Arbitration CAS 2013/A/3411 Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA), award of 9 May 2014

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Hendrik Kesler (The Netherlands); Mr Michele Bernasconi (Switzerland)

Football
Breach of a contract of employment during the protected period
Conditions for a "buy-out clause"
Parties' autonomy under Article 17.1 FIFA RSTP
Conditions for a contractual penalty or "liquidated damages" clause under Swiss law
Value of the services of a player
"Specificity of sport" as a correcting factor for elements not listed under Article 17 FIFA RSTP
Inducement to breach a contract under Article 17.4 FIFA RSTP

1. **A provision in a contract does not constitute a "buy-out clause", if, among other things, it does not grant the player the right to terminate the contract, but sets the consequences "if" the contract is terminated, or if it refers to "damages" caused by the player's *"cancellation of the contract"*.**

2. **Article 17.1 RSTP sets the principles and the method of calculation of the compensation due by one party because of a breach or unilateral and premature termination of a contract. According to Article 17.1 RSTP, primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*.**

3. **A clause qualifies as a contractual penalty or "liquidated damages" clause ("clause pénale" or "Konventionalstrafe") under Swiss law if it contains all the necessary elements required for such purpose: (i) the parties bound thereby are mentioned, (ii) the kind of penalty has been determined, (iii) the conditions triggering the obligation to pay it are set, (iv) its measure is identifiable In other words, a provision which sets an amount of "damages" to be paid "if" the contract is breached, appears to perform a function (the determination of the amount that a party has to pay to the other as damages in the event of breach of contract) perfectly consistent with Swiss law. Furthermore, Swiss law does not require "penalty clauses" to be "reciprocal" in order to be valid.**

4. **The value of the services of a player is only partially reflected in the remuneration which a club would be available to pay, since the club has to sustain expenses to obtain such services. Therefore, in order to determine the full amount of the value of the services lost, the amount that the club would have to spend to acquire them must also be taken into account.**

5. According to CAS case law, the "specificity of sport" is not an additional head of compensation, nor a criteria allowing to decide in *ex aequo et bono*, but a correcting factor which allows a panel to take into consideration other objective elements which are not envisaged under the other criteria of Article 17 RSTP.

6. Under Article 17.4 RSTP, inducement to breach a contract is sanctioned with a ban on registration of new players for at least two "transfer windows", and *"it shall presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach"*. In other words, a rebuttable presumption is established: the new club is subject to sanction if it does not prove that it has not induced the breach.

1. BACKGROUND

1.1 The Parties

1. Al Gharafa S.C. ("Al Gharafa" or the "First Appellant") is a football club, with seat in Doha, Qatar. Al Gharafa is affiliated to the Football Federation of Qatar, which is a member of the Fédération Internationale de Football Association (FIFA).

2. Mr Mark Bresciano (the "Player" or the "Second Appellant") is a professional football player of Australian nationality born in Melbourne (Australia) on 11 February 1980.

3. Al Nasr S.C. ("Al Nasr" or the "First Respondent") is a football club, with seat in Dubai, United Arab Emirates (UAE). Al Nasr is affiliated to the UAE Football Association, which is also a member of the Fédération Internationale de Football Association (FIFA).

4. The Fédération Internationale de Football Association (FIFA or the "Second Respondent") is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich (Switzerland).

1.2 The Dispute between the Parties

5. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence given in the course of the proceedings ([1]). Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

6. On 10 August 2011, Al Nasr and the Player entered into a contract (the "Contract") under

([1]) Several of the documents submitted by the parties and referred to in this award contain various misspellings: they are so many that the Panel, while quoting them, could not underscore them all with a *"sic"* or otherwise.

which the Player would render his professional services to the First Respondent for the period between 10 August 2011 and 9 August 2013.

7. The Contract contained, *inter alia*, the following provisions:

Article 3 *"Salaries and Privileges"*

"In consideration of performing the above-mentioned duties by The Player, in Article 5, The First party shall pay to The Player the following benefits:

1. *Whole Value for the first year from 10/08/2011 till 09/08/2012 (1,100,000), One Million and one Hundred Thousand euro, will be paid as the following:*
   - *A. The first party will pay to second party the amount of (200,000) two hundred thousand euro on 01/09/2011.*
   - *B. The first party will pay to the second party (900,000) nine hundred thousand Euros as monthly salaries divided by (12) month, each month salary is (75,000) Seventy five thousand euro including, Housing allowance, furniture and transportation (Car). Paid on the first week of each month from every month.*
2. *Whole value for the Second year from 10/08/2012 till 09/08/2013 (1,200,000) One Million two Hundred thousand euro, will be paid as monthly salaries divided by (12) month, each month salary is (100,000) one hundred thousand euro including, Housing allowance, furniture and transportation (Car), paid on the first week of each month from every month.*
3. *An annual paid leave for (30) days each year will be given to second party, the leave starting and end dated will be decided by the football 1st team administration.*
4. *(8) Eight round trip business class air tickets for the player and his family annually. (Dubai – Australia (Melbourne) – Dubai).*
5. *Medical health insurance for the player during the contract period.*
6. *To provide the player with English copy of regulations issued by the U.A.E. Football Association and the Club".*

Article 8 *"Cancellation of the Contract"*

"1. If the Second Party cancels by himself the said contract made between him and the First Party for any reason whatsoever, he shall pay to the First Party all amounts paid by the First Party to the Second Party as a result of implementation of the Contract. Unless the damage caused to the First Party exceeds these amounts, and in this case the First Party may claim the Second Party for compensating it for the actual damages resulting from such breach.

2. *When the termination of the contract is not due to breach of the obligations contained herein, but by mutual agreement between the First Party and the Second Party, neither party shall have the right to claim the other party for any compensations.*
3. *The First Party shall have the right to terminate this Contract without paying the Second Party any compensation in case the Second Party breaches his obligations set forth in article (5) of the same contract and fails to remedy such breach, if remediable, after being warned by the First Party".*

Article 10 *"General Clauses"*

"1. This contract is committed by both parties and no party should break any condition mentioned.

2. The Association, or any entities constituted thereby, shall settle all litigation which may arise between the Player and the Club. The decision issued in this instance shall be binding to both parties.

3. In case of any dissatisfaction of the association decision; each party has the right to refer the case to FIFA.

…

5. The provisions of the FIFA and Association regulations shall be applicable for any matter not included herein. …".

8. On 25 June 2012, the Player's counsel sent a letter to Al Nasr as follows:

"Mr. Bresciano has instructed us to take care of his interests with respect to the employment contract entered between him and your club.

Please find hereafter a short summary of the events for ease reference.

On 10 August 2011, Al Nasr Football CO (LLC) and Mr. Mark Bresciano signed an employment contract valid from 10 August 2011 until 10 August 2013. The Club inter alia undertook to pay to Mr. Bresciano (i) EUR 1,100,000 (one million and one hundred thousand Euros) for the first year (season) of contract and (ii) EUR 1,200,000 (one million and two hundred thousand Euros) for the second (season) year.

The Article (8) of said the employment contract states in verbis that "if the Second Party cancels by himself the said contract made between him and the First Party for any reason whatsoever, he shall pay to the First Party all amounts paid by the First Party to the Second Party as a result of implementation of the Contract".

As per requested by Mr. Bresciano, we kindly inform you that the referred employment contract is from the present moment on irrevocably and unilaterally terminated. Considering the good relationship that has always existed with your club, Mr. Bresciano whishes the present matter to be settled in amicable manner and has consequently instructed us to get in contact with your club so as to try to achieve a friendly solution.

We, therefore, expect as a gesture of goodwill from your side to forward us the bank account details of Al Nasr Football CO (LLC) to the following facsimile number: … Please be informed that as soon as we have received the referenced bank account details, the amount due as compensation will be transferred to the Club by no later than 4 (four) working days based upon the provisions as set out in the supra Article (8).

In the event, however, a friendly solution is not achievable, we have been instructed to start legal procedure against Al Nasr Football CO (LLC) and pay the compensation at stake to one of the bank accounts indicated by the UAE Football Association or eventually appointed by one of the sporting-deciding bodies of FIFA".

9. On 27 June 2012, Mr Arif Abbas Al Muhsen, CEO of Al Nasr, sent to the Player's counsel an email as follows:

"… we went through your letter and would like to bring the following point:

1- the player have a valid contract with us as you know until 09/08(2013.

2- As per our chairman phone conversation with the player today the player emphasis that he is happy with al Nasr club and would like to continue with the club.

3- As the intention of the club to extend the contract and keep the player services, the chairman and the player agreed that a meeting will be held at the beginning of the team gathering once the player is back from his vacation to discuss the issue. …".

10. In a letter dated 28 June 2012, Mr Marwan A. Bin Ghulaita, Chairman of Al Nasr, wrote to the Player's counsel the following:

"We are quite astonished by the content of your letter dated June 25, 2012.

Indeed, according to several conversations that we recently had with the player, M. Bresciano not only told us that he is pleased to stay with Al Nasr, but also that he is ready to negotiate an extension of our contract for another year, i.e. from August 2013 to August 2014.

So, there is a conflict between the content of your letter and the declarations reported to us by Mr. Bresciano, and should the player actually confirm his will to terminate the contract with Al Nasr, we kindly ask you to eventually send us a termination letter duly signed by the player. In this case, please be aware that Al Nasr will look not only for the compensation provided by art. 8 of the employment contract, but also for the additional damages deriving to our club from the late notice of termination and for disciplinary measures to be imposed on the Player according to art. 17.3 of FIFA Regulations.

Considering the excellent relationship we always had with the Player, we too expect to settle this matter amicably although we were quite surprised about your all of sudden letter.

We still believe that we can negotiate a one year extension of the employment contract between Al Nasr and Mr. Bresciano: however, should the player confirm to us in writing that he wants to terminate his employment with Al Nasr now and we do not reach a friendly settlement on this subject, we will reserve all the remedies to protect our interests".

11. In a letter of 30 June 2012, Mr Mohamed Saeed Bin Kadfor, first team manager of Al Nasr, informed the Player that the Al Nasr first team's program would start on 8 July 2012, but that the Player request to postpone his arrival had been agreed, so that *"you need to join the team training no later than 12/07/2012".*

12. On 2 July 2012, the Player sent an email to Mr Mohamed Saeed Bin Kadfor in reply as follows:

"… I have received the letter with dates you would like me to be back. At this point I would kindly ask you to consider giving me an extra week on top of the date you wish for me to be back. My reason being: my football commitments didn't stop after the last game … intense training, games and all the travelling continued on from that for almost another 3 weeks. And plus as you know I got injured in the last game and still need more time to get myself right. This is an important request on my behalf as I know that next season requires the best of me.

Included in this extra time off I will commence a running program which I have followed for many years with great benefits".

13. On the same 2 July 2012, Mr Mohamed Saeed Bin Kadfor answered that:

"Thanks for the reply to my letter dated 30/06/2012; we would like to inform you that after we discus with the technical Manager of the first team, we are worried about you injury, so we need your attendance as our referred to above mention on 12/07/2012, to make the necessary required tests and to make sure your fitness level for the next season 2012/2013 are on top level, we hope that you will see you in the next week meeting on 06/07/2012 as agreed with the Chairman to discuss the issue in more details".

14. On 6 July 2012, the Player met in Dubai with the Chairman and the coach of the first team of Al Nasr to discuss the contractual relations for the following seasons.

15. On 9 July 2012, Al Nasr sent a letter to the Player, referring to the meeting of 6 July 2012, as follows:

"Thanks for having the meeting with the chairman and the coach on Friday 6th of July and we would like to summarize the meeting in the following point:

1- The letter sent to Alnasr FC from Tannuri Ribeiro Avocados dated (25 June 2012) is not acknowledge by you and its look you was not a wear of it as you mentioned.

2- AlNasr FC never received replay letter from the lawyer to the letter issued on (28 June 2012) in replay to the mentioned lawyer letter in point 1.

3- You acknowledged that you received the replayed copy issued on (28 June 2012) of the lettered dated (25 June 2012) sent to Alnasr FC from Tannuri Ribeiro Avocados.

4- AlNasr FC never issued a verbal or written statement about your existing contract to anyone. And was surprised to see the media article on local news paper a statement issued by the person called Abdullah saying that you terminated your existing contract with Alnasr. And you acknowledged that you didn't know about this article and never issued from you side.

5- The chairman and the coach discussed the existing valid service contract with you and the interest of Alnasr FC to extending your existing service contract which started from 10/8/2011 until 9/8/2013 for two more years. And an offer will be submitted to you on your day joining the training with the team".

16. On 11 July 2012, Mr Arif Abbas Al Muhsen transmitted to the Player a schedule detailing the financial terms of a *"Proposed Contract extension from 10/08/2013 to 09/08/2015"*.

17. On 12 July 2012, the Player returned to Dubai and started training with Al Nasr.

18. On 18 July 2012, a new text of a *"Contract Extension"* was sent to the Player by email.

19. On 22 July 2012, a meeting was held in Dubai between the Player, his agent and representatives of Al Nasr.

20. On 27 July 2012, the Player met with the Chairman of Al Nasr. In that occasion, the Player informed Al Nasr of his decision to leave the club. The Player's decision was confirmed also in a meeting held in Dubai on 29 July 2012 between the Player's counsel and the Chairman of Al Nasr.

21. On 30 July 2012, the Player's counsel sent the First Respondent the following letter:

"We revert to our meeting held yesterday at the head offices of Al Nasr Football CO (LLC) in Dubai (UAE) regarding the above-captioned subject.

We herein ratify that the employment contract entered between your club and our client is irrevocably and unilaterally terminated.

In this concern and in order to fulfill with the provisions as stated in Clause 8 of the aforementioned employment contract, once again, we kindly request you to provide us with the bank account details of Al Nasr Football CO (LLC) to the following facsimile number and email address: …

We look forward to hearing from you regarding the above …".

22. On 31 July 2012, Al Nasr answered as follows*:*

"Thank you for your letter dated 30.7.2012 regarding the unilateral earlier termination of Mr. Bresciano of his employment agreement with our club.

As discussed during our meeting, the new decision of Mr. Bresciano and its timing are causing relevant damages to our club. Nevertheless, Al Nasr is ready to settle this matter subject to the prompt payment in full of the indemnity provided by art. 8 of the contract. …".

23. On 6 August 2012, the Player signed a contract with the First Appellant (the "New Contract"), under which he would render his services to Al Gharafa for a period of 3 years, expiring on 31 July 2015. Pursuant to the New Contract, the Player was entitled to receive in the period between its signature and 9 August 2013 (date of expiry of the Contract with Al Nasr) the total amount of USD 2,094,400, corresponding to USD 418,880, to be paid on 6 August 2012, plus USD 1,675,520, to be paid in monthly instalments.

24. On 6 August 2012, Al Nasr sent a letter to FIFA as follows:

"We hereby respectfully inform FIFA of the following urgent matter.

Al Nasr is a club duly affiliated with the U.A.E. Football Association and on 10 August 2011 it entered into a 2 year contract with the Australian Player Mark Bresciano.

The official season of the U.A.E. Pro League ended on 27 May 2012, and Al Nasr obtained the second position in the final standings.

On 22 July 2012, a meeting was held at the club premises with the Player and his agent, Mr. Sergio Berti, and the subject of the meeting was to negotiate the extension of the Player's contract. The Player and his agent accepted the Club's offer and the Player was supposed to play with Al Nasr for two more years.

However, after the meeting the Player did not attend the Club's training session and on 29 July 2012 his agent's lawyer, Mr. Tannuri, visited Al Nasr and informed the Club that the Player wished to accept an offer from the Qatari club Al Gharafa and asked Al Nasr to negotiate a transfer.

Although we were very disappointed and although this new and late request of the Player was causing damages to our Club, we understood the Player's position and informed the Player that we were prepared to negotiate a compensation for his transfer.

Today, we found out that the Al Gharafa Sports Club announced on their website that they signed a three year contract with Mark Bresciano, despite the fact that he is still bound by a valid contract with Al Nasr until 9 August 2013.

Al Nasr shall obviously lodge a formal claim with FIFA against Al Gharafa and against Mr. Bresciano for their serious violation of the FIFA Regulations. In the meantime, Al Nasr respectfully asks FIFA to consider the application of the most severe sporting sanctions against the Qatari club Al Gharafa for inducing the Player to breach his contract with Al Nasr during a protected period, and against the Player for his conduct in violation of FIFA regulations.

Furthermore we formally and respectfully request FIFA to deny any demand for the issuance of an ITC for the Player Mark Bresciano that may be submitted by the relevant National Association in the interest of, or on behalf of, Al Gharafa, until the dispute described above has been resolved in full. We are sending a copy of this correspondence to, inter alia, Al Gharafa Sports Club and the Qatar F.A. who are hereby put on formal notice

that the Player is under contract with Al Nasr".

25. On 21 August 2012, the Single Judge of the FIFA Players' Status Committee issued a provisional International Transfer Certificate authorizing the Player to be registered with Al Gharafa.

26. On 21 February 2013, Al Nasr lodged a claim with FIFA indicating that the Player on 30 July 2008 had unilaterally terminated the Contract without just cause. Therefore, Al Nasr requested FIFA to award compensation for breach of contract in the amount of EUR 2,500,000, plus interest at 5% from 10 August 2011. In addition, Al Nasr requested that sporting sanctions be imposed on the Player and his new club, Al Gharafa.

27. On 4 October 2013, the FIFA Dispute Resolution Chamber (the "DRC") issued a decision (the "Decision"), holding as follows:

"1. The claim of the Claimant, Al Nasr Sports Club, is partially accepted.

2. The Respondent player, Mark Bresciano, is ordered to pay to the Claimant, Al Nasr Sports Club, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 1,375,000, plus interest of 5% p.a. as of the date of this decision until the date of effective payment.

3. The Respondent club, Al Gharafa Sports Club, is jointly and severally liable for the payment of the aforementioned compensation.

4. If the aforementioned sum plus interest is not paid within the above-mentioned time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for its consideration and a formal decision.

5. The Claimant, Al Nasr Sports Club, is directed to inform the Respondent player, Mark Bresciano, and the Respondent club, Al Gharafa Sports Club, immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.

6. A restriction of four months on his eligibility to play in official matches is imposed on the Respondent player, Mark Bresciano. This sanction applies with immediate effect as of the date of notification of the present decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.

7. The Respondent club, Al Gharafa Sports Club, shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.

8. Any further claims lodged by the Claimant, Al Nasr Sports Club, are rejected".

28. In the Decision, the DRC preliminarily found that the 2012 edition of the Regulations on the Status and Transfer of Players (the "RSTP") was applicable to the merits of the dispute. The DRC, then, in support of the Decision, considered the following:

i. as to the breach / termination of the Contract:

"6. The members of the Chamber … acknowledged that the parties have already divergent positions

with regard to when the employment contract had been unilaterally terminated by the player. In fact, while the Respondent player considers that he unilaterally terminated the employment contract on 25 June 2012, the Claimant, on the other hand, sustains that the player terminated the said contract on 30 July 2012.

7. In this regard, the Chamber came to the unanimous conclusion that the letter of 25 June 2012 cannot be considered as the date of termination of the employment contract since the player requested an extension of his holidays on 2 July 2012, and subsequently he was training with the Emirati club. Furthermore, the Chamber also wished to emphasise that it is not contested that in July 2012 the Claimant and the Respondent player were negotiating the extension of the relevant employment contract.

8. In light of the above, the members of the Chamber considered that, by a letter of the player's representative, the player effectively and prematurely terminated the contract on 30 July 2012. …

12. …, the members of the Chamber took into account that the Respondents have, as established above, not invoked a just cause for the early termination of the contract but deem that art. 8 par. 1 of the contract is a "buy-out clause". However, after a careful analysis of the contents of the relevant clause in the contract, the DRC deemed that this was not the case. In particular, the Chamber emphasised that relevant provision does not establish a right for the player to terminate the contract for a specific, clearly predetermined amount but only seeks at somehow fixing the minimum amount of compensation due in case of breach by the player. Furthermore, the amount in question remains open as to its maximum.

13. Based on the aforementioned the Chamber had no other option than to consider that the player had no contractually stipulated right prematurely terminate the contract. Therefore, he had terminated the contract without just cause by means of the letter dated 30 July 2013 sent by his lawyer";

ii. as to the compensation to be paid as a result of the Player's breach of the Contract:

"14. The DRC established that, in accordance with art. 17 par. 1 of the Regulation, the player is liable to pay compensation to the Claimant for breach of contract. Furthermore, in accordance with the unambiguous contents of art. 17 par. 2 of the Regulations, the Chamber established that the player's new club, i.e. the Respondent club, shall be jointly and severally liable for the payment of compensation. In this respect, the Chamber was eager to point out that the joint liability of the player's new club is independent from the question as to whether the new club has committed an inducement to contractual breach or any other kind of involvement by the new club. This conclusion is in line with the well-established jurisprudence of the Chamber that was repeatedly confirmed by the Court of Arbitration for Sport (CAS). Notwithstanding the aforementioned, the Chamber recalled that according to art. 17 par. 4 sent. 2 of the Regulations, it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach.

15. Having stated the above, the Chamber focused its attention on the calculation of the amount of compensation for breach of contract in the case at stake. In doing so, the members of the Chamber firstly recapitulated that, in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including in particular the remuneration and other benefits

due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years as well as the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period. The DRC recalled that the list of objective criteria is not exhaustive and that the broad scope of criteria indicated tends to ensure that a just and fair amount of compensation is awarded to the prejudiced party.

16. *In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the pertinent contract contained a provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract.*

17. *In this respect, the Chamber acknowledged that the Respondents sustain that pursuant to the terms and conditions as stated in art. 8 par. 1 of the employment contract, the compensation due shall take in consideration only the amounts paid as remuneration. The Claimant for his part alleges that according to the aforementioned article of the employment contract, the amounts paid to the Respondent player and the actual damage incurred have to be calculated.*

18. *The Chamber considered noteworthy to mention, form the outset, that, due to their important objective of setting forth, in advance, the indemnity to be payable by a party in case of breach of contract, compensation clauses should be clear and give no room for ambiguity. In other words, the DRC emphasized that, as a deciding body, when assessing the existence or not of a compensation clause, it must be in a position to clearly establish the precise intention of the parties as to the matter.*

19. *Taking into account the clause at stake, the members of the Chamber underlined again that no fixed amount was set out but that the amount remains open as to its maximum and only seeks at somehow fixing the minimum account of compensation due in case of breach by the player.*

20. *In light of the above, the Chamber considered that the aforementioned clause cannot be considered by the DRC when establishing the amount of compensation for breach of contract. What is more and for the sake of good order, the Chamber wished to emphasise that, in any case, the clause at stake was not reciprocal, meaning that it did not foresee the consequences of the unilateral termination without just cause by the club, and that as such it could not be seen as enforceable.*

21. *In continuation, the members of the Chamber determined that the amount of compensation payable in the case at stake had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. The Chamber recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable. Therefore, other objective criteria may be taken into account at the discretion of the deciding body. In this regard, the Dispute Resolution Chamber stated beforehand that each request for compensation for contractual breach has to be assessed by the Chamber on a case-by-case basis taking into account all specific circumstances of the respective matter.*

22. *In order to estimate the amount of compensation due to the Claimant in the present case, the members of the Chamber first turned their attention to the financial terms of the former contract and the new contract, the value of which constitutes an essential criterion in the calculation of the amount of compensation in accordance with art. 17 par. 1 of the Regulations. The members of the Chamber deemed it important to emphasise that the relevant compensation should be calculated based on the average fixed remuneration, i.e. excluding any conditional or performance related payment, agreed by the player with his former club and his new club, as well as considering the*

period of the time remaining on the contract signed between the player and the former club.

23. *Bearing in mind the foregoing, the Chamber proceeded with the calculation of the fixed remuneration payable to the player under the terms of both the employment contract signed with the Claimant, i.e. Al Nasr Sports Club, and the one signed with the Respondent club, i.e. Al Gharafa Sports Club, for the period of 12 months that was remaining since the unilateral termination of the contract by the player until its expiry, i.e. from 1 August 2012 until 9 August 2013.*

24. *In this regard, the Chamber noted that, as per the employment contract signed with the Claimant, the Respondent player was entitled to a monthly salary in the amount of EUR 100,000 for the remaining contractual period, i.e. a total fixed remuneration of EUR 1,200,000.*

25. *In continuation, the DRC equally took note of the Respondent player's monthly remuneration under the terms of his employment contract with his new club, i.e. the Respondent club, which corresponds to USD 174,530 or approximately EUR 128,900, i.e. the total amount of EUR 1,550,000 for the months from August 2012 until July 2013.*

26. *Taking into account the above, the Chamber concluded that, for the relevant period, the player's average remuneration amounts to EUR 1,375,000.*

27. *Having stated that, the DRC recalled that the remuneration paid by the player's new club is particularly relevant in so far as it reflects the value attributed to his services by his new club at the moment the breach of contract occurs and possibly also provides an indication towards the players market value at that time.*

28. *In this regard, the Chamber was eager to emphasise that the player appeared to have raised his income considerably by concluding an employment contract with the Respondent club and that no transfer compensation had been paid by the Claimant to the Italian club, SS Lazio, for the player's transfer.*

29. *Furthermore, with regard to the criterion relating to the fees and expenses allegedly paid by the Claimant for the acquisition of the player's services, the member of the Chamber took due note that Al Nasr Sport Club had claimed to have paid the amount of EUR 1,169,986 ... and that the actual damage was estimated to be the total amount of EUR 1,354,046 … . In this respect, the Chamber wished to point out that the Claimant had not sufficiently corroborated the expenses invoked and that in any case, the amounts paid to the player while he was rendering his services to the club could not be considered.*

30. *Taking into account all the aforementioned objective elements in the matter at had, the Dispute Resolution Chamber decided that the total amount of EUR 1,375,000 was to be considered reasonable and justified as compensation for breach of contract in the case at hand.*

31. *As a consequence, the Chamber deiced that the Respondent player has to pay the amount of EUR 1,375,000 as compensation for breach of contract to the Claimant, plus interest of 5% p.a. as of the date of this decision until the date of effective payment, taking into account the Claimant's petition and the Chamber's constant jurisprudence in this regard.*

32. *Furthermore, the Chamber decided that, in accordance with art. 17 par. 2 of the Regulations, the Respondent club shall be jointly and severally liable for the payment of the aforementioned amount of compensation"*;

iii. as to the disciplinary consequences of the Player's breach of the Contract:

"33. … the Chamber … addressed the question of sporting sanctions against the player in accordance with art. 17 par. 3 of the Regulations. The cited provision stipulates that, in addition to the obligation to pay compensation, sporting sanctions shall be imposed on any player found to be in breach of contract during the protected period.

34. In this respect, the members of the Chamber referred to item 7 of the "Definitions" section of the Regulations, which stipulates, inter alia, that the protected period shall last "for three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional". In this regard, the DRC pointed out that the player, whose date of birth is 11 February 1980, was 31 years of age when he signed his employment contract with the Claimant on 10 August 2011, entailing that unilateral termination of the contract occurred within the applicable protected period.

35. With regard to art. 17 par. 1 of the Regulations, the Chamber emphasized that a suspension of four months on a player's eligibility to participate in official matches is the minimum sporting sanction that can be imposed for breach of contract during the protected period. This sanction, according to the explicit wording of the relevant provision, can be extended in case of aggravating circumstances. In other words, the Regulations intend to guarantee a restriction on the player's eligibility of four months as the minimum sanction. Therefore, the relevant provision does not provide for a possibility to the deciding body to reduce the sanction under the fixed minimum duration in case of mitigating circumstances.

36. Consequently, taking into account the circumstances surrounding the present matter, the Chamber decided that, by virtue of art. 17 par. 3 of the Regulations, the Respondent player had to be sanctioned with a restriction of four months on his eligibility to participate in official matches.

37. Finally, the members of the Chamber turned their attention to the question of whether, in view of art. 17 par. 4 of the Regulations, the player's new club, i.e. Al Gharafa Sports club, must be considered to have induced the player to unilaterally terminate his contract with the Claimant without just cause during the protected period, and therefore shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods.

38. In this respect, the Chamber recalled that, in accordance with art. 17 par. 4 of the Regulations, it shall be presumed, unless established to the contrary, that any club signing a professional player who has terminated his previous contract without just cause has induced that professional to commit a breach. Consequently, the Chamber pointed out that the party that is presumed to have induced the player to commit a breach carries the burden of proof to demonstrate the contrary.

39. Having stated the above, the members of the Chamber took note that the Respondents referred in particular to art. 17 of the FIFA Commentary to the Regulations on the Status and Transfer of Players which states that with the "buy-out clause" the player can also cancel the contract during the protected period and that no sporting sanctions may be imposed on the Respondent club. In this regard, … the Chamber did not consider the provision of art. 8 par. 1 of the contract to be a "buy-out clause".

40. In light of the aforementioned and given that the Respondent club did not provide any other specific or plausible explanation as to its possible non-involvement in the player's decision to unilaterally terminate his employment contract with the Claimant, the DRC had no option other than to conclude that the Respondent club had not been able to reverse the presumption contained in art.

17 par. 4 of the Regulations and that, accordingly, the latter had induced the player to unilaterally terminate his employment contract with the Claimant.

41. In view of the above, the Chamber decided that in accordance with art. 17 par. 4 of the Regulations, the Respondent club shall be banned from registering any new players, either nationally or internationally, for the two entire and consecutive registration periods following the notification of the present decision. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of the exception and the provisional measures stipulated in art. 6 par. 1 of the Regulations in order to register players at an earlier stage".

29. The grounds of the Decision were communicated to the parties on 14 November 2013.

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

30. On 27 November 2013, the Appellants filed a statement of appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (2013 edition) (the "Code") against the Respondents to challenge the Decision. The statement of appeal, accompanied by 5 exhibits, contained the appointment of Mr Quentin Byrne-Sutton as arbitrator.

31. Concurrently with their statement of appeal, the Appellants also filed an application for a stay of the Decision, pursuant to Article R37 of the Code, equally dated 27 November 2013.

32. On 12 December 2013, FIFA filed its answer to the Appellants' application for the stay of the Decision, requesting that such application be dismissed.

33. In a letter of 16 December 2013, FIFA indicated to the CAS Court Office that it had been informed of the First Respondent's intention to appoint Mr Michele Bernasconi as arbitrator in this case, and that it did not have any objection in that respect. The appointment by the Respondents of Mr Bernasconi as arbitrator was confirmed by Al Nasr in a letter of the same 16 December 2013.

34. On 19 December 2013, the Appellants lodged with CAS their appeal brief, together with 11 exhibits, pursuant to Article R51 of the Code. The exhibits included witness statements signed by Mr Gary Moretti, Mr Sergio Berti, Mr Abdallah Lemsagam and Mr Zouheir Hamama.

35. On 31 December 2013, the President of the CAS Appeals Arbitration Division issued an Order on Request for a Stay as follows:

"1. The application for provisional measures requested by Al Gharafa S.C. in its request for the stay of the execution dated 27 November 2023, in the matter CAS 2013/A/3411 Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA is rejected.

2. The application for provisional measures requested by Mark Bresciano in its request for the stay of the execution dated 27 November 2023, in the matter CAS 2013/A/3411 Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA is rejected.

3. The costs of the present order shall be determined in the final award or in any other final disposition of this arbitration".

36. On 24 January 2014, the Second Respondent lodged with CAS its answer in accordance with Article R55 of the Code. The Second Respondent's answer had attached 5 exhibits.

37. By communication dated 30 January 2014, the CAS Court Office informed the parties on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Quentin Byrne-Sutton and Mr Michele Bernasconi, arbitrators.

38. In a letter of 31 January 2013, the CAS Court Office informed the parties that Mr Quentin Byrne-Sutton, upon receiving and reviewing the file, had decided to resign, *"given the relative urgency with which an award needs to be rendered (which may also involve holding a hearing at short notice)"* and because *"his availability may not be sufficient"*. The CAS Court Office therefore invited the Appellants to designate another arbitrator.

39. On 3 February 2014, the Appellants designated Mr Hendrik W. Kesler as arbitrator. As a result, the Panel appointed in this arbitration was constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Hendrik W. Kesler and Mr Michele Bernasconi, arbitrators.

40. On 19 February 2014, the First Respondent filed its answer to the appeal, pursuant to Article R55 of the Code, together with 37 exhibits, including witness statements signed by Mr Marwan Bin Ghulaita, Mr Ibrahem Al Fardan, Mr Ahmed Khoory, Mr Ali Ibrahim and Mr Walter Zenga.

41. On 4 March 2014, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (the "Order of Procedure"), which was accepted and countersigned by the parties.

42. A hearing was held on 6 March 2014 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 17 February 2014. Mr Bernasconi, prevented from being in Lausanne at the hearing, attended it on the phone, with the consent of the parties. The Panel was assisted at the hearing by Mr Fabien Cagneux, Counsel to CAS. The following persons attended the hearing:

i.	for the Appellants:	Mr Mark Bresciano, Mr Zouheir Hamama, General Manager of Al Gharafa, and Mr Breno Costa Ramos Tannuri, counsel;
ii.	for the First Respondent:	Mr David Casserly, counsel;
iii.	for the Second Respondent:	Ms Isabel Falconer and Ms Saskja Kuhn, of the FIFA Players' Status and Governance Department.

43. At the hearing, the Panel heard declarations by the Player and by the witnesses. All of them confirmed their written statements filed, and declared, *inter alia*, the following:

i. Mr Mark Bresciano explained the circumstances of the negotiation of the Contract, underlining that Al Nasr was offering an amount considerably lower than the one he was requesting. As a result, only the insertion in the Contract of Article 8.1 induced him to accept the terms proposed by the First Respondent, as it meant that he could leave Al Nasr whenever he wished. At the same time, Mr Bresciano explained the circumstances of the termination of the Contract, which he decided to declare without any inducement by anybody, at the end of June 2012: he was in fact confident that he could find another club to play for. He returned to Al Nasr, at the beginning of July 2012, on the basis of the existing Contract, but only in light of the assurances given by its Chairman that an agreement could be found to renew it at the same conditions offered by any other club; he then decided to leave, of the end of July 2012, because the Chairman had not made a satisfactory offer for the renegotiation of the Contract. Finally, he confirmed that he was not aware of any offer by other clubs received by his agent prior to 25 June 2012;

ii. Mr Zouheir Hamama, General Manager of Al Gharafa, confirmed that, after some informal contact at the end of June 2012, he met the Player only around 5 or 6 August 2012, only after it was clear that the Player was no longer bound by the Contract to Al Nasr. At the same time, Mr Hamama confirmed that he never contacted Al Nasr for explanations about the situation of the Player. Finally, Mr Hamama explained the adverse consequences that the transfer ban was having for Al Gharafa;

iii. Mr Abdallah Lemsagam, an agent, rendered some declarations regarding the negotiation of the Contract, which he attended as agent for Al Nasr, and mentioned the fact that a "buy-out clause" was inserted in the Contract as per the Player's request;

iv. Mr Marwan Bin Ghulaita, Chairman of Al Nasr, confirmed that no request for information was made by Al Gharafa, even though he understands that the First Appellant was always behind the actions of the Player. Indeed, in July 2012 he had heard of no other club interested in the Player's services.

44. In addition, the parties made submissions in support of their respective cases. In such context, and *inter alia*:

i. the Appellants underlined that it was Mr Bresciano's primary intention to remain a player of Al Nasr. He however terminated the Contract on 25 June 2012 (on the basis of the "buy-out clause" contained in its Article 8.1), because he had not received answers to his request to have the Contract renegotiated, and returned to Al Nasr in July 2012 only because an agreement had been reached with the Chairman of Al Nasr as to the financial conditions to be applied in the following season. As a further confirmation of the fact that the Contract was terminated on 25 June 2012, the Appellants indicated the fact that the salary for the months of June and July 2012 was not paid by Al Nasr. With respect to Article 8.1 of the Contract, the Appellants emphasized that in a corresponding provision of a contract (filed by the First Respondent) entered into by Al Nasr with another player ([…]) additional words are inserted, which subject the application of the mechanism therein provided to the *"final approval"* of Al Nasr: the deletion of those words, requested by the Player, shows that the operation of Article 8.1 of the Contract corresponds to that of a "buy-out clause";

ii. the First Respondent emphasized that there is no evidence that the June and July 2012 salaries were not paid to the Player, and in any case that the Player in July 2012 returned to Al Nasr to provide services on the basis of the Contract, and not of a new agreement. In addition, according to Swiss law, the termination of an employment relation can be revoked by resuming the activity for the employer. At the same time, the First Respondent indicated that Article 8.1 of the Contract does not contain a "buy-out clause" and pointed to some discrepancies between the explanations given by the Player (that Al Nasr had suggested the insertion of a "buy-out clause" in the Contract) and the declarations of the witnesses (that the Player had requested the insertion of a "buy-out clause") concerning the circumstances of the negotiations;

iii. the Second Respondent preliminarily withdrew the objection, raised in its answer, of inadmissibility of the appeal (for late filing of the appeal brief), also on the basis of the explanations given by the Panel at the opening of the hearing. FIFA, then, underlined the importance of contractual stability, in light of which contractual clauses have to be interpreted. As a result, Article 8.1 of the Contract cannot be interpreted to contain a "buy-out clause", since it does not grant the right to terminate the Contract, but only governs the consequences of its breach.

45. At the conclusion of the hearing, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

2.2 The Position of the Parties

46. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Appellants and the Respondents. In any case, the Panel has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

a. The Position of the Appellants

47. The Appellants' appeal brief contains the following request for relief:

"FIRST – To set aside the Appealed Decision since clearly defaults the provisions as stated in the Employment Contract, the various regulations of FIFA, in particular, the Regulations on the Status and Transfer of Players and, additionally, Swiss law;

SECOND – To confirm that the Employment Contract was lawfully cancelled by the Player, pursuant to the terms and conditions as set out in its buy-out clause, in casu, clause 8, par. 1;

THIRD – To uphold that the total compensation amount for the cancelation of the Employment Contract and to be paid by the Player to the First Respondent is EUR 928,226 (EUR 728,226 due as salaries + EUR 200,000 due as signing-on fee) towards clause 8, par. 1 of the Employment Contract.

FOURTH – To determine that no interest shall apply on any compensation applicable to be matter and since the First Respondent deliberately failed to provide its bank account to receive the amount as set out in the reference buy-out clause, despite of the fact the Player formally requested it several times.

FIFTH – To confirm that the Appellant has never induced the Player to breach the Employment Contract;

SIXTH – To uphold that the there is no legal basis for the imposition of sporting sanction against the Player nor the Appellant since the Employment Contract was breached upon the fulfilment of the provisions as set out in its buy-out clause;

SEVENTH – To condemn the First Respondent and the Second Respondent to the payment of the legal expenses incurred by the Appellant and the Player, and

EIGHT – To establish that the costs of this arbitration procedure before CAS will be borne by the First Respondent and the Second Respondent".

48. In support of their appeal, the Appellants maintain that the Decision is to be set aside as it runs contrary to various rules of the RSTP, to provisions of Swiss law and/or to principles of *lex sportiva*. More specifically, the Appellants make submissions with respect (i) to the meaning and effects of Article 8.1 of the Contract and the exercise of the rights conferred thereby, (ii) to the sporting sanctions imposed by the DRC, and (iii) to the calculation of the damages to be paid to the First Respondent.

49. With regard to the first point, the Appellants contend that the Player *"cancelled the … Contract lawfully and towards the terms and conditions as set out in the buy-out clause drafted by the First Respondent"*. In fact, in the Appellants' opinion, Article 8.1 of the Contract contains a "buy-out clause", as it can be understood having in mind the context in which Al Nasr drafted it. In that respect, the Appellants *inter alia* underline, on the one hand, that the Player, one of the most talented Australian footballers, was employed by Al Nasr as a *"free agent"* (so that no transfer fee had to be paid by Al Nasr to the Player's former club) at a rather advanced age, and emphasise, on the other hand, that Al Nasr was not available to pay the remuneration requested by the Player. As a result, the parties agreed that the Player could cancel the Contract *"for any reason whatsoever"* in order to be in a position in any moment to sign a new contract with Al Nasr or another team, with better conditions. In other words, *"the First Respondent … convinced the Player to accept its offer with term and remuneration far behind his initial pretentions by proposing to him very special conditions to cancel the … Contract at any time and for any reason whatsoever in order to persuade him to sign the … Contract"*.

50. The interpretation of Article 8.1 of the Contract in the meaning suggested by the Appellants is, in their opinion, supported by the principles of interpretation of contracts set by Swiss law (and chiefly by Article 19 of the Swiss Code of Obligations, the "CO") and applied in the CAS jurisprudence. Therefore, according to the Appellants, *"any eventual mistake or inexact information necessary to calculate the compensation amount due to the First Respondent … had to be resolved by the … DRC paying consideration to the real intention of the parties …"*.

51. In addition, the second sentence of Article 8.1 (according to which *"unless the damage caused by the First Party exceeds these amounts and in this case the First Party may claim the Second Party for compensating it for the actual damages resulting from such breach"*) is *"horribly worded"* and *"an incomprehensible abomination of the English language"*, which could not be used against the Player and to the benefit of the author of *"such monstrosity"*. At the same time, the Decision was wrong in holding Article 8.1 unenforceable for *"lack of reciprocity"*, since the principle underlying it intends to protect the weaker party to a contract, and therefore could not be invoked against the Player, i.e. the employee in an employment relation. In summary, the DRC *"ignored the real and true intention of the parties, neglected … the principle of the supremacy of the contractual obligations"*, also recognized by

Article 17 RSTP, *"disrespected the 'contra proferentem' doctrine and misused the application of the lack of reciprocity rule"*.

52. In conclusion, *"it was the intention of the parties to create a buy-out clause"*, the exercise of which would not trigger any sporting sanction. In that respect, the Appellants confirm that the Contract was terminated on 25 June 2012: the visits of the Player to Dubai after that date were only meant to negotiate a possible extension of the Contract.

53. As to the second point, the Appellants maintain that the application of sporting sanctions on the Player is clearly *"excessive and inappropriate"*, also because the Player always acted in good faith and in several occasions tried to pay the compensation due to Al Nasr under Article 8.1 of the Contract. Indeed, pursuant to Article 17 RSTP, as interpreted by CAS precedents, sanctions do not apply automatically: and the controversy that Article 8.1 of the Contract was suitable to raise was a good reason for the DRC to deviate from the application of sporting sanctions.

54. In addition, the Appellants maintain that there is no doubt that the decision to cancel the Contract was taken by the Player without any involvement of, or inducement by, Al Gharafa: the Player had a first informal meeting with Al Gharafa at the end of June 2012, when the Contract had already been terminated, and restarted negotiations for the conclusion of the New Contract only in August 2012. Therefore, no sporting sanction should be imposed on the First Appellant.

55. As to the third point, the Appellants maintain that the calculation of the compensation to be paid by the Player to the First Respondent has to be made in accordance with Article 8.1 of the Contract, for a total amount of EUR 928,226. The First Respondent's claim for a larger amount is *"totally baseless"*, since the second part of Article 8.1 is *"incomprehensible"* and unenforceable, unjustified and not supported by evidence.

b. The Position of the Respondents

b.1 The position of Al Nasr

56. The First Respondent, in its answer of 19 February 2014, requested the CAS to:

> *"(i) Uphold the finding in the DRC Decision that Mr Mark Bresciano terminated his contract with Al Nasr without just cause;*
>
> *(ii) Uphold the finding in the DRC Decision that orders Mr Mark Bresciano and Al Gharafa to pay Al Nasr compensation in the amount of € 1,375,000 (one million, three hundred and seventy five thousand euros), plus interest of 5% p.a. as of the date of the DRC Decision;*
>
> *(iii) Uphold the finding in the DRC Decision that imposes a restriction of four months on Mr Bresciano's eligibility to play official matches following the notification of the DRC Decision;*
>
> *(iv) Uphold the finding in the DRC Decision that determines that Al Gharafa is banned from registering any new players either nationally or internationally, for two entire and consecutive registration periods following the notification of the DRC Decision;*
>
> *(v) Order Mr Bresciano and Al Gharafa to pay the full amount of the CAS arbitration costs; and*

(vi) Order Mr Bresciano and Al Gharafa to pay a significant contribution towards the legal costs and other related expenses of Al Nasr, at least in the amount of €30,000 (thirty thousand euros)".

57. Al Nasr, in other words, requests that the appeal be dismissed for the following reasons:

i. it is not in dispute that the Contract was unilaterally terminated by the Player, and that the Player did not have just cause to terminate the Contract unilaterally;

ii. the termination of the Contract did not take place before 29 July 2012: the letter of 25 June 2012 was sent by the Player's counsel without any authority or power to represent the Player and was not subsequently ratified by the Player, who, on the contrary, confirmed to Al Nasr, after that letter, his intention to return – and actually returned – for the beginning of the team's training and expressly denied having given his counsel any authorisation to unilaterally terminate the Contract. Further, there is no doubt that at the end of July 2012 the Contract was terminated by the Player, who informed of his intention the Chairman of Al Nasr in a meeting of 29 July 2012;

iii. Article 8.1 of the Contract does not contain a "buy-out clause". This conclusion can be reached on the basis of a literal interpretation of the provision, corresponds to the real intention of the parties to the Contract, and is confirmed by an objective interpretation, while the *"contra proferentem"* rule has no application in the present dispute. In fact:

- *"whereas in the context of a buy-out clause, the former club has given its consent to the early termination of the employment contract against the payment of a given amount, in a situation where the former club did not provide its consent, the compensation that it eventually receives following the unilateral termination of the contract aims at compensating that club for the damage caused by such unilateral termination"*, and *"Article 8 (1) of the Contract could never be considered as an offer made by Al Nasr that would only require its acceptance in order for the employment contract to be eventually terminated and a subsequent transfer could be concluded … Article 8(1) does not set a pre-determined fixed amount of compensation against which Al Nasr would be considered to have agreed to the early termination of the Contract … Instead, it only provides for an indemnity 'floor' …"*;
- the provision contained in Article 8.1 of the Contract intended to protect the investment made by Al Nasr in the event of breach of the Contract, while the explanations given by the Appellants are artificial, incorrect and contradictory;
- Article 8.1 of the Contract makes explicit reference to a "breach" of the Contract and to the obligation to pay damages. Therefore, from an objective point of view, it cannot be *bona fide* intended to allow an early termination of the Contract;
- it cannot be submitted that only Al Nasr had full control over the terms of the Contract and that the Player did not have any bargaining power: well to the contrary, Article 8.1 was negotiated by both parties, leaving no room for the application of the *"contra proferentem"* rule;

iv. compensation is payable to Al Nasr by the Player and Al Gharafa in the amount set in the Decision, which should be confirmed, even though Al Nasr believes that it was entitled to a higher compensation. In fact, Article 8.1 of the Contract sets the minimum amount to be paid, which corresponds to EUR 1,169,986, *i.e.* EUR 1,139,986 for amounts

paid and EUR 30,000 for costs sustained. In any case, the actual damage sustained is in excess of such figure. Considering the Player's remuneration and the non-amortised expenses, the value of the services of the Player and the specificity of sport, the damages amount to a level between EUR 1,312,808 and EUR 1,859,266;

v. there are no reasons for the Panel not to confirm the sporting sanction imposed on the Player, as he acted in full knowledge of the consequences that a breach of the Contract would have entailed;

vi. the sporting sanction imposed on Al Gharafa should also be confirmed as *"not only did Al Gharafa not reverse the presumption of inducement of the breach of the Contract, but the available evidence indicates that such inducement was blatant"*.

b.2 The position of FIFA

58. The Second Respondent, in its answer of 24 January 2014, submitted the following requests for relief:

"1. That the CAS rejects the present appeal and confirms the presently challenged decision passed by the Dispute Resolution Chamber … on 4 October 2013 in its entirety.

2. That the CAS orders the Appellants to bear all the costs of the present procedure.

3. That the CAS orders the Appellants to cover all legal expenses of FIFA related to the proceedings at hand".

59. FIFA, in other words, requests that the appeal be dismissed and the Decision confirmed because the grounds supporting it are *"fully justified"* and *"legally valid"*, while the objections submitted by the Appellants in this arbitration *"lack grounds"*.

60. FIFA examines the various issues raised in these proceedings by the Appellants as follows:

i. as to the *"legal interpretation of art. 8 par. 1 of the Contract and the Second Appellant's breach of contract without just cause"*, the Second Respondent submits that:

- *"a 'buy-out clause' is generally understood as a clause which unequivocally confers one of the parties to an employment contract … the right to prematurely terminate the contractual relationship at any time against the payment of a clearly fixed and predetermined amount stipulated in the contract. The parties must have clearly indicated in the contract that by means of the unconditional payment of the relevant amount, their relation will be definitely terminated without further conditions or additional claims for damages"*;
- the wording of Article 8.1 of the Contract makes it clear that it cannot be viewed as a "buy-out clause", since it lacks one of its essential elements, *i.e.* a fixed and predetermined amount of compensation to be paid. In addition, such provision does not confer the right to terminate the Contract, but merely establishes the consequences if the Player decides to do so;
- as to the *"intent"* of the parties when they agreed on Article 8.1 of the Contract, there is *"absolutely no evidence"* that the parties would renegotiate the Contract at the end of the first season, and no evidence is given of the fact that the First

Respondent was aware of the possibility for the Player to terminate the Contract at the end of the first season in the event of good performance. On the contrary, the Contract explicitly mentions the remuneration to be paid in the second season;

- the Player did not act in good faith when invoking Article 8.1 of the Contract to unilaterally terminate it;

ii. as to *"the consequences of the Second Appellant's breach of Contract without just cause: financial compensation"*, the Second Respondent notes that Article 17.1 RSTP clearly provides for the obligation of the Player to compensate the damages caused by his breach, and that the First Appellant's joint liability is automatic and independent from the question as to whether it has induced the Player to breach the Contract. At the same time, FIFA underlines that it was not possible for the DRC to assess the measure of the compensation due by the Player on the basis of Article 8.1 of the Contract, since *"the clause in question is drafted in vague and ambiguous terms which do not allow for the deciding body to establish a precise amount of compensation to have been agreed by the parties"*. As a result, the conclusion reached by the DRC as to the compensation to be paid to Al Nasr has to be confirmed, since it is based on a reasoning which is *"detailed, very clear and well-founded"*;

iii. as to the *"further consequences of the Second Appellant's breach of contract without just cause: sporting sanctions"*, FIFA confirms that sanctions have to be imposed on the Player, since he was found to be in breach of the Contract during the *"protected period"*, as defined in the RSTP. In that regard the Decision *"fully respects the applicable terms"* of the RSTP, *"while also duly considering the specific circumstances of the matter of stake"*. In fact, *"the circumstances surrounding the present matter did warrant for the imposition of sporting sanctions"*, also because *"the Second Appellant showed a look of diligence and good faith by simply and abruptly terminating the Contract, without any further explanations other that the First Respondent would not have responded to his wish to renegotiate the terms of the Contract"*, while *"the First Respondent did not have any such obligation"*. With respect to the sporting sanctions imposed on Al Gharafa, FIFA underlined that the First Appellant has not been able to reverse the presumption mentioned at Article 17.4 RSTP, and prove that it did not induce the Player to breach the Contract. On the contrary, the fact that the Contract was terminated only on 30 July 2012 and that at the end of June 2012 Al Gharafa was already in contact with the Player is in itself sufficient to establish that the First Appellant induced the Second Appellant to breach the Contract.

3. LEGAL ANALYSIS

3.1 Jurisdiction

61. CAS has jurisdiction to decide the present dispute between the parties.

62. In fact, the jurisdiction of CAS is not disputed by the parties, has been confirmed by the Order of Procedure, and is contemplated by the Statutes of FIFA (edition 2013) as follows:

Article 66

"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players,

Officials and licensed match agents and players' agents.

2. *The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

Article 67

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

2. *Recourse may only be made to CAS after all other internal channels have been exhausted.*

3. *CAS, however, does not deal with appeals arising from:*

   (a) violations of the Laws of the Game;

   (b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

   (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. *The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. […]".*

3.2 Appeal Proceedings

63. As these proceedings involve an appeal against a decision rendered by FIFA, brought on the basis of rules providing for an appeal to the CAS, in a dispute relating to a contract, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, in the meaning and for the purposes of the Code.

3.3 Admissibility

64. The admissibility of the appeal is not challenged by the Respondents. The statement of appeal was filed within the deadline set in Article 67.1 of the FIFA Statutes. No further internal recourse against the Decision is available to the Appellants within the structure of FIFA. Accordingly, the appeal is admissible.

3.4 Scope of the Panel's Review

65. According to Article R57 of the Code,

"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. …".

3.5 Applicable Law

66. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

67. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

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

68. In the present case the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA's rules and regulations. More precisely, the Panel agrees with the DRC that the regulations concerned – apart from the FIFA Statutes – are particularly the RSTP in their 2012 edition, in force since 1 December 2012, as the petition to FIFA was received on 21 February 2013.

69. At the same time, the Panel notes that, pursuant to Article 66.2 of the FIFA Statutes,

"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

70. As a result, in addition to the FIFA's regulations, Swiss law applies to the merits of the dispute.

71. The provisions set in the FIFA rules and regulations which are relevant in this arbitration include the following:

Article 17 RSTP (*"Consequences of terminating a contract without just cause"*)

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

1. *In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.*
2. *Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.*
3. *In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following season at the new club. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.*

4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two registration periods.

5. Any person subject to the FIFA Statutes and regulations (club officials, players' agents, players, etc.) who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned".

3.6 The Dispute

72. The object of these proceedings is the Decision, which ordered the Appellants, held to be jointly liable, to pay to the First Respondent the amount of EUR 1,375,000, plus interest, and sanctioned the Player with a 4-month ineligibility period and Al Gharafa with a ban on the registration of new players for two (2) entire and consecutive transfer periods. The Decision, in fact, is challenged by the Appellants and defended by the Respondents: the former want it to be set aside; the latter request it to be confirmed.

73. In the Decision, the DRC dealt with all the points which have been disputed by the parties before this Panel and/or are relevant for the purposes of this arbitration. In summary, the DRC found that the Player had breached the Contract, that compensation had to be paid and that sporting sanctions were applicable. More specifically:

i. as to the first point, it was held that:
   - the Player terminated the Contract on 30 July 2012,
   - there was no "just cause" for termination,
   - Article 8.1 does not contains a "buy-out" clause;

ii. as to the second point, the DRC concluded that:
   - the Contract does not provide for a "liquidated damages" clause,
   - compensation therefore has to be established on the basis of the other criteria set by Article 17 RSTP,
   - the application of those criteria leads to the amount of EUR 1,375,000, being the average of the annual fixed remuneration payable to the Player under the Contract and under the New Contract for the period of 12 months between the date of termination of the Contract and its expiry date;

iii. as to the third point, the DRC stated that:
   - the Player breached the Contract during the "Protected Period", as defined by the RSTP,
   - Article 17.3 RSTP provides in that event for the Player the minimum sanction of a four-month restriction on playing in official matches,

- Al Gharafa provided no evidence of its non-involvement in the breach of the Contract and is therefore subject to the minimum sanction indicated at Article 17.4 RSTP.

74. The points so listed mark the issues that this Panel has to examine for the determination of the dispute. More specifically, the Panel has to answer the following main questions:

i. did the Player breach the Contract without just cause? In that respect, the issue relating to the moment in which the Contract was "terminated" has to be examined, together with the question of interpretation of Article 8.1 of the Contract, in order to determine whether it granted or not the Player the right to terminate it;

ii. what are the financial consequences of the Panel's answer to the first question? More specifically, what is the amount, if any, to be paid to the First Respondent as a result of the termination of the Contract? Is Al Gharafa jointly liable, together with the Player, for such payment?

iii. what are the sporting consequences of the Panel's answer to the first question? More specifically, are sanctions to be applied on the Player and Al Gharafa? And if so, is the measure of the sanctions imposed by the DRC proper?

75. The Panel shall answer each of those questions separately.

i. Did the Player breach the Contract without just cause?

76. As mentioned above, the answer to this question involves the examination of separate issues. In fact, much of the debate in this arbitration (and before it, in front of the DRC) focused on the moment the Player put an end to the Contract and on whether such termination corresponded to the exercise of a right given him by Article 8.1 of the Contract.

77. With respect to the first point, it is the Appellants' position that the Contract was terminated on 25 June 2012, when the Player's counsel wrote a letter to Al Nasr informing the First Respondent that the Contract *"is from the present moment on irrevocably and unilaterally terminated"* (§ 8 above). Contrary to that position, the Respondents maintain that the Contract was effectively terminated only on 30 July 2013, as per another letter set by the Player's counsel on that date (§ 21 above).

78. The Panel finds the Respondents' position to be more convincing, and more in line with the Player's behaviour in the month of July 2012, which could not be explained if the Contract had been already terminated in that period. In fact:

i. immediately upon receipt of the letter of 25 June 2012 (not signed by the Player, but only by his counsel), the Chairman of Al Nasr contacted the Player on the phone, and received confirmation that he wanted to continue to play for the First Respondent: the point was mentioned in two communications sent by Al Nasr on 27 and 28 June 2012 (§§ 9 and 10 above);

ii. the Player, on summer leave in that period, specifically requested twice, – with both requests sent after 25 June 2012 – to be authorized to join the First Respondent's team for training later than he was required, and maintained, in support of his request, various reasons (chiefly the need to rest longer) and not the termination of the Contract and the existence of negotiations for the signature of a new contract;

iii. the Player, then, actually jointed the First Respondent and started to train with its team;

iv. at the hearing, the Player specifically confirmed that he understood that he was returning to the First Respondent to train on the basis of the Contract, even though negotiations were pending for its renewal and that the contract in his opinion ended at the end of July;

v. the failure of Al Nasr to pay the salaries due to the Player for the months of June and July 2012, mentioned by the Appellants at the hearing, is not *per se* conclusive evidence to the contrary, as it could be easily explained by other reasons – including the simple existence of the controversy caused by the letter of 25 June 2012 – or represent a breach of Contract by Al Nasr.

79. In other words, the behaviour of the Player in July 2012 is inconsistent with a claim that the Contract had already been terminated on 25 June 2012. Termination, therefore, effectively occurred only on 30 July 2012. The Decision, which so held, is correct on the point and should be maintained.

80. The next question, then, is whether the Player's termination of the Contract, declared on 30 July 2012, corresponds to the exercise of a contractual right, as granted him, if the case, by Article 8.1 of the Contract.

81. Art. 8.1 of the Contract so reads:

"If the Second Party cancels by himself the said contract made between him and the First Party for any reason whatsoever, he shall pay to the First Party all amounts paid by the First Party to the Second Party as a result of implementation of the Contract. Unless the damage caused to the First Party exceeds these amounts, and in this case the First Party may claim the Second Party for compensating it for the actual damages resulting from such breach".

82. The Appellants interpret such provision as contemplating a "buy-out clause", *i.e.* a clause granting the Player the right to terminate the Contract by paying Al Nasr an amount corresponding to all the amounts he had received under the Contract. Such interpretation of Article 8.1 is disputed by the Respondents.

83. The question, therefore, turns out to be the following: is Article 8.1 a "buy-out clause"?

84. The FIFA Commentary on the Regulations for the Status and Transfer of Players so deals with "buy-out clauses":

"The parties may … stipulate in the contract the amount that the player shall pay to the club as compensation in order to unilaterally terminate the contract (a so-called buyout clause). The advantage of this clause is that the parties mutually agree on the amount at the very beginning and fix this in the contract. By paying this amount

to the club, the player is entitled to unilaterally terminate the employment contract. With this buyout clause, the parties agree to give the player the opportunity to cancel the contract at any moment and without a valid reason, i.e. also during the protected period, and as such, no sporting sanctions may be imposed on the player as a result of the premature termination".

85. As made clear by such definition, which corresponds to standard practice in international football, the parties, while entering into a contract, may agree that at a certain (or at any) moment one of the parties (normally, the player) may terminate the contract, by simple notice and by paying a stipulated amount. In other words, one of the parties (ordinarily, the club) accepts in advance that the contract may be terminated: as a result, when the contract is effectively terminated, such termination can be deemed to be based on the parties' (prior) consent. Therefore, no breach occurs, and the party terminating the contract is not liable for any sporting sanction. It is only bound to pay the stipulated amount – which represents the "consideration" (or "price") for the termination.

86. On the basis of the foregoing, the Panel notes that the provisions contained in Article 8.1 of the Contract do not appear to establish a "buy-out clause". The Panel in fact remarks that:

i. the wording of the clause is rather clear: it does not grant the Player the right to terminate the Contract, but sets the consequences *"if"* the Contract is terminated;

ii. Article 8.1 refers to *"damages"* caused by the Player's *"cancellation of the Contract"*: the expression *"damages"* is inconsistent with a "buy-out clause", since any payment to be made by the Player would not be *"damages"*, but the consideration for the exercise of a contractual right;

iii. the Appellants did not provide sufficient evidence to establish that the real, common intent of the parties was, at the time of the negotiation of the Contract, to insert a "buy-out clause". Indeed, the declarations of the Player on the point are contradicted by the witnesses heard at the hearing;

iv. the clear meaning of the rule does make it necessary to resort to the *"contra proferentem"* rule of interpretation. In addition, and in any case, it is clear that the Contract was negotiated on the point by the parties and not unilaterally imposed by one on the other, as made apparent by a comparison with the corresponding provisions – slightly different – contained in the contracts signed by other players. There is therefore no room for such rule of interpretation to come into play;

v. the differences between the Contract and the contracts signed by other players give no indications to the nature (as a "buy-out clause") of Article 8.1 of the Contract. Contrary to the Appellants submissions at the hearing (§ 44 (i) above), the deletion of the words subjecting the "cancellation" of the Contract to the *"final approval"* of Al Nasr marks the unilateral, rather than consensual, nature of the termination of the Contract pursuant to its Article 8.1;

vi. a different interpretation of Article 8.1 would render Article 8.2 of the Contract difficult to understand: that clause, in fact, and not Article 8.1. deals with termination of the Contract by mutual agreement, and confirms that all the other situations contemplated

by Article 8 (and therefore also by Article 8.1) refer to *"the termination of the contract… due to breach of the obligations contained herein"*.

87. In summary, the Panel agrees with the Decision's conclusion: the Player had not been granted by Article 8.1 of the Contract the right to terminate it; when, on 30 July 2012, the termination was declared, no contractual right was exercised. Since (as it is not disputed) there was no other justification for such termination, it can be concluded that, on 30 July 2012, the Player terminated without just cause the Contract.

ii. What are the financial consequences of the answer to the first question?

88. Article 17.1 RSTP sets the principles and the method of calculation of the compensation due by one party because of a breach or unilateral and premature termination of a contract. In light of the conclusion reached above (§ 87), the Panel finds that the termination by the Player of his Contract falls within the scope of application of Article 17 RSTP.

89. The Panel notes indeed that it is a common ground between the parties that, should the termination of the Contract be held a breach of the same (which the Appellants deny), Article 17 RSTP would have to be applied. None of the parties, however, agree with the DRC's application of such rule in the case at stake. As a result, the Panel has to determine the amount of damages to be paid to the First Respondent under that rule, and in such context verify whether the method of calculation adopted in the Decision was correct.

90. According to Article 17.1 RSTP, primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. Then, if the parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for:

- the law of the country concerned,
- the specificity of sport,
- any other objective criteria, including in particular
  - √ the remuneration and other benefits due to the player under the existing contract and/or the new contract,
  - √ the time remaining on the existing contract up to a maximum of five years,
  - √ the fees and expenses paid or incurred by the former club (amortised over the term of the contract), and
  - √ whether the contractual breach falls within a protected period.

91. Against that framework, the DRC:

i. decided that the Contract did not provide for an amount agreed by the parties to be paid in the event of breach;

ii. assessed the compensation to be paid to Al Nasr on the basis of the average of the annual fixed remuneration payable to the Player under the Contract and under the New Contract for the period of 12 months between the date of termination of the Contract and its expiry date.

92. As a result, the Panel has to look at the Contract first, to see if the parties have agreed a contractual remedy for the breach of the Contract: as mentioned, the DRC concluded that they had not.

93. The question for this Panel, indeed, is whether Article 8.1 of the Contract, not having the nature of a "buy-out" clause, performs the function of a "liquidated damages" clause, *i.e.* of a clause identifying the amount to be paid in case of breach. The DRC, actually, excluded such function, mainly for three reasons: the clause is not clear and leaves room for ambiguity; the amount it sets remains open to its maximum; the clause is not reciprocal, *i.e.* it applies only to a breach committed by the Player and does not define the damages to be paid by Al Nasr, should this breach the Contract.

94. The Panel does not agree with such indication, and confirms that the clause contained at Article 8.1 of the Contract qualifies as a contractual penalty or "liquidated damages" clause (*"clause pénale"* or *"Konventionalstrafe"*) under Swiss law (Article 160 of the Swiss Code of Obligations, the "CO"), e.g. under the law applicable to the merits of the dispute in this arbitration. In fact, it contains all the necessary elements required for such purpose: (i) the parties bound thereby are mentioned, (ii) the kind of penalty has been determined, (iii) the conditions triggering the obligation to pay it are set, (iv) its measure is identifiable (COUCHEPIN, *La clause pénale*, Zurich 2008, § 462). In other words, Article 8.1, which sets an amount of *"damages"* to be paid *"if"* the contract is breached, appears to perform a function (the determination of the amount that a party has to pay to the other as damages in the event of breach of contract) perfectly consistent with Swiss law.

95. It is to be noted, in that regard, that Swiss law does not require "penalty clauses" to be "reciprocal" in order to be valid. Therefore, the DRC was not entitled to disregard it, only because it would not apply to a breach committed by Al Nasr([2]). In addition, the fact that Article 8.1 appears to set, in accordance with its second sentence, only a "minimum threshold" is again perfectly consistent with Swiss law: Article 161.2 CO, in fact, provides that, *"where the loss or damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault"*, and therefore explicitly states that compensation in a larger measure could be sought by the creditor, by giving evidence of the debtor's fault, if the amount of damages actually suffered exceeds the amount stipulated in the penalty clause.

96. Indeed, notwithstanding some syntactical difficulties in its English version, Article 8.1, second sentence is, based on its very wording, rather clear: it indicates that Al Nasr is entitled to compensation for the *"actual damages"* caused by the Player's *"breach"* if they exceed their "liquidation" contained in the first sentence.

97. In light of the foregoing, and based on the parties' submissions in this arbitration, the Panel holds that:

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[2] An issue that is irrelevant in this arbitration, but that, if the case, could have been easily solved by applying by analogy the same clause to a breach committed by the club.

i. Article 8.1 contains a "liquidated damages" clause;

ii. under that provision, the Player is bound to pay to Al Nasr, in the event of breach of Contract, *"all amounts paid by the First Party* [Al Nasr] *to the Second Party* [the Player] *as a result of implementation of the Contract"*;

iii. such amounts correspond to EUR 928,226 for salaries plus EUR 57,683 for bonuses, for a total of EUR 985,909. The Panel, in fact, remarks that such clause does not cover indirect payments (to airline company, car rental, insurance, etc.) for benefits, but includes, in additional to salaries, all payments directly made to the Player – whose amount is not disputed;

iv. based on Art. 8.1, Al Nasr is entitled to receive compensation in excess of EUR 985,909, as a result of the Player's breach of the Contract without just cause, by giving evidence of the actual damages sustained.

98. Indeed, this is what actually the DRC basically did: it determined the amount of damages sustained by Al Nasr – in a measure larger than the one resulting from the application of Article 8.1 of the Contract – and ordered the Player to pay it.

99. There is a dispute, however, as to the way the DRC made that determination: even the First Respondent, which seeks the confirmation of the measure of compensation indicated in the Decision, maintains that the method followed the DRC is wrong, and should have led to a larger compensation – even though not requested before the CAS.

100. The Panel actually notes that there is no written reasoning behind the DRC's decision to take the average of the remuneration under the Contract and the New Contract in this case. Much as it has used part of the Art. 17.1 criteria, that is *"... the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract .."*., the DRC has not given any detailed reasoning behind the decision to take the average, and to base its finding on the amount to be paid to the Player under the New Contract only for the period overlapping the original term of the Contract – and not, for instance, on the average yearly salary payable to the Player over the entire term of the New Contract. No indication, then, is contained in the Decision as to any relevance of the *"specificity of sport"*.

101. As a result, the Panel is called to determine the actual measure of the damages sustained by Al Nasr, on the basis of Article 17.1 RSTP. In such examination, the Panel is limited by the parties' requests for relief: in other words, should it come to the conclusion that Al Nasr would be entitled to compensation in a measure larger than the one awarded in the Decision, no such compensation could be granted, and the amount of compensation set by the DRC should be confirmed.

102. The Panel notes that there have been a number of previous awards rendered by CAS panels on the issue of the determination of damages in accordance with Article 17 RSTP (CAS 2007/A/1298, 1299, & 1300; CAS 2007/A/1358 and CAS 2007/A/1359; CAS 2008/A/1519 & 1520; CAS 2009/A/1880 & 1881; and CAS 2010/A/2145, 2146, & 2147, to mention a few where the breach was on the part of the player): such precedents provide indeed a useful guidance for this Panel, even if there is no specific reference to them in this award.

103. In that respect, the Panel notes that there is a growing *consensus* in the CAS jurisprudence as to the application of the "positive interest" principle approach followed in CAS 2008/A/1519 & 1520 and equally applied in CAS 2009/A/1880 & 1881. This Panel agrees with such approach and underlines that the application of the criteria indicated by Article 17.1 RSTP should *"aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly"* (CAS 2008/A/1519 & 1520, § 86).

104. For such purposes, it is this Panel's role to consider each of the criteria within Art. 17.1 RSTP and any other objective criteria, in the light of the specific facts of this case and to determine how much weight, if any at all, to apply to each in determining the amount of compensation due in this particular case and to ensure that *"the calculation made ... shall be not only just and fair, but also transparent and comprehensible"* (CAS 2008/A/1519 & 1520, § 89), with a view to putting the injured party in the position it would have been in had no breach occurred.

105. The first factor that this Panel considers in this exercise is the "remuneration element", mentioned at Article 17.1 RSTP.

106. With regard to this point, the Panel notes that:

i. under the Contract, the Player was entitled to receive, at the time of its termination (season 2011/2012), a yearly salary of EUR 1,100,000;

ii. under the same Contract, the Player would have received for the season 2012/2013 a yearly salary of EUR 1,200,000;

iii. on 11 July 2011, Al Nasr proposed the extension of the Contract for two years (to include the seasons 2013/2014 and 2014/2015) with a yearly salary of:
- EUR 1,300,000 for the season 2013/2014, and
- EUR 1,400,000 for the season 2014/2015,

iv. on 18 July 2011, Al Nasr submitted a new proposal for the extension of the Contract to include the seasons 2013/2014 and 2014/2015 with a yearly salary of:
- EUR 1,300,000 for the season 2012/2013,
- EUR 1,400,000 for the season 2013/2014, and
- EUR 1,500,000 for the season 2014/2015.

107. At the same time, the Panel notes that, as indicated in the Decision, the Player was to receive by Al Gharafa under the New Contract, in the period originally covered by the Contract, an amount corresponding to EUR 1,550,000. The Panel remarks that such sum roughly corresponds to the amount of EUR 1,600,000 mentioned in the witness statement signed by Mr Berti, the Player's agent, filed by the Appellants in this arbitration, to be the yearly salary offered to the Player by Al Gharafa.

108. In light of the foregoing, the Panel concludes that, for the purposes of the calculation under Article 17.1 RSTP, the value that the parties gave to the yearly services of the Player, on the basis of the remuneration element, can be estimated to be, at the time of the termination of the Contract:

i. EUR 1,400,000 from the point of view of Al Nasr, being the average salary the First Respondent was available to pay for the following 3 seasons;

ii. and EUR 1,550,000 from the point of view of Al Gharafa;

iii. for an average value, therefore, of EUR 1,475,000.

109. The value of the services of a player, however, is only partially reflected in the remuneration which a club would be available to pay, since the club has to sustain expenses to obtain such services. Therefore, in order to determine the full amount of the value of the services lost, the Panel has to take into account also the amount that the club would have to spend to acquire them.

110. In this regard, it appears that Al Gharafa was available to pay to Al Nasr at least the amount corresponding to the calculation of the compensation due by the Player under Article 8.1 of the Contract. This point is confirmed by the very relief sought by the Appellants in this arbitration. The acquisition amount of EUR 928,226 over 3 years corresponds to the yearly amount of EUR 309,409.

111. As a result, it is possible to conclude that the value of the services of the Player, taking into account the remuneration as well as the cost of acquisition factors, can be fixed at EUR 1,784,226 (EUR 1,475,000 + EUR 309,409) for the period (1 year) covering the original term of the Contract.

112. To the amount so determined, the Panel finds that the non-amortized acquisition costs sustained by the First Respondent should be added. Although it paid no transfer fee to acquire the services of the Player, who was a "free agent" at the time the Contract was signed, Al Nasr undertook to pay his agent the amount of EUR 100,000, half of which was actually paid. Considering that Al Nasr entered into the Contract for 2 years, the cost to be allocated for each season would be of EUR 25,000, *i.e.* of half of the amount actually paid. As a result, Al Nasr would have suffered a loss, caused by the Players' breach, of EUR 1,784,226 + EUR 25,000, corresponding to a total of EUR 1,809,226. The Panel notes that such amount is not excessively different from the amount (EUR 2,000,000) the First Respondent declared (§ 73 of the answer in this arbitration) to be available to accept as a minimum for the transfer of the Player.

113. From such amount, the value of the salaries owed under the Contract, but not paid by Al Nasr (EUR 1,200,000), should be deducted. Such deduction would lead to a net loss for Al Nasr of EUR 609,226.

114. The First Respondent, however, maintains that it had to replace the Player, and that it incurred into large expenses in that respect, to be compensated by the Appellants.

115. The Panel underlines that in order to claim compensation for "replacement costs" a club should be able to prove several factual elements, including the link between the premature termination of a contract by a player and the hiring of the new player. The Panel does not find that Al Nasr has satisfied in this arbitration the burden to prove (at least) such link between the termination of the Contract by the Second Appellant and the signature of contracts with 2 new players.

116. However, the Panel understands that a Player of the importance of the Second Appellant had to be somehow replaced, and that considering the specific circumstances of this case and of the team of First Respondent, Al Nasr was indeed obliged to incur into expenses (for acquisition costs and salaries) that the Panel determines, also pursuant to Article 42.2 CO, in the amount of EUR 600,000, *i.e.* to the half of the salary it would have paid to the Player under the Contract for the season 2012/2013. Adding this amount to the net loss for Al Nasr of EUR 609,226, would lead to a (provisional) damage of EUR 1,209,226.

117. The Panel notes, however, that it *"should aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case"* (CAS 2008/A/1519 & 1520, § 155; CAS 2009/A/1880 & 1881, § 233): indeed, as mandated by Article 17.1 RSTP, the Panel has to take into account the "specificity of sport".

118. The Panel agrees with the CAS case law that the "specificity of sport" is not an additional head of compensation, nor a criteria allowing to decide in *ex aequo et bono*, but a correcting factor which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of Article 17 RSTP.

119. The Panel notes that in the "specificity of sport" should in the current case lead to an increase (based for instance on a number of monthly salaries the Player was entitled to receive under the Contract) in the amount of compensation for the damages, provisionally set at EUR 1,209,226, suffered by Al Nasr, taking into account the sporting importance of the Player for the First Respondent's team and the behaviour of the Player at the time of the termination. The Panel however does not need to exactly quantify the measure of the damages to be finally compensated: it only needs to confirm that such amount exceeds the amount granted by the DRC, which, therefore, this Panel is bound to confirm.

120. This conclusion is reinforced by the fact that the Contract was terminated within the Protected Period. On the other hand, no compelling indications have been given by the parties as to any role any "law of the country concerned" might have on the calculation of the damages to be compensated by the Appellants.

121. In light of the foregoing, the Panel concludes that the compensation to be paid by the Player to Al Nasr equals EUR 1,375,000, *i.e.* the amount granted by the DRC.

122. On such amount, interest is to be paid. The DRC set in that respect the measure of 5% p.a., accruing as of the date of the Decision until the date of effective payment.

123. The Panel is aware of the CAS jurisprudence, which granted interest from various dates, including the date of termination of the contract, which is the moment in which a claim for compensation arises pursuant to Article 339.1 CO. However, failing a specific challenge to the Decision on the point, the Panel is bound to confirm the starting date for the application of interest set by the DRC, considering the prayers for relief submitted by Al Nasr.

124. According to the Decision, Al Gharafa is jointly and severally liable for the compensation due

to Al Nasr.

125. Article 17.2 RSTP provides indeed that the new club is jointly and severally liable for the payment of compensation, regardless of any involvement or inducement of the player to breach his contract.

126. As a result, the Panel upholds the Decision in this regard, confirms the joint and several liability of Al Gharafa towards Al Nasr for the payment of EUR 1,375,000, plus interest at 5% p.a. accruing from the date of the Decision.

iii. What are the sporting consequences of the Panel's answer to the first question?

127. The DRC, in the Decision, applied sporting sanctions on both the Player and Al Gharafa, as a result of the Player' breach of the Contract during the *"Protected Period"*, as defined by the RSTP. More exactly, the Player was sanctioned with a four-month restriction on playing in official matches pursuant to Article 17.3, while Al Gharafa was banned from registering new players for two registration periods under Article 17.4 RSTP.

128. Such sanctions have been challenged by the Appellants in this arbitration: the sanction imposed on the Player is defined to be *"excessive and inappropriate"*, and not warranted by the applicable provisions in the RSTP, since the Player always acted in good faith and in several occasions tried to pay the compensation due to Al Nasr under Article 8.1 of the Contract; the sanction imposed on the First Appellant is not justified, as Al Gharafa is not responsible of inducement to breach the Contract.

129. With respect to the sanction applied to the Player, it is the Panel's opinion that the measure decided by the DRC is fair and appropriate: it corresponds to the minimum set by Article 17.3 RSTP and is warranted by the circumstances of the case. Indeed, the Player terminated the Contract for purely economic reasons, notwithstanding the ongoing negotiations with the club he was bound to, aiming at satisfying his requests for an increase in the salary. An elimination, or even a simple reduction, of such sanction would be likely to put in question the importance of contractual stability, and chiefly so in the "Protected Period", and would undercut the role of the sporting values embodied in the respect of contracts.

130. The Panel reaches the same conclusion with respect to the sanction imposed on Al Gharafa.

131. Under Article 17.4 RSTP, inducement to breach a contract is sanctioned with a ban on registration of new players for at least two "transfer windows", and *"it shall presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach"*. In other words, a rebuttable presumption is established: the new club is subject to sanction if it does not prove that it has not induced the breach.

132. In this case, the Panel finds that Al Gharafa has not adduced such proof of non inducement. Well to the contrary, the evidence available to the Panel indicates that Al Gharafa had been in contact with the Player at the time he was negotiating a possible renewal of the Contract.

133. As a result, the Panel finds no reason to depart from the DRC's conclusion, which must be confirmed.

3.7 Conclusion

134. In light of the foregoing, the Panel holds that the appeal brought by the Player and Al Gharafa is to be dismissed, the Decision to be confirmed and any other prayers or requests to be rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 27 November 2013 by Al Gharafa S.C. and Mr Mark Bresciano against the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 4 October 2013 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 4 October 2013 is confirmed.

3. (…)

4. (…)

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