



Arbitration CAS 2016/A/4471 Abel Aguilar Tapias v. Hércules de Alicante FC, award of 2 February 2017

Panel: Prof. Petros Mavroidis (Greece), President; Mr Pedro Tomas Marqués (Spain); Mr José Juan Pintó (Spain)

Football

Waiver of payments in view of a mutually agreed premature termination of an employment contract

Applicable regulations

Duress

1. The submission before the Court of Arbitration for Sport of an appeal against a decision triggers the application of art. 58 of the Code of Sports-related Arbitration to the proceedings. The mandatory hierarchy of the applicable legal framework it sets forth results in giving precedence to the regulations applicable to the dispute over other applicable laws. If, in turn, such applicable regulations refer to a national law, said national law shall be referred to in order to ensure a uniform application of the applicable regulations. Conversely, one panel will only apply the law chosen by the parties in case it is faced with matters not regulated by the applicable regulations.
2. Under Spanish law, there is duress when (i) the party issues his consent under justified fear; (ii) the fear derives from an imminent and serious threat; (iii) there exists a causal link between the threat and the consent (the victim would not have concluded the agreement under the conditions in which it did had it not been for the threat); (iv) the threat must have been committed with fault (intentionally or negligently); and (v) the threat must be unfair or illegitimate. If the fear of an imminent and serious threat cannot be proven, the other criteria, which must be met for the qualification of duress can be dismissed without further consideration.

I. PARTIES

1. Mr Abel Aguilar Tapias (the “Player”) is a professional football player of Colombian nationality.
2. Hércules de Alicante Club de Fútbol (“Hércules”) is a football club with its registered office in Alicante, Spain. It is a member of the Real Federación Española de Fútbol, itself affiliated to the Fédération Internationale de Football Association (“FIFA”) since 1904.

II. FACTUAL BACKGROUND

A. *Background facts*

3. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings, and evidence adduced in these proceedings. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis 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 it deems necessary to explain its reasoning.

B. *The contracts entered into by the Parties*

4. In summer 2010, the Italian club, Udinese Calcio S.P.A contractually accepted to transfer the Player to Hércules for the sum of EUR 1,500,000. According to the transfer agreement, *"Should the Federative Rights and the Economic Rights deriving from the federative rights of the PLAYER be transferred by HERCULES to a third club, HERCULES will pay to UDINESE the net sum of Five Hundred Thousand Euros (Euros 500,000); Furthermore, should the sale of the PLAYER to a third club be for a price of over Five Hundred Thousand Euros (Euros 500,000), HERCULES will pay to UDINESE 50% (fifty per cent) of the remaining amount after deducting from the sale price the amount of Five Hundred Thousand Euros (Euros 500,000)"*.
5. On 23 July 2010, the Player entered into an employment contract with Hércules. This contract was a fix-term agreement, valid for four seasons, effective until 30 June 2014.
6. At the end of the 2011/2012 season, the Spanish club Real Club Deportivo de La Coruña ("La Coruña") was interested in obtaining the Player's services. It is undisputed that La Coruña was not in a position to register any new player on a loan basis for the 2012/2013 season. For this reason, Hércules agreed to enter into a permanent transfer agreement with La Coruña but with an option for Hércules to get the Player back for the following season.
7. On 24 July 2012, Hércules and La Coruña signed the agreement for the transfer of the Player, including the option for Hércules to get the latter back for the 2013/2014 season.
8. The same day, on 24 July 2012, in anticipation of the Player's return, Hércules and the Player signed a new employment contract (the "Employment Contract"), which would govern their labour relationship for the 2013/2014 season. The main characteristics of this document can be summarised as follows:
 - It is a fixed-term agreement, effective from 1 July 2013 until 30 June 2014.
 - The Player's yearly remuneration amounted to EUR 700,000 payable *"on a monthly basis (12 months)"*.

- Articles 6 and 13 of the Employment Contract read as follows (as translated from Spanish into English by the Player):

“SIXTH. SUPPLEMENTARY APPLICATION OF THE ROYAL DECREE NO. 1006/1985 DATED JUNE 26

For whatever is not provided for in this Agreement, the Royal Decree No. 1006/1985 dated June 26 shall be followed, to rule the special work relationship of the professional players, the collective bargaining in effect, and all other applicable standards.

(...).

THIRTEENTH. DISPUTE RESOLUTION

For the resolution of any differences derived from the interpretation, execution and application of the present Agreement, the Parties agree to be subject to the jurisdiction and competency of the Courts and Tribunals of the city of Alicante”.

9. On 25 June 2013, Hércules sent an e-mail to the Player advising him that the team would be back in training on 8 July 2013 and that he was expected to be in Alicante on 7 July 2013.
10. The same day, the Player replied that his commitments with his national team ended on 11 June 2013 and that it was common practice among the players to take a whole month of vacation in the summer. Hence, he informed his club that he “*got the return tickets for July 11 [and hoped] that there [was] no problem with that*”. Hércules immediately answered that “*There is no problem. In that sense, we expect you here on July 11, in Alicante (...)*”.
11. The Player came back from holiday on 13 July 2013 and did not receive any remark, warning or complaint from Hércules about his late arrival.
12. On 16 August 2013, the French club Toulouse Football Club (“Toulouse”) informed Hércules that it was interested in acquiring the Player’s services for the sum of EUR 1,250,000. Toulouse insisted on the fact that its offer was valid until 20 August 2013 at 20:00.
13. On 20 August 2013 and after negotiations, Hércules agreed to permanently transfer the Player to Toulouse for the sum of EUR 1,800,000.
14. On 21 August 2013, Hércules and Toulouse signed the transfer agreement (“Transfer Agreement”). The Player was not a party to this contract but signed it nevertheless. The Articles 2, 3 and 5 of this document read as follows:

“2. Agreement

Hercules undertakes to terminate the Player’s contract and will transfer the registration of the Player to Toulouse FC on the 21st August 2013 under the terms set out below (...)

This agreement sets out the entire agreement between the parties and supersedes all prior discussions, statements, representations and undertakings between them.

3. Conditions

This agreement is subject to the following conditions:

The signing of an employment contract between Toulouse FC and the Player.

The issue of the Player's International Transfer Certificate by the Spanish Association.

The approval by the new club's Football Association of the contract between Toulouse FC and the Player. If any of these conditions have not been met, then this agreement shall be automatically terminated and ineffective.

(...).

5. TMS ACTIVITY

Following the signing of this Agreement and subject to the conclusion of an early termination agreement between Hercules and the Player, the Parties undertake all steps necessary in a timely manner so that the International Registration Transfer Certificate can be issued by the Spanish association and the Player can be duly qualified and registered with the French Football Association on 21st August 2013 the latest".

15. The same day, Hércules required the Player to sign the following waiver ("Waiver")(as translated from Spanish into English by the Player):

"CONSIDERING

- 1. That HERCULES CF is owner of 100% of the economic and federative rights of the PLAYER.*
- 2. That the player has a contract in effect during the 2013-2014 season with HERCULES C.F.*

AGREEMENT

- 1. HERCULES C.F. and the PLAYER terminate the contract between the Parties that was in effect for the 2013-2014 season, without the PLAYER having any right to claim the amount for the season to HERCULES C.F.*
- 2. HERCULES C.F. transfers 100% of the economic and federative rights to the Toulouse FC, in a private contract subscribed between both entities".*

16. In its original version, the second Article 1 of the Waiver reads as follows:

"El Hércules C.F. y el JUGADOR resuelven el contrato que unia a las partes y que estaba vigente para la temporada 2013/2014 sin el que el JUGADOR pueda reclamar cantidad de la presente temporada al Hercules CF)".

17. The Player did not sign the Waiver and flew to France, where he arrived on 21 August 2013, carried out the medical exams and signed with Toulouse an employment contract, valid until the end of the 2015/2016 season.
18. On 22 August 2013, the Player's agent sent the following e-mail to Hércules (as translated from Spanish into English by the Player):

"According to our conversations yesterday in your office with [the Player], Giancarlo Uda, you and I and the telephone messages of today, [the Player] is requesting me to tell you the same as he told you yesterday.

He would not like to renounce to his potential right to 15% of Article 13 of the [Real Decreto 1006/1985], however, for the sake of the transaction, as was the case when he renounced to €100,000 last year in order to sign for La Coruña, he would do so.

He is not willing, under any circumstance, to renounce to his monthly salaries for July and August 2013 (...).

19. On the same day, Hércules answered to the Player's agent that *"the agreement for [the Player's] exit does not include the payment of salaries of July and part of August"* and confirmed that it was still awaiting to receive the Waiver duly signed. In response, the Player's agent restated that his client *"was not going to waive his labor rights of receiving his salaries from July until August 21st, 2013"* and informed Hércules that he brought the situation to the attention of Toulouse.
20. On 22 August 2013, Toulouse uploaded the Transfer Agreement into the electronic transfer system of the FIFA (TMS) for the international transfer of the Player. As Hércules did not comply with its side of the TMS obligations, the Player's registration with Toulouse could not be completed.
21. On 23 August 2013, Toulouse urged Hércules to immediately meet the administrative requirements resulting from the TMS, failing which it would file a complaint with FIFA Disciplinary Committee.
22. On 26 August 2013 and in the absence of any reaction from Hércules, Toulouse complained to the French Football Federation (FFF) that the Spanish club was blackmailing the Player, in the sense that it refused to issue his International Transfer Certificate (ITC) as long as the Player would not forfeit his salaries for the months of July and August 2013. Toulouse requested the FFF to immediately report the matter to FIFA, which it did on 27 August 2013.
23. Eventually, the FIFA Disciplinary Committee initiated an administrative sanction procedure against Hércules regarding a possible abuse of the TMS for illegitimate purposes. However, in a ruling dated 4 September 2015, the FIFA Disciplinary Committee decided to dismiss in full all charges brought against Hércules.
24. On 27 August 2013, the Player filed the following claim to FIFA:

"(...) on August 21, 2013, Hercules and the French Team, Toulouse, agreed my transfer to Toulouse for that same 2013-2014 season. I signed my contract with Toulouse on that same day, August 21, 2012 (sic).

Then, after everything was agreed, Hercules called me and said they would only allow my transfer if I accepted to waive my salaries during the time I was with Hercules in the 2013 – 2014 season; in other words, until August 21, 2013 (which corresponds to approximately 100,000 Euros).

Since these are salaries that Hercules owes me, I rejected such proposal, and through my Agent, I requested immediate payment of my salaries. Hercules said they would not pay me and would not allow my transfer to Toulouse. In the meantime, I was informed by my new Club, Toulouse that they wanted to have my services, but that it was not possible because Hercules refused to comply with their obligations according to the FIFA transfer

system. I called Hercules again and they said that if I did not sign a document waiving my salaries, they would not follow the FIFA system and nobody would be able to help me so my international certificate was sent to Toulouse in order to be able to play again.

Right now I am desperate because I cannot play either in Toulouse nor Hercules, and because no one pays me. They also now say that due to the attitude of Hercules, it is possible that the transfer to Toulouse cannot be done. If Toulouse aborts the transfer (given that Hercules would never accept me going back to that team), I will be left without a work contract! That is a complete disaster for my career!

For such reason, I am going to sign the document sent to me by Hercules (which is hereby attached), to see if they give me the international certificate and I am able to start playing again. That document seems to not let me request payment for my salaries during the months of July and August, but I want to clearly declare to the Arbitration Court that, in no case, am I waiving to the salaries to which I have a right on, as a result of my work, and which have to be paid by Hercules! I request you to consider this letter as my claim. I will get in contact with a lawyer so he send you all the necessary documents and so he claims the salaries owed to me, with respect to the other times in which Hercules blackmailed me and forced me to waive my salaries. I also request your disciplinary commission to sanction Hercules due to its incredible behaviour”.

25. On 28 August 2013, the Player signed the Waiver and sent it to Hércules, which fulfilled its TMS obligations the same day.
26. On 29 August 2013, the Player informed FIFA that he had signed the Waiver, only because Hércules forced him to. He reiterated that he had no other option as Hércules would have otherwise “destroy[ed] [his] career and not allow[ed] [him] to participate in Brazil’s World Cup”. The Player confirmed his intention to maintain his claim for the payment of his outstanding wages in spite of the Waiver and requested FIFA “to order Hercules to make such payment as soon as possible”.
27. On 11 October 2013, Toulouse paid to Hércules the contractually agreed transfer fee of EUR 1,800,000.
28. On 22 November 2013 and in accordance with the transfer agreement signed in 2010 with Udinese Calcio S.P.A, Hércules paid to the Italian club the sum of EUR 1,150,000.
29. On 13 June 2014, the Player sent to FIFA a correspondence named “*Submission Complementing Claim filed on 27 August 2013*”, by means of which he required for the first time (in addition to the salaries of July and August 2013) the payment of EUR 270,000 corresponding to 15% of the transfer fee paid by Toulouse to Hércules. This claim was based on Article 13 a) of the “*Real Decreto 1006/1985, de Junio, por el que se regula la relación laboral especial de los deportistas profesionales*” (the “*Real Decreto*”), which states the following (as translated from Spanish into English by the Player):

“The employment relationship will be terminated on the following grounds:

By mutual agreement between the parties. If the termination by mutual agreement has as an object the permanent transfer of the athlete to another club or sporting entity, the parties shall agree on the economic conditions for the

execution of the contract; in case no express agreement exists, the sportsman shall be entitled to compensation of at least 15% gross of the agreed transfer compensation. (...)”.

C. The Proceedings before the FIFA Dispute Resolution Chamber

30. On 27 August 2013, the Player initiated proceedings before the FIFA Dispute Resolution Chamber (the “DRC”) against Hércules requesting the payment of his wages for the months of July and August 2013. On 13 June 2014, he completed his claim and asked the DRC to condemn the club to pay in his favour the total amount of EUR 386,666 calculated as follows:

“EUR 58,333, corresponding to the salary for the month of July 2013, plus 5% interest as from 31 July 2013;

EUR 58,333, corresponding to the salary for the month of August 2013, plus 5% interest as from 28 August 2013;

EUR 270,000, corresponding to 15% of the transfer compensation paid by [Toulouse] to [Hércules], plus 5% interest as from 28 August 2013”.

31. In a decision dated 3 September 2015, the DRC dismissed the claim, considering that, by signing the Waiver, the Player abdicated from any financial claim against Hércules for the 2013/2014 season. In particular, the DRC deemed that the Player failed to establish his allegation that the Waiver had been signed under duress.
32. With reference to the Player’s request to be awarded with an amount equivalent to 15% of the transfer fee paid by Toulouse to Hércules, the DRC held that such claim had no contractual basis. It was also of the opinion that the Player did not prove that Hércules had somehow agreed to share with him some of the said transfer fee. In addition, the DRC observed that the Player’s claim was based on Spanish national legislation and *“that when deciding a dispute before the DRC, FIFA’s regulations prevail over any national law chosen by the parties. In this regard the [DRC] emphasized that the main objective of the FIFA regulations is to create a standard set of rules to which all the actors within the football community are subject and can rely on. This objective would not be achievable if the DRC would have to apply the national law of a specific party on every dispute brought to it. In this respect, the DRC wished to point out that it is in the interest of football that a Player’s remuneration is based on uniform criteria rather than on provisions of national law that may vary considerably from country to country. Therefore, the [DRC] deemed that it is not appropriate to this case to apply specific aspects of a particular national law but rather the Regulations on the Status and Transfer of Players, general principles of law and, where existing, the Chamber’s well-established jurisprudence”.*
33. On 3 September 2015, the DRC decided the following:
- “1. The claim of [the Player] is rejected”.*
34. On 3 February 2016, the Parties were notified of the decision issued by the DRC (the “Appealed Decision”).

III. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

35. On 24 February 2016, the Player filed a statement of appeal against the Appealed Decision with the Court of Arbitration for Sport (CAS) in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”).
36. On 1 March 2016, the CAS Court Office acknowledged receipt of the Player’s statement of appeal, of his payment of the CAS Court Office fee, and the nomination of Mr Pedro Tomás Marqués as arbitrator. It noted that the Player chose English as the language of the arbitration. In this respect, it informed Hércules that, unless it objected within three days, the procedure would be conducted in English. It advised the Player that he had to file his appeal brief or declare that his statement of appeal was to be considered as the appeal brief within ten days.
37. On 1 March 2016, the Player requested from the CAS Court Office to a) direct Hércules to produce the document related to the payment made by Toulouse for his transfer and b) suspend the deadline to file his appeal brief until the requested document was provided.
38. On 2 March 2016, Hércules was invited to communicate within two days its position on the Player’s requests of 1 March 2016. The CAS Court Office informed Hércules that its silence within the prescribed deadline would be considered as an agreement to suspend the deadline for the appeal brief pending a decision on the Player’s request for disclosure.
39. On 7 March 2016 and as Hércules failed to provide its position on the Player’s requests, the CAS Court Office confirmed that the deadline to file the appeal brief was suspended pending a decision from the Panel on the Player’s request for disclosure or the filing by Hércules of the requested document.
40. On 10 March 2016, Hércules informed the CAS Court Office that it was appointing Mr José Juan Pintó Sala as arbitrator.
41. On 27 April 2016, the CAS Court Office informed the Parties that the Panel to hear the case had been constituted as follows: Prof. Petros C. Mavroidis, President of the Panel, Mr Pedro Tomás Marqués and Mr José Juan Pintó Sala, arbitrators.
42. On 17 May 2016, Hércules filed the document requested by the Player.
43. On 30 May 2016 and within the granted deadline, the Player filed his appeal brief in accordance with Article R51 of the Code.
44. On behalf of the Panel, the CAS Court Office requested the Player to provide a translation in English of all exhibits in Spanish filed in support of his appeal. Until the production of such translation, the deadline for Hércules to file its answer was suspended.
45. On 8 June 2016, FIFA confirmed to the CAS Court Office that it had renounced on its right to request to intervene in the present arbitration proceedings.

46. On 19 July 2016 and within the granted deadline, Hércules filed its answer in accordance with Article R55 of the Code.
47. On 20 July 2016, the Parties were invited to inform the CAS Court Office whether their preference was for a hearing to be held.
48. On 26 July 2016, the Player confirmed to the CAS Court Office that he would prefer for a hearing to be held, whereas Hércules did not give any indication with this respect.
49. On 28 July 2016, the Parties were informed that the Panel had decided to hold a hearing, which was scheduled for 19 December 2016, with the agreement of the Parties.
50. On 31 August and on 6 September 2016, the Player, respectively Hércules, signed and returned the Order of Procedure in these appeal proceedings.
51. The hearing was held on 19 December 2016 at the CAS premises in Lausanne. The Panel members were present, assisted by Mr William Sternheimer, Deputy Secretary General of the CAS, and Mr Patrick Grandjean, acting as *ad hoc* Clerk.
52. The following persons attended the hearing:
 - The Player was not present but was represented by his legal counsels, Mr David Casserly, Mr Alfredo Garzon and Mr Karim Piguet.
 - The Club was represented by its president, Mr Carlos Parodi García-Portusa, and its legal counsel, Mr Miguel Liétard Fernández-Palacios.
53. At the outset of the hearing, the Parties confirmed that they did not have any objection as to the composition of the Panel.
54. The Panel heard evidence from the following persons, who testified via teleconference, with the agreement of the President of the Panel (see Article R44.2 para. 4 of the Code):
 - The Player.
 - Mr Pedro Bravo, the Player's agent.
55. Each person heard was invited by the President of the Panel to tell the truth subject to the consequences (in case of non-obedience) provided in Swiss law.
56. After the Parties' final arguments, the Panel closed the hearing, and announced that its award would be rendered in due course. At the conclusion of the hearing, the Parties confirmed that their right to be heard and to be treated equally in the present proceedings before the Panel had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

(i) *The Appeal*

57. In his appeal brief, the Player submitted the following requests for relief:

“[The Player] respectfully requests the Court of Arbitration for Sport to:

- (i) Set aside the decision of the FIFA Dispute Resolution Chamber dated 3 September 2015;*
- (ii) Order [Hércules] to pay [the Player] an amount of €58,333 (...), corresponding to his salary for the month of July 2013, plus 5% interest from 1 August 2013 until the date of effective payment;*
- (iii) Order [Hércules] to pay [the Player] an amount of €37,634 (...), corresponding to his salary for 20 days of the month of August 2013, plus 5% interest from 22 August 2013 until the date of effective payment;*
- (iv) Order [Hércules] to pay [the Player] an amount of €270,000 (...), corresponding to 15% of the relevant transfer fee, plus 5% interest calculated from 11 October 2013 until the date of effective payment;*
- (v) Order [Hércules] to pay [the Player] any other amounts deemed appropriate by the arbitration panel;*
- (vi) Order [Hércules] to pay the full amount of the CAS arbitration costs;*
- (vii) Order [Hércules] to pay a significant contribution towards the legal costs and other related expenses of [the Player], at least in the amount of €30,000”.*

58. The Player’s submissions, in essence, may be summarized as follows:

- The Parties were bound by an employment contract valid from 1 July 2013 up until the moment the Player signed with Toulouse on 21 August 2013. The Player complied with all of his contractual obligations and is therefore entitled to receive the corresponding wages for the month of July and the 20 first days of August 2013.
- The Employment Contract is subject to Spanish law and the Parties specifically agreed that the Real Decreto was applicable *“For whatever is not provided for in this Agreement”* (Article 6 of the Employment Contract). On 20 January 2015, the Spanish Supreme Court confirmed that Article 13 a) of the Real Decreto must be understood as imposing upon a Spanish club, which transfers a player to a foreign club, an obligation to pay to his former employee 15% of the transfer fee, unless agreed otherwise. As a consequence, the Real Decreto is applicable to the present matter and Hércules owes to the Player 15% of the transfer fee paid by Toulouse.
- In view of its wording, the Waiver does not cover the 15% of the transfer fee paid by Toulouse to Hércules. This is also supported by the emails sent on the Player’s behalf after 21 August 2013. Should the Panel consider that there is ambiguity in the wording of

the Waiver, any such ambiguity must be construed against Hércules, which is the author of the document.

- Contrary to the allegations of Hércules, the Player's transfer to Toulouse was not subject to the signature of the Waiver. Article 3 of the Transfer Agreement contains an exhaustive list of the conditions, which had to be met for the transfer to be effective. The signature of the Waiver was not among them.
- In any event, the Waiver is invalid as it was signed under duress:
 - Hércules, Toulouse and the Player signed the Transfer Agreement on 20 August 2013. This document governs the relationships among the signatories: a) Hércules agreed to transfer the Player to Toulouse and terminate the Employment Contract (Article 2); b) Toulouse accepted to hire the Player and to pay to Hércules a transfer fee of EUR 1,800,000 and c) the Player signed the Transfer Agreement and, thus, gave his consent to be transferred. As from the signature of the Transfer Agreement, the Parties were obliged to refrain from adopting any conduct, which could prevent the respective obligations to come into effect.
 - Hércules forced the Player to sign the Waiver when no such condition had been agreed to prior to the signing of the Transfer Agreement.
 - Hércules took advantage of the fact that it was crucial for the Player's career to be transferred as soon as possible:
 - a) During the 2013/2014 season, Hércules was in financial difficulties and could not afford to keep the Player on its main team, as his wages was estimated to account for one third of the club's total available budget for that season. Hércules had no possibility to comply with its financial obligations under the Employment Contract.
 - b) During the 2013/2014 season, Hércules was participating in the Spanish second division, which was incompatible with the criteria defined by the national Colombian coach in order to be selected for the Colombian national team. In other words, had the Player remained with Hércules, he would not have been entitled to play for his country.
 - Hércules misused TMS as a tool to coerce the Player into signing the waiver. It refused to enter its transfer instruction into TMS, blocking the Player's transfer to Toulouse. By refusing to process the transfer, Hércules was placing the Player in an impossible position and was not giving him any alternative other than signing the Waiver.
 - Hércules also took advantage of the fact that Toulouse was considering signing another player and that the transfer window was nearly closed. It put considerable

amount of pressure on the Player, who was “terrified at the possibility of not competing for several months and, consequently, being dropped from his national team”. This would have been devastating for the Player, who is the kind of person whose professional focus has always been to represent his national team in a World Cup competition.

(ii) The Answer

59. Hércules submitted the following requests for relief:

“[Hércules] respectfully asks the Panel to:

- i Dismiss the appeal filed by [the Player] in full.*
- ii. Confirm the Decision of the FIFA DRC dated 3 September 2015.*
- iii. Order that [the Player] shall bear the full costs of these proceedings.*
- iv. Order [the Player] to pay a substantial contribution to the legal fees and expenses incurred by Hércules in these proceedings, in an amount to be determined by the Panel”.*

60. The submissions of Hércules, in essence, may be summarized as follows:

- The initiative to transfer the Player to Toulouse did not come from Hércules. It was the Player who wanted to terminate the Employment Contract, in order to join the French club. In such a context, Hércules always made very clear under what conditions it was willing to accept the offer made by Toulouse: the Player was to waive his salaries for the months of July and August 2013 as well as the 15% of the transfer fee to be paid by Toulouse.
- For the transfer of the Player to Toulouse to come into force, the signature of the Transfer Agreement was not enough. This is supported by Article 5 of this document, which clearly states *“Following the signing of this Agreement and subject to the conclusion of an early termination agreement between Hercules and the Player, the Parties undertake all steps necessary (...) so that (...) the Player can be duly qualified and registered with the French Football Association on 21st August 2013 the latest”*.
- On 22 August 2013, Toulouse prematurely uploaded the Transfer Agreement into the TMS. It should have waited until the Waiver had been signed.
- At the moment of the signature of the Transfer Agreement, it is undisputed that the Player had a copy of the Waiver. In other words, from the beginning of the negotiations with the Player, Hércules made clear that his transfer was conditional upon him waiving his salaries and his share of the transfer fee.
- The Player’s agent email of 22 August 2013 establishes the following:

- Hércules' conditions had been discussed on 21 August and on 22 August 2013; *i.e.* on the day of the signature of the Transfer Agreement and on the following day. They did not come as a surprise and were not raised at a particular inopportune or unexpected moment. They were part of the negotiations.
- The email does not suggest that Hércules was putting some kind of pressure on the Player for him to sign the Waiver. This is simply because there was not such pressure.
- The Player had agreed without any reservation to waive his entitlement to the 15% of the transfer fee paid by Toulouse. He specifically said that he would do so *"for the sake of the transaction"*.
- In the past, the Player had already agreed to waive his share of the transfer fee. As stated in the said email, *"he renounced to €100,000 last year in order to sign for La Coruña"*. Hence, such a waiver was neither unusual for the Player nor new.
- In the present proceedings, the Player submitted that he had been willing to give up his right only provided that Hércules would facilitate his transfer, which was not the case.
Such a reservation is not mentioned in the email of 22 August 2013 and Hércules never tried to hinder the Player's transfer. *"The club was clear from the very first minute and very comprehensively informed the [Player] what the conditions were in order to accept the transfer offer from Toulouse"*.
- On 27 August 2013, the Player initiated proceedings before the DRC and exclusively requested the payment of his wages for the months of July and August 2013. The fact that he did not make any reference to his percentage of the transfer fee validates the fact that he had waived his entitlement to this amount, namely by means of the email of 22 August 2013.
- The Player regularly played for the Colombian national team, regardless of the division in which his club was competing. For instance, during the 2013/2014 season, while the Player was still registered with Hércules (which was at the time participating in the Spanish second division), the Colombian Football Federation asked for the release of the Player in order for him to play with the national team in September 2013.

V. JURISDICTION

61. The jurisdiction of the CAS derives from Articles 66 *et seq.* of the applicable FIFA Statutes and Article R47 of the Code.
62. At the hearing before the CAS, the Parties expressly accepted the jurisdiction of the CAS, which has therefore the power to adjudicate the appeal filed by the Player.

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

VI. ADMISSIBILITY

64. The appeal is admissible as the Player submitted it within the 21-day deadline provided by Article R49 of the Code as well as by Article 67 para. 1 of the applicable FIFA Statutes. It complies with all the other requirements set forth by Article R48 of the Code.

VII. APPLICABLE LAW

65. In their submissions, the Parties accepted that pursuant to Article R58 of the Code, FIFA Regulations were applicable and, while Hércules submitted that Swiss law must apply subsidiarily, the Player maintained that Spanish law governs the merits of the dispute in view of the fact that it was the law chosen by the Parties. In this respect, the Player referred to Article 6 of the Employment Contract according to which *“For whatever is not provided for in this Agreement, the Royal Decree No. 1006/1985 dated June 26 shall be followed, to rule the special work relationship of the professional players, the collective bargaining in effect, and all other applicable standards”*.

66. Article R58 of the Code states as follows:

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

67. Article 66 para. 2 of the applicable FIFA Statutes reads as follows:

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

68. The Panel observes that according to Article 25 para. 6 of the applicable Regulations on the Status and Transfer of Players (RSTP), *“The Players’ Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge (as the case may be) shall, when taking their decisions, apply these regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport”*. Article 2 of the applicable Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber has a similar content.

69. In light of the above provisions, it appears that a) FIFA Regulations apply primarily, b) Swiss law applies *“additionally”* and c) the Parties’ express choice of law must be taken into account. Because of the potential for conflict, the question arises how to delineate the scope of application of each body of law to the facts of a given case. This question has been recently

dealt with by Prof. Dr. Ulrich HAAS (HAAS) in an article published in the CAS Bulletin 2015/2 (pages 7 *et seq.*), the conclusions of which the Panel fully endorses (*ibidem*, page 17):

“(2) In CAS proceedings the parties have invariably made a choice of law, since the agreement on the CAS as the court of arbitration always also entails an implicit (and indirect) agreement in relation to the provision of Art. R58 of the CAS Code.

(3) This implicit agreement on Art. R58 of the CAS Code takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. R58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. R58 of the CAS Code the “applicable regulations” always primarily apply, regardless of the will of the parties.

(4) If for their part the “applicable regulations” contain a reference to a national law (see for example Art. 66 (2) of the FIFA Statutes), then the scope of application of the national law thus invoked must be delineated from the law chosen by the parties. Swiss law as invoked in Art. 66 (2) of the FIFA Statutes does not prevail over the choice of law made by the parties. Rather, this gives rise to a co-existence of the “applicable regulations”, Swiss law and the law chosen by the parties.

(5) The application of Swiss law is confined to ensuring uniform application of the FIFA regulations. Art. 66 (2) merely clarifies that the FIFA regulations are based on a normative preconception, which is borrowed from Swiss law. Therefore if questions of interpretation arise over the application of the FIFA regulations recourse must consequently be made to Swiss law in this regard.

(6) Accordingly any other issues (regarding interpretation and application) that are not addressed in the FIFA regulations, i.e. for which FIFA has not set any uniform standards of the industry, are subject to the law that has been chosen by the parties”.

70. In other words, when parties have made an express choice of law, FIFA Regulations apply primarily, and recourse must be made to Swiss law only when questions of interpretation of the FIFA Regulations arise. As explained by HAAS (*ibidem*, page 15), “FIFA lays down the standard for a particular sports industry in its rules and regulations [and] the purpose of the reference to Swiss law in Art. 66 (2) of the FIFA Statutes is to ensure the uniform interpretation of the standards of the industry”. The law chosen by the parties applies to all the matters, which are not addressed in the FIFA Regulations and which, therefore, do not require a globally uniform application, because “they are not part of the standards of the industry set by FIFA”.
71. In the present matter and in view of Article 6 of the Employment Contract, the Panel accepts that the Parties have expressly chosen the Real Decreto as the law governing their labour relationship. As a consequence, the applicable FIFA Regulations apply primarily and Swiss Law shall apply solely for the purpose of interpreting the said FIFA Regulations. The Real Decreto applies to all the aspects not specifically governed by the FIFA Regulations.

72. The case at hand was submitted to the DRC on 27 August 2013, *i.e.* after 1 December 2012, which is the date when the 2012 edition of the RSTP came into force. Pursuant to Article 26 para. 1 and 2 RSTP, the case shall be assessed according to this edition of the Regulations.

VIII. MERITS

73. The main issues to be resolved by the Panel in deciding this dispute are the following:

- A/ What is the scope of the Waiver?
- B/ Was the Waiver signed under duress, and therefore, invalid?

A/ What is the scope of the Waiver?

74. It is the Player's position that he is entitled to receive a) his salaries for July and August 2013 as well as b) 15% of the transfer fee paid by Toulouse to Hércules. With reference to the payment of a portion of the transfer fee, the Player's claim is based on Article 13 a) of the Real Decreto, which provides that *"If the termination by mutual agreement has as an object the permanent transfer of the athlete to another club or sporting entity, the parties shall agree on the economic conditions for the execution of the contract; in case no express agreement exists, the sportsman shall be entitled to compensation of at least 15% gross of the agreed transfer compensation. (...)"*.
75. The RSTP do not contain any provision governing financial consequences of the mutually agreed termination of an employment contract between a club and a player. Assuming that the Real Decreto is applicable to the present dispute (a question which can actually be left open, in view of the conclusion reached hereafter), its Article 13 a) specifically foresees the possibility for the parties to a labour relationship to agree among themselves to any other allocation percentage of the transfer fee. The *"15% gross of the agreed transfer compensation"* appears to be a default amount set by the Real Decreto *"in case no express agreement exists"*. In this regard, it is recalled that, in the past, the Player had accepted to renounce entirely to his rights under Article 13 a) of the Real Decreto, when he was transferred to La Coruña for the 2012/2013 season. In other words, it is possible for a player to waive his entitlement to a percentage of the transfer fee. This conclusion is crucial for the remainder of the Panel's analysis. If, as the Player had argued, the 15% compensation cannot be contractually waived, then similar contractual clauses will have to be consistently disregarded. For the reason mentioned above, this is not the case, and the Panel accepts that the Spanish Law at hand, the Real Decreto, provides for the possibility to deviate from the practice of paying 15% of the transfer fee to the Player. Article 13 a) is a default payment, which kicks in only when parties have not, through contractually means, provided otherwise.
76. In light of the foregoing consideration, the question to be addressed is whether the Waiver covers the 15% of the transfer fee paid by Toulouse and/or the salaries for July and August 2013. The Player submits that, even if the Waiver had been validly agreed to (which he objects has been the case), it applied exclusively to the unpaid salaries. Thus, in his view, the obligation

of Hércules to pay him 15% of the transfer fee remains unaffected and must be performed even if the Panel were to agree that the Waiver had been validly concluded (quod non, in his view).

77. In view of the circumstantial evidence before the Panel, and after careful analysis of the Waiver, and in particular of its original Spanish version (which obviously must take precedent over its translation, a point that both Parties to the dispute have confirmed), the members of the Panel unanimously agree that this document covers all the claims of the Player against Hércules, *i.e.* the salaries of July and August 2013 as well as his share of the transfer fee paid by Toulouse.

a) The circumstantial evidence

78. It results from the email of 22 August 2013 sent by the Player's agent that Hércules and the Player had been discussing the terms of the transfer to Toulouse. This document establishes unambiguously that Hércules made clear that it wanted the Player to waive his salaries for the months of July and August 2013 as well as the 15% of the transfer fee to be paid by Toulouse.
79. According to the same email, the negotiations between the Player and Hércules took place on 21 and 22 August 2013. On 21 August 2013, the Player already had a copy of the Waiver. Under these circumstances, there is no reason to believe that, in the Parties' mind, the Waiver only covered the Player's salaries for the months of July and August 2013. Between 21 August and 22 August 2013, the text of the Waiver remained unchanged and, at that moment, Hércules explicitly stated under what conditions it was willing to accept the offer of Toulouse: the Player was to waive his salaries for the months of July and August 2013 as well as the 15% of the transfer fee to be paid by Toulouse.
80. In other words, when the Player signed the Waiver on 28 August 2013, *i.e.* less than a week later, he could not ignore what the exact scope of this document was.
81. In addition, the email of 22 August 2013 also establishes the fact that the Player was prepared to abandon his rights under Article 13 a) of the Real Decreto but that "*He [was] not willing, under any circumstance, to renounce to his monthly salaries for July and August 2013*". It appears that:
- on 27 August 2013, before signing the Waiver, the Player filed a claim with FIFA requesting the payment of his wages for the months of July and August 2013;
 - on 29 August 2013, after he signed the Waiver, the Player informed FIFA that he was maintaining his claim for the payment of his outstanding salaries.
82. In none of his interventions of August 2013 to FIFA, did the Player mention or claim the payment of his share of the transfer fee paid by Toulouse. It is only on 13 June 2014 and with the assistance of a legal counsel that the Player completed his claim before FIFA and asked the DRC to condemn Hércules to pay in his favour the total amount of EUR 386,666, including the unpaid salaries and the 15% of the transfer fee.

83. The Player's immediate behaviour following the signature of the Waiver leads the Panel to conclude that, during his negotiations with Hércules, the Player actually agreed to renounce to the 15% of the transfer fee but not to the payment of his salaries for the months of July and August 2013. The payment of these wages was actually the only point of contention between the Parties and the Player reluctantly had to concede on it, in order to move on with his transfer to Toulouse.

b) *The literal interpretation of the Waiver*

84. The pertinent clauses of the Waiver read as follows:

- "1.- HERCULES C.F. and the PLAYER terminate the contract between the Parties that was in effect for the 2013-2014 season, without the PLAYER having any right to claim the amount for the season to HERCULES C.F.
2. HERCULES C.F. transfers 100% of the economic and federative rights to the Toulouse FC, in a private contract subscribed between both entities".

85. In its original version, the above-quoted Article 1 of the Waiver has the following content:

"El Hércules C.F. y el JUGADOR resuelven el contrato que unia a las partes y que estaba vigente para la temporada 2013/2014 sin el que el JUGADOR pueda reclamar cantidad de la presente temporada al Hercules CF)".

86. In view of the circumstances of the case and of the above-quoted Article 2 of the Waiver, it is undisputable that this document was signed within the framework of the Player's transfer to Toulouse.

87. Pursuant to the above-quoted Article 1 of the Waiver, the Player abandoned "*any right to claim the amount for the season to HERCULES C.F.*"; i.e. the 2013/2014 season.

88. In his submissions, the Player tried to argue that his share of the 15% was "*not linked to any particular season, but rather to his performances and work while under contract with [Hércules] and of which [Hércules] benefitted by receiving a very significant amount in transfer compensation. In fact, if there is a season which is not relevant for these purposes that is the 2013/2014 season, as the Player moved to Toulouse and was no longer under contract with Hercules. (...). Given that the Involuntary Waiver only makes reference to amounts which would be due for the 2013/2014 season, the Player's entitlement to the 15% of the transfer compensation paid by Toulouse was obviously not meant to be included in the waiver*" (para. 137 and 138 of the appeal brief).

89. The Panel finds the Player's submission unconvincing:

- As expressed by the Spanish Supreme Court in its decision of 20 January 2015 (on which the Player relies), "*the obligation to pay to the player compensation in the amount of 15% of the transfer compensation arises, as a result of the contract between the former club and the player*" (emphasis added). There is a direct link between the Employment Contract and the Player's claim.

- The Parties were bound by an employment relationship, which was valid exclusively for the 2013/2014 season. It must be recalled that the Player had been transferred on a permanent basis to La Coruña for the 2012/2013 season. Under these circumstances, it is unclear how the Player can contend that *“In fact, if there is a season which is not relevant for these purposes that is the 2013/2014 season, as the Player moved to Toulouse and was no longer under contract with Hercules”*. In fact and contrary to the Player’s assertion, the 2013/2014 season is the only relevant season for the purposes of Article 13 a) of the Real Decreto.
90. Finally, by signing the Waiver, the Player was not just renouncing to claim his salaries as he actually gave up *“any right to claim the amount for the season [2013/2014] to HERCULES”*. In the English version of the Waiver, the word *“amount”* is the translation of *“cantidad”*, which cannot be interpreted in a restricted manner, limited to unpaid salaries. It seems unquestionable that by using the word *“cantidad”*, the author of the Waiver wanted this document to be understood in the widest possible sense.
- c) *Conclusion*
91. The Player does not contest that, if valid, the Waiver covers the salaries of July and August 2013 only. In view of the circumstantial evidence and of the wording of the Waiver, the Panel holds that it also covers the Player’s right to 15% of the transfer fee paid by Toulouse.

B/ Is the Waiver valid?

92. The Player claims that the Waiver is not valid as it was signed under duress. He contended that the Transfer Agreement reflected exhaustively the full agreement among all of its signatories and was not conditional upon the Player waiving his outstanding salaries and his entitlement to 15% of the transfer fee. In other words, Hércules forced the Player to sign the Waiver when no such condition had been agreed to prior to the signing of the Transfer Agreement. In addition, Hércules took advantage of the fact that it was crucial for the Player’s career to be transferred as soon as possible. Finally, at the hearing before the CAS, the Player made reference to Swiss law and in particular to Article 341 of the Swiss Code of Obligations (CO), according to which *“For the period of the employment relationship and for one month after its end, the employee may not waive claims arising from mandatory provisions of law or the mandatory provisions of a collective employment contract”*.
93. The RSTP do not contain any express provision related to duress. Assuming that Spanish law was to be applied in relation to this aspect (which can actually be left open, in view of the conclusion reached hereafter), there is duress when (i) the party issues his consent under justified fear; (ii) the fear derives from an imminent and serious threat; (iii) there exists a causal link between the threat and the consent (the victim would not have concluded the agreement under the conditions in which it did had it not been for the threat); (iv) the threat must have been committed with fault (intentionally or negligently); and (v) the threat must be unfair or illegitimate (see appeal brief, para. 156 and references).
94. The Panel will address hereafter the various points raised by the Player.

a) *The Transfer Agreement constituted the mutual termination of the Employment Contract*

95. The Panel cannot agree with the Player when he claims that the Transfer Agreement reflected exhaustively the full agreement among Hércules, Toulouse and the Player. The parties to the Transfer Agreement are the two clubs and not the Player. The latter did indeed sign the Transfer Agreement but more as a declaration of acceptance to be transferred. Had either club failed to comply with any of its contractual obligations under the Transfer Agreement, it is doubtful that the Player would have been in a position to enforce it. In any event, the Player did not prove otherwise.
96. Moreover, Article 2 of the Transfer Agreement clearly states that Hércules “*undertakes to terminate the Player’s contract*”, which means that the Employment Contract was still in force at the moment of the signature of the Transfer Agreement.
97. The fact that the labour relationship between Hércules and the Player was not terminated is further confirmed by Article 5 of this document, which provides that “*Following the signing of this Agreement and subject to the conclusion of an early termination agreement between Hércules and the Player, the Parties undertake all steps necessary in a timely manner so that the International Registration Transfer Certificate can be issued by the Spanish association and the Player can be duly qualified and registered with the French Football Association on 21st August 2013 the latest*” (emphasis added).
98. In his appeal brief (para. 171), the Player submits that Article 3 of the Transfer Agreement enumerates exhaustively the conditions under which his transfer was subject. “*A mutual termination of the Employment Contract was not included as a condition precedent, for the obvious reason that, as explained above, the Transfer Agreement itself which was agreed to and signed by the clubs and the Player constituted that agreement for the mutual termination of the Employment Contract*”.
99. Such a statement is in contradiction with Articles 2 and 5 of the Transfer Agreement. It is also inconsistent with the fact that the Player was negotiating with Hércules on 21 and 22 August 2013 (i.e. after the signature of the Transfer Agreement), the terms of the premature termination of the Employment Contract. Such negotiations would have been without any purpose if the labour relationship between the Player and Hércules had already been terminated by the mere signature of the Transfer Agreement.

b) *The Player signed the Waiver under fear of an imminent and serious threat*

100. The Panel finds that the Player failed to establish the existence of “*an imminent and serious threat*”. He was bound to Hércules with an Employment Contract, valid from 1 July 2013 until 30 June 2014.
101. There is no evidence that Hércules was not in a position to comply with its financial obligations towards the Player or that Hércules had told the latter that he could not stay or that it would not count on him for the 2013/2014 season. The club admitted that “*it has neither been denied that (...) it was better to transfer him than to keep him on the team, in order to compose a more balanced squad*”.

However, Hércules has never said that it would not respect its contractual duties as an employer, should the Player remain at its service.

102. In reality, the Player wanted to prematurely terminate the Employment Contract in order to join a more attractive club. The fact that Hércules was willing to accept the transfer under certain conditions (*i.e.* the renunciation by the Player to his pending wages and his share of 15% of the transfer fee) does not constitute a threat. This was the price for the Player to pay in order to obtain what he wanted. The Player had the choice to accept that price or to decline it and, consequently, to remain at the services of Hércules. In the latter case, one can leave open the question (which is irrelevant for the present case), whether Toulouse could have brought a damage claim against Hércules for not complying with its commitments made under the Transfer Agreement.
103. Hércules claimed that its mistake was to sign the Transfer Agreement before the signature by the Player of the Waiver and that, on 22 August 2013, Toulouse prematurely uploaded the Transfer Agreement into the TMS as all the requirements of the Transfer Agreement (*i.e.* namely the termination of the Employment Contract) were not met. This submission seems consistent with the fact that the FIFA Disciplinary Committee decided to drop all the charges against Hércules for an alleged misuse of the TMS.
104. The fact that, during the 2013/2014 season, Hércules was participating in the Spanish second division, which was allegedly incompatible with the criteria defined by the national Colombian coach in order to be selected for the Colombian national team, does not give the right to the Player to unilaterally request from Hércules a premature termination of the Employment Contract. This agreement was not subject to Hércules staying in first division.
105. Since the Panel holds that the Player did not sign the Waiver under fear of an imminent and serious threat, the other criteria, which must be met for the qualification of duress can be dismissed without further consideration.

c) The Waiver is incompatible with Article 341 CO

106. At the hearing before the CAS, the Player's representatives made reference to Article 341 CO, which seems inconsistent with the fact that, from the beginning of these appeal proceedings, they have claimed that Spanish law was applicable to the substantive issues of the present dispute. They put forward that according to this provision, it is inadmissible for an employee to waive his salary. However, they have not explained on what basis Article 341 CO should be taken into account in the case at hand.
107. As this argument was raised for the first time at the hearing and Hércules was not in a position to address comprehensively this matter, the Panel will refrain from making any comment other than, in the framework of a mutually agreed premature termination of the labour relationship, Article 341 CO does not forbid the parties to enter into a settlement whereby they each make reciprocal concessions (Decision of the Swiss Federal Tribunal, 4A_376/2010, 30 September 2010, consid. 3 and references). In the present case, Hércules was ready to accept the premature

termination of the Employment Contract whereas the Player accepted to waive his salaries and share of 15% of the transfer fee paid by Toulouse. Article 341 CO seems of no help for the Player's case. At least the contrary was not established.

C/ Conclusion

108. The Panel holds that the Waiver is valid and that holds that the Player perfectly knew its scope, which covered not only the unpaid salaries for July and August 2013 but also his share of the 15% of the transfer fee paid by Toulouse. He accepted to sign this document, despite the fact that he was not happy with Hércules' conditions for his transfer to Toulouse. The Panel agrees with the conclusion reached by the DRC that the Player failed to establish his allegation that the Waiver had been signed under duress.
109. The above conclusion makes it unnecessary for the Panel to consider the other arguments submitted by the Parties. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 24 February 2016 by Mr Abel Aguilar Tapias against the decision issued on 3 September 2015 by the FIFA Dispute Resolution Chamber, is dismissed.
2. The decision issued on 3 September 2015 by the FIFA Dispute Resolution Chamber is confirmed.
3. (...).
4. (...).
5. All other of further claims are dismissed.