute derives from Articles 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.

89. In particular, Article 67.1 of the FIFA Statutes provides as follows:

"Appeals against final decisions 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".

90. By signing the Order of Procedure, the Parties further confirmed the jurisdiction of the CAS in the present case.

91. Under Article R57 of the CAS Code, the Panel has the full power to review the facts and the law.

XI. APPLICABLE LAW

92. Article R58 of the CAS 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".

93. Article 66 par. 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".*

94. The Panel observes that the "applicable regulations" are indeed all FIFA rules material to the dispute at stake, including in particular the 2015 RSTP.

95. The Panel further notes that none of the agreements entered into by the Parties and the Player contains an express choice of law. However, Article 66 par. 2 of the FIFA Statutes contains an election of Swiss law, which is deemed to be applicable in addition to the FIFA Regulations. Under the literature and CAS jurisprudence, such a choice of law, by reference to the FIFA Regulations, is both admissible and binding on the Parties (KARRER P., Basler Kommentar zum Internationalen Privatrecht, 1996, no 92 and 96 ad art. 187 LDIP; POUDRET/BESSON, Droit comparé de l'arbitrage international, Zurich et al. 2002, no 683, p. 613; DUTOIT B., Droit

International Privé Suisse, Bâle 2005, no 4 ad art. 187 LDIP, p. 657; CAS 2004/A/574; TAS 2005/A/983 & 984). Therefore, the Panel holds that the dispute must be decided in accordance with FIFA statutes and regulations and, complementarily, with Swiss Law.

96. The Panel also notes that the Player, Újpest 1885 and FIFA all, in their written submissions or at the hearing, referred to Swiss law as the law applicable complementarily.

XII. ADMISSIBILITY

97. The appeals were filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. They further complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court office fees.

98. It follows that the appeals are admissible.

XIII. MERITS

A. FIFA rules and regulations

99. The most relevant provision of the FIFA rules and regulations in the case at hand is Article 17 RSTP (*"Consequences of terminating a contract without just cause"*), which reads as follows:

> 1. *"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.*
> 2. *Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.*
> 3. *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. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. These sporting sanctions shall take effect immediately once the player has been notified of the relevant 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. This suspension of the sporting sanctions shall, however, not be applicable if the player is an established member of the representative team of the association he is eligible to represent, and the association concerned is participating in the final competition of an international*

tournament in the period between the last match and the first match of the next season. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.

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

5. *Any person subject to the FIFA Statutes and regulations who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned".*

B. The Dispute

100. The object of these proceedings is the Appealed Decision, which imposed (i) on the Player a restriction of four months on his eligibility to play in official matches and (ii) on Újpest 1885 a ban from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the Appealed Decision. The Player and Újpest 1885 request that the Appealed Decision is set aside, whereas FIFA requests for its confirmation.

101. In the Appealed Decision, the FIFA DRC dealt with all the points which have been disputed by the Parties before this Panel and/or are relevant for the purposes of this arbitration. In summary, the FIFA DRC found that the Player had breached the Employment Contract, that compensation had already been paid by the Player to La Equidad, and that sporting sanctions had to be applied to the Player and to his new club, Újpest 1885. More specifically:

i. as to the first point, it was held that:

- the Player terminated the Employment Contract on 28 January 2016,
- there was no "just cause" for termination,
- Clause 2 par. 2 of the Employment Contract does not contains a "buy-out" clause;

ii. as to the second point, the FIFA DRC concluded that:

- the Employment Contract provides for a "liquidated damages" clause,
- the compensation provided for in Clause 2 par. 2 of the Employment Contract was duly paid by the Player;

iii. as to the third point, the FIFA DRC stated that:

- the Player breached the Employment Contract during the "Protected Period", as defined by the RSTP,
- Article 17 par. 3 RSTP provides in that event for the Player the minimum sanction of a four-month restriction on playing in official matches and Újpest 1885 (having signed the Player) is considered to have induced the breach of the Employment Contract and is therefore subject to the minimum sanction indicated at Article 17 par. 4 RSTP.

102. The points so listed mark the issues that this Panel has to examine for the determination of the dispute. More specifically, the Panel has to answer the following main questions:

i. did the Player breach the Employment Contract without just cause? In that respect, the issue relating to the moment in which the Employment Contract was "terminated" has to be examined, together with the question of interpretation of Clause 2 par. 2 of the Employment Contract, in order to determine whether it granted or not the Player the right to terminate it;

ii. what are the financial consequences of the Panel's answer to the first question? More specifically, what is the amount, if any, to be paid to La Equidad as a result of the termination of the Employment Contract?

iii. what are the sporting consequences of the Panel's answer to the first question? More specifically, are sanctions to be applied on the Player and Újpest 1885? And if so, is the measure of the sanctions imposed by the FIFA DRC proper?

103. The Panel shall answer each of those questions separately.

i. Did the Player breach the Employment Contract without just cause

104. As mentioned above, the answer to this question involves the examination of separate issues. There is no dispute that the Player terminated the Employment Contract on 28 January 2016. The Panel needs therefore to focus on whether such termination corresponded to the exercise of a right given to him by Clause 2 par. 2 of the Employment Contract.

105. As a reminder, Clause 2 par. 2 of the Employment Contract reads as follows:

"The parties mutually agreed that, in accordance with the provisions of Article 64 of the Labour Code, the termination [of the Employment Contract] *without just cause by the employee before the expiration date of the contract end will cause the employee to be liable and to pay to the EMPLOYER all resulting damages, which the parties have in advance valued in the amount of one hundred thousand dollars".*

106. The Player interprets this provision as being a so-called "buy-out clause", i.e. a clause granting the Player the right to terminate the Employment Contract by paying La Equidad an amount of USD 100,000. Such interpretation of Clause 2 par. 2 of the Employment Contract is contested by FIFA, which considers such clause to be a "liquidated damages clause".

107. The question, therefore, turns out to be the following: is Clause 2 par. 2 of the Employment Contract a "buy-out clause"?

108. The FIFA Commentary on the RSTP so deals with "buy-out clauses", as follows:

"The parties … may stipulate in the contract the amount that the player shall pay to the club as compensation in order to unilaterally terminate the contract (a so-called buyout clause). The advantage of this clause is that the parties mutually agree on the amount at the very beginning and fix this in the contract. By paying this amount to the club, the player is entitled to unilaterally terminate the employment contract. With this buyout clause, the parties agree to give the player the opportunity to cancel the contract at any moment and without a valid reason, i.e. also during the protected period, and as such, no sporting sanctions may be imposed on the player as a result of the premature termination".

109. The Panel agrees with CAS jurisprudence (CAS 2013/A/3411, par. 85) that as made clear by such definition, which corresponds to standard practice in international football, the Parties, while entering into a contract, may agree that at a certain (or at any) moment one of the Parties (normally, the player) may terminate the contract, by simple notice and by paying a stipulated amount. In other words, one of the Parties (ordinarily, the club) accepts in advance that the contract may be terminated: as a result, when the contract is effectively terminated, such termination can be deemed to be based on the Parties' (prior) consent. Therefore, no breach occurs, and the party terminating the contract is not liable for any sporting sanction. It is only bound to pay the stipulated amount – which represents the "consideration" (or "price") for the termination. In summary, the parties to the contract agree that one party (usually the club) shall grant the other party (usually the player) an option to prematurely terminate the contract, upon serving notice and payment of the agreed option price.

110. On the basis of the foregoing, the Panel notes that the provisions contained in Clause 2 par. 2 of the Employment Contract do not appear to establish a "buy-out clause". The Panel actually remarks that:

i. The wording of the clause is rather clear: it does not grant the Player the right or an option to terminate the Employment Contract but sets the consequences in case of *"the termination [of the Employment Contract] without just cause by the employee before the expiration date of the contract";*

ii. Clause 2 refers to "*damages*" caused by the Player's termination without just cause. As explained by the Panel in the case with reference 2013/A/3411 (para. 86), the term "*damages*" is inconsistent with a "buy-out clause", since any payment to be made by the Player would not be *"damages"*, but the consideration for the exercise of a contractual right or the option price.

111. The Panel therefore agrees with FIFA that Clause 2 par. 2 of the Employment Contract does not constitute a "buy-out clause", nor that the Parties to the Employment Contract could have meant said clause to be a "buy-out clause" entitling the Player to simply terminate the Employment Contract at any point in time.

112. The Panel notes that the Player's reference to Article CCC is of no help to his case, as the relevant part of this provision (par. 1) stipulates that the financial consequences, the compensation for damages, of a unilateral termination without just cause of an employment contract, shall be included in the latter.

In view of the above, the Panel concludes that the Player, on 28 January 2016, terminated the Employment Contract without just cause.

ii. What are the financial consequences of the answer to the first question?

113. Article 17 par. 1 RSTP sets the principles and the method of calculation of the compensation due by one party because of a breach or unilateral and premature termination of a contract. In light of the conclusion reached above, the Panel finds that the termination by the Player of the Employment Contract falls within the scope of application of Article 17 RSTP.

114. The Panel notes that the Player did not make any argument as to the consequences if it was concluded that he terminated the Employment Contract without just cause. On the contrary, the FIFA DRC in the Appealed Decision, and FIFA in it answer, considered that Clause 2 par. 2 had to be considered as a "liquidated damages clause" and that the Employment Contract therefore *"contained all the relevant provisions agreed beforehand by the parties in case of termination of the contract without just cause"*. In particular, the FIFA DRC observed that the relevant clause clearly stipulated and without ambiguity, the amount of USD 100,000 as liquidated damages in case of termination of the Employment Contract without just cause.

115. According to Article 17 par. 1 RSTP, primary role is played by the Parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. Then, if the Parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for the elements listed in this provision.

116. As a result, the Panel has to look at the Employment Contract first, to see if the Parties have agreed a contractual remedy for the breach of the Contract: as mentioned, the FIFA DRC concluded that they had.

117. The question for this Panel, indeed, is whether Clause 2 par. 2 of the Employment Contract, not having the nature of a "buy-out" clause, performs the function of a "liquidated damages" clause, i.e. of a clause identifying the amount to be paid in case of breach. This is FIFA's position in the case at hand, and is contested by the Player.

118. The Panel agrees with FIFA's position, and confirms that the clause contained at Clause 2 par. 2 of the Employment Contract qualifies as a contractual penalty or "liquidated damages" clause ("clause pénale" or "Konventionalstrafe") under Swiss law (Article 160 of the Swiss Code of Obligations (the "CO"), e.g. under the law applicable to the merits of the dispute in this arbitration. In fact, it contains all the necessary elements required for such purpose: (i) the Parties bound thereby are mentioned, (ii) the kind of penalty has been determined, (iii) the conditions triggering the obligation to pay it are set, (iv) its measure is identifiable (COUCHEPIN G., La clause pénale, Zurich 2008, § 462). In other words, Clause 2 par. 2 of the Employment Contract, which sets the amount of "damages" to be paid in case of *"termination [of the Employment Contract] without just cause by the employee before the expiration of the contract"*, appears to perform a function (the determination of the amount that a party has to pay to the other as damages in the event of breach of contract) perfectly consistent with Swiss law.

119. This conclusion is also in line with Article 64 CCC.

120. As it is undisputed between the Parties that the Player, on 5 February 2014, paid the sum of USD 100,000 to La Equidad, the Panel concludes that the agreed amount to be paid by the Player in case of termination of the Employment Contract without just cause, has actually been paid by the Player to La Equidad and that, therefore, no additional compensation for breach of contract is due.

iii. What are the sporting consequences of the answer to the first question?

121. The FIFA DRC, in the Appealed Decision, applied sporting sanctions on both the Player and Újpest 1885, as a result of the Player's breach of the Employment Contract during the "Protected Period", as defined by the RSTP. More exactly, the Player was sanctioned with a four-month restriction on playing in official matches pursuant to Article 17 par. 3, while Újpest 1885 was banned from registering new players for two registration periods under Article 17 par. 4 RSTP.

a. The Player

122. The Player, in the course of the hearing, invoked CAS jurisprudence (CAS 2014/A/3765), to consider that sporting sanctions are not mandatory according to Article 17 par. 3 and that in the case at hand the Player should not be sanctioned as he is not a *"repeated offender"*.

123. The reasoning of the Panel in the case with reference CAS 2014/A/3765 is in particular the following, with regard to the imposition of sporting sanctions in accordance with Article 17 par. 3 RSTP:

> *"57. Turning his attention to the legal framework for assessing the authority of the FIFA DRC to impose sporting sanctions, the Sole Arbitrator observes that Article 17(4) of the FIFA Regulations provides as follows – as relevant: "In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract during the protected period […]. The Club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. […]".*
>
> *58. The Sole Arbitrator finds that from this provision it is clear that the sporting sanctions as mentioned in article 17(4) of the FIFA Regulations "shall be" imposed on any club found to be in breach of contract during the protected period, irrespective of a request by a party to impose the sporting sanctions and without giving the competent body the discretion to impose another – more lenient – sanction as the one foreseen in the applicable provision.*
>
> *59. The Sole Arbitrator finds that the prerogative to impose the sporting sanctions provided for in article 17(4) of the FIFA Regulations entirely lies with FIFA, which implicates that it is of no relevance whether a player or a club requests the imposition of sporting sanctions. As such, and in principle, the FIFA DRC has full authority to impose a ban on the Club to register any new players for two entire and consecutive registration periods, only because the Club breached an employment contract during the protected period.*
>
> *60. However, although it follows from a literal interpretation of article 17(4) of the FIFA Regulations that it is a duty of the competent body to impose sporting sanctions whenever a club is found to have breached an employment contract during the protected period, the Sole Arbitrator is satisfied that there is a well-accepted and consistent practice of the FIFA DRC, as explained by FIFA in its submissions and at the hearing, not to apply automatically a sanction as per article 17(4) of the FIFA Regulations, but to leave it to the free discretion of the FIFA DRC to evaluate the particular and specific circumstances on a case by case basis.*
>
> *61. This discretion is also contemplated in the Commentary on the Regulations for the Status and Transfer of Players (hereinafter: the "FIFA Commentary"), which determines the following in respect of article 17(4) of the FIFA Regulations – as relevant: "A club that breaches a contract with a player during the protected period risks being prohibited from registering new players, either domestically or internationally, for two registration periods following the contractual breach".*
>
> *62. Hence, according to the FIFA Commentary the imposition of sporting sanctions on a club breaching an employment contract within the protected period is not mandatory.*
>
> *63. In view of the above, the Sole Arbitrator finds that the legal basis for the imposition of sporting sanctions by the FIFA DRC is clear, but that the ex officio imposition of sporting sanctions is not necessarily warranted in each and every case. […].*
>
> *64. In continuation, the Sole Arbitrator turns his attention to the question whether the FIFA DRC violated certain general legal principles, such as the principle of being bound by previous standard practice, the principle of legality, equal treatment and/or good governance by imposing the sporting sanctions on the Club".*

124. Considering this jurisprudence from the CAS, the Panel is ready to accept that Article 17 par. 3 and 17.4 do not apply mandatorily, but the situation has to be analysed on a case-by-case basis, verifying in each case in particular if some general principles of law have been respected.

125. In the case at hand, the Player does not invoke the violation by the FIFA DRC, in the Appealed Decision, of general principles of law, but merely stated that the Player was not a *"repeated offender"* and that, therefore, no sporting sanction could be imposed on him.

126. The Panel notes that FIFA's position in the case with reference CAS 2014/A/3765 was in particular that Article 17 par. 4 had to be applied more strictly *"particularly in cases involving clubs that are repeatedly found to be in a situation of breach of contract without just cause, reaching the condition of "repeated offenders""*. In the case at hand, the Player argues that this position shall also generally be applied to players, and that it was the first time that the Player was in such a situation and was therefore not a "repeated offender".

127. The Panel agrees that "repeated offenders" shall be treated with severity and be systematically sanctioned according to Article 17 par. 3 or 17 par. 4 RSTP. However, FIFA's position in the above-mentioned case cannot be interpreted that players or clubs that are not to be considered as "repeated offenders" shall automatically be exempted of any sanction. On the contrary, the Panel considers that each case shall be analysed individually, according to the specific circumstances of the case, and that the burden lies on the offender to demonstrate that it does not deserve any sanction, in particular in light of a possible violation of general principles of law, as stated by the Sole Arbitrator in the case with reference CAS 2014/A/3765. There is also some logic in FIFA considering whether clubs are "repeated offenders" or not, as they employ dozens of players every season; whereas, a player may only ever play for a handful of clubs over his entire career, as such, this test will be of less relevance when FIFA considers the position of a player as a "repeated offenders" or not.

128. The analysis of the facts in the case at hand demonstrates that the Player is to be sanctioned for his behaviour. Indeed, it is evident from the facts that the Player left for Europe, in particular for financial reasons. Furthermore, the Player terminated the Employment Contract, on 28 January 2014, although he had signed ten days before, on 18 January 2014, an employment contract with Milloniaros, with which La Equidad had concluded a loan transfer agreement on 17 January 2014. The Panel further noted that the Player seemed content to sign employment contracts with Truidense and Újpest FC too.

129. With respect to the sanction applied to the Player, it is the Panel's opinion that the measure decided by the FIFA DRC, in the Appealed Decision, is fair and appropriate: it corresponds to the minimum set by Article 17 par. 3 RSTP and is warranted by the circumstances of the case.

b. Újpest 1885

130. Under Article 17 par. 4 RSTP, inducement to breach a contract is sanctioned with a ban on registration of new players for at least two *"transfer windows"*, and *"it shall be presumed, unless*

established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach". In other words, a rebuttable presumption is established: the new club is subject to sanction if it does not prove that it has not induced the breach.

131. Újpest 1885 argues that (i) it is a different entity than Újpest FC, which obtained a provisional ITC for the Player on 28 March 2014 and (ii) that Újpest 1885 was in any circumstances not the first club to sign an employment contract with the Player after the latter terminated the Employment Contract.

132. First of all, Újpest 1885 deems that it is a different legal entity than Újpest FC, which obtained a provisional ITC for the Player on 28 March 2014, and cannot be held responsible for its actions.

133. The Panel first notes that this question is not relevant in the case at hand, considering its reasoning below with regard to question of the inducement of the Player to terminate the Employment Contract.

134. However, the Panel emphasizes that with regard to the application of the RSTP in particular, the issue of the succession of two sporting clubs might be different than if one were to apply civil law, regarding the succession of two separate legal entities.

135. Indeed, as rightfully pointed out by FIFA, CAS jurisprudence considers that *"a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it"* (CAS 2013/A/3425 at par. 139). The full reasoning of the Sole Arbitrator in the particular CAS case is the following:

> *"The Sole Arbitrator highlights that the decisions that had dealt with the question of the succession of a sporting club in front of the CAS (CAS 2007/A/1355; TAS 2011/A/2614; TAS 2011/A/2646; TAS 2012/A/2778) and in front of FIFA's decision-making bodies (…), have established that, on the one side, a club is a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it. Thus, the obligations acquired by any of the entities in charge of its administration in relation with its activity must be respected; and on the other side, that the identity of a club is constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc. that allow it to distinguish from all the other clubs. Hence, the prevalence of the continuity and permanence in time of the sporting institution in front of the entity that manages it has been recognised, even when dealing with the change of management companies completely different from themselves"* (original text in Spanish).

136. The Panel agrees with such reasoning, and consider that, in the case at hand, Újpest 1885 is actually the sporting successor of Újpest FC.

137. In this regard, the Panel first notes the statement provided by the HFF on 6 November 2014, according to which:

"The club currently participating in the Hungarian 1st Division is Újpest Kft. which also obtained the necessary license. The right for participation in the 1st division has been overtaken by Újpest 1885 Kft from Újpest FC Kft. in accordance with the Hungarian Law on Sports and after consultation with UEFA.

For your better understanding we would like to inform you that the name Újpest FC refers to the team participating in the league, while Újpest FC Kft. and Újpest 1885 Kft. are the official names of the legal entities".

138. Furthermore, with regard to the application of the above-mentioned CAS jurisprudence on the matter, the Panel notes that:

a. Both clubs, Újpest FC, and the new club, Újpest 1885 Kft., competed in the first division of the Hungarian championship under the name "Újpest FC";

b. The logo and colours of "Újpest FC" remain identical;

c. Both the old club and the new club are registered at the same address;

d. Both the old club and the new club have the same managing director.

139. The Panel therefore agrees with the FIFA DRC, that Újpest 1885 and Újpest FC shall be considered as the same football club, irrespective of any change of management or legal entity which operates the club.

140. Secondly, Újpest 1885 considers that it cannot be considered as having induced the Player's breach of contract, as it is not the first club which tried to recruit the Player.

141. The Panel recalls that Article 17 par. 4 RSTP sets forth a *iuris tantum* presumption, as said provision states that *"it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause had induced that professional to commit a breach"*.

142. The Panel notes that Újpest 1885, with the aforementioned argument, that the latter failed to provide any conclusive evidence that it did not induce the Player to unilaterally terminate the Employment Contract. The argument in accordance with which Újpest 1885 allegedly is the third club having been interested in the Player's recruitment, i.e. having requested an ITC and/or signed an employment contract, does not in itself rebut the aforementioned presumption. Indeed, Article 17 par. 4 RSTP states that *"any club"* signing a professional who has terminated his contract without just cause is presumed to have induced that professional to commit a breach, and not only the club which requests an ITC or signs an employment contract with that professional immediately after the breach.

143. The Panel emphasizes that Újpest 1885 is the first and only club with whom the Player's transfer was fully implemented and executed, i.e. an employment contract was signed and the Player was registered in the TMS, on 15 July 2014.

144. Furthermore, the Panel considers that the circumstances surrounding the termination of the Employment Contract by the Player demonstrate the involvement of Újpest 1885 from the very beginning.

145. Indeed, the exact same date as the unjustified termination of the Employment Contract occurred, i.e. 28 January 2014, the Player signed an employment contract with Truidense which requested the Player's ITC on 11 February 2014. This request was rejected by the Single Judge on 18 February 2014, based on the fact that the request was lodged outside the dates of any registration period in Belgium. On the same day, the Player signed an employment contract with Újpest FC and the Player's ITC was requested by the latter on 21 February. On 14 March 2014, the Player concluded an employment contract with Újpest 1885. Ten days later, on 24 March 2014, the Player terminated his employment contract with Újpest FC. Finally, Újpest 1885 requested the Player's ITC on 28 June 2014, following the aforementioned decision on the provisional registration rendered by the Single Judge on 17 July 2014.

146. As demonstrated above, it shall be considered that Újpest 1885 is the sporting successor of Újpest FC. Furthermore, the fact that on the exact same date than Truidense's request for an ITC regarding the Player, the latter and Újpest FC had concluded an agreement regarding the loan of the Player demonstrates that Újpest FC and Truidense were closely collaborating regarding the Player's case.

147. Újpest 1885 owner and managing director, Mr. Roderick Duchâtelet, further stated in the course of the hearing that already in 2013, the management team realised that Újpest FC would more than likely not be able to overcome certain difficulties and to avoid liquidation. Mr. Duchâtelet also stated that at this time Újpest 1885 started the licensing process before liquidation of Újpest FC and were trying to buy assets from the latter. With regard to the links between Truidense and Újpest FC, Mr. Duchâtelet stated that they had an *"historical collaboration"*, such as with other clubs. Standard de Liège, the club which currently employs the Player, is another example of collaboration with Újpest 1885, even if it not owned by the Duchâtelet family anymore.

148. Furthermore, when asked by the Panel in the course of the hearing whether he had contacts with Újpest 1885 at the time of the termination of the Employment Contract, the Player stated that (i) it was not the case, (ii) that he did not know, at that time, to which club he would be playing, (iii) that he paid the amount of USD 100,000 from his own money, with the help of his family, and (iv) that he terminated the Employment Contract as he had issues with La Equidad and therefore wanted to leave the club.

149. The Panel is of the opinion that the sequence of events described above, as well as the oral testimonies from the Player and Mr. Roderick Duchâtelet, tend to demonstrate that from the very beginning, the Player was in close contacts, directly or indirectly, with Újpest FC and Újpest 1885 management team. The Player ultimately signed and was registered to play with Újpest 1885.

150. The Panel therefore considers that Újpest 1885's arguments as being only the third club to have tried to acquire the Player's services, and therefore not having been in contact with the Player at the period of the unjustified termination of the Employment Contract is irrelevant.

151. Considering that Újpest 1885 has not brought forward any other argument to rebut the presumption of Article 17 par. 4 RSTP, the Panel therefore concludes that Újpest 1885 shall be considered as having induced the Player to terminate the Employment Contract, without just cause.

152. In this context, the Panel deems that the sanction imposed on Újpest 1885 by the FIFA DRC, in the Appealed Decision, shall be confirmed.

XIV. CONCLUSION

153. Based on the foregoing, and after taking into consideration all evidence produced and all arguments made, the Panel finds that:

a. Clause 2 par. 2 of the Employment Contract shall not be considered as a so-called "buy-out clause", but as a "liquidated damages clause";

b. The Player therefore did not have the right to terminate the Employment Contract on the sole basis of Clause 2 par. 2 of the Employment Contract;

c. The Player's termination of the Employment Contract was therefore made without just cause;

d. By paying the sum of USD 100,000, as agreed under Clause 2 par. 2 of the Employment Contract, the Player fulfilled its obligation to compensate La Equidad, in accordance with Article 17 par. 1 RSTP;

e. The principle and the measure of the sporting sanctions imposed on the Player was rightfully assessed by the FIFA DRC;

f. Újpest 1885 was not able to rebut the presumption of Article 17 par. 4 RSTP, and was therefore rightfully imposed sporting sanctions by the FIFA DRC.

154. The appeals shall therefore be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Darwin Andrade Marmolejo on 12 April 2016 against the Decision of the FIFA Dispute Resolution Chamber rendered on 18 February 2016 is dismissed.

2. The appeal filed by Újpest 1885 FC on 28 April 2016 against the Decision of the FIFA Dispute Resolution Chamber rendered on 18 February 2016 is dismissed.

3. The Decision of the FIFA Dispute Resolution Chamber rendered on 18 February 2016 is confirmed.

(…)

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