

**Arbitration CAS 2016/A/4544 Al Ain FC v. Sunderland AFC, award of 30 January 2017**

Panel: Mr Ivaylo Dermendjiev (Bulgaria), Sole Arbitrator

*Football**Entitlement of a club to receive payment of a contingent fee pursuant to a transfer agreement**Interpretation of a contractual clause of a transfer agreement*

The interpretation of a clause of an agreement must be carried out according to the general rules of contract interpretation. In this respect, it is necessary to make reference to Article 18(1) of the Swiss Code of Obligations. The real and common intention of the parties must be identified and interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith, based on its wording, the context and the concrete circumstances in which it was expressed. In this regard, however the immediate interpretation of the literal meaning of the relevant clause is the first step, attention should be paid to other factors and interpretative tools, too i.e. all relevant circumstances of the case - namely the negotiations and any subsequent conduct of the parties -, the wording of the entire agreement and the review of all means of evidence.

I. THE PARTIES

1. Al Ain Football Club ("Al Ain" or the "Appellant") is an Emirati football club having its office seat Sheikh Khalifa International Stadium in Al Ain, Abu Dhabi, United Arab Emirates. The Appellant is affiliated to the United Arab Emirates Football Association (the "UAEFA"). The UAEFA, in turn, is affiliated to the Fédération Internationale de Football Association (the "FIFA"), the world governing body of football.
2. Sunderland Association Football Club ("Sunderland" or the "Respondent") is an English football club having its seat, in Sunderland, United Kingdom. The Respondent is affiliated to the English Football Association (the "FA"). The FA is also a member of FIFA.
3. The Appellant and the Respondent will be jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

4. This appeal was filed by Al Ain against the Decision of the Single Judge of the FIFA Players' Status Committee passed on 8 September 2015 (the "Decision"). The grounds of the Decision were notified to the Appellant and to the Respondent on 18 March 2016.

5. The circumstances stated below are a summary of the main relevant facts, as submitted by the Parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. While the Sole Arbitrator took duly note of all the evidence and legal arguments raised, in this award the Sole Arbitrator only refers to the submissions and evidence considered necessary to explain his reasoning.
6. The present contractual dispute is related to the right of the Respondent to receive payment in the amount of EUR 250,000 as a contingent fee due in the event that the player A. (the “Player”) has scored 20 goals or more for the Appellant for the season 2014/2015.
7. The contractual basis for such contingent fee is found in Clause 3.1.3 of a permanent transfer agreement dated 20 June 2012 entered into between Sunderland and Al Ain for the permanent transfer of the Player from the Respondent to the Appellant (the “Transfer Agreement”).
8. The Transfer Agreement was preceded by a loan agreement entered into by the Parties on 9 September 2011 for the temporary transfer of the Player from the Respondent to the Appellant for the period from 9 September 2011 until 30 June 2012 (the “Loan Agreement”). In consideration of the loan of the Player to Al Ain, the Appellant agreed to pay to the Respondent a guaranteed net fee in the amount of EUR 6,000,000 payable in two equal installments (Clause 2.1 of the Loan Agreement).
9. The Loan Agreement contained a permanent transfer option (the “Option”, Clause 3.1 of the Loan Agreement). Should Al Ain decide to exercise the Option it would pay to Sunderland a guaranteed net fee of EUR 2,000,000 (two million Euros) payable in three installments (the “Guaranteed Option Fee”, Clause 3.3 of the Loan Agreement).
10. In addition to the Guaranteed Option Fee, Al Ain consented to pay to Sunderland contingent fees further to Al Ain utilizing the Option (the “Contingent Fees”, Clauses 4.1.1 - 4.1.3 and Clauses 4.2 - 4.5 of the Transfer Agreement, the latter not being relevant for the present case). The Contingent Fees were conditional depending on: (i) Al Ain winning the UAE Pro League and the Player appearing on the field in at least 50% of the Al Ain’s games during that season (Clause 4.1.1 of the Loan Agreement); (ii) Al Ain winning the UAE President Cup during the term of the Player’s contract with Al Ain and the Player having appeared in 50% of that season games (Clause 4.1.2 of the Loan Agreement); (iii) reaching a threshold of 20 goals scored by the Player per season (Clause 4.1.3 of the Loan Agreement).
11. The Appellant decided to exercise the Option and on 20 June 2012 Sunderland and Al Ain executed the Transfer Agreement. The Transfer Agreement in Clause 2.1 referred to the Option contemplated in Clause 3.1 of the Loan Agreement.
12. In accordance with the terms of the Loan Agreement, the parties to the Transfer Agreement further agreed to contingent fees which were payable by Al Ain to Sunderland under the same conditions as stipulated in the Loan Agreement (see § 9 above). In addition to the transfer fee,

Al Ain consented to pay to Sunderland the Contingent Fees (Clause 3 “Contingent Fees” of the Transfer Agreement). The Contingent Fees under Clauses 3.1.3, 3.1.2 and 3.1.3 of the Transfer Agreement (the contingent fees under Clause 3.2 - 3.5 of the Transfer Agreement are not relevant for the present case) were payable upon the occurrence of any of three conditions which were virtually the same as those contemplated in Clauses 4.1.1, 4.1.2 and 4.1.3 of the Loan Agreement:

- (i) if Al Ain wins the UAE Pro League and the Player has appeared on the field of play in 50% of the games that season then Al Ain would pay Sunderland a net fee of EUR 400,000. The maximum Sunderland could attain under this clause was capped to a limit of EUR 1,200,000 (Clause 3.1.1 of Transfer Agreement);
 - (ii) if Al Ain wins the UAE President Cup during the term of the Player’s contract with Al Ain and the Player has appeared in 50% of that season games then Al Ain would pay Sunderland a net fee of EUR 300,000. The maximum Sunderland could attain under this clause was capped to a limit of EUR 900,000 (Clause 3.1.2. of the Transfer Agreement);
 - (iii) per season, when the Player has scored 20 goals scored for Al Ain the latter shall pay Sunderland a net fee of EUR 250,000 (Clause 3.1.3 of the Transfer Agreement).
13. The Player was playing for Al Ain until 7 July 2015 when a transfer agreement between Al Ain and the Chinese club SIPG was signed for the Player’s further permanent transfer.
14. It is not in dispute between the Parties that during the season 2014/2015 the Player was registered for Al Ain. It is further not in dispute that the Player had the following achievements in that season: 13 goals scored in the UAE Pro League, 5 goals scored in the Asian Football Confederation Champions League (the “AFC Champions League”) and 4 goals scored in the UAE President Cup.

III. THE FIFA PROCEEDINGS

15. Having explained that despite several reminders, Al Ain failed to reply to their communications and failed to make the relevant payment, on 26 May 2015 Sunderland lodged a claim before FIFA against Al Ain requesting payment of a total amount of EUR 650,000 being the sum of the Contingent Fees under Clause 3.1.1 (EUR 400,000) and Clause 3.1.3 (EUR 250,000) of the Transfer Agreement.
16. In its reply to the claim, Al Ain partially rejected the allegations made by Sunderland. The Appellant confirmed the debt of EUR 400,000 being the Contingent Fees due for winning UAE Pro League in the season 2014/2015 but added that it had never received any invoices from Sunderland as it stated in its claim. Al Ain held on the opinion that the Player had only scored 13 goals in the UAE Pro League in the season 2014/2015.
17. Further in its reply, the Appellant explained that any goal scored in competitions different than those mentioned in the Transfer Agreement (UAE Pro League and UAE President Cup,

Clauses 3.1.1 and 3.1.2) should be considered excluded from the agreement between Al Ain and Sunderland. Al Ain asserted that only the goals scored within the frame of domestic competitions should have been counted for the purpose of payment of the Contingent Fees under Clause 3.1.3 of the Transfer Agreement. Therefore, the Appellant acknowledged a result of 17 goals scored by the Player in the tournaments of the UAE Pro League and the UAE President Cup and denied that any other scored goals in that season fell within the scope of Clause 3.1.3 of the Transfer Agreement and triggered payment of the Contingent Fees under that clause.

18. On 8 September 2015, the Single Judge issued the Decision on the claim brought by Sunderland, upholding it in its entirety. The operative part of the Decision is as follows:

“1. The claim of the Claimant, Sunderland AFC, is accepted.

2. The Respondent, Al Ain Sports Club, has to pay to the Claimant, Sunderland AFC, within 30 days as from the date of notification of this decision, the total amount of EUR 650,000.

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

4. The final costs of the proceedings in the amount of CHF 15,000 are to be paid by the Respondent, Al-Ain Sports Club, within 30 days as from the date of notification of the present decision as follows:

4.1. The amount of CHF 10,000 has to be paid to FIFA to the following bank account...

4.2. The amount of CHF 5,000 has to be paid directly to the Claimant, Sunderland AFC.

5. The Claimant is directed to inform the Respondent, Al-Ain Sports Club, immediately and directly of the account number to which the remittances under points 2 and 4.2.above are to be made and to notify the Players’ Status Committee of every payment received” [emphasis as in the original].

19. In support of its Decision as to the substance of the dispute, the Single Judge made the following considerations:

“7. Having duly examined the argumentation and documentation put forward by both parties, the Single Judge first of all concluded that Al Ain did not dispute that it still owed Sunderland the amount of EUR 400,000 on the basis of art. 3.1.1. of the agreement. Consequently, the Single Judge determined that, in accordance with the basic legal principle of pacta sunt servanda, which in essence means that agreements must be respected by the parties in good faith, Al Ain has to pay Sunderland the aforementioned amount of EUR 400,000.

8. Turning his attention to art. 3.1.3. of the transfer agreement, the Single Judge emphasized that said provision does not specify any particular condition apart from the player scoring 20 goals in “any one season” while registered with Al Ain. Indeed, said provision stipulated: “3.1.3. In any season that the Player is registered for Al-Ain, if the Player scores 20 goals in any one season then Al-Ain shall pay Sunderland a net fee of €250,000”. On account of the foregoing, and in absence of any further specification in art. 3.1.3. of the agreement, the Single Judge came to the conclusion that also those goals scored by the player in the “AFC Champions League” during the 2014/2015 season shall be taken into account in order to determine whether the player scored 20 goals in the 2014/2015 season.

9. With the abovementioned considerations in mind, and since it remained undisputed between the parties that the player scored 13 goals in the “UAE Pro League”, 5 goals in the “AFC Champions League” as well as 4 goals in the “UAE President’s Cup”, the Single Judge decided that the condition set in art. 3.1.3. of the agreement was fulfilled and that, as a result, Al Ain was liable to pay Sunderland a further amount of EUR 250,000”.

20. The Decision with its supporting grounds was notified to the Parties on 18 March 2016.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “Code”), the Appellant filed its statement of appeal with the Court of Arbitration for Sport (the “CAS”) challenging the Decision on 6 April 2016. The Appellant requested that, pursuant to Article R50 of the Code, the appeal be submitted to a sole arbitrator.
22. As at the time of filing of the Statement of Appeal another dispute between the same parties arising out of the Transfer Agreement was pending before the CAS under the reference CAS 2016/A/4379 Al Ain FC v. Sunderland AFC, by a letter dated 12 April 2016, the Parties were invited to inform CAS Court Office whether they agree to refer the present matter to the same Sole Arbitrator as in CAS 2016/A/4379.
23. By a letter dated 17 April 2016, the Appellant did not agree the case to be referred to the same Sole Arbitrator.
24. By a letter dated 26 April 2016, the Respondent agreed the case to be referred to the same Sole Arbitrator.
25. By a letter dated 2 May 2016, the Parties were informed that, pursuant to Article R54 of the Code, the Deputy President of the Appeals Arbitration Division had decided that these proceedings to be submitted to the same Sole Arbitrator as in the proceedings CAS 2016/A/4379 Al Ain FC v. Sunderland AFC, i.e. Mr Ivaylo Dermendjiev, attorney-at-law, in Sofia, Bulgaria.
26. In accordance with Article R51 of the Code, the Appellant filed its Appeal Brief on 18 April 2016 (the “Appeal Brief”).
27. On 6 May 2016, the Respondent requested that the time limit for the filing of the answer be fixed after the payment by the Appellant of its share of the advance of costs pursuant to Article R55 of the Code.
28. On 9 May 2016, the CAS Court Office confirmed that the time limit for the Respondent to file its answer was to be fixed upon receipt by the CAS of the Appellant’s payment of its share of the advance of costs.

29. By a letter of 23 May 2016, the CAS Court Office acknowledged receipt of the Appellant's payment of its share of the advance of costs and indicated that the time limit for the Respondent to file its answer would start running upon receipt of that correspondence by courier.
30. In accordance with Article R55 of the Code, the Respondent filed its answer on 16 June 2016 (the "Answer").
31. On 1 July 2016, the CAS Court Office informed the parties that the Sole Arbitrator had decided to order them to file an additional round of written submissions pursuant to Articles R57 and R44.4 of the Code.
32. By a letter dated 19 July, the CAS Court Office acknowledged the receipt of the Appellant's reply of 11 July 2016 to the Respondent's answer of 16 June 2016 and granted the Respondent a time limit of ten days of receipt of the CAS letter at issue to file its Response.
33. On 19 July 2016, the Respondent requested an extension until 8 August to file its response. Such request was granted by the Sole Arbitrator on 20 July 2016.
34. On 8 August 2016, the Respondent filed its response by facsimile.
35. On 16 August 2016, the CAS Court Office invited the Respondent to provide proof of sending of the response by courier pursuant to Article R31 of the Code.
36. On the same date, the Respondent informed the CAS Court Office that the response had not been sent by courier "*because [the Respondent] did not consider this letter [i.e. the "letter of 8 August"; see par. 34 above] to be a formal submission for the purpose of Article R31 of the Code*".
37. On 19 August 2016, the CAS Court Office informed the parties of the Sole Arbitrator's decision to declare the Respondent's response inadmissible pursuant to Articles R31 and R32 of the Code.
38. On 27 September 2016, the CAS Court Office sent to the parties the Order of Procedure, which was returned duly signed by both parties on 4 October 2016.
39. A hearing was held on 18 October 2016 in Lausanne. The Appellant was represented by Messrs. Abdulla Alhawmoodi and Islam Eid. The Respondent was represented by Mr Stuart Baird. The parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Sole Arbitrator. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings.

V. POSITIONS OF THE PARTIES

A. The Appellant

40. Regarding the facts, in its submissions the Appellant asserts as follows:
- The Appellant concluded with the Respondent a Permanent Transfer Agreement on 20 June 2012 whereby the parties agreed (in Clause 3.3.1. and Clause 3.3.3) that particular contingent fees shall be paid by the Appellant to the Respondent in case the Appellant win UAE Pro League and the Player has appeared on the field of play in 50% of the games that season, and if he scored 20 or more goals;
 - Al Ain fulfilled its obligation and paid the Contingent Fees for winning the UAE Pro League in the seasons 2011/2012 and 2012/2013 and for winning the UAE President Cup in the season 2013/2014, as well as for scoring by the Player of more than 20 goals in the seasons 2011/2012 and 2013/2014;
 - Al Ain has already paid to Sunderland as Contingent Fees for winning the UAE Pro League and the UAE President Cup an amount of EUR 1,100,000 (one million one hundred thousand Euros);
 - Moreover, as the Player has scored more than 20 goals in the seasons of 2011/2012 and 2013/2014, Al Ain paid to Sunderland Contingent Fees of EUR 500,000 (five hundred thousand euros);
 - Sunderland filed a claim before the FIFA asking for payment of EUR 650 000 for winning the UAE Pro League including claim for scoring by the Player of more than 20 goals in the season 2014/2015;
 - In the season 2014/2015 the Player scored 13 goals in the UAE Pro League and 4 goals in the UAE President Cup.;
 - The Player further scored 5 goals in the AFC Champions League which however must not be calculated and combined with the goals scored in the UAE League and the UAE President Cup.
41. On the merits, the Appellant maintains that the Parties to the Transfer Agreement have agreed that the Contingent Fees were related only to the performance of the Player within the UAE Pro League and the UAE President Cup competitions. These were the only competitions stated in the Transfer Agreement to define the sport season and the performance of the Player which would result in entitlement for Contingent Fees.
42. Further, in the Appellant's submission, despite of the fact that as of signing of the Transfer Agreement it was well known to the Parties that the Appellant is participating in the ACL during the season 2012/2013 no reference at all was made to that competition in the Transfer Agreement.
43. Therefore, the Appellant considers that the UAE Pro League and the UAE President Cup are the only competitions which the parties referred to when the Contingent Fees have been agreed.

44. Further, the Appellant refers to previous invoices issued by the Respondent indicating that the contingent fee for scored goals related to scored goals in the Pro League.
45. Moreover, the Appellant points out that its obligation to pay the Contingent Fees for winning the UAE Pro League in the 2011/2012 and 2012/2013 seasons and the Contingent Fees 2013/2014 for winning the UAE President Cup in the 2013/2014 season has been duly performed.
46. For the purpose of reaching to the right interpretation and the common intention of the parties at the time of concluding the Transfer Agreement the Appellant resorts to Article 18 of the Swiss Code of Obligations (“CO”) stating that *“when assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement”*.
47. In the Appeal Brief, the Appellant requested the following relief:
*“Accept the present Appeal.
Partially revoke the decision of FIFA's Dispute Resolution Chamber.
Decide that the Respondent is entitle only EUR 400,000 of winning the pro league.
To allocate to the Respondent the costs and fees of this Appeal, and costs of the case before the FIFA an amount of CHF 15,000 which has been paid by the Appellant and a contribution CHF 7,000 towards the appellant's costs”*.

B. The Respondent

48. As for the relevant facts, the Respondent asserts the following:
- On 20 June 2012, the Parties entered into the Transfer Agreement in respect of the permanent transfer of the Player from Sunderland to Al Ain;
 - The Respondent quotes the text of the clauses 3.1.1. and 3.1.3 from the Transfer agreement under which both parties agreed as follows:
 - “3.1.1. In any season that the Player is registered for Al-Ain, if Al-Ain win UAE Pro League and the Player has appeared on the field of play in 50 % of the games that season then Al-Ain shall pay Sunderland a net fee of € 400,000 (four hundred thousand Euros). The maximum Sunderland can attain under this Clause 3.1.1 shall be € 1,200,000 (one million and two hundred thousand Euros) net.*
 - 3.1.3. In any season that the Player is registered for Al-Aim, if the Player scores 20 goals in any one season then Al-Ain shall pay Sunderland a net fee of EUR 250,000 (two hundred thousand Euros.)”;*
 - The Respondent states that Al-Ain won the UAE Pro League in 2014/2015 season, therefore Sunderland is entitled to receive the sum of EUR 400,000 under Clause 3.1.1 of the Transfer Agreement;

- The Respondent accepts at this stage, after the decision of FIFA's Dispute Resolution Chamber that sum is undisputable between the parties even the amount was not paid yet by Al Ain;
 - The Player scored 22 goals for Al Ain during the 2014/2015 season (comprising 13 goals in the UAE Pro League, 5 goals in the AFC Champions League and 4 goals in the UAE President Cup).
 - The Respondent maintains that, as far as the Player scored 22 goals for Al Ain during 2014/2015 season, Sunderland is entitled to receive the amount of EUR 250,000 under Clause 3.1.3 of the Transfer Agreement;
 - The Respondent denies the Appellant's allegation that only the goals scored in the UAE Pro League and the UAE President Cup are to be counted for the purposes of Clause 3.1.3 of the Transfer Agreement.
52. As a matter of law, the Respondent's submission in essence may be summarized as follows. Al-Ain's obligation to pay contingent fee in case that the threshold of 20 goals is triggered once 20 goals have been scored by the Player in any competition where the Player played for Al Ain.
53. The Respondent holds that if the parties had intended any other interpretation of Clause 3.1.3 of the Transfer Agreement, they would have included alternative wording, e.g. *"It is acknowledged and agreed that only goals scored by the Player in the UAE Pro League and Presidents Cup shall count for the purposes of this clause 3.1.3"*.
54. Further, the Respondent relies on Swiss law approach to interpretation of contracts as set out in Article 18 of the CO.
55. The Respondent also refers to a Decision of 4A_124/2014 of 7 July 2014, where the Swiss Federal Tribunal clarified that approach to interpretation as follows: *"The Court will first seek to establish the real and common intention of the parties, adopting an empirical approach, without stopping at the inaccurate expressions or denominations they may have used. Failing this, it will apply the principle of reliance and determine the meaning that, according to the rules of good faith, the parties could and should give to their mutual statements of will in each circumstance"*.
56. The Respondent further notes that it is well established that a party seeking to rely on a subjective interpretation which diverges from the literal interpretation of the text bears the burden of proof. It is notable that Al Ain has not submitted any evidence that the real and common intention of the parties is anything other than what is stated in clause 3.1.3 of the Transfer Agreement.
57. As to the objective interpretation of the disputed clause and with reference to Article 2 of the Swiss Civil Code, the Respondent also underlines that the Appellant is "an established professional football club", "commercially experienced" and that Al Ain should be aware with the meaning of clause 3.1.3 of the Transfer Agreement.
58. In its Answer, the Respondent requested the following relief:

- I. This Answer is admissible and well-founded;*
- II. Al-Ain's appeal is dismissed in its entirety and the Decision is upheld;*
- III. Al-Ain must immediately pay to Sunderland the sum of EUR 250,000 pursuant to clause 3.1.3 of the Transfer Agreement, plus interest thereon;*
- IV. The sum of €400,000 is due and owing to Sunderland by Al-Ain under clause 3.1.1 of the Transfer Agreement, plus interest thereon; and*
- V. Al-Ain must pay in full, or, in the alternative, a contribution towards, the costs and expenses, including Sunderland's legal costs and expenses, pertaining to these appeal proceedings before the CAS”.*

VI. JURISDICTION OF THE CAS

59. Article R47 of the Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the 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”.

60. The jurisdiction of the CAS, which is not disputed by either Party and has been confirmed by the Parties by signing the Order of Procedure, derives from Article 67 of the FIFA Statutes (edition 2014, in force as of 1 April 2015).

61. The Parties have conferred jurisdiction to the CAS also by the clear reference to it contained in Clause 4.3, second sentence, of the Transfer Agreement.

62. It follows that the CAS has jurisdiction to decide this dispute.

VII. ADMISSIBILITY

63. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

64. The grounds of the FIFA Decision were notified on 18 March 2016.

65. No further recourse against the Decision is available within the structure of FIFA.

66. The statement of appeal was filed on 6 April 2016 and, thus, within the deadline of twenty-one days set in Article R49 of the Code and in Article 67.1 of the FIFA Statutes referred to in the Decision itself.

67. Accordingly, the appeal filed by Al Ain is admissible.

VIII. APPLICABLE LAW

68. Article R58 of the Code provides 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

69. The matter at stake relates to an appeal against a FIFA decision, and reference must hence be made to Article 66.2 of the FIFA Statutes (edition 2015) which states 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”.

70. In Clause 4.3 of the Transfer Agreement the Parties recognized and confirmed that the agreement *“is subject to the regulations of FIFA”*.

71. The Parties expressly agreed that, for the resolution of the dispute, the Sole Arbitrator shall apply primarily the FIFA Regulations and, subsidiarily, Swiss law.

72. In the present case the *“applicable regulations”* for the purposes of Article R58 of the Code are, indisputably, the FIFA’s regulations, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA’s rules and regulations. More precisely, the Sole Arbitrator agrees with the Single Judge that the regulations concerned, apart from the FIFA Statutes, are particularly the Regulations on the Status and Transfer of Players, edition 2015 (“RSTP”), considering that the matter was brought to FIFA on 17 July 2015 after the entry into force of the RSTP 2015 (1 April 2015).

73. The specific provisions of the FIFA rules and regulations which are relevant in this arbitration are set in the RSTP and include the following:

Article 12bis (“Overdue payables”):

“1. Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements.

[...]

3. In order for a club to be considered to have overdue payables in the sense of the present article, the creditor (player or club) must have put the debtor club in default in writing and have granted a deadline of at least ten days for the debtor club to comply with its financial obligation(s)”.

IX. MERITS

74. The core principle applicable by CAS is the *de novo* principle resulting from Article R57 of the Code. According to Article R57 of the 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.
75. Based on the Parties' submissions, the main issue for determination is whether Sunderland is entitled to receive payment of the Contingent Fees for the 2014/2015 season in the amount of EUR 250,000 pursuant to Clause 3.1.3 of the Transfer Agreement. In particular, the Sole Arbitrator must decide on the question if Clause 3.1.3 of the Transfer Agreement requires that the threshold of 20 goals per season be reached only in the competitions mentioned in the Transfer Agreement, namely the UAE Pro League and the UAE President Cup, or that any other competitions should be counted, too.
76. The answer of that question is decisive for the outcome of the dispute which is boiled down to the issue if the Respondent is entitled to receive the amount of EUR 250,000 on the account that the Player scored more than 20 goals in the 2014/2015 season.
77. As a starting point, the Sole Arbitrator must identify the relevant contractual provisions devoted to Sunderland's entitlement to receive the Contingent Fees of EUR 250,000.
78. Clause 3.1.3 of the Transfer Agreement, which lies in the centre of the dispute here, reads as follows:
"In any season that the Player is registered for Al-Ain, if the Player scores 20 goals in any one season then Al-Ain shall pay Sunderland a net fee of €250,000 (two hundred and fifty thousand Euros)".
79. Clause 3.1.3 follows systematically Clauses 3.1.1 and 3.1.2 of the Transfer Agreement (Clauses 3.1.1, 3.1.2 and 3.1.3 being subsections of Clause 3.1) which provide:
"3.1.1 In any season that the Player is registered for Al-Ain, if Al-Ain win UAE Pro League and the Player has appeared on the field of play in 50 % of the games that season then Al-Ain shall pay Sunderland a net fee of €400,000 (four hundred thousand Euros). The maximum Sunderland can attain under this Clause 3.1.1 shall be €1,200,000 (one million and two hundred thousand Euros) net.
3.1.2 In any season that the Player is registered for Al-Ain, if Al-Ain win the UAE President Cup during the term of the Player's contract with Al-Ain and the Player has appeared in 50 % of that seasons games then Al-Ain shall pay Sunderland a net fee of €300,000 (three hundred thousand Euros). The maximum that Sunderland can attain under this Clause 3.1.2 shall be €900,000 (nine hundred thousand Euros) net".
80. It is undisputed that in the 2014/2015 season the Player scored 22 goals for Al Ain comprising 13 goals in the UAE Pro League, 4 goals in the UAE President Cup and 5 goals in the AFC Champions League. The issue to be decided is if the 5 goals in the AFC Champions League should be taken into account for the purpose of Clause 3.1.3 of the Transfer Agreement, thus triggering the Respondent's entitlement to receive the Contingent Fees in the amount of EUR

250,000. If in the affirmative, the Respondent would be entitled to receive the claimed amount and accordingly, if negative, the Respondent should be denied payment of the Contingent Fees.

81. The Parties stand on entirely contradicting positions. As described above, the Appellant maintains that payment under Clause 3.1.3 of the Transfer Agreement would be due to the Respondent only in case the threshold of 20 goals scored was reached in games of the UAE Pro League and the UAE President Cup. On the contrary, the Respondent holds that the Contingent Fees under Clause 3.1.3 of the Transfer Agreement is due irrespective of the particular tournaments in which the goals were scored during the season. Consequently, the answer to the question in dispute depends on the interpretation of Clause 3.1.3 of the Transfer Agreement.
82. For the present purposes, the interpretation of Clause 3.1.3 of the Transfer Agreement must be carried out according to the general rules of contract interpretation. According to the principles established in the applicable Swiss law, the court shall first seek to bring to light the real and common intent of the parties, empirically as the case may be, on the basis of clues without regard to the inaccurate expressions or designations they may have used. Failing this, it shall then apply the principle of reliance and seek the meaning that the parties could and should give according to the rules of good faith to their reciprocal expressions of will considering all the circumstances (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted, ATF 4A_676/2014 at 3.3). Should the application of this principle fail to bring to a conclusive result, some alternate means of interpretation may be resorted to, such as the so-called rule of ambiguous clauses, pursuant to which, in case of doubt, the contract must be interpreted against the party which drafted it (*in dubio contra stipulatorem* or *proferentem*; ATF 124 III 155 at 1b, p. 158 and the cases quoted).
83. In order to interpret Clause 3.1.3 of the Transfer Agreement, it is necessary to make reference to Article 18(1) of the CO, dealing with the interpretation of contracts:
“As regards both the form and content of the contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or manner of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract” [Translation of the official text by the Swiss-American Chamber of Commerce, 2005].
84. Under this provision, the parties’ common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention (WINIGER, Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO). This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them (WINIGER, op. cit., n. 26 ad art. 18 CO; WIEGAND, Obligationenrecht I, Basel 2003, n. 19 ad art. 18 CO). The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation (WINIGER, op. cit., n. 33, 37 and 134 ad art. 18 CO; WIEGAND, op. cit., n. 29 and 30 ad art. 18 CO). By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must – according to the jurisprudence of the Swiss Federal Court – be interpreted based on the

principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith ("Treu und Glauben": WIEGAND, op. cit., n. 35 ad art. 18 CO), based on its wording, the context and the concrete circumstances in which it was expressed (ATF 124 III 165, 168, consid. 3a; 119 II 449, 451, the same in CAS 2008/A/1544).

85. In other words, the Sole Arbitrator has to identify the real and common intent of the parties, pursuant to the mentioned principles.
86. The Sole Arbitrator considers that the case at hand is to be analysed in the light of the provisions of CO dealing with the conditional obligations. In accordance with article 151(1) CO, "*a contract which is dependent upon the occurrence of an uncertain fact in order to be binding is deemed to be conditional*". Therefore, Clause 3.1.3 of the Transfer Agreement must be considered as a conditional clause in the sense of Article 151(1) CO, which is also corroborated by the CAS jurisprudence (CAS 2009/A/1756). When signing the Transfer Agreement dated 20 June 2012, the claim of the Respondent based on Clause 3.1.3 of this agreement was conditional upon scoring by the Player of 20 goals in any season. The second chapter of the 4th title of the first part of CO contains provisions regarding the obligations which are submitted to conditions. It results from these provisions that Swiss law distinguishes between a condition precedent, which is defined at Article 151 CO, and a condition subsequent, which is defined at Article 154 CO. The Sole Arbitrator is clearly of the opinion that the obligation provided by Clause 3.1.3 of the Transfer Agreement is to be construed as conditional according to Article 151(1) CO. When entered into, this obligation was dependent upon the occurrence of a future and uncertain fact, namely the scoring of a minimum number of goals by the Player in the season.
87. The achievement of at least 20 goals by the Player in the 2014/2015 season is not in dispute between the Parties. It is the question of the kind of sport events in which these 20 goals must have been scored that is giving rise to the different and conflicting interpretations suggested by the Parties.
88. The literal meaning of Clause 3.1.3 of the Transfer Agreement, if taken separately, is that if the Player scores 20 goals in any one season when registered for Al Ain, the Respondent would be entitled to the Contingent Fees. Clause 3.1.3 of the Transfer Agreement in itself does not specify particular tournaments where the goals should be scored for being eligible for counting in the overall number of 20 goals.
89. Clause 3.1.3 of the Transfer Agreement is drafted in such manner so that Sunderland would be entitled to the Contingent Fees irrespective of the kind of tournament the goals were scored in ("*20 goals in any season*"). The immediate interpretation of the clause, considering the ordinary sense of the language used therein, would result in the conclusion that the Respondent's entitlement is triggered by scoring by the Player of 20 goals in the season be it on the international or domestic scene. On the face of it, the contingent payment under Clause 3.1.3 of the Transfer Agreement is not dependent on any other condition except from scoring certain number of goals.

90. However, the immediate interpretation of the literal meaning of the clause is the first step. Attention should be paid to other factors and interpretative tools, too.
91. In a Decision 4A_124/2014 of 7 July 2014 (to which the Respondent referred in its Answer, quoting only limited part of it) at 3.4.1 the Swiss Federal Tribunal held the following:
“Even if it is apparently clear, the meaning of a text signed by the parties is not necessarily decisive, as purely literal interpretation is prohibited (Article 18(1) CO). When the wording of a contract clause appears crystal clear at first sight there may still be some other conditions of the contract, the goal sought by the parties, or some other circumstance causing the text of the clause to fail to express the exact meaning of the agreement concluded. However, there is no reason to depart from the literal meaning of the text adopted by the parties to the contract if there is no serious reason to doubt that it does not correspond to their intent (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted)” (English translation from French in the original).
92. Therefore, in order that Clause 3.1.3 of the Transfer Agreement is not interpreted according to its literal wording, the Sole Arbitrator should have been advised of some other conditions of the Transfer Agreement, the goal sought by the Parties, or some other circumstance causing the text of the clause to fail to express the exact meaning of the agreement concluded. Otherwise, there would be no reason to depart from the literal meaning of the text. The Sole Arbitrator notes that in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its “burden of proof”, i.e. must meet the onus to substantiate its allegations and affirmatively prove the facts on which it relies with respect to that issue. It is the Appellant’s burden to prove that the Parties’ mutual intent was anything else than what is stated in the agreement.
93. On the balance, the Sole Arbitrator is satisfied that Clause 3.1.3 of the Transfer Agreement should not be read in isolation from the entire agreement of the parties.
94. In determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is indeed necessary to look first to the words actually used or the conduct engaged in. However, as explained above, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct of the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations and any subsequent conduct of the parties.
95. Neither party has presented witnesses who had a direct knowledge of the events that could have helped to understand the context of the negotiations between Sunderland and Al Ain. This leaves the Sole Arbitrator with the difficult task to determine the common intent (if it would be different from what appears from the expressed agreement) of the Parties with little documentary evidence and factual elements. No offers, faxes, memos of meetings and discussions, clarifying the process of negotiation, drafting and signing of the Transfer Agreement, were produced in the course of the present proceedings.
96. The Sole Arbitrator notes that there are sensible arguments for both of the two possible interpretations of Clause 3.1.3 of the Transfer Agreement suggested by the Parties (first, that the Contingent Fees is due irrespective of the kind of games played where the goals were scored,

being the Respondent's interpretation and second, that the Contingent Fees is due for 20 and more goals scored only in the UAE Pro League and the UAE President Cup, being the Appellant's understanding).

97. The Sole Arbitrator observes that both the Loan Agreement and the Transfer Agreement on their head page bear the emblem of Sunderland which is an indication that the agreements were drafted by Sunderland and then offered to Al Ain for signing. Therefore, though not a decisive proof of authorship, the Sole Arbitrator is mindful of the possible application of the *contra proferentem* principle meaning that, in case of doubt, an interpretation against the drafter of the clause would be preferred.
98. As stated by the Appellant, which was not expressly denied by the Respondent, as of signing of the Transfer Agreement, the Parties were aware that Al Ain would have qualified for the AFC Champions League. However, the contractual clauses related to the Contingent Fees did not make any specific reference to potential scores and appearances of the Player in that tournament.
99. As to the subsequent conduct of the parties, the Sole Arbitrator gives credit to the Appellant's argument that on previous occasions (e.g. for the 2013/2014 season) the Respondent issued an invoice for the Contingent Fees of EUR 250,000 pursuant to Clause 3.1.3 of the Transfer Agreement specifying in the description of the invoice that the justification for claiming the Contingent Fees was the Player's *20th league goal of the 2013-14 season*, thus specifically referring to goals scored in the league only and not in the AFC Champions League, for example. On the other hand, match statistics of Al Ain show that in 2013 the Appellant took place in the group stages of the AFC Champions League reaching to semi-final in 2014. The Player's profile and statistics in the file further demonstrate that in 2013 and 2014 the Player played for Al Ain in the AFC Champions League and scored goals which apparently were not taken into account when the Respondent claimed payment of the Contingent Fees in 2014.
100. The Sole Arbitrator further notes that during the procedure before the Single Judge, the Appellant did not dispute the right of the Respondent to receive the Contingent Fees under Clause 3.1.1 of the Transfer Agreement (EUR 400,000 due for winning the UAE Pro League in the 2014/2015 season). However, the Appellant rigorously contested the entitlement of the Respondent to payment of the Contingent Fees provided in Clause 3.1.3 of the Transfer Agreement for reasons that the Player scored less than 20 goals in the UAE Pro League and the UAE President Cup in the same season. Further, at the Hearing Al Ain submitted that the Player was loaned and then permanently transferred especially to participate in competitions which are significant for it at national level. Therefore, by signing that clause the Club had the intention to honour the achievements of the Player only with respect to these nationally significant competitions.
101. The Sole Arbitrator, taking in due consideration the wording of the entire Transfer Agreement and after careful review of all means of evidence produced by the Parties, is of the view that the purpose of the arrangement contained in Clause 3.1.3 of the Transfer Agreement is to provide

the Respondent with additional payment only if the Player scored goals for the UAE Pro League and the UAE President Cup.

102. As mentioned above, Clause 3.1.3 of the Transfer Agreement cannot be interpreted as a fragmentary part of the agreement not having relation with the entire contractual relationship. Notably, the UAE Pro League and UAE President Cup are the only sport events which have been referred to and defined by the Parties in the preceding clauses of the Transfer Agreement, in particular Clauses 3.1.1 and 3.1.2. It is noted in this respect that, according to statistics of Al Ain achievements through the years, the Club regularly participates in various competitions in addition to the UAE Pro League and UAE President Cup (e.g. League Cup, Super Cup, Gulf Club Champions Cup, AFC Champions League, etc.) These, however, were not contemplated by the Transfer Agreement.
103. Based on the Parties' arguments and the evidence provided, the Sole Arbitrator's analysis of Clause 3.1.3 of the Transfer Agreement in the context of the whole Clause 3.1 of the Transfer Agreement leads to the corollary that the interpretation offered by the Appellant should be given prevalence, i.e. that the Contingent Fees relate only to achievements of the Player in the UAE Pro League and the UAE President Cup.
104. In the reading of the Sole Arbitrator, by inserting the provision of Clause 3.1.3 in the Transfer Agreement the Respondent was merely provided a further option to receive certain amount as Contingent Fees including in the case where Al Ain would not win the UAE Pro League and the UAE President Cup and/or the Player had participated in less than 50% of the games but nevertheless he scored 20 goals in the said competitions.
105. If the broader interpretation of Clause 3.1.3 of the Transfer Agreement was applied, that could lead to the loose conclusion that even goals scored in friendly football matches during the season were to be counted which goes counter good sense.
106. In light of the foregoing, the Respondent's entitlement to receive the amount of EUR 250,000 pursuant to Clause 3.1.3 of the Transfer Agreement must be denied.
107. Having found that Al Ain is not liable to pay to Sunderland the amount of EUR 250,000, the Sole Arbitrator is therefore in disagreement with the Single Judge ordering the payment of the same amount in the Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al Ain FC on 6 April 2016 against the Decision passed by the Single Judge of the FIFA Players' Status Committee on 8 September 2015 is upheld.
2. Point 2 of the operative part of the Decision passed by the Single Judge of the FIFA Players' Status Committee on 8 September 2015 is set aside and replaced by the following:
“Al Ain Sports Club, has to pay to the Claimant, Sunderland AFC, within 30 days as from the date of notification of this decision, the total amount of EUR 400,000”.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.