Arbitration CAS 2014/A/3746 Al-Hilal Sports Club v. Diego Garzitto, award of 31 March 2015

Panel: Mr José Juan Pintó (Spain), Sole Arbitrator

Football
Contract of employment between a club and a coach
Inadmissibility of counterclaims
Validity of a contract of employment
Termination of contract without just cause
Validity of a "liquidated damages" clause

1. **According to Article R55 of the CAS Code and to the CAS constant and clear jurisprudence, it is not possible to submit a counterclaim at the stage of the filing of the answer to the appeal.**

2. **As a general rule and unless one party challenges it, a contract that has been produced by another party is under the presumption of being authentic. This is especially the case where that party has not only filed a copy of the contract in which it grounds its claim, but also has produced further evidence to corroborate the authenticity of the contract (written statements, official documents from the club, etc.). The mistakes and the lack of some formalities are not relevant in this respect.**

3. **To terminate a coach's employment contract with just cause, a club must have valid reasons. The fact that the fans had become hostile towards the coach after an early exit from a competition and that the situation had deteriorated as a result of poor results in the national championship are not valid reasons.**

4. **The validity of a "liquidated damages" clause shall be assessed on a case by case basis, taking into account all the circumstances of the case. Even if a contract only foresees the specific effects deriving from a breach of the club, this does not mean that the club is deprived from claiming the relevant compensation to the coach in accordance with the applicable law, including the potential analogical application of said clause. Absent any justification, the lack of reciprocity of the clause must not lead to its inapplicability. In this respect, there is no imbalance or disproportion between the rights and duties of both contractual parties that could lead to the invalidity of the clause.**

I. PARTIES

1. Al-Hilal Sports Club (hereinafter the "Club" or the "Appellant") is a Sudanese football club affiliated to the Sudan Football Association (hereinafter "SFA"), which in turn is a member of the Fédération Internationale de Football Association (hereinafter "FIFA"), with its seat in Omdurman, Sudan.

2. Mr. Diego Garzitto (hereinafter the "Coach" or the "Respondent") is a French football coach with his domicile in Digne, France.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings, the evidence taken and the submissions made at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence it he considers necessary to explain his reasoning.

4. On 28 December 2011, the Appellant and the Respondent concluded a one-year employment contract (hereinafter the "First Contract") by which the Coach was engaged as the head coach of the senior team of the Club from the period from 1 January 2012 until 31 December 2012.

   The relevant part of the Contract reads as follows:

   "1.2. RULES AND REGULATION [sic]

   Refers to the rules and regulations in:

   - *The ALHILAL Football Club;*
   - *The Sudan Football Association's constitution and rules;*
   - *CAF constitution and rules;*
   - *FIFA constitution and rules.*

   Which shall together with this agreement regulate the HEAD Coach's obligation [sic]*, duties and performance.*

   3. DURATION

   The period of the employment shall be for one year starting on 1st January 2012 until 31th December 2012.

4. RENUMERTION [sic]***:***

4.1 SALARY

The HEAD COACH shall be paid a monthly basic net salary of the sum of US$ 10,000/=Only Ten Thousand US Dollars by the last day of each month.

4.2 SIGNING ON FEE

The HEAD COACH shall be paid a once off sum of US$ 50,000 (only fifty thousand US Dollars in advance upon signed the contract"

4.3. Bonuses *[…]*

5. RENEWAL

"THE CLUB and the HEAD COACH reverse the right and shall have option and right of renewal of the contract on the terms and conditions to be agreed upon, and/or refusal to renew the contract. These rights shall be expressed in winning [sic] *by the CLUB and the HEAD COACH not later than two months prior to the end of hid* [sic] *agreement.*

[…]

9. BREACH AND TERMINATION

Should the HEAD COACH commits any breach of this agreement and fail to remedy such breach within 14 (fourteen) days after registered post of notice by THE CLUB or its attorneys forthwith, or to take action against the HEAD COACH for specific performance of his obligations under the agreement, or to prohibit the HEAD COACH joining another club affiliated to the League for the remainder of the contractual period.

Likewise should THE CLUB commits such breach the prevision of clause 11 shall apply MUTATIS MUTANDI.

In the event the Head coach wants to cancel this contract for whatsoever reason the parties agree that the HEAD COACH will pay the club amount of $ 50,000/= (only fifty thousand US DOLLARS) with a condition club must be notified by writing notice before 45 days.

In the events [sic] *club is electing and wants to cancel this contract the parties agree that the club will pay the head coach amount of three months' salary:*

A) Nothing if the club terminates the contract during the first year.

B) Three months' salary if the club terminates the contract at any time after two seasons.

[…]

11. JURISDICTION

The parties consent to the jurisdiction of the Sudan FA and FIFA".

5. During the season 2012, under the direction of the Respondent, the Club won the Sudanese Premier League.

6. On 25 November 2012, the Club paid the Coach an amount of USD 73,000, together with SDG 238,000 (Sudanese pounds) through a cheque, in concept of the remainder of all his entitlements under the First Contract.

7. On 8 December 2012, the Coach apparently (this is disputed by the Appellant) concluded a one-year employment contract with the Club (hereinafter the "Second Contract"), valid from 1 January 2013 until 31 December 2013.

The relevant part of the Second Contract reads as follows:

"Article 4 – DURATION OF THE CONTRACT

The present contract is granted and accepted by the both parties for a duration of One (1) Year sports season from 01/01/2013 up to 31/12/2013. At the expiration of the present contract Mr. Diego Garzitto will be free of any commitment.

Article 5 – REMUNERATION

5.1 The Parties agreed for an amount of USD 600,000 (US Dollars six hundreds thousands [sic]) as a total Contract Amount to be paid as follows:

i. *Monthly salary of 10.000 (USD Ten Thousands [sic]) will be paid before the 7th in the month.*

ii. *An advance [sic] payment of USD 50.000(USD Fifty thousands [sic]) to be paid upon the signature of the Contract on JANUARY 1st 2013;*

iii. *An amount of USD 100,000 (USD One hundred thousands [sic]) to be paid via bank transfer on JUNE 1st, 2013;*

iv. *An amount of USD 100,000 (USD One hundred and eighty [sic] thousands [sic]) to be paid via bank transfer on SEPTEMBER 1st, 2013;*

v. *An amount of USD 100,000 (USD One hundred and eighty [sic] thousands [sic]) to be paid via bank transfer on NOVEMBER 1st, 2013;*

vi. *The remaining balance of USD 130,000 (USD One hundred thirty [sic] thousands [sic]) to be paid via bank transfer on DECEMBER 1st, 2013.*

Article 8 – GOVERNING LAW AND LANGUAGE

7.1 […]

7.2 […]

7.3 The validity and interpretation of this Contract and the legal relations of the Parties to it shall be governed and construed in accordance with the Rules and Regulations of the ALHILAL FOOTBALL CLUB, The Sudan Football Association rules and regulations, CAF and FIFA constitution and rules.

[…]

Article 10 – THE EARLY BREAK OF THE CONTRACT

The retreat by the club of all or any of the definition of function planned to the present contract and attributed, or the non-full payment by the employer of his obligations will be considered as an one-sided break of the present contract.

This break will have the effect of returning the indebted club of damages as follows:

- *Compensations corresponding to the monthly fixed salary multiplied by the number of six (6) months in the contract;*

- *Coverage of the airplane ticket return for 2 persons on the airplane company of Mr. Diego Garzitto's choice".*

Article 11 – COMPETENT JURISDICTION

Before any procedure raising national jurisdictions, for the formation, the execution and the possible break of the present contract, the parties suit expressly that any dispute will be subjected to the competent commission, as well as to the commission of the FIFA player's status or the arbitration court of the Sport".

8. On 17 April 2013, the Club sent a letter to the Coach by which it notified him the termination of their contractual relationship. In its correspondence, the Club stated the following:

"J'ai le regret de vous informer que le conseil d'administration d'Al Hilal a décidé lors de sa réunion du 17/4/2013, de mettre un terme à vous [sic] *services de directeur technique à partir de 18/4/2013. On a parié beaucoup sur vous et sur l'équipe qui vous assiste pour gagner le premier championnat extérieur à savoir le championnat de clubs champions.*

Malheureusement la sortie précoce de l'équipe a créé une grande tension et une hostilité grandissante entre vous et le public (les fans d'Al Hilal) qui ont boycotté les matchs de l'équipe dans le championnat local ont attisé cette hostilité. Ainsi le conseil d'administration ne sera pas en mesure d'assurer votre sécurité personnelle dans ces conditions tellement hostiles et difficiles.

Tout en vous remerciant de [sic] *travail que vous avez accompli lors de la période passée le conseil D'* [sic] *administration vous souhaite bonne chance et plein succès pour le* [sic] *suite de votre carrière"*.

Which could be freely translated into English as follows (translation provided by the Appellant and not contested by the Respondent):

"I regretfully inform that the board of Al Hilal decided at its meeting on 17/04/2013 to terminate your services as technical director from 18/04/2013. We were counting a great deal on you and the team around you to win the first foreign competition, namely the competition of club champions.

Unfortunately, the early exist of the team gave rise to considerable tension and an increasing hostility between you and the public (the fans of Al-Hilal) which boycotted matches of the team. The mediocre results achieved by the team in the local championship worsened this hostility. Consequently, the board will not be able to ensure your personal safety in these hostile and difficult conditions.

Whilst thanking you for the work you have accomplished previously, the board wishes you good luck and much success for the rest of your career".

9. Also on 23 April 2013, the Club sent a letter to the SFA in the following terms:

   "1. With all respect Al-Hilal Club Board of Directors Council express [sic] *its best regards and good wishes to the SFA Board Directors.*

   2. In the abovementioned subject, we would like to inform you that the club is in the process of terminating the contract of the Coach, according to the renewed contract of 2012.

   3. The club has already settled some of its liabilities regarding the said contract, which amounted to 50,000 USD.

   4. According to the said contract the salary of 4 months is due in favor of the Coach.

   5. When we met with the Coach to discuss the arrangements of termination, we were surprised by a different contract which has not been signed or stamped by the club and the Coach pretended having entitlements which do not exist according to the contract entered into between us.

   6. Therefore, the SFA is kindly requested to intervene in order to put in order the termination of the contract as per the law.

   7. We hereby deposit the Coach's dues at the SFA's custody or as instructed by your good selves".

B. Proceedings before the FIFA Players' Status Committee

10. On 16 May 2013, the Respondent lodged a claim before the FIFA Players' Status Committee against the Appellant for terminating the contract without any valid reason, requesting FIFA to condemn the Club to pay him the following amounts: *"(i) USD 540,000 as a compensation for breaching the contract without any valid reason; (ii) USD 1,500 in regard of the legal costs; (iii) USD 2,200*

representing one flight ticket; (iv) USD 38,000 corresponding to the cheque of "238.000 Sudanese Pound" as well as CHF 5,000 as reimbursement of advance costs".

11. On 5 December 2013, the Club rejected the Coach's claim in its entirety. In this respect, the Club argued that *"no contract was found deposited with the Association to justify those amounts of money which were stated in the claim"*. Furthermore, the Club stated that *"the previous Board asserted in press interviews that he did not sign with Coach Garzitto the contract referred to in the letter"*.

12. On 7 January 2014, the Coach submitted his comments regarding the Club's answer and reiterated his previous statements. Likewise, the Coach argued that the Club's former President, Mr. El Bireir, confirmed to the press having signed the Second Contract with the Coach.

13. On 22 January 2014, the Club reiterated its previous statements of defence and emphasized that it did not find any contract that asserted the claim raised by the Coach, since, according to the Club, the only contract in its possession was the one executed in December 2012, i.e. the First Contract.

14. On 23 April 2014, the Single Judge of the FIFA Players' Status Committee rendered the following Decision concerning the aforementioned dispute:

    1. *"The Claim of the Claimant, Diego Garzitto, is partially accepted.*

    2. *The Respondent, Al Hilal Club, has to pay to the Claimant, Diego Garzitto,* ***within 30 days*** *as from the date of notification of the present decision, the amount of USD 30,000 as outstanding salary as well as the amount of USD 1,700 as the cost of a flight ticket.*

    3. *Furthermore, the Respondent, Al Hilal Club, has to pay to the Claimant, Diego Garzitto,* ***within 30 days*** *as from the date of notification of the present decision, the amount of USD 369,000 as compensation for breach of contract.*

    4. *Any further claims lodged by the Claimant, Diego Garzitto, are rejected.*

    5. *If the aforementioned amounts are not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of the expiry of the fixed time limit and the present matter shall be submitted, upon request, to the FIFA's Disciplinary Committee for consideration and formal decision.*

    6. *The final costs of the proceedings in the amount of CHF 18,000 are to be paid to FIFA, within 30 days as from the date of notification of the present decision, as follows:*

        6.1 *The amount of CHF 6,000 has to be paid by the Claimant, Diego Garzitto. Given that the latter already paid an advance of costs in the amount of CHF 5,000 at the start of the present proceedings, the Claimant, Diego Garzitto has to pay the remaining amount of CHF 1,000.*

        6.2 *The amount of CHF 12,000 has to be paid by the Respondent, Al Hilal Club.*

6.3 The abovementioned two amounts of CHF 1,000 and CHF 12,000 have to be paid to the following bank account with reference to case nr. 13-01459/lde […].

7. *The Claimant, Diego Garzitto, is directed to inform the Respondent, Al Hilal Club immediately and directly of the account number to which the remittance under points 2 and 3 above is to be made and to notify the Player's Status Committee of every payment received".*

15. On 8 May 2014, the findings of the Decision passed by the Single Judge of the Players' Status Committee were notified to the parties.

16. On 17 May 2014, the Appellant requested FIFA to notify it the grounds of the Decision passed by the Single Judge of the Players' Status Committee of FIFA.

17. On 19 August 2014, the FIFA notified the parties the grounds of the Decision passed by the Single Judge of the FIFA Players' Status Committee on 23 April 2014.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 15 September 2014, the Appellant filed a Statement of Appeal before the CAS against the Respondent and FIFA with respect to the decision rendered by the Single Judge of the FIFA Players' Status Committee on 23 April 2014 (hereinafter "the Appealed Decision"), requesting the following:

"The Club hereby respectfully requests CAS to rule that:

(i) The Appeal of the Club against the Decision is admissible.

(ii) The Decision is set aside.

(iii) All claims of the Coach against the Club are rejected.

(iv) The entirety of the arbitration costs shall be borne by the Respondents.

(v) The Respondents shall make a substantial contribution to the legal and other costs of the Appellant".

19. On 23 September 2014, FIFA sent a letter to the CAS Court Office requesting its exclusion as a Respondent in the present procedure arguing that the same was related to a contractual matter between the Club and the Coach in connection with the execution of an employment contract signed by and between the aforesaid parties, and thus the matter did not concern FIFA. Furthermore, FIFA alleged that the Single Judge of the Players' Status Committee acted solely as the competent deciding body in the first instance and was not a party to the dispute, not to mention the fact that the Appealed Decision was not of disciplinary nature.

20. On the same day of 23 September 2014, the Appellant sent a letter to the CAS Court Office requesting a twenty-day extension of the deadline for filing of the Appeal Brief, on the basis that it intended to instruct an expert opinion from a Sudanese counsel and that due to language

barriers it had some difficulties to communicate with its legal counsel. In this respect, on the same date, the CAS Court Office notified the parties that the deadline was suspended until the other parties submitted their positions in this regard.

21. On 24 September 2014, in light of FIFA's letter dated 22 September 2014, the Appellant informed the CAS Court Office that it withdrew its appeal against FIFA as the latter was only included as a respondent *ex abundanti cautela,* notwithstanding the non-disciplinary nature of the present matter.

22. On 24 September 2014, the CAS Court Office informed the parties that the Appellant withdrew its appeal against FIFA and, therefore, the Coach should be considered as the sole Respondent.

23. On 29 September 2014, the CAS Court Office notified the parties that, in the absence of any objection from the Respondent on the Appellant's request for an extension of its deadline to file the Appeal Brief, the deadline had been extended by twenty days.

24. On 13 October 2014, the Appellant requested another extension of the deadline to file the Appeal Brief until 23 October 2014.

25. On 14 October 2014, the CAS Court Office invited the Respondent to inform whether he agreed with the Appellant's request for a deadline extension to file its Appeal Brief, informing that the Respondent's silence would be considered as an approval.

26. The Respondent did not file any communication towards the Appellant's request to extend the deadline to file the Appeal Brief.

27. On 20 October 2014, the CAS Court Office notified the parties that the Appellant's deadline to file its Appeal Brief was extended.

28. On 23 October 2014, the Appellant filed its Appeal Brief reiterating the prayers for relief previously submitted with its Statement of Appeal. The Appellant filed with its Appeal Brief a legal opinion on *"Contractual formalities, applicable law in contractual obligations, employment contracts & liquidated damages in Sudanese Law"*. In addition, pursuant to Article R44.3 of the CAS Code, the Appellant asked the Sole Arbitrator to request the Respondent to produce the original version of the Second Agreement and to instruct an independent expert to assess the authenticity of the signature of Mr. Al-Birair.

29. On 3 November 2014, pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that Mr. José Juan Pintó, attorney-at-law in Barcelona (Spain), had been appointed as the Sole Arbitrator in this case. No objections were raised as to the appointment of the referred arbitrator to rule the present dispute.

30. On 12 November 2014, the Respondent submitted his Answer to the Appeal Brief, which was drafted in French. Furthermore, the Respondent informed the CAS by e-mail that he

could not provide the original version of the Second Contract because it had been previously filed before FIFA within the first instance proceedings.

31. On 13 November 2014, the CAS Court Office advised the Respondent that the language of the proceedings was English and thus all the correspondence and submissions should be sent in English.

32. Notwithstanding the above, on 17 November 2014, the CAS Court Office invited the Appellant to inform whether it agreed with the filing of the answer in French, taking into account that the language of the proceedings is English.

33. On 19 November 2014, the CAS Court Office requested FIFA to lodge a copy of its file related to the present matter and, if possible, to send the originals of the two employment contracts concluded between the parties.

34. On 22 November 2014, the Appellant informed the CAS that it did not agree with the filing of the Answer in French and requested that the Respondent be ordered to produce an English translation of his Answer to the Appeal Brief and of any exhibit that was not in English.

35. On the 25 November 2014, the CAS Court Office invited the Respondent to file a translation into English of his Answer to the Appeal Brief as well as of the exhibits that were not yet translated in English.

36. On 26 November 2014, the Respondent filed an English version of his Answer to the Appeal Brief, together with the requested translation in English of his exhibits. The Respondent's Answer to the Appeal Brief contained the following requests for relief:

"145. The Coach rejects the Appeal Brief of the Club in its absolute totality.

146. The Coach asks the CAS that the FIFA decision be confirmed

147. The Coach asks the Club the application to immediate payment of amounts calculated by FIFA.

148. The Coach asks the Club the application of the check payment (exhibit 29) in USD.

149. The Coach asks the club the application of repayment of all instruction fees.

150. The Coach asks the Club the application of damages payment at the discretion of the CAS".

37. On 5 December 2014, the Appellant requested the CAS to be authorized to produce further evidence.

38. On the same 5 December 2014, the CAS Court Office invited the Respondent to inform the CAS whether he agreed or not with the request of the Appellant with regard to the new evidence.

39. The same 5 December 2014, the Respondent informed the CAS Court Office that he did not agree with the Appellant's request.

40. On 9 December 2014, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that the Appellant's request to file additional evidence was denied in accordance with Article R56 of the CAS Code due to the absence of exceptional circumstances.

41. On the same 9 December 2014, the Appellant resubmitted its request to file witness evidence in order to contest the witness evidence produced by the Respondent together with his Answer to the Appeal Brief.

42. On 11 December 2014, the CAS Court Office invited the Appellant to provide the list of witnesses it proposed, together with a written statement of each of them, and to justify, in connection with each witness, the exceptional circumstance potentially allowing to their acceptance.

43. On 15 December 2014, the Appellant sent a letter to the CAS Court Office, providing the list of witness proposed together with their witness statements, explaining the exceptional circumstances that, under its point of view, were leading to the admission of these new evidence.

44. On 17 December 2014, the FIFA lodged before the CAS the original FIFA file, and informed the CAS that it was not in possession of the original version of any of the employment contracts that had been concluded between the parties of the procedure.

45. On the same 17 December 2014, the Respondent requested the CAS to be allowed to file an answer to the witness statements filed by the Appellant.

46. On 18 December 2014, the CAS Court Office informed the parties that the Sole Arbitrator had denied the Respondent's request to reply the witness statements produced by the Appellant, without prejudice to his right to contest such statements at the hearing.

47. On 13 January 2015, the Respondent informed the CAS Court Office that he had been able to recover an original copy of the Second Contract and thus was able to present it at the hearing along with the original signature of the Club's President Mr. Al-Birarir.

48. On 19 January 2015, the CAS Court Office invited the Appellant to state whether it agreed to the production of the original copy of the Second Contract at this stage in the proceedings.

49. On 21 January 2015, the Appellant informed the CAS that it did not agree to the production of the purported original of the Second Contract, on the basis that there were no exceptional circumstances which would warrant the admission of this document at this stage in the proceedings.

50. On 22 January 2015, the CAS Court Office informed the parties that the Sole Arbitrator had decided not to accept the production of the Second Contract as, in his view, there were no exceptional circumstances leading to its admission, pursuant to Article R56 of the CAS Code.

51. The hearing in the present case took place in Lausanne on 11 February 2015. In addition to the Sole Arbitrator the following persons attended the hearing:

a) For the Appellant:

1. Mr. Ross Wenzel.
2. Mr. Vincent Jäggi.
3. Mr. Nicolas Zbinden.

b) For the Respondent:

1. Mr. Diego Garzitto.
2. Mr. Raoul Savoy.

52. During the hearing, the Sole Arbitrator examined the following witnesses, in order of appearance:

- Mr. Anthony Garzitto, Fitness Coach (by videoconference, pursuant to article R44.2 of the CAS Code).
- Mr. Abdou Karim Dieng, FIFA Agent (by videoconference, pursuant to article R44.2 of the CAS Code).

53. Mr. William Sternheimer, Managing Counsel and Head of Arbitration for CAS, and Mr. Yago Vázquez Moraga, *ad hoc* clerk, assisted the Sole Arbitrator at the hearing.

54. At the outset of the hearing, the Sole Arbitrator invited the parties to try to reach an agreement in this case. However, after the corresponding private negotiations, the parties were not able to reach any agreement and thus the hearing was resumed. In addition, at the beginning of the hearing and upon the invitation of the Sole Arbitrator, taking into account that both parties understood French, the parties agreed that the hearing was simultaneously held in English (the Appellant) and French (the Respondent), allowing also the witness to be examined in French.

55. After the opening statements of the parties, the Appellant renounced to examine the witnesses he had initially proposed, substituting them by their written statements filed within the proceedings, which was accepted by the Respondent.

56. During the hearing, the parties had the opportunity to present their case, to submit their arguments, and to answer the questions posed by the Sole Arbitrator. At the end of the hearing both parties expressly declared that they did not have any objection with the procedure and that their right to be heard had been respected.

57. Both parties countersigned the order of procedure issued by the CAS Court Office.

IV. SUMMARY OF THE PARTIES' SUBMISSIONS

58. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

IV.1 THE APPELLANT

59. The Appellant's submissions, in essence, may be summarized as follows:

A. As to the facts

60. On 28 December 2011, the Club and the Coach entered into an employment contract for the period from 1 January 2012 until 31 December 2012. Under clause 5 of this contract, the parties could renew it in writing no later than two months prior to the end of the initial term agreed.

61. On 28 November 2012, the Club paid to the Coach an amount of USD 73,000 which constituted the remainder of all the Coach's entitlements under the First Contract.

62. Within the negotiations held afterwards to renew the First Contract, the Coach requested a higher salary. However, in view of the *"modest results of the football team under his leadership"* the Appellant did not agree to such request. Ultimately, the Coach and the Club did not enter into any written agreement or other correspondence to renew the First Contract.

63. Despite the absence of a formal extension of the First Contract, the Coach remained with the Club as its head coach in the beginning of 2013, under the same terms and conditions. However, on 17 April 2013, the Club decided to terminate the tacitly extended First Contract due to the team's poor results in the national championship.

64. On 23 April 2013, the Appellant informed the SFA of the termination of the tacitly renewed First Contract, explaining that it had already paid the Coach USD 50,000 under the renewed contract and that, additionally, four monthly salaries were still due to the Coach, which would be deposited before the SFA. In addition, the Club informed the SFA that the Coach had surprisingly produced an unsigned and unstamped contract within the context of the termination discussions and sought to claim entitlements which were not provided for in the First Contract.

65. The annual compensation provided for in the Second Contract amounted to USD 600,000, which was more than three and a half times the annual remuneration under the First Contract.

B. With regard to the validity of the Second Contract

66. The alleged Second Contract was discovered by the Appellant for the first time during the discussions surrounding the termination of the First Contract.

67. Mr. Al-Birair, former President of the Club, has categorically denied that he had signed this Second Contract. Furthermore, Mr. Imad Eltayeb Mohamed Saleh, who is the Secretary General of the Club, also stated that he *"never negotiated or was aware of the 2013 contract upon which Mr. Garzitto is now relying"*.

68. It is difficult to understand why the Club would have increased the remuneration under the First Contract by nearly four times (USD 170,000 to USD 600,000) taking into account that *"the Club performance in 2012 was mediocre"*.

69. There are several formal differences between the First Contract and the Second Contract that are particularly noteworthy:

- the alleged contract does not contain the Club logo,
- the signature page of alleged contract does not have the Club's seal,
- the alleged contract does not have the initials of the parties in any of its pages, as the First Contract does in every page,
- there are no witnesses to the signatures notwithstanding the fact that this is a *de facto* requirement pursuant to Sudanese law and forms part of the Club's standard and constant contractual practice,
- the structure and drafting of the two contracts contain few or no similarities,
- pursuant to an express provision in the alleged Second Contract, it was supposedly executed in five original copies and shared with the SFA, the French Football Federation and FIFA; however, neither the Club nor any of these entities was sent a copy at the time,
- there are a number of errors and discrepancies in the Second Contract; in particular (i) its final page refers to the agreement being entered into in Omdurman on 1 January 2013 while the first page refers to it being entered into I Khartoum on 8 December 2012 and (ii) in the signature block, the name of the former President (Mr. Al Amin Al-Birair) is wrongly spelt (*"Mr. El Ameen Al Brair"*).

70. It makes no sense that the Club, rather to modify and existing employment agreement, had produced an entirely different (and generic) template to document a salary increase.

71. The Respondent bears the initial burden of proving that the alleged Second Contract is valid and authentic. For this purpose, it is not sufficient to produce a contract which purports to be signed by or on behalf of the Club. Taking into account the evidence (sworn statement from Mr. Al-Birair) and the arguments provided by the Appellant, the Coach has not met his burden to establish that it is a valid and binding contract entered into between the parties.

72. Under Sudanese law, a person wishing to rely on a contract that has not been witnessed bears the burden of proof *vis à vis* the validity of the contract in question.

73. Even if the Sole Arbitrator considered that it is the Club which has the burden of proving that the alleged Second Contract is not valid and authentic, the Club has already met that burden. In particular, the Appellant cannot go beyond as it does not have an original copy of the contract and thus it is unable to arrange for an expert report to prove that the signature is not that of Mr. Al-Birair.

74. Taking into account the circumstances of the case, the Club is in a position of *Beweisnotstand*, a principle of Swiss Law that reflects the general principle of *negativa non sunt probanda*. In situations of *Beweisnotstand*, the party which contests a fact (that the other party has the burden of proving) is required to *"substantiate and explain in detail why it deems the facts submitted by the other party to be wrong"* (CAS 2011/A/2384).

75. If the Sole Arbitrator considers that the Club bore the burden of proving that the alleged Second Contract is not a valid and binding contract, the Coach should, as a result of the *Beweisnotstand* in which the Club is, do more than simply refute that allegation out of hand. The Coach has a duty to provide further evidence to demonstrate that the Second Contract is valid and authentic.

C. With regard to the Club's liability to the Coach under the First Contract

76. The terms of the First Contract are applicable to this dispute. However, taking into account that such contract was tacitly renewed (thus becoming an open-ended employment contract) and that it was terminated before two seasons had elapsed since it was executed, Clause 9 ("Breach and Termination") is not applicable.

77. According to Sudanese Law, where the parties to a fixed-term contract continue to perform that contract after the expiry of its initial term, it automatically mutates into a contract without fixed duration. In addition, the situation is the same under Swiss Law (article 334 al.2 of the Swiss Code of Obligations).

78. Under Sudanese employment law, the notice period required to terminate an open-ended employment contract which does not contain a provision regarding the length of such period is one month. Under Swiss law, such notice period would be two months.

79. In the present case, the Club terminated the Coach's employment contract on 17 April 2013, and thus the default notice period of one month means that the contract would have terminated on 17 May 2013. Therefore, under the First Contract, the Club owed the Coach the following amounts in respect of 2013:

- an initial one-off payment of USD 50,000,
- four months' salaries (January to April 2013, inclusive),

- a *pro rata* amount of the Coach's salary for the period from 1 May 2013 until 17 May 2013 (i.e. the end of the default notice period under Sudanese law) in the amount of USD 5,484.

80. In addition to the one-off payment of USD 50,000, the Club already paid to the Coach four monthly salaries (USD 40,000) and thus it only neglected to pay the Coach the abovementioned USD 5,484 (i.e. the pro rata amount covering the first seventeen days of May), which the Club intends to pay to the Coach.

D. The compensation which would be owed under the alleged Second Contract

81. Subsidiarily, even if the Sole Arbitrator considers that the Second Contract is valid and authentic, the Single Judge of the FIFA Players' Status Committee erred in the calculation of the compensation due to the Coach, as it disregarded the liquidated damages provision under article 10 of such contract.

82. There is nothing in the FIFA regulations, in Sudanese law or in Swiss law that invalidates such a liquidated damages provision in the event that it is not reciprocal. This has been also confirmed by the CAS case law (CAS 2013/A/3411; CAS 2009/A/1909) that has established that liquidated damages provisions of this nature are also valid and enforceable.

83. Therefore, pursuant to art. 17 para. 2 of the FIFA Regulations on the Status and Transfer of Players, which provides that the amount of compensation may be *"stipulated in the contract or agreed between the parties"*, clause 10 of the alleged contract should be applied in case the Sole Arbitrator finds that the alleged Second Contract is valid, and thus the damages due to the Coach in the event of an unilateral termination of the contract will be limited to six monthly salaries (i.e. USD 60,000) and two airplane tickets.

IV.2 THE RESPONDENT

84. The Respondent's submissions, in essence, may be summarized as follows:

A. As to the facts

85. On 16 December 2011, the Respondent entered into an employment contract with the Appellant. At the same time, Mr. Frédéric Anikine and Mr. Anthony Garzitto also entered into respective employment agreements, as goalkeeper coach and as fitness coach, respectively.

86. During the season 2012, under the direction of the Respondent, the Appellant won the national Championship of Sudan. In addition, in that season, the Club reached the semi-finals of the Orange CAF Confederation Cup. Therefore, the season 2012 cannot be described as "mediocre", as suggested by the Appellant.

87. In light of the successful season 2012, the Club wanted to hire the Coach for the season 2013. The President of the Club at that time (Mr. Al-Birair) was convinced about the Coach's experience and thus he had to accept all the conditions imposed by the Respondent to sign a new contract.

88. In November 2012, the Respondent received from the Appellant the sum of USD 73,000 and a cheque of SDG 238,000 to fully settle the salary payments related to the First Contract. This cheque has never been paid since *"it had been post-dated to July 2014"*.

89. The President of the Appellant (Mr. Al-Birair), supported by a Sudanese businessman called Mr. Abubaker Alaskalani, made a contract proposal that was accepted by the Respondent and that included an annual salary of USD 600,000. This new contract was discussed and prepared during the month of December, before the departure of the Respondent to France to rest. Indeed, the signing of the new contract took place in January 2013 at the President of the Appellant's place, just before the departure of the team to Ethiopia, for a training camp.

90. The new contract was signed before the President of the Appellant, Mr. Al-Birair, the Sports Director of the Club, Mr. Khaled Bakheet, the advisor to the President, Mr. Ali Gagarine, a translator (Mr. Ali Hassan), the FIFA Agent Mr. Abdou Karim Dieng, the Fitness Coach of the team, Mr. Anthony Garzitto, and before the physiotherapist of the team, Mr. Jean-Charles Déléan. On the day of the signing of the new contract and pursuant to article 5 of such contract, the Appellant paid to the Respondent USD 50,000 (signing-on fee) and USD 10,000 (salary of January 2013).

91. On the same day, both Mr. Jean-Charles Déléan (the physiotherapist) and Mr. Anthony Garzitto (the fitness coach) entered into new employment contracts with the Appellant. Afterwards, during the training camp in Ethiopia, Mamadu Sow (assistant coach) also entered into a new employment agreement with the Appellant.

92. The Coach did not receive his salaries as provided in article 5 of the new employment contract.

93. On 17 April 2013, the Club decided to unilaterally terminate the Second Contract, as well as the 2013 employment contracts of its technical staff (Mr. Jean-Charles Déléan, Mr. Anthony Garzitto and Mr. Mamadu Sow), who did not receive their salaries either.

94. By means of two settlement agreements dated 27 April 2014, the Appellant undertook to pay USD 51,000 USD to Mr. Anthony Garzitto, and USD 24,000 to Mr. Jean-Charles Déléan. However, the Appellant has not fulfilled these obligations.

95. On May 2014, the President of the Club proposed the Coach to sign a new contract, which was refused by the Respondent. Within the conversations held in this regard, the President of the Club recognized that he had been misled by his advisor and member of the Board of Directors of the Club, Mr. Abubaker Alaskalani, who actually had committed himself to pay the salary of the Coach agreed in the Second Contract.

96. It makes no sense that the Appellant is denying having signed the Second Contract with the Respondent and that, at the same time, has recognized (by means of the settlement agreements signed with them on 27 March 2014) that the new employment agreements in 2013 of Mr. Anthony Garzitto and Mr. Jean-Charles Déléan, who were part of the Coach's technical staff, are valid.

97. It is worth noting that the amount that the Appellant undertook to pay to Mr. Anthony Garzitto (USD 51,000) in the settlement agreement was higher than the total annual remuneration agreed in his 2012 employment contract (USD 48,000). This fact demonstrates that the 2013 employment contract of Mr. Anthony Garzitto was indeed a new contract and not an extension of the 2012 employment contract.

98. The written statement of Mr. Al-Birair dated 29 September 2014 that the Appellant has filed with its appeal is contradictory with what Mr. Al-Birair had previously declared to the press.

99. The written statement of Mr. Imad Eltayeb Mohamed Saleh produced by the Appellant is irrelevant because he was not a member of the Appellant Committee from 2011 to 2013.

B. As to the law

100. Sudanese law does not apply to the present case, which falls under the jurisdiction of FIFA.

101. Article 17 para. 1 and 2 of the FIFA Regulations on the Status and Transfer of Players are not applicable to the present case, as those provisions are only applicable to unilateral breaches of a player towards his club, which is not the case in the present matter. In any case, article 10 of the Second Contract already provides for compensation in case of unilateral breach of the contract.

V. ADMISSIBILITY

102. Article R49 of the CAS Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties.

103. Article 67, para. 1 of the FIFA Statutes provides as follows:

1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

104. The Appealed Decision was communicated to the Appellant on 24 August 2014, and the Statement of Appeal was filed by the Appellant on 15 December 2014, i.e. within the time limit required both by the FIFA Statutes and Article R49 of the CAS Code. Consequently the Appeal filed by the Appellant is admissible.

105. On the other hand, with regard to the petitions submitted by the Respondent under paragraphs 148 *("The Coach asks the Club the application of the check payment (exhibit 29) in USD")* and 150 *("The Coach asks the Club the application of damages payment at the discretion of the CAS")* of his Answer to the Appeal Brief, the Sole Arbitrator notes that those petitions are not actually mere statements of defence and constitute a counterclaim that exceeds the content that any answer to an appeal should have in accordance with Article R55 of the CAS Code.

106. On this particular point, for the sake of brevity, the Sole Arbitrator wants to recall the CAS constant and clear jurisprudence on the inadmissibility of counterclaims filed within an answer to the appeal. In this regard, as declared, for instance, at CAS 2013/A/3432 (emphasis added):

> *"56. From the amendment of January 2010 of Article R55 of the CAS Code, CAS jurisprudence (e.g. CAS 2010/2035* […]*; TAS 2010/A/2101* […]*; CAS 2010/A/2108* […]*; CAS 2010/A/2193* […]*; or CAS 2012/A/2707* […]*) has declared that the new wording of the aforesaid Article determines that* ***it is no longer possible to file a counterclaim within an Appeal procedure to challenge a decision and thus the only way to do it is through an independent appeal to be filed in due time****.*
>
> *57. In CAS 2010/A/2193* […]*, par. 6.3, the Panel held in particular that "It is however clear that the aim of the amendment of the Code in the 2010 edition, in respect of Art. R55, was to abolish the possibility to file a counterclaim. Art. R55 has been modified and the wording "Any counterclaim" has been withdrawn from para. 1 of the said Article. The fact that the 2010 edition of the Code do not literally stipulates that a counter appeal can no longer be submitted does not change the above mentioned conclusion. The possibility to submit a counter appeal within the framework of an already existing appeal is a procedural right which does not exists per se unless it is clearly granted under the Regulations or the Code governing the proceedings. Therefore, the amendment of the Code, by abolishing the previous existing possibility to submit a counterclaim, was enough in order to bring about the result embodied in the abovementioned intention, i.e. that under the 2010 edition of the Code it* ***is not any longer possible to submit a counterclaim at the late stage of the filing of the Answer to the Appeal****". This CAS Jurisprudence has been also ratified by the Swiss Federal Tribunal in its decision of 10 December 2010 (ATF 4A_10/2010)".*

107. Taking into consideration the provision of Article R55 of the CAS Code as well as the referred CAS jurisprudence on this matter, the Sole Arbitrator rejects *a limine* the petitions submitted by the Respondent under paragraphs 148 and 150 of his Answer to the Appeal Brief, which are not admissible in these proceedings under the CAS Code.

VI. JURISDICTION

108. Article R47 of the CAS Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

109. The jurisdiction of the CAS, which has not been disputed by any party, arises out of Article 67 of the FIFA Statutes, in connection with the above-mentioned Article R47 of the CAS Code. Therefore, the Sole Arbitrator considers that the CAS is competent to rule on this case.

VII. SCOPE OF THE SOLE ARBITRATOR'S REVIEW

110. Pursuant to Article R57 of the CAS Code:

The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. […].

VIII. APPLICABLE LAW

111. Article R58 of the CAS Code reads as follows:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

112. With regard to the rules of law chosen by the parties in the present case, the Sole Arbitrator notes that in the First Contract the parties agreed as follows:

*"**1.2. RULES AND REGULATION*** [sic]

Refers to the rules and regulations in:

- *The ALHILAL Football Club;*
- *The Sudan Football Association's constitution and rules;*
- *CAF constitution and rules;*
- *FIFA constitution and rules.*

Which shall together with this agreement regulate the HEAD Coach's obligation [sic], duties and performance.

[…]

11. JURISDICTION

The parties consent to the jurisdiction of the Sudan FA and FIFA".

113. On the other hand, the Second Contract contains the following provisions on applicable law:

*"**Article 8 – GOVERNING LAW AND LANGUAGE***

113.1 […]

113.2 […]

113.3 The validity and interpretation of this Contract and the legal relations of the Parties to it shall be governed and construed in accordance with the Rules and Regulations of the ALHILAL FOOTBALL CLUB, The Sudan Football Association rules and regulations, CAF and FIFA constitution and rules".

114. The Sole Arbitrator firstly notes that both the First and the Second Contract were submitted in essence to the same set of sport rules and regulations, which provide for the applicability of the FIFA Regulations (with whom the other cited rules and regulations should be compliant).

115. The Appellant argues that the FIFA regulations, even if they are applicable, do not contain any relevant or substantive provision relating to employment agreements between coaches and clubs, because Article 17 of the FIFA Regulations on the Status and Transfer of Players (hereinafter the "FIFA RSTP") is not applicable to relationships between coaches and clubs. Therefore, in the Appellant's view, although some general principles relating to contracts between players and clubs may be applied by way of analogy to the case at hand, the present dispute cannot be determined primarily in accordance with the FIFA regulations.

116. Furthermore, the Appellant holds that pursuant to Article 25.6 of the FIFA RSTP *"6. The Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge (as the case may be) shall, when taking their decisions, apply these regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport",* and that on this basis, Sudanese Law should be applied as it is the law within the closest connection with the present dispute.

117. Taking the aforementioned into account, the Appellant maintains that the present dispute shall be resolved by applying (i) the FIFA regulations, (ii) Sudanese law with respect to the employment-related issues in dispute and (iii) Swiss law to the extent that it is necessary to interpret relevant provisions of the FIFA regulations.

118. On his side, the Respondent does not share the Appellant's view and argues that Sudanese law is not applicable to the present dispute, which should be resolved in accordance with the FIFA regulations and Swiss Law.

119. After analysing the arguments raised by both parties on the applicable law, and taking into account the provisions of article R58 of the CAS Code and those of FIFA mentioned below, the Sole Arbitrator considers that the present dispute shall be decided according to the FIFA regulations and Swiss law, based on the following reasons:

- Both parties called for the applicability of the FIFA regulations both in the First and the Second Contracts, so these regulations have the consideration of *"applicable regulations"* and also of *"law chosen by the parties"* in the terms of article R58 of the CAS Code.

- Article 66.2 of the FIFA Statutes stipulates that *"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"*.

- Some CAS jurisprudence confirms the applicability and scope of the referred statutory article, *inter alia*, CAS 2013/A/3407 (*"The very provision of the FIFA Statutes (Article 66) which confers jurisdiction on the CAS, which jurisdiction the Appellant has utilised to lodge his appeal, itself requires the application of the FIFA regulations and Swiss law as a condition to the conferring of that jurisdiction and therefore to the right of appeal"*).

- Indeed, article 25.6 of the FIFA RSTP envisages that, when taking their decisions, the FIFA bodies shall apply the FIFA regulations *"whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport"*. However, the Sole Arbitrator is of the view that article 25.6 of the FIFA RSTP does not impose to the decision-making bodies the compulsory and automatic applicability of the laws and/or collective bargaining agreements that may exist at the national level, as it only establishes that, while taking their decisions, the relevant FIFA bodies shall take those regulations into account, which is not the same as to apply them in a direct and immediate manner. Applying this to the case at stake, the referred article does not justify the direct applicability of Sudanese Law to the present dispute as suggested by the Appellant. Furthermore, article 25.6 does not appear to apply to CAS panels but only to the bodies of FIFA.

120. Just for the sake of completeness and merely *ad abundantiam*, the Sole Arbitrator shall in any case stress that, in this particular case, after studying the relevant provisions of the Sudanese and the Swiss law, it can be concluded that the application of any of these national laws would lead to the same conclusion on the merits.

IX. CONSIDERATIONS AS TO THE MERITS

121. According to the parties' submissions and to the further explanations and grounds given at the hearing of the present procedure, to settle the present dispute the Sole Arbitrator shall address the following issues:

i. Is the Second Contract valid and authentic?

ii. Was the employment contract, the First or the Second Contract depending on the answer to point i. above, terminated by the Club with just cause?

iii. If the answer to point ii. above is negative, which are the financial consequences of the termination of the employment contract with the Respondent?

A. The parties' controversy about the validity of the Second Contract

122. The Sole Arbitrator shall firstly determine which of the employment contracts, either the First Contract or the disputed Second Contract, was in force at the moment of the termination of the employment relationship existing between the parties.

123. In this regard, the Sole Arbitrator notes that the Appellant challenges the authenticity of the Second Contract, and holds that the only valid employment agreement that was signed by the parties was the First Contract of 2012, that was tacitly extended (in the same terms and conditions) at the expiration of the initial contractual term.

124. In this respect, the Sole Arbitrator has noticed that under the direction of the Respondent (i.e. during the season 2012) the Appellant won the Sudanese Premiere League and reached the semi-finals of the Orange CAF Confederation Cup. Therefore, taking into account these sporting results, it cannot be said that, as suggested by the Appellant, *"the Club performance in 2012 was mediocre"* (written statement of Mr. Imad Eltayeb Mohamed Saleh) or that during this season the club had *"modest results"* (written statements of the former President of the Club, Mr. Al-Birair).

125. On the contrary, the Sole Arbitrator considers that during the season 2012, the team performed very well and the Club had excellent sporting results, which would logically explain why the parties, at the end of the season, negotiated a new contract and why, at the same time, the Respondent took advantage of his success to request a substantial increase of his salary.

126. In the Sole Arbitrator's opinion, this is also coherent with the undisputed fact that simultaneously to the alleged signing of the Second Contract, the Club also entered into new employment agreements with the technical staff of the Coach (i.e. Mr. Anthony Garzitto, Mr. Jean-Charles Déléan and Mr. Mamadu Sow). In line with this, it worth noting that:

- the wording of the Second Contract is exactly the same as the wording of the 2013 employment contracts signed by the Coach's technical staff;
- the 2013 contracts of the technical staff (that are undisputed) were terminated on the same date (17/04/2013) and by the same means (letter sent by Mr. Mohamed Ahmed Bahr on behalf of the Appellant) than the ones used for the termination of the Respondent's employment contract;
- the compensation agreed between the Appellant and the members of the technical staff for the termination of their 2013 contracts was higher than the total remuneration that they had agreed for in their former employment contracts (2012), which would not make

sense in case the 2012 contracts were the ones in force at the time of the termination of their employment relationships.

127. In the same line, the Sole Arbitrator has also observed that in the written statement filed by Mr. Al-Birair (the President of the Club at the time of the facts), he stated (emphasis added) that *"I, the undersigned, Al-Amin Mohamed Ahmed Al-Birair, former President of Al-Hilal Club Board of Directors during the term (2011-2013), attest by the present that, during our negotiations with the Coach Garzitto for the renewal of his contract of 2012, he requested a higher salary and a new contract, but the Board of the Directors did not sanction his request in view of the modest results of the football team under his leadership. Therefore, Mr. Garzitto continued to serve as Head Coach under the same terms and conditions of 2012 contract".*

128. In the Sole Arbitrator's view, it seems difficult to believe that a coach (i) who has won a national league with his team and, (ii) whose employment contract has expired, and (iii) who has requested a substantial increase of salary based on his previous success, would anyway keep on training the team and working for that club, on the belief that his former contract has been "tacitly renewed", in the same terms and conditions than the former ones. And this especially when that club owes the coach some salaries from his former contract and when this coach would probably have several offers from third clubs, due to the good results he has had in the previous season. It is quite revealing in this respect that after the termination of the employment contract with the Club, the Respondent just needed a couple of months to engage with a new football club (i.e. Club Sportif Constantinois) under much better economic conditions (USD 282,000 instead of USD 170,000 USD agreed in the First Contract).

129. Furthermore, the fact that in his written statement Mr. Imad Eltayeb Mohamed Saleh, current Secretary General of the Club, stated that *"I have never negotiated or was aware of the 2013 contract upon which Mr. Garzitto is now relying"* is not relevant for the present case because, at the time of the events leading to the present dispute (2012-2013), Mr. Saleh was not part of the Appellant's Board of Directors (which, as the Appellant explained within the FIFA procedure, resigned on 24/11/2013) and thus could not give testimony with regard to the signing of the Second Contract.

130. With regard to the rest of the factual arguments raised by the Appellant in connection with the lack of some contractual formalities in which the Second Contract incurred, apart from the fact that under the applicable law the circumvention of these formalities does not make the Second Contract invalid or not authentic, in any case the Sole Arbitrator has noted that:

- Although in his written statement Mr. Al-Birair has stated that *"When I was President [...] contracts were always witnessed, stamped and initialled on every page, and in my experience, the club has never entered into a contract lacking all these formal elements"* (emphasis added), a rough analysis of the undisputed contracts executed by the Appellant that had been produced in the present file demonstrates that such statement is not correct.

  For example, the 2012 employment contract of Mr. Anikine Frederic, which is printed in the paper of the club and with its logo, is not signed by Mr. Al-Birair on each page, but only on its last page. The same occurs with the 2012 employment contract of Mr. Anthony Garzitto, which is not signed on each page by the President Al-Birair neither.

- The fact that in the Second Contract the name of the former President (Mr. Al Amin Mohamed Ahmed Al-Birair) was wrongly spelt ("Mr. El Ameen Al Brair") is not relevant. Indeed, this also occurs with some of the official contracts of the Appellant which are undisputed and that have been produced in this procedure. For example, in the contracts of 2012 of Mr. Anikine Frederic and of Mr. Anthony Garzitto, the name of the former President was also misspelt (Mr. Al Amin Mohamed Ahmed "El Berrir" instead of "Al-Birair").

The same misspelling takes place in some of the official documents from the Club in connection with the name of its Secretary General, Mr. Mohamed Ahmed Bahar, which is correctly spelt in some of the Club's official documents and wrongly spelt in other cases (as, for example, in the termination letter sent to the Coach on 17/04/2013 where he signed as Mohamed Ahmed "Bahr" instead of "Bahar").

131. Therefore, the Sole Arbitrator considers that the mistakes and the lack of some formalities argued by the Appellant to support that the Second Contract is not authentic are not relevant for this purpose.

132. In addition to the foregoing, when reviewing the FIFA file, the Sole Arbitrator has surprisingly noticed that, in one of its first correspondence to the FIFA Players' Status Committee (letter dated 5 December 2013), the Appellant stated that *"after reviewing the issue with the Sudanese Football Association, no contract was found deposited with the Association to justify those amounts of money which were stated in the claim. This was due to the fact <u>that the contract that binds the Coach to the Club, and which is deposited with the Sudanese Football Association stipulates that in case the contract is terminated by Al Hilal Club, the Club shall pay to the Coach according to the penal condition, a sum equal to a six-month salary</u>"* (emphasis added).

133. In this context, taking into account that in the First Contract, the compensation agreed in case of a unilateral termination of the agreement by the Club was not *"a sum equal to a six-month salary"* and that, on the contrary, in the Second Contract it was agreed that in case of unilateral termination of the agreement, the Club would be obliged to pay the Coach a *"compensation corresponding to the monthly fixed salary multiplied by the number of six (6) months in the contract"*, it may be concluded that most probably the Appellant was making reference to the Second Contract in the referred correspondence, of which it was obviously aware in spite of what it maintained in these proceedings.

134. Finally, for the sake of completeness, the Sole Arbitrator has taken into account that pursuant to Article 8 of the Swiss Civil Code, *"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit" ("Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact").*

135. The Appellant submits that the Respondent bears the initial burden of proving that the Second Contract is a valid and authentic contract and failed to do so. The Sole Arbitrator does not share this view. Even if as a general rule and unless one party challenges it, a contract that has been produced by one party is under the presumption of being authentic, in the present case, the Respondent has not only filed a copy of the contract in which he grounds his claim, but

also has produced further evidence to corroborate the authenticity of the contract (written statements, official documents from the Appellant, etc.).

136. On the contrary the Appellant has limited itself to (i) simply challenge the authenticity of the Second Contract by filing two written statements (one of them from an individual that was not part of the Appellant's Board of Directors at the time of the events) which, apart from coming from individuals who work for or have worked for the Appellant, do not clearly state that the Second Contract is not authentic, (ii) remark some irregularities that the Second Contract would have and that, under its view, would demonstrate it is not an authentic contract, and (iii) point out that it is in a position of *Beweisnotstand* and that, due to its difficulty to prove that the Second Contract is not authentic (*negativa non sunt probanda*), the Respondent should be requested to do something more than to simply refute the allegation of the Appellant.

137. In the Sole Arbitrator's view, none of these arguments can be upheld and distort the conclusions reached above. On the contrary, it has been proven that it is the Appellant who has not conducted all the potential evidentiary activity that it could have reasonably performed to try to challenge the authenticity of the Second Contract.

138. In particular, in the Sole Arbitrator's opinion, it is quite significant that the Appellant indeed renounced to a very relevant evidence that it could have produced in order to demonstrate that the Second Contract was not valid and authentic. Specifically, although in its Appeal Brief the Appellant requested the Sole Arbitrator to order the Respondent to produce the original version of the Second Contract in order to instruct an independent expert to assess the authenticity of the signature of Mr. Al-Birair, once the Respondent found the original version of the Second Contract and offered its production during the hearing (see correspondence from the Respondent dated 13 January 2015), the Appellant rejected such offer arguing that such document came too late in these proceedings.

139. Even if it is true that the Respondent produced this original document quite late (January 2015 instead of November 2014), which led to the Sole Arbitrator's decision not to admit it in the file, it is nonetheless true that, ultimately, he offered to produce the original version of the disputed document. However, instead of taking advantage of this opportunity to produce a new evidence that could have potentially demonstrated that the Second Contract was not authentic, the Appellant decided not to request and conduct the expert opinion that he had previously asked for in its Appeal Brief. Therefore, in the Sole Arbitrator's view, this circumstance should be detrimental to the Appellant, which cannot claim to be in a position of *Beweisnotstand*.

140. For all the reasons explained above, the Sole Arbitrator considers that the Second Contract is valid and authentic and that it was in force at the moment of the termination of the employment relationship between the parties, on 17 April 2013.

B. The termination of the employment contract

141. After examining the reasons argued by the Appellant to try to ground the termination of the contract (the fans had become hostile towards the Coach after an early exit from the African Champions League and that the situation had deteriorated as a result of poor results in the national championship), the Sole Arbitrator can only conclude that these reasons do not constitute a valid cause for the termination of the Second Contract.

142. In particular, for the sake of brevity, the Sole Arbitrator agrees with the conclusion reached by the Single Judge of the FIFA Players' Status Committee, according to which these reasons cannot constitute a valid reason for a club to terminate a coach's employment contract, and thus the dismissal of the Respondent by the Appellant lacks just cause. In addition, it must be underlined that the Appellant has not expressly challenged the conclusion of the referred Single Judge in this respect.

143. Therefore, the Sole Arbitrator considers that the termination of the Second Contract was executed without just cause.

C. The financial consequences of the termination of the contract

144. After concluding that the Second Contract was terminated without just cause by the Club, the Sole Arbitrator shall stress that in Clause 10 of the Second Contract the parties agreed a "liquidated damages" clause to be applied in case of a breach of the Contract by the Club, according to which they established in advance the specific amount to be paid by the Club to the Coach for such breach. In particular, Clause 10 of the Second Contract provides as follows:

*"**Article 10 – THE EARLY BREAK OF THE CONTRACT***

The retreat by the club of all or any of the definition of function planned to the present contract and attributed, or the non-full payment by the employer of his obligations will be considered as an one-sided break of the present contract.

This break will have the effect of returning the indebted club of damages as follows:

- *Compensations corresponding to the monthly fixed salary multiplied by the number of six (6) months in the contract;*

- *Coverage of the airplane ticket return for 2 persons on the airplane company of Mr. Diego Garzitto's choice".*

145. The Appealed Decision disregarded the compensation agreed by the parties in the Second Contract, on the basis that *"the Single Judge was of the opinion that the relevant clause should not be applied in the present matter as it was non-reciprocal"*. However, the Appealed Decision did not provide any justification to this finding, without explaining why this lack of reciprocity must lead to the inapplicability of this clause.

146. Furthermore, the Sole Arbitrator is of the view that the validity of these particular clauses shall be assessed on a case by case basis, taking into account all the circumstances of the case. In the case at stake, the Sole Arbitrator notes that indeed, the Second Contract only foresees the specific effects deriving from a breach of the Club, but this does not mean the Club was deprived from claiming the relevant compensation to the Coach in accordance with the applicable law, including the potential analogical application of said Clause 10 to that case. Therefore, the Sole Arbitrator does not find that there is any imbalance or disproportion between the rights and duties of both contractual parties that could lead to the invalidity of the clause. For all these reasons, the Sole Arbitrator finds that the Clause 10 of the Second Contract is valid and must be applied to the present dispute.

147. Consequently, taking into account that at the time of the termination (17 April 2013) the Appellant had already paid the Coach the agreed signing-on fee (i.e. USD 50,000) and the salary of January 2013, and that it owed the Respondent the full salaries of February, March and April 2013 (that were payable in full before the 7th day of the corresponding month), the Sole Arbitrator finds that the Appellant has to pay the Respondent the following amounts:

1. the outstanding salaries of February, March and April 2013, in the amount of USD 30,000 (i.e. a monthly salary of USD 10,000 multiplied per three months);

2. the compensation agreed in Clause 10 of the Second Contract in the amount of:

   2.1. USD 60,000 corresponding to 6 monthly salaries;

   2.2. the cost of *"the airplane ticket return for 2 persons on the airplane company of Mr. Diego Garzitto's choice"*. Taking into account that the Appealed Decision established that the cost of a flight ticket *"Khartoum-Paris-Bourg-en-Bresse"* is of USD 1,700 each, and that none of the parties has challenged such finding, the total amount to be paid for this concept is USD 3,400.

148. As previously declared (and not contested by the parties) by the Appealed Decision and in line with articles 102 and ff. of the Swiss Code of Obligations, interest accrues on these amounts, at the rate of 5% per annum as of the expiry of the thirty day period after the notification of the Appealed Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al-Hilal Sports Club against the Decision rendered by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 23 April 2014 is partially upheld.

2. The Decision taken by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 23 April 2014 is confirmed, except for sections 2 and 3 of its operative part, that are replaced as follows:

   "2. The Respondent, Al Hilal Club, has to pay to the Claimant, Diego Garzitto, ***within 30 days*** *as from the date of notification of the present decision, the amount of USD 30,000 as outstanding salary.*

   3. Furthermore, the Respondent, Al Hilal Club, has to pay to the Claimant, Diego Garzitto, ***within 30 days*** *as from the date of notification of the present decision, the amount of USD 60,000 as compensation for breach of contract, as well as the amount of USD 3,400 as the cost of two airplane tickets".*

3. The counterclaim filed by Mr. Diego Garzitto on 26 November 2014 (dated 12 November 2014) is inadmissible.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.