

**Arbitration CAS 2011/A/2567 Al Salmiya SC v. Atanas Bornosuzov, award of 2 March 2012**

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

*Football**Termination of a contract of employment without just cause**Omission of the respondent's address in the statement of appeal**Admissibility of the appeal brief in case of use of erroneous address**Grounds for termination of an employment contract and discretion of the deciding authority to assess the facts**Player's absence from the country without the club's permission**Unilateral termination of the contract of employment due to the player's unauthorized leave**Player's misconduct and termination of the contract of employment**Warnings or disciplinary sanctions and termination of the contract of employment**Repeated failure on the part of a player to report to work and termination of the contract of employment*

- 1. The appellant's initial omission of the respondent's address in its Statement of Appeal is reasonably understandable if it is explained immediately to the CAS Court Office in good faith and an honestly diligent intention to adduce this address. It is further admissible if the deadline extension only relates to provision of the respondent's contact details, and not to the identification of the respondent as required under art. R48 of the CAS Code if the latter was made within the deadline of appeal before the CAS.**
- 2. Pursuant to art. R51 of the Code, the appeal brief should be sent to the CAS. If the appeal brief is addressed to "FIFA/CAS" but sent to FIFA only, the FIFA administration, even if it is not its obligation, should inform the appellant, by courtesy, of the erroneous address or should forward the document to the CAS Court Office. Like in the situation when the appeal brief is delayed or lost by the post or the courier company, the CAS Court Office gives the opportunity to the appellant to establish that it has sent the appeal brief on time.**
- 3. Pursuant to the FIFA Regulations on the Status and Transfer of Players (RSTP) and CAS jurisprudence, only material breaches of an employment contract are just cause for termination. The breach must be material and the other party cannot be expected to continue the contract. Art. 14.4 of the FIFA Commentary to the RSTP further lays out a number of grounds which a club can invoke in justifying the termination of an employment contract with its player. As per art. 337.3 of the Swiss Code of Obligations (CO) and art. 14.2 of the FIFA Commentary, the deciding authority has the discretion to assess the facts and determine whether there was just cause for terminating the contract, on the merits of each particular case.**
- 4. Given the fact that the player was absent from the country during a period when there were no official or friendly match of the club or any other club's activity that would**

require the player's attendance; and the alleged verbal permission of the senior coach and the club's team director, a mere statement by the club to the effect that the player left without written consent is insufficient to prove that the player did so without the club's permission.

5. CAS jurisprudence is clear that before a club can unilaterally terminate a player's employment contract, it must first warn or notify the player of the breach or breaches he has committed and/or start disciplinary proceedings in accordance with its internal disciplinary regulations. Only after having undertaken these procedures is a club then entitled to terminate the player's employment contract.
6. While violent conduct by players against referees during matches may justify the termination of a contract, there are various procedures which must be followed before such termination. The nature and/or degree of injuries sustained by the referee is an important factor in the evaluation of the player's conduct and whether it is sufficient to justify the termination of his employment contract.
7. Warnings or disciplinary sanctions such as yellow and red cards received by players during matches do not justify the termination of an employment contract, even if the contract contains a clause allowing termination on such grounds.
8. Whereas repeated failure over a period of time on the part of a player to report to work can justify the termination of his employment contract, this termination must be preceded by the usual preliminary or disciplinary measures.

## **I. THE PARTIES**

1. Al Salmiya SC (hereinafter referred to as the "Club", or "Al Salmiya" or the "Appellant") is a Kuwaiti professional football club affiliated to the Kuwaiti Football Association (hereinafter referred to as the "KFA"). The latter is a member of the Fédération Internationale de Football Association (hereinafter referred to as the "FIFA").
2. Atanas Bornosuzov (hereinafter referred to as the "Player" or the "Respondent") is a Bulgarian professional football player.

## **II. THE FACTS**

3. This appeal was filed by Al Salmiya against the decision rendered by the FIFA Dispute Resolution Chamber (hereinafter referred to as the "FIFA DRC") passed on 19 August 2010 (hereinafter referred to as the "FIFA Decision"). The grounds of the FIFA Decision were notified to the parties on 18 August 2011.

4. A summary of the most relevant facts and the background giving rise to the present dispute will be developed on the basis of the parties' submissions and the evidence taken. The FIFA file is also taken into consideration. Additional factual background may also be mentioned in the legal considerations of the present award.

## II.1. The contractual relationship between Al Salmiya and the Player

5. On 1 September 2008, Al Salmiya and the Player signed an employment contract (hereinafter referred to as the "Contract") under which Al Salmiya employed the Player as one of its professional footballers for the period from 1 September 2008 to 30 June 2009.
6. Under clauses 4, 5, 7 and 9 of the Contract, the Player was entitled to the following payments and benefits:
- EUR 60,000 down payment (clause 4)
  - EUR 10,000 monthly salary (clause 5)
  - A family car (clause 7)
  - A furnished apartment (clause 7)
  - Four air tickets (two adults and two children Bulgaria – Kuwait – Bulgaria – clause 9)
7. The parties also agreed under clause 19 of the Contract that:

*"In the event where the player is found guilty of misbehaviour or violation of the club's statutes (...) or instructions or articles of this contract, the club shall have the right to impose the penalties conformant to the nature of violations or misbehaviour, particularly in the following cases:*

- 1. Violation of the instructions issued by the Administration of the Club or KFA or neglect in the performance thereof.*
  - 2. Violation of the provisions of the contract (...).*
  - 3. Violation of the instructions of the coach or team manager.*
  - 4. Penalty of the player by the referees by warnings, expulsion from the match or suspension by the KFA.*
  - 5. Not attending the training, being late on the time specified or not participating seriously.*
- (...)*

*He shall be subject to the following penalties according to the nature of violation or behavior and the repetition of the same (...) as follows:*

- 1. Addressing a written notice.*
- 2. Addressing a written warning.*
- 3. Cancelling bonuses.*
- 4. Deducting not more than 50% of the player's salary.*
- 5. Preventing from the salary throughout the suspension period by a resolution from the Kuwaiti Football Association, AFC or FIFA or by a resolution from the Club's Board of Directors.*

*The [Club] may cancel the contract alone in case of continuity of misbehaviour of the player leading to damages occurring to the benefits of the club, preserving the right of the [Club] to claim compensations for the salaries, advance payment of the contract until the date of cancellation of the contract.*

*The prior penalties shall be issued according to resolutions taken by the Club's Board of Directors".*

8. Clause 20 of the Contract further provided that “[i]n the event where the player is found guilty of violating the rules and laws of the State of Kuwait or articles of this contract, the Club may terminate the contract, without prejudice to the right of the First party to claim compensation for salaries, advance payment of the contract until the date of cancellation of the contract”.

## **II.2. The termination of the Contract**

9. On 6 December 2008, the Player travelled to Bulgaria, allegedly with Al Salmiya's permission.
10. While on leave in Bulgaria, the Player received a telephone call from Al Salmiya informing him that the Contract had been terminated for just cause.
11. On 30 December 2008, the Player sought the KFA's intervention in his contractual relationship with Al Salmiya. In the said letter, the Player requested the KFA to solve his problems with Al Salmiya and also informed the KFA that Al Salmiya had failed to provide him with a furnished apartment, to pay his December 2008 salary as well as his return air ticket to Kuwait.
12. On 30 December 2008, the Player returned to Kuwait and informed Al Salmiya of his arrival. He also sent a notice asking Al Salmiya to pay his December 2008 salary and to give him a furnished apartment as agreed in clause 7 of the Contract.
13. On 7 January 2009, Al Salmiya sent a letter to the KFA informing them that they no longer needed the Player's services and that the Player was required to vacate the furnished apartment and to rent a room in a hotel at his own expense. The KFA forwarded a copy of this letter to the Player on 18 January 2009.
14. On 18 January 2009, the KFA issued a certificate pursuant to which it held that Al Salmiya had unilaterally terminated the Contract.

## **II.3. The events subsequent to the termination of the contractual relationship between Al Salmiya and the Player**

15. On 19 February 2009, the Player signed an employment contract with the Bulgarian club PFC Cherna (hereinafter referred to as “Cherna”) valid until 31 December 2010. He was entitled to a monthly salary of BGN 8,385 (approximately EUR 4,290).
16. On 8 April 2009, the Player filed a claim before the FIFA DRC stating that Al Salmiya had terminated his Contract without just cause. He sought compensation from Al Salmiya, totalling to EUR 70,000 (EUR 10,000 outstanding December 2008 salary, EUR 60,000 as remaining salaries from January 2009 to June 2009 plus 5% interest per annum and costs). He also claimed a refund of the hotel accommodation costs, KWD 770 for the period 30 December 2008 to 20 January 2009 and the flight costs.

### III. THE FIFA DRC PROCEEDINGS

17. During the FIFA DRC proceedings, it was the Player's position that Al Salmiya terminated the Contract without just cause and that his flight to Bulgaria on 6 December 2006 had been approved by Al Salmiya's senior coach and its director.
18. On its part, Al Salmiya maintained that the Contract was terminated with just cause and that even though the Player informed the club's director of his trip of 6 December 2006, he left without receiving any written permission from Al Salmiya's board. Al Salmiya also averred that the Player had breached various contractual obligations, such as offending referees during matches, missing training sessions claiming to have been injured without submitting a medical report and constantly receiving warnings during the club's matches. These, Al Salmiya argued, caused the Club lots of damages which justified the termination. Al Salmiya also adduced documents referring to a reservation made at the Holiday Inn Hotel for 4 coaches for a period of 3 days but there was no indication on whether the Player was also accommodated at this hotel.
19. On 19 August 2010, the FIFA DRC issued its decision and held as follows:
  - a) Pursuant 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 Procedural Rules"), Al Salmiya had failed to discharge its burden of proving that the Player had engaged misconduct in the form of evidence.
  - b) The Club's alleged unsatisfactory performance by the Player cannot amount to a just cause for terminating a contract. Any clause entitling Al Salmiya to terminate the Contract on grounds of unsatisfactory performance would be considered potestative, and hence void.
  - c) Al Salmiya had hence terminated the Contract without just cause and was bound to compensate the Player pursuant to the "*other objective criteria*" established under art. 17 of the FIFA Regulations on the Status and Transfer of Players edition 2008 (hereinafter referred to as the "FIFA Regulations").
  - d) The Player was entitled to compensation in an amount of EUR 70,000, *i.e.* his December 2008 salary of EUR 10,000 and the remaining salaries of EUR 60,000.
  - e) The Player would however not receive the entire EUR 70,000. This is because he mitigated his damages by seeking new employment at Cherna, where he was entitled to a monthly pay of BGN 8,385 from 19 February 2009 to 31 December 2010. This new remuneration would be taken into account.
  - f) In view of this, Al Salmiya was ordered to compensate the Player in an amount of EUR 42,840.

- g) The Contract stipulated that Al Salmiya would provide the Player with a furnished apartment. The Player adduced a receipt proving that he resided in a hotel from 30 December 2008 to 20 January 2009, and paid KWD 770 (approximately EUR 2,100). Al Salmiya was hence bound to reimburse the Player EUR 2,100 for hotel accommodation.
- h) The Player would not be refunded his flight costs because there was no specific mention of such costs in the Contract.
- i) Therefore, to summarize, the Player's claim is partially accepted. Al Salmiya must pay the Player EUR 12,100 at a 5% annual interest rate effective from 1 January 2009. Out of this amount, EUR 10,000 amounted to his outstanding December 2008 salary and EUR 2,100 as hotel accommodation costs. Salmiya was additionally condemned to pay the Player EUR 42,840 as a reasonable and justified compensation for breach of the Contract, plus 5% annual interest until its effective date of payment.

#### **IV. THE ARBITRAL PROCEEDINGS BEFORE THE CAS**

- 20. On 7 September 2011, the Appellant filed its Statement of Appeal at the Court of Arbitration for Sport (hereinafter referred to as the "CAS") but omitted to state the Respondent's address and to nominate an arbitrator as required under art. R48 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code").
- 21. On 8 September 2011, the CAS Court Office granted the Appellant 3 days to complete its Statement of Appeal by providing the Respondent's address and to nominate an arbitrator. Since 11 September 2011 was a Sunday, this deadline was extended to 12 September 2011, pursuant to art. R32 of the CAS Code.
- 22. On 13 September 2011, and following the lack of any information from the Appellant, the CAS Court Office asked the Appellant to confirm whether it had completed its Statement of Appeal via courier as required.
- 23. On 13 September 2011, the KFA forwarded to the CAS Court Office a letter dated 11 September 2011 it had received from the Appellant. In the said letter, the Appellant indicated it shall file its Appeal Brief within the deadline set forth in the CAS Code. In addition, the Appellant did not provide the Respondent's address in the said Appeal Brief. The Appellant informed the CAS Court Office that upon leaving Al Salmiya, the Respondent did not provide the Club with his new address and that is why the Appellant was unable to provide the Respondent's address earlier.
- 24. On 14 September 2011, the CAS Court Office granted the Appellant a new deadline until 19 September to provide the Respondent's address.
- 25. On 15 September 2011, the Appellant reverted to the CAS Court Office with the Respondent's address.

26. On 22 September 2011, given that the Appeal Brief had not reached the CAS Court Office, the CAS asked the Appellant to provide the information on the shipment of the Appeal Brief by courier.
27. On 25 September 2011, the Appellant informed the CAS Court Office that on 11 September 2011, it actually sent the original copies of its Appeal Brief but to FIFA's address. The Appeal Brief was resent by the Appellant by DHL on 25 and 27 September 2011.
28. On 29 September 2011, the Respondent challenged the admissibility of the Statement of Appeal and the Appeal Brief. He stated that:
  1. The Appellant had not abided by the deadlines extended to it within which to serve the CAS Court Office with the Respondent's address and that the same should be deemed withdrawn pursuant to art. R48 of the CAS Code.
  2. The Appeal Brief was filed out of time. FIFA and the CAS are two separate entities. The Appeal Brief should also be deemed withdrawn pursuant to art. R51 of the CAS Code.
29. On 7 November 2011, the Parties were informed that the Panel appointed to decide the above-referenced case was constituted as follows:
  - Sole Arbitrator: Mr. Rui Botica-Santos, attorney-at-law in Lisbon, Portugal
30. On 28 November 2011, pursuant to art. R55 of the CAS Code, the Respondent filed his Answer.
31. On 5 December 2011, the Sole Arbitrator requested FIFA to provide the complete case file relating to the present matter. The FIFA file was sent on 13 December 2011.
32. On 12 December 2011, following the Appellant's wish to have a hearing held in the present matter, the CAS Court Office convened the parties on 21 December 2011 at the CAS headquarters in Lausanne, Switzerland. However, on 19 December 2011, being unable to secure a visa for the hearing, the Appellant finally agreed to have the matter decided on the basis of the written submissions. The Sole Arbitrator therefore decided to cancel the hearing, considering him to be sufficiently well informed to decide this matter on the basis of the written submissions.
33. In view of the late cancellation of the hearing, on 19 December 2011, the Respondent asked the CAS to order the Appellant to reimburse the Respondent with the amount of EUR 749 which his lawyer had already spent on an air ticket for the hearing, EUR 200 in administrative costs and EUR 5,000 as the legal costs incurred by the Respondent.
34. On 4 January 2012, both parties signed the Order of Procedure. By doing so, the parties confirmed that they waived their right to a hearing and that they agreed that the Sole Arbitrator

may decide this matter based on the written submissions. The parties confirm that their right to be heard has been respected.

## V. THE PARTIES' POSITIONS

### V.1. The Appellant's position

35. As a general ground for justifying the termination of the Contract, Al Salmiya invokes its clause 19, under which it states it was entitled to terminate the Contract *"if the player is convicted with misbehaviour or violated the system of the club or the decisions of the board of the club or the regulations, by-laws and resolutions of KFF or the instructions or articles of this contract, the club may impose the penalties which are deemed suitable with the nature of violations or the misbehaviour or the transgressions"*.
36. It makes specific reference to the provisions of clause 19, saying this clause warranted the Player's immediate dismissal if he:
- a) Disobeyed any directions issued by the Club management or lazily carried out such instructions;
  - b) Breached the provisions of the Contract;
  - c) Received any disciplinary sanction from a referee via warnings or expulsion, or was suspended by the KFA;
  - d) Failed to attend the team's training session, reported late to training, or failed to exert seriousness during training;
  - e) Refused to play in any match when so requested, or played but failed to exert his best efforts;
  - f) Misbehaved or engaged in anti-sportsman like conduct, therefore damaging the reputation of athletes in the country; and
  - g) Abused any injury or illness treatment programme.
37. It is Al Salmiya's position that the termination was justified because the Player breached clauses 3, 7 and 10 of the Contract as read together with clause 19. Al Salmiya avers that contrary to his contractual obligations, the Player particularly (i) went on an unauthorised leave, (ii) engaged in professional misconduct and constantly had disciplinary problems, (iii) failed to attend training sessions and (iv) breached clause 7 of the Contract.
38. Al Salmiya wrote to the Player informing him that it had terminated the Contract with just cause with effect from 13 December 2008 because he had gone on leave without any authorisation, and spat on a referee on 5 December 2008 during Al Salmiya's match against Al Kadhmiya

Sporting Club. The Player claims not to have received this letter. Part of the said letter, which contained no date, read as follows:

*“Dear player / Pronosezov Atanas Yossifov*

*Greetings,*

*Be it known that the executive office of Al-Salmiya Sporting Club Administrative Board has discussed in its meeting no. (3) held on Saturday corresponding 13/12/2008 A.D. the incidents during the match held on 05/12/2008 A.D. between Al Salmiya Sporting Club and Al-Kadhimya Sporting Club as it discussed also your strange and immoral acts which contradict with sportsmanship, including spitting in the face of the match arbitrator causing, as per the report of the match arbitrator, your dismiss earlier from the match.*

*Whereas the contract entered with you on 01/09/2008 includes in article (19) a number of procedures and penalties which the administrative board is entitled to take against you because of your breaching to the contract articles. Furthermore, the contract entitles the administrative board the right of solely terminating it in case of continuing bad conducts which cause damages to the club interests: (...).*

*Whereas you obtained the first notice in the union cup match with Al-Nasr Sporting Club held on 19/09/2008 and obtained the second notice in the public league match with Al-Tadamon Sporting Club on 28/11/2008 A.D. in addition to your deliberate immoral acts with the arbitrator of our match with Al-Kadhimya Sporting Club on 25/12/2008 leading to damages to the club interests and loss due to your early dismiss causing the club’s failure in competing on the first rank in addition to defamation of the club.*

*Also, you depart the country without prior written consent from the club (...). Also the contract entered with the club (...) does not include any vacation for you during the contract period.*

*So, we inform you that the executive office has decided to terminate the entered contract with you as of Saturday corresponding 13/12/2008 A.D (...) and you are claimed to compensate the club by returning what you have received from the club (...).”*

39. In illustrating the above, Al Salmiya avers as follows:

***i. Unauthorised leave***

40. The Player left Kuwait without the Club’s written approval. The Contract contained no clause allowing the Player to go on leave during the validity of the Contract.

41. The Appellant therefore claims that it was entitled to terminate the Contract pursuant to clause 3, which provided as follows:

*“If the player leaves the club prior to the end of this contract, he shall be responsible towards the club for the payment of all the incurred expenses, either they are paid for obtaining approval of his transfer to the club or it has been incurred for any other purpose, in addition to the compensations for the incurred damages to the club”.*

**ii. Professional misconduct and disciplinary problems**

42. Al Salmiya reiterates that 4 days before leaving Kuwait, the Player engaged in professional misconduct during the validity of the Contract. It states that the Player hit a referee during Al Salmiya's match against Al Kadhmiya Sporting Club and went on to spit on him. This, Al Salmiya says, saw the Player being sent off the pitch and eventually caused the Club to lose the match.
43. Notwithstanding the above, the Player had on many previous occasions received warnings during matches, which warnings damaged Al Salmiya's reputation. Al Salmiya also averred in its termination notice that it had on two previous occasions warned the Player for his conduct during matches against Al Nasr Sporting Club on 19 September 2008 and Al Tadamon Sporting Club on 28 November 2008. It however adduced no evidence of such warnings.

**iii. Failure to attend training sessions**

44. Al Salmiya also avers that the Player missed the Club's training sessions on numerous occasions by falsely claiming to have been injured.
45. In relating the above acts with the Contract, Al Salmiya quotes clause 10 of the Contract which read as follows:

*"The player undertakes to do his best endeavours and capabilities in all the matches that he plays in the name of the club and to participate in training in time and place that are determined by the club".*

**iv. Breach of clause 7 of the Contract**

46. Al Salmiya claims to have provided the Player with a furnished apartment, house allowance and transport covering the duration of the Contract pursuant to clause 7 of the Contract.
47. Despite this, Al Salmiya states that the Player breached the aforementioned clause by renting a hotel room knowing too well that the Club would not assume the expenses related to this. In view of this, Al Salmiya was entitled to terminate the Contract since he had breached one of the terms contained therein.
48. In conclusion, the Appellant requests the CAS to:

*"First: To accept the appeal formally to be sued on time.*

*Second: To cancel the decision of the chamber of settlement of the disputes and to decide rejection of the proceedings and to obligate the appellant with the expenses".*

## V.2. The Respondent's position

49. The Respondent informs the CAS that in addition to the submissions and documents filed in its Answer, he retains and relies on all the submissions and documents it filed in the FIFA proceedings.

### *i. Jurisdiction and law applicable*

50. The Player acknowledges the CAS jurisdiction. He further avers that pursuant to art. 21 of the Contract, the law applicable to the present dispute is the FIFA Regulations edition 2008 and Swiss law as a subsidiary.

### *ii. Admissibility*

51. The Player challenges the admissibility of both the Statement of Appeal and the Appeal Brief on grounds of arts. R48 and R51 of the CAS Code respectively, asking the CAS not to move into the merits of the matter but to terminate the proceedings.

52. According to the Player, Al Salmiya was on 8 September 2011 granted one more deadline of 3 days to complete its Statement of Appeal but failed to do so.

53. In addition to the above, Al Salmiya did not observe the deadline for submitting the Appeal Brief because it sent the same to FIFA's address, and not to the CAS. Al Salmiya was fully aware of the different addresses of FIFA and the CAS as indicated to it in the FIFA Decision, and had as a matter of fact already sent the Statement of Appeal to the correct address of the CAS.

54. The failure to meet the deadline for the Appeal Brief therefore means that the Statement of Appeal must be deemed withdrawn, because Al Salmiya did not state its wish to have the Statement of Appeal serving as its Appeal Brief.

### *iii. The substance*

55. It is the Player's assertion that Al Salmiya's submissions are baseless, unsubstantiated and unfounded. The FIFA Decision was right in finding the Contract was terminated without just cause. The said decision was correct and was based on the facts and evidence adduced by the parties.

56. In addition to reiterating the facts highlighted in Section II above, the Player stresses that Al Salmiya breached clause 7 of the Contract by failing to provide him with a furnished apartment and a family car.

57. He claims to have gone on leave on 6 December 2008, when the rest of the team was on vacation and returned on 30 December 2008. This leave was approved by Al Salmiya's team director, Mr. Basel Abd Alnabi, and the senior coach, Mr. Mihai Stoihcita. He adduces a sworn statement signed by his fellow player Mr. Kiril Kilikov confirming that the two players had gone

on leave following the Club's approval. In this respect, Al Salmiya does not dispute that the Club was on holiday during this period. It only claims that the Player did not have any written consent.

58. Al Salmiya acted in bad faith by informing the Player of the termination of the Contract via telephone because it had neither paid his December 2008 salary nor provided him with a furnished apartment.
59. Clause 3 of the Contract did not prohibit the Player from going on leave. This clause does not intend to violate the human rights of freedom of movement. Al Salmiya's assertions that the Player was not entitled to any leave violate the basic social and labour rights and also contradicts Al Salmiya's claims that the Player was first required to seek the Club's permission before going on leave.
60. In view of this, Al Salmiya had no just cause to terminate the Contract on the basis of unauthorised leave. Even if there existed any such grounds, the same could not have been applied because Al Salmiya had already breached the Contract by failing to provide the Player with a furnished apartment and to pay his outstanding salary.
61. The Player never engaged in any improper conduct during matches. He did not hit the referee during the match held on 5 December 2008 and Al Salmiya's assertions to this effect contradict their submissions before the FIFA DRC. In this respect, Al Salmiya has not adduced any evidence of match misconduct. The Player does not deny having received warnings for his conduct during matches. However, such behaviour in the field is not uncommon and does not justify the unilateral termination of the Contract. Al Salmiya first ought to have warned the Player of his conduct in the field and sanctioned him according to clause 19 of the Contract.
62. Furthermore, it is false that the Player missed training sessions during his stay in Kuwait. No evidence has been adduced to this effect.
63. Al Salmiya adduced no evidence proving its compliance with clause 7 of the Contract. The letter adduced by Al Salmiya during the FIFA DRC proceedings referring to a reservation made at the Holiday Inn Hotel for 4 coaches for a period of 3 days did not state whether the Player was among those accommodated.
64. The Player did all he could to maintain the Contract. On its part, Al Salmiya breached clause 7 and never issued any notices to the Player informing him that he had breached any term of the Contract. Therefore, and in the absence of a notice, there existed no just cause for termination. All the aforementioned facts were considered by the FIFA DRC and should be entirely upheld and Al Salmiya's assertions dismissed in full.
65. The Player concludes by requesting the CAS:

*"1. To entirely reject the Appeal as unsubstantiated and ungrounded.*

2. *To entirely uphold the Decision, issued by FIFA Dispute Resolution Chamber on 19 August 2010, by means of which the Appellant was sentenced to pay the amount due of euro 12,000 /twelve thousand euro/ plus interest at the rate of 5% p.a. as of 01 January 2009 until the date of effective payment; the amount of euro 42 840 /forty two thousand eight hundred and forty euro/ plus interest at the rate of 5% p.a as of 19 August 2010 until the date of effective payment, the player Atanas Bornosuzov, as justifiable and well grounded.*
3. *To decide that the costs of the present procedure, including legal fee be borne by the Appellant”.*

## **VI. LEGAL ANALYSIS**

### **VI.1. Jurisdiction of the CAS**

66. The jurisdiction of the CAS, which is not disputed, derives from arts. 62 and 63 of the FIFA Statutes edition 2011 and art. R47 of the CAS Code.
67. Moreover, the Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure.
68. It follows that the CAS has jurisdiction to decide this dispute.

### **VI.2. Admissibility**

69. The Respondent states that the appeal is not admissible because:
  - a) The Appellant did not meet the CAS deadline within which the Appellant had to complete its Statement of Appeal by providing the Respondent’s address as required under art. R48 of the CAS Code.
  - b) In filing its Appeal Brief before FIFA and not to the CAS, the Appellant did so outside the fixed time limit of 18 September 2011. FIFA and the CAS are two separate entities and the Appeal Brief should be deemed withdrawn pursuant to art. R51 of the CAS Code.
70. The Sole Arbitrator shall analyse each issue individually.

#### ***i. The Statement of Appeal***

71. The Sole Arbitrator notes that the initial deadline of 11 September 2011 granted to the Appellant to complete its Statement of Appeal was, on 14 September 2011, extended to 19 September 2011 following a letter sent on 11 September 2011 by the Appellant to the KFA but intended to the CAS Court Office which the KFA forwarded only on 13 September 2011. In such letter from the Appellant which was sent within the initial deadline prescribed by the CAS Court Office, the Appellant informed the CAS Court Office that upon leaving Al Salmiya, the Respondent did not provide the Club with his new address. The Appellant then met the 19 September 2011 deadline by completing its Statement of Appeal on 15 September 2011.

72. The Appellant's initial omission of the Respondent's address in its Statement of Appeal is reasonably understandable to the Sole Arbitrator and its immediate explanation to the CAS Court Office of the reason thereto demonstrates good faith and an honestly diligent intention on its part to adduce this address.
73. Moreover, the deadline extension of 19 September 2011 only related to provision of the Respondent's contact details, and not to the identification of the Respondent as required under art. R48 of the CAS Code which was made within the deadline to appeal before the CAS.
74. It therefore follows that the Statement of Appeal is admissible and the Respondent's objection thereto is dismissed.

*ii. The Appeal Brief*

75. The FIFA Decision was notified on 18 August 2011, meaning that the deadline for filing the Statement of Appeal was to expire on 8 September 2011 and the deadline for filing the Appeal Brief on 18 September 2011 which was a Sunday. Therefore, this deadline extended to 19 September 2011, pursuant to art. R32 of the CAS Code.
76. It is not disputed that on 11 September 2011, the Appellant filed its Appeal Brief but instead of sending it to the CAS Court Office, it sent it to FIFA.
77. Upon receiving the CAS Court Office notice dated 22 September 2011 stating that the CAS Court Office had not received the Appeal Brief, the Appellant replied on 25 September 2011 by sending to the CAS Court Office the DHL tracking number showing that it had erroneously sent the Appeal Brief to FIFA. This was within the CAS Court Office deadline of 26 September 2011 granted in the letter dated 22 September 2011.
78. The circumstances surrounding such delay are, in the Sole Arbitrator's view, not sufficient to consider the appeal inadmissible. The fact that the Appeal Brief was sent to FIFA on 11 September 2011, 7 days before the expiry of the 19 September 2011 deadline shows good faith and an honest intention on the Appellant's part to respect the granted deadline.
79. The Appeal Brief also bears the words "Receiver: FIFA / CAS". This is another indication that it was meant for the attention of both FIFA and the CAS and that by only sending it to FIFA, the Appellant was confident that the appeal would be forwarded to the right authority.
80. Therefore, it appears that the appeal brief was sent within the time limit fixed for that purpose. Pursuant to art. R51 of the Code, the appeal brief should have been sent to the CAS. In the present case, the appeal brief was addressed to "FIFA/CAS" but sent to FIFA only. Such mistake could have been avoided if the FIFA administration, even if it is not its obligation, would have informed the Appellant, by courtesy, of the erroneous address or would have forwarded the document to the CAS Court Office. Like in the situation when the appeal brief is delayed or lost by the post or the courier company, the CAS Court Office, on 22 September

2011, has given the opportunity to the Appellant to establish that it has sent the appeal brief on time. The Appellant has replied immediately and has re-sent the document directly to the CAS Court Office. Then, by letter of 29 September 2011, the CAS Court Office confirmed that the procedure would continue and invited the Respondent to send an answer.

81. In view of these circumstances, the Appellant's good faith cannot be called into question and the CAS Court Office has taken the right decision to continue the procedure. On the contrary, any decision to consider the appeal withdrawn would have constituted a case of excessive formalism. It must be emphasized that the situation would have been different in the absence of reaction from the Appellant to the CAS letter of 22 September 2011.
82. As a consequence, it follows that the Appeal Brief is admissible.

### **VI.3. Scope of the Sole Arbitrator's review**

83. According to art. R57 of the CAS Code, the Sole Arbitrator has full power to review the facts and the law of the case. Furthermore, the Sole Arbitrator may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

### **VI.4. Law applicable to the merits**

84. Art. R58 of the CAS 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".*

85. There is no law chosen by the parties. In addition to this, the matter at stake relates to an appeal against a FIFA decision.
86. Under art. 62.2 of the FIFA Statutes edition 2011:

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

87. In light of the above, the Sole Arbitrator is of the view that the law applicable to the present appeal shall be the FIFA rules and subsidiary Swiss law.
88. In relation to which FIFA regulations should be applicable to the matter, the Sole Arbitrator, as the FIFA DRC did in its decision, confirms that in accordance with art. 26.1 and 26.2 of the FIFA Regulations (editions 2008 and 2009), the 2008 edition is applicable to the matter at hand as to the substance.

89. Pursuant to art. 26.1 of the FIFA Regulations edition 2010 “*any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations*”.
90. Art. 26.2 of the FIFA Regulations edition 2010 adds that “*any cases not subject to this general rule shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose*”.
91. The Contract was signed on 1 September 2008 and the claim filed before the FIFA DRC on 8 April 2009, when the FIFA Regulations 2008 edition was in force. It follows that this particular edition, *i.e.* the FIFA Regulations edition 2008, shall be applied, additionally with Swiss law.

#### **VI.5. The Merits of the Appeal**

92. The subject matter of the dispute is to determine whether Al Salmiya’s termination of the Contract was with or without just cause and, depending on the answer to this question, what the legal consequences of such termination are.
93. As a preliminary note, the Sole Arbitrator deems it important to outline the grounds on which a club can terminate a player’s employment contract with just cause.
94. Pursuant to the FIFA regulations and CAS jurisprudence, only material breaches of an employment contract are just cause for termination. The breach must be material and the other party cannot be expected to continue the contract (CAS 2004/A/587; CAS 2006/A/1180; and CAS 2006/A/1100).
95. Art 14.4 of the FIFA Commentary further lays out a number of grounds which a club can invoke in justifying the termination of an employment contract with its player. These grounds include *inter alia* (i) failure by the player to report to work, (ii) going on leave without permission, or staying longer than the period granted, (iii) an uncooperative player, who constantly argues and/or fights with teammates or officials, (iv) a player, who disobeys the coach’s instructions or takes two or more weeks of unjustified absence from training. In each of these cases or circumstances, the club will only have just cause to terminate the employment contract if it had previously warned the player of his unacceptable conduct or attitude (CAS 2007/A/1233 & 1234; CAS 2004/A/587).
96. In accordance with the extensive case law regarding such matters, the seriousness and frequency of the facts, the circumstances under which they occurred and the parties’ attitude with regard thereto, before, during and after they occur, is decisive in terms of the evaluation of the extent of the employee’s fault and whether the facts amount *per se* to grounds for the termination of the employment relationship.
97. As per art. 337.3 of the Swiss Code of Obligations (hereinafter referred to as “CO”) and art. 14.2 of the FIFA Commentary, the deciding authority has the discretion to assess the facts and determine whether there was just cause for terminating the contract, on the merits of each particular case.

98. With the aforementioned legal principles in mind, the Sole Arbitrator is required to determine whether or not the termination of the Contract was with just cause, by assessing whether:
- i. the Player's leave was unauthorised and if so, whether this justified the termination of the Contract;
  - ii. the Player was guilty of professional misconduct and disciplinary offences and if so, whether this justified the termination of the Contract;
  - iii. the Player failed to attend training sessions and if so, whether this justified the termination of the Contract; and
  - iv. the Player breached clause 7 of the Contract and if so, whether this is, *per se*, or together with all the other alleged breaches, justified the termination of the Contract.

*i. The Player's leave*

99. Al Salmiya states that the Player left Kuwait without its written consent. During the FIFA DRC proceedings, it conceded however that when leaving Kuwait, the Player received the approval of the senior coach and the Club's director but still did not receive any written consent from the Club.
100. In relation to this issue, the Sole Arbitrator notes that:
- The Contract does not regulate the holiday period granted to the Player.
  - The Player was absent from Kuwait from 6 to 30 December 2008, *i.e.* during a time when the Club did not have any games scheduled, the last game of the Club in the 2008 Championship having been played on 5 December 2008 and the first game of the 2009 Championship on 2 February 2009 according to the FIFA website.
  - The Player did not receive written approval to leave Kuwait, but received the oral approval of the senior coach and the Club's director. The witness statement of Kiril Vasilev Nikolov confirms this allegation and in fact Al Salmiya only invokes the lack of "written consent".
  - Al Salmiya has neither alleged the existence of any friendly matches during the period the Player was absent, nor any training sessions that the Player failed to attend.
  - Al Salmiya has not alleged nor proved that the Player's attitude and leave damaged or affected the Club.
101. Art. 12.3 of the FIFA Procedural Rules sets out the burden of proof and states that "*any party claiming a right on the basis of an alleged fact shall carry the burden of proof*".

102. Given the fact that the Player was absent from the country during a period when there were no official or friendly match of the Club or any other Club's activity that would require the Player's attendance; and the alleged verbal permission of the senior coach and the Club's team director, a mere statement by Al Salmiya to the effect that the Player left without written consent is, in the Sole Arbitrator's view, insufficient to prove that the Player did so without the Club's permission.
103. Al Salmiya did not call any witness or adduce statements from any of its directors to rebut the Player's assertion that he received the permission of the senior coach and Al Salmiya's director to go on leave. The Sole Arbitrator is therefore not convinced, when assessing the evidence before him, that the Player's leave was unauthorized and that his attitude damaged the Club's interest.
104. Note is additionally taken of Al Salmiya's assertion that the Contract contained no clause allowing the Player to go on leave during the validity of the Contract.
105. In relation to the above, the Sole Arbitrator remarks that the absence in the Contract of a provision allowing the Player to go on leave during its validity does not jeopardize the Player's right to a vacation. Under art. 329(a) 1 of the CO, "[t]he employer shall grant the employee at least four weeks vacation in each year of service".
106. In addition to the above, the Sole Arbitrator reminds that Al Salmiya did not have any official game scheduled during the Player's leave or prove that the Player's absence prejudiced the Club in any other respect (friendly match, training sessions, etc.).
107. In any event, even considering that the Player was on leave during the Championship, which is not the case, it is the Sole Arbitrator's view that this could not warrant the unilateral termination of the Contract.
108. CAS jurisprudence is clear that before a Club can unilaterally terminate a player's employment contract, it must first warn or notify the player of the breach or breaches he has committed (CAS 2007/A/1233 & 1234 and CAS 2004/A/587) and/or start disciplinary proceedings in accordance with its internal disciplinary regulations. Only after having undertaken these procedures is a club then entitled to terminate the player's employment contract.
109. Al Salmiya has not adduced any evidence to prove that it first undertook these preliminary disciplinary measures. The alleged letter sent by Al Salmiya to the Player terminating the Contract with effect from 13 December 2008 is undated and no evidence of service has been adduced. Some of the facts referred in the said letter are also inaccurate, as it refers to incidents that occurred during a match held on 25 December 2008, when the Player was absent from the country.
110. On his part, the Player has adduced an un rebutted written statement from his fellow player at Al Salmiya, Mr Kiril Nikolov, substantiating that he, along with the Player were on leave from 6 December to 30 December 2008 with the permission of Al Salmiya's team director, Mr Basel Abd Alnabi, and the senior coach, Mr Mihai Stoichita.

111. In view of all the foregoing, the Sole Arbitrator finds that Al Salmiya had no grounds to terminate the Contract on the alleged grounds that the Player took unauthorised leave.

**ii. *The Player's alleged misconduct and disciplinary problems***

112. Al Salmiya avers that it terminated the Contract because the Player caused the Club prejudice by hitting a referee and spitting at him during a match held on 5 December 2008, leading to him being sent off the pitch. It also states that he had, on several occasions, been warned during matches and that these warnings damaged the Club's reputation.

113. While violent conduct by players against referees during matches may justify the termination of a contract, there are various procedures which must be followed before such termination.

114. The nature and/or degree of injuries sustained by the referee is an important factor in the evaluation of the Player's conduct and whether it is sufficient to justify the termination of his employment contract.

115. Al Salmiya has not adduced evidence establishing that the Player's attitude was sufficiently serious to justify the termination of the Contract. Likewise, no evidence has been adduced with regard to cumulative or previous warnings received by the Player in other matches. Furthermore, no reports showing that the assault was violent and caused grievous bodily harm to the referee have been filed.

116. In the absence of such evidence, the Sole Arbitrator finds that there were no grounds for Al Salmiya to terminate the Contract on the grounds of the alleged violence.

117. Moreover, it is the Sole Arbitrator's view that warnings or disciplinary sanctions such as yellow and red cards received by players during matches do not justify the termination of an employment contract, even if the Contract contained a clause allowing termination on such grounds. Indeed, art 14.2 of the FIFA Commentary is relevant and states that "*behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally*".

118. In view of the foregoing, coupled also with the absence of a warning from Al Salmiya to the Player in relation to his conduct, the Sole Arbitrator finds that there were no grounds for the termination of the Contract on the basis of the Player's misconduct or disciplinary problems.

**iii. *The training sessions***

119. Al Salmiya states that the Player failed to attend the Club's training sessions on numerous occasions by falsely claiming to have been injured, thereby justifying the termination of the Contract pursuant to clause 10. The Player denies this allegation and says that no evidence has been adduced to this effect.

120. Whereas repeated failure over a period of time on the part of a player to report to work can justify the termination of his employment contract, this termination must be preceded by the usual preliminary or disciplinary measures.
121. Despite alleging that the Player missed training on several occasions, Al Salmiya did not send the Player any letter warning him to abstain from the said conduct (CAS 2007/A/1233 & 1234 and CAS 2004/A/587). Al Salmiya has adduced no evidence regarding the number and dates of the training sessions that the Player allegedly failed to attend.
122. In view of this, it is the Sole Arbitrator's view that there was no just cause for terminating the Contract on grounds of failing to attend training sessions.

*iv. Did the Player breach clause 7 of the Contract?*

123. It is Al Salmiya's case that the Player breached clause 7 of the Contract by residing at a hotel despite having a furnished apartment, house allowance and transport provided to him by the club.
124. Note is taken of the fact that the Player resided at the hotel during the period 30 December 2008 to 20 January 2009. This was after he had received a call from Al Salmiya while on leave informing him that the Contract had been terminated.
125. In view of the above, the Player was no longer entitled to enjoy the benefits and allowances accorded to him under clause 7 of the terminated Contract. He was therefore within his rights to stay at a hotel and procure transport services at his own expense.
126. Al Salmiya cannot therefore state that in doing the above, the Player breached clause 7 of the Contract. Even assuming that the Contract was still valid and that Player resided at the hotel and used transport using his own money contrary to clause 7 of the Contract, it is the Sole Arbitrator's view that in doing this, the Player did not commit a serious act or fundamental breach of the Contract which would justify its termination. At most, the Player would forfeit the right to the reimbursement of the expenses incurred.
127. Al Salmiya's termination of the Contract merely because it was the first time the Player allegedly breached clause 7 of the Contract was hence unwarranted.

*v. The consequences of the termination of the Contract*

128. In view of the above, the Sole Arbitrator finds that Al Salmiya's termination of the Contract was without just cause. The provisions of art. 17.1 of the FIFA Regulations must therefore be applied in determining the consequences of such termination.
129. The Sole Arbitrator indeed notes that the FIFA DRC correctly applied the provisions of art. 17.1 of the FIFA Regulations in determining the amount of compensation due by Al Salmiya to the Player.

130. The Player has not requested a review of the FIFA Decision. The Player has merely asked that the CAS uphold the said decision and dismiss the appeal.
131. The Sole Arbitrator shall therefore not go into the substance of art. 17.1 of the FIFA Regulations, or any other criteria established under the FIFA regulations or Swiss law, in analysing or reviewing the amount of compensation established by the FIFA Decision. To do so would be *ultra petita*. Therefore, the grounds and reasons adopted by the FIFA DRC in arriving at the amount of compensation and the amount granted thereunder are wholly upheld.
132. Al Salmiya is therefore ordered to pay the Player EUR 42,840 as compensation for breaching the Contract. This amount fell due 30 days following notification of the FIFA Decision, which took place on 19 August 2010. Interest has accordingly accrued on the said sum, at an annual interest rate of 5%, from the said date.
133. In addition to this, Al Salmiya is ordered to pay the Player EUR 2,100 for the hotel expenses he incurred and EUR 10,000 in respect of his unpaid December 2008 salary. Interest has accrued on the said sum at the annual rate of 5% from 1 January 2009.
134. In conclusion, the appeal shall be dismissed.

## ON THESE GROUNDS

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

1. The appeal filed by Al Salmiya SC against the FIFA Dispute Resolution Chamber decision dated 19 August 2010 is admissible.
2. The appeal filed by Al Salmiya SC against the FIFA Dispute Resolution Chamber decision dated 19 August 2010 is dismissed.
3. The FIFA Dispute Resolution Chamber decision dated 19 August 2010 is fully upheld.
4. (...).
5. (...).
6. All other and further claims or prayers for relief are dismissed.