CAS 2010/A/2145 Sevilla FC SAD v. Udinese Calcio S.p.A.
CAS 2010/A/2146 Morgan de Sanctis v. Udinese Calcio S.p.A.
CAS 2010/A/2147 Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Mark **Hovell**, Solicitor, Manchester, England

Arbitrators: Mr José Juan **Pintó Sala**, Attorney-at-law, Barcelona, Spain
Professor Massimo **Coccia**, Attorney-at-law, Rome, Italy

CAS 2010/A/2145:

in the arbitration between

Sevilla FC SAD, Sevilla, Spain
Represented by Mr Juan de Dios **Crespo Pérez**, Valencia, Spain

-Appellant-

and

Udinese Calcio S.p.A.
Represented by Mr Jorge **Ibarrola**, Lausanne, Switzerland

-Respondent-

CAS 2010/A/2146:

in the arbitration between

Mr Morgan de Sanctis, Naples, Italy
Represented by Mr Vittorio **Rigo**, Vicenza, Italy

-Appellant-

and

Udinese Calcio S.p.A.
Represented by Mr Jorge **Ibarrola**, Lausanne, Switzerland

-Respondent-

CAS 2010/A/2147:

in the arbitration between

Udinese Calcio S.p.A.
Represented by Mr Jorge **Ibarrola**, Lausanne, Switzerland

-Appellant-

and

Mr Morgan De Sanctis, Naples, Italy
Represented by Mr Vittorio **Rigo**, Vicenza, Italy

and

Sevilla FC SAD, Sevilla, Spain
Represented by Mr Juan de Dios **Crespo Pérez**, Valencia, Spain

-Respondents-

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I. THE PARTIES

A. CAS 2010/A/2145

1. The Appellant is Sevilla Fútbol Club SAD (hereinafter referred to as "Sevilla"), a Spanish football club currently competing in La Liga. It is a member of the Real Federación Española de Fútbol (hereinafter referred to as the "RFEF"), which is affiliated to the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. The Respondent is Udinese Calcio S.p.A. (hereafter referred to as "Udinese"), an Italian football club currently competing in Serie A. It is a member of the Federazione Italiana Giuoco Calcio (hereinafter referred to as the "FIGC"), which is affiliated to FIFA.

B. CAS 2010/A/2146

3. The Appellant is the professional footballer, Morgan De Sanctis, born on 26 March 1977 (hereinafter referred to as "De Sanctis" or "the Player"), currently playing for Napoli in Serie A of the Italian Leagues, having previously played for Udinese and then Sevilla.

4. The Respondent is Udinese.

C. CAS 2010/A/2147

5. The Appellant is Udinese.

6. The first Respondent is the Player.

7. The second Respondent is Sevilla.

II. BACKGROUND FACTS

8. On 5 July 1999, the Player joins Udinese from Juventus Turin, in the position of goalkeeper, signing his first contract with Udinese, for a period of 5 years effective from 1 July 1999. At that time, Udinese acquires 50% of his economic rights from Juventus Turin for the sum of EUR 1,291,142.

9. The remaining 50% of the economic rights in the Player were acquired by Udinese from Juventus Turin on 30 May 2000 for the sum of EUR 4,131,655.

10. On 10 November 2000, the Player and Udinese sign a second contract, for 5 years and with effect from 1 July 2000.

11. On 18 October 2003, the Player and Udinese sign a third contract, for 5 years and with effect from 1 July 2003.

12. The Player reaches the age of 28 on 26 March 2005.

13. On 20 September 2005, the Player and Udinese sign a fourth and final contract, for 5 years and with effect from 1 July 2005 (hereinafter referred to as the "Udinese Contract" or the "Old Contract"), under which the Player was to be paid a gross annual salary of EUR 630,000 along with an annual contribution to his rent of EUR 9,700 and the opportunity to participate in certain squad performance bonuses. On the same day the Player and Udinese sign a loyalty bonus agreement, under which the Player would receive the gross sum of EUR 350,878 for each year he remained at Udinese.

14. Udinese also submitted that the agent, Mr V., was to be paid EUR 60,000 (including VAT at 20%) for his part in the signing of the Udinese Contract.

15. The Udinese Contract was registered with the FIGC on 22 September 2005.

16. On 7 July 2006, Udinese loans out another of their goalkeepers, H. (hereinafter referred to as "H."), to FC Rimini Calcio SRL (hereinafter referred to as "Rimini"). Within the loan arrangement was an option for Rimini to acquire the economic rights of H. for EUR 1,200,000 and a counter option for Udinese to take the player back, but at a cost of EUR 250,000, which Udinese would then have to pay to Rimini.

17. The last match of the 2006/2007 season for Udinese was on 27 May 2007. Udinese shortly thereafter, on 7 June 2007, writes to FIFA regarding an alleged approach by Sevilla to the Player.

18. Around that time, Rimini exercises its option in relation to H.

19. On 8 June 2007, the Player writes to Udinese to terminate the Udinese Contract. The notice to terminate (hereinafter referred to as the "Notice") was with effect from the end of the 2006/2007 and specifically referred to Art. 17 of the FIFA Regulations for the Status and Transfer of Players (hereinafter referred to as the "Regulations").

20. On 21 June 2007, Udinese exercises its counter option with Rimini and H. rejoins Udinese.

21. In June 2007, Udinese releases three goalkeepers – Messrs. Casazza, Sciarrone and Murrielo – and, on 29 June 2007, also signs C., a 37 year old goalkeeper, who was at that time without a club.

22. The Player, on 10 July 2007, signs with Sevilla on a 4 year contract (hereinafter referred to as the "Sevilla Contract" or the "New Contract"), which provided for an annual gross salary of EUR 331,578 and a gross contract premium payment of EUR 1,050,000. In addition, the Sevilla Contract contained a clause stating that if the Player sought to terminate the Sevilla Contract before its expiry, then he would be liable to pay compensation to Sevilla in the sum of EUR 15,000,000.

23. Sevilla, through the RFEF, applied for the International Transfer Certificate for the Player from the FIGC in July 2007. The FIGC refused and the matter was finally resolved by the Single Judge of the FIFA Players' Status Committee, who issued the ITC on 13 August 2007, subject to any claim of compensation that Udinese may make.

24. On 18 April 2008, Udinese files its complaint with FIFA's Dispute Resolution Chamber (hereinafter referred to as the "DRC") claiming an amount of EUR 23,267,594 as compensation for the Player's breach. After both Sevilla and the Player were given their respective opportunities to file submissions, the DRC considers the matter on 10 December 2009, circulating the operative part on 13 January 2010 to the parties.

25. Following the request of the parties to issue a detailed decision (hereinafter referred to as the "Appealed Decision" or the "DRC Decision"), the DRC notified this on 3 June 2010, in which it determined:

"1. The claim of the Claimant, Udinese Calcio, is partially accepted.

2. The Respondent 1, Morgan de Sanctis, has to pay the Claimant, Udinese Calcio, the amount of EUR 3,933,134, as well as 5% interest per year on the said amount as from 9 June 2007, ***within 30 days*** *as from the date of notification of this decision.*

3. The Respondent 2, Sevilla FC, is jointly and severally liable for the payment of the aforementioned sum.

4. All other claims lodged by the Claimant, Udinese Calcio, are rejected.

5. If the aforementioned sum is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

6. The Claimant, Udinese Calcio, is directed to inform the Respondent 1, Morgan de Sanctis, and the Respondent 2, Sevilla FC, 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."

26. On 24 June 2010, Sevilla, the Player and Udinese all separately filed Statements of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS") against the Appealed Decision.

III. PROCEEDINGS BEFORE THE CAS

III.1 SUMMARY OF THE ARBITRATION PROCEEDINGS

27. Sevilla filed with the CAS its Statement of Appeal on 24 June 2010, challenging the Appealed Decision, in the matter CAS 2010/A/2145, requesting:

"1. To accept this appeal against the decision of the FIFA Dispute Resolution Chamber dated 10th of December 2009 with grounds given to the Parties on the 3rd of June 2010.

2. To adopt an award annulling the said decision and adopt a new one stating that the Appellant is not liable to compensate the Respondent for the breach of contract by the Player.

3. Further and in the alternative, to adopt an award annulling the said decision and adopt a new one declaring that the Appellant is not liable to compensate the Respondent with EUR 3,933,134 plus 5% annual interest because the amount is disproportionately high and/or incorrectly determined, according to the evidences and the law.

4. To confirm the Player was indeed outside of the Protected Period when he breached his contract.

5. To fix a sum of 40.000 CHF to be paid by the Respondents to the Appellant, to help the payment of its defence fees and costs.

6. *To condemn the Respondent to the payment of the whole CAS administration costs and Arbitrators fees."*

28. On 15 July 2010, Sevilla filed its Appeal Brief with the CAS. This contained the revised prayers for relief, as follows:

"1. To accept this appeal against the decision of the FIFA Dispute Resolution Chamber dated 10th of December 2009 with grounds given to the Parties on the 3rd of June 2010.

2. To adopt an award annulling the said decision and adopt a new one stating that the Appellant is not liable to compensate the Respondent with EUR 3,933,134 plus 5% annual interest because the amount is disproportionately high and/or incorrectly determined.

3. Further and in the alternative, to adopt an award stating that the Player and Sevilla are jointly and severally liable in the amount of EUR 262,500 as payment for

the value of 8 months of salaries of Player in accordance with Article 339 c).2 of Swiss law.

4. Further and in the alternative, to adopt an award stating that the Player and Sevilla are jointly and severally liable in the amount of EUR 1,050,500 as payment for the value of the residual salaries of the Player.

5. To confirm the Player was indeed outside of the Protected Period when he breached his contract and as a result neither Sevilla FC nor Morgan De Sanctis should receive any sporting sanctions.

6. To fix a sum of 40.000 CHF to be paid by the Respondent to the Appellant, to help the payment of its defence fees and costs.

7. To condemn the Respondent to the payment of the whole CAS administration costs and Arbitrators fees."

29. The Player filed with the CAS his Statement of Appeal on 24 June 2010, also challenging the Appealed Decision, in the matter CAS 2010/A/2146, requesting:

"1. The appeal is confined to Section III, paragraph 2 of the DRC Decision relating to the award of financial compensation. The Appellant requests that the CAS Panel makes an order quashing Section III, paragraph 2 of the DRC Decision and finds that in view of the facts the compensation awarded was incorrectly determined and/or erroneously calculated and is in any case disproportionately excessive.

2. The CAS Panel, in accordance with R57 of the CAS Statutes should review the pertinent facts and law, annul Section III, paragraph 2 of the DRC Decision and issue a new decision in this regard.

3. The costs of this arbitration procedure should be borne by the Respondent, which shall include all the costs and expenses of the CAS and the CAS Panel and the legal fees and expenses of the Appellant."

30. On 15 July 2010, the Player filed his Appeal Brief with the CAS. This contained the revised prayers for relief, as follows:

"1. To accept and uphold this appeal against the decision of the FIFA DRC of the 10th of December 2009.

2. To overturn the following provision contained in the decision of the FIFA DRC and which forms the subject of this appeal:

"Section III. Decision of the Dispute Resolution Chamber

3. Udinese 1 [sic]*, Morgan de Sanctis, has to pay the Claimant, Udinese*

Calcio, the amount of EUR 3,933,134 as well 5% interest per year on the said amount as from 9 June 2007, within 30 days, as from the date of notification of this decision."

on the basis that the said amount of EUR 3,933,134 is excessive and has been incorrectly determined.

3. To otherwise endorse and concur with the considerations made by the DRC with express reference to the finding that the termination of the contract was effected outside the protected period and the refusal to take into consideration the requests by Udinese for further and other compensation as contained at Section II, paragraphs 27,31,33,34 and 36 of the DRC decision.

4. In the event that an award of compensation is made in favour of Udinese, to make an award in the amount of Euro 233.333,00 further to Article 339c.2 of the Swiss Code of Obligations.

5. In the alternative to make an award in favour of Udinese, by way of compensation, in the amount of EUR 1.050.500 being the residual value of the Player's contract.

6. To order that Sevilla FC is jointly and severally liable, together with the Player for the payment of any compensation that the Player may be directed to pay to Udinese.

7. To make an order that Udinese is liable to pay the entire of the costs and expenses of the Court, including those of the Panel, including any advance of costs paid by the Player together with all and any legal fees and expenses of the Player to be submitted upon request."

31. Udinese filed with the CAS its Statement of Appeal on 24 June 2010, also challenging the Appealed Decision, in the matter CAS 2010/A/2147, requesting:

"1. The appeal is upheld.

<u>Ruling de novo</u>

2. Morgan De Sanctis and Sevilla Fútbol Club S.A.D are ordered to pay, jointly and severally, EUR 23,267,594 (twenty-three million two hundred and sixty-seven thousand, five hundred and ninety-four Euro), plus interest at 5% from 8 June 2007.

3. Morgan De Sanctis and Sevilla Fútbol Club S.A.D shall bear all the costs of this arbitration.

4. Morgan De Sanctis and Sevilla Fútbol Club S.A.D shall be ordered to pay

Udinese Calico S.p.A. compensation towards the legal and other costs incurred by the latter in this arbitration."

32. On 15 July 2010, Udinese filed its Appeal Brief with the CAS. This contained the revised prayers for relief, as follows:

"1. The appeal is upheld and the decision issued on 10th December 2009 by the FIFA Dispute Resolution Chamber is varied in part.

Ruling de novo

2. Morgan De Sanctis and Sevilla Fútbol Club S.A.D are ordered to pay, jointly and severally, EUR 10,000,000 (ten million Euro), plus interest at 5% from 9 June 2007.

3. Morgan De Sanctis and Sevilla Fútbol Club S.A.D shall bear all the costs of this arbitration.

4. Morgan De Sanctis and Sevilla Fútbol Club S.A.D shall be ordered to pay Udinese Calico S.p.A. compensation towards the legal and other costs incurred by the latter in this arbitration."

33. On 17 August 2010, Sevilla filed its Answer to Udinese's Appeal, the details of which are contained in the summary of Sevilla's submissions below. In its Answer, it confirms its prayers for relief contained in its Appeal Brief, as set out above.

34. On 18 August 2010, the Player filed his Answer to Udinese's Appeal, the details of which are contained in the summary of the Player's submissions below. In his Answer, he repeats his prayers for relief as in his own Appeal Brief, as set out above

35. On 18 August 2010, Udinese filed its joint Answer to both Sevilla's and the Player's Appeals, the details of which are contained in the summary of Udinese's submissions below. In addition, the Answer slightly modified Udinese's prayers for relief, as it no longer claimed there were any unamortised Agent's fees to consider.

36. The parties requested a hearing and all duly signed the Order of Procedure beforehand.

37. A hearing was held on 16 November 2010 at the CAS premises in Lausanne, Switzerland. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel. In addition, Mr William Sternheimer, Counsel to the CAS, was in attendance.

38. The following persons attended the hearing for the parties:

a. For Sevilla, Mr José Maria Cruz de Andrés, CEO of the club, along with its attorneys;

b. the Player was present in person, along with his attorneys; and

c. for Udinese, Mr Franco Collavino, the club's Managing Director, along with its attorneys.

39. There were no witnesses or experts providing evidence or opinions at the hearing, but the Player and the representatives of Sevilla and Udinese all spoke and were examined by the Panel and the other parties. The parties were given the opportunity to present their cases, submit their arguments and to answer any questions posed by the Panel. A summary of the submissions is detailed below. After the parties' final, closing submissions, the hearing was closed and the Panel reserved its decision to its written award. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their right to be heard and to have been treated equally in these arbitration proceedings. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties both in their written submissions and at the hearing, even if they have not been summarised in the present award.

III.2 OVERVIEW OF THE PARTIES' SUBMISSIONS

40. As Udinese is the injured party and bringing the claim for compensation, its written and oral submissions, made at the hearing, shall be summarised first, followed by the Player's and finally Sevilla's. The parties' written submissions, their verbal submissions and the contents of the FIFA file, received by the CAS Office on 15 September 2010, were all taken into consideration.

Udinese's submissions

41. Udinese made a number of submissions, in its Appeal Brief; in its Answer to both Sevilla's and the Player's Appeals, and at the hearing. These can be summarised as follows:

a) Udinese set out a number of "undisputed facts" – setting out the chronology of the Player's arrival at, through to his departure from, Udinese; the details of the remuneration under the Udinese Contract and the loyalty bonus contract, being principally, a yearly gross salary of EUR 630,000, a yearly loyalty bonus of EUR 350,878 and the rent on the Player's house of EUR 9,700 a year. In addition, Udinese gave details of the Player's share of the collective bonuses in the 2005/2006 season and in the 2006/2007 season. Further, it stated they had paid an agent EUR 60,000 for his part in securing the Udinese Contract; that the Udinese Contract was to run for 3 more years, until 30 June 2011; but that on 8 June 2007, the Player terminated it, without just reason.

b) Udinese stated that it had never seen the New Contract, but took from the Appealed Decision that the Player was to receive a yearly gross salary of

EUR 331,578 and a gross yearly contract premium of EUR 1,050,000, giving a total gross annual remuneration from Sevilla of EUR 1,381,578.

c) It set out a number of "disputed facts" – Udinese alleged that Sevilla had, through the agent Federico Pastorello, made contact with the Player, before he handed his Notice in to Udinese; they produced a copy of a text message sent by that agent to the General Technical Manager of Udinese scheduling a meeting between himself and the agent on 5 June 2007 and a copy of a letter of complaint sent to FIFA about this alleged approach to the Player, dated 7 June 2007, the day before the Player's Notice. The inference being that even though the Sevilla Contract was signed a month later, the Notice was induced by Sevilla's approach.

d) At the hearing, however, it was confirmed that Udinese had no actual evidence that Sevilla and the Player had met or discussed a move before the Notice was given by the Player.

e) Udinese provided details of the costs it incurred to replace the Player. It had to recall the goalkeeper H. who had been loaned out to Rimini for EUR 300,000 a year. Rimini was entitled to exercise an option to acquire H. for EUR 1,200,000 and it had exercised that option. After the Player gave his Notice and breached the Udinese Contract, Udinese was in a window of time, up to 21 June 2007, during which it could stop the transfer to Rimini, by foregoing the EUR 1,200,000 and by paying Rimini EUR 250,000, as a counter option price. Udinese claimed it decided to exercise the counter option, as the Player had handed his Notice in and left it. In addition, it now was committed to H.'s salary for the next three seasons, totalling EUR 1,179,000.

f) In its written submissions, Udinese also claimed it had brought in C., in addition to H., as a result of the Player leaving it. At the hearing, the representative of Udinese was able to expand on this claim. Udinese felt that as was young, only 22 years old, and had been playing in Serie B, the league below, compared with the Player, who was 30 years old, with international experience, it needed to bring in an older, more experienced keeper (C., aged 37) for the next season, but that H. had the potential to take over in seasons to come. Indeed, that is how things had transpired. C. cost nothing to acquire, but Udinese committed to a 3 year contract, with a total remuneration of EUR 1,881,000. In summary, Udinese claimed it incurred total replacement costs comprising of the lost transfer fee, the counter option fee and the wages of the two replacement keepers, all totalling EUR 4,510,000 for the 3 years left remaining on the Udinese Contract. However, Udinese did not directly claim this sum from the Player or Sevilla, rather used it to justify their argument that no deduction should be made (see below).

g) Udinese set out a summary of the Appealed Decision; noted that the other parties had appealed too; that the CAS had the jurisdiction to deal with the appeals, by virtue of Art. 63(1) of the FIFA Statutes; that both its Appeal and

its Answer were admissible, as it had met all time limits and other requirements in the Code for Sports-related Arbitration (2010 edition) (hereinafter referred to as the "Code"); and that the law applicable in this matter should be the FIFA Statutes and Regulations and that Swiss Law may apply subsidiarily.

h) Udinese submitted that the amount of compensation awarded by the DRC should be increased. It felt that the *"actual value of the Player upon the termination of the Old Contract was higher than…"* the sum of EUR 3,933,134, with interest at 5% per annum from 9 June 2007, that had been awarded.

i) In addition, it contended the amount within that sum relating to the specificity of sport, of EUR 350,000, was *"not in line with the CAS jurisprudence in relation to the interpretation of the FIFA Regulations."*

j) Turning to the DRC Decision, Udinese confirmed that there was no liquidated damages clause in the Udinese Contract, so the provisions of Art. 17.1 of the Regulations were applicable. One of the criteria provided by Art. 17.1 is the remuneration due to the Player. Udinese took issue with why the DRC on one hand considered that the remuneration under the New Contract *"reflects the value attributed to his services by his new club at the moment of the breach of contract."* Further, such remuneration *"may possibly also provide an indication towards the player's estimated market value at that time."* But then, on the other hand, calculated the compensation under this criterion using the average of the remuneration under the Old Contract and the New Contract.

k) Udinese relied upon the jurisprudence in *CAS 2008/A/1519 – FC Shakhtar Donetsk v/ Mr. Matuzalem Francelino da Silva & Real Zaragoza & FIFA* and *CAS 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza v/ Shakhtar Donetsk & FIFA* (hereinafter referred to as "Matuzalem") and in *CAS 2009/A/1880 FC Sion v. FIFA & Al-Ahly Sporting Club* and *CAS 2009/A/1881 Essam El-Hadary v, FIFA & Al-Ahly Sporting Club* (hereinafter referred to as "El-Hadary"). These were described as the *"most significant and recent"* jurisprudence on Art. 17.1 of the Regulations and in both cases the remuneration under the new contract was taken into account over the period the old contract would have had left to run but for the player's breach. In addition, in El-Hadary, the amount the new club was willing to pay for the player's transfer should be added. Neither case took the average remuneration between the old and new contracts. This point was made again at the hearing – the DRC had been mistaken to take the average remuneration between the Old and New Contracts.

l) However, Udinese sought to distinguish its case from Matuzalem and El-Hadary, in that it did not believe the Panel should deduct the sums Udinese was no longer required to pay to the Player under the Old Contract, as he was no longer at the club. Even though the panels in Matuzalem and El-Hadary had

made such deductions, this Panel should not for two reasons: firstly, if Udinese had transferred the Player, then it would not be expected to receive the transfer fee net of the salaries it no longer had to pay the Player as he was no longer with it (and at the hearing, this was expanded upon, by stating the salary was for the position and it would simply use the salary "saved" to pay the next goalkeeper or goalkeepers); and secondly, there had not been any actual saving by Udinese – it had incurred EUR 4,510,000 in replacement costs, which exceeded the amounts it would have had to pay the Player had he not left it.

m) To further illustrate its point, Udinese drew comparison to a painting. *"If I buy a painting for 10,000 (actual market value upon its acquisition), the value of which increases for the 5 following years up to 20,000, and someone damages it at this point of time, the compensation may only correspond to the value of the painting at the moment when the damage occurs, regardless of the value of its purchase. The compensation of the damage shall thus amount to 20,000 and not to 15,000 ((20,000 + 10,000)/2)."*

n) As such, Udinese calculated the value of the Player's services at the time of the breach to be the 3 years remuneration under the Sevilla Contract, i.e. EUR 4,144,734, without any deductions for any savings made by not having to pay the Player any further under the Old Contract, as these were more than covered by the replacement costs.

o) Udinese also referred to the specificity of sport criterion. It cited paras 154 to 156 inclusive of Matuzalem and noted that the DRC had referred to the *"exceptional and outstanding position of the Player…playing a fundamental role in the Italian club's latest success. De Sanctis was considered a masterpiece in Udinese's organisation, not easy to replace."*

p) Udinese produced the details of three other international transfers of goalkeepers – Petr Cech who in 2004/2005 season had transferred to Chelsea for EUR 10,000,000; Pepe Reina who in 2004/2005 season had transferred to Liverpool for EUR 8,867,870; and Sebastien Frey who transferred to Fiorentina in 2006/2007 season for EUR 5,725,250. Udinese submitted that the Panel, using Art. 42 of the Swiss Code of Obligations, could put the Player in this bracket and place a transfer value on him of between EUR 5,000,000 – 10,000,000: "*in accordance with the principle of the specificity of sport, as defined in CAS jurisprudence, the amount of compensation should therefore at least reach the comparable figures of the transfer of goalkeepers of a similar level in Europe, as Cech, Frey or Reina."*

q) Udinese argued in the alternative that the Panel should follow Matuzalem and utilise Art. 337c(3) of the Swiss Code of Obligations and award 6 months of the Player's remuneration under the New Contract, for the specificity of sport, i.e. EUR 690,789.

r) In its Appeal Brief it had submitted that the agent's fee relating to the Udinese Contract had not been amortised over the term of that contract, but in its Answer to Sevilla's and the Player's Appeals, as it confirmed at the hearing, this claim was withdrawn.

s) Interest at 5% per year was also claimed on any compensation, to run from the day after the Notice was given, i.e. from 9 June 2007, in accordance with Art. 102(1) of the Swiss Code of Obligations, as confirmed by Matuzalem.

t) Udinese also submitted that Sevilla should be jointly and severally liable with the Player for any compensation, citing Art. 17.2 of the Regulations, regardless of whether Sevilla could rebut the presumption it induced the Player's breach, under Art. 17.4 of the Regulations.

u) In its Answer, Udinese challenged the submissions made by both Sevilla and the Player that the *"remuneration"* aspect of compensation calculated under Art. 17.1 of the Regulations should be based on the Old Contract, in line with the cases of *CAS 2007/A/1298 Wigan athletic FC v/ Heart of Midlothian* and *CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC* and *CAS 2007/A/1300 Webster v/ Heart of Midlothian* (hereinafter referred to as "Webster") and that any award should be reduced using the Swiss Code of Obligations to 6 or 8 months of such remuneration.

v) Udinese relied on the CAS jurisprudence of Matuzalem and El-Hadary, which both looked at the remuneration under the new contract, over Webster – as these awards were *"the most recent CAS awards, issued with full knowledge of the previous precedents";* that Webster *"makes little sense"* as *"the outstanding salaries of an employee do certainly not constitute damage for the employing club, which will not have to pay them…";* and those two cases are *"much more in line with the reality of the world of football and the sports world in general"* as they also look at the amount the old club would have to spend to acquire a player of analogous value. Udinese, at the hearing, also rejected that the Panel should follow the Webster approach, as claimed by Sevilla and the Player. What Udinese was asking for "*is the transfer fee that Sevilla would have paid if they had come and asked for the Player*."

w) Sevilla and the Player had sought in their Appeals, to limit the amount of any compensation, using Art. 339c(2) of the Swiss Code of Obligations. Udinese contended that this legislation was not relevant in this instance – the FIFA Regulations applied here, with Swiss Law only *"applicable to complete and fill in any possible gap in the FIFA Regulations."* There is no reference to any limitation of the number of month's remuneration under the old or the new contract in Art. 17.1, rather the time remaining under the old contract is referred to.

x) Udinese submitted that the Player's behaviour was not *"gentlemanlike"* and that Sevilla and the Player should have negotiated a transfer, rather than breach the Old Contract.

y) Udinese also rejected the submissions of Sevilla and the Player regarding his freedom of movement and that any compensation awarded should be proportionate to ensure it did not limit this freedom. Udinese stated in this case, as Sevilla will be jointly and severally liable, there was no restriction.

z) At the hearing, Mr Collavino spoke on behalf of Udinese. Whilst he was able to confirm there had been some communication between Sevilla and Udinese before the breach, there was no evidence that the Player and Sevilla had been in contact; he spoke of the surprise Udinese experienced when it received the Player's Notice – *"like a thunder"*; and he explained the steps Udinese took to replace the Player with H. and C.; that the 3 other goalkeepers would have gone anyway – one was retiring, Casazza, who was the reserve goalkeeper to the Player; and the other 2 were not good enough. Mr Collavino confirmed that the 2 replacements were both for the Player, and that there were other goalkeepers in the youth set up coming through that could replace the others.

aa) In the submissions at the hearing, Udinese did comment upon the liquidated damages clause in the Sevilla Contract, which was set at EUR 15,000,000. It acknowledged that these types of clauses are intended to be penal, as opposed to an exact market valuation of a player. Udinese noted in Matuzalem there was a buy out clause set at EUR 22.5m, although ultimately the CAS panel valued the sum to acquire a similar player at about EUR 12m, so roughly 50%; and in the Barreto Case the liquidated damages value was EUR 5m, but the value accepted was EUR 1.5m, so nearer 30%. If the same was applied in this case, the market value of the Player, that Udinese have submitted the Panel should award, using the specificity of sport criterion, would be between EUR 5,000,000 and EUR 7,500,000.

bb) Finally, Udinese challenged the amount awarded by the DRC for specificity of sport, EUR 350,000. It contended that the DRC had acknowledged the Player was the *"masterpiece"* in the club's success, a leader and an example to his team. The Player attracted sponsors and fans and as a result of his breach caused damage such as the loss of fans and sponsors. Udinese acknowledged the Matuzalem precedent for awarding compensation under this criterion was 6 months remuneration under the New Contract, so in the alternative, felt this was the *"best we can have"*.

The Player's Submissions

42. The Player made a number of submissions, in his Appeal Brief; in his Answer to Udinese's Appeal; and at the hearing. These can be summarised as follows:

a) The Player's Appeal was specifically against Section III, para 3 of the DRC Decision, on 2 grounds. Firstly, the criteria were erroneously applied in fact and in law; and secondly, the amount of compensation is excessive.

b) The Player contended that the DRC followed the wrong version of the Regulations, relying on the 2005 edition, as opposed to the 2008 edition. The claim was made on 18 April 2008, after the 2008 edition came into force.

c) With regard to the Player's behaviour, he had given 8 years of service to Udinese, which had been *"mutually rewarding"*; however his notice of termination was in accordance with Art. 17 of the Regulations. The Player acknowledged that he has the potential liability to compensate Udinese, but argued that any compensation "*should be reckoned taking into account the facts and circumstances of this particular case and must be appropriate, fair and acceptable so as not result in an award of compensation which is punitive…"*.

d) The Player took issue with the DRC Decision, in that the DRC appeared to have relied solely upon the jurisprudence of Matuzalem, thus ignoring the Webster jurisprudence. The Player argued that his case bore more similarity to the Webster facts, in the long periods of service both Webster and the Player had given their clubs; and a substantial period had elapsed since entering into the contracts (compared to Matuzalem, who breached his contract 3 months after extending it).

e) The Player submitted that if the DRC sought to quantify the residual value of the contract, then the Old Contract contained the amount Udinese deemed the Player's services to be worth, when it was renewed 2 years before. Further, if Udinese had terminated the Old Contract, the Player would just get his net remuneration, for 3 seasons, not the loyalty bonus or rent, which were both contingent on the Player's presence at Udinese – so the residual value of the Udinese Contract was 3 years at EUR 350,000, i.e. a total of EUR 1,050,000. The Player also argued that the loyalty bonus was not within the Udinese Contract and was not therefore remuneration under that contract and that loyalty bonuses are of *"uncertain nature"*. Art. 17.1 does not refer to "bonuses", just to "remuneration".

f) The DRC stipulated Swiss Law should apply *"in addition to the regulations of FIFA"* and as such the DRC should have limited any compensation from an employee to an employer, pursuant to Art. 339c(2) of the Swiss Code of Obligations, and award 8 month's net salary under the Old Contract, i.e. EUR 233,333.

g) With reference to Art. 12.3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter referred to as "the FIFA Rules"), i.e. *"any party claiming a right on the basis of an alleged fact shall carry the burden of proof",* the Player submitted that

Udinese had failed to make representations to the DRC regarding the New Contract, so the DRC should not have taken it into consideration. In addition, and further to Art. 5.8 of the FIFA Rules, the DRC should have made available a copy of the New Contract to the Player, if it intended to base its decision on this.

h) The Player also argued that, following Webster, the DRC need not take into account all the criteria in Art. 17.1 of the Regulations, as some apply to player's breaches, some to club's, some when a breach is inside the protected period, others when outside. Here the breach was outside the protected period and as such the *"need for contractual stability was adequately protected by the protected period…"* Webster looked at the Old Contract, not the New Contract – the DRC should have done the same.

i) The Player did raise objections to the amortisation claim of Udinese relating to the agent's fees.

j) With regard to the specificity of sport, the Player felt the DRC had given too much weight to this criterion. Instead of following CAS jurisprudence, the amount of any of the criteria in Art. 17.1 of the Regulations could be amended upwards or downwards; this should not be used as the subject of a separate award for damages.

k) The Player pointed to his position on the pitch, his length of service to Udinese, that his notice was outside the protected period, and, in summary *"there are no aggravating factors to the present circumstances…"* yet Udinese were awarded damages under the specificity of sport criterion. In addition, the DRC failed to comply with Art. 14.4 of the FIFA Rules when it gave no detailed breakdown of the EUR 350,000 awarded.

l) The Player dismissed claims made by Udinese, in its Appeal, that Sevilla had contacted him prior to him handing in his Notice. The text message Udinese produced a copy of was between an agent purportedly representing Sevilla and a representative of Udinese – the Player had no knowledge of or control over such events, but stated his first contact with Sevilla was after he gave Notice to Udinese.

m) The Player raised queries as to whether Rimini would have exercised its option in relation to H.; and even if it had, H. had enjoyed a good season at Rimini and would have increased in value, so Udinese would have exercised its counter option regardless of the Player's Notice. He also argued that to replace one goalkeeper with two is not acting reasonably. If either one was taken as a direct replacement, the savings made on the Udinese Contract meant Udinese broke even or profited.

n) The Player agreed with Udinese that the DRC were wrong to take the average of the Old and the New Contracts' remuneration. However, the Player did not

agree with Udinese's valuation of the Player's services being the 3 years remuneration under the New Contract. He submitted the appropriate valuation was in Webster, i.e. the 3 years under the Old Contract, but that in any event, Udinese could not claim the remuneration under the New Contract and not deduct the savings made under the Old Contract.

o) Further, the Player states that to simply award Udinese the 3 years remuneration under the New Contract would leave Udinese in a better position than if no breach had occurred. That is, if the Player had stayed for 3 years, then left as a free agent, the cost to Udinese would have been 3 years remuneration under the Old Contract, along with the loyalty bonuses and rent.

p) In the Player's Answer to Udinese's Appeal, he submits that *"what Udinese Calcio is essentially attempting to do here, in the guise of relating this to the 'specificity of sport' is to seek an award of compensation on the basis of a lost transfer fee."* Udinese had already attempted to claim EUR 6,750,000 before the DRC and this was rejected by the DRC due to the *"lack of documentary and convincing evidence"* (para 36 of DRC Decision).

q) The Player noted in Matuzalem that the panel did award compensation using the specificity of sport criterion and using Art. 337c(3) of the Swiss Code of Obligations. The Player then cites a reference to an academic paper on Art. 17.1 of the Regulations, which states it is not possible to have recourse to the Swiss Code of Obligations.

r) At the hearing, the Player told the Panel about his time at Udinese; how he had played for them for 8 seasons; signed 4 contracts with them; broken into the national team, but been disappointed not to make the squad for the 2006 FIFA World Cup; he felt that Udinese, having qualified for the UEFA Champions League, but not progressing beyond the group stages, had gone as far as it could; and eventually decided he wanted a new challenge. He confirmed it was at the suggestion of his agent, Frederico Pasterello, that he gave notice under Art. 17.1 of the Regulations. He again confirmed that he had not had any contact from Sevilla before he gave the Notice to Udinese – there was no *"conspiracy"* between the Player and Sevilla, as Udinese alleged.

s) The Player informed the Panel that he only remained at Sevilla for one season, playing 13 matches; the next he was loaned out to Galatasary; and the season after he was transferred by Sevilla to his present club, Napoli, for EUR 1,500,000. His salary has stayed constant throughout those 3 seasons.

t) At the hearing, the Player confirmed that he had been aware that Udinese had received interest in him from other clubs from time to time, Manchester United and Arsenal were two, but he felt Udinese had put too high a value on him (although he never knew the amount) so these never progressed. In any event, the Player submitted there had been no evidence of any firm transfer offers made for him produced in this matter.

u) Finally, the Player stated that he felt he had become a better player once he left Udinese and had benefited from his time at Sevilla and Galatasary. He acknowledged compensation was due, but stressed he had acted professionally at all times.

Sevilla's Submissions

43. Sevilla made a number of submissions, in its Appeal Brief; in its Answer to Udinese's Appeal; and at the hearing. These can be summarised as follows:

a) Sevilla's initial submissions set out and confirmed the chronology above.

b) In addition, Sevilla pointed out that *"the Player breached the contract in accordance with the FIFA Regulations",* the consequence of this being that compensation is payable. However, the amount set by the DRC is *"disproportionate and conflicts with the jurisprudence of the FIFA DRC, the CAS, the FIFA Regulations, Swiss Law and general principles of Justice."* The DRC also used the incorrect criteria when calculating the compensation.

c) Sevilla submitted that the Player had conducted himself professionally: he was 30 years old and had dedicated 8 years of his career to Udinese and was entitled to see if he could find a bigger challenge, as this might be his last opportunity at this stage of his career. It was stated that players *"who have made a valuable and significant contribution to their club…should be commended for their dedication and not penalized in the light of the specificity of sport when they chose to leave the club."*

d) Like the Player, Sevilla drew parallels between the facts of this case and the facts in Webster, and in particular the behaviour of the Player. Sevilla also stated it was the European Union's and FIFA's aim not to punish breaches outside of the protected period, as they allow such breaches by not imposing sporting sanctions.

e) Sevilla advanced the same position as considered in Webster and in *TAS 2006/A/1082-1104 Real Valladolid CF SAD v. Diego Daniel Barreto Cáceres and Club Cerro Porteño* (hereinafter referred to as "Barreto"), i.e. that the appropriate amount of compensation is the residual value of the Old Contract and that the amount of compensation should be the same regardless of who breaches. So, if it was the club that breaches, the player gets the residual value of the contract – certainly not his potential transfer value. Sevilla states that *"any decision which imposes unequal amount of compensation between parties in a breach of contract case should be viewed as punitive and incorrectly calculated."*

f) Following Webster, Sevilla contended that Udinese had assessed the value of the Player when it entered into the Udinese Contract – it agreed the salary for each of the 5 years. It was a *"meeting of minds"* and it would be punitive to examine the value of the New Contract, as that valuation was not set by the

parties in dispute. Sevilla also points out that clubs and players revalue the services during contracts, as these parties had 4 times over the course of the employment relationship. If the Player's value increases, then he's offered a new contract for longer than what's left on the old, at more money. If not, then there is no new contract.

g) Sevilla initially assessed the level of compensation to be the net salary under the Old Contract, being 3 x EUR 350,000, that is EUR 1,050,000. Then, Sevilla referred to Art. 339c(2) of the Swiss Code of Obligations. The Panel have a discretion to set the amount of compensation an employee must pay, but that cannot exceed 8 months wages or EUR 262,500; as the CAS is a body based in Switzerland, it should take into account the laws of Switzerland when issuing its decision. Also, the applicable law here is the FIFA Regulations, and as FIFA is a Swiss entity, it must adhere to the laws of Switzerland.

h) In its calculation above, Sevilla disregarded the loyalty bonus the Player would have received from Udinese. It argued that *"this loyalty bonus is effectively an appearance bonus."* Further, if Udinese had breached the Old Contract, then the Player would not be able to claim unpaid loyalty bonuses, as he would no longer be at the club.

i) Sevilla did make initial submissions regarding the amortisation of the transfer fee paid to Juventus Turin and the agent's fee relating to the Udinese Contract; and submissions regarding the loss of ticket sales, sponsorship monies and the like; but these were ultimately not required, as Udinese withdrew its remaining amortisation and loss of profit claims before the CAS.

j) Udinese had in its Statement of Appeal repeated its claim for a lost transfer fee for the Player; however, that was not pursued directly in its Appeal Brief, instead through the specificity of sport criterion. Sevilla initially submitted Udinese had failed to prove any loss suffered.

k) On the issue of specificity of sport, Sevilla criticised the DRC for simply awarding the sum of EUR 350,000, without giving any "*reasons for findings."* Sevilla submitted that this criterion cannot be put into monetary terms, but *"must and can only be used as a concept in the light of the other objective criteria contained in article 17."* Here, the DRC have wrongly used the specificity of sport as a separate head of damage and awarded that sum.

l) Sevilla also reviewed the jurisprudence in Webster, Matuzalem, El-Hadary and in *CAS 2007/A/1358 FC Pyunik Yerevan v Carl Lombe, AFC Rapid Bucasresti & FIFA* and *CAS 2007/A/1359 FC Pyunik Yerevan v Edel Apoula Edima Bete, AFC Rapid Bucasresti & FIFA* (hereinafter referred to as "Pyunik") in relation to the specificity of sport. Sevilla felt that the panel in Matuzalem had misinterpreted the panel in Pyunik by firstly awarding damages under this criterion and then by following the Swiss Code of Obligations to calculate the amount.

m) Sevilla then pointed to the Player's long service with Udinese, his performances for the club and the fact he respected the protected period. As such, it would be *"nonsensical"* to award additional damages against the Player.

n) In the alternative, if the Panel was minded to follow Matuzalem and consider awarding damages using the specificity of sport criterion, then looking at the behaviour of the Player, it should be set at zero. Again, in the alternative, if the Panel is minded to award more, then it should, as the panel in Matuzalem did, apply a limit of 6 months salary, following Art. 337 c and d of the Swiss Code of Obligations.

o) In addition, Sevilla submitted any award should not be *"disproportionate to the aim pursued."* It submitted that the principles of freedom of movement for workers needed to be observed and to award too much would restrict a player's ability to move freely. Sevilla relied upon para 88 of Barreto to support its submissions on this point.

p) In Sevilla's Answer to Udinese's Appeal, it calculated the remuneration under the New Contract to be EUR 1,334,210 per season, totalling EUR 4,002,630, not the EUR 4,144,734 Udinese had stated.

q) Sevilla argued that as Udinese had not actually claimed the replacement costs, the Panel should disregard these, as taking them into account would constitute an *ultra petita* ruling. For completeness, Sevilla did comment on these replacement costs, disputing that the lost transfer fee can be claimed, as Udinese's written submissions do not show whether Rimini had actually exercised its option; if H. had remained on loan, Udinese would have received EUR 300,000 per season, which should be accounted for; Udinese have not shown that H. was brought back as a replacement for the Player, 3 other goalkeepers left Udinese at the end of that season, so they cannot claim the EUR 250,000 counter offer fee or his wages; Udinese actually saved EUR 2,291,634 in wages and loyalty bonuses that they did not have to pay to the Player, which should be taken into account; and, with C., there is again no evidence he was a direct replacement, if anything he was Casazza's replacement, also he only played for one season.

r) Sevilla argued that *"without sufficient proof …it is impossible to establish an objective value of the potential market value of the player at the time of the breach of contract. Therefore the most accurate and equitable amount to refer to is, as stated in extensor, the remaining value of the employment contract between the parties."*

s) With regard to a transfer fee for the Player, Sevilla criticises Udinese's approach to firstly rely on transfer fees of other players and then to address this within the specificity of sport. Two of the three transfer fees quoted were from the 2004/2005 season. Sevilla compared the ages of the other goalkeepers, their

international experience, the leagues they played in and the like. These other players were not comparable to the Player.

t) Like the Player, Sevilla submits that the facts in this case are much closer to those in Webster, not Matuzalem. There is no evidence here of the Player's immediate transfer value, unlike in Matuzalem and El-Hadary. Further, although Udinese favour the Matuzalem approach, it fails to deduct savings made under the Old Contract.

u) Sevilla additionally criticises Udinese's painting example – *"paintings do not hold the rights to freedom of movement and freedom to perform labour"* so the two are not comparable. If a sum was paid for a player, it is to be amortised over the length of a contract. At the end of a contract that has been completed, the player may have no value to a club.

v) At the hearing, the CEO of Sevilla, Mr Cruz de Andrés, confirmed that the Player had been loaned out after one season to Galatasaray for EUR 500,000 and then transferred the season after to Napoli for EUR 1,500,000. He acknowledged that within the Sevilla Contract was a liquidated damages clause for EUR 15,000,000; however, in 99% of cases this does not reflect the transfer value – here, the best offer was from Napoli and that is what he was transferred for. He acknowledged that if the Player had breached the Sevilla Contract, they would have claimed that sum, but would not have expected any court or tribunal to award that much.

w) At the hearing, Sevilla acknowledged that, despite the original prayer in its Statement of Appeal, it was jointly and severally liable to pay any compensation, along with the Player.

x) Again, at the hearing, Sevilla corrected its submission regarding Art. 227 c and d of the Swiss Code of Obligations, in that any indemnity should be 8 months, not 6 months, as submitted by the Player.

y) Sevilla also submitted at the hearing that interest should run from the end of the season that the Notice was given, i.e. 30 June 2007, so 5% per year from 1 July 2007.

z) Finally, at the hearing, Sevilla compared the views of FIFA and FIFPro regarding Art. 17.1 – did it give a right to players to "buy out" their contracts after the protected period? Udinese had submitted that Sevilla should have paid a transfer fee, but Sevilla argued the Player came to it after he had given his Notice; he had used Art. 17 and Sevilla argued that meant it no longer had to go to Udinese to talk about a transfer fee.

IV DISCUSSION

IV.1 CAS JURISDICTION

44. The jurisdiction of the CAS, which is not disputed between the parties, derives from Art. 62 and 63 of the FIFA Statutes (August 2008 edition) as well as Art. R47 of the Code.

45. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law and may issue a *de novo* decision superseding, entirely or partially, the appealed one. The parties confirmed this position by all signing the Order of Procedure in this matter.

IV.2 APPLICABLE LAW

46. Art. R58 of the Code provides the following:

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

47. Moreover, Art. 62 para 2 of the FIFA Statutes provides that the:

"Provisions of the CAS Code of Sport-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law."

48. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss Law shall apply subsidiarily.

49. The dispute at hand was submitted by Udinese to the DRC on 18 April 2008, as was confirmed by FIFA in the DRC Decision. As the filing date occurred after 1 January 2008, which is the date the 2008 version of the Regulations came into force, the 2008 version of the Regulations is relevant for this case.

IV.3 ADMISSIBILITY

50. The hearing relating to the DRC Decision was held on 10 December 2009, and the findings were notified to the parties shortly thereafter. The detailed version of the DRC Decision was notified to the parties on 3 June 2010. The parties, therefore, had under Art. 63, para 1 of the FIFA Statutes, until 24 June 2010 to file their Statements of Appeal, which they all did. Hence, the three Appeals are admissible as they were filed within the stipulated deadlines.

51. The Appeals were filed within the deadline provided by the FIFA Statutes and stated in the DRC Decision. The parties complied with all other requirements of Art. R48 of the Code, including the payment of the CAS Court Office fees.

IV.4 JOINDER

52. The appeals procedures CAS 2010/A/2145, CAS 2010/A/2146 and CAS 2010/A/2147 shall be conducted jointly, as the three appeals arise from the same circumstances and are directed at the same DRC decision; the parties are the same in the procedures, being the old club, the player and the new club; the same panel of arbitrators has been appointed for the three appeals; and pursuant to Art. R50(2) of the Code, the parties have all expressly agreed to the joinder, confirming the same by signing the Order of Procedure. The Panel will therefore render one common award.

IV.5 NEW DOCUMENTS

53. At the hearing, Udinese initially claimed it had never seen the FIFA file, or a copy of the Sevilla Contract. It later discovered the same had been sent to its attorney's offices, but temporarily mislaid. Time was given to Udinese to review these and the Sevilla Contract, in particular.

54. Sevilla objected to Udinese seeking to amend its submissions, particularly referring to the liquidated damages clause in the Sevilla Contract. The Panel, however, noted Udinese did not seek to add to its claims or prayers at the hearing, merely to rely upon a document within the CAS file.

IV.6 THE MERITS

55. The Panel noted in this instance the parties all agreed that the Player had breached the Udinese Contract without just cause and that compensation was due to Udinese. Whilst Sevilla had initially submitted that it should not be responsible for the Player's breach, it was confirmed at the hearing that any award for compensation should be made joint and severally against the Player and Sevilla. In addition, none of the parties agreed with the DRC's method of calculation within the DRC Decision and as such, the Panel had to determine the following:

    (a) Is the method of calculation within the DRC Decision correct?

    (b) If not, how should the compensation be calculated?

    (c) In particular, is there any liquidated damages clause?

    (d) If not, then how should the *"objective criteria"* of Art. 17 of the Regulations be applied?

    (e) Is the *"law of the country concerned"* of relevance and if so, how should it be applied?

(f) What is the relevance of *"the specificity of sport"* and how should it be applied?

(g) Should interest accrue on any compensation and, if so, at what rate and from what date?

(h) Any other prayers for relief?

(a) Is the method of calculation within the DRC Decision correct?

56. All of the parties took issue with the averaging aspect within the DRC Decision, that is to say, the main part of the compensation calculation made by the DRC as set out in para 40 of the Appealed Decision:

"In sum, the Chamber concluded that the amount of compensation for breach of contract without just cause to be paid by the Respondent 1 to the Claimant is firstly composed of the amount of EUR 3,547,134 being the reflection of the average remuneration and other benefits due to Respondent 1 under the previous and the new contract and the value attributed to his services by the both clubs as well as EUR 36,000 being the non-amortized agent fee over the term of the contract. Equally, the amount of compensation needs to include EUR 350,000 reflecting the sports-related damage caused to the Claimant by the Respondent 1 in the light of the specificity of sport. On account of the above, the Chamber considered that the total amount of EUR 3,933,134 is to be considered an appropriate and justified amount of compensation to be awarded to the Claimant."

At the hearing, Udinese submitted that perhaps the DRC had been confused by the averaging of the CAS panels in both the Matuzalem and El-Hadary decisions, when they respectively looked at the range of fees that the new clubs were willing to pay to acquire the services of the players in those cases and took the mid point in each instance. However, in both of these cases, in order to calculate the value of those players' services, they also took the remuneration under the new contracts and then deducted the remuneration from the old contracts – in neither case did they take the average of the remuneration between the old and the new contracts.

57. The Panel notes that there is no written reasoning behind the DRC's key decision to take the average of the remuneration under the New Contract and the Old Contract in this case, despite the wording of Art. 13.4 of the FIFA Rules which provides that decisions of the DRC must contain *"reasons for the findings"*. Much as it has used part of the Art. 17.1 criteria, that is *"...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..."*, the DRC has not given any detailed reasoning behind the decision to take the average, as opposed to using the total left under the Old Contract (as in Webster) or the total due under the New Contract less the total under the Old Contract for those 3 remaining years (as formed part of the calculation for the value of the players' services in Matuzalem and El-Hadary). The Panel also noted Udinese's contentions regarding the sum awarded for the specificity of sport, i.e. EUR 350,000. Again, there was no explanation as to how this figure was arrived at, again falling

short of the requirements of Art. 13.4 of the FIFA Rules.

58. Finally, the Panel notes the parties' requests and its ability under Art. 57 of the Code to issue a new decision to replace the DRC Decision, and determines that the DRC should not have taken the average remuneration in this instance and should have produced detailed reasons for its findings on the specificity of sport criterion, so the parties could understand how the sum of EUR 350,000 had been arrived at.

(b) How should the compensation be calculated?

59. The Panel notes, and each of the parties submits, that the compensation for the Player's breach of the Udinese Contract is to be determined in accordance with Art. 17 of the Regulations. For completeness, Art. 17 of the Regulations states the following:

"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. In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period. This sanction shall be a restriction of four months on his eligibility to play in Official Matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following season of the New Club. Unilateral breach without just cause or sporting just cause after the Protected Period will not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the Protected Period for failure to give due notice of termination (i.e. within fifteen days following the last match of the Season). The Protected Period starts again when, while renewing the contract, the duration of the previous contract is extended.

4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the Protected Period. It shall be presumed, unless

established to the contrary, that any club signing a Professional who has terminated his contract without just cause has induced that Professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two Registration Periods.

5. Any person subject to the FIFA Statutes and FIFA Regulations (club officials, players' agents, players, etc.) who acts in a manner designed to induce a breach of contract between a Professional and a club in order to facilitate the transfer of the player shall be sanctioned."

60. The Panel notes that there have been a number of previous awards delivered by CAS panels on this very issue (Webster, Matuzalem, El-Hadary and Pyunik, to mention a few where the breach is on the part of the player). The Panel also notes both the different facts and outcomes in these awards, and the views of those panels in relation to the method of calculation, i.e. that *"each of the factors listed in Article 17 is relevant, but that any of them may be decisive on the facts of a particular case...Article 17.1 does not require the judging authority...to necessarily evaluate and give weight to any and all of the factors listed therein"* (paras 201 and 202 of El-Hadary); *"Article 17.1 includes a broad range of criteria...some of which may be appropriate to apply to one category of case and inappropriate to apply in another."* (para 135 of Webster); and *"the task for the body assessing the entity of the compensation due is therefore to verify and analyze as carefully as possible <u>all</u> the elements above and take them in due consideration."* (para 77 of Matuzalem).

61. The Panel also notes the "positive interest" principle that was referred to in Matuzalem and equally applied in El-Hadary, as such a panel *"will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly"*(para 86 of Matuzalem).

62. As such, it is this Panel's role to consider each of the criteria within Art. 17.1 of the Regulations and indeed any other objective criteria in the light of the specific facts of this case and to determine how much weight, if any at all, to apply to each in determining the amount of compensation due in this particular case. In addition, the onus is on the parties to provide the evidence for the panel to carry out this task. The Panel notes the facts involved in the previous awards, and suspects that those in cases to follow, are and will be different from each other, but that the role of a panel remains the same, to apply all of the Art. 17.1 criteria and any other objective criteria to the specific facts and determine which are relevant and which are not and to ensure *"the calculation made ...shall be not only just and fair, but also transparent and comprehensible."* (para 89 of Matuzalem) with a view to putting the injured party in the position it would have been in had no breach occurred.

<u>(c) Is there a liquidated damages clause?</u>

63. The Panel noted that it is to look at the Old Contract first, to see if the parties have agreed a contractual remedy for the breach of the Old Contract. Such a clause is often referred to as a penalty clause or a liquidated damages clause.

64. In this instance, there was nothing in the Old Contract, but the Panel did note that there was one in the New Contract. It is only the Old Contract that it is relevant for this question; such a clause in the New Contract may assist a judging authority if it follows Matuzalem principles in seeking to assess the value of the player's services.

65. With no such clause in the Old Contract, the Panel returns to Art. 17.1 of the Regulations for the criteria to follow.

(d) How should the *"objective criteria"* of Art. 17 of the Regulations be applied?

66. The Panel notes that Article 17.1 of the Regulations states: *"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"*. It is clear to this Panel that the list is not intended to be definitive. Indeed, if the positive interest principle is to be applied, then other objective criteria can and should be considered, such as loss of a possible transfer and replacement costs, as were considered in the Matuzalem and El-Hadary cases. However, the Panel also notes that for compensation to be due in such instances there must be the logical nexus between the breach and loss claimed. The loss of a transfer fee was awarded in El-Hadary, where the new club and the old club had been directly negotiating a fee at the time of the breach ("*it appears to the Panel that, as a consequence of the early termination of the Player's employment contract, Al-Ahly was deprived of the opportunity to obtain a transfer fee of USD 600,000*", para 221 of El-Hadary). The Panel also noted that within FIFA's commentary on the Regulations, such matters as whether a collective bargaining agreement is in force could be considered.

67. In the jurisprudence available and referred to by the parties in their submissions and during the hearing, the Panel notes that previous panels did not feel bound to consider the Art. 17.1 criteria in a strict order, but rather consider the most appropriate to the facts of their case first. Udinese in both its submissions and at the hearing provided the Panel with details of the replacement costs it had incurred, it alleged, as a direct result of the Player's breach. Whilst replacement costs are not referred to in Art. 17.1 of the Regulations, these have been considered in previous CAS jurisprudence (such as Matuzalem, El-Hadary and *CAS 2009/A/1856 Club X vs. A* and *CAS 2009/A/1857 A vs. Club X*) in order to establish the "positive interest", and it thus seems a logical place to start – to see what loss the injured party has actually suffered as a result of the breach, before comparing this with the theoretical calculations a judging authority is directed to make under Art. 17.1 of the Regulations; as stated by the panel in El-Hadary (para 200) *"…Article 17.1 of the FIFA Transfer Regulations is an attempt by FIFA to give some directions on how to calculate the damage suffered."* The Panel also notes that in these type of cases, which have different facts from others and will have been through the DRC, a panel has the benefit of hindsight or the benefit of seeing how the breach of contract has actually effected the injured party, as the CAS panel may be looking at a breach that happened many years ago. Indeed, in Matuzalem, the panel was able to

derive a lot of information from that player's next contracts.

68. The Panel notes that in the event that a player waits until the last match of a season, at the end of the protected period and then hands in his notice within 15 days thereof, he avoids the sporting sanctions as set out in Art. 17.3 of the Regulations. However, it then leaves the old club in the position where it is obliged to mitigate its position, but in a short period of time. As detailed in para 111 of Matuzalem, *"...any injured party has the obligation to take reasonable steps to mitigate the effects and loss related to his or her damage. This well-recognized principle is confirmed by art. 44 para. 1 of the Swiss Code of Obligations, which states that a judge may reduce or completely deny any liability for damages if circumstances for which the injured party bears the responsibility have aggravated the damage."*

69. Whilst there is an obligation on the old club to mitigate its position, how this is done in practice will vary from case to case. In some instances the breach is not in accordance with the notice "window" detailed in Art. 17.3 of the Regulations and the old club may find it impossible to mitigate immediately, as they are outside a transfer window; in other cases clubs may do nothing, when they could have or may seek to bring in a replacement player of greater value than the player in breach – in all instances it is the judging authorities' role to review the particular facts of the case concerned, with the benefit of being able to look back at what actually was done and how that worked out in the specific case. What is normal in football today is the shortage of time available for the injured party in which to make replacements.

70. In this case, Udinese had argued before the DRC that the breach had resulted in certain losses such as sponsorship, ticket sales and the like, but the DRC had rejected these in the Appealed Decision and the claims were not made to the CAS. However, Udinese submitted and provided evidence to support the claim that they had to bring back one of their squad who was on loan to Rimini as a replacement. That player, H., was subject to a loan agreement between Udinese and Rimini, under which Rimini could acquire his transfer for the sum of EUR 1,200,000. During the hearing, the representative of Udinese confirmed that Rimini had exercised its option prior to Udinese's receipt of the Player's Notice and this evidence has not been contradicted by the other parties. Udinese had a right to counter offer, by which it could reject Rimini's transfer, waive the sum of EUR 1,200,000 and take the player back, but that required an additional payment to Rimini of EUR 250,000, which they duly made and paid, as a result of the Player's breach.

71. Udinese also submitted that it felt H. would be too inexperienced to be the immediate direct replacement for the Player. He was 22 years old in that moment and he had never played in Serie A or in another primary European league, whereas the Player was 30 years old, the regular starting keeper in a Serie A team for many years, with international experience. As such, they also brought in an experienced goalkeeper, C., aged 37, on a free transfer. The representative of Udinese explained at the hearing that their tactic was to have the older, experienced goalkeeper to be the initial replacement for the Player, whilst continuing to train and develop the younger one, so he could takeover during the next 3 years, the unexpired period of the Player's Old Contract.

The Panel noted Udinese acted quickly to bring these players in, both before the Player had signed with Sevilla, but after the receipt of the Player's Notice. The Panel also noted the specific position of the Player – a goalkeeper. Only one is on the pitch at anytime for a club and they tend to be rotated less. Outfield players can often play in different positions and are easier to replace from a squad.

72. The Panel noted the comments of Sevilla during the hearing, stating that three other goalkeepers had left Udinese at the end of the 2006/2007 season, and, as such, queried whether these two goalkeepers were direct replacements for the Player or whether Udinese would have brought these players back/in anyway. In addition, the Panel noted the submissions of the Player that one player should not be replaced by two new ones. The representative of Udinese at the hearing confirmed their submissions that these two players, H. and C., were brought in specifically as a result of the Player's breach. On balance, the Panel feels that in this instance Udinese had acted reasonably, immediately upon receipt of the Player's Notice, and forgone the transfer fee for H., paid the counter offer fee and then committed itself to H.'s wages for the next 3 years, to fill the gap left by the Player. The Panel also accepts that Udinese had not replaced like with like and further mitigated its position by bringing in the more experienced goalkeeper as the starting replacement for the Player. Ordinarily, replacing one player with two might seem odd, but the Panel considers as reasonable the strategy of Udinese to replace the Player with both the young player, with potential eventually, and the old player, with experience immediately. Udinese therefore committed itself to the additional costs of C.'s salary. The speed in which Udinese acted and the fact that we are dealing here with a goalkeeper and not a midfield player, for example, made it easier for the injured party to make the logical nexus between these replacement costs/loss and the breach, proving that these two new players were hired in direct substitution for the Player; done as a result of the Player's termination of the Old Contract; and Udinese was able to produce copies of the agreements with Rimini, which expressly set out the sums payable to bring H. back and copies of the new players' contracts. In addition, Udinese did bring in other goalkeepers over the remainder of the Old Contract period, just as other goalkeepers went. Using the ability to look back at how things turned out, the Panel can see that Udinese's strategy here worked, as eventually H. replaced C. as first team choice and remained in that position as at the date of the hearing.

73. The Panel notes that Udinese did not directly claim the sums it paid out from the Player and Sevilla, but instead sought to use these sums as a reason for the Panel not to look to deduct any savings Udinese made, by not having to pay the Player's remuneration and benefits under the Old Contract. The Panel felt Udinese was still looking for these sums to be taken into account in the overall scheme of calculating compensation, so the Panel does not consider that taking them into account would constitute an *ultra petita* ruling; in addition, the Panel notes that under Swiss law the *ultra petita* doctrine applies only with reference to a party's motions and not to its reasoning and arguments supporting those motions. Therefore, it accepts that Udinese suffered and awards as compensation, the following replacement costs:

Lost transfer fee from Rimini for H.	EUR 1,200,000

Additional counter offer fee paid for H.	EUR 250,000
Salary of H. (3 years)	EUR 1,179,000
Salary of C. (3 years)	EUR 1,881,000
Total	EUR 4,510,000

74. Whilst the Panel notes Udinese has suffered some direct loss, which it has been able to quantify, the purpose of Art. 17.1 of the Regulations is to lay out some criteria by which a judging authority, be it the DRC or a CAS panel, can look to establish the total loss or damage suffered by the Player's breach. The Panel should look to see if an injured party has in fact suffered more loss than the direct losses; roughly the same; or, indeed, should the injured party have brought in a new player of greater value than the one in breach, whether in fact it should be compensated for all its replacement costs. As stated by the panel in Matuzalem (para 114) *"…the judging authority will have a wide discretionary power to decide on the appropriate amount, taking into consideration the specific circumstances of the case and the responsibilities of both the parties"*. The injured party has a well established duty to mitigate and the level to which this has been done has to be considered by the judging authority. Each case will turn on its own facts, so this Panel will now review these in light of the Art. 17.1 criteria.

75. The Panel also notes the burden of proof is with the injured party, as it requests the compensation for the Player's breach.

Loss of transfer fee

76. The Panel notes the different approaches of previous panels – on the one hand, the Webster case where that panel felt transfer fees were not a possible factor in assessing compensation; whereas, in both Matuzalem and El-Hadary, the panels felt it was possible, if the injured party could provide sufficient evidence.

77. In this case, none of the parties produced any evidence of any offers made or pending for the Player. Udinese did produce the details of 3 other international goalkeepers that had transferred between clubs over the previous couple of years; however, this was not taken by the Panel as evidence of any loss suffered by Udinese in relation to this Player, more background information to be used in assessing the specificity of sport criterion below.

78. As such, as no party advanced any submissions under this criterion, the Panel did not use it as part of assessing the compensation due to Udinese.

Remuneration and other benefits

79. The Panel notes that this criterion has proved the most contentious to date. The panels in Matuzalem and El-Hadary both sought to calculate the value of the services of the player looking at the amount the injured party, the old club, would have to pay to replace the player. Those panels felt there were two components, the wages of the replacement player and the cost to acquire him. They felt that the amount the new club were willing to pay the player in breach gave the best indication of what a theoretical replacement player would be paid. Those panels then had to look for evidence as to what the old club would have to pay to acquire a replacement player. In El-Hadary, the two clubs had started negotiations as to a transfer fee the new club would pay the old; in Matuzalem, the panel took the evidence from the contracts the new club entered into with a third club. In both instances the remuneration under the old contract was treated as being saved and deducted. This all contrasts with the Webster decision, in which compensation was the remuneration for the unexpired part of the old contract, not the new (as it could be *"potentially punitive"*) and that panel did not look at what the old club might have to pay to acquire a replacement player and queried whether the costs of acquiring any player should be amortised beyond the protected period. The protected period being defined in the Regulations as *"a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional."*

80. In this matter, Udinese claimed that the compensation should be the remuneration under the New Contract, for the 3 years that were unexpired on the Old Contract. It felt that any savings made under the Old Contract should not be deducted, as they had been used to acquire the replacement players, H. and C. Udinese did not request the acquisition costs of a replacement player be used in addition to calculate the value of the Player's services, rather submitted that his market value should be awarded as compensation, under the specificity of sport criterion.

81. On the other hand, both Sevilla and the Player submitted that the facts of this case were closer to those in Webster and that the compensation should be limited to the net remuneration payable under the Old Contract, over the 3 year unexpired term, and disregarding other benefits, such as rent and the loyalty bonus (if not reduced further pursuant to their arguments that using the Swiss Code of Obligations any award should be limited to 8 months salary, as a maximum).

82. The Panel has determined that the applicable law in this matter is contained within the Regulations, with Swiss Law applying subsidiarily. The Panel did not believe that there was any gap or *lucuna* within the Regulations that required the Panel to utilise Art. 339c(2) of the Swiss Code of Obligations when assessing any damage under this criterion and further notes Udinese's submission that Art. 17.1 actually directs a judging authority to look at *"the time remaining on the existing contract up to a maximum of five years"* as opposed to placing any maximum limit. As such the Panel

rejects the claims of Sevilla and the Player to limit the amount of compensation awarded to a maximum of 8 months salary.

83. The Panel has determined that in this specific case, there are considerable actual damages suffered as a result of the breach. The Panel further notes that it had limited evidence provided to it by the parties in order to attempt to calculate the theoretical calculation of the value of the services of the Player in order to put the injured party, Udinese, back in the position it would have been if there had been no breach by the Player.

84. If the Panel attempted to follow a Matuzalem or El-Hadary type calculation, then it would need to look at the remuneration under the New Contract, submitted as:

Annual salary	EUR 331,578
Annual contract premium	EUR 1,050,000
Annual total	EUR 1,381,578
Three year total	EUR 4,144,734

To complete the theoretical calculation, that sum would be less the savings under the Old Contract, but then the Panel would seek to assess the acquisition costs Udinese would have to pay for a replacement goalkeeper by looking at the value of the Player.

Quite apart from the fact that Udinese did not actually advance the argument that the Panel should look to calculate the value of the Player's services, as would be requested under the Matuzalem approach, and that both Sevilla and the Player argued the Webster principles should be followed here instead, the Panel were not provided with clear evidence that would enable them carry out this task, in particular what would the acquisition costs of a theoretical replacement player be. During the hearing the Panel were made aware of the amount Napoli paid for the Player, 2 seasons after he left Udinese, i.e. EUR 1,500,000 – if Napoli signed him for a 3 year contract, does that place his acquisition value at EUR 500,000 per season? Indeed, the Panel noted Sevilla loaned the Player out to Galatasaray for the 2008/2009 season, for a loan fee of EUR 500,000.

85. The Player at the hearing submitted that he had become a far better player after he left Udinese, so was the transfer fee paid by Napoli something that should be used to compensate Udinese? Would he have received as much remuneration and contract premium in the New Contract by Sevilla if they had paid to acquire him? Is it safe for a judging authority to use a transfer fee paid 2 years after the breach as evidence as to the amount a replacement player might have cost Udinese at the time of the breach? - a lot can happen in football in 2 years. How much of that transfer fee was down to the Player's *"own efforts, discipline and natural talent"* or from his *"charisma and personal marketing"* (see para 142 of Webster)?; On the other hand, if Napoli paid EUR 1,500,000 for the Player when he was 2 years older, might they have paid more at the time of the breach?

86. Udinese did not produce concrete evidence of any offers for the Player, just the details from a website of some other transfers of goalkeepers over the last few years, where the Panel had no details of those players' salaries, unexpired terms, etc. There was no expert evidence provided. If this was a personal injury claim for damages, one might expect the judging authority to be provided with expert evidence, reports and statements. Here, the Panel was not put in a position by Udinese where it could safely value the services of the Player. In the absence of any concrete evidence with respect to the value of the Player, the Panel cannot apply exactly the same calculation as in Matuzalem and shall use a different calculation method to determine the appropriate compensation, the one which would be the closest to the amount that Udinese would have got or saved if there had been no breach by the Player. By using the value of the replacement costs only rather than the estimated value of the Player, the Panel does not seek to depart from the Matuzalem jurisprudence but wishes to emphasize that there is not just one and only calculation method and that each case must be assessed in the light of the elements and evidence available to each CAS panel.

87. The Panel can still use the remuneration of the Old Contract, as directed by Art. 17.1 of the Regulations when considering the issue of whether Udinese has saved the remuneration that it would have paid the Player. The Panel believes it is correct to deduct these as part of the calculation of compensation, but also to give credit for the actual replacement costs incurred. In this case, keeping the consistent approach (see for example the grossing up in the *CAS 2009/A/1856 and 1857* decision, at paras 196 and 197) of looking at the gross sums (as tax rates differ from country to country and, more basically, in any playing contract, the club's obligation is to pay the whole contract sum, and the tax liability is the player's; for convenience and usually as a result of tax legislation, the club deduct the tax at source and pay it on the player's behalf to the government), Udinese have saved the following:

The yearly salary of the Player	EUR 623,000
The yearly loyalty bonus	EUR 350,878
The annual rent contribution	EUR 9,700
A yearly total	EUR 983,578
The total for the 3 years	EUR 2,950,734

The Panel determined that the loyalty bonus and the rent should be treated as remuneration, whether they were detailed in the Udinese Contract or an agreement between the same parties, supplemental to the Udinese Contract. The Panel did not agree with Sevilla's submissions that the loyalty bonus *"is effectively an appearance bonus."* If the Player had remained, yet never physically played again, say due to an injury or loss of form, that bonus would still be due. Only the squad bonuses were uncertain and required participation in matches. The Panel very much doubts whether the Player would not have made a claim for the loyalty bonus, had it been Udinese that breached the Old Contract prematurely.

So at this juncture, the Panel has determined to award Udinese as compensation for the Player's breach:

The replacement costs	EUR 4,510,000
Less, the savings made	EUR 2,950,734
Sub total	EUR 1,559,266

Time remaining under the Old Contract

88. The Panel noted that the time remaining under the Old Contract is taken into account when looking at the period for replacement costs, i.e. 3 years of the replacement costs, less 3 years of the savings made.

89. However, the Panel also notes that the Player had concluded 2 years of his 5 years on the Udinese Contract. In certain previous cases, such as Matuzalem, this was dealt with in the specificity of sport and the Panel determined to deal with the same below.

Fees and expenses amortised

90. Udinese had argued before the DRC that the initial fees paid to Juventus Turin should have been amortised over the entire period the Player was under contract with it. In addition, it claimed the agent's fees paid in relation to the Udinese Contract should be amortised over the 5 year period of that contract on a pro rata basis, year by year. In the DRC Decision, it was decided that the fees paid to Juventus Turin had been amortised over the first 5 years of the Player's time with Udinese, but EUR 36,000 was allowed as part of the compensation for the agent's fees.

91. However, Udinese did not appeal the DRC's Decision in regard of the unamortised fees and expenses; the Player and Sevilla both submitted that there was no proof the agent was actually paid; and Udinese confirmed at the hearing that it no longer made any claim in relation to the agent's fees. As such, no party made any claim under this criterion and the Panel therefore determined it had no relevance in assessing the level of compensation due to Udinese.

In or out of the protected period

92. Whilst Udinese had argued before the DRC that the breach occurred within the protected period, this had been disputed by the Player and Sevilla, and the DRC, in the Appealed Decision, determined that the breach was outside of the protected period. As such the arguments were not advanced to the CAS. It was therefore common ground that the breach occurred outside of the protected period.

93. The Panel noted that in certain previous cases, such as Matuzalem, this was dealt with in the specificity of sport criterion and determined to deal with the same below.

(e) Law of Country concerned

94. None of the parties made any submissions on this criterion, despite Art. 17.1 of the Regulations requiring the judging body to consider the law of the country concerned. In this instance, the law would be Italian Law, as it has the closest connection to the injured party, the party in breach and the employment contract itself.

95. The Panel finds this criterion is of no relevance for the calculation of the compensation due in this matter and agrees with the El-Hadary conclusion in para 208, *"that law of the country concerned may be relevant in favour of the player or in favour of the club, or be utterly irrelevant. It is up to the party which believes that such factor could be in its favour to make sufficient assertions in this regards. If it does not, the judging authority will not take that factor into account in order to assess the amount of compensation. In no way does this mean that the judging authority failed to properly evaluate this matter."*

(f) Specificity of Sport

96. The Panel noted it *"should aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case."* (para 155 of Matuzalem and confirmed at para 233 of El-Hadary). The Panel agreed with the jurisprudence set out in previous cases mentioned herein that the specificity of sport is not an additional head of compensation nor a criteria allowing to decide in equity, but a correcting factor which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of Art. 17 of the Regulations.

97. In this specific case, Udinese has suffered loss as a result of the Player's breach. Udinese has mitigated its position, in a reasonable way. It did not go out and acquire a more expensive replacement; instead it brought in an experienced, older goalkeeper on a free transfer and brought back a younger goalkeeper with prospects. However, the Panel is not convinced that these direct replacement costs have fully compensated Udinese for the loss it suffered as a result of the breach.

98. At the hearing, Udinese submitted that the market value of the Player was evidenced by the liquidated damages clause in the New Contract, a sum of EUR 15,000,000. However, Udinese also conceded that this was set at an artificially high level and that a more realistic level would be a third or half of this sum.. So should the Panel look at the value set in the New Contract, should the Player have looked to breach that, i.e. EUR 15,000,000?; or perhaps the lower of the suggestions made by Udinese, i.e. a third of that sum (as all parties agreed at the hearing that clubs tended to set the sums in a liquidated damages clause far in excess of the player's true market value – these clauses are more a deterrent than a price tag), so EUR 5,000,000 and should the Panel, as suggested by Udinese, use the specificity of sport criterion to award that sum to Udinese? To further their position, Udinese also submitted that the Panel should look at the market value/transfer fees paid for other goalkeepers in the market around that

time and use the specificity of sport to award between EUR 5m and EUR 10m to Udinese.

99. The Panel, in addition to being unimpressed by a few pages downloaded from a sporting website as evidence to support this submission, did not find that there was any similarity between those transfers and this specific case, and also determines that the specificity of sport is a correcting factor, and not one that enables a transfer fee through the back door. The Panel noted that Udinese quoted para 156 of Matuzalem in its submission, in which that panel stated this head of compensation is limited, that it serves to correct and should not be misused, yet then Udinese request between EUR 5,000,000 and EUR 10,000,000 under this criterion.

100. In addition, the Panel did consider the parties' submission regarding the time left unexpired on the Old Contract – 3 years left of a 5 year contract; the special role of the Player in the eyes of sponsors, fans and his colleagues at Udinese; the position he played on the pitch and the success he had brought to Udinese; whether it was felt there was any evidence that the Player and Sevilla had met before the Player handed his notice in (and on that point, the Panel noted the lack of evidence produced by Udinese to back up its allegations); but also the time he had given to the club; whether he was a "model professional" or not; the fact he was outside the protected period; that he felt he followed a "process" set out in Art. 17.3 of the Regulations; whether the Player felt as Udinese had not offered him a new deal, after 2 years on the 4th contract, it was a sign he was not their future or whether any renegotiation would typically have occurred a few months later; and the like. On balance, the Panel felt that a downside of Udinese's strategy to replace the Player with the older, experienced goalkeeper and with the younger goalkeeper with potential was a factor that is specific to football and sport in general, that is the effect it will have on the fans and sponsors.

101. The Panel noted that Udinese had attempted to quantify such losses before the DRC – a near impossible task. However, the Panel notes that the Player was a senior professional, with whom the club had enjoyed some of their greatest successes. The fans and sponsors of all clubs demand immediate success and results. The Panel believes that at any club, when a key player is sold or goes and time is required for a new "hero" to materialise, revenues will be affected, the injured party will suffer losses which it may not be able to prove in Euros. This, in the opinion of the Panel, is where the specificity of sport can be used and should be used.

102. The Panel notes that in the various previous cases mentioned above, only the panels in Bourgas and Matuzalem awarded any sum for the specificity of sport, where the breach is by the player. The Regulations offer no express guidance as how a judging authority should calculate compensation under this basis. However, the commentary to the Regulations states, as a footnote on the specificity of sport:

"…Furthermore, there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six monthly salaries…"

In the Appealed Decision, the DRC awarded a sum of EUR 350,000, but did not offer any detail as to how they arrived at this sum. In Bourgas, the panel rounded the compensation up – having worked from the remuneration due under the old contract, but then reviewing the increased remuneration the player received at his new clubs. In Matuzalem, the CAS panel considered Swiss Law as guidance, to fill that gap or *lacuna*, in particular, Art. 337c(3) and article 337d(1) of the Swiss Code of Obligations. Further, two of the parties in their submissions referred to the Swiss Code of Obligations as being applicable in this case. The Player did in his written submissions put forward an excerpt from academic paper, suggesting Swiss Law had no place here, but the author referred to was actually a panel member in the Matuzalem case, so without the entire paper, the Panel decided to follow the jurisprudence. That panel stated *"…the specific circumstances of a case may lead a panel to increase the amount of the compensation, by letting itself inspire, mutatis mutandis, by the concept of fair and just indemnity in the …Swiss Code of Obligations."* In that instance that panel awarded additional compensation in the form of an additional indemnity amount equal to 6 months of the salary under the new club's contract. That panel used as further support Art. 42 para 2 of the Swiss Code of Obligations, stating *"if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of the events and the measures taken by the damaged party to limit the damages."* The Panel in this determines to follow the specificity of sport jurisprudence detailed in Matuzalem. So, taking into account the specific facts of this matter, determines the additional compensation for Udinese shall be EUR 690,789, being 6 months remuneration under the New Contract.

103. As such, the total compensation due to Udinese is:

The replacement costs	EUR 4,510,000
Less, the savings made	EUR 2,950,734
	EUR 1,559,266
Add, the specificity of sport	EUR 690,789
Total	EUR 2,250,055

Such sum being payable jointly and severally by the Player and Sevilla.

104. The Panel noted that whilst Sevilla had initially claimed in its statement of appeal that it should not be liable to compensate Udinese for the Player's breach, at the hearing, it confirmed that claim was withdrawn; the Panel notes, for good order, that under Art. 17.2 of the Regulations, the new club is jointly and severally liable for the payment of any compensation, regardless of any involvement or inducement of the Player to breach his contract.

(g) Interest

105. In the parties' submissions, the right for Udinese to claim interest and the rate of interest, being 5% per annum, were not disputed. However, the date from which interest should run was.

106. The Panel referred to the Player's Notice given on 8 June 2007. It stated that the "*…contract will have to be considered as finally cancelled at the end of the 2006/2007 sporting season…"* At the hearing there was a debate as to whether the 2006/2007 season ended on 30 June 2007, or, as the last match of that season had been played, it had already ended, and as such the Notice took effect on the date it was received. The Panel note the definition of a "Season" in the Regulations, as being *"…ending with the last Official Match of the relevant national league championship",* which had been played before the Notice was given.

107. As such, the Panel confirms the DRC's finding that compensation awarded shall bear interest at 5% each year from 9 June 2007, that date being the first day following the date on which the player is considered to have been in breach – the *dies a quo* – as confirmed by the Webster and Matuzalem decisions.

(h) Other Prayers for Relief

108. The Panel determines that following the above conclusions, it makes it unnecessary for the Panel to consider the other requests submitted by the parties to the CAS. Accordingly, all other prayers for relief are rejected.

V. COSTS

109. Pursuant to Art. R64.4 of the Code, the CAS Court Office shall, upon conclusion of the proceedings, determine the final amount of the costs of the arbitration, which shall include the CAS Court Office fee, the costs and fees of the arbitrators computed in accordance with the CAS fee scale, the contribution towards the costs and expenses of the CAS, and the costs of witnesses, experts and interpreters. In accordance with Art. R64.4 of the Code and with the consistent practice of the CAS, the award states only how these costs must be apportioned between the parties. Such costs are later determined and notified to the parties by separate communication from the Secretary General of CAS.

110. In the present case, the Panel notes that whilst the case consists of three consolidated arbitration proceedings, the parties were all entitled to challenge the Appealed Decision, as the DRC had calculated the compensation by averaging the remuneration left on the unexpired term of the Old and New Contracts and had failed to explain the basis of the additional sum awarded for the specificity of sport. The Panel determined that all parties were correct to challenge the Appealed Decision by means of their Appeals, and as such, the Panel determines that the costs of the arbitration shall be shared equally between the parties, so each pays a third thereof.

111. On that same basis, the Panel determines that each party bears its own legal costs and expenses in this matter.

ON THESE GROUNDS

The Court of Arbitration for Sport rules with a majority decision, jointly, with respect to the three proceedings:

1. The appealed decision of the FIFA Dispute Resolution Chamber dated 3 June 2010 is set aside.
2. Mr Morgan de Sanctis and Sevilla Fútbol Club SAD are jointly and severally liable to pay Udinese Calcio S.p.A. an amount of EUR 2,250,055 as compensation, with interest at 5% a year from 9 June 2007.
3. Each party shall bear one third of the total costs of the three proceedings, to be determined and served on the parties by the CAS Court Office.
4. Each party shall bear its own legal costs.
5. Any and all other motions or prayers for relief are dismissed.

Done in Lausanne, 28 February 2011

THE COURT OF ARBITRATION FOR SPORT

Mark **Hovell**
President of the Panel

José Juan **Pintó**
Arbitrator

Massimo **Coccia**
Arbitrator