Arbitration CAS 2016/A/4673 Wydad Athletic Club v. Benito Floro Sanz, award of 20 June 2017

Panel: Prof. Petros Mavroidis (Greece), President; Mr Koffi Sylvain Mensah Attoh (Togo); Mr José Juan Pintó (Spain)

Football
Termination of the employment contract with a coach without just cause by the club
Admissibility of exhibits sent by electronic mail
Interpretation of a contractual clause
FRMF Dispute Resolution Commission as independent arbitral tribunal within the meaning of Art 22 lit. c RSTP
Res judicata effect of a first instance decision
Set-off

1. **Article R31 of the CAS Code should be applied less strictly when it refers to the filing of exhibits only and not of written submissions, since contrary to written submissions exhibits can be sent only by electronic mail, which is indeed a means of transmission which is less trustful than a fax.**

2. **In case of disagreement between the parties, the contract must be interpreted in accordance with Article 18 para. 1 of the Swiss Code of Obligations. If a contractual provision uses the terms "arbitration of the FRMF and possibly to that of FIFA", without using the terms "after" or "before" to denote a sequence between the two processes, it shows that the parties intended FIFA (if possible) as an alternative dispute resolution forum to the FRMF, and not as a second instance forum. Standing CAS case law holds for the proposition that the literal interpretation is the starting point of an interpretation, and that any other interpretative method is applicable only if the literal meaning is ambiguous. Even if the text of the provision had not been clear, quod non, on the basis of the principle *"in dubio contra stipulatorem"*, which can be applied if it is not possible to choose otherwise between several meanings of a clause, the provision should have been interpreted in the sense less favourable to the author of this text.**

3. **With regard to the terms "independent and duly constituted arbitral tribunal", FIFA Circular n°1010 of 20 December 2005 provides in particular that the parties must have equal influence over the appointment of arbitrators (principle of parity), that the rejection of an arbitrator in case of doubt regarding his independence and his replacement must be regulated, and that each party must have an equal right to present its arguments regarding the facts and the law, file motions and participate in the proceedings. The principle of parity is not respected if the parties do not choose the arbitrators but the latter are always designated by the President of the national federation. This means that any time the national federation is a party to a dispute, it**

will have an undue advantage over the other party. Furthermore, if three of the current five members of the Dispute Resolution Commission are employees of the national federation, this fact alone suffices to hold that the Dispute Resolution Commission is not an independent arbitral tribunal within the meaning of Article 22 lit. c of the FIFA Regulations on the Status and Transfer of Players (RSTP).

4. If the right to a due process has been violated during the proceedings before the first instance body, the decision reached by this body, as a result from this vice, cannot be acknowledged as producing a res judicata effect.

5. A decision taken in violation of a party's procedural rights, cannot be enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or under the Swiss Private International Law Act, and cannot serve as a basis for a set-off.

I. FACTS

A. THE PARTIES

1. Wydad Athletic Club ("Wydad", "the Club" or the "Appellant") is a football club affiliated to the Fédération Royale Marocaine de Football ("FRMF") which is, in turn, affiliated to the Fédération Internationale de Football Association ("FIFA")

2. Mr Benito Floro Sanz ("Mr Floro Sanz" or the "Respondent") is a Spanish professional football coach.

B. FACTS OF THE CASE AND ORIGIN OF THE DISPUTE

a) The Contract and its termination

3. On 20 January 2012, the Parties signed an employment contract (the "Contract"), according to which Mr Floro Sanz was hired as head coach of Wydad's first team, for a fixed period running from the date of signature until the end of June 2013.

4. Article 4 of the Contract provides that the Appellant shall pay to the Respondent a net monthly salary of EUR 35'000, as well as different bonuses in case of winning matches or tournaments (9'000 Moroccan Dirham (MAD) per winning match, 3'000 MAD per draw as guest team, 35'000 EUR for winning the national tournament or finishing in second position, 30'000 EUR for winning the Moroccan Throne's Cup). Wydad also undertook to provide the Respondent with a car, a furnished apartment, as well as eight plane tickets between Casablanca and Spain for the duration of the Contract.

5. Article 5 para. 2 of the Contract states that in case of termination of the Contract by Wydad or by Mr Floro Sanz, the relevant party should pay to the other an amount equivalent to the residual value of the contract. The exact terms of that provision in the original French version are: *"Par mesure de réciprocité, si le Club et l'entraineur décide de mettre fin à ce contrat, l'une des partie doit payé* [sic] *le montant restant jusqu'au fin du présent contrat"* [sic].

6. Article 7 of the Contract, under the title "Disputes" (in the original French version: *"Litiges"*), provides:

"Tout litige devra être réglé à l'amiable entre les deux parties où (sic), *à défaut, être soumis à l'arbitrage de la FRMF et de la FIFA"* (free translation: *"All disputes shall be settled amicably between the parties or, in absence of a settlement, shall be submitted to the arbitration of the FRMF and of FIFA"*).

7. Furthermore, the Appellant concluded similar contracts with two other technical staff members, *i.e.* Mr Rubén Albes Yanez, assistant coach, and Mr Cédric Roger, physical trainer.

8. In accordance with the Contract, Mr Floro Sanz assumed his professional responsibilities, and began training sessions of Wydad's first team, together with the assistant coach and the physical trainer.

9. Several times throughout the duration of his contractual relationship with the Club, Mr Floro Sanz received his salary with some delay, as he testified before the Court of Arbitration for Sport (CAS) during the hearing held in the present case. Mr Floro Sanz also explained that his relationship with Mr Abdelillah Akram, who, at the time of his employment, was the President of the Club, deteriorated following a series of events in 2012, in particular because he disagreed with certain choices relating to players hired by the President.

10. On 19 September 2012, Wydad's first team lost a match against another team participating in the same league, the FAR Rabat. The next day, a training session had already been scheduled. In his testimony before the CAS during the hearing, Mr Floro Sanz explained that the President assured him that he would arrange for the police to protect the team members outside of the sports' complex against angry supporters, who would surely turn up because of the match lost the previous day. However, no police forces were present on 20 September 2012, as between twenty and thirty supporters angrily demonstrated against the team and threatened its members.

11. According to Mr Floro Sanz's testimony, before the training started that day, Wydad's Vice-president asked him to go and see him at an office located in the sports' complex. The Vice-president then told Mr Floro Sanz that Wydad's President had decided to dismiss him. Mr Floro Sanz requested a written termination notice, because he knew that a document was necessary to eventually prove that he had been dismissed, and he had not on his own initiative resigned. Nevertheless, the Vice-president refused to provide him with a document to this effect, and added that he had advised the security guards to accompany Mr Floro Sanz out of the sports' complex. Mr Floro Sanz explained, during his testimony before the CAS, that he had no reason to doubt the fact that the decision had been taken by the President. It is for this reason that at this moment he did not contact the President directly.

12. The Respondent and the Vice-president then joined the rest of the team and it was the latter, who announced to the players and the other members of the technical staff, that Messrs Floro Sanz and Albes Yanez would not train the team any longer.

13. Under the circumstances, Mr Floro Sanz decided that it would not be necessary to request a written (formal) notice of termination. The explicit announcement of his dismissal amounted to a notice of termination anyway, in his view. Furthermore, at that moment it was impossible for him to reach out to a lawyer, and proceed with a formal request to this effect. As he explained during the hearing, he could not contact a lawyer or notary public, who would summon Wydad to provide a notice of termination in writing, because angry supporters were present outside of the sports' complex blocking his access. When access was freed, the Vice-president asked him to leave immediately, threatening to have him put out by the security guards. Mr Floro Sanz contacted a lawyer immediately upon his return to his native Spain.

14. Concerning these events, Mr Roger, also testifying during the hearing before the CAS, explained that after their defeat against FAR Rabat, during the training, which took place the next day, Wydad's former Secretary general, as well as other members of the Club's committee, addressed the players and the technical staff on the field. They explained that Mr Floro Sanz and Mr Albes Yanez would no longer coach the team. On that occasion, it was announced to everybody present at the training session that a "technical committee" would immediately take over the team's training. Mr Roger also explained that he did not know the exact reason for the termination of the two coaches' contract, but, in his opinion, it was due to the disappointing result against FAR Rabat, as well as to the fact that Wydad was not satisfied with the team's overall results. After that training session (which was held on 20 September 2012), Mr Roger did not take part in any other training session or match with Wydad. He was not aware of a written termination notice being sent by Wydad to Mr Floro Sanz and Mr Albes Yanez, and had been surprised by the manner in which the two coaches had been verbally dismissed.

15. In his testimony before the CAS, Mr Albes Yanez explained that when he and Mr Floro Sanz arrived for training on 20 September 2012, the Vice-president talked to Mr Floro Sanz in an office in the sporting complex. Ten minutes later, Mr Floro Sanz told Mr Albes Yanez that they had just been dismissed. Few minutes after that, the Vice-president informed the rest of the team of this fact.

16. Thereafter Mr Floro Sanz and Mr Albes Yanez never trained the team again.

17. At that time, Mr Floro Sanz's salary had not been paid for three months (corresponding to EUR 105'000) and several bonuses amounting to MAD 138'000 were also outstanding. According to his testimony, he was never offered a payment by cheque, despite Wydad alleging during the proceedings before CAS that the opposite has been the case.

18. Mr Roger testified that he was surprised that his contract had not also been terminated on 20 September 2012, and he immediately called Mr Hafid Akram, at that time Wydad's Committee member, in order to discuss his future at the Club. He was then offered to work with the youth division of the club, but he declined this offer. Mr Roger added during his testimony

that he did not want to start legal proceedings at the time and that two or three days after 20 September 2012, he signed a termination agreement (settlement) with Wydad, and eventually received his overdue salaries. Mr Roger also testified that the club had often paid his salary with some delay.

19. An announcement in the media on 21 September 2012 informed the public that Wydad had nominated a three-member "Technical committee" (in French: *"commission technique"*), composed of Mr Hassan Benabicha, Mr Rachid Daoudi and Mr Mustapha Chahid, in order to train the team. The news also appeared in the social media and Wydad announced it on its official website as well.

20. Wydad sent the President of the FRMF three letters on 20, 21 and 22 September 2012, informing him of the fact that Mr Floro Sanz did not participate in the training scheduled on those days.

21. Wydad also sent Mr Floro Sanz a "semi-judicial notification" (in French: *"notification semi-judiciaire"*) through a court bailiff (in French: *"huissier de justice"*), asking him to continue his work and informing him that, if it were not the case, he would be considered as having resigned and that Wydad reserved its right to claim compensation. The court bailiff tried to remit the letter to Mr Floro Sanz at his Casablanca apartment on 24 September 2012 at 12:00, but did not find the Respondent there. The court bailiff attested through official minutes that the notification did not succeed.

22. Messrs Floro Sanz and Albes Yanez testified that they met Mr Yassine Saadallah, member of Wydad's committee, on 23 or 24 September 2012. According to Mr Floro Sanz's testimony, another member of Wydad's management was present at that meeting. On that occasion, the Respondent requested payment of his overdue salaries, as well as those of Mr Albes Yanez and of the players. He also tried to negotiate the conditions of the termination, but without success.

23. A few days after this meeting, as Wydad had also stopped paying the rent of the Respondent's apartment, Mr Floro Sanz travelled back to Spain and contacted his attorneys, the law firm "Sport Advisers" (hereinafter, "the law firm"). This law firm sent a letter to Wydad on 17 October 2012, stating that they were *"writing on behalf of* (their) *client Mr Benito Floro Sanz"*. The law firm referred to a letter, which had been sent to Wydad by Mr Floro Sanz on 1 October 2012, and which stated *"his intention to reach an agreement with Wydad in order to facilitate an amicable solution to the unjustified breach of his contract caused by Wydad"*. In their letter, the law firm requested the payment of the Respondent's overdue remuneration amounting to EUR 152'413,28, as well as compensation in the amount of EUR 315'000 for unilateral breach of contract without just cause. According to this letter, unless Wydad paid these amounts within 5 days, the law firm would proceed with a compensation claim before the FIFA Player's Status Committee. Finally, the law firm added in that letter that Wydad could contact them on their fax number (+34 91 355 06 27) for any further queries.

24. Mr Albes Yanez also travelled back to Spain and a similar letter was sent on his behalf by the same law firm.

25. The Appellant received these letters, but neither did it reply, nor did it pay any of the requested sums.

26. On 8 October 2012, the Appellant nominated a new coach, Mr Badou Ezaki.

b) The procedure before FIFA

27. On 31 October 2012, Mr Floro Sanz filed a request before the FIFA Players' Status Committee ("PSC"), alleging that Wydad had breached the Contract and requested the payment of his outstanding salaries (EUR 140'000 corresponding to 4 monthly salaries), his outstanding bonuses (MAD 138'000, corresponding to 14 winning bonuses and 4 draw bonuses as guest team) and a compensation corresponding to the residual value of the Contract (EUR 315'000 from October 2012 to June 2013).

28. On 15 January 2013, FIFA sent Mr Floro Sanz's claim to Wydad via the FRMF, asking the latter to transmit the claim to Wydad. The club was given a deadline until 29 January 2013 to express its position.

29. On 5 March 2013, the FRMF informed FIFA that Wydad had filed a claim against Mr Floro Sanz. A copy of the claim (*i.e.* the letter dated 16 January 2013, received the next day by the FRMF) was enclosed, together with the letters sent to the attention of Mr Floro Sanz by Wydad. The contents of this claim shall be examined below, under section c).

30. FIFA answered this letter on 7 March 2013, repeating that Mr Floro Sanz had filed a claim on 31 October 2012 and giving Wydad a new deadline to provide FIFA with its position, until 22 March 2013.

31. On 6 June 2013, Wydad's counsel wrote a letter addressed to the FIFA PSC, explaining that the FRMF had already rendered a decision on 17 May 2013, which he had enclosed in his letter. According to Wydad's counsel, as Mr Floro Sanz had not appealed that decision within the applicable statutory deadlines, the decision had become final. The dispute had therefore already been decided, and the PSC was not competent to hear the matter, according to Wydad. We note that this letter appears to have been sent by fax by Wydad's counsel, but it does not appear in FIFA's file.

32. On 8 October 2013, the FIFA PSC gave Mr Floro Sanz a deadline until 23 October 2013 to express his position on the FRMF's letter dated 5 March 2013 and its enclosures.

33. On 9 October 2013, Wydad wrote to FIFA, requesting that all correspondence should be sent to it in French.

34. On 22 October 2013, Mr Floro Sanz stated in front of the FIFA PSC that he had never before been informed about Wydad's alleged claim and had never had the opportunity to present his arguments in front of the FRMF. He also explained that Wydad lodged its claim in front of the FRMF two days after having been informed of the procedure already pending before FIFA and that, for this reason, only FIFA was competent to hear this dispute. Finally, Mr Floro

Sanz rejected Wydad's factual allegations and explained that he had not left the club willingly, but had been dismissed.

35. On 13 February 2014, FIFA sent Mr Floro Sanz's last brief to the FRMF and asked the federation to transmit it to Wydad. The FIFA gave Wydad a deadline until 27 February 2014 to provide FIFA with its position. In absence thereof, Wydad was advised that the investigation would be closed and the file submitted to the PSC or its Single Judge for decision.

36. Wydad did not file its position and the PSC closed its investigation on 25 March 2014 advising both parties accordingly.

37. On 9 June 2015, FIFA asked Mr Floro Sanz whether he had concluded another employment contract between 20 September 2012 and 30 June 2013 and to provide all relevant documents.

38. Mr Floro Sanz replied the next day and informed FIFA that he had not concluded a contract to train another football club for that period of time.

39. On 25 June 2015, the parties were informed that the matter would be submitted to the Single Judge of the PSC on 30 June 2015.

40. Wydad's counsel wrote to FIFA on 28 June 2015, sending again his letter dated 6 June 2013. Through its counsel, Wydad repeated that on 17 May 2013, the FRMF's Dispute Resolution Commission had rendered a decision. Wydad sent a copy of that decision to FIFA and claimed that, on the basis of the principle of *res judicata*, FIFA should declare itself incompetent to deal with the dispute.

41. On 29 June 2015, FIFA informed the parties that the Single Judge of the PSC would decide whether Wydad's letter and the newly produced documents would be admissible or not.

42. On 30 June 2015, the Single Judge of the PSC issued a decision (the "FIFA Decision"), and the parties were notified of its operative part on 24 July 2015. Upon Wydad's request dated 28 July 2015, the parties were notified of the reasons for the FIFA Decision on 3 June 2016.

43. The FIFA Decision held that FIFA was competent to decide the dispute, because Mr Floro Sanz's claim in front of FIFA had been lodged before Wydad's claim in front of the FRMF and that Mr Floro Sanz's right to be heard had not been respected in the proceedings before the FRMF. The Single Judge also considered that Article 7 of the Contract contained a non-exclusive arbitration clause, which gave FIFA the competence to decide the dispute. The Single Judge then retained that the 2010 edition of the Regulations on the Status and Transfer of Players ("RSTP") was applicable. Regarding the merits of the case, the Single Judge held that the Contract had been unilaterally terminated by Wydad without just cause. He accordingly ordered Wydad to pay Mr Floro Sanz his outstanding salaries from June to August 2012 (EUR 105'000), the outstanding bonuses (MAD 138'000), as well as the amount of EUR 350'000 for breach of contract, all amounts with interests of 5% *per annum*. The Single Judge also ordered Wydad to pay CHF 15'000 for the procedural costs and CHF 5'000 for Mr Floro Sanz's legal costs.

44. The reasoning contained in the FIFA Decision shall be examined below in the "Legal Discussion" part of this award.

c) The procedure before the FRMF

45. On 17 January 2013, Wydad sent a letter to the President of the FRMF, arguing that Mr Floro Sanz's work had not been satisfactory and that he had left the country during 10 days at the beginning of the 2012/2013 season, without being authorized to do so. Wydad claimed that, due to these facts, but above all because of the match lost on 19 September 2012, Messrs Floro Sanz and Albes Yanez had deliberately and without notice left from their position (in French: *"abandon de poste"*). After having noticed their absence, Wydad had sent them three letters on 20, 21 and 22 September 2012, the latter through a court bailiff (in French: *"huissier de justice"*), asking them to continue their work and informing them that, if it were not the case, they would be considered as having resigned and that Wydad reserved its right to claim compensation. As Wydad further explained, Mr Floro Sanz and his assistant coach had not replied these letters, and Wydad had therefore replaced them. In its letter sent to the FRMF, Wydad described the above facts, but did not seek any relief (no monetary or non-monetary claim was put forward).

46. On 6 February 2013, Wydad wrote to the FRMF, informing the latter's Secretary general that Messrs Floro Sanz and Albes Yanez had been absent from the training sessions since 20 September 2012. Wydad enclosed in its letter the reports of Mr Nouffel RAIHANI, attorney-at-law, allegedly transmitted to the two coaches by Mr Abdelkadir EL HAJJAMI, court bailiff.

47. The FRMF wrote two letters dated 27 February 2013 and 5 March 2013 to the intention of Mr Floro Sanz, informing him that Wydad formed a request against him and asking him to provide his position. There is no evidence on file confirming that these letters had indeed been sent to Mr Floro Sanz.

48. On 2 April 2013, the FRMF wrote a letter to Mr Floro Sanz, entitled "Reminder", asking him to explain his position regarding Wydad's request. The FRMF tried to send this letter by fax. Nevertheless, as shown by the copy produced in the present proceedings, the fax could not be sent, as the wrong number had been used (+34 91 3**3**5 06 27 instead of +34 91 3**5**5 06 27, and the fax report shows, in French: *"Page 000/002"* and *"Résultat PAS DE REPONSE"*). On 4 April 2013, the FRMF tried to send another fax, with the same content and again without success.

49. On 17 May 2013, the FRMF's Dispute Resolution Commission (in French: *"Commission des litiges"*) issued a decision (the "FRMF Decision"). Wydad was notified of the FRMF Decision on 28 May 2013. This Decision was not sent to Mr Floro Sanz (the fax report of 30 May 2013 showed the same erroneous fax number and the lack of answer: *"Page 000/006"*, *"Résultat PAS DE REPONSE"*).

50. The FRMF's Dispute Resolution Commission held that it was competent to rule on the dispute, as it concerned the relationship between a club and a professional executive. The Dispute Resolution Commission further retained that Mr Floro Sanz had unduly breached the

Contract, by leaving his position, and that he did not reply to Wydad's letters. For this reason, the FRMF Decision ordered that Mr Floro Sanz should pay EUR 350'000 to Wydad. The FRMF Decision indicated that an appeal before the FRMF's Appeal Commission was possible, within 5 days from notification.

C. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

51. Wydad filed its Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the FIFA Decision on 23 June 2016. In this brief, the Appellant nominated Mr Koffi Sylvain Mensah Attoh as arbitrator.

52. On 28 June 2016, the CAS Court Office acknowledged receipt of the statement of appeal, directed against Mr Floro Sanz and FIFA, and invited them to appoint an arbitrator and to present any arguments regarding the language of the proceedings, the Appellant having filed its Statement of Appeal in French.

53. On 29 June 2016, the Respondent objected to the use of French as language of the arbitration and, in particular given that the FIFA Decision was in English, proposed that the proceedings should be conducted in English. In a letter dated 1 July 2016, FIFA concurred with this request.

54. Upon proposition of the CAS Court Office, the parties finally agreed that English be the language of the proceedings, but they also agreed that the parties be allowed to use both French and English in their written and oral submissions and other communications.

55. In a letter dated 11 July 2016, the Appellant informed the CAS Court Office that it did not wish to maintain FIFA as Respondent in the proceedings.

56. On 20 July 2016, the Respondent appointed Mr José Juan Pinto Sala as arbitrator.

57. On 5 August 2016, the Appellant requested that the Respondent produce the case file of the proceedings before FIFA. The Respondent opposed this request, explaining that Wydad had been a party to the proceedings before FIFA, and that it could obtain such documents from its former counsel and also from the Appellant's national association. Finally, the Respondent recalled that the CAS could order FIFA directly to produce the case file, if it deemed necessary.

58. On 9 August 2016, the CAS Court Office *inter alia* advised the parties that the issue of document production would be addressed by the Panel, once constituted.

59. Further to several extensions of the relating time limit, the Appellant produced its Appeal Brief on 19 August 2016 and requested a second round of written arguments, given that it had not obtained the file of the FIFA proceedings.

60. In a letter of the CAS Court Office dated 26 August 2016, the Respondent was invited to file his Statement of Defence and the parties were informed that the request for a second round of submissions would be transmitted to the Panel, once constituted.

61. The Arbitration Panel constituted by Messrs Petros C. Mavroidis (President), Koffi Sylvain Mensah Attoh and José Juan Pinto Sala (Arbitrators) was duly appointed and the parties were notified of its constitution on 27 September 2016.

62. On 7 October 2016, upon instruction of the President of the Panel, the CAS Court Office invited FIFA to produce the complete case file.

63. The Respondent filed his Statement of Defence on 10 October 2016.

64. On 14 October 2016, the CAS Court Office advised the parties that they would not be authorized to supplement their submissions or to file new documents, on the basis of Article R56 of the Code of Sports-related Arbitration (the "Code"). Regarding the Appellant's request for a second round of submissions and the Respondent's objection thereto, the Panel would decide in due course. Finally, the parties were invited to express their preference for a hearing to be held or for the case to be decided on the basis of the written submissions.

65. FIFA produced a copy of its file on 17 October 2016.

66. On 20 October 2016, both parties expressed their wish to hold a hearing.

67. On 31 October 2016, the Panel, through the intermediary of the CAS Court Office, requested, in application of Article R44.3 para. 2 of the Code, from the FRMF a copy of the file relating to the claim brought by Wydad against Mr Floro Sanz, as well as a copy of the FRMF DRC Regulation in force in January 2013.

68. On the same day, the CAS Court Office sent a copy of the FIFA file to the parties and informed them that they would be invited to file final written observations, the time-limit and the scope of which would be determined at a later stage. The parties were also asked whether they agreed to hold a common hearing in the cases of Mr Floro Sanz and Mr Albes Yanez, to lift the confidentiality of the present procedure towards the Respondent in the other case and to leave the hearing room during the testimony of the other party.

69. The parties agreed with these proposals, in their letters dated 31 October 2016 and 9 November 2016.

70. On 10 November 2016, the CAS Court Office informed the parties that a hearing would be held in Lausanne, Switzerland, on 13 December 2016, after the parties confirmed their availability.

71. On 18 November 2016, the CAS Court Office sent the parties a copy of the file received from the FRMF and invited them to file their final written submissions by courier and electronic mail, until 28 November 2016 for the Appellant and ten days from receipt thereof for the Respondent.

72. On 22 November 2016, the parties were informed of the appointment of Ms Nora Krausz as *ad hoc* clerk.

73. On 28 November 2016, the Appellant requested an extension of its time-limit to file its final written submissions, submitted two new exhibits and requested to be provided with some awards quoted by the Respondent in his Answer, but not yet publicly available. On 29 November 2016, the requested time-limit was extended and the requested awards were sent to the Appellant.

74. On 1 December 2016, the Respondent informed the CAS Court Office of the names of the persons who would attend the hearing and the witnesses who would testify. On the same day, the Appellant confirmed by fax the presence of his counsel at the hearing and enclosed three new pieces of evidence.

75. The CAS Court Office wrote to the parties on 2 December 2016, noting that the Appellant had not submitted any written submissions by courier and electronic mail, but only produced new documents on 28 November and 1 December 2016. The Respondent was then given ten days to produce his submissions, limited to these new pieces of evidence.

76. On 5 December 2016, the Respondent filed his written submissions and contested the admissibility of the new documents, given in particular the fact that they had been sent by fax instead of electronic mail and courier.

77. The parties received the Procedural Order on 7 December 2016. They duly signed and returned a copy thereof.

78. The hearing took place in Lausanne on 13 December 2016 and was attended by the following persons: for the Appellant, Mr Mohamed Ghazi, representative of Wydad, and the counsels Messrs Nicolas Bone and François Vesval, and for the Respondent, Mr Floro Sanz and his counsels Ms Reyes Bellver Alonso and Mr Miguel Lietard Fernandez-Palacios.

79. At the outset of the hearing, after having heard the parties, the Panel decided to accept the documents filed on 28 November and 1 December 2016 by the Appellant. The reasons for this decision shall be set out below, under the legal discussion part, section II D.

80. The witnesses heard were Mr Roger, who testified through video-conferencing and without the presence of the two coaches, and Mr Albes Yanez, who was heard without the presence of Mr Floro Sanz.

81. The parties confirmed having no objection regarding the composition of the Panel. The parties had the opportunity to present their case, comment on the evidence, submit their arguments on the facts and on the legal issues and answer the questions posed by the Panel.

D. THE PARTIES' REQUEST FOR RELIEF

82. In its Appeal Brief, Wydad requested the following relief (freely translated from French):

> *"The Appellant requests from the CAS:*

- *the annulment of the decision of the Single Judge of the Players' Status Committee dated 30 June 2015 notified on 6 June 2016;*

- *the imposition on the Respondent of the fees of the proceedings before the Dispute Resolution Chamber of FIFA and before CAS;*

- *the reimbursement of the Appellant's relevant expenses and lawyers' fees".*

83. The Respondent's Statement of Defence contains the following prayers for relief:

"For the foregoing reason, Mr Floro respectfully asks that the Panel issue an award establishing that:

1. That the appeal filed by Wydad is rejected.

2. That Wydad shall bear all court costs related to the current arbitral proceedings.

3. That Wydad must pay a substantial contribution towards Mr. Floro's legal fees and other expenses in an amount to be determined by the Panel".

II. LEGAL DISCUSSION

A. JURISDICTION OF THE CAS

84. As the CAS is an arbitral tribunal with seat in Switzerland, and as neither party has its domicile or habitual residence in Switzerland, pursuant to Article 176 of the Swiss Private International Law Act ("PILA"), chapter 12 of this act (Articles 176 to 194 PILA) is applicable to the present arbitration[1].

85. According to Article 186 PILA, the arbitral tribunal shall rule on its own jurisdiction. Therefore, the Panel is competent to rule on its own jurisdiction (*"Kompetenz Kompetenz"*).

86. Article R47 para. 1 of the Code provides the following: *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as 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 it prior to the appeal, in accordance with the statutes or regulations of that body".*

87. The present dispute is governed by the FIFA Statutes, edition 2016 (given the date at which the FIFA Decision was rendered with reasons), and by the Regulations on the Status and Transfer of Players ("RSTP"), edition 2010 (given the date at which the facts of the case took place). According to Article 58 para. 1 of the FIFA Statutes, *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question".* Article 23 para. 3 RSTP

1 CAS 2005/A/983 & 984 §61; CAS 2006/A/1180 §7.1.

provides: *"Decisions reached by the single judge or the Players' Status Committee may be appealed before the Court of Arbitration for Sport (CAS)"*.

88. In the case under scrutiny, the FIFA Decision is a final decision passed by one of FIFA's legal bodies, namely the Single Judge of the PSC, and is therefore capable of appeal before the CAS. In addition, none of the parties raised any objection regarding the jurisdiction of the CAS.

89. In conclusion, the Panel finds that it has jurisdiction to rule upon the present dispute.

90. CAS jurisdiction is further confirmed by the signature of the Order of Procedure by both parties.

B. ADMISSIBILITY OF THE APPEAL

91. As quoted above, Article 58 para. 1 of the FIFA Statutes provides that appeals to CAS shall be filed within a time limit of 21 days from the date of notification.

92. In the present case, the FIFA Decision was notified on 3 June 2016 and Wydad lodged its Statement of Appeal on 23 June 2016, *i.e.* within the set time-limit.

93. The Statement of Appeal further respects the formal conditions set out by Article R48 of the Code.

94. Accordingly the Panel concludes that the appeal is admissible.

C. APPLICABLE LAW

95. Article 187 para. 1 PILA provides: *"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection"*.

96. According to Article R58 of the Code, *"the Panel shall decide the dispute according to the applicable regulations and, subsidiarly, 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"*.

97. In the present case, the Appellant is of the view that the regulations of the FRMF are applicable, in particular the Procedural regulation of the Special Dispute Resolution Commission, edition 2013 (in French: *"Règlement procédural de la Commission spéciale de résolution des litiges"*). The Appellant considers that if the FRMF's regulations are silent on an issue, the regulations of FIFA, as well as Swiss law and Moroccan law apply.

98. On the contrary, the Respondent refers to Article 57.2 of the FIFA Statutes (edition 2016), which provides: *"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"*. The

Respondent therefore considers that the RSTP (edition 2010) and additionally Swiss law apply to the present dispute.

99. Given the parties' arguments and given the fact that the Contract does not contain a choice-of-law clause, the Panel shall apply the rules of FIFA, which is the federation whose decision has been challenged, as well as, and on subsidiary basis, Swiss law, to which the relevant FIFA Statutes make explicit reference. The regulations of the FRMF shall only be examined insofar as the parties raised arguments regarding the FRMF Decision or the proceedings before this federation.

D. ADMISSION OF NEW DOCUMENTS

100. The Panel shall first give the reasons for which it accepted the exhibits filed by the Appellant on 28 November and 1 December 2016 by fax.

101. The Respondent indeed contested the admissibility of these documents, reasoning that they should have been filed through courier or electronic mail, instead of fax, based on Article R31 of the Code, which provides that: *"the request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted in advance by facsimile or by electronic mail at the official CAS electronic mail address (procedures@tas-cas.org), the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit, as mentioned above"*. The Respondent also criticised the fact that these pieces of evidence were sent autonomously, that is, without being attached to written submissions.

102. During the hearing before CAS, the Appellant explained that the documents were admissible, because according to Article R31 of the Code, evidence can also be filed through electronic mail, but this method of filing is not exclusive: *"The exhibits attached to any written submissions may be sent to the CAS Court Office by electronic mail, provided that they are listed and that each exhibit can be clearly identified; the CAS Court Office may then forward them by the same means"*. The Appellant added that, in its opinion, the Statement of Defence had not called for additional submissions and that it had deemed sufficient to file the contested pieces of evidence. The Appellant *inter alia* explained that if the Panel would reject these documents, it would be acting guided solely by excessive formalism.

103. After considering the parties' arguments, the Panel exceptionally decided to accept these documents, because the goal pursued by Article R31 of the Code had been met and because this provision should be applied less strictly when it refers to the filing of exhibits only and not of written submissions, since contrary to written submissions exhibits can be sent only by electronic mail, which is indeed a means of transmission which is less trustful than a fax. Indeed, the Respondent had duly received the documents in question, despite the fact that they were only filed by fax. The Respondent filed his final written submissions, after reception of these documents. His right of defence had thus not been nullified or impaired, as a result.

In similar vein, Mr Floro Sanz exercised his right to be heard well aware of the content of these documents, and commented upon them at the hearing before CAS.

E. MERITS OF THE CASE

104. Given the parties' submissions, the Panel held that its eventual response to the claim lodged before it, would have to account of the following questions: a) Did FIFA have jurisdiction to decide the dispute? b) If FIFA had jurisdiction, is the FIFA Decision correct? If of course, the response to question (a) is negative, there is no need to respond to question (b), and, if this proves to be the case, the Panel would then annul the FIFA Decision and decide the dispute *de novo*.

a) Did FIFA have jurisdiction to decide the dispute?

i) The Appellant's position

105. According to the Appellant, FIFA did not have jurisdiction to decide the dispute. Indeed, Article 22 lit. c RSTP provides: *"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:* (…) *employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level"*. In addition, Article 68.3 of the FIFA Statutes (edition 2015), which corresponds to Article 59.3 of the FIFA Statutes (edition 2016), provides: *"The associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation or to CAS"*.

106. Based on these provisions, the Appellant contends that the FRMF had indeed created an independent arbitral tribunal guaranteeing fair proceedings. For this reason, according to the Appellant, FIFA did not have jurisdiction. The Appellant brings forward that the FRMF Procedural Regulation of the Special Commission for Dispute Resolution contains provisions guaranteeing the independence of this commission, as well as fair proceedings.

107. The Appellant also contends that based on Article 7 of the Contract, the parties did not have a choice between FIFA and FRMF, but were obliged to submit their dispute to the FRMF first and only then to FIFA. Wydad considers that in that provision, the words *"l'arbitrage de la FRMF et de la FIFA"* mean *"arbitration before the FRMF and then before FIFA"*. The Appellant interprets this clause on the basis of Article 27 para. 2 of the Regulation on the Status and Transfer of Players of the FRMF, which provides that all disputes shall be submitted, in case they cannot be settled amicably, to the FRMF Dispute Resolution Commission (in French: *"Tout différend sera soumis à la ligue concernée pour un règlement amiable. En cas de non règlement le litige sera soumis à la chambre de résolution des litiges de la FRMF"*), as well as of Article 28 para. 2 of said

regulation, which provides that the decisions of the commission can be appealed in front of FIFA (in French: *"Les décisions de la chambre sont susceptibles d'appel devant la FIFA"*). The Appellant considers that this regulation is applicable, because the parties to the Contract submitted in general to the rules of the FRMF, even if the Contract does not contain a choice-of-law clause.

108. According to the Appellant, given the fact that the Respondent had not submitted the dispute to the FRMF before turning to FIFA, it did not matter that FIFA was seized already on 31 October 2012. In other words, because Mr Floro Sanz had not exhausted domestic legal remedies available to him, FIFA should not have decided that it had jurisdiction to adjudicate the dispute opposing him to the Club.

109. The Appellant adds that it is doubtful whether FIFA is competent regarding coaches, because they are in general not members of the FRMF. In particular, Mr Floro Sanz was never a member of the FRMF.

110. The Appellant also explains that it contested FIFA's jurisdiction through its letters dated 6 June 2013 and 28 June 2015, and its arguments were taken into account, given that the Single Judge of the PSC considered it necessary to rule on his jurisdiction, in the FIFA Decision.

111. Finally, the Appellant explains that the FRMF Decision has a *res judicata* effect, in that it provides authority for deciding the dispute in final and definitive manner, making it impossible for FIFA to render a subsequent decision on the same matter. The FRMF Decision was taken after contradictory proceedings. Indeed, according to the Appellant, all the relevant documents had been sent by fax to Mr Floro Sanz's counsel, using the fax number indicated on a letter FIFA had sent to the FRMF on 15 January 2013 (+34 91 335 06 27). Wydad cannot be blamed for the fact that this fax number proved to be incorrect. In addition, the Respondent had left Morocco without giving Wydad his new address. Under the circumstances, it was impossible for the Club, or any other interested party, to effectively notify him of the proceedings. Furthermore, the FRMF Decision was sent to FIFA on 6 June 2013 and again on 28 June 2015, without the Respondent contesting it. The Respondent was therefore duly notified of the FRMF Decision and is now estopped from contesting it or from criticizing the proceedings. The FRMF Decision was therefore final and definitive. The Appellant also adds that only the dates at which the two decisions were issued should be taken into account. In this regard, the FRMF Decision was rendered in 2013, *i.e.* 3 years before the FIFA Decision and should therefore prevail. Finally, the FRMF Decision has never been contested, and it is not this decision that has been appealed before CAS. Its existence can therefore not be questioned and it cannot be considered null and void. The Respondent's arguments (see below §117) regarding the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") are irrelevant, because, the FIFA Decision is subject to the same criticisms (arbitrators not nominated by the parties, decision not capable of recognition in another country, etc.).

112. The Appellant concludes that the FIFA Decision should be annulled, because it violates Article 7 of the Contract, Article 22 of the RSTP and the principle of *res judicata*.

ii) The Respondent's position

113. According to the Respondent, Article 7 of the Contract does not establish any order of prevalence between the jurisdictions of FIFA and of the FRMF, but leaves to the parties the choice between these two *fora*, as can also be deducted from CAS case-law. The Respondent also contends that he lodged his claim on 31 October 2012, while Wydad filed its claim on 17 January 2013, after having received copy of Mr Floro Sanz's claim through FIFA. Therefore, a situation of *lis pendens* existed, which should have prevented the FRMF from issuing a decision, had Mr Floro Sanz been given the chance to raise an objection regarding *lis pendens* before the FRMF body. Wydad consequently, had acted in bad faith when filing its claim, because at that time it was well aware of the proceedings before FIFA.

114. The Respondent also explains that FIFA is competent because at the national level, no independent arbitration tribunal guaranteeing fair proceedings exists. The FRMF's Dispute Resolution Commission is not independent, because it does not respect the standards set by FIFA for such independent and duly constituted arbitral tribunals. Indeed, according to FIFA Circular n°1010 of 20 December 2005, the principle of parity must be respected when appointing the arbitrators and the parties must be able to challenge an arbitrator if a doubt arises regarding their independence. The Respondent contends that, based on Article 8 of the Swiss Civil Code, the Appellant bears the burden of proving that the FRMF Dispute Resolution Commission had respected these conditions. Nevertheless, the FRMF Procedural rules (produced as evidence by the Appellant) only came into force in March 2013, *i.e.* after the dispute was brought before the FRMF. These regulations were accordingly not applicable to the proceedings initiated by Wydad, and, for this reason, the independence of the FRMF Dispute Resolution Commission cannot be proven. In addition, according to the Respondent, the principle of parity has not been respected before the FRMF, because the parties cannot choose their arbitrators. Arbitrators are designated by the President of the FRMF and they are selected from a fixed list. The list itself is compiled by the President of the FRMF, in violation of FIFA Circular n°1129 containing the National Dispute Resolution Chamber Standard Regulation. Finally, the Respondent explains that the members of the FRMF's Dispute Resolution Commission are appointed by the President of the FRMF, who in turn is elected only by clubs and leagues, according to Articles 9 and 16 of the FRMF Statutes. Furthermore, three of the five members of this commission are employees of the FRMF.

115. Accordingly, in the Respondent's opinion, the PSC Single Judge was right to accept his jurisdiction, because the FRMF did not provide an independent arbitral tribunal guaranteeing fair proceedings, as foreseen by Article 22 lit. c RSTP.

116. The Respondent also argues that the FRMF Decision is null and void, because the FRMF Dispute Resolution Commission was not competent to adjudicate the dispute (cf. §§113 and 114 above), and because the FRMF did not respect Mr Floro Sanz's right to due process, in particular his right to be heard. All the notifications sent to Mr Floro Sanz were sent to the wrong fax number, and it was clear to the sender that these letters were not received, because of the error message appearing in the fax reports. The FRMF was in possession of documents other than FIFA's letter dated 15 January 2013 and it could easily have verified the Respondent's counsels' fax number. After having heard of the existence of the proceedings

before the FRMF, through FIFA, the Respondent clearly stated to FIFA that he considered the FMRF proceedings as null, as he had never been notified of their opening and was never given the opportunity to defend himself. The first time Mr Floro Sanz received the FRMF Decision was on 29 June 2015, through FIFA and he then realized that he could not appeal that decision anymore. In any case, even if Mr Floro Sanz's counsel in the proceedings before FIFA had been duly notified of the proceedings before the FRMF, this would have been insufficient, because they only had power to act on behalf of Mr Floro Sanz in the FIFA proceedings.

117. The Respondent further argues that the FRMF Decision is not enforceable in Switzerland under Articles 25 and 27 PILA[2]. Indeed, the Respondent explains that he had not been duly summoned to the FRMF proceedings, that his right to be heard had been violated, and that a lawsuit concerning the same parties and the same cause of action had already been submitted in Switzerland before the FIFA instances. The Respondent further explains that the FRMF Decision is not recognizable or enforceable under Article 194 PILA[3] and/or Article V of the NYC[4], because he was not given proper notice of the FRMF proceedings and his right to be heard was violated. For this reason, the PSC Single Judge and the CAS could not recognize any *res judicata* effect of that decision.

118. The Respondent added during the hearing that Wydad knew his counsel's name and contact details. Indeed, it was Mr Floro Sanz's counsel who had written to the club, to propose an amicable solution, in a letter dated 17 October 2012, referring to the fact that the law firm was acting on behalf of Mr Floro Sanz in the instant dispute. Despite this fact, Wydad never tried to contact the Respondent directly or through his counsel.

119. Finally, the Respondent underlined that he immediately reacted, as soon as he learned about the FRMF Decision by writing to FIFA, and stating that he did not concede that the proceedings before the FRMF had respected his right to be heard, as well as the many other minimal procedural requirements mentioned already above. He did not appeal the FRMF Decision because he was never formally notified of it.

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2 Artide 25 PILA provides: *"A foreign decision shall be recognized in Switzerland: a. if the judicial or administrative authorities of the state where the decision was rendered had jurisdiction; b. if the decision is no longer subject to any ordinary appeal or if it is a final decision; and c. if there is no ground for denial within the meaning of Article 27"*. Artide 27 para. 2 PILA provides: *"Recognition of a decision must also be denied if a party establishes: a. that it did not receive proper notice under either the law of its domicile or that of its habitual residence, unless such party proceeded on the merits without reservation; b. that the decision was rendered in violation of fundamental principles pertaining to the Swiss conception of procedural law, including the fact that the said party did not have an opportunity to present its defense; c. that a dispute between the same parties and with respect to the same subject matter is the subject of a pending proceeding in Switzerland or has already been decided there, or that such dispute has previously been decided in a third state, provided that the latter decision fulfils the prerequisites for its recognition"*.

3 Artide 194 PILA provides: *"The recognition and enforcement of foreign arbitral awards is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards"*.

4 Artide V para. 1 lit. b NYC provides that recognition or enforcement of an arbitral award may be refused if *"the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"*.

iii) The Panel's determination

120. In the Panel's view, Article 7 of the Contract is a valid arbitration agreement, within the meaning of Article 178 para. 1 and 2 PILA, which provides:

> *"[1] As regards its form, an arbitration agreement is valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *[2] As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law".*

121. The parties do not dispute that a valid arbitration agreement had been concluded between them. They disagree on the meaning of the arbitration clause, contained in Article 7 of the Contract.

122. In case of disagreement between the parties, the contract must be interpreted in accordance with Article 18 para. 1 of the Swiss Code of Obligations, which reads: *"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".*

123. According to the case law of the Swiss Federal Tribunal, *"seized of a dispute as to the interpretation of a contract, a Court must first research the real and common intent of the parties, even empirically on the basis of such hints as may be available, without limiting itself to the wordings and inaccurate denominations the parties may have used. (…) If the effective intent cannot be sufficiently established or if the Court finds that one of the contracting parties did not understand the real intent expressed by the other, the Court will determine the meaning they could and should have given to their respective expressions of will according to the rules of good faith (in accordance with the principle of good faith). Such objective interpretation is an issue of law and is carried out not only on the basis of the text of the contract and the context of the statements, but also in the light of the circumstances preceding and accompanying them, to the exclusion of what took place afterwards. If a doubt remains as to the intent of the parties, additional means can be resorted to"*[5]. These principles have been widely endorsed in CAS case-law[6].

124. In the present case, the wording of Article 7 of the Contract is clear. Indeed, this provision uses the terms *"arbitrage de la FRMF et de la FIFA"*, *i.e. "arbitration of the FRMF* ***and*** *of FIFA"*[7], without using the terms *"after"* or *"before"* to denote a sequence between the two processes. This choice of words shows that the parties intended FIFA as an alternative dispute resolution forum to the FRMF, and not as a second instance forum, as the Appellant has been claiming before the CAS. The Panel is comforted in its conclusion by the fact that the arbitration clause

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5 Decision of the Federal Tribunal of August 20, 2012, in the case 4A_240/2012 and cases quoted, §4.2; also more recently: Decision of the Federal Tribunal of 3 June 2015, in the case 4A_676/2014, §3.2.2; and Decision of the Federal Tribunal ATF 142 III 296, §2.4.1.

6 E.g. CAS 2013/A/3148 §102 and 103.

7 Emphasis added.

never refers to an *appeal* against decisions issued by the FRMF before the relevant FIFA instances.

125. Under the circumstances, the Respondent was free to choose[8] the forum where he would be adjudicating any (eventual) disputes. His choice however, was limited: he could do so either before the FRMF or before the FIFA bodies. The Respondent chose to litigate this dispute before FIFA.

126. The main argument raised by the Appellant thus, regarding the necessity to submit the dispute to the FRMF before turning to FIFA, is not consistent with the wording of Article 7 of the Contract. Indeed, nothing in this clause indicates that the FRMF should be seized before FIFA.

127. The only possible meaning of Article 7 of the Contract, in the Panel's view, is that the parties had the choice to submit their eventual disputes either to FRMF or to FIFA. No hierarchy between the two instances was agreed.

128. The Panel finds comfort in its understanding of Article 7 of the Contract in standing CAS case law[9], which holds for the proposition that the literal interpretation is the starting point of an interpretation, and that any other interpretative method is applicable only if the literal meaning is ambiguous. In the present case, the text of Article 7 of the Contract is clear. Even if this was not the case though, *quod non*, the Panel underlines that, on the basis of the principle *"in dubio contra stipulatorem"*, which can be applied if it is not possible to choose otherwise between several meanings of a clause[10], Article 7 of the Contract should be interpreted in the sense less favourable to Wydad, who was the author of this text. The result of such an interpretation would be the same as the literal meaning, *i.e.* that the choice between the two arbitral *fora* has been expressed in the alternative, that is, it is up to the contractual parties to decide whether they would like to litigate their disputes against each other before the FRMF - or before the FIFA instances. Their choice to this effect is not constrained at all.

129. Finally, none of the other elements put forward by the Appellant contradicts the clear meaning of Article 7 of the Contract. The Appellant has not proven to the Panel's satisfaction that the parties did not intend to agree upon an alternative dispute resolution mechanism. We explain in what now follows.

130. The Appellant relies on the FRMF regulations to interpret Article 7 of the Contract and deducts from Articles 27 and 28 of the FRMF Regulation on the Status and Transfer of Players that the arbitration before the FRMF would be compulsory, without precluding further submission to FIFA in specific circumstances. However, this regulation cannot be used to interpret the Contract, because the parties have never referred to it in their Contract as a means of interpretation of obligations contractually assumed. Furthermore, this regulation does not preclude at all the parties from agreeing on a direct arbitration in front of FIFA.

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8 See Decision of the Federal Tribunal of 29 March 2005, prev. cited, §2.2, which admits the choice between two alternative *fora*.

9 CAS 2007/A/1377; CAS 2009/A/1974; CAS 2003/A/461 & 471 & 473; CAS 2011/O/2588.

10 CAS 2010/A/2306.

Finally, Article 27 para. 1 of the FRMF regulations provides: *"Without prejudice to the right of the player or club to ask for reparation before a civil court for employment-related disputes, the* ***jurisdiction of the FRMF and of FIFA*** *applies to:* (…) *employment-related disputes between a club or a federation and a coach"*[11]. According to this text, both the FRMF and FIFA are competent for such disputes.

131. Therefore, the Panel cannot accept that the regulations of the FRMF would exclude an arbitration clause providing for alternative venues. On the contrary, the Panel retains that Article 7 of the Contract allowed the parties to bring their dispute either before the FRMF or before FIFA.

132. After having thus determined the meaning of Article 7 of the Contract, the Panel shall now turn to evaluate whether the FIFA Decision is well-founded.

133. Once the dispute brought before FIFA, according to Article 22 lit. c and 23 RSTP, the Single Judge of the PSC was competent to rule on the matter. Indeed, the dispute is of international nature, between a Spanish coach and a club originating in Morocco.

134. This Panel agrees with the view expressed by the Respondent to the effect that the FRMF body does not meet the statutory criteria embedded in Article 22 lit. c RSTP. To this effect, the Panel notes that the FRMF Procedural rules only came into force in March 2013, *i.e.* after the dispute had been submitted to the FRMF. These regulations were therefore not applicable to the proceedings initiated by Wydad against Mr Floro Sanz. Contrary to Article 8 of the Swiss Civil Code[12], the Appellant did not bring any evidence attesting the fact that it alleges, and did not demonstrate the independence of the FRMF's Dispute Resolution Commission.

135. Even if the FRMF Procedural rules would have been applicable to the proceedings brought by Wydad, the Panel notes that the FRMF's Dispute Resolution Commission does not meet the standards set in FIFA Circular n°1010 of 20 December 2005. This circular defines the terms *"independent and duly constituted arbitral tribunal"* contained in Article 59 para. 3 of the FIFA Statutes[13]. FIFA Circular n°1010 provides in particular that the parties must have equal influence over the appointment of arbitrators (principle of parity), that the rejection of an arbitrator in case of doubt regarding his independence and his replacement must be regulated, and that each party must have an equal right to present its arguments regarding the facts and the law, file motions and participate in the proceedings.

136. It appears from Article 5 of the FRMF Procedural rules that the principle of parity is not respected with regard to the appointment of arbitrators, because the parties do not choose the arbitrators. They are always designated by the President of the FRMF. This means that

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11 Emphasis added.

12 This provision sets out: *"Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact".*

13 Artide 59 para. 3 of the Statutes (Art. 60 para. 3 in the 2005 version) has the following contents: *"The associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation or to CAS".*

any time the FRMF is a party to a dispute, it will have an undue advantage over the other party and that parties other than the FRMF can never choose their arbitrators. Furthermore, three of the current five members are employees of the FRMF. This fact alone suffices to hold that the FRMF Dispute Resolution Commission is not an independent arbitral tribunal within the meaning of Article 22 lit. c RSTP.

137. The Panel thus, concludes that FIFA had the competence to issue the challenged Decision. The Panel recalls further that Wydad has acknowledged that it had been duly notified of the proceedings before FIFA through its national federation. Although it chose not to play an active role, Wydad was a party to the proceedings before FIFA.

138. The Panel now turns to the issue whether the FRMF Decision should have had an effect on FIFA's jurisdiction.

139. The answer to this question is negative. Indeed, the FRMF proceedings started on 17 January 2013, *i.e.* two and a half months approximately after the beginning of the FIFA proceedings, which started on 31 October 2012. Furthermore, the Respondent never received any of the notifications allegedly sent to him by the FRMF. At first, Wydad sent Mr Floro Sanz a letter through a court bailiff to his domicile in Morocco on 24 September 2012. Whether or not Mr Floro Sanz had already left the country at that time has not been established during the present proceedings. Nevertheless, the notification protocol of that letter clearly shows that the letter of 24 September 2012 was not remitted to Mr Floro Sanz. In addition, the Respondent never received any of the faxes sent to him by the FRMF, after Wydad had seized it. Indeed, the wrong fax number was used on all the letters sent, and all the fax reports show an error message. Due diligence would require from the party charged with contacting the Coach to do so. In presence of proof in the form of the message 'Error' appearing on the body of the fax sent to the wrong number, it is for the party responsible for contacting the Coach to look further for the correct number. In case it did not, it would be failing its duty, since it would acquiesce to a situation where the information had not been transmitted. Furthermore, in the Panel's view, it would not have taken a disproportional effort for Wydad to accede to the right fax number for Mr Floro Sanz. The various communications that it was possessing indicated a different number, and a simple comparison with these communications should have alerted Wydad to the reasons explaining the erroneous transmission. Under the circumstances, and given the fact that the FRMF or Wydad never tried to contact Mr Floro Sanz's counsels, although they knew the telephone number and address of the law firm, the Panel agrees with the Respondent that there was indeed lack of notification of these proceedings to him. The Panel equally agrees with the lack of notification of the FRMF Decision.

140. Despite the fact that the Appellant produced a letter dated 6 June 2013 through which Wydad's previous counsel seems to have sent the FRMF Decision to FIFA, this letter does not appear in the file received by the Panel from FIFA. It can also be deducted from the fact that FIFA did not react to that letter and the description of the proceedings as above (§32 - §41) that FIFA in fact had never received that letter. The Respondent explained that he only received the FRMF Decision on 29 June 2015, through FIFA, and he then realized that he could not appeal that decision anymore, because it had been rendered more than two years

before. The Panel considers that this explanation is consistent with the rest of the evidence on file.

141. In any case, the FRMF Decision is of no concern to the present proceedings. The parties did not ask, in their request for relief, that the FRMF Decision be declared null and void, although Mr Floro Sanz had included a claim to this effect in the arguments contained in his Statement of Defence.

142. Furthermore, there is no need for the Panel to decide whether the Respondent could have raised the issue of *lis pendens* during the FRMF proceedings, because the Respondent did not receive any timely notification regarding these proceedings. He was therefore prevented from defending his position before the FRMF.

143. As to the *res judicata* effect of the FRMF Decision, raised by the Appellant, it is the Panel's view, that a similar effect cannot be recognized. This is so because the right to a due process had been violated during the proceedings before the FRMF. As a result, because the process before the FRMF suffers from this vice, it cannot be acknowledged as producing a *res judicata* effect. Indeed, the Swiss Federal Tribunal recognized as much, when it held that *"if a party seizes an arbitral tribunal sitting in Switzerland of a claim identical that which was decided in a judgment or an enforceable award issued between the same parties by a state court or an arbitral tribunal sitting elsewhere than in Switzerland, the Swiss arbitral tribunal must declare the request inadmissible provided the foreign judgment or award are susceptible to recognition in Switzerland pursuant to Art. 25 PILA or to Art. 194 PILA. Failing this, it will be found in breach of procedural public policy"*[14].

144. In the present case, as already discussed above (§139), the Respondent had not been duly notified of the FRMF proceedings, and did not have the opportunity to defend his position during those proceedings. Furthermore, the FRMF, although it was aware of the FIFA proceedings (because Mr Floro Sanz's claim had been notified to Wydad through the FRMF, *cf. supra* §28), did not take into account the fact that proceedings on the same matter were already pending before FIFA when Wydad filed its claim before the FRMF. Due process thus, has been irreversibly violated. Therefore, based on Articles 25 and 27 para. 2 PILA, the FRMF Decision cannot be recognised as having the force of *res judicata* in Switzerland. Accordingly, the Single Judge of the PSC was right when he refused to recognise in his decision *res judicata* effect of the FRMF Decision.

145. The Panel adds that according to the case-law of the Swiss Federal Tribunal, *"a deficiency falling within procedural public policy, such as compliance with the right to be heard, is both a ground for refusal to be invoked by the parties (Art. V(1)(b) of the New York Convention) and an ex officio ground of refusal (Art. V(2)(b) of the New York Convention)"* and can be invoked at any time by the aggrieved party[15].

146. In the present case, the Respondent raised the issue of violation of his right to be heard only after he had become aware of the FRMF Decision, *i.e.* approximately two years after the

14 Swiss Federal Tribunal, decision 4A_374/2014 of 26 February 2015.
15 Swiss Federal Tribunal, decision 4A_374/2014 of 26 February 2015.

decision had been issued. Given the fact that the violation of the right to be heard is an *ex officio* ground for refusing the recognition of an arbitral award, according to the NYC, the Respondent was not late in raising this defence at that moment. In similar vein, the Single Judge of the PSC was right when he reached his decision without taking into account at all the FRMF Decision.

147. In conclusion, FIFA had jurisdiction to decide the dispute brought before it by Mr Floro Sanz.

b) Is the FIFA Decision correct?

148. In the FIFA Decision, the Single Judge of the PSC held that, at the moment of the Respondent's dismissal by Wydad, the latter still owed Mr Floro Sanz three monthly salaries for the months of June, July and August 2012, that is, the sum of EUR 105'000. The Single Judge also held that Wydad owed Mr Floro Sanz bonuses regarding 14 wins and 4 draws, *i.e.* a total amount of MAD 138'000. Finally, taking into account the fact that the Contract had been unilaterally terminated by Wydad without just cause, the Single Judge concluded that Mr Floro Sanz was entitled to a compensation of EUR 350'000 corresponding to his salary for the period from September 2012 until June 2013.

149. The Appellant claims that it was Mr Floro Sanz, who terminated the Contract and he did so without just cause, because he had decided to abandon his position. The Appellant also claims that Mr Floro Sanz never put Wydad on notice to pay the salaries that were owed to him. The Appellant also explains that Mr Floro Sanz did not prove that Wydad would have stopped him from training the team, because he did not produce any written document demonstrating this allegation. The Appellant adds that it never terminated the Contract, and maintains that it had been obliged to nominate a new provisional staff to train the team, respecting thus the FRMF Club Licensing Procedure for the Professional Championship Season 2012-2013 ("FRMF CLP"), in particular its Rule n°P.06[16] and its Article 22[17]. The Appellant adds that it only nominated a new coach three weeks after Mr Floro Sanz had left the team, *i.e.* on 8 October 2012. Wydad also contends that the Respondent never sent to it written notice, asking it to respect the Contract. The Appellant adds that the Contract contained an obligation not to leave Morocco without the written authorisation of the Club and that the Respondent did not respect this obligation. In the Appellant's view, the above constitutes proof that the Contract had not been terminated by Wydad without just cause, contrary to the conclusions of the Single Judge of the PSC. The Appellant therefore requests the Panel to set aside the FIFA Decision.

150. The Respondent considers that the unilateral termination of the Contract by Wydad is evidenced by the appointment of a Technical Committee to coach the team on the day following his dismissal. If Wydad had considered that Mr Floro Sanz was still under contract with it, it would not have nominated a Technical Committee on 21 September 2012. In any

16 This rule provides that the club must have nominated its head coach in charge of the football-related questions of the first team.

17 This provision sets out that in case of violation of the A-type criteria, the club is relegated to the lower division, unless the FRMF accepts a derogation.

case, the Respondent claims that, contrary to the Appellant's assertion, the nomination of that committee was not made in order to avoid a breach of the FRMF CLP. If this had been the case, *i.e.* if Wydad had intended to meet the A-type criteria set by those regulations and had nominated the Technical Committee for that purpose, it would have had to do so at a much earlier stage, since these criteria must be fulfilled prior to the start of the relevant season, as foreseen by Article 15 FRMF CLP[18]. No sanction is imposed for breaches that might occur during the course of the season, as the FRMF CLP makes clear. Finally, the Respondent underlines that, in any case, Wydad acknowledged that the new coach's contract was only registered after 25 October 2012. Despite the fact that Wydad had not entered into a contractual arrangement with another coach for a period extending beyond one month, the club was not relegated to the lower division. In the Respondent's view, further proof of his dismissal can be found in the wide coverage this matter was given in the international and in the Moroccan media. Furthermore, the Respondent considers that Wydad's actions after the termination of the Contract add further proof to his allegation that he had been dismissed. Firstly, Wydad never informed the Respondent of any alleged breach on his part, given that the only notification sent to him was written in Arabic and sent through a court bailiff. The Respondent recalled in this context, that the bailiff did not hand him that notification. Secondly, the Appellant did not respond to the letter sent by the Respondent's counsels on 17 October 2012, and only reacted when it learned that a claim was pending before FIFA. In other words, Wydad did not contest that the coach had been dismissed, a fact that was explicitly included in the letter of 17 October 2012. Finally, the Respondent explains that, in any event, he had just cause to terminate the Contract, because Wydad owed him three monthly salaries and several bonus payments, and no prior notice was needed as the club knew that these payments were outstanding. In addition, the nomination of the Technical Committee was a serious breach that constituted just cause for the Respondent to terminate the Contract. For these reasons, the Respondent asks the Panel to confirm the amounts awarded by the Single Judge of the PSC.

151. Taking into account all the evidence brought before it, the Panel confirms the FIFA Decision.

152. During the present proceedings, in addition to the evidence already brought before FIFA, the two coaches testified and explained the circumstances of their dismissal. They both clearly explained that the decision to terminate the Contract on 20 September 2012 was not theirs, but Wydad's, and that they were taken by surprise. Mr Floro Sanz explained that he had requested a written document specifying that he had been dismissed and the reasons thereof, but Wydad refused to issue it, and that the dismissal was only communicated orally to him and then to the rest of the team, including Mr Albes Yanez. Their statements were confirmed by Mr Roger, who was present when the dismissal was announced to the team. The slight differences in the description of events by the three witnesses are natural, because more than four years have elapsed since the relevant facts.

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18 This provision sets out that if the candidate for a license does not fulfill the A-type criteria until 30 June 2012 at the latest, it shall not receive a license for the 2012/2013 season in the corresponding division, unless the FRMF's Federal Bureau (or another recognised authority) accepts a derogation.

153. In the Panel's opinion, the fact that Wydad nominated a Technical Committee on the day following the dismissal of Mr Floro Sanz and Mr Albes Yanez is equally decisive. Indeed, if Wydad had not been the party who put an end to the Contract, it would not have been so certain that Mr Floro Sanz would not come back to train the team, only one day after 20 September 2012. The Appellant's argument regarding the obligation to nominate a coach in relation with FRMF's licensing rules does not change anything to the above (this argument is all the less convincing that Wydad only hired a new coach on 8 October 2012 and did not lose its license in the meanwhile). In addition, although the media reports are not in themselves sufficient to prove a termination by one of the parties, it is duly proven that the media presented the termination as having been decided by Wydad.

154. It is regrettable that the termination was not formalised in writing, but the Panel deems that the evidence on file suffices to establish to its satisfaction that Wydad terminated the Contract.

155. As far as the cause for termination is concerned, the Panel cannot follow Wydad's contention, according to which Mr Floro Sanz would have violated the Contract. Indeed, Wydad did not prove that the Respondent would have failed to fulfil his contractual obligations. In particular, despite its allegations, the Appellant did not prove that Mr Floro Sanz was effectively absent from training at any time before the events that took place on 20 September 2012. In this regard, Wydad's letters dated 20, 21 and 22 September 2012, complaining of Mr Floro Sanz's absence, were not sent to him, but to the Secretary General of the FRMF Dispute Resolution Commission, and the letter sent by Wydad to the Respondent through a court bailiff on 24 September 2012 never reached him. More importantly, all these letters are posterior to the termination of the Contract, so they cannot be used as evidence pointing to the cause of termination.

156. In the absence of evidence regarding a justified cause for termination, the Panel concludes that Wydad terminated the Contract without a just cause.

157. The above makes it unnecessary to decide whether Mr Floro Sanz would have had a just cause for termination and on which basis and whether he left Morocco without the authorisation of the Club (because this authorisation was no longer relevant after the termination of the Contract, which took place prior to his departure).

158. The Panel shall now turn to the financial consequences of this termination without just cause.

159. As set forth by Article 5 para. 2 of the Contract, in case of termination by one of the parties, the party liable for terminating the Contract shall pay to the other the rest of the amounts due under the Contract.

160. In accordance with this provision, the Single Judge granted Mr Floro Sanz an amount of EUR 350'000, corresponding to 10 monthly salaries of EUR 35'000 (from the termination of the Contract in September 2012 until the term of the Contract in June 2013). This part constituted the damage suffered by Mr Floro Sanz as a result of the sudden break of his contractual relationship with the Club, that prevented him from benefiting from the payment of salaries until the end of his contractual relationship with it.

161. The Appellant never contested that this amount had been correctly calculated in Decision that the Single Judge (PSC) had issued.

162. Based on the evidence on file, the Panel is convinced that this amount represents the residual value of the Contract and is due to Mr Floro Sanz.

163. In addition, the Single Judge considered that Wydad owed Mr Floro Sanz outstanding salaries, for the months of June, July and August 2012, representing EUR 105'000. The Single Judge also held that Wydad owed Mr Floro Sanz bonuses regarding 14 wins and 4 draws, *i.e.* a total amount of MAD 138'000. These two amounts constitute the damage that Mr Floro Sanz had already suffered at the moment when he was dismissed from his functions.

164. Again, the Appellant did not contest the amounts it owed to the Respondent, but explained that the payments were only late because it would have offered Mr Floro Sanz to pay by way of cheques, but he refused. This allegation is however not proven and shall, therefore, be rejected.

165. The Panel is satisfied that the outstanding bonuses and salaries correspond to the amounts granted to the Respondent by the FIFA Decision.

166. The Panel shall now examine Wydad's argument regarding the fact that it would have been entitled to withhold the payment of the unpaid salaries and other amounts, because the FRMF Decision condemned Mr Floro Sanz to pay to Wydad an amount of EUR 350'000. The Respondent replied that this argument is misconstrued since the FRMF Decision is null, void and unenforceable. This is the case, because, in his view, Wydad had terminated the Contract without just cause. As a result, it is the view of Mr Floro Sanz that he owes no compensation to Wydad.

167. The Panel disagrees with the Appellant. As explained above (§139), the FRMF Decision was taken in violation of Mr Floro Sanz's procedural rights, and he had at no point in time been notified of it. Under the circumstances, this decision cannot be enforced under the NYC or under the PILA, and cannot serve as a basis for a set-off. This argument is rejected.

168. The Panel now turns its attention to the question regarding payment of interests. The Single Judge had already decided that, without any contestation from the Appellant, all the amounts due by Wydad bear interest of 5% per annum, from the date they were due. The date(s) when they are due is/are set out with precision in the FIFA Decision and are confirmed by the Panel.

169. In conclusion, the appeal is dismissed and the FIFA Decision is upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Wydad Athletic Club on 23 June 2016 against the Decision of the Single Judge of the Players' Status Committee of FIFA dated 30 June 2015, is dismissed.

2. The Decision of the Single Judge of the Players' Status Committee of FIFA dated 30 June 2015 is confirmed.

3. (…).

4. (…).

5. All other or further claims are dismissed.