



**Arbitration CAS 2013/A/3149 Avaí FC v. Fédération Internationale de Football Association (FIFA) & Bursaspor Club Association & Marcelo Rodrigues, award of 13 May 2014**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr José Juan Pintó (Spain); Mr Lars Hilliger (Denmark)

*Football*

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

*Right to be heard*

*Aim of article 17 para. 2 of the FIFA Regulations on the Status and Transfer of Players*

*Joint liability of the club taking advantage of the early termination*

*Specificity of sport*

1. According to Article R57 of the Code, the CAS has full power to review the facts and the law. The panel consequently hears the case *de novo* and is not limited to the consideration of the evidence that was adduced before the tribunal of first instance: the panel can consider all new evidence produced before it. This implies that, even if a violation of the principle of due process occurred in prior proceedings, it may be cured by a full appeal to the CAS. In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance “*fade to the periphery*”.
2. Article 17.2 is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player’s decision to terminate his former contract, and at better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club on the basis of Article 17. It is in fact clear that the new club will be responsible, together with the player, for the payment of compensation to the former club, regardless of any involvement or inducement to breach the contract, and without considering its good or bad faith.
3. Only after the ordinary expiration of an employment contract a club signing a new contract with the player would not have taken advantage of his early (and wrongful) termination of the employment contract. Therefore, a joint liability exists at least for the original term of the breached contract: taking advantage of the early termination of the previous contract, the club of first registration after the early termination has the burden to sustain also the adverse consequences of such termination and be jointly liable for the payment of compensation. As a result, the facts that the new contract is signed a long time after the breach and that the new club is in good faith are irrelevant.
4. Specificity of sport is in itself not an additional head of damage, but a factor to take into account in the evaluation of the other elements. Sport, in fact, answers not only to economic factors, but also to social values and emotional aspects: when an employment contract is breached, the ensuing dispute arises in the somehow special world of sport;

**and the damages to be awarded have to take into account its peculiarities, which include the possibility that a player's services turns out not to have the sporting impact expected by a club when contracting them.**

## **1. BACKGROUND**

### **1.1 The Parties**

1. Avaí FC (hereinafter referred to as “Avaí” or the “Appellant”) is a football club, with seat in Florianópolis, Brazil. Avaí is affiliated to the *Confederação Brasileira de Futebol* (hereinafter referred to as “CBF”), which is a member of the Fédération Internationale de Football Association.
2. The Fédération Internationale de Football Association (hereinafter referred to as “FIFA” or the “First Respondent”) is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich (Switzerland).
3. Bursaspor Club Association (hereinafter referred to as “Bursaspor” or the “Second Respondent”) is a football club, with seat in Bursa, Turkey. Bursaspor is affiliated to the *Türkiye Futbol Federasyonu* (hereinafter referred to as the “TFF”), which also a member of FIFA.
4. Marcelo Rodrigues (hereinafter referred to as the “Player” or the “Third Respondent”) is a professional football player of Brazilian nationality born on 9 January 1987.
5. FIFA, Bursaspor and the Player are hereinafter jointly referred to as the “Respondents”.

### **1.2 The Dispute between the Parties**

6. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
7. On 1 July 2008, Bursaspor signed with the Player an employment contract for two seasons, entering into force at the date of its signature and expiring on 31 May 2010 (hereinafter referred to as the “Employment Contract”).

8. The Employment Contract contained *inter alia* the following provisions:

**“III- REMUNERATION AND PAYMENT TERMS**

a) **BURSASPOR** will pay the **PLAYER** as of the following:

**First Season (2008-2009)**

100,000 USD on the signing

400 USD per month, from July 2008 to June 2009  $\times 12$  months = 4,800 USD

Transfer Fee, from August 2008 to May 2009 19,520 USD  $\times 10$  months = 195,200 USD

Player accepts to comply with the Club's discipline regulation.

**Second Season (2009-2010)**

100,000 USD on 25.08.2009

400 USD per month, from July 2009 to June 2010  $\times 12$  months = 4,800 USD

Transfer Fee, from August 2009 to May 2010 19,520 USD  $\times 10$  months = 195,200 USD

Player accepts to comply with the Club's discipline regulation”.

9. On 29 January 2009, Bursaspor lodged a claim with FIFA indicating that the Player on 22 December 2008 had left Bursaspor without any justification. As a result, Bursaspor requested FIFA to declare the Employment Contract terminated because of breach by the Player and to award compensation in the amount of USD 535,000, corresponding to USD 85,000 for three fines imposed on the Player because of his absence at training sessions, and USD 450,000 for damages calculated on the basis of the residual value of the Employment Contract. In addition, Bursaspor requested that sporting sanctions be imposed on the Player.
10. As a result of the claim filed by Bursaspor, the Player was invited to submit his position and to provide FIFA with copies of any employment contracts he would have signed between 1 December 2008 and 1 June 2010.
11. No reply from the Player was ever received.
12. Based on the information received from the CBF at FIFA's request, Avaí was determined to be the first club the Player had been registered with after leaving Turkey.
13. Invited by FIFA to state its position on the claim lodged against the Player, Avaí submitted its answer and confirmed, *inter alia*, that it had signed an employment contract with the Player on 28 April 2010, and transmitted to FIFA a copy of said contract (hereinafter referred to as the “New Contract”). Avaí further specified that it had signed this contract only after the Employment Contract between the Player and Bursaspor would have come to an end. In this respect, it submitted a document in Portuguese presented to be a “players’ database” managed by the CBF, from which it would be visible that the Employment Contract would have ended on 25 April 2010. FIFA was further provided by the CBF with a copy of the employment contract signed by the Player with Avaí on 28 April 2010, which was valid as from the date of its signature until 10 December 2010.

14. On 25 October 2012, the Dispute Resolution Chamber of FIFA (hereinafter referred to as the “DRC”) rendered a decision on the claim brought by Bursaspor (hereinafter referred to as the “Decision”) holding the following:
- “1. The claim of the Claimant, Bursaspor Club Association, is partially accepted.*
  - 2. The Respondent, Marcelo Rodrigues, has to pay to the Claimant compensation for breach of contract amounting to USD 150,000 within 30 days as from the date of notification of this decision.*
  - 3. In the event that the aforementioned amount is not paid within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
  - 4. The Intervening Party, Avai Futebol Clube, is jointly and severally liable for the payment of the aforementioned amount.*
  - 5. Any further claim lodged by the Claimant is rejected.*
  - 6. The Claimant is directed to inform the Respondent and the Intervening Party immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received”.*
15. In the Decision, the DRC preliminarily found that the edition of 2008 of the Regulations on the Status and the Transfer of Players (hereinafter referred to as the “RSTP 2008”) was applicable to the merits of the dispute, since Bursaspor had lodged the claim on 29 January 2009. Then, considering the substance of the matter, the DRC stated that:
- “4. ... firstly acknowledged that, on 1 July 2008, the Claimant [Bursaspor] and the Respondent [the Player] concluded an employment contract valid during 2 sporting seasons, i.e. as from 1 July 2008 until 31 May 2010.*
  - 5. The Chamber further noted that the Claimant [Bursaspor] asserted having paid the total amount of USD 159,760 to the Respondent [the Player] in connection with the execution of the employment contract and that it presented various documents corresponding to contractual payments totalling the amount of USD 159,760 between 30 June 2008 and 15 December 2008.*
  - 6. The members of the Chamber further acknowledged that the Claimant [Bursaspor] asserted that the Respondent [the Player] unilaterally breached the employment contract by having left on 22 December 2008 without any authorisation and any further communication.*
  - 7. On such basis, the Claimant [Bursaspor] deemed that the Respondent [the Player] shall be sentenced to pay compensation for breach of contract to the Claimant [Bursaspor] in the amount of USD 450,000, which, according to the Claimant [Bursaspor], corresponds to the residual value of the employment contract signed by and between the Claimant [Bursaspor] and the Respondent [the Player] on 1 July 2008.*
  - 8. In addition, the Claimant [Bursaspor] claimed the payment of three fines that were imposed upon the player by the club’s board of directors and further asked that sporting sanctions be imposed on the Respondent [the Player].*
  - 9. In continuation, the Chamber duly took note that, in spite of having been invited to do so, the*

*Respondent [the Player] did not submit any response to the claim lodged against him. In this way, so the Chamber, the Respondent [the Player] renounced his right to defence and, thus, accepted the allegations of the Claimant [Bursaspor].*

10. *Furthermore, as a consequence of the aforementioned consideration, the Chamber concurred that in accordance with art. 9 par. 3 of the Procedural Rules it shall take a decision upon the documents already on file.*
11. *The Intervening Party [Avai], for its part, highlighted that it signed an employment contract with the player after his contract had allegedly already ended, i.e. on 28 April 2010, and it submitted a document issued by the CBF in Portuguese only. In the light of the fact that such document was not presented along with a translation into an official FIFA language (cf. art. 9 par. 1 lit .e) of the Rules), the Chamber could not take it into account.*
12. *Nonetheless, the Chamber wished to emphasise that Avai's respective argument is not relevant as will be demonstrated below.*
13. *In light of all the above, the Chamber concluded that the employment contract between the Claimant [Bursaspor] and the Respondent [the Player] was unilaterally terminated by the Respondent [the Player] on 22 December 2008, i.e. the date on which the Respondent [the Player] left the club and, thus, ceased to render his services to the Claimant [Bursaspor] without any authorisation or any further communication.*
14. *Having established the aforementioned, the DRC deemed that the underlying issue in this dispute was to determine as to whether the employment contract had been unilaterally terminated with or without just cause by the Respondent [the Player]. The Chamber also underlined that subsequently, if it was found that the employment contract has been breached by the Respondent [the Player] without just cause, it would be necessary to determine the financial and/or sporting consequences to be imposed as a result of the breach of the relevant employment contract without just cause.*
15. *In this respect, and as a consequence of the absence of any statement or evidence submitted by the Respondent [the Player] with regard to the circumstances related to his departure from the Claimant [Bursaspor], the Dispute Resolution Chamber could only find, in line with its well-established jurisprudence, that the Respondent [the Player] had unilaterally terminated the employment contract signed with the Claimant [Bursaspor] without just cause on 22 December 2008".*
16. The DRC, then, considered the consequences of such finding, i.e. that the Player had terminated without just cause the Employment Agreement. In this respect the DRC stated that:
  - "16. *This being established, the Chamber stated that it, therefore, had to assess the consequences of this unilateral termination of the employment contract without just cause by the Respondent [the Player], in accordance with the provisions provided for by Chapter IV of the Regulations.*
  17. *As a matter of fact, by unilaterally and prematurely terminating the employment contract with the Claimant [Bursaspor] without just cause, in accordance with article 17 par. 1 of the Regulations, the Respondent [the Player] is liable to pay compensation to the Claimant [Bursaspor].*
  18. *Furthermore, in accordance with the unambiguous contents of article 17 par. 2 of the Regulations, the Chamber established that the Respondent's [the Player's] new club, i.e. the Intervening Party [Avai],*

*shall be jointly and severally liable for the payment of compensation.*

19. *In this respect, the Chamber was eager to point out that the joint liability of a player's new club is independent from the question as to whether this new club has committed an inducement to contractual breach. This conclusion is in line with the well-established jurisprudence of the Chamber that was repeatedly confirmed by the Court of Arbitration for Sport (CAS).*
20. *In continuation, the Chamber focussed its attention on the calculation of the amount of compensation for breach of contract in the case at stake ... in accordance with art. 17 par. 1 of the Regulations.*
21. *In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the pertinent employment contract contains a provision by which the parties had beforehand agreed upon an amount of compensation payable in the event of breach of contract. In this regard, the Chamber established that no such compensation clause was included in the employment contract at the basis of the matter at stake.*
22. *As a consequence, the members of the Chamber determined that the amount of compensation for breach of contract in the present matter had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. The Chamber recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable. Therefore, other objective criteria may be taken into account at the discretion of the deciding body. Furthermore, the Chamber highlighted that each request for compensation for breach of contract had to be assessed on a case-by-case basis.*
23. *Having said this, the Chamber turned its attention to the remuneration and other benefits due to the player under the existing contract and/or the new contract. The members of the Chamber deemed it important to emphasise that the wording of article 17 par. 1 of the Regulations allows the Chamber to take into account both the existing contract and any new contract(s) in the calculation of the amount of compensation.*
24. *In connection with the employment contract signed by and between the Claimant [Bursaspor] and the Respondent [the Player], the Chamber firstly recalled that the breach of contract in the case at hand occurred when the relevant employment contract was still to run for more than seventeen months, i.e. as from 22 December 2008 until 31 May 2010.*
25. *It further recalled, on the one hand, that the Claimant [Bursaspor] demonstrated that it paid the amount of USD 159,760 to the Respondent [the Player] prior to the early termination of the contract and, on the other hand, that it was requesting the payment of the amount of USD 450,000 as compensation for breach of contracts, which amount it had not further specified.*
26. *Bearing in mind that the Respondent [the Player] left the Claimant [Bursaspor] on 22 December 2008, the Chamber concluded that on that date, and based on the financial terms of the relevant contract, the Claimant [Bursaspor] should have paid to the Respondent [the Player] the amount of USD 180,080 for services rendered by the Respondent [the Player] to the Claimant [Bursaspor].*
27. *In view of the above, the Chamber held that the residual value of the contract at the time when the Respondent [the Player] acted in breach of the contract was USD 419,920.*
28. *In continuation, the Chamber noted that subsequent to the moment in time when the breach of contract occurred, as from 22 December 2008<sup>9</sup> until 31 May 2010, the Respondent [the Player] appeared to have remained unemployed until 28 April 2010, i.e. during a period of time of 16 months, when*

*he signed on with Avaí.*

29. *Likewise, the Chamber took into account that the Respondent's [the Player's] remuneration under his new employment contract has been significantly lower than the remuneration stipulated in the contract signed with the Claimant [Bursaspor].*
  30. *In continuation, and referring to art. 12 par. 3 of the Procedural Rules, although bearing in mind that the Claimant [Bursaspor] had not specifically included any of these costs in its claim, the Chamber established that it had no indication at its disposal regarding possible fees and expenses paid or incurred by the Claimant [Bursaspor] for the acquisition of the player's services and that therefore, it could not further consider that criterion in the specific case at hand, whereas according to art. 17 par. 1 of the Regulations such fees and expenses may be included as one of the criteria to be taken into account in the calculation of compensation.*
  31. *Furthermore, the Chamber underlined that at the time of the early termination of the contract by the Respondent [the Player] without just cause, the Claimant [Bursaspor] had not fully complied with its contractual obligations. Indeed, the Claimant [Bursaspor] substantiated that it paid the amount of USD 159,760 to the Respondent [the Player], whereas, at the time when the breach occurred, i.e. on 22 December 2008, and as previously detailed, the total amount of USD 180,080 based on the financial contractual terms had fallen due, the difference corresponding to one month's remuneration.*
  32. *On account of all the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the Respondent [the Player] must pay the amount of USD 150,000 to the Claimant [Bursaspor] as compensation for breach of contract, which was considered a fair and adequate amount of compensation in the present matter. Furthermore, the Chamber decided that the Intervening Party, i.e. Avaí Futebol Clube, is jointly and severally liable for the payment for the relevant compensation in accordance with art. 17 par. 2 of the Regulations.*
  33. *Finally, and with regard to the Claimant's [Bursaspor's] claim relating to the payment of three fines that were imposed upon the Respondent [the Player] by the Claimant's [Bursaspor's] board of directors, the members of the Chamber wished to point out that said fines were related to missed trainings as from 28 December 2008 until 10 January 2009 and the Respondent's [the Player's] absence in connection with a match on 18 January 2009.*
  34. *In this respect, without addressing the issue as to whether these fines were proportionate and to be considered valid, the members of the Chamber unanimously agreed that the compensation for breach of contract and the fines at stake were both related to the Respondent's [the Player's] illegitimate absence. Hence, a simultaneous imposition upon the Respondent [the Player] of the obligation to pay said fines, on the other hand, would in fact consist of the imposition of a double sanction based on the same breach of obligations.*
  35. *The DRC members therefore unanimously rejected the Claimant's [Bursaspor's] claim for the payment of the three fines that were imposed upon the Respondent [the Player] by the Claimant's [Bursaspor's] board of directors.*
  36. *The Chamber concluded its deliberations in the present matter by rejecting any further claim lodged by the Claimant [Bursaspor]”.*
17. The Decision was notified to the parties, together with the grounds supporting it, on 2 April 2013.

## 2. THE ARBITRAL PROCEEDINGS

### 2.1 The CAS Proceedings

18. On 23 April 2013, Avaí filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”), pursuant to Article R48 of the Code of Sports-related Arbitration (hereinafter referred to as the “Code”), to challenge the Decision, naming FIFA, Bursaspor and the Player as Respondents. In the statement of appeal, the Appellant, *inter alia*, expressed its preference for the appointment of a sole arbitrator to hear the case; it however designated Mr Rui Botica Santos as an arbitrator in the event of appointment of a Panel of three arbitrators.
19. In a letter of 30 April 2013, Bursaspor indicated that it did not agree with the appointment of a sole arbitrator and designated Prof. Ulrich Haas to be a member of the Panel.
20. On 3 May 2013, the Appellant filed its appeal brief in accordance with Article R51 of the Code, together with 18 exhibits.
21. In a letter of 6 May 2013, FIFA expressed its preference for a Panel of three arbitrators to be appointed and agreed with the Second Respondent’s designation of Prof. Haas.
22. On 6 May 2013, the CAS Court Office invited the Appellant to provide “*a valid address, email, phone and fax numbers*” for the Player.
23. On 13 May 2013, the Appellant provided the CAS Court Office with the addresses of “*Boa Sport Clube (MG)*”, being “*Mr Marcelo Rodriguez, new club*”.
24. On 17 May 2013, the CAS Court Office informed the parties that it had not been able to notify the Third Respondent of the CAS arbitration, and confirmed that a new attempt would be made by sending the relevant documents to the new address (at his new club) communicated by the Appellant.
25. On 10 September 2013, the Second Respondent filed its answer to the statement of appeal, together with 1 exhibit.
26. On 28 May 2013, the CAS Court Office advised the parties that the President of the CAS Appeals Arbitration Division had decided to submit the case to a three member Panel.
27. In a letter of 11 June 2013 Boa Esporte Clube informed the CAS that the Player had terminated his employment contract on 11 April 2013, and therefore that it did “*not have his current address*” and it was “*not able to deliver him your referred correspondence*”. As a result, on 13 June 2013, the CAS Court Office invited the Appellant to provide a new valid address.
28. On 15 July 2013, the Appellant indicated to the CAS Court Office a new address for the Respondent.
29. On 12 August 2013, the First Respondent filed its answer to the statement of appeal, together

with 12 exhibits.

30. On 13 August 2013, the CAS Court Office confirmed to the parties that the documents pertaining to the arbitration had been successfully delivered to the Third Respondent on 1 August 2013, as per DHL report.
31. On 14 August 2013, the CAS Court Office informed the parties that Prof. Haas had declined to serve as a member of the Panel. It therefore invited the Respondents to jointly nominate another arbitrator.
32. On 16 August 2013, the Second Respondent appointed Mr Michele Bernasconi to be a member of the Panel.
33. On 22 August 2013, the CAS Court Office noted that the Third Respondent had failed to submit an answer to the statement of appeal, and that pursuant to Article R55 of the Code the arbitration would proceed.
34. In a letter of 22 August 2013, FIFA agreed with the Second Respondent's designation of Mr Bernasconi as an arbitrator.
35. By communication dated 10 October 2013, the CAS Court Office informed the parties, on behalf of the Deputy President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Rui Botica Santos and Mr Michele Bernasconi, arbitrators.
36. In a letter of 10 October 2013, Mr Bernasconi resigned from the Panel.
37. On 14 October 2013, the Second Respondent challenged the appointment of Mr Rui Botica Santos as an arbitrator. A challenge against the appointment of Mr Botica Santos was filed on 23 October 2013 also by the Second Respondent.
38. On 22 October 2013, Mr Botica Santos informed the CAS Court Office of his decision to resign from the Panel.
39. On 30 October 2013, the Second Respondent appointed Mr Lars Hilliger to be a member of the Panel. The First Respondent agreed with such designation in a letter of 31 October 2013.
40. On 1 November 2013, the CAS Court Office informed that parties that the recent correspondence sent to the Player had not been delivered to him, despite of several attempts. The Appellant was therefore requested to provide a new valid address of the Third Respondent.
41. On 1 November 2013, the Appellant appointed Mr José Juan Pintó as an arbitrator.
42. On 19 November 2013, the Appellant provided the CAS Court Office with a new address for the Third Respondent.
43. On 20 December 2013, the CAS Court Office informed the parties that, in view of the Third

Respondent's silence, the appointment of Mr Hilliger as arbitrator was confirmed.

44. As a result, the Panel appointed to hear the case was constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr José Juan Pintó Santos and Mr Lars Hilliger, arbitrators. On 20 January 2014, the CAS Court Office forwarded to the Panel the file of the arbitration proceedings.
45. In a letter of 29 January 2014, the CAS Court Office, writing on behalf of the Panel, invited the Second Respondent *"to provide the Panel with a copy of the contract by means of which the player ... was transferred from the Brazilian club São Caetano to Bursaspor"*, and confirmed that the Panel had decided to hold a hearing in this case.
46. On 3 February 2014, the CAS Court Office invited the Appellant, on behalf of the Panel, to file a translation of the documents attached to the appeal brief without an English translation. At the same time, FIFA was invited to provide copy of the case file.
47. On 10 February 2014, FIFA lodged with the CAS copy of the file of the procedure conducted before the DRC.
48. In a letter of 11 February 2014, the CAS Court Office invited again the Second Respondent *"to provide the Panel with a copy of the contract by means of which the player ... was transferred from Sao Caetano to Bursaspor"*.
49. On 13 February 2014, the Appellant filed the English *"free translation"* of its exhibits 1, 2, 3 and 4 to the appeal brief.
50. On 24 February 2014, the CAS Court Office insisted with the Second Respondent for the production of the document already requested on 29 January 2014 and 11 February 2014.
51. On 6 March 2014, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the *"Order of Procedure"*), which was accepted and countersigned by the Appellant, the First Respondent and the Second Respondent.
52. In a letter of 10 March 2014, the Second Respondent, writing with regard to the CAS letter dated 6 March 2014, lodged some documents and advised the CAS Court Office of the following:
  - "1. The said player had registration to Bursaspor in the season 2008-2009. (See attached records of Turkish Football Federation)
  - 2- There was labor contract between the player and the clubs that will be end 31 May 2010. (see attached labor contract)
  3. We have searched the clubs records and books; we could not find any written contract between (Sao Caetano and Bursaspor)) from club's records.
  4. Nevertheless, we have found attached protocol regarding to the transfer of the player (see attached an original copy and translation of the protocol dated on 09.07.2008).
  5. It is obvious that Bursaspor has given authorization to Ambrasia Paulino Miranda for transfer of three player Jose Leondro Gomes, Marcelo Rodriguez, and Adriano Bizerra Melo (see attached TFF

*registrations of those players)”.*

53. On 19 March 2014, the Appellant informed the CAS Court Office that it had come into the “possession of certain documents that are of the utmost importance to the outcome of the dispute at hand and for [its] defence”. It therefore requested the Panel to accept, pursuant to Article R56 of the Code, the submission of
  - “1- *Employment contract between Sao Caetano and the Third Respondent, valid from 25.04.2005 to 25.04.2010;*
  - 2- *Letter from Sao Caetano to the President of the Paulista Football Federation providing with copy of the Third Respondent’s temporary loan signed between Sao Caetano and the Second Respondent as well as copies of the documents “International Transfer Authorization” agreed and signed by the Third Respondent and “Declaration of Onus” signed by the Third Respondent;*
  - 3- *Agreement between Sao Caetano and the Second Respondent by means of which they agreed on the temporary loan of the Third Respondent as from 15 July 2008 to 25 April 2010; and*
  - 4- *ITC issued by the CBF, which indicates the club of origin (Sao Caetano), the destination club and the existence of a Special Convention”.*
54. In a letter of 19 March 2014, the CAS Court Office advised the parties that a decision as to the admissibility of such filing would be taken by the Panel at the beginning of the hearing.
55. A hearing was held on 21 March 2014 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 21 February 2014. The Panel was assisted at the hearing by Mr Antonio De Quesada, Counsel to CAS. The following persons attended the hearing:
  - i. for the Appellant: Mr Lorenzo Guerrero and Mr Bruno Comicholi, counsel;
  - ii. for the First Respondent: Mr Antoine Bonnet, Players’ Status and Governance Department;
  - iii. for the Second Respondent: Ms Jale Demir and Mr Nihat Güman, counsel;
  - iv. for the Third Respondent: nobody.
56. At the hearing, the parties made submissions in support of their respective cases. In such context, the Panel announced its decision to admit to the file the documents filed by the Appellant on 19 March 2014, as mainly corresponding to the documents whose production had been requested by the Panel (see §§ 45, 48 and 50 above) in the course of the arbitration.
57. At the conclusion of the hearing, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

## 2.2 The Position of the Parties

58. The following outline of the parties’ positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully

considered, for the purposes of the legal analysis which follows, all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

*a. The Position of the Appellant*

59. In its prayers for relief, as indicated in the statement of appeal and confirmed in the appeal brief, the Appellant requested the CAS to:

- “A- Firstly, annul the decision passed by the Dispute Resolution Chamber of FIFA on the grounds of procedural/formal defects, and refer the case back to its origin in the first instance, i.e. before the Dispute Resolution Chamber of FIFA.*
- B- In the case the above is rejected, which is not expected, alternatively and successively, the Appellant requests that the decision rendered by the Dispute Resolution Chamber of FIFA be entirely replaced and the CAS issue an new decision stating, inter alia, that the Appellant is not jointly and severally liable for the payment of any compensation issued by the DRC.*
- C- Also, alternatively and successively, and in case the requests in items A and B are dismissed, which should not be the case, the Appellant requests the partial amendment of the appealed decision in order to reduce the “quantum” of the compensation amount granted to the Second Respondent to be paid by the Third Respondent.*
- D- Finally, in any case and in addition to the above requests, the Appellant shall request the Panel to grant an order that the Respondents shall be liable for all the costs and expenses incurred by the Appellant bringing this appeal including the costs and expenses of CAS”.*

60. According to the Appellant, in fact, “two main issues” are involved in this appeal, i.e.

- i. “the concurrence of procedural defects during the proceedings before FIFA, regarding the claim filed by Bursaspor ... against Marcelo Rodrigues ...”; and*
- ii. “the unfairness and disproportionality of considering the Appellant as jointly and severally liable for the payment of USD 150.000 considering all the circumstances and events occurred”.*

61. In support of such indication, the Appellant preliminarily submits, as an “undisputed” fact, the circumstance that the Player had been transferred to Bursaspor from the Brazilian club São Caetano (hereinafter referred to as “São Caetano”) “on a loan basis” for the period between 15 July 2008 and 25 April 2010, and that the New Contract was signed only on 28 April 2010, i.e. after the loan would have expired, even though the Employment Contract had an expiry date at 31 May 2010.

62. The Appellant, then, summarises the procedure before FIFA and the correspondence it had received and sent in that connection, and underlines that “it was neither informed that the case was going to be decided nor that it was a party to the proceeding”, and that only when the Decision was notified it became aware “for the first time that it was an Intervening Party and that it was considered as jointly and severally liable for the payment of compensation for breach of contract occurred sixteen month before signing the employment contract with the Player”.

63. The “*legal arguments*” offered by the Appellant in support of its request for relief can be grouped as follows:
- i. as to the alleged “*procedural defects*”, invoked to “*justify the annulment of the ... Decision*”:
    - the Appellant contends that it lacked a “*legitimatío ad causam*” before the DRC, since the new club for the purposes of Article 17.2 RSTP was São Caetano and not Avaí: in the Appellant’s opinion, in fact, “*it is quite logical to think that once the Third Respondent breached the contract with the Second Respondent ... the employment contract with São Caetano that was still in force would resume*”. As a result, the Appellant could not be condemned as jointly and severally liable to pay the compensation set in the Decision. The lack of “*legitimatío ad causam*”, then, would render the Decision “*null*”;
    - according to the Appellant, its “*right of defense*” during the FIFA proceedings. In fact, “*the Second Respondent had almost four years and several opportunities to amend its requests, to provide further evidence, to provide translations of documents so they could be considered, always being informed of the consequences of its actions or silence*” and “*the Third Respondent had several opportunities as well to defend himself, having been informed of the relevant procedural rules and of the consequences of his silence*”. On the other hand, “*the Appellant, ... only after two and a half years of the signature of the employment contract with the Third Respondent, was informed about the proceedings against the latter and invited to provide its position, without knowing that it was considered the Intervening Party and without being warned that, if it failed to provide its position the case would be decided on the basis of the documentation on file and that it could be considered liable for a breach of contract that occurred sixteen (16) months before the Appellant hired the Third Respondent*”. In addition, the Appellant submits that it “*could not know and would have no reasons to know that it was considered as the new club, having signed a contract after sixteen months of the alleged breach by the Third Respondent and after the original expiry of the employment contract with the Second Respondent (according to the player passport and the CBF database), related to the loan from São Caetano, as well as after the expiry of the employment contract between the Third Respondent and São Caetano. In addition, it is important to emphasize that the Appellant was only informed about the proceedings after a considerable period of time, four (4) years, and was not properly informed about its situation and the consequences of the relevant notification via letter dated 2 October 2012, being given only ten (10) days to submit its comments. Furthermore, it is necessary to highlight that FIFA had a copy of the player passport issued by CBF on 26 June 2010 and, therefore, could have also informed São Caetano about the claim and invited it to provide its position, before deciding which was the new club*”;
  - ii. as to the substantive issue relating to the joint and several liability under Article 17.2 RSTP, the Appellant maintains that the DRC strictly applied the rule “*without considering the many particularities of the case which would justify the detailed analysis of the “spirit of the rule” and its background*”. In that respect, the Appellant underlines that purpose of Article 17.2 RSTP is to avoid any doubt and difficulties of proof regarding the possible involvement of the new club in a player’s breach of contract, and to guarantee the payment of compensation, fostering the maintenance of contractual stability. In the case at hand, however, the New Contract was signed when the term of the

Employment Contract had expired. Therefore, it could not be maintained that the Appellant had the duty to contact the Second Respondent, since the Player was not, at the time of signature of the New Contract, bound to Bursaspor. In addition, the Appellant notes that the case of the Player differs from all other precedents in which Article 17.2 was applied: in those cases, in fact, the period of time between the moment in which the Player breached the contract and the moment in which he signed the new contract was “*considerably short*”, and the new contract was for better financial or sporting conditions. Contrary to these precedents, the New Contract was signed 16 months after the breach of the Employment Contract, and for much worse financial terms: under the Employment Contract the Player was to receive a monthly salary of USD 19,920, which under the New Contract he would receive only 6,000 Brazilian Reais. As a result, the amount of compensation to be paid under the Decision is “*completely disproportionate*” to the salary that the Appellant undertook to pay to the Player.

64. At the same time, the Appellant underlines, that

- i. the Player’s behaviour before the DRC “*did not affect only himself, but the interest of third parties, particularly the interest of the Appellant*”: his failure to file any defence, in fact, meant an acceptance of the Second Respondent’s charges against him, and this led to the finding of an “*objective*” liability of the Appellant;
- ii. a comparative reference to the rules applicable in Spain show that a final deadline for the new club’s liability should be provided;
- iii. “*punishing a team that signed a player after having breached his contract sixteen months earlier, taking into account that the player did not defend himself from the claimed filed against him and considering that nobody alerted the Appellant of the Third Respondent’s breach of the contract, is we can say, genuinely going against the principles of fairness and justice*”.

65. Finally, the Appellant maintains that “*considering all the facts and arguments previously raised and in particular, taking into account the silence of the Third Respondent, the time elapsed between the breach of the contract and the signature of the contract between the Appellant and the Third Respondent as well as the considerable different financial conditions of both contracts, the amount of compensation to be paid*”, corresponding to “*five times more the value of the entire contract between the Appellant and the Third Respondent*”, “*must be reduced*”.

b. *The Position of the Respondents*

b.1 The Position of FIFA

66. The First Respondent, in its answer, requested:

- “1. That the Court of Arbitration for Sport rejects the present appeal and entirely confirms the presently decision passed by the Dispute Resolution Chamber on 25 October 2012.
- 2. That the Court of Arbitration for Sport orders the appellant to bear all the costs of the present procedure.

3. *That the Court of Arbitration for Sport orders the appellant to cover all legal expenses of FIFA related to the proceedings at hand*".

67. More specifically, FIFA in its submissions before this Panel, deals with the presentation of the facts, described by the Appellant to be "*undisputed*", confirms that the procedure before the DRC was "*exempt of any mistakes or deficiencies*", considers the breach of Contract committed by the Player, and refers to the financial compensation payable by the Appellant to the First Respondent.
68. With respect to the first point, FIFA rejects the Appellant's submission that during the proceedings before the DRC it could be held as "*undisputed*" the circumstance that the Player was on loan from São Caetano to Bursaspor. As indicated at the hearing, then, a different solution would have been reached on the basis of different documents, as those filed before CAS.
69. As to the second point, the First Respondent underlines that the Appellant's procedural rights have been fully respected in the procedure before FIFA, and that none of the Appellant's assertions evidence any violation: Avaí was informed of the procedure pending before the DRC and was given the possibility to state its case, having received the entire file of the proceedings at stake.
70. With regard to the point concerning the breach of contract, FIFA notes that the Appellant does not challenge in these proceedings the conclusions reached by the DRC. As a result, the finding in the Decision that the Player breached the Contract without just cause are final. The main question, however, concerns the identification of the Player's new club after the breach. As to this point, FIFA maintains that the available documents, including the Player's passports and other correspondence, fail to prove that the Third Respondent returned to São Caetano after having breached the Employment Contract without just cause. According to the Player's passports filed, FIFA remarks that the Player remained registered with Bursaspor until 25 April 2010, a circumstance which is contradicted by proven facts. Such documents are therefore "*questionable*". In addition, if the Player had been on loan with Bursaspor until 25 April 2010, and if he had returned to São Caetano, such information should have been inserted in said passports – which is not the case. At the same time, FIFA refers to some information provided by the CBF, which shows that the Player had not returned to São Caetano after the breach of the Employment Contract. Therefore, the Appellant was the first club with which the Player was registered after the breach: as a result, it is jointly and severally liable for compensation under article 17.2 RSTP.
71. As to the final point, FIFA confirms that the DRC strictly applied the relevant provisions of the RSTP, taking into account "*the particularities*" of the case when assessing the amount of compensation payable as a result of the breach of contract.

b.2 The Position of Bursaspor

72. The Second Respondent, in its answer, requested that:

*"CAS should approve the decision of FIFA and the new club (AVAI FUTEBOL CLUBE) of the player*

*shall jointly be responsible for compensation according to the clear rules and regulations of FIFA”.*

73. The position of the Second Respondent can be summarized as follows:

- i. *“there is no ... dispute regarding the unilateral (with right cause) termination of ... contract”;*
- ii. the Player had been transferred to the Second Respondent on a permanent basis and not on loan;
- iii. the Appellant signed with the Third Respondent the New Contract on 28 April 2010, which the Employment Contract had a term expiring on 31 May 2010;
- iv. the Appellant is jointly liable with the Player towards Bursaspor, *“because of the undisputed fact that Avaí ... is new club of the player according to the records”*, as confirmed by the Player’s passport;
- v. Article 17.2 allows no exception to the joint liability of the new club;
- vi. therefore, Avaí has to pay the amount mentioned in the Decision.

b.3 The Position of the Player

74. The Third Respondent did not submit any answer to the appeal filed by the Appellant.

### 3. LEGAL ANALYSIS

#### 3.1 Jurisdiction

75. CAS has jurisdiction to decide the present dispute between the parties and has been confirmed by the Order of Procedure signed by the Appellant, the First Respondent and the Second Respondent.

76. In any case, the CAS jurisdiction also with respect to the Third Respondent is contemplated by the Statutes of FIFA (edition 2012), in force at the time the appeal was filed, as follows:

#### Article 66

1. *FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players’ agents.*
2. *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.*

#### Article 67

1. *Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.*
2. *Recourse may only be made to CAS after all other internal channels have been exhausted.*
3. *CAS, however, does not deal with appeals arising from:*

- (a) *violations of the Laws of the Game;*
  - (b) *suspensions of up to four matches or up to three months (with the exception of doping decisions);*
  - (c) *decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.*
4. *The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. [...].*

### 3.2 Appeal Proceedings

77. As these proceedings involve an appeal against a decision rendered by FIFA, brought on the basis of rules providing for an appeal to the CAS, in a dispute relating to a contract, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, in the meaning and for the purposes of the Code.

### 3.3 Admissibility

78. The admissibility of the appeal is not challenged by any of the Respondents. The statement of appeal was filed within the deadline set in Article 67.1 of the FIFA Statutes. No further internal recourse against the Decision is available to the Appellant within the structure of FIFA. Accordingly, the appeal is admissible.

### 3.4 Default of appearance

79. According to Article R55 of the Code, *“if the Respondent fails to submit its answer ..., the Panel may nevertheless proceed with the arbitration and deliver an award”*.
80. In this respect, the Panel notes that the request for arbitration, together with a letter of the CAS Court Office explaining its meaning and a copy of the file of the arbitration, were received by the Third Respondent at the address provided by the Appellant in the letter of 15 July 2013: as a result, the Third Respondent was informed that arbitration proceedings had been started involving him before the CAS, and that he had the opportunity to state his case. The Third Respondent did not file an answer nor any other submission in response to the Appeal. In accordance with Article R55, second paragraph of the Code, the Third Respondent’s failure to submit any answer does not prevent the Panel from deciding on the claim brought by Avaí.

### 3.5 Scope of the Panel’s Review

81. According to Article R57 of the Code,
- “the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. ...”*

### 3.6 Applicable Law

82. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

83. Pursuant to Article R58 of the Code, the Panel is required to 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”.*

84. In the present case the “applicable regulations” for the purposes of Article R58 of the Code are, indisputably, the FIFA’s regulations, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA’s rules and regulations. More precisely, the Panel agrees with the DRC that the regulations concerned – apart from the FIFA Statutes – are particularly the RSTP 2008, in force since 1 January 2008, as the petition to FIFA was received on 29 January 2009, before the entry into force of the subsequent editions of the RSTP.

85. At the same time, the Panel notes that, pursuant to Article 66.2 of the FIFA Statutes,

*“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”.*

86. As a result, in addition to the FIFA’s regulations, Swiss law applies to the merits of the dispute.

87. The provisions set in the FIFA rules and regulations which are relevant in this arbitration include the following:

**“Article 17 RSTP (“Consequences of terminating a contract without just cause”)**

*The following provisions apply if a contract is terminated without just cause:*

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. ...”.*

### 3.7 The Dispute

88. The object of these proceedings is the Decision, which held (i) that the Player breached the

Employment Contract without just cause, (ii) that Bursaspor is entitled to receive compensation in the amount of USD 150,000, and (iii) that the Player and Avaí are jointly liable for such payment. The first point of the Decision is not challenged in this arbitration, and is therefore final. On the other hand, disputed are the consequences of such finding: more exactly, the Appellant submits that it could not be held liable, jointly with the Player under Article 17.2 RSTP, to pay the damages awarded to the Second Respondent. In that context, the Appellant criticizes the procedure which was conducted before the DRC, as well as the results to which it came. Contrary to the Appellant's claims, the First Respondent and the Second Respondent submit that the Decision was properly adopted and that it correctly applied the relevant provisions of the RSTP. The Third Respondent has not taken any position with regard to the Appellant's claims.

89. As a result of the parties statements and requests, this Panel has to examine a number of issues, and more specifically:
  - i. whether the Appellant's right to be heard was respected in the course of the FIFA proceedings;
  - ii. whether the Appellant can be considered to be the new club of registration of the Player for the purposes of Article 17.2 RSTP, and what are the consequences of the Panel's finding in that respect;
  - iii. whether the measure of the compensation awarded to Bursaspor by the Decision is proper.
90. The Panel shall examine each of those questions separately.
  - i. *Was the Appellant's right to be heard respected in the course of the FIFA proceedings?*
91. The Appellant criticizes the proceeding conducted before the DRC and alleges that its right to be heard has been violated under several points of view: the parties were treated unequally, since Bursaspor and the Player had the possibility to state their position before the DRC over a much longer period of time than the Appellant; the Appellant had not been informed that it might be considered liable to pay an amount to Bursaspor and of the consequences of its involvement in the FIFA proceedings; the Appellant did not know that it was a party to such proceedings and only in the Decision was informed of the reasons why it was treated as the new club of the Player.
92. In respect of the Appellant's contentions regarding the procedure before FIFA, the Panel notes that, according to Article R57 of the Code, the Panel has full power to review the facts and the law. The Panel consequently hears the case *de novo* and is not limited to the consideration of the evidence that was adduced before the DRC: the Panel can consider all new evidence produced before it. This implies that, even if a violation of the principle of due process occurred in prior proceedings, it may be cured by a full appeal to the CAS (CAS 94/129; CAS 98/211; CAS 2000/A/274; CAS 2000/A/281; CAS 2000/A/317; CAS 2002/A/378). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of

first instance “*jade to the periphery*” (CAS 98/211, citing Swiss doctrine and case law).

93. In that context, the Appellant has had (and used) the opportunity to bring the case before CAS, where all of the Appellant’s fundamental rights have been duly respected. At the end of the hearing, the Appellant’s counsel expressly confirmed that the Appellant had no objections in respect of its right to be heard and to be treated equally in the arbitration proceedings. Accordingly, even if any of the Appellant’s rights had been infringed upon by the DRC – but without conceding that they had actually been infringed – the *de novo* proceedings before CAS would be deemed to have cured any such infringements.
94. In any case, the Panel wishes to stress that the proceedings before the DRC have taken place in accordance with the applicable provisions, and that the rights of the Appellant have been fully respected.
95. The Panel notes, in fact, that:
  - i. FIFA made very careful researches, for which it should be commended, in order to find the Player’s new club: after the Second Respondent’s letter of 3 December 2010, it requested on 7 February 2011 and on 7 March 2011 confirmation from the CBF as to whether the Player was registered with Avaí; on 23 March 2011, the CBF provided an answer to the request; on 6 February 2012, FIFA requested additional information from the CBF, which was provided on 16 February 2012; a new request was sent by FIFA on 22 June 2012; CBF answered on 27 June 2012 and on 9 July 2012, including copy of an ITC for the transfer of the Player to Bursaspor on 2008, and indicating that “*in the period June 30, 2009 to May 31, 2010, the Player just was registered in Avaí*”; on 17 September 2012, FIFA requested *inter alia* explanations as to the reference to a “*special convention*” appearing on the ITC; on 30 September 2012, CBF provided FIFA with copy of the New Contract;
  - ii. on 2 October 2012, FIFA informed Avaí that proceedings started by Bursaspor against the Player were pending, and transmitted the entire file of the case (with the exception of some confidential documents). In such letter, FIFA expressly mentioned the “*fact that the player ... and Avaí ... had apparently concluded an employment contract valid as from 28 April 2010 and 10 December 2010*”, drew the Appellant’s attention to “*the relevant applicable provisions of the Regulations on the Status and Transfer of Players, in particular its art. 17*”, and granted a deadline for the submission by Avaí of its position. As a result, on 15 October 2012, Avaí provided some documents to FIFA;
  - iii. on 19 October 2012, FIFA informed the Player, Bursaspor and Avaí that the matter would be submitted to the DRC for a decision.
96. In other words, and in summary, the Panel remarks that Avaí was identified by FIFA to be the new club of the Player after extensive research, that the Appellant was informed of the proceedings, receiving copy of the file, together with an indication of their meaning, by reference to Article 17 RSTP, and that the Appellant was advised that the matter would be decided. In that framework, the Appellant did not request additional information or filed a petition to have the deadline for the statement of its position extended: if it did not understand

the proceedings before the DRC, it cannot blame FIFA.

97. As a result, the Panel finds that the proceedings before FIFA were not affected by any violation of the Appellant's right to be heard. The request of the Appellant to have the Decision for that reason set aside, and the case remanded to the DRC for further consideration in due respect of the Appellant's right to be heard, has therefore to be denied. In fact, this Panel has the full power to review the dispute decided by the DRC: in such context, this Panel can examine the question whether Avaí can be considered the new club of the Player, and determine the consequences of a finding in that respect.
- ii. *Can the Appellant be considered to be the Player's new club for the purposes of Article 17.2 RSTP? What are the consequences the Panel's answer to this question?*
98. Under Article 17.2 RSTP:  
*"... if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment ...".*
99. Such provision plays an important role in the context of the compensation mechanism set by Article 17 RSTP. As the Appellant correctly points out, also by reference to CAS precedents, Article 17.2 is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player's decision to terminate his former contract, and at better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club on the basis of Article 17. It is in fact clear that the new club will be responsible, together with the player, for the payment of compensation to the former club, regardless of any involvement or inducement to breach the contract, and without considering its good or bad faith.
100. The Appellant denies being the Player's new club for the purposes of Article 17.2 RSTP and therefore denies its "*legitimitas ad causam*", implying that it had no standing in the FIFA proceedings, even to answer the Second Respondent's claim for compensation. In essence, the Appellant submits that the Player had been transferred to Bursaspor on loan: therefore, as a result of the Player's breach of contract, the new club should be the loaning club (São Caetano), to which the Player had returned following the termination of the Employment Contract, and not Avaí; in any case, too long time had passed between the breach of the Employment Contract and the signature of the New Contract; and the New Contract was signed after the date on which the loan to Bursaspor would have expired.
101. The first question that the Panel has therefore to examine is whether the Player was transferred on loan to Bursaspor.
102. The Panel, having the advantage of the possibility to review documents not filed before the DRC, is satisfied that the transfer to Bursaspor had taken place on the basis of a loan. Indeed, the text of the loan agreement executed between São Caetano and Bursaspor on 15 July 2008 (hereinafter referred to as the "Loan Agreement") was lodged with CAS by the Appellant, even though at a rather late stage of the arbitration proceedings, together with some

surrounding correspondence confirming the genuineness of such document. This text, in addition, was not contradicted by Bursaspor by the presentation of a document conclusively showing that the transfer of the Player to it had taken place on a definitive basis: the Panel understands the problems that the Second Respondent (which underwent some corporate restructuring) might have had to retrieve documents dating some years ago; such problems, however, cannot go to the detriment of other parties to these proceedings.

103. This finding, however, does not change, in the Panel's opinion, the conclusion, already reached by the DRC, that Avaí was the first club to register the Player after his breach of the Employment Contract. In fact, no other club registered the Player in the period between 22 December 2008 (date of breach of the Employment Contract) and 28 April 2010 (date of signature of the New Contract).
  
104. In that respect, the Panel notes that on 22 December 2008 the Player breached the Employment Contract he had entered into with Bursaspor, and not the Loan Agreement executed between São Caetano and Bursaspor. Therefore, even if the Player had terminated his employment relation with the Second Respondent, the loan agreement formally remained in force, failing a specific provision therein contained. As a result, the Panel does not agree with the Appellant's contention that upon termination of the Employment Agreement the Player automatically returned to the loaning club. In any case, this is what actually happened: in fact, the Player was not registered back to play for São Caetano.
  
105. As a result, the fact that the New Contract was signed after the expiration of the Loan Agreement is also irrelevant: the contract that was breached – and the violation of which gave rise to the Second Respondent's claim for compensation – is the Employment Contract, which had a different expiration date, set for 31 May 2010. Only after that date it could be maintained that the Player would have been in any case free, even if no breach had been committed. In other words, only after the ordinary expiration of the Employment Contract a club signing a new contract with the Player would not have taken advantage of his early (and wrongful) termination of the Employment Contract.
  
106. In this regard, the Panel notes that the New Contract was signed before the original term of the Employment Agreement had expired. As a result, the Panel finds it unnecessary to assess whether Article 17.2 RSTP contains, as an implied qualification, a time-limit for the possibility to consider the first club of registration to be the new club for the purposes of the joint liability therein provided (as the Appellant maintains also by comparison to some domestic system) or not (as FIFA affirms). In the Panel's opinion, in fact, a joint liability exists at least for the original term of the breached contract – as in the case at stake: taking advantage (even though in good faith) of the early termination of the previous contract, the club of first registration has the burden to sustain also the adverse consequences of such termination. As a result, the fact that the New Contract was signed only 16 months after the breach and that the Appellant was in good faith are irrelevant: what is relevant is only that, after the breach of the Employment Contract, the first club with which the Player was registered is Avaí, which had signed a contract in the period covered by the Employment Contract, taking advantage of its early termination.

107. The Panel, in summary, concludes, that, by signing the New Contract and by having the Player registered as a player with the club, Avaí became the “new” club for the purposes of Article 17.2 RSTP.
108. This conclusion has a main consequence: Avaí correctly was considered to be jointly liable for the payment of compensation to Bursaspor, and had a “*legitimitio ad causam*” in the FIFA proceedings. The Decision which so found has therefore to be confirmed on the point.
109. This finding, however, has an important additional implication: being jointly liable for the payment of compensation, Avaí has a standing to answer the Second Respondent’s claim for compensation and, consequently, has a standing to challenge before CAS the Decision also in the portion relating to the quantification of the damages, as it directly affects its position. Challenge which indeed the Appellant filed, by requesting “*the partial amendment of the appealed decision in order to reduce the “quantum” of the compensation amount granted to the Second Respondent to be paid by the Third Respondent*”.
110. The remaining question, therefore, turns into a verification of the compensation awarded by the DRC.

*iii. Is the measure of the compensation awarded by the DRC proper?*

111. In the Decision, the DRC ordered the Player and the Respondent to pay to Bursaspor the amount of USD 150,000. Such conclusion was reached on the basis of several factors: the residual value of the Employment Contract (corresponding to USD 419,920) at the time of the breach; the fact that the Player had remained unemployed for 16 months thereafter; the salary (much lower) that the Player received in the New Contract; and the circumstance that no acquisition costs had been indicated as incurred by Bursaspor. As a result, USD 150,000 was set to be “*a fair and adequate amount of compensation*”.
112. 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 set by Article 17.1 RSTP. It is in fact undisputed that the termination by the Player of the Employment Contract falls within the scope of application of Article 17 RSTP.
113. According to Article 17.1 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 law of the country concerned,
  - the specificity of sport,
  - any other objective criteria, including in particular
    - √ the remuneration and other benefits due to the player under the existing contract and/or the new contract,
    - √ the time remaining on the existing contract up to a maximum of five years,

- √ the fees and expenses paid or incurred by the former club (amortised over the term of the contract), and
  - √ whether the contractual breach falls within a protected period.
114. With regard to such criteria, the Panel preliminarily notes that in the Employment Contract the parties have not agreed a contractual remedy for the breach. As result, the actual measure of the damages sustained by Bursaspor should be assessed on the basis of the other factors indicated by Article 17.1 RSTP.
115. In their regard, the Panel first remarks that no compelling indications have been given by the parties as to any role any “law of the country concerned” might have on the calculation of the damages to be compensated to Bursaspor by the Appellant and the Third Respondent.
116. With regard to the “remuneration element”, mentioned at Article 17.1 RSTP, the Panel notes that:
- i. under the Employment Contract, the Player was entitled to receive, at the time of its termination (season 2011/2012), a yearly salary, made of various components, of USD 300,000, i.e. an average monthly salary of USD 25,000;
  - ii. after the termination of the Employment Contract, the Player remained unemployed for nearly 16 months, receiving no salary for any football related activity;
  - iii. under the New Contract, the Player was to receive a monthly salary of BRL 6,000 (roughly corresponding to USD 2,700) for 8 months.
117. In addition, the Panel remarks that under the Loan Agreement, Bursaspor undertook to pay São Caetano the amount of USD 50,000. In other words, Bursaspor estimated the value on the Player’s services over two seasons in the amount of USD 650,000.
118. On the other hand, the Panel finds that the value of the Player’s services at the time of the breach had sharply decreased. Indeed, the Player found no new football related employment for the entire year 2009 and for the first part of year 2010, missing nearly one and a half football seasons. Indeed, only on 28 April 2010 did it find a new club (Avaí) available to hire his services, but for a salary not comparable to the salary he was to earn with the Second Respondent.
119. In other words, while Bursaspor expected, at the time of the signature of the Employment Contract, the Player’s services to have a considerable value, such value had almost disappeared, becoming nearly equal to zero, at the time the Employment Contract was breached.
120. As a result, the Panel finds the remuneration factor to be inapplicable to the determination of the damage sustained by Bursaspor. In fact: the Player’s services had lost all value; the salaries paid for the period in which the Player rendered his services are not a damage incurred, but remuneration paid by the Second Respondent, for the signature of the Employment Agreement or for the services rendered; and Bursaspor, because of the breach, was relieved of the obligation to pay an average monthly salary of USD 25,000 to the Player for the

remaining term of the Employment Contract.

121. On the other hand, the Panel remarks – as already mentioned – that under the Loan Agreement, Bursaspor paid to São Caetano the amount of USD 50,000 for the acquisition of the Player's services for two seasons. Of such amount, only a portion relating to the first part (July to December 2008) of the first season was amortized by the Second Respondent. As a result, USD 37,500 remain the portion of the non amortized acquisition costs.
122. The Panel finds that the amount of USD 37,500 can be held to represent the actual damage incurred by Bursaspor as a result of the termination by the Player of the Employment Contract without just cause. Said amount, which the Panel sets also pursuant to Articles 99.3 and 42.2 of the Swiss Code of Obligations<sup>1</sup>, takes into account the remuneration factor, to the extent it is relevant, the fact that the Player had breached the Employment Contract, by his behaviour contrary to Bursaspor internal disciplinary code, also before terminating it, as well as all the objective criteria set by Article 17.1 RSTP.
123. This conclusion takes also into account the specificity of sport, which is in itself not an additional head of damage, but a factor to take into account in the evaluation of the other elements. Sport, in fact, answers not only to economic factors, but also to social values and emotional aspects: when an employment contract is breached, the ensuing dispute arises in the somehow special world of sport; and the damages to be awarded have to take into account its peculiarities, which include the possibility that a player's services turns out not to have the sporting impact expected by a club when contracting them.
124. In summary, the Panel finds that the DRC set the amount of compensation for the Second Respondent to an excessive level. As a result, this Panel finds it proper to review it and determine it in the amount of USD 37,500, to be paid according to all other terms set in the Decision.

### 3.8 Conclusion

125. In light of the foregoing, the Panel holds that the appeal brought by Avaí is to be partially upheld and the Decision to be modified: the Player is to be ordered to pay to Bursaspor the amount of USD 37,500 as compensation for the damages caused by his breach of the Employment Contract. Avaí is jointly liable for such payment. All other points of the Decision, including the measure of the applicable interest, and the period for their calculations, are to be confirmed.

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<sup>1</sup> Under those provisions if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party to limit the damages.

## ON THESE GROUNDS

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

1. The appeal filed on 23 April 2013 by Avaí FC against the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 25 October 2012 is partially upheld.
  2. Point 2 of the operative part of the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 25 October 2012 is modified as follows:  
*“The Respondent, Marcelo Rodrigues, has to pay to the Claimant compensation for breach of contract amounting to USD 37,500 within 30 days as from the date of notification of this decision”.*
  3. The remaining portions of the operative part of the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 25 October 2012 are confirmed.
- (...)
6. All other motions or prayers for relief are dismissed.