**Arbitration CAS 2016/A/4560 Al Arabi SC Kuwait v. Papa Khalifa Sankaré & Asteras Tripolis FC, award of 25 April 2017**

Panel: Mr Ivaylo Dermendjiev (Bulgaria), President; Mr David Wu (China); Prof. Stavros Brekoulakis (Greece)

*Football*
*Termination of the employment contract with just cause by the player*
*Inadmissibility of counterclaims or new claims lodged by respondents in appeal proceedings before CAS*
*Definition of a just cause to terminate a contract of employment*
*Non-registration of a player by a club as a just cause for the termination of an employment contract*
*Calculation of the amount of compensation for damages based on the 'positive interest' principle*

1. **The CAS Code does not provide for the possibility of a respondent in appeal arbitration proceedings to file a counterclaim against a decision challenged by an appellant. Any party wishing to have the disputed decision set aside or modified has to file an independent appeal. A request for awarding interest on principal amounts, which was initially not claimed by the (now) respondent, goes beyond the permitted scope of review under Article R57 of the Code since such prayer for relief had not been included in the subject matter of the claim lodged before the first instance legal body.**

2. **The definition of just cause to terminate a contract of employment and whether it exists shall be established in accordance with the merits of each particular case. One-off behaviour that is in violation of the terms of an employment contract usually cannot justify the termination of a contract for just cause. However, should the violation persists over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally. Accordingly, an employment contract may be terminated with just cause when the main terms and conditions under which it was entered into are no longer implemented and the party terminating it can in good faith not be expected to continue the contractual relationship.**

3. **One football player's fundamental rights under an employment contract is not only his right to a timely payment of his remuneration, but also a reasonable opportunity to compete with his fellow team mates in the team's official matches. By not registering a player, even if it has the legal options to do so, a club bars in an absolute manner such player's potential access to competition and, as such, violates one of his fundamental rights as a football player. What is more, by *de facto* preventing a player from being eligible to play for it, a club breaches the parties' contract in an extent that gives the player just cause to terminate the parties' employment contract.**

**4. The principle of the so-called positive interest (or "expectation interest") shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is a club. In this context, the judging authority should not satisfy itself in assessing the damage suffered by a player by only calculating the net difference between the remuneration due under the existing contract and the remuneration he received from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in article 17 of the FIFA Regulations on the Status and Transfer of Players. The fact that a CAS panel establishing the amount of compensation due has a considerable scope of discretion has been accepted both in legal doctrine and the CAS' jurisprudence.**

## I. PARTIES

1. Al Arabi SC Kuwait (the "Appellant" or the "Club") is a professional football club based in Kuwait City, Kuwait. The Club is affiliated to the Kuwait Football Association ("KFA") which, in turn, is a member of the Fédération Internationale de Football Association ("FIFA").

2. Mr Papa Khalifa Sankaré (the "First Respondent" or the "Player") is a professional football player of Senegalese nationality, born on 15 August 1984.

3. Asteras Tripolis FC (the "Second Respondent") is a professional football club affiliated to the Hellenic Football Federation ("HFF") which, in turn, is a member of FIFA.

4. The Appellant, the First Respondent and the Second Respondent will be collectively referred to as the "Parties".

5. The First Respondent and the Second Respondent will be collectively referred to as the "Respondents".

## II. FACTUAL BACKGROUND

6. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. 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 Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions, pleadings and evidence it considers necessary to explain its reasoning.

7. On 19 June 2013, the Club and the Player concluded an employment contract valid as from 1 August 2013 until 30 June 2016 (the "Employment Contract"). The parties to the Employment

Contract agreed to a gross remuneration in the amount of USD 900,000 for the duration of the contract. According to the terms of the Employment Contract, upon signature, the Player would receive a sign-on bonus in the amount of USD 100,000. Thereafter, at the beginning of the second and the third season, respectively, the Player would receive each time as advance payment the amount of USD 100,000. In addition, the Employment Contract provided for a monthly salary of USD 20,000 payable in ten months (September - June) for each of the 2013/2014, 2014/2015 and 2015/2016 seasons. The Player was further entitled to other benefits such as the use of a furnished apartment and a car, as well as two economy return air tickets for him and his family per season.

8. On 5 August 2013, the Club initiated the pertinent ITC request in order to complete registration of the Player through the FIFA TMS, which was finally withdrawn by the Club on 5 September 2013.

9. On 3 October 2013, the Player put the Club in default of salaries for August and September 2013, noting also the Club's failure to provide a car and an apartment, as well as the exclusion of the Player from the first team training sessions.

10. On 5 November 2013, the Player formally notified the Club for the unilateral termination of the Employment Contract with just cause and with immediate effect on ground of contractual breaches committed by the Club such as the non-payment of salaries, demands by the Club for returning the sign-on advance payment, denied access to the training process of the team, failure to provide a car and accommodation, all of which in the Player's view clearly demonstrated the Club's intent to part with the Player. The Player also noted that the Club's allegation for the problem faced with regard to the Player's International Transfer Certificate ("ITC") was subsequently found to be untrue.

11. On 1 January 2014, the Player signed a contract with the Second Respondent valid until 30 June 2016 for remuneration in the total amount of EUR 250,000 for the entire term of the contract.

## III. THE FIFA PROCEEDINGS

12. On 11 December 2013, the Player filed a claim before the FIFA Dispute Resolution Chamber (the "DRC") contending that the Employment Contract was terminated by the Player with just cause and requesting that the Club be ordered to pay the following amounts:

    *a)* USD 800,000 comprising of: *(i)* USD 200,000 corresponding to the salaries of the 2013/2014 season, *i.e.* September 2013 until June 2014 (10 months x USD 20,000); *(ii)* USD 300,000 pertaining to the advance payment of USD 100,000 and ten monthly salaries (September 2014 until June 2015) amounting to USD 200,000 for the 2014/2015 season; *(iii)* USD 300,000 pertaining to the advance payment of USD 100,000 and ten monthly salaries (September 2015 until June 2016) amounting to USD 200,000 for the 2015/2016 season;

*b)* USD 156,000 as reimbursement of expenses for contractually provided benefits comprising of: *(i)* use of an apartment, estimated at USD 2,000 per month, and use of a car, estimated at USD 1,000 per month, for the thirty six months (equal to a total of USD 108,000) and *(ii)* two return tickets from Doha to Dakar per season, each return flight claimed for USD 8,000 (equal to USD 48,000 for the three seasons);

*c)* USD 50,000 as compensation for moral damages.

13. In his claim, the Player averred to have joined the Club for a pre-season tournament on 1 August 2013 but was allegedly told by the Vice-President of the Club on 17 August 2013 that the Club wanted to terminate the Employment Contract, asking the Player to reimburse the USD 100,000 sign-on bonus. On 27 August 2013, the Club allegedly informed the Player that he could not play in light of the fact that the HFF had not delivered the ITC. On 3 September 2013, the Club allegedly called the Player's agent stating that the Club did not need his services and requested the agent to find him a new club. According to the Player, on 4 September 2013, the team manager informed the latter of the ITC problems that were leading to the necessary termination of the employment relationship. The Player asserted that the HFF never received any request for an ITC delivery from the KFA. The Player further claimed that he sent a default notice to the Club because he received no salary, was not allowed to train with the first team, was not provided with a car and apartment, and was eventually made to pay for his own hotel room and pay weekly tax as a result of the expiry of his visa, the fault of which he attributed to the Club.

14. In its reply, the Club claimed that as of the termination of the Employment Contract, the Player had received a total of USD 150,731 (converted from Kuwaiti Dinar) in two instalments paid on 23 June 2013 meaning that the Player already received both the advance payment and the salaries corresponding to the months of September and October 2013 and thus no salaries were due. The Club disputed the Player's assertion that the USD 100,000 was a sign-on bonus. With respect to the ITC, the Club stated that it requested the delivery of the ITC on 5 August 2013, however, Asteras Tripolis FC failed to respond to the request. The Club claimed that the subsequent signing of a labor contract between Asteras Tripolis FC and the Player was in breach of FIFA's regulations. The Club also claimed that the Player had refused to provide it with his passport in order to renew his visa and refused to accept the accommodation provided to him.

15. On 2 February 2014, the Club filed a counterclaim before the DRC, against the Player (Counter-Respondent 1 in the FIFA proceedings) and Asteras Tripolis FC (Counter-Respondent 2 in the FIFA proceedings) requesting to be reimbursed of all the amounts paid to the Player (USD 148,966), as well as to be awarded an unspecified amount of compensation for the breach of contract. The Club also requested the imposition of sporting sanctions on the two Counter-Respondents in the FIFA proceedings. On 6 April 2014, the Club modified the counterclaim claiming that the Counter-Respondents were jointly and severally liable for compensation for breach of contract in the total amount of USD 1,050,731.

16. In his reply to the counterclaim, the Player provided transcripts of "WhatsApp" conversations to substantiate the claim that the Club wished to terminate the employment relationship as early as 17 August 2013 and to recover monies paid to him. In support of his allegation that the Club

never requested the delivery of the ITC, the Player provided an e-mail exchange dated 20 September 2013 with the HFF in confirmation of the fact that the KFA had not submitted any request for ITC in favour of its affiliated Club. The Player further noted that even if the request had been sent and no reply received from the HFF, the KFA could have provisionally registered the Player. The Player acknowledged receipt of approximately USD 150,000 stating however that the amount in excess of the sign-on fee of USD 100,000 was made on the Club's free will and did not constitute an advance of salary payments.

17. In its reply to the counterclaim, the Counter-Respondent 2 (Asteras Tripolis FC) asserted that it verified the Player's status through his international player's passport, which indicated that the Player had not been registered with any other club since his previous registration with Asteras Tripolis FC ended on 30 June 2013 and the Player had not been registered with Al-Arabi SC Kuwait.

18. On 15 October 2015, the DRC issued its decision which grounds were finally communicated to the Parties on 23 March 2016 (the "Appealed Decision"). The DRC partially accepted the Player's claim and ordered the Club to pay the Player compensation for breach of contract in the amount of USD 370,000, plus 5% interest *p.a.* that would fall due as of expiry of the 30 days from the notification of the Appealed Decision. Any further claims lodged by the Player were rejected. The counterclaim of the Club was rejected. The operative part of the Decision read as follows:

> *"1. The claim of the Claimant/Counter-Respondent 1, Papa Khalifa Sankare, is partially accepted.*
>
> *2. The Respondent/Counter-Claimant, Al-Arabi SC, has to pay to the Claimant/Counter-Respondent 1, compensation for breach of contract in the amount of USD 370,000,* ***within 30 days*** *as from the date of notification of this decision.*
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> *3. In the event that the amount due to the Claimant/Counter-Respondent 1 in accordance with the aforementioned number 2. is not paid by the Respondent/Counter-Claimant within the stated time limit, interest at a rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claim lodged by the Claimant/Counter-Respondent 1 is rejected.*
>
> *5. The counterclaim of the Respondent/Counter-Claimant is rejected.*
>
> *6. The Claimant/Counter-Respondent 1 is directed to inform the Respondent/Counter-Claimant immediately and directly of the account number to which the remittance is to be made, and to notify the Dispute Resolution Chamber of every payment received".*

19. In support of its Decision as to the substance of the dispute, the DRC stated the following:

*"9. Indeed, according to the contract salaries are payable from the "beginning of the season", and it was noted from the information contained on TMS that the 2013/2014 season began on 3 September 2013. Therefore, on the date of termination, i.e. 5 November 2013, the salaries of September and October 2013 had fallen due in the total amount of USD 40,000 as well as the advance of payment in the amount of USD 100,000. Consequently, the amount due at the time of termination is USD 140,000. In consideration of the fact Al-Arabi alleges to have paid said amounts (cf. point I.13 above) and the fact that the player has acknowledged the payment of USD 150,000 (cf. point I.21 above), the members of the Chamber noted that Al-Arabi had paid an excess of USD 10,000 to the player. Thus, the Chamber established that no outstanding monies were due at the time of termination by the player, who therefore did not have just cause to terminate the contract on the basis of outstanding remuneration.*

*10. Consequently, the Chamber concluded that none of the aforementioned allegations* [NB: that a car was not provided to the Player, that accommodation was not provided to the Player as a result of which he had to pay for his own hotel room, that the Player was not permitted to train with the first team and that the Player had to pay tax duties in order to remain in the country without visa] *were substantially proven and would justify the player having just cause to terminate the contract.*

*11. Furthermore, the Chamber noted that the player had claimed that Al-Arabi had never requested the delivery of the ITC, and had claimed that even had the request been sent and no reply was received from the HFF, the Kuwaiti Football Association could have provisionally registered the player. The members of the Chamber acknowledged that Al-Arabi stated that it had informed Asteras that the player had signed a contract with Al-Arabi on 8 August 2014 and had requested the ITC (cf. point I.24 above). It was noted by the Chamber that each party gave diverging positions, and in light of art. 6.3 of Annex 3 of the Regulations, the DRC took note of what is contained on TMS.*

*12. Consequently, the DRC noted from the documentation provided and the information contained on TMS that Al-Arabi had entered an ITC request on 5 August 2013 and had cancelled the ITC request on 5 September 2013, i.e. eleven days before the closure of the registration window. During this period, Asteras did not enter a counter instruction and the ITC was never transferred from the Hellenic Football Association to the Kuwaiti Football Association.*

*13. In this regard, the Chamber considered relevant to recall its jurisprudence in accordance with which the registration procedure in connection with the international transfer of a player is of the sole responsibility of a club and on which a player has no influence. With regard to the specificities of the case at stake and the aforementioned considerations, notably in point II.9 above, the members of the Chamber again concluded that Al-Arabi had cancelled the ITC request when Asteras still could have completed the administrative formalities. Bearing in mind that according to Annexe 3 of the Regulations an ITC request depends on the new club's application to the new association to register a professional, the club is actually in the position to prevent the occurrence of the condition precedent of receipt of an ITC by willfully choosing not to proceed with the application for an ITC request.*

*14. For these reasons, the members of the Chamber concluded that by cancelling the ITC request made on TMS, Al-Arabi put the player in the position where it was impossible for him to be registered, and*

*consequently impossible for him to execute his contract. The members of the Chamber concluded that the player therefore had just cause to terminate the employment contract on 5 November 2013".*

20. Having established that the Player prematurely terminated the Employment Contract with just cause, the DRC further ruled upon the consequences of such termination. In this regard, the DRC noted that on 1 January 2014 the Player had signed an employment contract with Asteras Tripolis FC valid until 30 June 2016, which provided for a total remuneration of EUR 274,475, corresponding to approximately USD 380,000 on 1 January 2014 after conversion. Therefore, according to its constant practice as well as the Player's general obligation to mitigate damages, the DRC deducted this amount from the remaining remuneration under the Employment Contract which the Player would have received if the contract had been properly performed (*i.e.* USD 750,000). Consequently, the DRC decided that the Club must pay the amount of USD 370,000 (USD 750,000 – USD 380,000) to the Player as compensation for breach of contract.

21. The DRC finally rejected all other claims lodged by the Player and the counterclaim of the Club.

22. The grounds of the Appealed Decision were notified to the Parties on 23 March 2016.

## IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (THE "CAS")

23. On 13 April 2016, the Appellant filed its statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code"). With its statement of appeal, the Appellant nominated Mr. David Wu, attorney-at-law in Shanghai, China. In its statement of appeal, the Appellant applied for a stay of the execution of the Appealed Decision and requested an extension of the time limit to file the appeal brief until 7 May 2016 due to the complexity of the case.

24. By letter of 20 April 2016, the Appellant completed its appeal and reiterated its request for an extension of the time limit to file the appeal brief.

25. By letter of 21 April 2016, the CAS Court Office notified the statement of appeal to the Respondents and invited the latter to jointly nominate an arbitrator within ten (10) days upon receipt of such letter by courier in accordance with Article R53 of the Code. The Respondents were further advised that, should they fail to jointly nominate their arbitrator within the given time limit, the President of the CAS Appeals Arbitration Division, or her Deputy, would proceed with the appointment of an arbitrator *in lieu* of the Respondents. The Respondents were further invited to state whether they consented to the extension of the time limit to file the appeal brief requested by the Appellant.

26. On 24 April 2016, the Appellant withdrew its application for a stay of the Appealed Decision.

27. On 7 May 2016, after having been granted the requested extension, the Appellant filed its appeal brief.

28. On 10 May 2016, the CAS Court Office noted that the Respondents failed to jointly nominate an arbitrator and advised them that, in accordance with Article R53 of the Code, it would be for the President of the CAS Appeals Arbitration Division to make the appointment of an arbitrator *in lieu* of the Respondents.

29. On 20 May 2016, the First Respondent requested an extension of the time limit to file its answer.

30. On 25 May 2016, the Second Respondent requested the same extension of the time limit to file its answer.

31. On 27 May 2016, the Appellant objected to the Second Respondent's request for extension. The Appellant did not object to the First Respondent's request for an extension of the time limit to file its answer.

32. On 14 June 2016, the Parties were advised that the President of the CAS Appeals Arbitration Division decided to grant the Second Respondent an extension of twenty (20) days to file its answer.

33. On 17 June 2016, the Second Respondent filed its answer.

34. On 20 June 2016, the First Respondent filed its answer.

35. On 24 June 2016, the CAS Court Office, on behalf of the Deputy President of the Appeals Arbitration Division and in accordance with Article R54 of the Code, informed the Parties that the Panel to hear this appeal was constituted as follows:

    President: Mr. Ivaylo Dermendjiev, Attorney-at-Law in Sofia, Bulgaria.

    Arbitrators: Mr David W. Wu, Attorney-at-Law in Shanghai, China;
    Prof. Stavros Brekoulakis, Professor of law, Attorney-at-Law in London, United Kingdom.

36. On 24 June 2016, the Parties were invited to inform the CAS Court Office, by 1 July 2016, whether they would prefer a hearing to be held in this matter or for the Panel to issue an award based solely on the parties' written submissions.

37. On 30 June 2016, the Appellant expressed its preference for a hearing to be held in this matter. The Respondents did not provide any comments as regards the necessity of a hearing.

38. On 1 July 2016, the Appellant filed a petition for challenge against the nomination of Prof. Stavros Brekoulakis as an arbitrator on the grounds that he is of the same nationality (Greek) as that of the Second Respondent.

39. On 18 August 2016, the Appellant submitted a letter sent by the KFA to all the Kuwaiti clubs on 13 July 2013 clarifying the starting and ending dates of the transfer windows for the 2013/2014 season.

40. By a Decision dated 22 September 2016, the Board of the International Council of Arbitration for Sport ("ICAS") dismissed the petition for challenge against the nomination of Prof. Stavros Brekoulakis, finding that *"there cannot be any doubt about the impartiality and independence of Prof. Stavros Brekoulakis in this case"*.

41. On 2 November 2016, the CAS Court Office, on behalf of the Panel, informed the Parties that the Panel deemed a hearing necessary in this matter and that it would be available on 25 January 2017. The Parties were invited by no later than 9 November 2016 to inform the CAS Court Office of any impossibility to attend the hearing at the aforementioned date. The Parties confirmed their availability for the hearing.

42. On 10 November 2016, the First Respondent completed its answer by submitting translations of certain exhibits.

43. On 11 November 2016, the Parties were invited to provide the CAS Court Office, by 21 December, with the names of all the persons attending the hearing.

44. On 21 December 2016, the Appellant's Counsel notified the CAS Court Office that he would not be able to attend the hearing on 25 January 2017 due to failure of the Club to pay the agreed legal fees and travelling expenses. Since 21 December 2016, the Appellant has no longer been represented by external counsel in this procedure.

45. On 22 December 2016, the CAS Court Office reconfirmed that the hearing would be held on 25 January 2017 and extended by one (1) week the deadline for the parties to provide the names of the persons to attend the hearing. Such time limit was further extended by a letter of the CAS Court Office dated 30 December 2016.

46. On 2 January 2017, the Second Respondent notified the CAS Court Office that Mr. Luca Tettamanti, Attorney-at-law, Lugano, Switzeland would attend the hearing on its behalf.

47. On 6 January 2017, the First Respondent informed the CAS Court Office that the Player would personally attend the hearing along with Mr Stéphane Ceccaldi, Attorney-at-Law, Marseille, France and Mr Moustapha Kamara, Attorney-at-Law, Marseille, France.

48. By 9 January 2017, the Appellant had not informed the CAS Court Office who would attend the hearing fixed on 25 January 2017 and was requested to do so without further delay. Despite numerous invitations, the Appellant did not announce any participants for the hearing.

49. On 18 January 2017, the CAS Court Office sent an Order of Procedure for this matter and requested the Parties to sign and return it by 23 January 2017.

50. On 23 January 2017, the Second Respondent signed the Order of Procedure.

51. On 25 January 2017, the First Respondent signed the Order of Procedure.

52. The Appellant did not sign the Order of Procedure.

53. A hearing was held on 25 January 2017 on the basis of the notice given to the Parties in the CAS Court Office's letters dated 2 November 2016 and 22 December 2016. The Panel was assisted at the hearing by Mr Fabien Cagneux, Counsel to CAS. The following persons attended the hearing:

    i. for the Appellant: the Appellant was not present or represented at the hearing;

    ii. for the First Respondent: Mr. Stéphane Ceccaldi, counsel, and Mr. Moustapha Kamara, co-counsel;

    iii. for the Second Respondent: Mr. Luca Tettamanti, counsel.

54. At the hearing, in the absence of the Appellant, the Respondents made submissions in support of their respective cases.

55. At the hearing, the Second Respondent, with the consent of the First Respondent and upon authorization of the Panel, produced a FIFA TMS document evidencing the starting and the ending dates of the transfer windows set by KFA.

56. On 26 January 2017, the Appellant was granted seven (7) days to comment on the said document produced by the Second Respondent at the hearing.

57. The Appellant did not provide any comments within the given deadline, or at all.

58. On 7 February 2017, the CAS Court Office advised the Parties that in the absence of any communication by the Appellant the Panel would now proceed to draft the arbitral award.

## V. POSITIONS OF THE PARTIES

59. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel, indeed, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

### A. The Appellant

60. The Appellant's submissions, may be summarized as follows:

- On 19 June 2013, the Player and the Club entered into the Employment Contract and on 23 June 2013 the Club paid the Player the amounts of Kuwait Dinar (KWD) 28,500 and 14,200, which is approximately USD 150,000, to cover the signing fee of USD 100,000 and the first monthly salaries due. The Employment Contract commenced on 1 August 2013 and on 5 August 2014 the Player arrived to Kuwait to join the team.

- On 5 August 2013, the Club uploaded the Player's information and the Employment Contract in the TMS to make the necessary ITC request. On 9 August 2013, the Player travelled to Portugal for the team's preseason training and returned to Kuwait on 24 August 2013.

- The Kuwait football season commenced on 30 August 2013 but the Player did not play in any official matches of the Club because the ITC was never transferred to the KFA. On 5 September 2013, having received no response from the Player's former club (the Second Respondent), the Club cancelled the ITC request. This was the final date of the summer transfer window as evidenced by letters of the KFA.

- The first monthly salary was due to be paid at the end of September 2013. Given that the Player had received USD 150,000 on 23 June 2013 of which only USD 100,000 constituted the sign-on fee, the Player's salary was covered and no further outstanding payments were due as at 5 November 2013. There was no basis in the Player's claim that the extra USD 50,000 was an additional sign-on bonus outside the terms of the contract.

- The Club offered the Player one of the Club's apartments but the Player refused the accommodation and preferred to stay at a hotel. The Club, however, could not continue to pay for the hotel indefinitely. In respect of the car promised to the Player, it was explained to him that in order for the Player to have access to a car, he would need to complete a visa application so as to be able to obtain the corresponding driving license. However, the Player refused to cooperate with the Club.

- The Player was not denied the opportunity to train with the first team. It was not unusual that a player might train with the reserves. The Employment Contract did not put a positive obligation on the Club to have the Player in the first team at all times. Furthermore, the Player had shown a negative attitude and low performance level since the preseason training. It was the Player who did not want to play for the Club. Whilst the Club did not want to terminate the Employment Contract, it considered that it should speak to the Player's agent to see if another club could be found for the Player. At no point, however, the Club took any steps to terminate the Employment Contract which was clearly supported by the "WhatsApp" messages exchanged between the Club's Vice-President and the Player's agent.

- The cancellation of the ITC request was made on 5 September 2013, just hours before the registration window would be closed. The ITC request remained pending for a month and there was no reason to believe that the Second Respondent would have completed the information in the late hours of the final evening of the transfer window. The starting

and ending dates of the registration window were specified in letters of the KFA sent to all Kuwaiti clubs. The Club could not control the actions of third parties with respect to obtaining of the ITC. Having received no response from the Second Respondent, a full ten (10) days before the request was withdrawn, the Appellant wrote to the KFA on 25 August 2013 asking it to contact the Second Respondent to move forward with the ITC.

- According to the established DRC jurisprudence, the registration of a player and the ITC of a player did not have any effect on the validity of a contract between a player and a club. The issuance of the ITC and the registration of a player are administrative formalities which could not invalidate an employment contract. Applying this reasoning of the DRC, the Player did not have just cause to terminate the Employment Contract.

- On the contrary, by leaving Kuwait on 8 November 2013, the Player was in breach of the Employment Contract. By leaving the country, the Player confirmed that he no longer intended to comply with his obligations under the Employment Contract. As at termination, the Player was already in breach of the Employment Contract by refusing to cooperate with the Club to obtain the necessary visa for residence and for performing work obligations in Kuwait. All actions of the Player should be viewed in the context of the general bad faith of the Player throughout the period of the Employment Contract.

- As a result of the Player's violations and consequent breach of the Employment Contact, the Club is entitled to claim for damages. On the basis of contractual provisions (Articles 3 and 21 of the Employment Contract) and Article 17.1 of the Regulations on the Status and Transfer of Players ("RSTP"), the Club is entitled to repayment of USD 150,000 that it had paid to the Player. In addition, the Club seeks compensation in the amount of USD 970,731, which is the amount that would be due to the Player under the Employment Contract.

- The DRC, relying on the information in TMS, found that the Club had in fact made an ITC request for the Player. The Second Respondent violated the RSTP in that it failed to check regularly the TMS to respond to the ITC request. The Second Respondent benefited from its failure to complete the ITC request as the Player, after leaving the Club, re-signed with the Second Respondent besides not having a just cause to terminate the Employment Contract. Therefore, the Second Respondent should be subject to sporting sanctions and must be held jointly and severally liable for any sums the Player would be ordered to pay to the Club.

61. In its prayers for relief, the Appellant requests the Panel the following:

*"a. to accept this appeal against the Decision;*

*b. to set aside the Decision, and in particular to:*

*i. set aside the decision of the DRC to partially uphold part of the Player's claim and to reject the whole of the Player's claim;*

*ii. set aside the decision of the DRC to reject the Club's counterclaim and to accept the counterclaim of the Club;*

*c. to find that the Player was in breach of this employment contract with the Club;*

*d. to order the Player and/or Asteras to pay damages (plus interest) to the Club and to order that Asteras should be jointly and severally liable for any damages owed by the Player;*

*e. to order the Player and/or Asteras to pay the costs of this arbitration process and the legal expenses incurred by the Club; and*

*f. to impose sporting sanctions on Asteras".*

## B. The First Respondent

62. The First Respondent's submissions may be summarized as follows:

- The Appellant failed to initiate and comply with the procedure aiming at obtaining an ITC. The FIFA TMS website confirmed that the summer transfer window in Kuwait has lasted from 22 July until 16 September for each year since 2013. The documents issued by the KFA were probably back-dated for the sake of the case.

- The TMS application produced by the Appellant showed that the ITC request was not filed out properly as it is evident from the filings with respect to ITC delivery date. The HFF confirmed that the KFA had not submitted any request for ITC in favour of its affiliated club.

- Completing the registration process in connection with the Player's ITC was the responsibility of the Appellant. Even if the request had been sent and no reply was received from the HFF, the KFA could have provisionally registered the Player. Nothing had been undertaken to register the Player on a provisional basis. Failure to achieve the registration and the ITC process had no consequence on the validity of the Employment Contract but only on its possible enforcement. By cancelling the ITC request, the Appellant put the Player in a position where it was impossible for him to be registered and consequently impossible for him to execute his contract.

- In addition, the First Respondent claimed that the Appellant failed to comply with its monetary obligations with respect to the salaries due to the Player. The First Respondent disagreed with the Appellant on the nature of the USD 50,000 received in excess of the contractually agreed sign-on bonus in the amount of USD 100,000. According to the First Respondent, the amount of USD 50,000 was an additional bonus paid to the Player when he actually signed the Employment Contract absent of any contractual justification for such payment and at a time when monthly salaries were not due and the TMS formalities had not been even initiated.

- With regard to accommodation and car promised to the Player, it was up to the Appellant to provide compelling evidence demonstrating that an apartment and a car had been provided to the Player. The same applied also to proving that the Player was not training with the reserve team, which was in any way not disputed by the Appellant. The rental contracts for an apartment and a car submitted by the Appellant were not conclusive.

- The evidence on record ("WhatsApp" conversations transcripts) showed that the Club wished to release the Player and retrieve the monies paid to him. From as early as mid-August 2013, the Club had been reluctant to keep the Player.

- With reference to Articles 13 and 14 of the RSTP and Article 337 of the Swiss CO and as a consequence of the non-performance by the Appellant, the Player had a just cause for the termination of the Employment Contract.

- As a result of the termination of the Employment Contract with just cause, the Player is entitled to compensation for damages (Articles 97 and 337b of the Swiss CO). The positive damages subject to reparation were the Player's salaries and other material income he would have had, if the Employment Contract had been performed until its natural expiration. Therefore, in addition to the amounts awarded by the DRC, the First Respondent claimed to be entitled to amounts corresponding to two monthly salaries, counter value of the apartment and a car and two family return plane tickets with interest at an annual legal rate of 5%. Reviewing the case *de novo*, the Panel would complete the Appealed Decision with these amounts.

63. In its prayers for relief, the First Respondent requests the following from the Panel:

*"1. For the foregoing reasons, the decision issued by the FIFA Dispute Resolution Chamber on 15 October 2015 is to be confirmed in so far as it held:*

*a) That the claim of Papa Khalifa Sankaré, is partially granted;*

*b) That the Respondent Mr Papa Khalifa Sankaré had a just cause to unilaterally terminate the employment contract on 5 November 2013 and that he cannot be held liable for breach of the contract without just cause in consequence thereof;*

*c) That the Club Al Arabi SC is ordered to pay to Papa Khalifa Sankaré compensation for breach of contract in the amount of USD 370,000, within 30 days as from the date of notification of this decision;*

*2. Reviewing the case de novo, the CAS will order the Appellant Al Arabi SC to pay to Mr Papa Khalifa Sankaré an annual 5% interest on the USD 370,000 compensation from the date of termination to June 2016, in the amount of USD 46,250;*

*3. Reviewing the case de novo, the Panel will find that the Appellant was owing two outstanding payments promised as salaries due for September and October 2013 and consequently order the Appellant to pay to the Respondent:*

*a) the sum of USD 40,000 (two monthly salaries) plus a 5% annual interest on this outstanding payments of USD 5000;*

*b) The sums of USD 108,000 corresponding to the counter value of the apartment and the car promised to the player during the life of the contract plus a 5% annual interest on this USD 108,000 payment, of USD 13,500;*

*c) The sum of USD 48,000 corresponding to the plane tickets from Doha to Dakar twice a year for each season during the life of the contract; plus a 5% annual interest on this USD 48,000 payment of USD 6000;*

*4. The CAS will grant the Respondent Mr Papa Khalifa Sankaré's motion to dismiss the Al Arabi SC appeal;*

*5. Mr Papa Khalifa Sankaré is granted an Award for costs of 50.000 Swiss Francs".*

## C. The Second Respondent

64. The Second Respondent's submissions may be summarized as follows:

- On 19 July 2012, the Second Respondent signed for the first time a labour contract with the Player valid until 30 June 2013. Following a successful season with the Second Respondent, the Player was eager to move to another club which was able to pay him significantly higher salary. Thus, the Player concluded an employment contract with the Appellant somewhere in June 2013, well before the expiration of his contract with the Second Respondent.

- After the Player had terminated his contract with the Appellant, his agent approached the Second Respondent examining the possibility to have the Player joining the Second Respondent. Having understood that the Player was never actually registered with the Appellant, information which was clear from both the FIFA TMS and from inquiry at the HFF, on 1 January 2014, the Second Respondent signed for the second time a contract with the Player valid until 30 June 2016.

- On 4 January 2014, three days after the Player was registered, the Second Respondent was informed for the first time by the HFF that a request from the KFA was sent to the HFF for the release of the ITC of the Player. The Second Respondent refused to release the Player's ITC since the Player belonged to it and there was no agreement to transfer him.

- By signing the contract on 1 January 2014 with the Player, the Second Respondent violated neither the FIFA Regulations nor any right of the Appellant. The Appellant never intended to register the Player as it lost interest in him. The Appellant did not actually and actively pursue the receipt of the Player's ITC.

- The payment of 14,200 KWD made on 23 June 2013 was effected when the Player was still under a contract with the Second Respondent and actually represented a signing fee. The Appellant was obviously planning to let the Player go following the performance of the Player in the pre-season training which was unsatisfactory for the Appellant. During the period from the return of the team from the pre-season training until 5 November 2013 the Player was not participating in any activity of the Club. The withdrawal of the Appellant's request for the Player's ITC demonstrates that the Club lacked any interest in the Player.

- The Second Respondent's first contract with the Player expired on 30 June 2013. Had the Second Respondent received a request it would have certainly released the ITC. As confirmed by the HFF, however, no request for release of the Player had been received within the period 30 June 2013 - 2 January 2014. The reason could be that some elements of the request were missing or that the Appellant did not fully upload the request in the TMS, or that the request was not further notified to the HFF and the Second Respondent.

- If the Appellant was really willing to register the Player it could have done so on a provisional basis as permitted by the FIFA regulations. The registration of a player is the sole responsibility of the registering club. The Club re-entered the request for release of the ITC on 4 January 2014 only as a reaction to the claim already filed by the Player before FIFA and for the purpose of filing a counterclaim against the Second Respondent.

65. In its prayers for relief, the Second Respondent requests the following from the Panel:

*"1. To accept all and every manifestation, argument, document and proof that the Second Respondent made and present as valid and true.*

*2. To reject all and every claim, argument and position of the Appellant.*

*3. To confirm the decision of the FIFA DRC dated October 15th 2015.*

*4. To reject the appeal lodged by the Appellant.*

*5. To decide that the First Respondent terminated the employment contract with the Appellant with a just cause;*

*6. To condemn the Appellant to bear all the administrative costs and legal expenses of this case before CAS.*

*7. To condemn the Appellant to compensate the legal costs of the Appellant* [*recte*: Second Respondent] *of as a sum of CHF 15.000".*

## VI. JURISDICTION OF THE CAS

66. 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".*

67. The jurisdiction of the CAS, which is not disputed by either Party, derives from Article 67 of the FIFA Statutes (edition 2014, in force as of 1 April 2015; the current version of the FIFA Statutes entered in force from 26 April 2016, *i.e.* after the statement of appeal was filed). The provisions of the FIFA Statutes that are relevant to that effect in these proceedings are the following:

*Article 66 "Court of Arbitration for Sport (CAS)":*

> *"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players' agents.*
>
> *2. 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".*

*Article 67 "Jurisdiction of CAS":*

> *"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.*
>
> *2. Recourse may only be made to CAS after all other internal channels have been exhausted.*
>
> *3. CAS, however, does not deal with appeals arising from: a) violations of the Laws of the Game; b) suspensions of up to four matches or up to three months (with the exception of doping decisions); c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.*
>
> *4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect".*

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

## VII. ADMISSIBILITY

69. 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".*

70. The grounds of the Appealed Decision were notified to the Parties on 23 March 2016. The statement of appeal was filed on 13 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 (ed. 2014) referred to in the Appealed Decision itself.

71. No further recourse against the Decision is available within the structure of FIFA. Consequently and in perfect accordance with the aforementioned Article 47 of the Code, the internal legal remedies have been exhausted.

72. Accordingly, the appeal filed by the Club is admissible.

73. In its Answer, the First Respondent stated that *"[t]he DRC reasoning is to be affirmed with the exception that follows"* (par. 99 of the Answer, *in fine*). The exceptions specified by the First Respondent relate to: *(i)* alleged outstanding payments in the amount of USD 196,000 which were not awarded by the DRC and *(ii)* interest on the awarded amounts to be accrued from the termination of the Employment Contract and not from the notification of the Appealed Decision (paras. 100-114 of the Answer). In addition, the First Respondent acknowledged that he did not appeal the decision but nevertheless claimed that *"he is not deprived of the right to challenge some of the findings of the DRC, which happen to be incorrect"* (par. 59 of the Answer).

74. Further, in his prayers for relief, the First Respondent requested *inter alia* that, reviewing the case *de novo*, the CAS should order the Appellant to pay to the Player an annual 5 % interest on the awarded USD 370,000 from the date of termination, as well as outstanding payments of two monthly salaries (USD 40,000) and monies corresponding to the value of apartment and car promised to the Player (USD 108,000) and to the value of plane tickets (USD 48,000) with 5 % annual interest accrued thereon.

75. The Panel notes that the Code does not provide for the possibility of a respondent to file in appeal arbitration proceedings a counterclaim against a decision challenged by the appellant - any party wishing to have the disputed decision set aside or modified has to file an independent appeal. Although the First Respondent's request was not made as counterclaim in the strict sense of the word or as an appeal against the Appealed Decision, in effect it seeks modification or a supplement of the holding of the Appealed Decision. With respect to the request for awarding interest on principal amounts, which was initially not claimed by the First Respondent before FIFA, the Panel notes that it goes beyond the permitted scope of review under Article R57 of the Code the review of prayers for relief which have not been included in the subject matter of the claim lodged before the first instance legal body. The Panel is not in a position to decide on a claim that has not been previously reviewed within FIFA and for which the internal remedies are not exhausted. CAS jurisprudence shows that, in reviewing a case in full, a Panel cannot go beyond the scope of the previous litigation and is limited to the issues arising from

the challenged decision (CAS 2007/A/1396 & 1402, CAS 2012/A/2875). In addition, with regard to all prayers for relief which seek an award beyond and above the USD 370,000 already awarded with the Appealed Decision, the Panel holds that it is not permitted to review and eventually entertain such prayers since no appeal was formally filed to that effect (CAS 2013/A/3204, CAS 2010/A/2098).

76. Accordingly, the First Respondent's requests that the Panel decides in the award that the Club be liable to pay the Player an annual 5 % interest on the awarded USD 370,000 from the date of termination of the Employment Contract, as well as outstanding payments of two monthly salaries (USD 40,000) and monies corresponding to the value of apartment and car promised to the Player (USD 108,000) and to the value of plane tickets (USD 48,000) with 5 % annual interest accrued thereon are inadmissible.

## VIII. APPLICABLE LAW

77. 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".*

78. 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 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".*

79. In Article 28 of the Employment Contract, the Club and the Player recognized and confirmed that disputes concerning the execution or interpretation of the contract *"shall fall under the football international federation association".*

80. The Parties expressly agreed in their respective submissions that, for the resolution of the dispute, the Panel shall apply primarily the FIFA Regulations on the Status and Transfer of Players ("RSTP").

81. Therefore, the FIFA rules and regulations shall be applied primarily. Swiss law applies subsidiarily to the merits of the dispute.

82. In the present case, the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, the FIFA Statutes and FIFA's regulations (in the edition applicable *ratione temporis* to the facts of the case), which must be primarily applied, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA's rules and regulations. More precisely, the Panel agrees with the DRC that the regulations concerned, apart from the FIFA

Statutes, are particularly the RSTP, edition 2012, considering that the matter was brought to FIFA on 11 December 2013 after the entry into force of the RSTP 2012 (1 December 2012).

83. As the present dispute concerns in essence employment matters regarding the termination of the Employment Contract and its consequences, such as compensation, the following particular rules of the RSTP 2012 are applicable:

*"**Article 5: Registration***

*1. A player must be registered at an association to play for a club as either a professional or an amateur in accordance with the provisions of article 2. Only registered players are eligible to participate in organised football. By the act of registering, a player agrees to abide by the statutes and regulations of FIFA, the confederations and the associations.*

*(…)*

***Article 6: Registration periods***

*1. Players may only be registered during one of the two annual registration periods fixed by the relevant association. As an exception to this rule, a professional whose contract has expired prior to the end of a registration period may be registered outside that registration period. Associations are authorised to register such professionals provided due consideration is given to the sporting integrity of the relevant competition. Where a contract has been terminated with just cause, FIFA may take provisional measures in order to avoid abuse, subject to article 22.*

*2. The first registration period shall begin after the completion of the season and shall normally end before the new season starts. This period may not exceed 12 weeks. The second registration period shall normally occur in the middle of the season and may not exceed four weeks. The two registration periods for the season shall be entered into TMS at least 12 months before they come into force (cf. Annexe 3, article 5.1 paragraph 1). FIFA shall determine the dates for any association that fails to communicate them on time.*

*(…)*

***Article 9: International Transfer Certificate***

*1. Players registered at one association may only be registered at a new association once the latter has received an International Transfer Certificate (hereinafter: ITC) from the former association. The ITC shall be issued free of charge without any conditions or time limit. Any provisions to the contrary shall be null and void. The association issuing the ITC shall lodge a copy with FIFA. The administrative procedures for issuing the ITC are contained in Annexe 3, article 8, and Annexe 3a of these regulations.*

*(…)*

***Article 13: Respect of contract***

*A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.*

***Article 14: Terminating a contract with just cause***

*A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.*

*(…)*

***Article 16: Restriction on terminating a contract during the season***

*A contract cannot be unilaterally terminated during the course of a season.*

***Article 17: Consequences of terminating a contract without just cause***

*The following provisions apply if a contract is terminated without just cause:*

*1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

84. Annexe 3 to the RSTP regulating the Transfer Matching System ("TMS") is also relevant for the present dispute.

## IX. THE MERITS OF THE APPEAL

85. 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 Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

86. Based on the Parties' submissions, the issues for determination are the following:

a) Was the termination of the Employment Contract made by the Player with just cause?

b) Depending on the answer to *(a)* above, what are the legal consequences of the termination of the Employment Contract with just cause?

c) Depending on the answer to *(b)* above, were damages for breach of contract determined correctly in the Appealed Decision?

**a) Was the termination of the Employment Contract by the Player with just cause?**

87. The central issue to be determined in the present matter is which party was in breach of the Employment Contract and thus whether the Player unilaterally terminated the Employment Contract without just cause or whether the Club breached the Employment Contract, entitling the Player to unilaterally terminate the contract with just cause.

88. The Panel has to establish if the unilateral termination of the Employment Contract by the Player was eventually done with or without just cause. The RSTP do not provide the definition of *"just cause"*.

89. The Commentary on the RSTP states the following with regard to the concept of just cause: *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally"* (RSTP Commentary, N2 to Article 14).

90. The CAS has had the opportunity of specifying in its jurisprudence that while the FIFA rules do not define the concept of "just cause", reference should be made to the law subsidiary applicable, *i.e.* Swiss law (CAS 2006/A/1062; CAS 2008/A/1447).

91. Article 337 para. 2 of the Swiss CO provides that *"a valid reason is considered to be, in particular, any circumstance under which, if existing, the terminating party can in good faith not to be expected to continue the employment relationship"*. The concept of "just cause" as defined in Article 14 RSTP must therefore be linkened to that of "valid reason" within the meaning of Article 337 para. 2 Swiss CO.

92. It is generally accepted in most legal systems that an employment contract which has been concluded for a fixed term can only be unilaterally terminated prior to expiry of the term of the contract if there is good cause or a valid reason. This would be any situation, in the presence of which the party terminating the contract cannot in good faith be expected to continue the employment relationship.

93. For example, a grave breach of duty by the employee or the employer would constitute a good cause. The existence of a valid reason may be admitted when the essential conditions, of an objective or personal nature, under which the contract was concluded are no longer present. Only a breach which is of a certain severity justifies termination of a contract. In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties such as serious breach of confidence. According to the practice of the Swiss Federal Tribunal, an employment contract may be terminated immediately for good reason when the main terms

and conditions, under which it was entered into are no longer implemented and the party terminating the employment relationship cannot be required to continue it (ATF 101 Ia 545; Judgment 4C.240/2000 of 2 February 2002; Judgment 4C.67/2003 of 5 May 2003; WYLER R., *Droit du travail*, Berne 2002, p. 364; TERCIER P., *Les contrats spéciaux*, Zurich 2003, N3402, p. 496).

94. The circumstances must be such that, according to the rules of good faith, the party terminating the employment relationship cannot be required to continue it. When immediate termination is at the initiative of the employee, a serious infringement of the employee's personality rights, consisting, for example, in unilateral or unexpected change in his status which is not related either to company requirements or to organization of the work or the failings of the employee, may be deemed "good reason".

95. According to Articles 28 *et seq.* of the Swiss Civil Code, any infringement of personality rights caused by another is presumed to be illegal and subject to penalties unless there is a justified reason that overturns this presumption. It is generally accepted in jurisprudence (ATF 120 II 369; ATF 102 II 211; ATF 137 III 303; Judgment of the Swiss Federal Tribunal 4A_558/2011, dated March 27, 2012) that personality rights apply to the world of sport. For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. An athlete who is not actively participating in competitions depreciates on the market and reduces his future career opportunities. Athletes have therefore a right to actively practice their profession. To the extent that Articles 28 *et seq.* Civil Code protect parties from negative actions and require offending parties to refrain therefrom, but do not grant rights to positive actions, such right to actively practice one's profession is resolved notably by labour law (CAS 2013/A/3091, 3092 & 3093).

96. Applying the above principles, the Panel will go on to establish if, considering the particular circumstances of the case, the Player had just cause to unilaterally terminate the Employment Contract. In performing this exercise, the Panel will start from analyzing the ITC issue as the Player's claim was partially upheld by the DRC exactly on the account that the Club was found to be in breach of the Employment Contract by cancelling the ITC request prior to closing of the transfer window.

97. Since 1 October 2010, the TMS has been incorporated into the FIFA RSTP. The use of TMS is mandatory for all international transfers of professional male players within the scope of 11-a-side football. In particular, Annexe 3 of the Regulations sets out the obligations of associations and clubs in relation to the use of TMS when processing the international transfer of professional male players.

98. Pursuant to Article 5(1) of the RSTP, a player must be registered with an association to play for a club since only players that have been registered with a member association can participate in organized football.

99. According to Article 6 of the RSTP, players may only be registered during one of the two annual registration periods fixed by the relevant association. The first registration period shall begin

after the completion of the season and shall normally (but not necessarily) end before the new season starts. The two registration periods for the season with start and end dates shall be entered into TMS at least 12 months before they come into force (*cf.* Annexe 3, Article 5.1 paragraph 1).

100. Therefore, in light of the applicable regulations, the Player could have been registered with the Club during the transfer window fixed by the KFA. The Parties adopt diverging positions as to the exact end date of the summer transfer window in the 2013/2014 season. In order to substantiate that the transfer window closed on 5 September 2013, the Appellant relies on letters by the KFA specifying that the first registration period for the 2013/2014 season had started on 14 July 2013 and ended on 5 September 2013.

101. In light of the applicable regulation (Annexe 3 to RSTP, Article 5.1 paragraph 1), the KFA would enter the registration periods in the TMS at least 12 months before they come into force. Indeed, the KFA entered the registration periods in the TMS. At the hearing, the Second Respondent submitted a FIFA TMS document (to which the Appellant did not provide any comments) evidencing the start and the end dates of the transfer windows set by KFA and entered into the TMS. The FIFA TMS document specifies the date 16 September 2013 as the end date of the first transfer window for the 2013/2014 season. Unlike the FIFA TMS, the end date of the summer transfer window shown in the letters issued by the KFA and filed by the Appellant appears to be 5 September 2013. The Panel notes that the letters of the KFA do not specify any exceptional circumstances dictating the amendment or modification of the registration period dates *(cf.* Annexe 3 to RSTP, Article 5.1 paragraph 1, second sentence). Even if such circumstances existed, the KFA obviously did not modify the information in the TMS which remained unchanged. Besides, some inconsistencies are detected in the letters of the KFA. For example, the letters dated 13 July 2013 and 29 December 2013 specify the date 2 January 2014 as the start date of the second transfer window, while the letter of 6 April 2016 refers to the date 1 January 2014. The Panel, therefore, gives credit to the official data provided by the KFA in the TMS and accordingly accepts that the first registration period for the 2013/2014 commenced on 14 July 2013 and ended on 16 September 2013. Consequently, the Appellant's cancellation was formally announced in the TMS eleven (11) days prior to the expiration of the registration period.

102. Article 9(1) of the RSTP states that international transfers cannot take place without an ITC. Article 9 RSTP requires that, in the case of an international transfer, an ITC must be requested and obtained in advance, that is, prior to the registration with a new club. This provision establishes that a player already registered in an association may only be registered with a new association (and a new club) when the latter has received an ITC for the player from the former association. In any case, considering that the procedure for the issuance of an ITC may be initiated only when the club to which the player is moving files an application to its association, this club is also responsible for ensuring that the ITC has been actually issued and received in a timely fashion. Failure to submit the mentioned application and to report the international transfer to the new association represents a breach of Art. 9(1) RSTP.

103. Annexe 3 RSTP underlines the central role of the TMS and the clubs requesting registration in this respect. Pursuant to Annexe 3 of the RSTP, it is the new club which has to initiate the procedure aiming at obtaining an ITC, by submitting a request to the competent association, to be filed by the club by using the FIFA TMS. If the club does not initiate the procedure for the issuance of the ITC nor complies with it, it is in breach of Article 9(1) of the RSTP.

104. The procedure for the issuance of an ITC begins with a request by the club to which the player moves, which must be submitted by the club itself through the FIFA TMS. All data allowing the new association to request an ITC shall be entered into TMS, confirmed and matched by the club wishing to register a player during one of the registration periods established by that association. The new club shall upload at least the mandatory set of documents required in the TMS. Upon notification in the system that the transfer instruction is awaiting an ITC request, the new association shall immediately request the former association through TMS to deliver an ITC for the professional player. At the very latest, the ITC must be requested by the new association in TMS on the last day of the registration period of the new association.

105. Annexe 3 to the RSTP further provides that upon receipt of the ITC request, the former association shall immediately request the former club and the professional player to confirm whether the professional player's contract has expired, whether early termination was mutually agreed or whether there is a contractual dispute. Within seven days of the date of the ITC request, the former association shall, by using the appropriate selection in TMS, either deliver the ITC in favour of the new association and enter the deregistration date of the player or reject the ITC request and indicate in TMS the reason for rejection. Nevertheless, if the new association does not receive a response to the ITC request within 15 days of the ITC request being made, it shall immediately register the professional player with the new club on a provisional basis ("provisional registration").

106. It is undisputed that no ITC has ever been issued in the present case. The Parties are in disagreement as to the reasons for this. The Appellant accuses the Second Respondent of not responding to the Appellant's instruction in the TMS while the Respondents assert that the Second Respondent and the HFF never received a valid request.

107. It is difficult for the Panel to trace the actual matching process that took place as from entering of the instruction by the Appellant in the TMS on 5 August 2013 until the cancellation on 5 September 2013. Curiously, the Appellant's instruction in the TMS refers to a non-existing transfer contract dated 1 July 2013 (the Appellant and the Second Respondent never entered into a transfer contract since the Player was a free agent at the time of the transfer). In addition, the fields in the TMS form related to the ITC request date are blank.

108. In any event, according to the applicable regulations quoted above, the ITC request should have been forwarded by the former association (HFF) to the new association (KFA). Indeed, on 25 August 2013, the Appellant requested the KFA to contact the HFF with respect of the delivery of the Player's ITC. No evidence was presented as to whether the KFA actually approached the HFF. As confirmed in letters of the HFF, it was not before 4 January 2014 (after the Player had been already registered again for the Second Respondent) that the HFF received an ITC request

for the Player. Nevertheless, in the Panel's opinion, it was up to the Appellant to pursue its request to the KFA so that the ITC delivery process would be eventually completed within the registration period.

109. Even if the Second Respondent and/or the HFF were found to be in violation of their TMS obligations and were not responding to the ITC request as a result of which the Player's ITC was not provided, the Appellant could still have applied before the KFA for registering the Player on a provisional basis (Annexe 3 to RSTP, Article 8.2 paragraph 6) had it not cancelled the request and if it really wished to make use of the Player's services.

110. The Panel holds that among a player's fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also a reasonable opportunity to compete with his fellow team mates in the team's official matches. By not registering the Player, even if it had the legal options to do so, the Club effectively barred in an absolute manner the potential access of the Player to competition and, as such, violated one of his fundamental rights as a football player, thus breaching the contract since it *de facto* prevented the Player from being eligible to play for the Club.

111. The Employment Contract was therefore not terminated by mutual agreement, but unilaterally by the Player with just cause due to the Club's misbehaviour. From the facts stated before, the Panel is satisfied that the unilateral termination was caused by the Appellant in that it cancelled the ITC request on 5 September 2013 in the TMS. This cancellation in the TMS had the effect of a just cause for the Player to terminate the Employment Contract. As mentioned above, according to Article 5 para. 1 RSTP, a player must be registered with an association to play for a club. Only registered players are eligible to participate in organized football. Article 11 RSTP states that any player not registered with an association who appears for a club in any official match shall be considered to have played illegitimately (ZIMMERMANN M., Vertragsstabilität im internationalen Fussball, Zürich 2015, p. 71). Therefore, the Appellant has barred the First Respondent's access to any official match with its team and it is therefore violating the First Respondent's fundamental right as it employed football player to compete on the highest level possible. Failure to register the Player when opportunities for registration were still not exhausted is therefore a serious breach of contract (similarly in CAS jurisprudence, CAS 2013/A/3091, 3092 & 3093, para. 228) which entitled the Player to terminate the Employment Contract with just cause. The Appellant clearly showed *de facto* that it did not rely on the First Respondent's services anymore when announcing in the TMS the cancelling of the request.

112. In addition, the Panel attaches importance to the conduct of the parties following the execution of the Employment Contract. The Panel notes that the Appellant was not satisfied with the Player's performance during the pre-season training. However, according to CAS jurisprudence, inadequate sporting performance cannot constitute a legitimate reason to terminate the Employment Contract (CAS 2010/A/2049, para. 12; see also ZIMMERMANN M., Vertragsstabilität im internationalen Fussball, Zürich 2015, p. 237). As evident from the "WhatsApp" conversation between the Vice-President of the Club and the Player's agent of 17 August 2013 (*i.e.*, well before the team returned in Kuwait on 24 August 2013 from the pre-season training in Portugal and before the season began in early September 2013), the Club was

already discussing the possibility that the Employment Contract be cancelled and another club was found for the Player. The Club was also mindful to retrieve the money paid to the Player.

113. Therefore, the Panel concludes that the Employment Contract was unilaterally terminated by the Player with just cause.

114. Given that the Panel already found that the Employment Contract was terminated by the Player with just cause due to failures of the Club with regard to completion of the ITC process, it does not need to determine the issue of whether the parties' conduct concerning accommodation, car and plane tickets provided in the Employment Contract would qualify as grave breaches justifying its termination.

**b) What are the legal consequences of termination of the Employment Contract with just cause?**

115. Having established that the Club is to be held liable for the early unilateral termination of the Employment Contract by the Player, the Panel will now proceed to assess the legal consequences of the termination.

116. The Panel observes that the DRC awarded the amount of USD 370,000 to the Player as compensation for the breach of contract by the Club as well as 5 % interest *per annum* after the expiry of 30 days as from the date of notification of the Appealed Decision.

117. The Panel observes that Article 14 of the RSTP reads as follows:

> *"A contract may be terminated by either party without consequences of any kind (either payment or compensation or imposition of sporting sanctions) where there is just cause".*

118. Although the Panel has established that the Player had just cause to terminate his Employment Contracts with the Club, this provision does not specifically determine that the Player is entitled to any compensation for breach of contract by the Club.

119. The Panel, however, is satisfied that the Player is, in principle, entitled to compensation because of the breach of the Employment Contracts by the Club. In this respect, the Panel makes reference to the Commentary to the RSTP (the "FIFA Commentary"). According to Article 14 (5) and (6) of the FIFA Commentary, a party *"responsible for and at the origin of the termination of the contract is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed".* Accordingly, although it was the Player who terminated the Employment Contract by filing a claim against the Club with FIFA, the Club was at the origin of the termination of the Employment Contracts and is thus liable to pay compensation for damages suffered by the Player as a consequence of the early termination.

120. The Panel observes that Article 17 (1) of the RSTP determines the financial consequences of a premature termination of a contract:

*"The following provisions apply if a contract is terminated without just cause:*

*1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annex 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

121. As the Employment Contract does not contain any contractual provisions determining the consequences of a possible unilateral breach by the Club (Article 3 of the Employment Contract provides only for compensation in favour of the Club in case of early termination by the Player without just cause), the Panel applies Article 17 of the RSTP and notes that there is ample jurisprudence of CAS on the issue of breach of contract. The vast majority of this jurisprudence establishes that the purpose of Article 17 of the RSTP is basically nothing more than to reinforce contractual stability, *i.e.* to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (CAS 2012/A/2874, §128, CAS 2012/A/2932, §84; CAS 2008/A/1519-1520, §80, with further references to CAS 2005/A/876, p. 17: *"(…) it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' (…)"*; CAS 2007/A/1358, §90; CAS 2007/A/1359, §92: *"(…) the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability (…)"*, confirmed in CAS 2008/A/1568, §6.37).

122. Therefore, in the case of premature termination of the Employment Contract the breaching party (the Club) shall owe compensation to the Player.

**c) Is the compensation for breach of contract determined correctly in the Appealed Decision?**

123. In respect of the calculation of compensation in accordance with Article 17 of the RSTP and the application of the principle of "positive interest", the Panel took note of the explanation thereof by a previous CAS Panel:

*"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*

*As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not*

*entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have* [had] *if no breach had occurred.*

*The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also WYLER R., Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).*

*The principle of the 'positive interest' shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations" (cf. CAS 2008/A/1519-1520, at §80 et seq.)".*

124. The Panel finds that the legal framework set out above and the principle of positive interest are also applicable to the present case. The principle of the so-called positive interest (or "expectation interest") aims at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is recognized by various law systems and aims at setting the injured party to the original state it would have if no breach had occurred. The positive damages of the employee are the salaries and other material income that he would have had if the contract would have been performed until its natural expiration. Therefore, in the case of termination of the Employment Contract for just cause by the Player, the latter would be entitled to the entire income until the expiration of the fixed duration of the Employment Contract (and not only until the termination) less any amount received from a third party.

125. According to the CAS jurisprudence (CAS 2008/A/1447, para. 30; CAS 2008/A/1518, para. 71), Article 17 para. 1 RSTP closely follows Article 337c Swiss CO, which grants as compensation to the party not being in breach of the contract an amount corresponding to all claims arising out of the employment relationship, reduced by everything *"which he saved as a consequence of the termination of the employment relationship and which he earned or intentionally failed to earn through other work"* (see CAS 2006/A/1180, para. 41). The Panel has therefore to compare two financial situations in order to determine the compensation: the Player's hypothetical financial situation without the Appellant's breach of contract and the financial situation as it is following the breach of contract by the Appellant.

126. Against this background, the Panel will proceed to determine the amount due.

127. It is not in dispute that as of the termination of the Employment Contract the Player had received from the Club 42,700 KWD (Kuwaiti Dinars) equal to approximately USD 150,000

after conversion in two instalments - 28,500 KWD equal to approximately USD 100,000 and 14,200 KWD equal to approximately USD 50,000, both sums received on 23 June 2013. The Parties, however, adopt diverging positions as to the purpose of the second payment of 14,200 KWD equal to approximately USD 50,000. The Appellant asserts that this amount pertains to the first salaries due for the 2013/2014 season which were paid in advance to the Player, while the Respondents seem to imply that the said amount was to be perceived as an extra bonus to the Player payable upon signing of the Employment Contract not related to monthly salaries.

128. Be it as it may, the Employment Contract provides for a total fixed value of USD 900,000 and the Panel needs not discuss in detail this controversial issue. But for the termination of the Employment Contract, the Player would have earned USD 750,000 (USD 900,000 less USD 150,000 already received = USD 750,000). Because these payments became immediately due as a result of the termination of the Employment Contract, the Player is principally entitled to receive these payments. Consequently, the total remaining value of the Employment Contracts at the time of breach was USD 750,000. Considering the principle of positive interest, the amount of USD 750,000 is the total amount of salary and bonuses the Player would have received should the Club not have breached the Employment Contract. The Panel therefore finds that this is the amount that shall be used as the basis for calculating the total amount of compensation due.

129. The Panel, however, notes that it remained undisputed that on 1 January 2014, the Player had concluded a new employment contract with the Second Respondent valid until 30 June 2016 and that the Player was entitled to receive a total amount of EUR 274,475 (equal to approximately USD 380,000 after conversion as of 1 January 2014).

130. According to generally accepted principles of the law of damages and also of labour law (*cf.* Article 337c of the Swiss CO and Article 17.1 of the RSTP), any amounts which the Player earned must be deducted from the compensation. The Panel, therefore, finds that the remuneration the Player earned with the Second Respondent during the remaining contractual term of the Employment Contract should be deducted from the amount the Player would have earned with the Club should the Club have properly performed the Employment Contract.

131. In conclusion, the compensation for termination of the Employment Contract for just cause is in the amount of USD 370,000 (USD 750,000 - USD 380,000 = USD 370,000).

132. According to the Player's requests for relief, the Player also requested 5 % interest on the USD 370,000 as from the date of termination of the Employment Contract (5 November 2013) until the date on which the arbitral award is delivered. Irrespective of whether, based on Article 337b of the Swiss CO the Player might be right in principle in claiming that statutory interest is due from the date of termination of the Employment Contract, the Panel will not address such prayer. As already discussed above in the admissibility section of the award, in the claim filed with FIFA the Player himself did not request that interest should be calculated at all (be it from termination, filing of the claim, delivering of the award or else). With respect to the default interest accrued on the principal amount, the Panel observes that in principle when a contract does not contain a specific date of performance, an obligation must be executed, or its execution

can be required, immediately (Article 75 Swiss CO). In such a case, the debtor will be considered in default when there is a subsequent notice by a creditor demanding performance (Article 102(1) Swiss CO). If the default concerns a payment of money, the debtor must pay interest on arrears at the rate of 5% per annum if not a higher rate is stipulated in the contract (Article 104 CO). However, the Appealed Decision was not appealed by the First Respondent, including with respect to the starting point of accrual of the interest. Therefore, the Panel orders that the Appealed Decision in the part of the interest calculated is also confirmed.

133. In light of the above, the appeal is dismissed and the Panel confirms the Appealed Decision.

## ON THESE GROUNDS

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

1. The appeal filed by Al Arabi SC Kuwait on 13 April 2016 against the decision issued by the FIFA Dispute Resolution Chamber on 15 October 2015 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 15 October 2015 is confirmed.

3. (…).

4. (…).

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