**Arbitration CAS 2017/A/5046 Anouar Kali v. Al-Arabi Sports Club, award of 24 October 2017**

Panel: Mr Jacopo Tognon (Italy), Sole Arbitrator

*Football*
*Termination of the employment contract without just cause*
*Change of argument during hearing*
*Novation*
*Penalty clause*
*Reduction of penalty under Article 163 para. 3 SCO*

1. **By bringing forward, after filing of the Appeal Brief, *e.g.* during the hearing, a new argument regarding the law governing a specific contract concluded by the parties of the arbitration proceedings, without having requested a prior authorisation to do so, an appellant is breaching Article R56 CAS Code. Furthermore, such a change of position by an appellant at the hearing constitutes a violation of the principle of *venire contra factum proprium*. Accordingly, the appellant is estopped from essentially changing his argument during the hearing and any new argument made at the hearing shall be disregarded by the CAS panel.**

2. **Under Swiss law, a novation (*novatio*) exists where a debt is settled by contracting a new debt relationship. However, pursuant to Article 116 Swiss Code of Obligations (SCO), such a novation is not presumed. A novation is in particular given if an existing debt is replaced by another debt; it is not given if – without modifying the original amount due – the parties to a settlement agreement simply agree on a mere payment schedule of the initial debt *e.g.* by dividing the amount due in different instalments, ultimately composing the same sum.**

3. **Under Swiss law the elements of a penalty clause are as follows: (i) the designation of the parties bound by the penalty clause, (ii) the determination of the kind of penalty, (iii) the conditions triggering the obligation to pay it, (iv) the determinability of its scope. Furthermore, a penalty can be agreed for the event of non-performance or of defective performance of a contract (Article 160 para.1 SCO). In such situation, the penalty clause must be considered "exclusive" *i.e.* the creditor must choose between compelling the performance or claiming the penalty. Alternatively, a penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160 para. 2 SCO). In that case, the penalty is "cumulative" *i.e.* the creditor might claim the penalty in addition to the performance, provided he has not expressly waived such right or accepted performance without reservation. In case the parties have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and the meaning of the main obligation that is guaranteed.**

**4. Under Swiss law, the judge (or the arbitrator) will use his discretion under Article 163 para. 3 SCO to reduce a contractual penalty if the relationship between the amount of the penalty agreed upon, on the one hand, and the interest of the creditor worthy of protection, on the other hand, is grossly disproportionate. In other words, an excessive penalty under Swiss law is a penalty that, at the time of the judgment, is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity, or, put more simply, is "abusive". Moreover, the specific circumstances of the case, such as the nature and duration of the contract, the seriousness of the contractual breach, the degree of fault, the behaviour of the creditor, the financial conditions of the parties, a special interest of the creditor that the debtor behaves in conformity with the contract, the experience in business matters of the parties and the damage incurred by the creditor shall be considered.**

## I. THE PARTIES

1. Mr. Anouar Kali (the "Player" or the "Appellant") is a professional football player. He was born on 3 June 1991 and he is of Moroccan nationality. He is currently registered with the club FC Utrecht, based in Utrecht, the Netherlands.

2. Al-Arabi Sports Club (the "Club" or the "Respondent") is a football club from Doha, Qatar. It is a member of the Qatar Football Association ("QFF"), which in turn is a member of the Fédération Internationale de Football Association ("FIFA").

## II. FACTUAL BACKGROUND

### A. The Dispute between the Parties

3. The Appellant challenges before the Court of Arbitration for Sport ("CAS") a decision (the "Appealed Decision") passed by the FIFA Dispute Resolution Chamber (the "FIFA DRC") on 24 November 2016, which partially accepted a claim brought by the Player against the Club, imposing upon the latter the payment of the amount of EUR 950,000 plus 10% interest p.a, to be paid within 30 days of notification of the Appealed Decision. The circumstances stated below are a summary of the main relevant facts as submitted by the Parties.

4. On 11 February 2015, the Player and the Club signed an employment contract valid until 30 June 2019 (the "Employment Agreement").

5. Article 4 para. 1 of the Employment Agreement reads as follows:

> *"The remuneration of the Player shall be set out in the Schedule attached to this Contract and signed by the Parties".*

6. Pursuant to the Football Player's Contract Schedule (the "Payment Schedule"), signed by the Parties, the Player would be entitled to the following remuneration:

> *"Total amount of the contract:*
>
> *Euro 2,150,000/- (Euro Two Million One Hundred Fifty Thousand Only) for Four and a Half seasons (2014/2015) – (2015/2016) – (2016/2017) – (2017/12018) – (2018/12019).*
>
> ***1 - The First season 20014 (sic)/2015.***
>
> *The total amount for the First season:*
>
> ***Euro 200,000/-*** *(Euro Two Hundred Thousand only) to be paid as follows:*
>
> *(a) Euro 40,000/- (Forty Thousand Euro) advanced payment, to be paid within a (sic) February 2015.*
>
> *(b) Euro 40,000/- (Forty Thousand Euro) as Monthly Salary, per month to be paid from 01/03/2015 to 30/06/2015 (Four months).*
>
> ***2 - The Second season 20015* (sic)*/2016.***
>
> *The total amount for the Second season:*
>
> ***Euro 400,000/-*** *(Euro Four Hundred Thousand only) to be paid as follows:*
>
> *(a) Euro 80,000/- (Eighty Thousand Euro) advanced payment, to be paid within a (sic) July 2015.*
>
> *(b) Euro 27,400/- (Twenty Seven Thousand Four Hundred Euro) per month Salary of July 2015.*
>
> *(c) Euro 26,600 (Twenty Six Thousand Six Hundred Euro) Monthly Salaries per month to be paid from 01/08/2015 to 30/06/2016 (Eleven months).*
>
> ***3 - The Third season 2016/2017.***
>
> *The total amount for the Third season:*
>
> ***Euro 450,000/-*** *(Euro Four Hundred Fifty Thousand only) to be paid as follows:*
>
> *(a) Euro 90,000/- (Ninety Thousand Euro) advanced payment, to be paid within a (sic) July 2016.*
>
> *(b) Euro 30,000/- (Thirty Thousand Euro) a (sic) Monthly Salaries per month, to be paid from 01/07/2016 to 30/06/2017 (Twelve months).*
>
> ***4 - The Fourth season 2017/2018.***
>
> *The total amount for the Fourth season:*
>
> ***Euro 500,000/-*** *(Euro Five Hundred Thousand only) to be paid as follows:*
>
> *(a) Euro 100,000/- (One Hundred Thousand Euro) advanced payment, to be paid within a (sic) July 2017.*
>
> *(b) Euro 33,700/- (Thirty Three Thousand Seven Hundred Euro) per month Salary of July 2017.*
>
> *(c) Euro 33,300 (Thirty Three Thousand Three Hundred Euro) a (sic) Monthly Salaries per month, to be paid from 01/08/2017 to 30/06/2018 (Eleven months).*

***5 - The Fifth season 2018/2019.***

*The total amount for the Fifth season:*

***Euro 600,000/-*** *(Euro Six Hundred Thousand only) to be paid as follows:*

*(a) Euro 120,000/- (One Hundred Twenty Thousand Euro) advanced payment, to be paid within a (sic) July 2018.*

*(b) Euro 40,000 (Forty Thousand Euro) a (sic) Monthly Salaries per month, to be paid from 01/07/2018 to 30/06/2019 (Twelve months).*

***e) Other benefits in favour of the player:***

***- House***

***- Car***

***- Air Tickets: (2) business class (Amsterdam – Doha – Amsterdam), for the player per each season.***

*- Bonuses:*

*1 – Euro (10,000) for winning Q.S.L. League.*

*2 – Euro (5,000) for winning Emir Cup.*

*3 – Euro (5,000) for winning Qatar Cup.*

*4 – Euro (5,000) for winning Gulf Cup.*

*5 – Euro (10,000) for winning Asian League.*

*The player's income refers to net amounts. Regarding the payment of eventual taxes and social costs, the legal provisions applicable at the club's domicile apply".*

7. On 13 July 2015, the Player, acting through his legal representative, sent a letter to the Club stating that he had not been informed about the training schedule for the upcoming season, while also not having been granted the return flight tickets to the Netherlands as agreed upon in the Employment Agreement. On the same occasion, the Player indicated that he had not been provided with housing and a car in Qatar. Furthermore, it was pointed out that the amount of EUR 120,000 consisting of salaries for the months April, May and June 2015 had not been paid to the Player by the Club and consequently the latter was granted a deadline of 5 days to make such payment.

8. On 20 July 2015, the Player sent an e-mail to the Club, stating that he had not received any reply to his formal letter and that the outstanding amounts had not been paid. Moreover, the Player informed the Club that he had visited its training camp and had been told that pre-season training would commence on 24 July 2015 but he was no longer needed by the Club. In the above mentioned letter, the Player expressed his willingness to search for a new club, in addition to restate the request to be paid the overdue amount of EUR 120,000, as well as to be compensated for the expenses incurred in connection with accommodation costs and flight tickets purchase.

9. On 27 July 2015, the Player sent another letter to the Club, reiterating the requests expressed in the previous two correspondences and informing the Club that he had been present at the training ground on 24 July 2015, where he had been told again that he was no longer needed and thus would not be allowed to join the pre-season training camp starting 30 July 2015. In the letter it was also stressed that the Player was paying for his own hotel accommodation, as the Club had failed to fulfil its contractual obligations towards him. The Player also requested for the payment of the outstanding amount of EUR 120,000 within 14 days of receipt of the letter, as well as for him to be allowed to participate in the season preparation with the Club's first team within 2 days; should the Club not meet its financial obligations, the Player would be entitled to terminate the Employment Agreement with just cause.

10. On 30 July 2015, the Player sent a new letter to the Club, pointing out that the Club's first team had left Qatar to attend the pre-season training camp, which the Player had been requested not to attend. The Player also asked for a written permission to leave the country for a short period.

11. On 3 August 2015, the Club granted the Player's request, allowing him to travel to the Netherlands for a period of ten days as of that date.

12. On 5 August 2015, the Player notified the Club stating that he would return to Qatar within the ten day period. The Player also stressed that the Club had still not complied with its duties set out in the Employment Agreement and that should it not do so by 10 August 2015, the Player would terminate the Employment Agreement unilaterally.

13. On 12 August 2015, the Player, acting through his legal representative, sent a letter to the Club acknowledging the receipt of the amount of EUR 40,000 consisting of the salary for the month of April. By means of the same letter, the Player terminated the Employment Agreement unilaterally, as well as requested the payment of the following amounts, within a deadline of eight days:

    - the overdue salaries for the months of May (EUR 40,000), June (EUR 40,000) and July (EUR 27,400), in the total amount of EUR 107,400;

    - the overdue sign-on fee in the amount of EUR 80,000;

    - the costs of the Player's flight tickets;

    - the costs of the Player's accommodation in Qatar;

    - car rental expenses.

14. On 22 January 2016, after a period of discussions between the Parties, aimed at solving the present dispute amicably, the Player sent a signed copy of a settlement agreement (the "Settlement Agreement") to the Club, asking for the latter to return it, signed by its representative.

15. Article 1 of the Settlement Agreement reads as follows:

*"1. SETTLEMENT*

*1.1 Subject to, and in accordance with, the terms of this Agreement, Al Arabi shall pay to the Player the total sum of EUR 950,000 (Nine Hundred and Fifty Thousand Euros and Zero Euro Cents) (the "**Settlement Sum**"), in a single installment with the instruction for the payment of such sum to made (sic) by Al Arabi to its bank no later than 6pm, Doha time, on 25th January 2016.*

*[…]".*

16. Articles 2 et seq. of the Settlement Agreement read as follows:

*"2. RELEASE*

*2.1 Payment of the Settlement Sum is in full and final settlement of, and each Party hereby releases and forever discharges, all and/or any actions, claims, complaints, rights, demands and set-offs:*

*(a) whether in this jurisdiction or any other;*

*(b) whether actionable before any court or judicial authority, including, but not limited to, FIFA, any judicial body of FIFA and/or the Court of Arbitration for Sport (the "**CAS**");*

*(c) whether or not presently known to the Parties or to the law; and*

*(d) whether in law or equity any claim under the FIFA Regulations or any other regulation from a football regulatory authority,*

*that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other Party or any of its Related Parties arising out of or connected with:*

*(e) the Employment Contract*

*(f) any agreement between, or act by, the Parties or their Related Parties or any of them; and*

*(g) any other matter arising out of, or connected with, the relationship between the Parties;*

*(together, the "**Released Claims**").*

*2.2 For the purposes of clause 2.1 above and this Agreement generally, "Related Parties" means a Party's affiliates, parents, subsidiaries, assigns, transferees, representatives, principals, agents, officers, shareholders, investors, sponsors, directors or family members, **insofar as the same may be applicable to a Party**. For the avoidance of doubt, therefore, in the case of Al Arabi, "Related Parties" means and includes each of the foregoing parties listed above in this clause 2.2 while, in the case of the Player, being an individual, "Related Parties" would mean and include only his "assigns, transferees, representatives, agents, and family members".*

*3. AGREEMENT NOT TO MAKE ANY CLAIM*

*3.1 Each Party agrees, on behalf of itself and on behalf of its Related Parties, not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the other Party or its Related Parties any action, claim, complaint, suit or other proceeding concerning the Released Claims, in this jurisdiction or any other and before any court or judicial authority whatsoever, including, but not limited to, FIFA, any judicial body of FIFA and/or the CAS.*

*3.2 Clauses 2 and 3.1 shall not apply to, and the Released Claims shall not include, any claims in respect of any breach of this agreement.*

*[…].*

*5. THE EMPLOYMENT CONTRACT*

*5.1 Subject to clause 4, Al Arabi acknowledges and accepts that the Employment Contract was terminated on 12 August 2015 pursuant to the Notice of Termination and the Parties agree that neither Party has nor shall have any liability, rights, duties or obligations hereunder.*

*5.2 Notwithstanding clause 5.1, Al Arabi shall, unconditionally and irrevocably, take any steps within its power to confirm the release of the Playerand (sic) liaise through the FIFA TMS in order that the Playermay (sic) be registered with such football club association as the Player or his lawyers may request Al Arabi in writing, without claiming any compensation whatsoever. Al Arabi shall take these steps promptly and, in any event, within three (3) Qatari business days (being days on which the banks and the QFA are open for business in Doha), of its receipt of the aforementioned written request.*

*6. CONSEQUENCES OF FAILURE TO PAY*

*In the event that Al Arabi fails to pay the Settlement Sum in accordance with clause 1 above, it shall be liable to pay interest to the Player on the Settlement Sum, or any outstanding amount of the Settlement Sum, from the date it falls due until the date of actual payment at a rate of 10% per annum".*

17. On 10 February 2016, the Player sent an e-mail to the Club, indicating that the signed Settlement Agreement had not been returned and the amount of EUR 950,000 (the "Settlement Amount") had not been paid as agreed. Furthermore, the Player pointed out that he intended to join the Dutch club Wilem II Tilburg and requested the Club's assistance with the TMS procedure in this regard. Consequently, the Club was asked to provide the Player with the signed Settlement Agreement as well as with a declaration containing the Club's agreement to transfer the Player *"out of contract"* within 24 hours.

18. On the same date, the Player signed an employment agreement (the "Subsequent Employment Agreement") with the Dutch Club Willem II Tilburg. Article 4 of that contract reads as follows:

*"Article 4: Salary and match fees*

*1. The gross basic monthly salary shall amount to EUR 1,525 (in words: one thousand and five hundred twenty five Euros) for the period between 10th of February and 30th of June 2016.*

*2. The Employee shall be entitled to a (match) premium scheme (for matches and otherwise) in accordance with the provisions in Article 3 of Annex 1 of this agreement.*

*3. The Employee shall not be paid an initial sum or sign-on fee".*

19. Article 3 para. 3 of Annex 1 of the Subsequent Employment Agreement reads as follows:

*"[…].*

*3. Employee is entitled to the collective premium scheme if and to the extent such premium scheme is concluded between the Players Council and the board of the Employer.*

*Individual bonus:*

*For every Official match in which the Employee in the season 2015-2016 is part of the starting eleven, the Employee is entitled to a bonus of EUR 1,000 gross.*

*For every Official match in which the Employee in the season 2015-2016 is not in the starting eleven but does play with a minimum of 45 minutes, the Employee is entitled to a bonus of EUR 750 gross".*

20. On 11 February 2016 and on 15 February 2016, the Player sent two e-mails to the Club, asking that the latter comply with the letter of 10 February 2016.

21. On 15 February 2016, the Club sent an e-mail to the Player, explaining that it did not have sufficient funds in order to pay the Settlement Amount before 1 March 2016. The Club therefore sent to the Player a signed amended version of the Settlement Agreement (the "Amended Settlement Agreement"), containing identical contractual clauses to the Settlement Agreement, but providing in Article 1.1 that the Settlement Amount should be paid by 1 March 2016 instead of by 25 January 2016.

22. On 16 February 2016, the Player sent an e-mail to the Club, indicating that he had accepted the proposed payment deadline of 1 March 2016 and requesting the Club's assistance in the TMS registration procedure with the Player's new club, Wilem II Tilburg. A copy of the Amended Settlement Agreement, signed by the Player, was attached to the e-mail.

23. On the same date, the Club sent by e-mail a signed declaration to the Player confirming that it had not entered into any Third Party Ownership Agreement regarding the Player.

24. On 18 February 2016, the Player sent the Club two original signed copies of the Amended Settlement Agreement, asking to be returned once signed by the Club's representative.

25. On 26 February 2016, the Club acknowledged receipt of the two copies of the Amended Settlement Agreement by e-mail and indicated that an original signed copy would be returned to the Player.

26. On 1 March 2016, the Player sent the Club an e-mail reminding the latter that it had not returned the signed original Amended Settlement Agreement and that it had not sent any proof of payment of the Settlement Amount.

27. On the same date, the Club's representative replied stating that the signed original Amended Settlement Agreement would be sent on the next day to the Player as well as that the request for the proof of payment had been forwarded to the Club's accountant.

28. On 2 March 2016, the Club sent the Player the original signed Amended Settlement Agreement.

29. On 7 March 2016, the Player informed the Club by e-mail that he had not received the payment of the Settlement Amount. As a result, the Player requested that amount to be paid and that a proof of payment be sent to him.

30. On 10 March 2016, the Player sent the Club another e-mail, reiterating his previous request concerning the payment of the Settlement Amount.

31. On 16 March 2016, the Player sent the Club a new e-mail, stressing that the Settlement Amount had still not been paid and reminding the Club that the contractual interest of 10% per year as of 1 March 2016 amounted to EUR 259.56 per day.

32. On the same date, the Club informed the Player by e-mail that it was still waiting for its budget to be approved, in order for the payment to be issued.

33. On 17 March 2016, the Player sent the Club a notification, stating that the Settlement Amount had still not been paid and requesting the payment of the total amount of EUR 950,000, as well as of the contractually established interest in the amount of EUR 4,931.69, within 48 hours of receipt of the letter. The Player also underlined that he would lodge a claim before the FIFA DRC against the Club, should it fail to comply with this request. Furthermore, the Player pointed out that he had incurred extrajudicial costs in the amount of EUR 5,000, which he would also claim from the Club. That notification was forwarded to the Qatar Football Association by the Player.

34. On 31 March 2016, the Player sent the Club another notification, requesting the payment of the total amount of EUR 959,863.39 consisting of the Settlement Amount and the contractually agreed interest, within seven days of receipt of the notification. Moreover, the Player pointed out that the Club's non-compliance with the Amended Settlement Agreement allowed him to dissolve the latter, resulting in the Club's obligation to pay to the Player his total salary until June 2019 in the amount of EUR 2,030,000, as agreed upon in the Employment Agreement. The Player stressed that should the Club not comply with this request, he would submit a claim before the FIFA DRC against the Club, requesting the full amount of his salary until June 2019, additional to interest of 5% per annum, as well as for sporting sanctions to be imposed upon the Club.

35. On 31 July 2017, the Player transferred to the Dutch club FC Utrecht, signing an employment contract with the latter.

36. Article 4 of said employment contract reads as follows:

*"1. The gross basic monthly salary shall amount to:*

- *During the season 2017/2018; € 5,000,-*
- *During the season 2018/2019; € 15,000,-*

*Should the employer use the option as agreed upon in Article 1, sub 3 of Annex 1, the salary shall amount to:*

- *During the season 2019/2020; € 17,500,-*

*1. The Employee shall be entitled to a premium scheme (for matches and otherwise) in accordance with the provisions of Annex V.*

*2. The Employer will not receive any signing-on fee.*

*3. The Employee shall be paid a one-time start bonus for the 2018/2019 season of € 9,000,- (in words NINE THOUSAND EUROS). This bonus will be paid to employee on September 15, 2018 if the player is still registered and eligible to play for FC Utrecht on September 1, 2018.*

4. *The salary and other amount which the Employer is required to pay as stipulated in this employment contract, shall be paid by transfer to a bank or giro account which the Employee notifies the Employer about".*

## B. Proceedings before the FIFA Dispute Resolution Chamber

37. On 26 April 2016, the Player lodged a complaint against the Club before the FIFA DRC, alleging that the Club had unilaterally breached the Employment Agreement without just cause and requesting from the Club (i) primarily, *"the payment of EUR 2,235,500 net + P.M., to be increased by the interest of 5 % per year as from 12 August 2015 until the effective date of payment in case of non-payment"* and (ii) subsidiarily, *"compensation in the amount of EUR 950,000 net, to be increased by the contractual interest of 10% per year as from 1 March 2016 until the effective date of payment"*. The Player also requested for sporting sanctions to be imposed upon the Club, as well as for the latter to be condemned to reimburse the Player's legal expenses and to pay the costs of the proceedings. In the submissions it was argued that the Parties had concluded a valid Employment Agreement, according to which the Club was under the obligation to pay to the Player wages and bonuses throughout the contractual period, an obligation which the Club had failed to respect. It was argued by the Player that he had terminated his Employment Agreement with just cause and that he was entitled to the requested amounts. It was also argued by the Player that the Club's failure to comply with the Settlement Agreement entitles the Player to dissolve said agreement and to claim outstanding remuneration as well as compensation based on the termination of the Employment Agreement with just cause.

38. The Club did not submit any response in the proceedings before the FIFA DRC.

39. On 24 November 2016, the FIFA DRC issued the Appealed Decision and partially accepted the Player's claim.

40. The operative part of the Appealed Decision reads as follows:

> *"1. The claim of the Claimant, Anouar Kali, is partially accepted.*
>
> *2. The Respondent, Al Arabi Sports Club, has to pay to the Claimant **within 30 days** as from the date of notification of this decision, the amount of EUR 950,000 plus 10% interest p.a. on said amount as from 2 March 2016 until the date of effective payment.*
>
> *3. In the event that the aforementioned amount plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claim lodged by the Claimant is rejected.*
>
> *5. The Claimant is directed to inform the Respondent 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".*

41. The Appealed Decision with grounds was notified to both the Appellant and the Respondent on 23 February 2017.

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

42. On 15 March 2017, the Player filed a Statement of Appeal against the Appealed Decision before the CAS. On this occasion, the Appellant requested the appointment of a Sole Arbitrator to the present dispute.

43. On 27 March 2017, the Player filed his Appeal Brief.

44. On 8 April 2017, the Respondent indicated its objection to submit the present matter to a Sole Arbitrator and requested that a panel of three arbitrators rule upon the dispute at hand.

45. On 10 April 2017, the CAS Court Office invited the Respondent to indicate within a deadline of three days if it would pay its share of the advance of costs.

46. On 13 April 2017, the Respondent informed the CAS Court Office that it would not pay its share of the advance of costs.

47. On 20 April 2017, the Respondent requested that the time limit for filing the Answer be fixed after the payment by the Appellant of his share of the advance of costs.

48. On 21 April 2017, the CAS Court Office informed the Parties that a new time limit for filing the Answer shall be set once the Appellant has paid his share of the advance of costs.

49. On 18 May 2017, the CAS Court Office informed the Parties that the Appellant had paid his share of the advance of costs and that consequently the Respondent was granted 20 days as of the letter date of receipt, in order to file its Answer.

50. On 19 May 2017, the CAS Court Office informed the Parties about the constitution of the Panel, as follows:

Sole Arbitrator: Mr. Jacopo Tognon, Attorney-at-law in Padua, Italy.

51. On 19 June 2017, the CAS Court Office informed the Parties that it had not received the Respondent's Answer within the prescribed time limit, i.e. until 12 June 2017. The Respondent was asked to provide the CAS Court Office with proof of filing of the Answer within said time deadline.

52. On 21 June 2017, the Respondent requested that a hearing be held in the present proceedings.

53. On 29 June 2017, the CAS Court Office informed the Parties that Mr. Lucian Novacescu, attorney-at-law in Lausanne, Switzerland, had been appointed as *ad hoc* clerk in these matters.

54. On 2 August 2017, the CAS Court Office sent the Parties the Order of Procedure.

55. On 3 August 2017, the Appellant signed the Order of Procedure.

56. On 4 August 2017, the Respondent signed the Order of Procedure.

57. On 8 August 2017, a hearing was held at the Court of Arbitration for Sport headquarters in Lausanne, Switzerland. At the outset of the hearing, the Parties declared that they had no objection with regard to the composition of the Panel.

58. Besides the Sole Arbitrator, the following persons attended the hearing:

- Mr. Anouar Kali attended the hearing in person and was assisted by Mr. Pieter Hoogstad, attorney-at-law;
- Al-Arabi Sports Club was represented by Mr. Nilo Effori and Mr. Jan Kleiner, attorneys-at-law.

59. Mr. Daniele Boccucci, Counsel for CAS, and Mr. Lucian Novacescu, *ad hoc* clerk, assisted the Sole Arbitrator at the hearing.

60. The Parties were afforded the opportunity to present their case, to submit their arguments and to answer the questions asked by the Sole Arbitrator. At the end of the hearing both the Appellant and the Respondent explicitly agreed that their right to be heard and to be treated equally in these arbitration proceedings had been fully observed.

61. On 17 August 2017, the Appellant, as authorized by the Sole Arbitrator at the hearing, filed a copy of the employment agreement stipulated by Mr. Anouar Kali with FC Utrecht.

## IV. PARTIES' POSITIONS AND PRAYERS FOR RELIEF

62. The following section summarises the Parties' main arguments in support of their respective prayers for relief.

### A. The Appellant

63. The Appellant argues that he concluded on 11 February 2015 an Employment Agreement with the Respondent, valid until 30 June 2019. Throughout the entire contractual period, the Appellant was entitled to a total salary of EUR 2,150,000 net, as well as to a housing allowance, a car, two return flight tickets to the Netherlands per season, additional to various performance bonuses.

64. According to the Appellant, starting as of April 2015, the Respondent stopped paying his salary which by contrary, was due in compliance with the Employment Agreement. Furthermore, the Respondent failed to provide the Appellant with housing and a car, as well as with the agreed flight tickets. Consequently, throughout the month of July 2015, the Appellant's lawyer sent numerous notifications to the Respondent, demanding that the latter fulfil its contractual obligations towards the Appellant.

65. The Appellant indicates that he went to the Respondent's training ground before the start of the pre-season training, in July 2015, and was informed by a representative of the Respondent, Mr. K. Akil, that pre-season training would commence on 24 July 2015 and that he was no longer needed by the Club. The Appellant attended the first training on said date and was again informed that he was no longer needed, this time by the members of the Respondent's coaching staff.

66. The Appellant outlines that at the beginning of August 2015, the Respondent allowed him to leave Qatar for 10 days and paid him an amount of EUR 40,000, which corresponded to the salary for the month of April. However, the Respondent continued not to fulfil his other contractual duties, as it had failed to pay to the Appellant the salaries of May, June and July 2015 in the total amount of EUR 107,400 additional to a sign-on fee in the amount of EUR 80,000, which had also been due in July 2015. Moreover, the Respondent had not provided the Appellant with housing, a car and the agreed flight tickets. In light of the foregoing, the Appellant emphasises that he had just cause to terminate the Employment Agreement on 12 August 2015.

67. According to the Appellant, after having terminated the Employment Agreement, his lawyers negotiated for several weeks with those of the Respondent in order to find an amicable solution to the dispute concerning the amount which was due to the Appellant following said termination. As a consequence thereof, the Settlement Agreement was drafted in October 2015 and in February 2016 the Parties concluded the Amended Settlement Agreement, providing for the Settlement Amount to be paid to the Appellant by 1 March 2016.

68. The Appellant argues that by concluding the Amended Settlement Agreement, the Parties did not intend to cancel the initial payment obligation of the Respondent (in accordance with the

Employment Agreement) and replace it with a new one by means of a novation. On the contrary, pursuant to Article 116 of the Swiss Code of Obligations, such a novation is not presumed. Therefore, the burden of proof to establish that the Amended Settlement Agreement caused the cancellation of the Club's initial payment obligations as per the Employment Agreement, lies with the Respondent. In the present case, as the Respondent did not file any Response before the FIFA DRC, such burden of proof has not been discharged.

69. The Appellant points out that since the Respondent's obligation set out in the Employment Agreement had been replaced with the new obligation as per the Amended Settlement Agreement, the Respondent's non-compliance with the Amended Settlement Agreement would lead to its nullification. According to the Appellant, he had only decreased his claim from EUR 2,030,000 to EUR 950,000 in order to settle the matter amicably within a short timeframe. Moreover, the contractually stipulated interest of 10% per year set out in the Amended Settlement Agreement does not restrict the Appellant's right to request the dissolution of said agreement.

70. The Appellant underlines that his claim in the present proceedings concerns a breach of the Amended Settlement Agreement by the Respondent and that thus Articles 2 and 3.1 of said agreement do not produce any effect with respect to the case in question. According to the Appellant, such breach provides for sufficient and valid reason for the judicial dissolution of the Amended Settlement Agreement.

71. The Appellant further states that in the event that the Amended Settlement Agreement cannot be dissolved in its entirety, Article 6 of said agreement can be declared null and void, as the amount of interest of 10% per year is disproportionate and unreasonable and thus cannot be applied. As a consequence of the clause in question being null and void, the Amended Settlement Agreement would no longer contain any sanction for a potential breach and therefore the Respondent's conduct of non-compliance could only be sanctioned by allowing the Appellant to claim the full amount of his salary in accordance with the Employment Agreement.

72. The Appellant emphasises that he terminated the Employment Agreement with just cause. In this regard, he underlines that he fulfilled all of his contractual obligations towards the Respondent, attending all the training sessions and maintaining a professional attitude towards the technical staff throughout his employment relationship with the Respondent.

73. The Appellant outlines that in accordance with the established jurisprudence of the FIFA DRC, he was allowed to terminate his contractual relationship with the Respondent with just cause as he was due an amount equal to more than two monthly salaries. The Appellant also stresses that his employer was in default given the numerous warning letters sent before the notice of termination.

74. According to the Appellant, he had just cause to terminate the Employment Agreement as he was excluded from the Respondent's activities by not being allowed to attend pre-season training with his colleagues. This constituted a breach of the Appellant's personality rights, as well as of the Employment Agreement. Moreover, established CAS jurisprudence confirms that

cases of repeated non-payment of the salary by the employer constitute just cause for the employee to terminate the contractual relationship.

75. In light of the foregoing, the Appellant claims from the Respondent the total amount of EUR 2,235,500, consisting of all the indemnities which he was entitled to as per the Employment Agreement, from 11 February 2015 until 30 June 2019, as well as the allowance covering the Appellant's expenses with housing, a car and two return business class flight tickets to the Netherlands per season.

76. The Appellant also requests that sporting sanctions be imposed upon the Respondent in accordance with Article 17 para. 4 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), since the Employment Agreement was breached within the protected period.

77. In light of the above, the Appellant requested the CAS:

> *"1. To accept the present appeal against the challenged decision;*
>
> *2. To set aside the challenged decision;*
>
> *3. To dissolve (art. 6 of) the Settlement Agreement dated 11 February 2016;*
>
> *4. To establish that Al-Arabi breached the employment contract with the (sic) Kali without just cause during the protected period;*
>
> *5. To establish that the (sic) Kali validly unilaterally terminated the employment contract with Al-Arabi with just cause;*
>
> *6. To condemn Al-Arabi to pay to Kali compensation in the amount EUR 2,235,500 net + P.M. or an amount to be determined in all fairness, to be increased by the interest of 5% per year as from 12 August 2015 until the effective date of payment;*
>
> *7. To send the case back to the FIFA Dispute Resolution Chamber for imposing sporting sanctions on Al-Arabi;*
>
> *8. To condemn Al-Arabi to the payment in favor of Kali of the legal expenses incurred;*
>
> *9. To establish that the costs of the arbitration procedure shall be borne by Al-Arabi".*

78. On the occasion of the hearing, the Appellant's representative indicated, contrary to the arguments brought forward in the Appeal Brief, that the Amended Settlement Agreement is governed by English law and not Swiss law.

79. In particular, the Appellant's representative underlined that the Amended Settlement Agreement is governed by the English Equality Act of 2010, section 147; pursuant to said Act any settlement agreement must fulfil a number of formal conditions under English Law, which the Amended Settlement Agreement does not. The Appellant's representative especially

indicated that the Appellant had not been advised by a lawyer qualified in England and Wales upon signing such agreement, which constituted one of the *sine qua non* conditions for its validity.

80. In the Appellant's view, as a consequence of the foregoing, the Amended Settlement Agreement is null and void and thus does not produce any effect in the case at hand.

### B. The Respondent

81. The Respondent has not submitted any Answer in the present proceedings.

82. On the occasion of the hearing, the Respondent's representatives indicated that they do not dispute any of the facts, while also emphasising the validity of the Amended Settlement Agreement.

83. In the Respondent's view, the applicable law to the Amended Settlement Agreement is Swiss law, as was also stated by the Appellant in his Appeal Brief.

84. The Respondent pointed out that under Swiss law the Amended Settlement Agreement constitutes a novation and thus generates a new payment obligation, replacing the one deriving from the Employment Agreement.

85. According to the Respondent, its non-compliance with the Amended Settlement Agreement does not lead to the latter's voidance, but rather to the application of the contractually established sanction, i.e. the interest rate amounting to 10% per year on the Settlement Amount.

86. The Respondent underlines that the Parties to the Amended Settlement Agreement had the opportunity to insert other contractual sanctions for non-compliance, as for example the payment of all the amounts due according to the Employment Agreement (as a penalty clause), but since the Parties have failed to do so, there can be no other consequence to the Respondent's failure to comply than applying the interest in question to the Settlement Amount.

87. In light of the above, the Respondent asked the CAS to dismiss the appeal and to uphold the decision issued by the FIFA DRC.

## V. CAS JURISDICTION

88. The jurisdiction of the CAS, which is not disputed by the Parties, derives from Article R47 of the CAS Code and Article 66 para. 1 of the FIFA Statutes in connection with Article 24 para. 2 of the FIFA RSTP.

89. Article R47 of the CAS Code stipulates:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".*

90. Article 57 para. 1 of the FIFA Statutes states:

> *"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".*

91. Article 24 para. 2 of the FIFA RSTP provides that:

> *"[…] Decisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)".*

92. The present appeal is directed against a final decision of a federation, the statutes and regulations of which provide for an arbitration clause in favour of the CAS. Thus, the appeal falls within the scope of Article R47 of the CAS Code. It follows that CAS has jurisdiction over the present matter.

93. According to Article R57 of the CAS Code, the Sole Arbitrator has full power to review the facts and the law of the case. Furthermore, the Sole Arbitrator may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

## VI. ADMISSIBILITY

94. In accordance with Article 58 para. 1 of the FIFA Statutes,

> *"appeals against final decisions passed by FIFA's legal bodies* […] *shall be lodged with CAS within 21 days of notification of the decision in question".*

95. The Appealed Decision was notified to the Appellant on 23 February 2017 and the Statement of Appeal was filed on 15 March 2017, hence within the required 21 day time-limit. As a result the appeal is admissible.

## VII. APPLICABLE LAW

96. Pursuant to Article R58 of the CAS Code, the Sole Arbitrator is required to decide the dispute:

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

97. The Sole Arbitrator notes that Article 16 of the Amended Settlement Agreement reads as follows:

> *"16.1 This Agreement shall be primarily governed by and construed in accordance with the applicable rules*

*and regulations of FIFA and/or the CAS; and, secondarily with the laws of England and Wales.*

*16.2 Any dispute arising out of or in connection with this Agreement shall be subject to the jurisdiction of the FIFA DRC and on appeal (or in the event that FIFA declines jurisdiction) to the CAS to be finally settled in accordance with the rules of the Code of Sports Related Arbitration, which rules are hereby deemed incorporated. The FIFA DRC and the CAS shall determine the dispute firstly in accordance with the applicable rules and regulations of FIFA and, in case of appeal or in the event that FIFA declines jurisdiction, the CAS; and, secondarily (in either case), the laws of England and Wales. The CAS proceedings shall be held in the English language".*

98. In his Appeal Brief, the Appellant contended that the Amended Settlement Agreement is governed by Swiss law and in particular quoted Article 116 of the Swiss Code of Obligations in support of his arguments.

99. However, on the occasion of the hearing, the Appellant brought forward a new argument, opposite to what had been shown in the Appeal Brief, namely that, as per Article 16 of the Amended Settlement Agreement, the latter is governed by the law of England and Wales and more specifically, by the 2010 Equality Act, Section 147.

100. In particular, the Appellant indicated that the Act in question provides for several conditions which must be fulfilled in order for a settlement agreement to become valid, one of which being that before entering into such contract, a party is required to have received advice from an independent adviser, i.e. a lawyer qualified in England and Wales. The Appellant's representative, who had also advised the Player upon signing the Amended Settlement Agreement, emphasised that neither he nor his colleagues who had assisted the Player throughout his dispute against the Respondent were lawyers qualified in England and Wales.

101. As a consequence of the above, in the view of the Appellant, the Amended Settlement Agreement is to be deemed null and void.

102. The Sole Arbitrator, without prejudice of the applicability of the principle *jura novit curia*, shall dismiss such new argument, for the following reasons. First of all, the Appellant has brought forward a new argument after filing the Appeal Brief, breaching Article R56 of the CAS Code.

103. In particular, the Sole Arbitrator takes note of Article R56 of the CAS Code, which reads as follows:

*"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.*

*The Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties".*

104. In the present proceedings, the Appellant has supplemented his argumentation during the hearing by changing his position as regards to the law governing the Amended Settlement Agreement.

105. The Sole Arbitrator considers that the Appellant has brought forward the new argument in question without having requested a prior authorisation to do so, thus breaching Article R56 of the CAS Code. In the Sole Arbitrator's view, the Appellant could and should have requested to be allowed to make such new argument only based on an exceptional circumstance, which the Appellant has failed to show in the case at hand.

*ii.* Secondly, the Appellant's argument breaches the principle of *"venire contra factum proprium"*.

106. As maintained in CAS jurisprudence, the Sole Arbitrator understands that the doctrine of *venire contra factum proprium* is recognised by Swiss law, and provides that "where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party" (cf. eg. CAS 2008/O/1455, para. 16, CAS 2015/A/4195, para. 42 et seq.).

107. The Sole Arbitrator agrees with the Respondent that the change of position of the Appellant at the hearing is indeed a violation of the principle of *venire contra factum proprium*. As previously shown, the Appellant has indicated throughout his written submissions that the law applicable to the Amended Settlement Agreement is Swiss law, whereas on the occasion of the hearing held in the present matter, the Appellant contended that the agreement in question is governed by the law of England and Wales, in particular by the 2010 Equality Act, section 147.

108. What is more, the Sole Arbitrator especially underlines that upon signing the Amended Settlement Agreement, the Player was advised by the same lawyers who represent him in the present proceedings. If indeed the Appellant's representatives regarded English law as being applicable to the agreement in question, it was their professional duty to inform the Appellant and to take all necessary steps in order to comply with the allegedly applicable legal provisions. Invoking their own professional fault at such a late stage in the proceedings does not in any case make for a valid argument in favour of the Appellant.

109. As a consequence of the above, the Appellant is estopped from essentially changing his argument concerning the applicable law of the Amended Settlement Agreement and any such new argument made at the hearing shall be disregarded by the Sole Arbitrator.

110. The Amended Settlement Agreement is primarily governed by FIFA Regulations, which renders Swiss law as directly applicable.

111. Thirdly, the Sole Arbitrator observes that the contracting Parties have established as the primary law governing the Amended Settlement Agreement *"the applicable rules and regulations of FIFA and/or the CAS; and, secondarily […] the laws of England and Wales"*.

112. The Sole Arbitrator also notes that Article 57 para. 2 of the FIFA Statutes provides the following:

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

113. In the present case it can be assumed that the Parties agreed a subsequent choice of law, for they submitted the Amended Settlement Agreement primarily to the FIFA rules and regulations. The agreement on English law in Article 16 of the Amended Settlement Agreement is subject to the prerequisite that the regulations of FIFA take precedence. The latter provide that in the event that the CAS has not the competence to decide the case, the case is to be decided, in the alternative, according to Swiss law.

114. Furthermore, the fact that the Parties are bound by Article 57 para. 2 of the FIFA Statutes and implicitly, Swiss law, also follows from the "capacity" of those involved, for all of the Parties are - at least indirectly - affiliated to FIFA. It follows that they are not only bound by the rules and regulations of the respective national associations; rather, in their capacity as - indirect - members of the "FIFA family", the Parties are also obliged to comply with FIFA's rules and regulations (RIEMER H. M., Berner Kommentar ad Article 60-79 ZGB, para. no. 511 and 515; cf. CAS 2004/A/574; CAS 2005/A/983 & 984, para. no. 82, CAS 2006/A/1180 para. 11 et seq.). In addition, the Parties have also submitted to Article 57 para. 2 of the FIFA Statutes by having brought the dispute to the CAS in accordance with the FIFA regulations and have therefore given one to understand that they wish to be bound by the rules of FIFA and of CAS.

115. Accordingly, and in light of Article R58 of the CAS Code and Article 57 para. 2 of the FIFA Statutes, the Sole Arbitrator rules that the Statutes and Regulations of FIFA shall apply primarily and Swiss law shall find subsidiary application.

116. With regard to the question of which edition of the FIFA RSTP shall apply, the Sole Arbitrator concludes that the RSTP (2014 edition) are applicable because the Employment Agreement was concluded in February 2015.

## VIII. MERITS

117. In the Sole Arbitrator's view, the underlying issue of the present case is straightforward.

118. First, the Sole Arbitrator notes that in principle, none of the Parties has disputed the facts as they have been established in the Appealed Decision.

119. The central issues to be determined in the present appeal are the matter of the validity or invalidity of the Amended Settlement Agreement as a novation under Swiss law, as well as what are the consequences for the Party in breach of said agreement.

### a. Is the Amended Settlement Agreement a valid novation under Swiss law?

120. Under Swiss law, a novation (*novatio*) exists where a debt is settled by contracting a new debt relationship. The Sole Arbitrator observes that Article 116 of the Swiss Code of Obligations, defining a novation, reads as follows:

*"1. Where a new debt relationship is contracted, there is no presumption of novation in respect of an old one.*

*2. In particular, in the absence of agreement to the contrary, novation does not result from signature of a bill of exchange in respect of an existing debt or from the issue of a new borrower's note or contract of surety".*

121. The Sole Arbitrator notes that it is in dispute whether or not the Amended Settlement Agreement constitutes a novation under Swiss law. In this regard, it is to be noted that the Appellant contended that the Amended Settlement Agreement does not constitute a novation and thus does not replace the Club's initial payment obligation deriving from the Employment Agreement.

122. The Player quoted in his Appeal Brief several paragraphs from the CAS award 2015/A/3907, which contains references to the concept of a novation as defined under Swiss law.

123. Indeed, in CAS 2015/A/3907 (para. 60 et seq.) the following was stated:

*"First, according to legal doctrine, the mere conclusion of a settlement agreement for an existing debt does not legally replace the existing debt, but rather stipulates a deferral of payment by defining payment modalities for this existing debt (cf. GONZENBACH R., Basler Kommentar, Obligationenrecht I, N 3 and 6 ad article 116 CO). Applied to the present case, the Settlement Agreement of 17 February 2014 did not replace the obligation of the Appellant under the Transfer Agreement to make payment of the instalment, due since 1 August 2012, but rather it defined how the Appellant, in view of its previous failure to make such payment, should now live up to its still existing obligation.*

*In addition, the Sole Arbitrator is comforted in his view by the fact that the aggregate amount due under the Settlement Agreement, i.e. the amount of EUR 754,178.08, precisely reflects the original amount of EUR 700,000, plus the accrued interest since 2 August 2014 until 17 February 2014.*

*Moreover, the Sole Arbitrator notes that if today, as requested by the Appellant, interest would be awarded on the amount of EUR 700,000 only as from 5 March 2014 or as from 26 August 2014, the effective amount, which the Appellant would have to pay to the Respondent would again be reduced compared to the amount stipulated in the Settlement Agreement. The Sole Arbitrator is convinced that such cannot have been the intention of the parties when concluding such agreement".*

124. The Sole Arbitrator in principle agrees with the argumentation found in CAS 2015/A/3907. However, in the Sole Arbitrator's opinion, the case at hand substantially differentiates itself from CAS 2015/A/3907, as will be explained hereunder.

125. In CAS 2015/A/3907 the parties agreed to a mere payment schedule of the initial debt by means of the "settlement agreement", without modifying the due amount. The effect of closing the "settlement agreement" is thus not that of replacing the existing debt with another, but of dividing the due amount in different instalments, ultimately composing the same sum, which is clearly stated in the award in question. On the contrary, in the case at hand, the Parties expressly agreed to settle a debt by payment of a different, lower amount.

126. Moreover, the Sole Arbitrator underlines that according to Article 2 of the Amended Settlement Agreement, the Parties have agreed that the *"Payment of the Settlement Sum is in full and final settlement of, and each Party hereby releases and forever discharges, all and/or any actions, claims, complaints, rights,*

*demands and set-offs"*. Such clause is to be corroborated with Article 3 of the same agreement, by which *"Each Party agrees, on behalf of itself and on behalf of its Related Parties, not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the other Party or its Related Parties any action, claim, complaint, suit or other proceeding concerning the Released Claims"*.

127. By interpreting the two provisions of the Amended Settlement Agreement, the Sole Arbitrator concludes that the Parties' intention upon entering into such contract was to erase the existing debt, in a way that it be replaced by the new debt, i.e. the payment of the Settlement Amount by the Club to the Player, as provided for in Article 1 of the agreement in question. The Parties' intention to novate is unambiguous given the wording of the contractual provisions.

128. Moreover, CAS jurisprudence has established the applicability of the principle *pacta sunt servanda* in the world of football, according to which obligations deriving from contracts which are validly entered into must be executed pursuant to the contract's terms until the parties consensually adopt a new contractual arrangement (cf. CAS 2013/A/3091, 3092 & 3093, CAS 2015/A/4220). In the case at hand, the Parties have entered into the Amended Settlement Agreement with the intention of modifying their initial contractual arrangement and are consequently obliged to execute any and all obligations deriving from such agreement.

129. In light of the foregoing, the Sole Arbitrator outlines that the Amended Settlement Agreement constitutes a valid novation under Swiss law.

**b. The consequences of the breach of the Amended Settlement Agreement by the Respondent**

130. As was pointed out in the Appealed Decision, the Parties to the Amended Settlement Agreement have provided for a single consequence for non-payment of the Settlement Amount in its Article 6, specifically the contractually established interest at a rate of 10% per annum.

131. In the Sole Arbitrator's opinion, nothing could have prevented the Parties from agreeing to full payment of the Player's wages in accordance with the Employment Agreement, as a consequence of the Club's non-compliance with Article 1 of the Amended Settlement Agreement. However, the Parties failed to agree to such penalty clause.

132. The Sole Arbitrator considers that the Parties' true intention was never to establish a higher penalty than the interest of 10% per year, in particular given that the Appellant, by means of the letter sent to the Respondent on 17 March 2016, requested that the latter pay "within 48 hours after receipt" only the amount of EUR 950,000 plus interest. On that occasion, the Appellant gave notice to the Respondent as follows:

> *"In case we do not receive the total amount of EUR 954,931.69 on 19 March 2016 I will initiate a legal proceedings (sic) against Al-Arabi Sports Club – which will be conducted before the FIFA DRC – <u>without prior notification</u>. Therefore, this is the <u>last chance</u> for your Club to comply with the Settlement Agreement"*.

133. It was only on 31 March 2016 that the Appellant for the first time mentioned the Respondent's obligation to pay him the amount of EUR 2,030,000. On that date, the Appellant sent a letter

to the Respondent, informing him inter alia of the following:

*"Because of the non-compliance of your Club with the Settlement Agreement of 11 February 2016, my client has the right to annul and/or to dissolve this agreement. The Parties have expressly not waived their rights to do so. In the absence of payment to my client of the full amount plus interest within undermentioned term, my client expressly reserves the right to do so.*

*In that situation the original claim of my client on your Club for the remaining salary under the employment contract for the months September 2015 till (sic) June 2019 shall revive; an amount of € 2,030,000, other emoluments excluded. Besides, your Club can not derive any rights from the Settlement Agreement".*

134. Given that the Appellant himself did not request from the outset the payment of EUR 2,030,000, the Sole Arbitrator highly doubts that the Parties' true intention was that such amount should constitute the penalty for non-compliance with the Amended Settlement Agreement.

135. Concerning the interest of 10% per annum, the Sole Arbitrator notes that, in the case at hand, the Appellant does not request the reduction of the contractually established penalty, but requests that the penalty clause itself be declared null and void, given that the amount of interest of 10% per year would be disproportionate and unreasonable.

136. It is not disputed that the penalty clause contained in Article 6 of the Amended Settlement Agreement represents a contractual penalty ("clause pénale" or "Konventionalstrafe") under Swiss law e.g. under the law applicable to the merits of the case.

137. In particular, the Sole Arbitrator takes note that Article 160 of the Swiss Code of Obligations (SCO) reads as follows:

*"1. Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.*

*2. Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.*

*3. The foregoing does not apply if the debtor can prove that he has the right to withdraw from the contract by paying the penalty".*

138. In the Sole Arbitrator's view, Article 6 of the Amended Settlement Agreement indeed contains all the elements of a penalty clause under Swiss law: (i) the designation of the parties bound by the penalty clause, (ii) the determination of the kind of penalty, (iii) the conditions triggering the obligation to pay it, (iv) the determinability of its scope (COUCHEPIN G., La clause pénale, Zürich, 2008, § 462).

139. Under Swiss law, a penalty can be agreed for the event of non-performance or of defective performance of a contract (Article 160 para.1 SCO). In such situation, the penalty clause must be considered "exclusive": this means that the creditor must choose between compelling the performance or claiming the penalty.

140. At the same time, a penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160 para. 2 SCO). In such situation, the penalty is "cumulative": this means that the creditor might claim the penalty in addition to the performance, provided he has not expressly waived such right or accepted performance without reservation. When the parties have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and on the meaning of the main obligation that is guaranteed.

141. By analysing the wording of Article 6 of the Amended Settlement Agreement, the Sole Arbitrator concludes that the penalty clause in the present case was stipulated for "failure to comply with the stipulated time or place of performance". According to Article 160 para. 2 SCO, it is therefore "cumulative": as a result, its payment can be requested by the Appellant in this arbitration, together with the payment of the Settlement Amount, unless the Respondent would have proven that it has the right to withdraw from the Amended Settlement Agreement by paying the penalty (Article 160 para. 3 SCO).

142. With regard to the actual amount of the contractual penalty, the Sole Arbitrator outlines that, in principle, under Swiss law, the Parties are free to determine such amount (Article 163 para. 1 SCO). However, the Court may reduce penalties that it considers excessive at its discretion (Article 163 para. 3 SCO). The law, on the other hand, does not state clearly what an excessive penalty is, so that it is for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty is excessive and, if so, to what extent it should be reduced (ATF 82 II 142 consid. 3, JdT 1957 I 104).

143. Under Swiss law, the interpretation of Article 163 para. 3 SCO is that the judge (or the arbitrator) will use his discretion to reduce a contractual penalty if the relationship between the amount of the penalty agreed upon, on the one hand, and the interest of the creditor worthy of protection, on the other hand, is grossly disproportionate (ATF 114 II 264 et seq.).

144. In other words, an excessive penalty under Swiss law is a penalty that, at the time of the judgment, is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity, or, more simply put, is "abusive" (ATF 82 II 142).

145. Moreover, according to the Swiss jurisprudence, the specific circumstances of the case, such as the nature and the duration of the contract, the seriousness of the contractual breach, the degree of fault, the behaviour of the creditor, the financial conditions of the parties, a special interest of the creditor that the debtor behaves in conformity with the contract, the experience in business matters of the parties and the damage incurred by the creditor shall be considered (ATF 114 II 264, 265; TF 4A_141/2008 at 14.1).

146. Having in mind these clear principles, the Sole Arbitrator indicates that should the agreed penalty indeed be excessive, as the Appellant contends, the legal consequence under Swiss law would be for its amount to be reduced and not for the clause itself to be rendered null and void.

147. On the other hand, after having analysed the amount of the contractually established penalty, of 10% per annum applied to the Settlement Amount, the Sole Arbitrator concludes that he

sees no reason to reduce said amount, underlining that (a) the relationship between the penalty and the creditor's interest in being protected from delays is proportionate in the present situation and (b) applying the penalty increases the Respondent's payment obligation by just fifteen percent of the Settlement Amount, approximately a year and a half after the initial payment deadline.

148. The Sole Arbitrator therefore agrees with the Appealed Decision in stating that the penalty clause agreed in Article 6 of the Amended Settlement Agreement is neither disproportionate nor unreasonable and shall consequently be applicable.

## IX. CONCLUSION

149. In conclusion, the Sole Arbitrator finds that:

(1) The Parties validly settled their dispute by means of the Amended Settlement Agreement, thus imposing the payment of the Settlement Amount to the Player by the Club.

(2) By means of a novation, the Club's obligation to pay the Settlement Amount replaced the Club's obligation to pay to the Player the total amount of wages as due in accordance with the Employment Agreement.

(3) As per the Amended Settlement Agreement, the only contractually established sanction to be applied in case of non-compliance is the interest of 10% per year, applied to the Settlement Amount.

(4) Therefore, the Club is obliged to pay to the Player an amount of EUR 950,000 consisting of the Settlement Amount, plus 10% interest per year calculated as from 2 March 2016 until the date of effective payment.

150. Any further claims or requests for relief are dismissed.

## ON THESE GROUNDS

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

1. The appeal filed on 15 March 2017 by Mr. Anouar Kali against the decision rendered by the FIFA Dispute Resolution Chamber on 24 November 2016 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 24 November 2016 is confirmed.

(…)

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