Arbitration CAS 2003/O/482 Ariel Ortega v/ Fenerbahçe & Fédération Internationale de Football Association (FIFA), award of 5 November 2002

Panel: Michael Beloff, President (United Kingdom); Olivier Carrard (Switzerland); Dirk-Reiner Martens (Germany)

Football
Breach of contract
Suspension
Compensation

1. **As there is no "just cause" for unilateral breach by the player of the contract nor any "exceptional circumstances" justifying such breach, a four months suspension on the athlete eligibility to participate in any official football matches is mandatory pursuant to article 23 (a) of the FIFA's Regulations for the status and transfer of players.**

2. **Art. 23(a) of the Regulations states as follows: "*if the breach occurs at the end of the first or second year of contract, the sanction shall be a restriction of four months on its eligibility to participate in any official football matches as from the beginning of the new season or the new club's national championship*". The phrase "*at the end of*" embraces the period up to and including the end, so the fact the relevant breach occurred during the first year does not disable FIFA from imposing a suspension. The article makes suspension mandatory where there is "*no just cause*" for unilateral breach by the player of the contract save in "*exceptional circumstances*".**

Mr Ortega is an international footballer of considerable pedigree and renown. He has had a peripatetic career, playing for River Plate in Argentina, Valencia in Spain, and Sampdoria and Palma, in Italy. The Club, his latest port of call, is one of Turkey's leading clubs. Ambitious to enhance its status and success, it signed Mr Ortega amid considerable fanfare in the Turkish press.

The salient stages in their brief relationship were as follows:

- On 23 May 2002 the Club, River Plate, and Mr Ortega signed a tripartite agreement to transfer Mr Ortega from River Plate to the Club at a fee of USD 7,500,000.
- On 8 June 2002, Mr Ortega signed a global contract, including for image rights, with the Club ("Global Contract") for which he was paid USD 2,000,000 per season.
- On 24 June 2002, Mr Ortega signed a contract to play football for the Club for 4 years ("Employment Contract") at a salary of USD 1,000,000 per season, payable in 10 instalments.

In the first half of the football season, 2002-2003, Mr Ortega's star shone only fitfully. There were problems on both sides, both on and off the field.

Between mid December 2002 and mid January 2003, Mr Ortega was in Argentina, whither he had returned so that an injury could be addressed by his personal physiotherapist. There was a flurry of correspondence between Mr Ortega and the Club over the New Year period. The Club was concerned about his delayed return to Turkey.

On 12 February 2003 a friendly international match took place between Argentina and Holland in Amsterdam, in which Mr Ortega played. Instead of returning thereafter to Turkey, Mr Ortega flew to Argentina (he asserts – but the Club denies) with the President's permission to be present at the forthcoming confinement of his wife with their third child.

On 18 February 2003 the Club sent a faxed complaint to Mr Ortega's representative, Mr Juan Berros. Thereafter there ensued discussions between the Club and River Plate about Mr Ortega's possible re-transfer back to Argentina.

On 6 March 2003 upon the breakdown of these discussions, the Club sent a fax demanding Mr Ortega's immediate return.

On the same date Mr Ortega faxed the Club, setting out particular conditions for his return. The Club made no direct response.

However, on 11 April 2003, Mr Ortega having not returned, the Club made a claim to FIFA.

On 6 June 2003, the Dispute Resolution Committee of the Players Status Committee of FIFA ("DRC"), in the absence of Mr Ortega or any representative, ruled that Mr Ariel Arnaldo ORTEGA ("Mr Ortega") was in breach of his contract without just cause, and ordered ("the Decision"), inter alia, Mr ORTEGA to pay FENERBAHÇE SPOR KULÜBÜ ("the Club") an amount of USD 11,000,000 as compensation for breach of an employment contract ("the compensation order") and stated that Mr Ortega was not eligible to play for any club until 30 December 2003 ("the suspension order").

On 15 July 2003, Mr Ortega filed a request for arbitration with the Court of Arbitration for Sport ("CAS") to set aside the decision. He also applied for a stay of execution of the compensation order and the suspension order.

On 28 July 2003, the Club and FIFA filed their opposition to the application for a stay of the suspension order. In respect of the compensation order, FIFA took no position.

Between 6 August and 29 August, the parties exchanged their written submissions.

On 19 August 2003 the Panel ordered a stay of the suspension order only.

On 19 September 2003 the Panel held an oral hearing in Lausanne.

The following issues arise in the present matter:

(i) Is Mr Ortega entitled to succeed on this appeal on the basis that he was not heard before the DRC ("natural justice")?

(ii) By what law was the employment contract governed ("law of contract")?

(iii) What were the material terms of Mr Ortega's contract with the Club ("terms")?

(iv) Was the Club in breach of those terms or any of them and did such breach (if any) entitle Mr Ortega to treat the contract as at an end? ("Club breach?")

(v) Alternatively, was Mr Ortega in unilateral breach of those terms without just cause ("Mr Ortega breach")?

(vi) If Mr Ortega was in breach, what were the powers of the DRC ("DRC's powers")?

(vii) Was the DRC entitled to suspend Mr Ortega ("suspension")?

(viii) Did the DRC calculate the compensation correctly ("compensation")?

LAW

1. Art. R27 of the Code of Sports-related arbitration ("Code") provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement.

2. FIFA has accepted the jurisdiction of CAS as from 11 November 2002 (Circular no. 827 to its National Associations.)

3. Further, the Decision provided that:

> "*This decision may be appealed before the Court of Arbitration for Sport (CAS) within 20 days of receiving notification of this decision by contacting the court directly in writing and by following the directions issued by the CAS, copy of which we enclose hereto.*"

4. Such provision constituted an offer by FIFA to conclude an ad hoc arbitration agreement which was accepted by Mr Ortega in filing his request for arbitration.

5. The Club and FIFA have both filed answers to the request for arbitration and confirmed their acceptance of CAS's jurisdiction. It is further confirmed by the unconditional appearance of the Club as well as by the signature of the order of procedure by all the Parties, i.e. by the Claimant, by the Respondent and by FIFA.

6. It follows that CAS has jurisdiction to decide the present dispute, which is not a disciplinary matter and, accordingly, pursuant to art. S20 of the Code has been assigned to the Ordinary Arbitration Division of CAS and is thus to be handled according to the rules applicable to ordinary arbitration proceedings. By signing the order of procedure, the Parties have entrusted the Panel with full power to establish the facts and the law and to rule on the case *de novo*.

7. Art. R45 of the Code provides that the Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss Law.

8. In the present matter, the parties refer exclusively to FIFA's regulations. They have not agreed on the application of any other particular law. Therefore, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply complementarily.

9. The request of arbitration of Mr Ortega was filed within the deadline, stated in the Decision, of twenty days after receipt of notification of the Decision itself. It complies with the requirements of art. R38 of the Code. It follows that the request for arbitration is admissible.

10. Mr Ortega contends that the Club wrongly failed to notify him of the forthcoming DRC proceedings. The Club contend that they took every reasonable step to do so, and in fact, that

the proper inference from events is that Mr Ortega had deliberately declined to involve himself in those proceedings.

11. It is not necessary for us to resolve this issue, because the order of procedure – to which all parties have subscribed – gives us full power to apply the relevant law and find the relevant facts, uninhibited by the DRC's decision, although, in fairness, we should state that, in our view, all reasonable steps were taken to ensure that Mr Ortega be duly notified by the direction of the relevant correspondence to his Turkish address, to the Argentinean Football Association ("AFA") and to Mr Ortega's agent (see in particular FIFA's letter to CAS dated 6 August 2003).

12. We appreciate that Mr Ortega's full case, whether or not through his own fault, was not deployed before the DRC's (although the DRC had not only his letter of 6 March 2003 but also one from Mr Ortega to the AFA of 19 March 2003) and his agent's defence to charges made by the Club dated 8th May 2003, which provided, albeit indirectly, an explanation of Mr Ortega's position).

13. However, we consider that any procedural disadvantage that Mr Ortega suffered in consequence of his absence is cured by the hearing before us, when his side of the argument was fully presented.

14. The Employment Contract contained no proper law clause. Given that it covered the relationship of Mr Ortega with the Club in Turkey, it was *prima facie* intended to be governed by the law of Turkey. It may seem peculiar that a parties' dispute over a contract of employment, itself governed by the law of another jurisdiction, should be resolved by a CAS Tribunal (where the disputant parties have not chosen to specify what other law should be applied by CAS) according to Swiss substantive law, pursuant to art. R45 of the Code (see para. 3 above). However, no party made any submissions in this respect. In any event, the various terms said by each to have been broken by the other, would, in the Panel's view, be recognised by the law of Turkey (which we understand to have some historic affinity with Swiss law) as well as by the law of Switzerland and, indeed, of any jurisdiction of which we have knowledge.

15. Mr Ortega complains of a breach of three terms:

    (i) Payment of his salary;

    (ii) Payment to a Mr Iacoppi who had an undefined – it may be undefinable – role as a friend, mentor and minder to Mr Ortega;

    (iii) Failure to provide adequate medical treatment.

16. The Club complains Mr Ortega's failure or refusal to continue to play for the Club after 12 February 2003.

17. As to Mr Ortega's claim:

(i) Payment terms are expressly provided for in the Employment Contract; he was entitled for each season from 2002 to 2006 to USD 1,000,000 net in "*10 equal instalments, which commence from the September 10th for each football season and followed every 10th day of following months*".

(ii) Payment to Mr Iacoppi was expressly provided for in the Global Contract; (in English translation) "*a monthly payment of USD 6.000 to Mr. Gluliano Iacoppi for his assistance to the player* […]".

(iii) We are prepared to presume – without finding – that it was part of the Club's general duty to be attentive to the physical welfare of a star footballer employed by it and therefore to provide adequate medical attention;

18. As to the Club's claim against Mr Ortega, it is fundamental to any employment contract that the employee should perform his essential duties – in the case of a footballer to play football.

19. As to the issue of payment it was common ground

(i) Mr Ortega was paid his salary for September, October and November on different dates within those months and in cash;

(ii) Mr Ortega was not paid his salary for December 2002 or January 2003 in those same months

(iii) On 10 March 2003 the Club paid Mr Ortega's salary for December and January into a special account with the Turkish Football Federation;

(iv) The Club have paid no salary since that date;

(v) There are no other sums outstanding i.e. under the Global Contract.

20. The Club's explanation for the non-timeous payment of the December and January instalments, was like much of the evidence in the case, variable and blurred. It was suggested that since Mr Ortega was absent from Turkey for a substantial part of those months, the Club did not know where to deposit the money, even though, according to Mr Bilgic, who appears to have acted as a high level go-between and facilitator, he had informed the Club of Mr Ortega's opening of a deposit account in Istanbul. It was hinted that Mr Ortega himself (for whatever reason) did not require – and certainly did not request – timeous payments. We ourselves cannot avoid the suspicion that the Club's failure to make such payments in December and January was a reaction to Mr Ortega's prolonged absence, a deliberate choice of stick not carrot to bring him back into line; and that the belated payment of the outstanding sums to the Turkish Football Association on 10 March 2003 was a reaction to Mr Ortega's fax of 6 March 2003, designed to avoid Mr Ortega being able to make good a charge that it was the Club, not he, who was in breach of the Employment Contract. Be that as it may, we find – critically – that the Club has always accepted – and accepts – an

obligation to pay Mr Ortega for these two months. Certainly there is no evidence to contrary effect.

21. We further find that any failure by the Club to make such payments could not, of itself, entitle Mr Ortega to treat himself as released from his contract. He never expressly alleged to the Club that they were in breach in this way, although he told us that he severed relations with Mr Caliendo, his agent, because of Mr Caliendo's insufficient diligence in pursuing the Club to pay the same (Mr Caliendo was candid about his conflict of interest and his need to avoid antagonising the Club as a potential future client). It is, in any event, a notable and curious feature of this case that this non-payment, the main plank in Mr Ortega's case before us, did not feature at all in the letters of the 6 March and 19 March 2003, nor was it referred to by the agent in his letter of 8 May 2003. Mr Ortega never made a formal claim for the outstanding sums either in the form of some letter before action or by the issue of proceedings. The Turkish Football Association regulations provide a specific mechanism for a player who considers that he is being denied his salary and wishes to terminate his contract. Art. 32 provides "*The Player may issue a notice of termination within 15 days if the Player has not been paid by the Club as per the agreement, and this* [sic]*Regulations, within 7 days following the maturity date thereof*" (the methodology is spelled out in Art. 33 of the same Turkish regulations). This was not deployed. Finally, we would note that at all times Mr Ortega's contractual entitlements to money were supported by a guarantee (governed by Monegasque law) provided by Turkiye Vakiflar Bankari T.A.O. Kadikoy Finance Market Branch.

22. In relation to non-payment to Mr Iacoppi, there were certain factual issues. It was common ground, however, that:

    (i) Mr Iacoppi was paid by the Club, the first instalment of USD 6,000

    (ii) He was not paid by the Club thereafter;

    (iii) He was told to return to Monte Carlo by IPC.

    In issue is whether his departure was at the request of Mr Ortega – itself reflecting a request by Mr Ortega's wife – or because of the Club's failure to pay him (or to provide accommodation as per the Global Contract, a particular breach which was only identified for the first time in a hearing before us).

23. We find it, once more, unnecessary to resolve this issue either because, on no view, could non-payment by the Club to Mr Iacoppi justify Mr Ortega in treating the contract as at an end. We do not underestimate the long-standing nature of the relationship between Mr Iacoppi and Mr Ortega (which had endured Mr Ortega's several moves around Europe from club to club over half a decade). But we consider that if Mr Iacoppi's presence was so vital to Mr Ortega's well-being, Mr Ortega could himself have paid the modest (in the context of the kind of figures involved in these contracts) sum and claimed it against the Club. Mr Ortega, after all, did not treat Mr Iacoppi's departure as a signal for his own, and could be said to have waived any breach involved. Finally, any breach, if any, was of the Global Contract and not of the Employment Contract itself.

24. As to the alleged failure to provide proper medical treatment two episodes only are relied upon; the groin strain sustained by Mr Ortega in December 2002, and the stomach upset he suffered in February 2003. In our view quite exaggerated importance was attached by Mr Ortega to these incidents. In neither incident did the Club deliberately decline to provide medical attention through the Club doctor. In relation to the first, when the Club doctor's ministrations proved ineffective, the Club permitted Mr Ortega to return to Argentina for treatment by his own physiotherapist, who had experience of that injury (although they were not prepared to fly him over to Turkey) and in the second instance we do not find that the Club doctor's insistence that Mr Ortega should visit him rather than vice versa involved any breach by the Club. In the end on the doctor's advice, pills were prescribed, and the problem solved.

25. Why then did Mr Ortega decide to remain in Argentina? In our view, the agent's letter to which we have referred properly summarised his problem as being personal, as distinct from professional. Istanbul may be one of the great cities of the world, but for a footballer whose main interests were sporting, who was in that city without friends (especially after Mr Iacoppi's departure) without family after his wife and children's departure, with a wife who, on account of a history of miscarriage, was undergoing a pregnancy which was as much a cause for concern as for delight, and without indeed, anyone with whom he could converse fluently in the languages he spoke, the prospect of a four year contract must have seemed like a life sentence in a cage, albeit one gilded with dollars. There were, it appears, also tensions with the coach, and even other team members – although these are the common coin of modern football and do not provide any justification for departure. The fact that Mr Ortega was looking for an excuse to quit, is illustrated by his letters, which referred to other reasons, sensibly not pursued; war with Iraq (was Turkey directly involved?); concerns about his personal security (there was no evidence of direct threats, let alone acts of violence against him!). The psycho-therapeutic report dated 14 July 2003 from Dr Marcelo Hector Marquez commissioned at this hearing, seems to us to confirm rather than undermine this analysis.

26. It may well be the case that as early as October 2002, there was talk of a possible transfer of Mr Ortega to Manchester United. In the giddy world of football transfers, talk is always cheap, and everyone has their price. We find that there were discussions, in February/March 2003, between River Plate and the Club as to whether Mr Ortega could return to Argentina, the Club says on Mr Ortega's initiative, Mr Ortega says on the Club's. We are inclined to the view that the Club were looking to the possibility of cutting (or recouping) their losses but it is notable that these talks, carried out on the Club's side, at whatever level (if any) of authority, post-dated Mr Ortega's departure to Argentina.

27. Mr Ortega insists that his departure to Argentina, after the friendly international match with Holland, was with the permission of the Club President who acceded to his wish to be present when his wife gave birth. The President denied this before us. He said bluntly that, with many foreign players on the Club's book, he could not sanction departure abroad every time one of the wives or partners was about to give birth. Insofar as it is necessary to do so, we find that no permission was granted. A letter – bearing no date - from Mr Ortega's lawyer Mr Berros states "*I hereby submit to you information by virtue of my position as legal representative of football player Ariel Ortega that pursuant to the preparatory match of Argentina National Team to be played*

in Holland on 12 February, football player Ariel Ortega will go to Argentina due to his personal reasons in relation with the problems of pregnancy of his wife to solve his family problems. We will contact to you again early next week to notify you of the personal problems the player is involved." (Respondent's translation).

We note:

(i) that the letter is said to provide information;

(ii) it makes no mention of any permission – an omission still more striking when Mr Berros's explanation for writing at all was that he was concerned to avoid what was said to be a misunderstanding about the permitted duration of Mr Ortega's absence in December and January.

28. Mr Ortega's explanation for not returning to Turkey being inadequate, our conclusion is that he has failed to identify any breach of contract by the Club *a fortiori* any such breaches would justify Mr Ortega's refusal to return from Argentina or, in the vocabulary of the FIFA rule, "just cause". It is therefore inevitable that we should find that Mr Ortega was himself in breach.

29. We are bound to say that Mr Ortega did not solicit, or certainly did not receive, proper advice as to the risk that he ran in adopting his chosen course of action rather than (if he had proper grounds of complaint against the Club) formulating them with precision, supporting them with evidence, and tying them – where appropriate – to the Club's contractual obligations or promises or – if Mr Ortega was determined for reasons which could not in law be held responsible, to move on from the Club as soon as possible - trying to negotiate an exit which would not involve him in potentially onerous liabilities.

30. Art. 21, 22, 23 and Article 42 of FIFA's regulations for the status and transfer of players ("the Regulations") provide the following

Art. 21

1 (a) In the case of all contracts signed up to the player's 28th birthday: if there is unilateral breach without just cause or sporting just cause during the first 3 years, sports sanctions shall be applied and compensation payable.

(b) In the case of contracts signed after the 28th birthday, the same principles shall apply but only during the first 2 years.

(c) In the cases cited in the preceding two paragraphs, unilateral breach of contract without just cause is prohibited during the season.

2 (a) Unilateral breach without just cause or sporting just cause after the first 3 years or 2 years respectively will not result in sanctions. However, sports sanctions may be pronounced on a club and/or a players' agent for inducing a breach of contract. Compensation shall be payable.

(b) A breach of contract as defined in the preceding paragraph is prohibited during the season.

(c) Disciplinary measures may be applied by the Dispute Resolution Chamber if notice is not given in the 15 days following the last official match of the national season of the club with which the player is registered.

Art. 22

Unless specifically provided for in the contract, and without prejudice to the provisions on training compensation laid down in Art. 13 ff, compensation for breach of contract (whether by the player or the club), shall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case, such as:

(1) Remuneration and other benefits under the existing contract and/or the new contract,
(2) Length of time remaining on the existing contract (up to a maximum of 5 years),
(3) Amount of any fee or expense paid or incurred by the former club, amortised over the length of the contract,
(4) Whether the breach occurs during the periods defined in Art. 21.1.

Art. 23

Other than in exceptional circumstances, sports sanctions for unilateral breach of contract without just cause or sporting just cause shall be applied:

1 In the case of the player:
- *(a) If the breach occurs at the end of the first or the second year of contract, the sanction shall be a restriction of four months on his eligibility to participate in any official football matches as from the beginning of the new season of the new club's national championship.*
- *(b) If the breach occurs at the end of the third year of the contract (or at the end of the second year if the contract was signed after the age of 28), no sports sanction shall be applied unless there was failure to give appropriate notice after the last match of the season. In such a case the sanction shall be proportionate.*
- *(c) In the case of aggravating circumstances, such as failure to give notice or recurrent breach of contract, sports sanctions may be imposed for up to a maximum of six months.*

2 […]

Art. 42

1 Without prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players, a dispute resolution and arbitration system shall be established, which shall consist of the following elements:
- *(a) Conciliation facilities, through which a low-cost, speedy, confidential and informal resolution of any dispute will be explored with the parties at their request by an independent mediator. Such mediation will not be a precondition to, nor suspend the resolution of the dispute according to formal mechanisms described in (b).*
- *(b) (i) The triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause), will be decided by the Dispute Resolution Chamber of the FIFA Players' Status Committee or, if the parties have expressed a preference in a written agreement, or it is provided for by collective bargain agreement, by a national sports arbitration tribunal composed of members chosen in equal numbers by*

players and clubs, as well as an independent chairman. This part of the dispute must be decided within 30 days after the date on which the dispute has been submitted to the parties' tribunal of choice.

(ii) If the decision reached pursuant to (i) is that a contract has been breached without just cause or sporting just cause, the Dispute Resolution Chamber shall decide within 30 days whether the sports sanctions or disciplinary measures which it may impose pursuant to Art. 23 shall be imposed. This decision shall be reasoned, also in respect of the findings made pursuant to (b)(i), and can be appealed against pursuant to (c).

(iii) Within the period specified in (ii), or in complex cases within 60 days, the Dispute Resolution Chamber shall decide any other issues related to a contractual breach (in particular, financial compensation). This decision shall be reasoned, and can be appealed against pursuant to (c).

(iv) In addition, the Dispute Resolution Chamber may review disputes concerning training compensation fees and shall have discretion to adjust the training fee if it is clearly disproportionate to the case under review.
Furthermore, the Dispute Resolution Chamber can impose disciplinary measures on the basis of Art. 34, par. 4 of the FIFA Statutes where these regulations or the Application Regulations so provide, or pursuant to a specific written mandate by the FIFA Players' Status Committee. The Dispute Resolution Chamber shall rule within 60 days after the date on which a case has been submitted to it by one of the parties to the dispute (with the exception of those disciplinary measures referred to in Art. 23, which are covered by (ii)). These decisions shall be reasoned, and can be appealed against pursuant to (c).

(v) The Dispute Resolution Chamber may award financial compensation and/or impose disciplinary measures on the club concerned, if it is established pursuant to (b)(i) that a player terminated his contract with this club with just cause or sporting just cause and the player, as a result of the procedural provisions in these regulations, has been suspended from playing in the national championship of his new club. The Dispute Resolution Chamber shall rule within 60 days after the date on which a case has been submitted to it by the player concerned. This decision shall be reasoned, and can be appealed against pursuant to (c).

(vi) All other measures provided for in these regulations will be taken by the FIFA Players' Status Committee, with the exception of those measures which are under the jurisdiction of the Disciplinary Committee.

(vii) All rulings taken pursuant to these regulations shall be published.

(c) Appeals contemplated in (b) shall be brought before a chamber of the Arbitration Tribunal for Football (TAF) provided for under Art. 63 of the FIFA Statutes, irrespective of the severity of any sanction or the amount of any financial award. This chamber of the Arbitration Tribunal for Football (TAF) shall be composed of members chosen in equal numbers by players and clubs and with an independent chairman, in compliance with the principles of the New York Convention of 1958. The tribunal must rule within 60 days or, in exceptional and particularly complex cases, within 90 days, after the date on which a case decided by the Dispute Resolution Chamber pursuant to (b) has been submitted to it. These appeals shall not have a suspensive effect. The tribunal's rulings shall be published.

2 The conciliation facilities envisaged under 1(a) above shall be supplied by FIFA. The Dispute Resolution Chamber provided for under 1 (b) above shall be instituted in the FIFA Players' Status

Committee. The rules of procedure of the Dispute Resolution Chamber are set out in the Application Regulations and may be reviewed from time to time by the FIFA Players' Status Committee.

3 Before reaching its decision on the matters covered under 1(b) above, the Dispute Resolution Chamber shall ask the national association which held the player's registration before the dispute arose to give its opinion.

31. A suspension order was imposed pursuant to art. 23(a) of the Regulations which states as follows:

> "*if the breach occurs at the end of the first or second year of contract, the sanction shall be a restriction of four months on its eligibility to participate in any official football matches as from the beginning of the new season or the new club's national championship*".

We construe the phrase "*at the end of*" to embrace the period up to and including the end, so the fact the relevant breach occurred during the first year, as here, did not disable FIFA from imposing a suspension.

32. The article makes suspension mandatory where there is "*no just cause*" for unilateral breach by the player of the contract save in "*exceptional circumstances*". Mr Crespo for Mr Ortega valiantly sought to identify two "exceptional circumstances":

i. that FIFA's involvement had, in fact, if not in law, caused Mr Ortega to be suspended from as early as March 2003 i.e. that it had a form of chilling effect. We cannot accept this. The DRC did not suspend Mr Ortega until 6 June 2003. Prior to that, contractual obligations apart, Mr Ortega was free to play for whichever club would engage him;

ii. Mr Ortega's wife's pregnancy. This plea *ad misericordiam* is equally unavailable, not least because, once his wife was mercifully delivered of a healthy child on 15 March 2003, this excuse for absence had exhausted itself. In any event we doubt it reaches the threshold of an exceptional circumstance.

33. The suspension of four months was therefore stand. The suspension will now run for four months from the date of this award.

34. We were informed by the FIFA representative that at the end of such period, Mr Ortega will be free to seek to sell his talents to another bidder. Indeed we hope that he will again be seen on the football field rather than before a committee or tribunal or court.

35. There are a number of problems of construction with art. 22 of the Regulations. The question of what is the "*national applicable law*" was not addressed, although we can envisage circumstances in which it may be of some importance. For example – to our knowledge – some legal systems allow damages for emotional distress arising out of a breach of contract, others not. Some provide for exemplary damages in such circumstances others do not. We assume that the heads of damages considered by the DRC reflect whatever national law was applicable: we are in this context consoled by the multi-national composition of the DRC.

36. Mr Ortega told us, in a short concluding address to the hearing, that if his liability remained as fixed by the DRC, that would mark the end of his career. His statement of case suggested that, in broad terms, the damage was disproportionate to the offence. We confess to a sense of unease as to the quantum of compensation viewed in the context of the breach committed. Although FIFA's representative suggested that, on occasion, the DRC decided cases *ex aequo et bono* to put, through sympathy, a cap on compensation for that reason, in our view the article allows on its true construction no such flexibility. *Ex aequo et bono* is the antithesis to "*objective criteria*".

37. We deal at the outset with marginal matters:

i. It is accepted that USD 200,000 must be set-off as sums admittedly owed by the Club to Mr Ortega;

ii. The Club claimed before the DRC USD 2,000,000 by way of "sporting loss". The DRC, although acknowledging that an unquantifiable impact on the Club's achievements and image was inevitable, through Mr Ortega's premature departure, did not award any sum in respect of that. The Club mentioned this aspect of loss in their response to the claim, but did neither cross-appeal as such nor raise any counterclaim in their answer; neither – it seems – before the DRC nor before us did they produce any cogent evidence of the dimensions of such loss. We are not minded, in those circumstances, to give the Club benefit of the whole or any part of that claim. In any event the Club accepted that they were not seeking an increase in the compensation awarded by the DRC.

iii. In the light of the Club's response of 29 August 2003, upon which Mr Ortega relied, it seems that the issue of the frozen guarantee is immaterial. It refers to moneys due to IPC, not Mr Ortega.

38. Otherwise we hold, albeit with a measure of reluctance, that the award of the DRC must stand in full for the reasons they express:

- […]
- *art. 22 of the FIFA Regulations for the Status and Transfer of Players lists the factors that are to be taken into account when establishing the compensation for the breach of contract.*
- *not only did the player Ortega breach the employment contract in the protected period, i.e. in the first year of its validity, but he also abandoned the club mid-season, which is contrary to art. 21.1 (c) of the transfer regulations.*
- *understandably so, this will have had a detrimental impact on the performance and the planning of the Turkish club,*
- *moreover, the Chamber noted that Fenerbahçe SK paid USD 2,500,000 to the Italian club Parma AC and USD 5,000,000 to River Plate, in order to obtain the federative rights to the player Ortega,*

- *additionally, and in spirit of art. 22 (3), the Chamber recognised that Fenerbahçe SK had paid the required 15% participation to the Argentine Football Association amounting to USD 750,000, as foreseen in the Argentine collective bargaining agreement, and that it cancelled tax payments, stamp duties and fees for bank guarantees amounting to around USD 590,630.*
- *aside of these expenses, the Turkish club remunerated the company "Image Promotion Company" with USD 1,500,000 so as to obtain the image rights to the player,*
- *in the sense of art. 22 (2) of the transfer regulations, the Chamber took into consideration that the player Ortega would have had 3 years and 3 months remaining on his employment contract with Fenerbahçe SK,*
- *the player was receiving a salary of USD 1,000,000 per season as well as USD 2,000,000 per season as compensation for his image rights,*

- *taking into account the expenses of the Turkish club and, on the other hand, the fact that the player Ortega had performed for Fenerbahçe during nine months, the Chamber concluded that the compensation for the breach of contract that the player Ortega is liable to reimburse to Fenerbahçe amounts to USD 11,000,000,*
- […].

The Court of Arbitration for Sport rules that:

1. The motions in the request for arbitration filed on 15 July 2003 by Mr Ariel Arnaldo ORTEGA, in connection with the decision issued on 6 June 2003 by FIFA is dismissed.

2. The decision issued on 6 June 2003 by Dispute Resolution Chamber of the Player's Status Committee is reaffirmed and Mr Ariel Arnaldo Ortega is thus ordered to pay USD 11,000,000 (eleven million American dollars) to FENERBAHÇE SPOR KULÜBÜ.

3. (…)