Decision of the Dispute Resolution Chamber

passed in Zurich, Switzerland, on 13 October 2016,

in the following composition:

Geoff Thompson (England), Chairman
Theo van Seggelen (Netherlands), member
Wouter Lambrecht (Belgium), member

on the claim presented by the player,

Player A, country B,

as *Claimant*

against the club,

Club C, country D,

as *Respondent*

regarding an employment-related dispute between the parties

I. Facts of the case

1. On 30 December 2015, the player from country B, Player A (hereinafter: *the Claimant*), and the club from country D, Club C (hereinafter: *the Respondent*), signed an employment contract valid from 1 January 2016 until 31 May 2018.

2. In accordance with the employment contract, the Claimant was *inter alia* entitled to receive total remuneration of USD 1,750,000 plus amenities, as follows:

    a. for the remainder of the 2015/16 season:
        i. USD 200,000 total, divided into five monthly salaries of USD 40,000 "*due at the last day of the month*".

    b. for the 2016/17 season, USD 800,000 total, as follows:
        i. USD 200,000 payable at the latest on 31 August 2016;
        ii. USD 60,000 per month for ten months beginning on 1 July 2016 and ending on 31 May 2017 "*due at the last day of the month*";

    c. for the 2017/2018 season, USD 750,000 total, as follows:
        i. USD 150,000 "*paid in August*"
        ii. USD 60,000 per month for ten months beginning on 1 July 2017 and ending on 31 May 2018 "*due at the last day of the month*";

    d. A car, monthly rent of the house valued at 15,000 and two business class tickets between city E and city F for each season.

3. Article 9 of the contract provides that:

    a. the Respondent and the Claimant may terminate the employment contract by mutual agreement;

    b. the Respondent and the Claimant may terminate the employment contract prematurely "*for just cause*" by giving a 15 day written notice;

    c. "*when the termination of the contract is not due to a just cause or a mutual agreement between the parties concerned, the* [Respondent] *or the* [Claimant] *shall be entitled to receive from the other party in breach of the contract a compensation for a net amount of:*
        i. *To the* [Respondent]*: USD 2,000,000 (two million us dollars)*
        ii. *To the* [Claimant]*: the remaining amount of the contract related only to the same season in which the contract is terminated*". (hereinafter: *the termination clause*)

4. The contract provides in its article 11 that any dispute concerning the validity, interpretation or execution/termination of the contract must be referred to FIFA's Dispute Resolution Chamber in first instance.

5. On 28 May 2016, the Respondent sent notice of termination to the Claimant indicating that "*pursuant to the terms and conditions set out in article IX* (*cf*. point I.3.c above) *of the employment contract entered on 30 December 2015, we formally confirm our decision to terminate our employment relationship*". The notice includes five receipts of payments for the 2015/16 season as follows:

    a. 146,000 on 16 February 2016 for the salary of January 2016;
    b. 146,000 on 15 March 2016 for the salary of February 2016;
    c. 146,000 on 27 April 2016 for the salary of March 2016;
    d. 146,000 on 22 May 2016 for the salary of April 2016;
    e. 213,000 on 25 May 2016 for the salary of May 2016.

6. On 12 June 2016, the Claimant lodged a claim before FIFA against the Respondent asking that he be paid a total of USD 1,500,000 pertaining to the residual value of the contract, plus 5% interest *p.a.* from 28 May 2016 until the date of effective payment.

7. The Claimant considers that the unilateral termination of 28 May 2016 (*cf.* point I.5 above) was without just cause on the basis that the termination clause is unilateral and completely disproportionate in favour of the Respondent. The Claimant argues that it is unjust that if the Claimant terminates the employment contract at any time, he would have to compensate the Respondent in the amount of USD 2,000,000. Whereas, if one were to take into account the day on which the contract was terminated, in accordance with the termination clause, the Claimant would be entitled to only USD 3,871 (USD 40,000 / 31 days x 3) as compensation, which is approximately 500 times less than the Respondent would be owed for a termination under the same circumstances. The Claimant further argues that the termination clause could be assimilated to a six month long trial period where the Respondent could unilaterally and arbitrarily decide to release the Claimant.

8. The Claimant is claiming USD 1,500,000 on the basis that the residual value of the contract for the 2016/17 and 2017/18 seasons is of USD 750,000 each. He also claims that no mitigation should apply on the basis that the requested amount does not take into account any of the bonuses or amenities the Claimant was to receive and the termination was made during the protected period.

9. In its reply, the Respondent claims that the negotiation of the contract was made freely and therefore the termination clause above should be considered valid and applicable, and should be considered to be a buy-out clause. It considers that in light of the application of said clause, it matters not whether there was just cause to terminate as the Respondent has already awarded the Claimant the compensation due in line with the terms of the contract. It states that the clause is not unilateral stating that the clause establishes pecuniary compensation in case of either party terminating the employment contract unilaterally.

10. The Respondent claims that seeing that the clause should be considered a buy-out clause there need not be any reciprocity in consideration of CAS jurisprudence. In this regard, the Respondent indicates that in CAS decision 2013/A/3411 there is a clarification relating to a buy-out clause which "*does not require "penalty clauses" to be "reciprocal" in order to be valid. Therefore, the DRC was not entitled to disregard it, only because it would not apply to a breach committed by Club G*".

11. It adds that since the Claimant is experienced, had already been in country D and was assisted by a well-known football intermediary, he has no justification in terms of not understanding the implications of signing a contract containing such a clause. It continues by stating that the Claimant is wrong in considering the clause as being a unilateral option in favour of the club adding that the clause is clearly written and was drafted with the Claimant's full consent, as well as his full awareness of the consequences. Consequently, the clause which the Respondent considers gives the right to each party the possibility of terminating the contract at any moment and without a valid reason, should be viewed as such in light of the specificity of sport.

12. It further mentions that by paying the Claimant compensation, *i.e.* monies owed until the end of the season, it is undisputed that the Respondent complied with its contractual obligations towards the player in light of FIFA Regulations. It adds that the clause does not infringe the Regulations.

13. The Respondent states that the Claimant received better remuneration with the Respondent than with his previous employer. In addition, it claims the Claimant acted in bad faith as, despite having freely negotiated the terms of the employment contract, in particular those relating to the "buy-out" clause, he considers it to be disproportionate and not reciprocal. It states that had he had any objections to the validity of the clause, he should have raised them during the negotiations and not in a claim lodged after the termination which the Respondent deems to be valid.

14. In response to FIFA's pertinent request, the Claimant stated that he had found employment on 29 August 2016 a valid for one season with the Club H from country B providing monthly remuneration EUR 22,000.

II. Considerations of the Dispute Resolution Chamber

1. First, the Dispute Resolution Chamber (hereinafter also referred to as *the Chamber* or *the DRC*) analysed whether it was competent to deal with the matter at hand. In this respect, it took note that the present matter was submitted to FIFA on 12 June 2016. Consequently, the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (2015 edition; hereinafter: *the Procedural Rules*) are applicable to the matter at hand (*cf*. art. 21 of the Procedural Rules).

2. Subsequently, the members of the Chamber referred to art. 3 par. 1 of the Procedural Rules and confirmed that in accordance with art. 24 par. 1 and par. 2 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players (2016 edition) the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a player from country B and a club from country D.

3. Furthermore, the Chamber analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (2016), and considering that the present claim was lodged on 12 June 2016, the 2016 edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

4. The competence of the Chamber and the applicable regulations having been established, the Chamber entered into the substance of the matter. In this respect, the Chamber started by acknowledging all the aforementioned facts as well as the arguments and the documentation submitted by the parties. The Chamber, however, emphasised that in the following considerations it will refer only to the facts, arguments and documentary evidence, which it considered pertinent for the assessment of the matter at hand.

5. In this respect, the members of the DRC acknowledged that the parties had signed an employment contract valid from 1 January 2016 until 31 May 2018. In continuation, the Chamber acknowledged that it had remained uncontested that the Respondent had notified the Claimant of the termination of the employment contract on 28 May 2016.

6. The members of the Chamber further noted that the Claimant, on the one hand, maintains that the Respondent terminated the employment contract without just cause on 28 May 2016 and is therefore owed compensation for the unilateral breach of the employment contract without just cause.

7. The DRC noted, on the other hand, that the Respondent rejects such a claim and holds that it had duly terminated the employment contract on 28 May 2016 in accordance with article 9 of the employment contract, and irrespective of whether the termination was with or without just cause, considered it had already paid compensation to the Claimant for the termination and therefore had no other obligations towards him. In continuation, the members of the Chamber noted that the Respondent deemed that the relevant termination clause is not unilateral but is reciprocal in light of the pecuniary measures established for each party in case of termination. Additionally, the DRC noted that the Respondent deems that the clause should be assimilated to a buy-out clause, which it asserts does not require any reciprocity, and adds that the clause in question was freely negotiated by the parties and must therefore be considered valid.

8. In order to be able to first establish whether, as claimed by the Claimant and contested by the Respondent, the Respondent had terminated the employment contract without just cause, the Chamber turned its attention to article 9 of the employment contract, which was invoked by the Respondent in its notification of the termination of the employment contract to the player and in its defence.

9. As stated above, according to article 9 of the employment contract "*when the termination of the contract is not due to a just cause or a mutual agreement between the parties concerned, the club or the player shall be entitled to receive from the other party in breach of the contract a compensation for a net amount of: - **To the club:** USD 2,000,000 (two million dollars); - **To the player:** the remaining amount of the contract related only to the same season in which the contract is terminated*".

10. The members of the DRC first noted that the aforementioned clause establishes financial consequences in case of a contractual termination where there is no just cause or mutual agreement for termination, and consequently determined that, by basing the termination on said clause, the Respondent had, in principle, acknowledged and not contested having terminated the employment contract without just cause.

11. Notwithstanding the above, the Chamber duly recalled the argument of the Respondent that the relevant termination clause should be considered to be a buy-out clause, *i.e.* a clause granting the Respondent the right to terminate the employment contract by paying the Claimant all salaries due until the end of the relevant season. In this regard, the Chamber noted that the parties to an employment contract can, in principle, agree that at a certain moment one of the parties may terminate the employment contract by simple notice or by paying a

stipulated amount. In other words, the Chamber agreed that such a clause would allow one of the parties to accept that the contract may be terminated and that such a termination can be deemed to be based on both parties' mutual consent, the only condition being the payment of the stipulated amount.

12. On the basis of the aforementioned considerations, the members of the Chamber deemed it necessary to analyse the relevant termination clause contained in the employment contract, and noted that the wording of the clause is clear: it does not grant either party, Claimant or Respondent, the right or an option to unilaterally terminate the employment contract, but sets out the financial consequences when "*the termination of the contract is not due to a just cause or a mutual agreement between the parties concerned, the* [Respondent] *or the* [Claimant] *shall be entitled to receive from the other party in breach of the contract a compensation for a net amount* (…)". Furthermore, the Chamber took particular note of the reference to the term "*compensation*" due to the other party in case of a termination without just cause. In this regard, the DRC considered that the term "*compensation*" within the context of the relevant clause, is inconsistent with a buy-out clause.

13. Consequently, the DRC determined that the termination clause does not constitute a buy-out clause entitling the Respondent to simply terminate the employment contract at any time. The members of the Chamber therefore rejected the Respondent's argumentation relating to the determination of the termination clause as being a buy-out clause. The Dispute Resolution Chamber, therefore, concluded that by basing the termination of the contract on said clause, the Respondent had indeed terminated the employment contract without just cause.

14. Subsequently, having established that the Respondent had terminated the employment contract without just cause on 28 May 2016, the Chamber focused its attention on the question of whether or not an amount of compensation for breach of contract is payable in the case at hand. In doing so, the members of the Chamber first recalled that in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including, in particular, the remuneration and other benefits due to the Claimant under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, and depending on whether the contractual breach falls within the protected period. The DRC recalled that the list of objective criteria is not exhaustive and that the broad scope of criteria indicated tends to ensure that a just and fair amount of compensation is awarded to the prejudiced party.

15. In application of the relevant provision, the Chamber held that it first had to clarify whether the pertinent employment contract contains a provision by means of which the parties had beforehand agreed on an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the Chamber recalled that the Respondent considered that article 9 of the employment contract contained provisions by means of which the parties had beforehand agreed on an amount of compensation payable by either party in the event of breach of contract, and that the Respondent considered its obligations deriving from said clause as having been fulfilled. In addition, the DRC recalled that the Respondent considers the clause to be applicable as the parties had freely negotiated it.

16. The DRC recalled that article 9 of the contract provides that if the Respondent decides to terminate the employment contract "*not due to a just cause*", it shall pay the remaining contractual value for the season of termination whereas if the Claimant decides to terminate such a contract under the same conditions, he would owe the Respondent USD 2,000,000. In this regard, the members of the Chamber pointed out that the relevant clause contravenes the general principle of proportionality and the principle of equal treatment of the parties since it blatantly provides benefits only towards the Respondent with no corresponding reward or analogous right in favour of the Claimant. Additionally, in response to the Respondent's arguments in this regard, the Chamber emphasised that the respect of contractual freedom cannot, in any way, be applied to the detriment of the principle of a proportionate repartition of the rights of the parties.

17. In continuation, the Chamber considered that such a clause, *in casu*, establishing different financial consequences of a breach of contract without just cause for the Claimant and the Respondent, consists in fact of a disguised way for the club to terminate the contract at the end of each season, without any financial consequences, whereas the player does not have such a possibility. In other words, such a clause provides the Respondent with the unilateral option of reducing the term of the employment relationship with the Claimant at its own will. In view of the foregoing, the Chamber concluded that the obligations deriving from article 9 of the employment contract are so imbalanced in favour of the Respondent that they should be considered to be null and void, and article 9 shall not be applied for the calculation of the amount of compensation due by the Respondent to the Claimant.

18. On account of the above, in particular the considerations to be found in point II.10 the Chamber established that the Respondent must still pay an amount of compensation to the Claimant and that the DRC had to assess the compensation due to the Claimant in accordance with the other criteria under art. 17 of the Regulations.

19. Bearing the foregoing in mind, the Chamber proceeded with the calculation of the remuneration payable to the Claimant under the terms of the employment

contract as from the date of termination, *i.e.* 28 May 2016. The Chamber concluded that the amount of USD 1,550,000, corresponding to the residual value of the contract serves as the basis for the final determination of the amount of compensation due for breach of contract.

20. In continuation, the Chamber verified whether the Claimant had signed an employment contract with another club during the relevant period of time by means of which he would have been able to mitigate his loss of income. According to the constant practice of the Dispute Resolution Chamber, remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligation to mitigate his damages.

21. In this regard, the members of the Chamber noted that on 29 August 2016, the Claimant had signed a new employment contract with the club from country B, Club H, valid from 29 August 2016 until the end of the 2016/17 sporting season, in accordance with which he was entitled to approximately USD 220,000.

22. Consequently, on account of all the aforementioned considerations, the Chamber decided that the Respondent must pay the amount of USD 1,330,000 to the Claimant as compensation for breach of contract, plus 5% interest *p.a.* from 12 June 2016, *i.e.* the date of claim, until the date of effective payment, as per the constant jurisprudence of the DRC.

23. The Dispute Resolution Chamber concluded its deliberations in the present matter by establishing that any further request filed by the Claimant is rejected.

III. Decision of the Dispute Resolution Chamber

1. The claim of the Claimant, Player A, is partially accepted.

2. The Respondent, Club C, has to pay to the Claimant **within 30 days** as from the date of notification of this decision, compensation for breach of contract in the amount of USD 1,330,000 plus 5% interest *p.a.* as from 12 June 2016 until the date of effective payment.

3. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

4. Any further claim lodged by the Claimant is rejected.

5. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.

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Note relating to the motivated decision (legal remedy):

According to art. 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, a copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS (*cf.* point 4 of the directives).

The full address and contact numbers of the CAS are the following:

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Encl.: CAS directives