Arbitration CAS 2020/A/7175 Al-Arabi Sporting Club v. Juan Ignacio Martínez, award of 29 January 2021

Panel: Mr Jacques Radoux (Luxembourg), President; Mr Jan Räker (Germany); Mr Manfred Nan (The Netherlands)

Football
Termination of the employment contract with just cause by a coach
Counterclaims
Just cause and burden of proof
Obligation to protect the employee's personality rights
Demotion as just cause to terminate the contract
Appropriate warning
Provisional suspension as just cause to terminate the contract
Non-payment of all or part of the remuneration as just cause to terminate the contract
Law applicable to compensation in employment-related disputes involving coaches
Duty of mitigation and concomitant fault of the player

1. **Counterclaims are, since 1st January 2010, inadmissible in CAS appeal procedures. Instead, a respondent needs to file an independent appeal within the applicable time limit. If it fails to do so, i.e. if the answer including the request is filed after the time limit for the appeal has expired, the counterclaim is inadmissible. This, however, does not concern requests that relate to procedural and legal costs.**

2. **Just cause to terminate a contract is generally said to exist where the breach has reached such serious levels that the injured party cannot in good faith be expected to continue the contractual relationship. The question whether just cause in fact existed, shall be established in accordance with the merits of each particular case. As it is an exceptional measure, the immediate termination of a contract for just cause must be accepted only under a narrow set of circumstances. Thus, only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter. In the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after being warned. The judging body determines at its discretion whether there is just cause. Furthermore, a termination of contract with immediate effect is to be applied as *ultima ratio*. As to the burden of proof, a party must provide the CAS panel with all relevant evidence that it holds, and, with reference thereto, convince the CAS panel that the facts it pleads are true, accurate and produce the consequence envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.**

3. The employer has the obligation to protect the employee's personality rights. The case law has deduced thereof a right for categories of employees to be employed, in particular for employees whose inoccupation can prejudice their future carrier development. The employer has to provide these employees with the activity they have been employed for and for which they are qualified. The employer is therefore not authorized to employ them at different or less interesting positions than the one they have been hired for.

4. The instruction *"not to train the first football team anymore"* and to *"just observe the U13 football team"* is a particularly offending demotion of a coach specifically hired to train the first football team and constitutes a serious breach of the contract by the club that gives the coach "just cause" to immediately terminate the contract.

5. Given that an immediate termination can only occur in presence of a *"very severe breach"* of the employment contract, a coach's approach to first warn the club and request his reinstatement is a reasonable and appropriate approach. This approach allows the coach to avoid all risk of seeing himself confronted with the reproach of having not asked the breaching party, *i.e.* the club, to desist its breachful act and/or with the argument that his immediate termination was not an *ultima ratio* measure.

6. The suspension of a professional coach, even for a limited period, is a measure that undoubtedly affects the personal and economic sphere of the latter and infringes his legal interests and may amount to a violation of his personality rights. In absence of any contractual basis, it can be considered as a severe breach of the contract and give the coach a "just cause" to terminate the contract.

7. Non-payment of all or part of the remuneration by an employer does in principle constitute just cause for termination of the contract, as the employer's payment obligation is his main obligation towards the employee. Whether the employee falls into financial difficulty by reason of the late or non-payment is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. However, the latter applies only subject to two conditions. First, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract.

8. The FIFA Regulations on the Status and Transfer of Players (RSTP) does not contain any provision governing the compensation that is to be awarded in employment disputes involving coaches, as Article 1.1 RSTP limits the scope thereof to the statutes, eligibility and transfers of "players". Thus, Swiss law is to be applied to the issue of compensation in case of termination of the contract with just cause. The employee who has terminated the employment contract with just cause can claim the loss of earnings consecutive to the termination of the employment relationship, which is equivalent to

the amount an employee who has been unjustly dismissed with immediate effect can claim in application of Article 337c (1) and (2) of the Swiss Code of Obligations (CO). Thus, in theory, he is entitled to compensation corresponding to what he would have earned had the contract been fulfilled to its expected date of expiry, pursuant to the so-called doctrine of restitution.

9. According to art. 337c (2) of the SCO, the duty of mitigation is related to the rule that the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn. Such a rule implies that, in accordance with the general principle of fairness, the injured player must act in good faith after the breach by the club and seek for other employment, showing diligence and seriousness. The duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign the contract with worse financial conditions, in the absence of any valid reason to do so. Article 337c (2) CO exactly defines what amounts have to be set-off from the amount the employee would have earned if the contract had gone to its end. It does not provide for the possibility of a reduced amount due to the simultaneous fault of the worker; it authorises set-off only against what he would have earned. It can therefore be inferred from the wording and system of Article 337c CO that the concomitant fault is a factor of reduction or cancellation of the compensation provided for in (3) of Article 337c CO, but not of the damages due under paragraph 1 of that article.

I. PARTIES

1. Al-Arabi Sporting Club (the "Club" or the "Appellant") 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 Juan Ignacio Martínez (the "Coach" or the "Respondent"), is a professional football coach born in Spain.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written and oral submissions, and the evidence examined in the course of the present appeal arbitration proceedings and the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in

the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background of the dispute

4. On 10 June 2019, the Coach and the Club signed an employment contract (the "Contract"), valid as from the date of signature for *"one sports season (2019/2020)"*. According to article 7 of the Contract, the Club was to pay the Coach *"a total amount 300000 $ […] which he receives $30,000 when he comes to start the preparation period during July 2019. The rest amount will be paid to the [Coach] equally as monthly salaries for ten months by 27000$ monthly […], net of taxes. The [Club] shall provide the tax certificates will assist the [Coach] in case there is any issue with the Kuwaiti and the Spanish tax authorities"*.

5. On 28 September 2019, the Club provided a settlement agreement to the Coach with the purpose of terminating the employment relationship against the payment of USD 54,000.

6. On 1 October 2019, the Club informed the Coach that he had violated his employment contract by not training the first team properly on several occasions.

7. On 3 October 2019, the Coach replied that he disagreed with the accusations of the Club.

8. By letter of the same day, the Club informed the Coach that he was *"not to train the first football team anymore and just to observe the U13 football team […] starting from 04/10/2019 at 05:30 PM"*.

9. By letter dated 4 October 2019, the Coach, alongside the rest of the Coaches team, requested to be reinstated in his position as with immediate effect, arguing that the decision to reassign the Coaches team to the training of the U13 team instead of the first team was *"a serious violation of our employment contracts, since [the club is] preventing us to perform our professional tasks in the first football team, as expressly referred in the contract"*.

10. On the same day, the Club replied to the Coach's letter by informing him that he was *"to continue with his work as coach of the first football team"*.

11. Still on 4 October 2019, the Coach and the Coaches team addressed a letter to the Club complaining about what they felt to be a mistreatment from the Club and informing the Club that they would not be able to lead the team for the match the following day (5 October) as they were not allowed to lead the trainings during the week prior to that match. Further, they informed the Club that they would be at the disposition of the first team from 6 October 2019.

12. On 5 October 2019, the Club send the Coach a warning as he and his team were absent from training and imposed a reduction of the equivalent of a day's salary out of his monthly salary.

13. On 6 October 2019, the Coaches team replied to the Club, arguing that the sanction was outrageous and that the Club had cancelled a training of the first team without the agreement of the Coaches team. They further requested the sanction to be cancelled and to be informed

as to when the next training session was scheduled.

14. On 7 October 2019, that request was reiterated by the Coaches team which further requested to be reinstated as coaches in charge of the first team as they considered that they did not have all the decision-making power with regards to the first team.

15. On 9 October 2019, the Coaches team reiterated their request to be reinstated, and gave 3 days for the Club to remedy its default.

16. On 10 October 2019, the Club replied to the Coaches team informing it about the opening of disciplinary proceedings due to (i) missing training and showing insubordination, as stated in the Club's letter dated 1 October 2019, (ii) the failure to take the training of the first team on 4 October 2019, and (iii) the failure to take the official match of 5 October 2019. In the said letter, the Club invited the Coach to provide his position on said accusation within 7 days. The letter finally stated that the Coach's salary of September 2019 was *"temporarily withheld until the Board of Directors renders its final decision"*. Furthermore, the club informed the coach that he could not and should not *"interpret such provisional measures as automatic termination without just cause by the club"*. The Club invited the assistant coaches to join the training on the same day.

17. On the same day, the Coaches team replied that they were surprised that a disciplinary proceeding was opened and added that the fact that the assistant coaches were invited to train the team while the head coach was suspended was a *"despicable strategy"*. They further added that since all the contracts of the Coaches team were linked in accordance with Article 33 of the Contract, the club was not *"entitled at all to request the assistant coaches to attend the training session"*.

18. On 13 October 2019, the Coach and his team notified the Club that they unilaterally terminated their contracts, arguing that, in consequence of their letters dated 9 and 10 October 2019 and in the absence of a reaction of the Club to their request to be reinstated as coaches of the first team, they had just cause to terminate the contracts. The Coach gave the club 5 more days to solve the matter avoiding a FIFA procedure.

19. On the same date, the Club replied that only the Coach and Mr. Jiménez were suspended and that the assistant coaches were still in charge of the first team. The Club thus requested them to attend all trainings and considered their claims to be reinstated to be without legal basis.

20. On 16 October 2019, the Coaches team reconfirmed, via the Coach's counsel, their termination of the Contract.

21. On the same day, the Club informed the Coach that it took good notice of the termination of the Contract with effect from 13 October 2019 and that it *"accepted the repudiatory breaches committed"* by the Coach and deemed the Contract to have been terminated without just cause, rendering the Coach liable to pay compensation for damages to the Club. It further informed the Coach that the salary of September 2019 was withheld *"as a security measure to offset part of the club's claims for damages"*.

B. Proceedings before the FIFA Players' Status Committee

22. On 23 October 2019, the Coach lodged a claim against the Club before the Players' Status Committee of the FIFA for outstanding remuneration and compensation for breach of contract, requesting the total amount of USD 243,000, plus 5% interest p.a. as from 13 October 2019 until the date of effective payment, corresponding to:

a. USD 27,000 as outstanding remuneration for the salary of September 2019;

b. USD 216,000 as compensation for breach of contract, corresponding to 8 monthly salaries;

c. Additional net compensation to be determined by the FIFA PSC as part art, 17.1.ii of the FIFA RSTP, and/or specificity of sport, plus 5% interest as from 13 October 2019;

d. Declare that if any further amount is requested by the Spanish Tax Authorities after receiving the compensation, such extra amount directly originated from the receipt of the compensation in Spain shall be borne by the [C]lub;

e. Sporting sanctions to be imposed on the Club;

f. Procedural costs and legal fees at the expense of the Club.

23. On 27 February 2020, the Single Judge of the Players' Status Committee rendered his decision ("Appealed Decision") the grounds of which were notified to the Parties on 28 May 2020. The operative part of the Appealed Decision reads as follows:

"1. The claim of the Claimant, Juan Ignacio Martínez, is partially accepted.

2. The Respondent, Al-Arabi Sporting Club, has to pay to the Claimant within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of USD 27,000, plus 5% interest p.a. as from 13 October 2019 until the date of effective payment.

3. Furthermore, the Respondent has to pay to the Claimant, within 30 days as from the date of notification of this decision, the amount of USD 216,000 plus 5% interest p.a. as of 13 October 2019 until the date of effective payment as compensation for breach of contract.

4. Any further claim lodged by the Claimant is rejected.

5. The Claimant is directed to inform the Respondent, immediately and directly, preferably to the e-mail address as indicated on the cover letter of the present decision, of the relevant bank account to which the Respondent must pay the amounts mentioned under points 2 & 3 above.

6. The Respondent shall provide evidence of payment of the due amounts in accordance with points 2 & 3 above to FIFA to the e-mail address psdfifa@fifa.org, duly translated, if need be, into one of the official FIFA languages (English, French, German, Spanish).

7. In the event that the amounts due to the Claimant in accordance with the above-mentioned number 2 & 3 are not paid by the Respondent within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

8. The final costs of the proceedings in the amount of CHF 25,000 are to be paid by the Respondent, as follow:

8.1 The amount of CHF 5,000 has to be paid to the Claimant.

8.2 The amount of CHF 20,000 has to be paid to FIFA to the following bank account with reference to case no. 19-02027/syi: […]".

24. In its version without grounds, the Appealed Decision contained a note relating to the findings of the decision to the findings of the decision according to which, pursuant to Articles 15 and 18 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, a *"request for the grounds of the decision must be received, in writing, within 10 days of receipt of notification of the findings of the decision. Failure to do so within the stated deadline will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal. Whenever procedural costs are due, the grounds of the decision will only be notified to the party requesting the grounds and upon payment of the relevant procedural costs. If the procedural costs are not paid within 20 days of the notification of the findings, the request for the grounds shall be deemed to have been withdrawn. As a result, the decision will become final and binding and the relevant party will be deemed to have waived their right to file an appeal […]".*

25. In the Appealed Decision, the Single Judge:

- Concluded, after having analysed the circumstances surrounding the present matter and on basis of the documentation on file, that the Coach took all the possible measures to ensure the continuation of the Contract under correct terms, however to no avail as the Club did everything possible to frustrate the Coach to render the service for which he was contracted. This conduct of the Club includes demoting the Coach to the U13 team – on the basis of unsubstantiated alleged violations, which were not properly analysed or being dealt with in any disciplinary proceedings with the Coach's right to be heard guaranteed, blatantly ignoring the principle of *"Audi alteram partem"*.

- Concluded, in light of the above and considering the non-payment of the Coach's September 2019 salary together with the unlawful and *male fide* conduct of the Club, that the Coach terminated the Contract with just cause on 13 October 2019.

- Noted that it remained undisputed that the Coach's salary for September 2019 in the amount of USD 27,000 remained unpaid and that the Club failed to provide any substantiated, reasonable and valid justification or reasons. Therefore, in accordance with the principle of *pacta sunt servanda*, the Single Judge held that the Club should pay the Coach outstanding remuneration in the amount USD 27,000 plus interest of 5% p.a. as from 13 October 2019, in accordance with the Coach's request.

- Considered that, as regards the compensation agreed upon by the contractual parties, the clauses of the Contract were not reciprocal and proportionate in the sense of the relevant jurisprudence. He concluded that, in line with the jurisprudence of the Players' Status Committee, the amount of compensation payable in this case should therefore be based on the residual value of the Contract.

- Found that between that date on which the Contract was terminated, *i.e.* 13 October 2019, until 31 May 2020, *i.e.* date on which the Contract was supposed to run, the Coach would have earned the total amount of USD 216,000.

- Assessed whether the Coach had signed an employment contract with another club during the relevant period of time, by means of which he would have been able to reduce his loss of income and, thus mitigate his damages.

- Observed that the Coach confirmed that he has remained unemployed since the date of termination of the Contract until the date on which the Appealed Decision was taken and decided that no mitigation was to be applied.

- Determined that the Club shall pay to the Coach the amount of USD 216,000 as compensation for breach of contract without just cause, with interest of 5% p.a. as from 13 October 2019 until the date of effective payment.

- Decided, in view of the fact that the claims of the Coach were almost "entirely accepted" and that the Club is the party at fault, that the Club should bear the costs of the proceedings in front of FIFA and determined those costs to the amount of CHF 25,000 to be paid by the Club in the following manner: CHF 5,000 directly to the Coach and CHF 20,000 to FIFA.

- Rejected any further claim of the parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 17 June 2020, in accordance with Article R47 of the Code of Sports-related Arbitration (the "Code") (2019 edition), the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Respondent with respect to the Appealed Decision. In its Statement of Appeal, the Appellant appointed Dr Jan Räker, Attorney-at-law in Stuttgart, Germany, as arbitrator.

27. On 22 June 2020, the CAS Court Office informed the Respondent of the initiation of the present appeals proceedings against him as well as of the possibility to start a mediation procedure under the CAS rules and invited the Appellant to file its Appeal Brief within the deadline stated in Article R51 of the Code. Separately, but still on the same day, the CAS Court Office informed the FIFA of its possibility to request its intervention to the present proceedings.

28. On 23 June 2020, the Respondent informed the CAS Court Office that he refused to submit

the present matter to a mediation procedure.

29. On 2 July 2020, the Respondent nominated Mr Manfred Nan, Attorney-at-Law in Arnhem, The Netherlands, as arbitrator.

30. On 29 July 2020, the CAS Court Office acknowledged receipt of the Appeal Brief filed on 8 July 2020 and of the Appellant's payment of its share of the advance of costs for the present appeal procedure. Further, it informed the Parties that the Panel appointed to decide on the present proceedings was constituted as follows:

President:	Mr Jacques Radoux, Référendaire, European Court of Justice, Luxembourg
Arbitrators:	Dr Jan Räker, Attorney-at-Law in Stuttgart, Germany
	Mr Manfred Nan, Attorney-at-Law in Arnhem, The Netherlands

31. On 28 August 2020, the CAS Court Office acknowledged receipt of the Answer, filed on 27 August 2020, and invited the Parties to state whether they would prefer a hearing to be held in the present matter.

32. On the same day, the Appellant informed the CAS of its preference for such a hearing.

33. On 2 September 2020, the Respondent informed the CAS Court Office that it preferred the Panel to render an award on the sole basis of the Parties' written submissions.

34. On 3 September 2020, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in the present matter.

35. On 8 September 2020, the CAS Court Office sent to the Parties an Order of Procedure, requesting them to return a signed copy of it to the CAS Court Office. On the same day, the CAS Court Office acknowledged receipt of the copy of the Order of Procedure as signed by the Appellant. On 17 September 2020, the Respondent transmitted its signed copy of the Order of Procedure on which he had reiterated his reservations in relation to the *"admissibility and competence"* as he considered the Appealed Decision to be final and binding.

36. On 13 November 2020, a hearing took place in the present proceedings. Due to COVID-19 restrictions, the hearing was held via cisco-webex. The Panel was assisted by Mr Antonio De Quesada, Head of Arbitration at the CAS, who was physically present at the CAS Court Office in Lausanne, Switzerland. The Panel was joined by the following participants:

For the Appellant:

Mr Georgi Gradev and Mr Marton Kiss, counsels;

Mr Khaled Waleed Abdulqodus, Director of football in the Club, as a witness;

Mr Ahmad Mohammad Alnajjar, First Team Manager of the Club, as a witness;

Mr Sameh Samir Mostafa, interpreter.

For the Respondent:

Mr Juan Ignacio Martínez;

Mr Juan de Dios Crespo Pérez and Mr Alejandro Pascual Madrid, counsels;

Mr Alfonso Léon Lleó, interpreter.

37. At the outset of the hearing, the Parties confirmed that they had no objections to the constitution of the Panel.

38. The Panel heard Mr Khaled Waleed Abdulqodus and Mr Ahmad Mohammad Alnajjar, witnesses called by the Appellant. Both witnesses were invited by the President of the Panel to tell the truth subject to the sanction of perjury under Swiss law.

39. Mr Abdulqodus testified, *inter alia*: that on 4 October 2019 he was informed by the Coach that the latter would not come to the training that day as he had been instructed to not train the first team anymore; that when meeting with the Coach at the Club, the latter said that he could not join the training without having an official letter from the Club telling him that he was the coach of the first team; that it was difficult to get that letter as it was Friday; that when that letter finally arrived (around 18h30) the Coach, although the start of the training had been delayed to 18h30, still refused to lead the training and said that he would not lead the team anymore; that he was worried about his image, did not have a lot of experience and did not now what to do; that the Coach did not want to give the list of players for the match on 5 October 2019; that the Coach and his Coaches Team left the stadium after that; that the 4 October training was finally led by the goalie trainer; that the players on some pictures submitted by the Respondent were the U20 and U 17 team; that Mr Nestorovic led the team in the 5 October Match; that on 7, 8 and 9 October 2019 he did not see the Coach at the stadium but only some assistant coaches recording the training with their cell phones; that he was not aware of the Coach's letter dated 7 October 2019; that he does not know how the disciplinary proceeding engaged by the Club works.

40. Mr Alnajjar testified, *inter alia*, that on 4 October 2019 Mr Abdulqodus arrived at the meeting room with the Coach and his Coaches Team; that the training session planned was delayed for 50 minutes; that after the meeting the training session was held without the Coach; that he was outside the pitch watching that training; that the Coach was not present and that he was told that the Coach had left the club/stadium; that the pictures submitted by the Respondent in relation to the training of 4 October 2019 shows the U17 team; that Mr Nestorovic had never been trainer of the Club's first team before; that on 7, 8, 9 and 10 October 2019, he was present at the trainings sessions of the first team, in the stands, and saw some of the assistant coaches in the stands (7, 8 and 9) making recordings with their cell phones (on 8 and 9 October) but did not speak to them.

41. The Parties were given full opportunity to pose questions to the witnesses, to present their cases, to submit their arguments and to answer the questions posed by the Panel.

42. Before the conclusion of the hearing, the Panel invited the Parties to continue their negotiations to find a settlement agreement and granted them a deadline of two weeks to do so. At the conclusion of the hearing, the Parties confirmed that their right to be heard had been fully respected and that they had no objections as to the manner in which the proceedings had been conducted.

43. On 1 and 2 December 2020, the Parties informed the Panel that they had not been able to reach an agreement to settle the dispute. It was thus up to the Panel to decide the appeal.

IV. THE PARTIES' SUBMISSIONS

44. The following summary of the Parties' positions is illustrative and does not necessarily include each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

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

- The jurisdiction of the Panel to decide upon the present matter is based on Article 58 of the FIFA Statutes and Article 23.4 of the 2020 FIFA Regulations on the Status and Transfer of Players ("RSTP"). In addition, the present appeal is admissible as it was initiated within the time limit provided under Article R51 of the Code.

- Concerning the Respondent's reservations in relation to the *"admissibility and competence"* of the appeal, the Appellant points out that the Respondent did not submit any specific request for relief, allowing the Panel to render the appeal inadmissible. The Panel being bound to the limits of the Parties' requests for relief, and prevented from stating *ultra petita*, it would have, in absence of a request for relief in that sense, no power to rule on the Respondent's objection to the admissibility of the appeal. The Respondent's reservations would thus be moot and without any legal effect.

- In any event, the Respondent's objection should fail as the three conditions set out by the CAS jurisprudence for the CAS to have jurisdiction, *i.e.* (i) the parties must have agreed to CAS jurisdiction, (ii) there must be a decision of a federation, association or another sports-related body, and (iii) the internal remedies available to the appellant must have been exhausted before an appeal to CAS, are all met in the present case. Disputes related to the compliance with the prerequisites to request the grounds of a FIFA decision would concern the admissibility of the appeal and not the jurisdiction of the CAS. In the present case, nothing in Article 15.4 of the FIFA Procedural rules would suggest that the Appellant had to pay the relevant procedural costs directly to the Respondent instead of to the FIFA. Although the Respondent objected, on 13 April 2020, to the production of the grounds of the Appealed Decision because *"the requirements to request the grounds […] have not been fulfilled and therefore the [Appealed Decision]*

shall be final", he did not challenge FIFA's decision to proceed with the notification of those grounds, on which he was informed by letter dated 6 April 2020. Further, as the objection is directed against the FIFA, the Appellant has no standing to be sued because it has no role in issuing the grounds of the Appealed Decision. FIFA not being a party to the present appeal, the issue of the notification of the grounds would fall outside the scope of this procedure.

- As to the applicable law, the Appellant considers that pursuant to Article R58 of the Code in conjunction with Article 57.2 of the 2019 FIFA Statutes, the Panel should apply Swiss law to the merits of the case at hand, in particular the Swiss Code of Obligations (CO), general principles of law, and the well-established CAS jurisprudence.

- As to the merits, the Appellant submits that, according to established CAS case-law (CAS 2015/A/4039 and CAS 2018/A/5607 & 5608), the question of whether the Respondent had a just cause to terminate the Contract should be established strictly based on the grounds invoked by the Respondent in the termination letter dated 13 October 2019. It is clear from that letter that the Respondent relied exclusively on his *"non-reinstatement in his position"* as the sole reason to terminate the Contract and he may not rely on other circumstances which he was aware of at the time of the termination but did not invoke in the termination letter. Thus, the mutual termination proposed by the Appellant on 28 September 2019, the Respondent's relocation to the U13 team on 3 October and the deduction of a day's salary from the Respondent's monthly salary for his unjustified absence from work on 4 October 2019 are moot and should not be heard by the Panel, contrary to what the Single Judge did.

- Further, according to the well-established CAS jurisprudence, a contract may be terminated prematurely by either party only when there are objective criteria that do not reasonably permit one to expect the continuation of the employment relationship. A premature termination of an employment contract can only be an *ultima ratio*, and the parties to an agreement have to try their best to maintain their contractual relationship. Indeed, when there is a misunderstanding or a conflict between a club and a coach, it is essential first to exhaust all the possibilities through negotiation to find a common understanding. In the present matter, as of the moment the Appellant temporarily suspended the Respondent from his position on 10 October 2019, the Respondent waited only three days before terminating the Contract although he could have taken a more lenient measure to ensure the performance of the Contract by the Appellant and wait, for example, for the internal disciplinary proceeding to end on 20 October 2019. Conversely, by temporarily suspending the Respondent between 10 and 20 October 2019 and conducting an internal disciplinary proceeding, the Appellant applied a more lenient measure to ensure the continuation of the contractual relationship. Even taking into account the timeframe between 3 and 13 October 2019, during which the Respondent refused in writing to lead the team in an official local match on 5 October 2019, such a short suspension from work, regardless of the reasons, cannot be viewed as a just cause for the Respondent to terminate the Contract in accordance with the CAS jurisprudence. Thus, since the Respondent's termination

was not an *ultima ratio* measure, it was unjustified.

- Regarding the non-reinstatement in his position alleged by the Respondent, the Appellant submits that although it instructed, on 3 October 2019, the Respondent to supervise the training of the U13 team in addition to his original work, exercising a contractual right under Article 3 of the Contract, the Appellant cancelled its order on 4 October 2019 and immediately reinstated the Respondent with the first team. Thus, even if there was a breach of Contract by the Appellant, *quod non*, it was remedied after just one day and without any adverse effects on the Respondent's career or reputation. However, according to the Appellant, it is established that after having been reinstated on 4 October 2019, the Coach and his team arrived late at the stadium after the training had started. It would be incumbent on the Respondent to prove that he was informed of his reinstatement late. At the hearing, the Appellant argued that the Respondent, as stated by the witnesses heard during the hearing, could have led the training on 4 October 2019, but refused to do so and left the stadium. Further, the Respondent, in clear violation of Article 22 of the Contract, refused to lead the first team in an official match on 5 October 2019. Thus, the Respondent cannot hold the Appellant liable for not reinstating him on 5 October 2019. On 6 October 2019, the first team had a day off after the official match played on the previous day, which would be a common practice and, hence, the Respondent could not legitimately expect to be reinstated on that day, either. As for the training on 7 October 2019, the Appellant argues that the Respondent failed to discharge his burden to prove that he has personally offered his services to the Appellant on that day before the training session. The pictures and videos adduced by the Respondent would not prove that he was personally present at the stadium and ready to lead the training. Further, that would be no evidence that anyone had stopped the Respondent from entering the stadium. The Respondent's argument that he was stopped *"at the gate"* on the following days and that he therefore waited on the parking lot while his assistant coaches would take pictures of the training sessions led by another coaches team, would not be established by any evidence and would be, on top inadmissible, as raised for the first time at the hearing. There would further be no evidence that the Respondent offered his services to the club on 8 and 9 October 2019, and, thus, one would have to conclude that on those days the Respondent did not show up at the training of the first team again and induced his coaches team into an unlawful conduct. The fact that the Respondent allegations are not true could be deducted from the fact that numerous pictures submitted by the Respondent to prove that the training of the first team was led by another coaches team, would show, as testified by the witnesses, the U20 and/or U17 team.

- The Appellant recalls that the opening of the disciplinary proceedings against the Respondent by letter of 10 October 2019 was justified by the latter's (i) failure to comply with his duty of obedience and having shown insubordination, (ii) failure to take the training of the first team on 4 October 2019 and (iii) failure to lead the official match on 5 October 2019.

- The Appellant points out that he endorsed the U17 coaches, M. Darko Nestorovic and M. Trkulja, to train the first team as from 29 October and thus after the

Respondent and the coaches team departed on 13 October 2019.

- Given that the Respondent did not have a just cause to terminate the Contract on 13 October 2019 unilaterally, he is, except for the September 2019 salary, *i.e.* USD 27,0000 which is due, not entitled to any compensation.

- In case the Panel would conclude that the Respondent terminated the Contract with a just cause, the Appellant submits that the Contract does not contain a liquidated damages clause and that according to Swiss law, in particular Article 337c (2) CO, an employee must act in good faith after the breach of the contract by the employer and seek another employment, showing diligence and seriousness. This principle aims at limiting the damages deriving from a breach and at avoiding that a possible breach committed by the employer could turn into an unjust enrichment for the employee. However, in the present case, the Respondent did not adduce any information or evidence whatsoever proving his *bona fide* efforts in securing a new employment after the termination of the Contract on 13 October 2019. He did not even state that he made any effort at all in good faith to mitigate his alleged damages. Regarding the elements of proof that the Respondent submitted after having been invited to do so in the Appeal Brief, the Appellant argues that these documents are not sufficient to establish that the Respondent's really searched for a new employment.

- Alternatively, out of the 7.5 months that the Contract was still supposed to run, 2,5 months can be considered adequate for finding a new employment. However, in the subsequent period from 1 January 2020 nothing impeded the Appellant from finding a new job as many championships have completed at the end of the 2019 year, and many clubs have been looking for new coaches in the new season 2020. Also, there were clubs in Eastern Europe that were looking to replace their coaches during the winter break. Thus, the Respondent's unemployment, at least between 1 January and 31 May 2020, cannot be reproached to the Appellant, as it was the result of his conscious decision not to actively look for new employment. Accordingly, the final calculation of damages to be awarded to the Respondent should be 1/3 of USD 216,000, *i.e.* USD 72,000.

- More alternatively, the Appellant argues that, according to FIFA and CAS jurisprudence, the Panel should consider the behaviour of the Respondent as a factor to reduce or completely deny any liability for damages of the Appellant. Indeed, according to Article 44.1 CO, the judge may reduce or completely deny any liability for damages if the damaged party consented to the act causing the damage, or if circumstances for which he is responsible have caused or aggravated the damage or have otherwise adversely affected the position of the person liable. In the present case, the Respondent's behaviour from 4 October 2019 onwards, aggravated the alleged damage and adversely affected the position of the Appellant. Therefore, the Panel should consider the Respondent's contributory fault or negligence to completely deny or, at the least, significantly reduce any Appellant's liability for damages towards the Respondent by at least 50%, *i.e.* to USD 108,000.

- As to the Respondent's requests for relief, the Appellant points out that these requests contain some points which were either expressly rejected in the Appealed Decision or which were not even lodged before the FIFA and were, thus, not part of the procedure before the Single Judge. The requests for relief in relation to the first category would amount to a "counterclaim" and would, thus, be inadmissible. Accordingly, the Panel should reject these on basis of articles R49 and R55 of the Code. The new claims, for their part, would clearly be inadmissible as they fall outside of the scope of the present appeal.

- In its Appeal Brief, the Appellant therefore requested the Panel to:

  "Primary

  1. *Set aside and annul the decision issued on 27 February 2020 by the Single Judge of the FIFA Players' Status Committee in case Ref. No. 19-02027, except para. III.2.*

  Alternatively, only if item no. 1 above is rejected

  2. *Partially set aside and annul the decision issued on 27 February 2020 by the Single Judge of the FIFA Players' Status Committee in case Ref. No. 19-02027 in the sense that the compensation for damages due by the Appellant to the Respondent is reduced at the discretion of the Panel.*

  In any event

  3. *Order the Respondent to bear any costs incurred with the present procedure.*
  4. *Order the Respondent to pay the Appellant a contribution towards its legal and other costs in an amount to be determined at the discretion of the Panel".*

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

- The law applicable to the merits is (i) the FIFA Statutes and Regulations; (ii) the FIFA jurisprudence; (iii) the Swiss law, both pursuant to Article 57 par. 2 of the FIFA Statutes and Article R58 of the CAS and the rules of law chosen by the Parties, and (iv) Swiss jurisprudence.

- According to Article 15 of the FIFA Rules Governing the Procedures of the Players Status Committee and the Dispute Resolution Chamber, the application of which has been expressly accepted by the Appellant, *"[w]henever procedural costs are due, the grounds of a decision will only be notified, to the party requesting the grounds and upon payment of the relevant procedural costs. If the procedural costs are not paid within 20 days of notification of the findings, the request for the grounds shall be deemed to have been withdrawn. As a result, the decision will become final and binding and the relevant party will be deemed to have waived their right to file an appeal"*. In the present case, the amount of CHF 5,000 awarded as costs to the Respondent by the Appealed Decision have not been paid to the Respondent but to the FIFA. Thus, the Appealed Decision shall be final and binding and this appeal shall be rejected.

- The Appellant prevented the Coach and his assistant coaches from leading the first team trainings, was not interested in the Coach's services, signed a new coaching staff

and wanted to terminate the Contract. Indeed, the following violations committed by the Appellant would leave no room for doubt as (i) on 29 September 2019, the Club wanted to settle all employment contracts right away, insisting on reaching an agreement for termination and offering a written settlement agreement; (ii) after the Respondent's refusal to sign the settlement agreement, the Club was suddenly complaining about the Respondent's training plan without any justification, (iii) the Club expressly instructed the Coach Team *"not to train with the first team anymore"* and to *"observe the U13 team"*; (iv) the Club hired a new coaching staff; (v) the Club simulated a reinstatement but never allowed the Coaches Team to conduct any further training session from 4 October 2019 onwards, and (vi) the Club did not effectively react to the warnings and deadlines given by the Coaches Team and the requested reinstatement never occurred. Especially the instruction to *"not train with the first team anymore"* would be self-explanatory and contrary to the Contract. The reinstatement, on 4 October 2019, was a mere simulation and the sanction of one-day salary for having been absent from the training on the 4 October 2019 was part of a strategy to demote the Respondent as the Coaches Team was notified about the reinstatement (18.21PM) one hour after the training session already started (17.30PM). Moreover, the Coaches Team was actually present during such training. It was obvious that the Appellant did want to reinstate the Coach and that the latter was prevented from exercising his work in clear violation of the Contract. However, according to constant FIFA and CAS jurisprudence (CAS 2013/A/3091 & 3092 & 3093; CAS 2013/A/3398; CAS 2014/A/3643), preventing a coach from fulfilling his duties is a severe violation of the employment contract giving the coach a just cause to bring such contract to an end. Swiss law, subsidiarily applicable to the present dispute, would follow the same line of reasoning.

- The Respondent's suspension from work and salary, was a result of his refusal to mutually terminate the Contract and shall, thus, be deemed as a strategic manoeuvre. However, according to constant FIFA jurisprudence, the suspension of a coach has been always considered a severe breach of contract. The decision to suspend a coach jeopardises the latter's sporting career and shall, thus, be perfectly justified, only applied under very exceptional circumstances and, above all, the coach in question shall be accurately informed about the reasons for such suspension. However, none of this has been done in the case at hand. The CAS jurisprudence (in particular CAS 2013/A/3091 & 3092 & 3093, CAS 2013/A/3398, CAS 2014/A/3643) would be consistent in this respect. Thus, it would be clear that the suspension of the Respondent was illegal and constituted a clear breach of the Contract by the Appellant leading per se to a justified termination by the Respondent.

- The Club not only prevented the Coach from working but also suspended the payment of the salary of September 2019, which constitutes another violation of the Contract by the Club. In the absence of a contractual provision allowing the Appellant to suspend the salary of the Respondent, such suspension would be a severe breach of the contract and contrary to article 323a CO as interpreted by the Swiss Federal Tribunal (4A-608/2009). In the present case, the suspension of the September 2019 salary clearly surpassed the limit of *"one-tenth of the salary due"* foreseen in Swiss law and

obviously cannot be considered as *"security for the employer's claims arising from the employment relationship"*, since the month of September 2019 was fully worked by the Coach and was completely independent from any potential compensation. In any event, even the Appellant confirmed in its Appeal Brief that the salary of September 2019 is due.

- As regards the Appellant's argument that the termination of the Contract can be only based in what is stated in the termination letter dated 13 October 2019, the Respondent recalls that he sent a total of 9 warning letters putting the Club in default about all the violations committed. Therefore, relying on just one letter to declare that the offer for mutual termination, the demotion of the Coach or the deduction of the salary are irrelevant would be completely absurd. Further, the CAS cases referred to by the Appellant, *i.e.* CAS 2018/A/5607 & 5608 and CAS 2015/A/4039, would not coincide with the Appellant's position and concern different scenarios as the one at hand.

- The Appealed Decision clearly addressed the question whether the termination by the Respondent was *ultima ratio* or not. The Club's allegations in this respect are outrageous since it is clear from the evidence that the Coach sent a substantial amount of warning letters putting the Club in default and granting the Club with the option to put a remedy. However, the Club showed no reaction and the Coach had no other option but to terminate the Contract, since there were no more measures that he could take.

- The above, together with all the evidence submitted as well as the determinations made by the Appealed Decision show that the Coach did actually satisfy his burden of proof by establishing the existence of a just cause to terminate the Contract.

- Regarding the duty to mitigate the relevant damages, the Respondent maintains that a period of 7,5 months, *i.e.* from 13 October until 31 May 2020 – date of the supposed end of the Contract, is, *per se*, common in a scenario like the one at hand, where a coach is dismissed in the beginning of a season. In case CAS 2008/A/5572 & 5573, referred to by the Appellant, the CAS held that a period of unemployment of 6 months was normal as the coach was looking to clear his name. Furthermore, due to the COVID-19, all the leagues were suspended at the beginning of March 2020 due to virus, leaving the Coach only 4 months to find a new team after having terminated the Contract barely 1 month after the official matches had started. In any event, it would be clear from the evidence he submitted, that he started looking for new employment options through his agents, but with no success. The Respondent points out that, at the date of the hearing, he was still unemployed which would show that it is difficult for the Respondent to find a new team. It is clear that the Respondent has not orchestrated any strategy disfavouring the Club as he offered the Club to solve the matter amicably as shown in its letter dated 13 October 2020 and contacted again the Club a few days later trying to reach an agreement, but the Club refused. Thus, the Appellant's arguments regarding (i) the termination letter, (ii) *ultima ratio*, (iii) the burden of proof and (iv) mitigation, shall be fully rejected.

- As regards the compensation to be paid by the Appellant, the Respondent, first, argues that the contractual provisions establishing beforehand the consequences of a premature termination of the Contract, i.e. Articles 15, 26, 27 and 28, are arbitrary and potestative. According to constant FIFA and CAS jurisprudence they have thus to be declared null and void (CAS 2016/A/4852, CAS 2016/A/4605, CAS 2014/A/3707). In any event, the Appellant expressly confirmed in its Appeal Brief that the *"Contract does not contain liquidated damages clause"* and the validity or invalidity of these contractual provisions shall thus be *"irrelevant"* in the sense that the Club did not argue their validity and considered them as non-existing.

- The amount of the compensation has to be determined with due consideration for objective criteria, specifying that in case the Coach has signed any new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated Contract, *i.e.* until 31 May 2020, shall be deducted from the residual value of the Contract. Consequently, the Appellant owes the Respondent all the outstanding salaries plus the residual value of the Contract. This is also in accordance with articles 337b and 339 (1) CO. Thus, the compensation amount to be received by the Respondent is USD 27,000 (Twenty Seven Thousand US Dollars) as outstanding salaries for September 2019 and USD 216,000 (Two Hundred Sixteen Thousand US Dollars) as compensation for the breach of the Contract committed by the Appellant.

- According to Article 7 of the Contract, all amounts stated in the Contract are "net" amounts. Thus, in application of constant CAS jurisprudence (CAS 2010/O/2237, CAS 2017/A/5164) and in line with the Swiss Federal Tribunal's jurisprudence (4A_678/2015) any amounts granted by means of this procedure shall be declared as "net of any taxes" and if any further amount is requested by the Spanish authorities after receiving the compensation, such extra amount shall be as well covered by the Club.

- In application of the well-established principle of the specificity of sport and on basis of Article 337c (3) CO, pursuant to which the *"court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstances; however, compensation may not exceed the equivalent six months' salary for the employee"*, the Panel should take into account the aggravating circumstances characterizing the behaviour of the Club in order to increase the compensation and therefore grant an extra sum in favour of the Coach in the same amount to any kind of mitigation which may be finally applied, if any, to the compensation granted by the Appealed Decision. This would be in perfect line with the concept of "Additional Compensation" set out in Article 17 (1).ii of the FIFA RSTP as well as Article 337c (3) CO.

- The Club shall bear all legal fees incurred by the Coach in addition to the totality of the CAS administrative and procedural costs.

47. The Respondent therefore requested the Panel to decide as follows:

"a. To reject the appeal filed by the Club;

b. Confirm the FIFA Decision in its entirety and:

i. Request the Club to provide the Coach with the pertinent tax certificates as per Article 7 of the Employment Contract;

ii. Declare that if any further amount is requested by the Spanish Tax Authorities after receiving the compensation, such extra amount directly originated from the receipt of the compensation in Spain, shall be as well borne by the Club;

iii. Pay additional net compensation in the same amount to any kind of mitigation which may be finally applied, if any, to the compensation granted by the FIFA Appealed Decision, as per article 17.1.ii of the FIFA RSTP, article 337c.3 of the SCO and/or specificity of sport, plus 5% interests starting from 13 October 2019 until its effective and entire payment;

c. To fix a sum of EUR 10,000 (ten thousand Euros) to be paid by the Club, in order to contribute to the payment of the Coach's legal fees and costs[;]

d. To order the Club to assume the entirety of the CAS administration and procedural fees".

V. JURISDICTION OF THE CAS

48. The question of whether or not the CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. As Switzerland is the seat of the arbitration and none of the Parties are domiciled in Switzerland, the provisions of the Swiss Private International Law Act ("PILA") apply, pursuant to its Article 176 paragraph 1. In accordance with Article 186 of PILA, the CAS has the power to decide upon its own jurisdiction (*"Kompetenz-Kompetenz"*).

49. 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 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 it prior to the appeal, in accordance with the statutes or regulations of that body.

[…]".

50. In addition, the Appellant relies on Article 58 para. 1 of the FIFA Statutes, which states as follows:

"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 receipt of the decision in question".

51. The Panel notes that the Appealed Decision qualifies as a *"decision of a federation"* in the meaning of Article R47 of the Code, and that the FIFA Statutes provide for a possibility to appeal its final decisions before the CAS.

52. In his written submissions, the Respondent raises doubts in relation to the jurisdiction of the CAS drawn from the fact that the Appellant had allegedly not properly fulfilled its obligation to pay the procedural costs as set out in point 8.1 of the operative part of the Appealed Decision and that, accordingly, the FIFA was not entitled to communicate, to the Appellant, the grounds of the Appealed Decision which had become final and binding.

53. In this respect, the Panel considers that, as such, this argument concerns the admissibility of the appeal and not the jurisdiction of the CAS. Hence, this argument will be dealt with in the relevant section of the present award.

54. The Panel notes that the Respondent has not raised any other arguments to dispute the jurisdiction of the CAS over the present matter.

55. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

56. 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. […]".

57. As already set out in para. 50 of the present award, Article 58 para. 1 of the FIFA Statutes reads as follows:

"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 receipt of the decision in question".

58. In his written submissions and in a comment on the Procedural Order, the Respondent argued that the Appealed Decision had become final and binding because the Appellant had, contrary to article 15 of the FIFA Procedural Rules, not paid the procedural costs as set out in the operative part of that Decision. Thus, the FIFA should not have communicated the grounds of the Appealed Decision to the Appellant.

59. In this regard, the Panel notes that it is uncontested that the Appellant paid the total of the relevant procedural costs within the 20 day deadline set out in the applicable rules and that the FIFA, although aware of the fact that the part of the procedural costs that was due to the Respondent had not been directly paid to the latter, not only notified, on 28 May 2020, the grounds of the Appealed Decision to the Appellant but also informed the Respondent, by letter dated 6 April 2020, that it would proceed to such notification *"in due course"*.

60. The Panel considers that the Respondent could have formally appealed FIFA's decision, contained in the letter of 6 April 2020, to proceed to the notification of the grounds instead of only informing FIFA, by letter dated 13 April 2020, that he had received no direct payment of the procedural costs by the Appellant and that he considered that the requirements to request the grounds of the Appealed Decision were thus not fulfilled. Such appeal should have been lodged against the FIFA. In absence of such appeal, the Respondent cannot challenge FIFA's decision to notify the grounds in an indirect way within his arguments in the Answer to the appeal lodged by the Appellant (CAS 2015/A/3904). In any event, this argument of the Respondent is directed towards the FIFA, whereas the latter is not a party to the present proceedings. This issue therefore falls outside of the scope of the present appeal (CAS 2015/A/3904).

61. As already mentioned, the grounds of the Appealed Decision were notified to the Appellant on 28 May 2020. The Statement of Appeal was filed on 17 June 2020, *i.e.* within the time limit of 21 days set in Article 58 para .1 of the FIFA Statutes.

62. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

63. Pursuant to Article R58 of the Code, in an appeal arbitration procedure before the CAS:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

64. In addition, Article 57 para. 2 of the FIFA Statutes stipulates the following:

> *"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".*

65. The Panel will therefore apply the various regulations of FIFA, chiefly the RSTP, and, subsidiarily, Swiss law.

66. The Panel further notes that the application of the FIFA regulations has also been expressly envisaged by the Parties in Articles 30 and 31 of the Contract and that the Parties reconfirmed in their written and oral submissions that the applicable rules are the different FIFA regulations and, subsidiarily, Swiss law.

VIII. MERITS OF THE APPEAL

67. In light of the written submissions lodged by the Parties, and although the Respondent withdrew part of his requests for relief, the Panel shall start its examination of the merits of

the present matter with the preliminary issue of the Respondent's counterclaims.

A. Preliminary Issue

68. In this respect, the Panel notes that, in his Answer, the Respondent requests the CAS, *inter alia*, to (i) *"[r]equest the Club to provide the Coach with the pertinent tax certificates as per Article 7 of the [Contract]"*; (ii) *"[d]eclare that if any further amount is requested by the Spanish Tax Authorities after receiving the compensation, such extra amount directly originated from the receipt of the compensation in Spain, shall be as well born by the club"* and (iii) *"[p]ay additional net compensation in the same amount to any kind of mitigation which may be finally applied, if any, to the compensation granted by the [Appealed Decision], as per article 17.1.ii of the FIFA RSTP, article 337c.3 of the SCO and/or specificity of sport, plus 5% interests starting from 13 October 2019 until its effective and entire payment"*. The Panel considers that these parts of the Respondent's request, which have (at least partially) already been submitted to the Single Judge of the Players' Statute Committee, to the extent they exceed the scope of the operative part of the Appealed Decision, qualify as counterclaims.

69. The Panel recalls that according to the constant construal of Article R55 of the Code in the CAS jurisprudence, counterclaims are, since 1st January 2010, inadmissible in CAS appeal procedures. Instead, a respondent needs to file an independent appeal within the applicable time limit. If it fails to do so, i.e. if the answer including the request is filed after the time limit for the appeal has expired, the counterclaim is inadmissible (see MAVROMATI/REEB, R55 para. 14; see also: CAS 2015/A/4135; CAS 2016/A/4852). This, however, does not concern requests that relate to procedural and legal costs.

70. As a result, the Panel finds that the Respondent's requests, to the extent they exceed the relief granted in the Appealed Decision, are inadmissible. The Respondent's requests therefore are limited to the confirmation of the Appealed Decision, except for what relates to the procedural and legal costs.

71. As the Appellant rightly put forward, the main issues in the present appeal concern the question whether or not the Respondent had a just cause to terminate the Contract and the consequences that follow from the answer to that question.

B. Just cause

72. With regard to the termination of the Contract, the Panel observes that it is undisputed between the Parties that the Contract was unilaterally terminated by the Coach on 13 October 2019, arguing that in consequence of his letters dated 9 and 10 October 2019 and in the absence of a reaction from the Club to his request to be reinstated as coach of the first team, he had just cause to terminate the Contract. The Coach gave the club 5 more days to remedy the default. On 16 October 2019, the Coach, via his counsel, confirmed to have terminated the Contract. On the same day, the Club informed the Coach that it deemed the Contract to be terminated with effect from 13 October 2019.

73. What is disputed in the present matter is whether or not the Coach had just cause to proceed

to the termination of the Contract.

74. In this respect, it has to be recalled that CAS, in referral to Swiss law, subsidiarily applicable to the present dispute, constantly held that *"just cause"* to terminate a contract is generally said to exist where the breach has reached such serious levels that the injured party cannot in good faith be expected to continue the contractual relationship. The question whether just cause in fact existed, shall be established in accordance with the merits of each particular case (ATF 127 III 153 consid. 1 a). As it is an exceptional measure, the immediate termination of a contract for just cause must be accepted only under a narrow set of circumstances. Thus, only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter. In the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after being warned (ATF 129 III 380 consid. 2.2). The judging body determines at its discretion whether there is just cause (Article 337 (3) CO). Furthermore, and still in reference to Swiss law, pursuant to CAS jurisprudence *"a termination of contract with immediate effect is to be applied as ultima ratio"* (CAS 2009/A/1956).

75. As to the burden of proof, the Panel recalls that, it is *"well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based"* (CAS 2015/A/3904). In order to discharge its burden of proof, a party must *"provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequence envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party"* (CAS 2015/A/3904).

76. Thus, in the present case, as the Parties rightly pointed out in their written submissions, the burden of proof for the facts giving rise to the legal conclusion that he had just cause to terminate the Contract lies with the Respondent.

77. As to the Appellant's argument that the question whether the Respondent had just cause to terminate the Contract should be answered strictly based on the grounds invoked in the termination letter, *i.e.* his non-reinstatement in his position as coach of the Appellant's first team, and not based on any other circumstances that the Respondent was aware of but did not invoke in that letter, the Panel observes that, in his termination letter, the Respondent expressly referred to his *"letters of 9 and 10 October 2019"* which contained referrals to a letter dated 7 October 2019 and specific events and circumstances that had occurred since 29 September 2019, such as, *inter alia,* the offer of a settlement agreement, the dismissal as coach of the first team, the reinstatement in that same position and the prevention from conducting the training scheduled for Monday 7 October 2019. In these circumstances, the Panel holds that the various grounds raised by the Respondent in those letters may be taken into consideration by the Panel when evaluating whether or not the Respondent has established that he had just cause to terminate the Contract.

78. In the present case, the Panel considers that the Respondent has established to the applicable standard of proof that he had just cause to terminate the Contract.

79. Indeed, first, in its letter dated 3 October 2019, the Club, although referring to article 3 of the Contract, which provides that the Club may assign the Coach *"in addition to his original work, the training and supervision of any other sector of the game"*, did not, contrary to what the Appellant argues, instruct the Coach to supervise the U13 team in addition to his original work. Indeed, this letter expressly states, *"we inform you not to train the first football team anymore and just observe the U13 football team in our club starting from 4/10/2019 at 05:30 PM"*.

80. Is this respect, the Panel recalls that according to Swiss law, subsidiarily applicable to the present dispute, and to constant CAS jurisprudence *"the employer has the obligation to protect the employee's personality [rights] (Article 328 CO). The case law has deduced thereof a right for categories of employees to be employed, in particular for employees whose inoccupation can prejudice their future carrier development. The employer has to provide these employees with the activity they have been employed for and for which they are qualified. The employer is therefore not authorized to employ them at different or less interesting positions than the one they have been hired for"* (CAS 2014/A/3643).

81. In the present case, the Panel finds that the instruction *"not to train the first football team anymore"* and to *"just observe the U13 football team"* was a particularly offending demotion of the Coach and constitutes a serious breach of the Contract by the Club that gave the Coach "just cause" to immediately terminate the Contract (cf. para 74).

82. The fact that the Respondent decided not to immediately terminate the Contract and requested, by letter dated 4 October 2019, to be reinstated in his position *"with immediate effect so to be able to lead the training of the first team scheduled for today at 5.30pm"* cannot be held to the detriment of the Respondent. Indeed, given that an immediate termination can only occur in presence of a *"very severe breach"* of the employment contract (see para 74 of the present award) and that it is, according to Swiss law, up to the judging body to determine whether there is just cause, the Panel considers that the Respondent's approach to first warn the Appellant and request his reinstatement was a reasonable and appropriate approach. This approach allowed the Respondent to avoid all risk of seeing himself confronted with the reproach of having not asked the breaching party, *i.e.* the Club, to desist its breachful act and/or with the argument that his immediate termination was not an *ultima ratio* measure.

83. Second, it follows from the testimony of Mr Kahled Waleed Abdulqodus that he and the Respondent as well as the Coaches Team defined, together, the training schedule – including the days off. However, as Mr Kahled Waleed Abdulqodus pointed out in an answer to a question from the Panel, he unilaterally decided that there would be no training on 6 October 2019 without referring or advising with the Respondent first. The fact that, according to Mr Kahled Waleed Abdulqodus, for the particular date, *i.e.* 6 October 2019, he had not received a schedule from the Respondent and that he wanted to avoid that the team would be at the training without there being a coach, constitutes proof, in the eyes of the Panel, that the Respondent had not been effectively reinstated in his position. It appears indeed that, although "officially reinstated" since 4 October 2019, the Respondent has not been involved in the decision to not hold a training on 6 October 2019 which was clearly contrary to what was the practice/custom until then. This has, incidentally, been rightly emphasized by the Respondent in his first letter dated 7 October 2019.

84. Third, on 10 October 2019, the Respondent was temporarily suspended until 20 October 2019 pending the outcome of the internal disciplinary proceedings opened the same day. However, the possibility of such a suspension is not foreseen in the Contract and, thus, has to be considered a violation of the Contract. Moreover, it is clear from the case law of the Swiss Federal tribunal that under Swiss law a suspension of a professional coach is a measure that undoubtedly affects the personal and economic sphere of the latter and infringes his legal interests and may amount to a violation of his personality rights (ATF 120 III 369) *["La suspension infligée à l'intimé – mesure qui affecte indubitablement la sphère personnelle et économique d'un entraîneur professionnel – va bien au delà d'une simple sanction destinée à assurer le déroulement correct d'un jeu; elle constitue une véritable peine statutaire qui porte atteinte aux intérêts juridiques de l'intéressé et peut, à ce titre, être soumise au contrôle du juge étatique. (…) Au demeurant, comme l'a jugé récemment la cour de céans, la distinction entre règles de jeu et règles de droit est dénuée de pertinence en cas d'atteinte aux droits de la personnalité (…). L'atteinte, au sens des art. 28 ss CC, est réalisée par tout comportement humain, tout acte de tiers, qui cause de quelque façon un trouble aux biens de la personnalité d'autrui en violation des droits qui la protègent (…); même l'application d'une règle de jeu peut dès lors violer les droits de la personnalité"]*.

85. In view of this jurisprudence as well as the one referred to in para. 80 of the present award, the Panel considers that by suspending, on 10 October 2019, even for a limited period, the Respondent from exercising his professional activity as a coach, the Appellant violated one of the Respondent's fundamental rights as coach. The Panel concludes that such a suspension has, in the circumstances of the present case and in absence of any contractual basis, to be considered as a severe breach of the Contract and gave the Respondent a "just cause" to terminate the Contract.

86. Fourth, as regards the suspension of the Respondent's salary from September 2019, the Panel notes the Contract contains no provision on basis of which the Appellant could have suspended the payment of that salary. At the outmost, article 26 of the Contract gives the Appellant the possibility to claim a compensation in case the behavior of the Respondent harmed the Club's interests. However, such claim had not been raised. In this regard, the Panel also notes that in its appeal brief, the Appellant agreed that the salary for September 2019 *"is due and payable to the Respondent"*.

87. Further, neither Article 323a (1) CO, according to which an employer may only withhold *"part of the salary"* to *"the extent provided for by individual agreement, custom, standard employment contract or collective employment contract"*, nor Article 323a (2) CO, pursuant to which *"the amount withheld on any given payment date must not exceed one-tenth of the salary due and the cumulative amount withheld must not exceed the salary due for one week's work; however, a higher amount may be withheld under the terms of a standard employment contract or collective employment contract"*, allowed the Appellant to legally suspend the payment of the Respondent's September 2019 salary.

88. Finally, according to Swiss jurisprudence and constant CAS jurisprudence, the non-payment of all or part of the remuneration by an employer does in principle constitute just cause for termination of the contract (ATF 4C.240/2000, consid. 3. b) aa), and CAS 2006/A/1180) as the employer's payment obligation is his main obligation towards the employee (CAS 2006/A/1180 and CAS 2016/A/4384). Several CAS panels further held that if the employer *"fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the*

contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of breach of the main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. First, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract" (CAS 2006/A/1180 and CAS 2016/A/4384).

89. The Panel finds that, in the present case, the non-payment of the Respondent's September salary, which was immediately contested by the Respondent, *i.e.* on 10 October 2019, constitutes a supplementary violation of the Appellant's contractual obligations that has to be added to the other violations.

90. In view of these considerations as well as in view of the fact that the Respondent had warned the Appellant on numerous occasions to stop his breachful acts, the Panel finds that the Respondent had just cause to terminate the Contract on 13 October 2019 and that such immediate termination was used as ultima ratio.

91. This finding is not called into question by the Appellant's arguments that it was the Respondent who stopped performing his activities and tasks under the Contract as of 4 October 2019, refused to take the official match on 5 October 2019, and did not establish that he offered his services to the Club from 7 October 2019 onwards.

92. As to the first of these arguments, even though Mr. Khaled Waleed Abdulqodus' explanations that, on Friday 4 October 2019, which was a day off, he had problems finding someone to open the Club (secretariat) to draft and sign the official letter of reinstatement, appear, in the eyes of the Panel, to be plausible, the fact remains that the official letter of reinstatement of the Respondent into his position of coach of the first team occurred around 18h30 and, thus, after the end of the deadline set by the Respondent in his letter of the same day, *i.e.* 17h30, which was the programmed starting time of the training for that day. The Panel considers that the question of whether the training had or not started around 17h30 or had been postponed by Mr Kahled Waleed Abdulqodus to 18h30 is irrelevant in the present matter as the Appellant does not claim any damages from the Respondent for an untimely termination of the Contract.

93. Regarding the second argument, the Panel notes that is uncontested that the Respondent refused to coach the Appellant's first team into the match of 5 October 2019, arguing that, given the circumstances, he was *"not in the best conditions physically, mentally nor anything in order to coach a match against the best team in the country"* and that the players *"knew that there was another person coaching them"*. The Panel considers that such a refusal is, in principle, a reprehensible act and observes that the Appellant had decided to address said refusal in the disciplinary proceedings opened on 10 October 2019. However, the Panel also notes that on 28 September 2019, the Club proposed to the Coach to terminate the Contract by mutual consent although its first team was to play, on 5 October 2019, what Mr Khaled Waleed Abdulqodus stated to be *"the most important match of the year"*. This fact is staggering and leads the Panel to believe that

the Club had, as soon as 28 September 2019, another staff to coach its first team prior to and during the match of 5 October 2019. Under these circumstances, the impact and the gravity of the Respondent's refusal to coach the team during that match appear to be insignificant and can certainly not have an impact on the determination of the existence of a just cause for termination of the Contract on side of the Respondent. The question whether this refusal would have amounted to just cause on side of the Appellant, can be left unanswered as the latter has not submitted any claim in that regard.

94. As to the third argument, the Panel notes that in its letter from 10 October 2019 entitled *"Notification of opening of disciplinary proceedings"* and addressed to the Respondent, the Appellant reproached the latter three grounds that could, according to the Appellant, constitute a potential breach of several provisions of the Contract: (i) *"you the missed training, did not comply with your duty of obedience and showed insubordination (see the club's letter dated 1 October 2019)"*; (ii) *"you did not take the training of the first team on 4 October 2019, although you were instructed to do so (see the club's letters of 4 October 2019)"*, (iii) *"you did not take the official local match on 5 October 2019 against Kuwait SC for the Kuwait Federation Cup (see your letter dated 4 October 2019)"*. Given that, as is clear from this letter, the Appellant did not reproach the Respondent not having offered his services to the Club from 7 October onwards, the Panel considers it safe to conclude that such offer had indeed occurred. This conclusion is corroborated by the fact that although the Respondent had, in his letters dated 7 October (warning letter) and 9 October 2019, argued that he had been *"prevented of leading the training"* scheduled for Monday 7 October this fact has neither been denied nor challenged in the Appellant's letter dated 10 October 2019. Thus, that argument has to also be rejected.

C. Compensation

95. With respect to the legal consequences of the Panel's finding in para. 90 of the present award, it should be observed that it is undisputed between the Parties that the Contract does not contain any liquidated damages clause. It is further undisputed that the FIFA RSTP, in its version applicable to the present dispute, does not contain any provision governing the compensation that is to be awarded in employment disputes involving coaches as Article 1.1 of said regulations limits the scope thereof to the statutes, eligibility and transfers of "players". Thus, Swiss law is to be applied to the issue of compensation in case of termination of the contract with just cause.

96. In this respect, Article 337b (1) CO states that *"[w]here the good cause for terminating the employment relationship with immediate effect consists in breach of contract by one party, he is fully liable in damages with due regard to all claims arising under the employment relationship"*.

97. Article 337c CO provides:

"1.Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration.

2. Such damages are reduced by any amounts that the employee saved as a result of the termination of the

employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work".

98. According to Swiss jurisprudence (ATF 133 III 659 consid. 3.2.) as well as CAS jurisprudence (TAS 2008/A/1491) the employee who has terminated the employment contract with just cause can claim the loss of earnings consecutive to the termination of the employment relationship, which is equivalent to the amount an employee who has been unjustly dismissed with immediate effect can claim in application of Article 337c (1) and (2) CO *["le travailleur peut ainsi réclamer la perte de gain consecutive à la résiliation des rapports de travail ce qui équivaut au montant auquel peut pretender un salarié injustement licencié avec effet immédiat en application de l'art. 337c al. l et 2 CO"* (ATF 133 III 659 consid. 3.2)]. Thus, in theory, the Respondent is entitled to compensation corresponding to what he would have earned had the Contract been fulfilled to its expected date of expiry, pursuant to the so-called doctrine of restitution (CAS 2015/A/4161).

99. Regarding the Respondent's remuneration, Article 7 of the Contract states as follows:

"The two parties agreed that the first party pays the second party a total amount of agreed that the first party a total amount of 300000$ (three houndred thousand american dollars only) which he receives $ 30,000 when he comes to start the preparation period during July 2019. The rest amount will be paid to the second party equally as monthly salaries for ten months by 27000$ monthly (twenty seven thousand american dollars only)[,] net of any taxes. The first part shall provide the tax certificates will assist the second party in case there is any issue with the [K]uwaiti and the [S]panish tax authorities".

100. The Respondent claims the amount of USD 216,000 (two hundred sixteen thousand USD) net of tax as compensation to what he would have earned if the Contract had been fulfilled between 13 October 2019 and 30 May 2020. Further, he claims an amount of USD 27,000 (twenty-seven thousand) net of tax as outstanding payment, which corresponds to his September 2019 salary.

101. The Panel notes that the amount of USD 27,000 net of tax is not contested between the parties.

102. As regards the amount of USD 216,000 net of tax, the Appellant argues, primarily, that this amount should be reduced in view of the Respondent's obligation to mitigate the damage and, subsidiarily, that the Panel should, on basis of Article 44.1 CO, consider the behaviour of the Respondent as a factor to reduce or completely deny any liability for damages of the Appellant.

103. As to the Appellant's primary argument, the Panel notes that in CAS 2015/A/4346, a CAS panel stated the following in this respect:

"103. […], according to art. 337c (2) of the SCO, the duty of mitigation is related to the rule that the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn.

104. In the opinion of the Panel, such a rule implies that, in accordance with the general principle of fairness,

the injured player must act in good faith after the breach by the club and seek for other employment, showing diligence and seriousness. The Panel considers that this principle is aimed at limiting the damages deriving from breach and at avoiding that a possible breach committed by the club could turn into an unjust enrichment for the injured party.

105. Moreover, the wording of art. 337c (2) of the SCO, with reference to what the employee intentionally failed to earn, suggests that the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign the contract with worse financial conditions, in the absence of any valid reason to do so".

104. The Panel considers that in the case at hand, especially in view of (i) the relatively short residual running time of the Contract, *i.e.* 7,5 months; (ii) the moment of the football season at which the termination occurred, *i.e.* the middle of the first half of the season; (iii) the fact that from January 2020 onwards the effects of the Covid-19 pandemic had an influence on the football leagues, first in China, then around the World, and (iv) that from March 2020 until the contractually agreed end of the Contract (31 May 2020), most professional leagues in Europe and abroad had suspended their competitions, the Respondent cannot reasonably have been expected to find a new employer within a period of 7,5 months from the termination.

105. Moreover, the Panel notes that, in reaction to a request from the Appellant, the Respondent has provided some elements of proof showing that he was actively seeking a new employment as of early November 2019. Further, not only did the Appellant not submit any evidence that, after the termination of the Contract, the Respondent acted in bad faith, but it is undisputed that up to the date of the hearing on 13 November 2020, the Respondent had not been able to secure a new employment contract. In the eyes of the Panel, this constitutes an indication of absence of bad faith.

106. Thus, the Panel concludes that the Appellant's primary argument aiming at having the amount of USD 216,000 net of tax reduced has to be rejected.

107. As regards the appellant's subsidiary argument, the Panel deems it sufficient to recall, that according to the Swiss Federal tribunal, Article 337c (2) CO exactly defines what amounts have to be set-off from the amount the employee would have earned if the contract had gone to its end. In particular, it stated *"[c]ette formulation légale n'envisage pas la possibilité d'un montant réduit en raison de la faute concomitante du travailleur; elle n'autorise une imputation que sur ce qu'il aurait gagné (ATF 120 II 243, cons. 3.e)). On peut donc déduire du texte et de la systématique de l'article 337c CO que la faute concomitante est un facteur de réduction ou de suppression de l'indemnité de l'alinéa 3 de l'article 337c CO, mais non pas de la créance due en application de l'alinéa 1 de ce même article".*

free translation:

"this legal wording does not provide for the possibility of a reduced amount due to the simultaneous fault of the worker; it authorises set-off only against what he would have earned (ATF 120 II 243, cons. 3) e)). It can therefore be inferred from the wording and system of Article 337 CO that the concomitant fault is a factor of reduction or cancellation of the compensation provided for in (3) of Article 337 CO, but not of the damages

due under paragraph 1 of that article".

108. Given that, in the present case, Article 337c (3) CO is not applicable, it is not necessary for the Panel to examine, for the sake of determining the damages due in application of Article 337c (1) and (2), whether or not the Respondent committed the faults alleged by the Appellant. This does, however, not mean that the Panel considers that, in view of his experience and the factual circumstances of the case, the Respondent's behaviour was irreproachable or flawless.

109. In light of the above, the Panel concludes, as did the Single Judge in the Appealed Decision, that the Respondent is entitled to receive, from the Appellant, outstanding remuneration in the amount of USD 27,000 net of tax as well as damages for breach of contract in the amount of USD 216,000 net of tax.

110. According to Article 104 (1) CO, a *"debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract"*. In the present case, it is undisputed, that the Contract did not contain any provision regarding such default interest rate and it is clear from the Appealed Decision that the Single judge, based on the Respondent's request, decided that the Appellant had to pay the Respondent interest of 5% per annum on both amounts due as from 13 October 2019, *i.e.* termination of the Contract, until the date of effective payment. The Panel thus holds that this aspect of the Appealed Decision has to be confirmed as well.

111. In view of all the above considerations, the Panel finds that the Appealed Decision is lawful and thus to be upheld and that the Appellant's appeal is to be dismissed.

112. Any other and further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al-Arabi Sporting Club against the decision issued on 27 February 2020 by the Single Judge of the FIFA Players' Status Committee is dismissed.

2. The decision issued on 27 February 2020 by the Single Judge of the FIFA Players' Status Committee is confirmed.

(…)

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