

**Arbitration CAS 2017/A/5402 Club Al-Taawoun v. Darije Kalezic, award of 7 June 2018**

Panel: Mr Olivier Carrard (Switzerland), Sole Arbitrator

*Football**Termination of the employment contract without just cause**Form of a choice of law agreement**Scope of application of the FIFA regulations with regard to coaches**Termination of a fixed-term contract**Grounds for termination of the employment relationship**Additional compensation for early termination**Ne ultra petita*

- 1. A choice of law agreement is not subject to any formal requirements. The parties' choice of law clause may have been tacitly or expressly accepted. Such choice of law could be found in the contract between the parties but it could also have been agreed upon at some later point in time.**
- 2. FIFA regulations do not contain any provision regarding the status of coaches in general and the termination of an employment contract between clubs and coaches in particular. In particular, the FIFA Regulations on the Status and Transfer of Players (RSTP) only applies to players and professionals, to the exclusion of coaches.**
- 3. The main characteristic of a fixed-term contract is that it cannot be terminated by the parties before the fixed term expires, unless the party who terminates the contract can justify cause for dismissal with immediate effect or if the parties reach mutual agreement on the termination of the contract. Immediate termination of the contract with cause is an exceptional measure and therefore must be admitted on a restrictive basis. Depending on the gravity of the grounds for dismissal, a previous formal warning is usually required before an immediate termination can be regarded as justified. Only a particularly gross employee's misconduct that affects mutual trust between the parties may justify immediate dismissal. In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued. Whether there is just cause depends on the overall circumstances of the case, in particular on the type and the duration of the employment relationship, as well as the nature and the gravity of the employee's misconduct. In principle, the parties can specify in the contract when there is "just cause". A contract which states that the club has a right to terminate the contract for the benefit of the club, at any time for any other reasons, does not refer to a just cause (*juste motif*) within the meaning of Article 337 CO that allows the termination of the contract with immediate effect. Regardless of whether this clause is arbitrary or not, it is rather a valid legitimate reason (*motif légitime*) on which the decision of**

termination is based that should not be confused with the notion of “just cause”.

4. Reference by a club to a contractual provision which gives it the right to terminate the contract for the benefit of the club at any time and for any reason, to justify the termination of the contract with a coach, without presenting nor evidencing any gross misconduct that could represent an irremediable breach of trust between the parties or any actions which were meant to be contrary to the club interests, and allegations that the coach was dismissed because of his poor results and difficulty in communicating with the club administrative committee and the players without providing any substantiated information on any such bad performance or lack of communication, do not reach the level of gravity required to justify termination of the employment relationship without notice. A previous formal warning providing the coach with an opportunity to solve the problem should have been given to him before termination with immediate effect of the contract could be considered as justified.
5. In addition to the amount awarded in accordance with Article 337c para. 1 CO, the judge can also award a compensation determined at his own discretion; however, such compensation shall not exceed the equivalent of six months of the salary due to the employee (Article 337c para. 3 CO). It does not constitute a purely punitive damage as it is due even if the employee did not suffer any damages. This indemnity of *a sui generis* character, which is similar to a penalty clause, is to be determined equitably by the judge. In doing so, the judge must not only consider the gravity of the breach committed by the employer but also the overall circumstances, in particular the infringement of the employee’s personality rights, his age, his social and personal situation, the duration of the employment relationship and the way the dismissal was handled. Such compensation is the rule. It may be waived only in exceptional circumstances in which, despite the unlawful nature of the dismissal, the payment of an additional punitive compensation by the employer appears to be unjustified. These exceptions entail the absence of fault from the employer and any other grounds that he cannot be held responsible for. A concurrent misconduct of the employee may result in a reduction or withdrawal of the compensation.
6. The interdiction of *ultra petita* under which the court may not award a party anything more than or different from what the party has requested, nor less than what the opposing party has acknowledged, also applies to the rules of mandatory law.

## I. PARTIES

1. Mr. Darije Kalezic (hereinafter referred to as the “Coach” or the “Respondent”), a Dutch citizen, is a professional football coach.

2. Club Al-Taawoun (hereinafter referred to as the “Club” or the “Appellant”) is a football club based in Buraydah, Saudi Arabia. It is affiliated to the Saudi Arabia Football Federation, which, in turn, is affiliated to the Asian Football Confederation.

## II. FACTUAL BACKGROUND

3. The elements set out below are a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, the exhibits produced as well as the evidence examined in the course of the proceedings. Additional facts and allegations may be set out, where relevant, in connection with the ensuing legal discussion. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, in its Award he refers only to the submissions and evidence he considers necessary to explain his reasoning.
4. On 27 May 2016, the Respondent entered into an employment agreement with the Appellant (hereinafter referred to as the “Contract”) for the position of “Head Coach”, valid for one year as of 1<sup>st</sup> July 2016.
5. Under the terms of this Contract, the Coach was entitled to receive a remuneration of a total amount of USD 500,000 to be paid as follows:
  - USD 120,000 to be paid upon signing the contract;
  - USD 240,000 to be paid through 12 monthly salaries of USD 20,000 each, payable between the first and fifteenth day of each month;
  - USD 70,000 on 31<sup>st</sup> January 2017 and
  - USD 70,000 on 31<sup>st</sup> May 2017.
6. In accordance with Clause 14 of the Contract, the Club bears the travel expenses of the Coach and his family and the amount to be paid to the Coach for that purpose shall not exceed USD 6,000 during this Contract.
7. In relation to termination, the Contract contains the following clause:

*“15. (The Club) have the right to terminate this Contract and to pay a rate of (75%) seventy five per cent from total remaining of the Contract to (the Coach) as a compensation for losses resulting from the termination of the Contract without any other financial commitments against (the Club) for the remaining period of the Contract in the cases listed below:*

  - a) *If the Coach’s duty level decreased during his Contract duration.*
  - b) *If the Club or its staff offended by coach’s speech through the visual or invisible media*
  - c) *For the benefit of the Club: at any time for any other reasons”.*

8. Besides, pursuant to Clause 16 of the Contract:

*“16. (The Coach) has right to terminate this Contract after sending an official request to (the Club) before one month of his desire to termination and he shall pay (50%) fifty per cent from the total remaining of the amount of the Contract to the Club as a compensation for losses resulting from the termination of the Contract in the case that (the Coach) has a desire to coaching in Europe”.*

9. In addition, Article 17 of the Contract provides, in particular, that the Coach could terminate the Contract with a one-month notice by means of an official letter sent to the Club and should, in that case, pay USD 1’000’000 to the Club should he take another position of coach in the Middle East.
10. On 16 October 2016, the Club sent a letter (hereinafter referred to as the “Termination Letter”) to the Respondent stating that the Club was terminating the Contract in accordance with Article 15 let. c of said Contract. The Club informed the Respondent that for the benefit of the Club, the Board of Al Taawoun Football Club had to terminate the Contract as of 15 October 2016, as well as all contracts which had been signed with the Respondent’s technical and medical staff.
11. On 22 October 2016, the Respondent requested the payment of USD 262,500 by 26 October 2016 at the latest. In case of failure to pay the requested amount, the Club was advised that the Respondent would file a claim before FIFA.
12. On 29 November 2016, the Respondent filed a claim against the Appellant with the Single Judge of the FIFA Players’ Status Committee.
13. The Respondent explained that he had sought to reach an amicable solution, in vain, before starting the legal proceedings.
14. The Coach requested the Club to pay USD 30,000 for the outstanding obligations as of 16 October 2016 and USD 232,500 as a compensation for breaching the Contract. To support his request, the Coach has provided a summary of the compensation calculation, as follows:

**Table n°1 - Total remuneration paid by the Appellant as of 16 October 2016**

N°	Description of the payment	Amount (USD)
1.	First instalment	120,000
2.	July 2016 monthly salary	20,000
3.	August 2016 monthly salary	20,000
	<b>TOTAL</b>	<b>160,000</b>

**Table n°2 - Outstanding obligations as of 16 October 2016**

N°	Description of the payment	Amount (USD)
1.	September 2016 monthly salary	20,000
2.	1 - 15 October 2016 pro rata monthly salary	10,000
	<b>TOTAL</b>	<b>30,000</b>

**Table n°3 - Calculation of the compensation**

N°	Description of the payment	Amount (USD)
1.	Total annual contractual remuneration	500,000
2.	Total effective remuneration paid	-160,000
3.	Outstanding obligations	-30,000
	<b>Total</b>	<b>310,000</b>
	Coefficient of the compensation (75%)	<b>X</b> 0.75
	<b>TOTAL</b>	<b>232,500</b>

15. The Respondent also requested the payment of 5% interest on the outstanding obligations from the moment these obligations were due.
16. The Respondent asserted that the termination of the Contract was made without cause and, for this reason, he deemed being entitled to an additional payment of USD 77,500, i.e. the difference of the remaining contractual remuneration.
17. Furthermore, the Respondent claimed the reimbursement of his travel costs for the itinerary Saudi Arabia - Netherlands amounting to USD 1,500.
18. As to the compensation for moral damages caused by the Appellant, the Respondent claimed an additional compensation of USD 500,000.
19. Finally, the Respondent requested that the Single Judge of the FIFA Players' Status Committee impose disciplinary sanctions on the Appellant.
20. In his Reply Brief submitted on 10 April 2017, the Respondent mainly reiterated the arguments submitted with his claim.
21. The Respondent explained that even if Article 15 let. c of the Contract provided the Appellant a certain level of discretion to evaluate, on a case-by-case basis, which contractual or

disciplinary misconduct of the Coach would have constituted cause for terminating the employment relationship, such cause should however be directly related to the actions of the Coach, not to a simple subjective evaluation by the Club.

22. The Respondent further noted that the Termination Letter did not contain any objective fact or circumstance explaining the Club's decision to terminate the relationship with the Coach.
23. He claimed that he had suffered severe inhuman treatment as the Appellant had failed to provide him with either a residence permit or a work permit and therefore, after the termination of the employment relationship, he would have faced the risk of deportation or he would have incurred a large fine. The Respondent concluded that the Club's only argument was that the Coach's allegations were not logical, whilst not supporting that argumentation with any subsequent legal or factual analysis.
24. On 5 July 2017, the Respondent informed FIFA that he had not been able to find a new job.
25. On 11 July 2017, the Single Judge of the Players' Status Committee issued a decision (hereinafter referred to as the "Appealed Decision"), stating the following, in relevant parts:

1. *The Claim of (...) Darije Kalezic, is partially accepted.*
2. *(...) Al Ta'awoun Saudi Club, has to pay to (...) Darije Kalezic within 30 days as from the date of notification of the present decision, outstanding remuneration in the amount of USD 30,000, plus 5% interest p.a. on said amount as from 29 November 2016 until the date of effective payment.*
3. *(...) Al Ta'awoun Saudi Club, has to pay to (...) Darije Kalezic within 30 days as from the date of notification of the present decision, an air ticket in the amount of USD 265, plus 5% interest p.a. on said amount as from 29 November 2016 until the date of effective payment.*
4. *(...) Al Ta'awoun Saudi Club, has to pay to (...) Darije Kalezic within 30 days as from the date of notification of the present decision, compensation for breach of the Contract in the amount of USD 310,000, plus 5% interest p.a. on said amount as from 29 November 2016 until the date of effective payment.*
5. *(...)*
6. *Any other claims lodged by (...) Darije Kalezic are rejected.*
7. *The final costs of the proceedings in the amount of CHF 20,000 are to be paid by both Parties, within 30 days as from the date of notification of the present decision, as follows:*
  - 7.1 *The amount of CHF 5,000 has to be paid by (...) Darije Kalezic (...);*
  - 7.2 *The amount of CHF 15,000 has to be paid by (...) Al Ta'awoun Saudi Club(...).*

26. The Appealed Decision was notified to the Club on 19 October 2017 and to the Coach on 20 October 2017.

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

27. On 6 November 2017, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) pursuant to Article R47 and R48 of the Code of Sports-related Arbitration and Mediation Rules (hereinafter referred to as the “CAS Code”).
28. In the Statement of Appeal, the Appellant requested that the President of the Division appoint a Sole Arbitrator pursuant to Article R50 of the CAS Code.
29. On 16 November 2017, the CAS Court Office wrote to the Appellant requesting that he submit within three days three copies of the Statement of Appeal by courier.
30. On 20 November 2017, the Appellant confirmed that the documents had been duly sent and informed the CAS that the Statement of Appeal shall be considered as the Appeal Brief.
31. On 21 November 2017, pursuant to Article R52 para. 2 of the CAS Code, the CAS sent a copy of the Statement of Appeal to FIFA providing for a ten-day deadline for the Authority to submit an intervention application.
32. On the same date, the CAS Court Office wrote to the Parties confirming the payment by the Appellant of his share of advance on costs. In addition, it asked the Respondent’s counsel to confirm his quality of legal representative for the present proceedings. Further, it provided a five-day deadline to the Respondent to confirm whether he accepted the appointment of a Sole Arbitrator and an additional three-day deadline to confirm that the proceedings would be conducted in French as per the Appellant’s request.
33. In addition, the CAS Court Office provided a copy of the Statement of Appeal and exhibits to the Respondent, and pursuant to Article R55 of the CAS Code, provided the Respondent a twenty-day deadline to submit his answer to the Statement of Appeal.
34. On 23 November 2017, the counsel of the Respondent wrote to the CAS Court Office confirming that he would act on behalf of the Respondent in the present proceedings. Furthermore, he rejected the appointment of a Sole Arbitrator arguing that the legal issues raised by the case were complex and the amounts in dispute significant. He therefore requested that the appeal be submitted to a panel of three arbitrators.
35. Furthermore, he requested that the language of arbitration be English instead of French since neither he, nor the Respondent were native French speakers.
36. On 24 November 2017, the CAS Court Office invited the Appellant to confirm by 28 November 2017 if it wished to maintain French as the language of the proceedings or if it accepted that the proceedings be conducted in English.

37. In addition, the CAS Court Office invited the Respondent to declare no later than 28 November 2017 whether he intended to pay his share of advance on costs.
38. Further to the above CAS Court Office letter, the Appellant maintained its choice to have the proceedings conducted in French. It explained that French is one of the CAS working languages and raised concerns about any additional workload as the Statement of Appeal had already been submitted in French. He further added that since the Respondent's counsel was authorized to practice in France and his law firm was in Paris, he obviously would have a good knowledge of French.
39. On 27 November 2017, the CAS Court Office informed the Parties that, pursuant to Article R29 of the CAS Code, failing an agreement between the Parties, the President of the Appeals Arbitration Division had the duty to decide whether the language of arbitration be French or English. Further, the CAS Court Office suspended the deadline for submission of the Answer to the Statement of Appeal until that issue was resolved.
40. By letter of 28 of November 2017, the Respondent informed the CAS Court Office that, contrary to the Appellant's allegations, he was not an attorney at the Paris Bar Chamber and did not have a full proficiency in professional French language. He also stated that his license to practice law was issued by the National Chamber of Attorneys of Albania, enclosing a copy with his letter, along with other documents proving that he was staying in Paris for a purely academic purpose. He proposed that the Appellant's written submissions should remain in French at the condition that the language of the arbitration be English.
41. On 29 November 2017, the President of the Appeals Arbitration Division of the CAS ruled that the language of the arbitration proceedings shall be English and the Statement of Appeal serving as Appeal Brief shall not be translated from French to English. In addition, the Respondent shall submit his answer within 20 days from the receipt of the Order.
42. By facsimile of 29 November 2017, the CAS Court Office informed the Parties of the operative part of the Order on language.
43. On 12 December 2017, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the case to a Sole Arbitrator.
44. By letter of 19 December 2017, the Respondent requested a five-day extension to submit his answer to the Appeal Brief.
45. On 20 December 2017, the CAS Court Office granted the requested extension.
46. On 24 December 2017, the Respondent filed his answer to the Statement of Appeal with the CAS Court Office.
47. By facsimile of 29 December 2017, the CAS Court Office invited the Parties to indicate by 8 January 2018 whether they requested a hearing to be held or the Award to be rendered solely based on the Parties' written submissions.



48. On 7 January 2018, the Appellant requested that the Award shall be rendered solely on the Parties' written submissions.
49. On 8 January 2018, the Respondent requested the Court to hold a hearing session for the case.
50. On 9 January 2018, the CAS Court Office informed the Parties that Mr. Olivier Carrard, attorney-at-law in Geneva, Switzerland, had been nominated as Sole Arbitrator in the present arbitration proceedings. It further advised the Parties that the Sole Arbitrator shall decide whether or not the hearing was to be held.
51. On 15 January 2018, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing and indicated the dates on which it may take place.
52. On 18 January 2018, both Parties informed the CAS Court Office that they would be available on 9 March 2018.
53. On 18 January 2018 also, the CAS Court Office confirmed to the Parties that the hearing would be held on 9 March 2018, at a location to be determined shortly after and invited the Parties to submit a list of names of all persons expected to attend the hearing.
54. By email of 25 January 2018, the Appellant's counsel informed the CAS Court Office that Mr. Ali Abbes and Mr. Mohamed Rokbani would attend the hearing either physically or by videoconference. In addition, he requested to be allowed to plead in French at the hearing.
55. On 26 January 2018, the CAS Court Office advised the Parties that the hearing would be held in Lausanne, Switzerland and invited the Respondent to comment on the Appellant's request by 30 January 2018 stating that, in the absence of any answer within the set deadline, it would be for the Sole Arbitrator to decide on the Appellant's request.
56. On 31 January 2018, the CAS Court Office sent a reminder to the Respondent asking him to comment on the Appellant's request and to provide the names of all persons expected to attend the hearing scheduled to be held on 9 March 2018.
57. By letter of 2 February 2018, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the arbitration proceedings.
58. On 5 February 2018, the CAS Court Office forwarded FIFA's letter to the Parties.
59. By letter of 2 February 2018, the Respondent's counsel informed the CAS Court Office that he in person and the Respondent's agent, Mr. Ilir Halili, would attend the hearing session.
60. On 5 February 2018, the CAS Court Office forwarded the Respondent's letter to the Parties.
61. On 12 February 2018, the Sole Arbitrator denied the Appellant's request to be allowed to plead in French at the hearing.
62. On 13 February 2018, the CAS Court Office forwarded the Order of Procedure to the Parties.

63. On 13 and 15 February 2018, the Parties each returned the duly signed copies of the Order of Procedure to the CAS Court Office, confirming the jurisdiction of the CAS.
64. A hearing was held on 9 March 2018 at the Lausanne Palace Hotel in Lausanne, Switzerland. The Sole Arbitrator was assisted by Delphine Deschenaux-Rochat, counsel to the CAS.
65. The following persons attended the hearing:  
  
For the Club:            Mr. Mohamed Rokbani, legal counsel  
  
                                 Mr. Ali Abbes, legal counsel  
  
For the Coach:         Mr. Lorin Burba, legal counsel
66. The Parties reached an agreement in regards to the applicable law and decided that the present case shall be resolved under Swiss law.
67. The Parties expressed that Article 25 of the Contract was not be interpreted as choice-of-law clause but rather as an undertaking by the Coach to abide by the legal principles governing the Kingdom of Saudi Arabia at the time when he was entering into the Contract.
68. The Club reiterated that it would be willing to pay the outstanding remuneration in the amount of USD 30,000 and the compensation for breach of the Contract in the amount of USD 232,500, to the exclusion of any other indemnity.
69. The Club explained that, in accordance with the jurisprudence of the CAS, the fact that the penalty clause was more severe against one party did not entail its invalidity or ineffectiveness. It referred in particular to an Arbitration Award of 9 May 2014 CAS 2013/A/3411.
70. The Coach replied that the compensation clause shall be deemed to be a buy-out clause.
71. In addition, the Coach stated that Article 15 let. c of the Contract was not valid and appeared to be disproportionate, taking into account the obligations imposed on each party. He further added that Article 16 and 17 had to be regarded as buy-out clauses.
72. Finally, the Parties had ample opportunity to present their cases, submit their arguments and answer the questions raised by the Court. The Sole Arbitrator listened carefully and, in his subsequent deliberation, took into account all the evidence and arguments presented by the Parties although those have not been exhaustively summarized in the present Award. The Parties expressly stated that they did not have any objections in respect of their right to be heard and to be treated equally in these arbitration proceedings. After the final submissions, the Sole Arbitrator closed the hearing and suspended the ongoing arbitration until Friday 23 March 2018 in order to provide the Parties with an opportunity to reach an amicable settlement.
73. At the expiration of the deadline, the Parties informed the CAS that an amicable resolution had not been reached.

#### **IV. OVERVIEW OF THE PARTIES' POSITIONS**

##### **A. The Appellants**

74. In its Appeal Brief, the Club made the following requests for relief from CAS:
- a. declare the Appeal admissible in the form.
  - b. set aside the Appealed Decision in regards with the termination payment and therefore rule that the compensation payable by the Appellant shall amount to USD 232,000.
  - c. condemn the Respondent to the payment in favour of the Appellant of the legal expenses incurred in the amount of CHF 30,000.
  - d. establish that the costs of arbitration proceedings shall be borne by the Respondent.
75. In summary, the Club submitted the following in support of its appeal:
- i) Due to the poor performances of the Club under the Coach as well as the lack of communication between him, on the one hand, and the administration and the players, on the other hand, the Board of Directors had decided that it was in the Club's best interest to terminate the Contract.
  - ii) The Club tried to reach an amicable settlement with the Coach consisting of a payment in three instalments of the amount requested (i.e. 75% of the remaining contractual remuneration and the outstanding salaries for September 2016 and half of October 2016), but the Coach declined the offer.
  - iii) The Parties intended to conclude the Contract, including the two penalty clauses and gave their consent voluntarily and free from coercion or deceit.
  - iv) According to the case law and the doctrine, the Parties are bound to pay such penalty clauses and cannot be relieved of their obligations on the ground that they are excessive.
  - v) It is expected from the Judge to establish the true and common intent of the Parties when assessing the terms of the Contract whereas the FIFA Single Judge had ignored the terms of the explicit agreement between the Parties.
  - vi) Furthermore, the Appellant asserted that according to Swiss law and in consideration of CAS jurisprudence, penalty clauses did not require being reciprocal in order to be valid.
  - vii) The Contract terms were not to be considered unfair as they provided for compensation to both Parties in the case of termination.
  - viii) In the event the above is rejected, neither Swiss law nor CAS case law prohibit a disproportion between the obligations when such a disproportion is the result of the

free, informed and expressed will of the Parties.

76. In his Answer Brief of 22 December 2017, the Respondent submitted the following requests for relief:
- a. dismiss the appeal filed by the Appellant.
  - b. confirm the Appealed Decision.
  - c. state that the Appellant be condemned to bear all arbitration costs.
  - d. require the Appellant to reimburse the Respondent's legal fees in the amount of EUR 50,000.
77. The Coach's submissions, in essence, may be summarized as follows:
- i) In the Termination Letter, the Appellant had not made any objection relative to the professional performance of the Respondent.
  - ii) Since the Appellant's Board of Directors had unilaterally terminated the Contract without providing any professional, personal or sporting cause, it could be assumed that it was a termination without cause, even if such termination was made on the basis of a contractual provision.
  - iii) The Contract contains several abusive and discriminatory aspects. For instance, in accordance with Article 17 of the Contract, the Appellant has reserved a right for compensation amounting to USD 1,000,000 in the event the Respondent signed an employment Contract with other clubs in the Middle-East within one year after the termination of the Contract. Such compensation is disproportional compared to the amounts the Appellant would have to pay in case of premature termination of the Contract, and is discriminatory with regard to the employee.
  - iv) At the time of the termination of the Contract, the Appellant had not paid his outstanding obligations (salaries for September 2016 and the first two weeks of October 2016) amounting to USD 30,000.
  - v) The Respondent had tried in vain to reach an agreement with the Appellant before initiating legal proceedings.
  - vi) The Respondent maintained that the Appellant did not provide any sustainable arguments or evidences during the proceedings before the Single Judge of the Players Status Committee. The only argument presented by the Appellant was that the Judge should have enforced the provision under Article 15 let. c as such provision had been agreed upon by the Parties.
  - vii) The Respondent pointed out that in evaluating the amount that the Appellant had to pay to the Respondent for the breach of the Contract, the Single Judge of the Players

Status Committee had considered Article 15 let. c as abusive.

- viii) The Respondent noted that according to Article 20 para. 2 of the Swiss Code of Obligations, the invalidity of a contractual clause does not cause, in principle, the invalidity of the Contract. In his view, another legal issue to be considered was whether an invalid contractual clause could be enforced or not.
- ix) He invoked that, pursuant to Article 334 para. 1 of the Swiss Code of Obligations, a Contract with a defined duration is considered terminated upon its expiration.
- x) He further added that, in other words, such Contract cannot be prematurely terminated; however, in the Contract, the Parties can stipulate several circumstances giving them the right to terminate the Contract with cause. In any case, these circumstances shall be reasonable, proportional, executable and should not restrict the rights of a party. For these reasons, he considered Article 15 let. c of the Contract invalid.
- xi) Contrary to the Appellant's submissions, the Respondent claimed that Article 15 let. c of the Contract should not be considered a penalty clause. According to him, a penalty clause sets for a sum payable in the event of a violation of the contractual rights of the other party. In the Respondent's view, for Article 15 let. c to be considered penalty clause, it should have referred to a failure of the obligation of the Appellant towards the Respondent. To summarize, he claimed that this penalty clause was "*an attempt to give legitimacy to an illicit circumstance*".
- xii) The Respondent further added that, if Article 15 let. c of the Contract was deemed a penalty clause, the Respondent was entitled to claim further compensation because the loss and damages suffered exceed the penalty amount.
- xiii) The Respondent alleged that the termination of the Contract is illegal under Saudi law, which is the applicable law to the Contract pursuant to Article 25 of the Contract.
- xiv) In addition, according to Saudi law, and more particularly Article 77 of the Royal Decree N° M/51, if the employer dismisses the employee with immediate effect without cause, the employee shall receive a compensation taking into account the termination circumstances and potential material and moral damages sustained.
- xv) Furthermore, he added that in accordance with the same Article "*in principle, it has been excluded the possibility of the parties to stipulate a penal clause, since for evaluating the compensation for the termination of the contract certain other criterions are taken into consideration*". He therefore considered that the alleged penalty clause could not be opposable to the Respondent.
- xvi) Finally, the sole purpose of these arbitration proceedings would be to delay the execution of the obligations towards the Respondent.

## V. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL

78. Pursuant to Article 176 para. 1 of the Swiss Private International Law Act (hereinafter referred to as “PILA”), the provisions of Chapter 12 shall apply to an arbitration if the seat of the Arbitral Tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

79. Since these prerequisites are fulfilled in the case at hand, said Provisions are applicable.

80. According to Article 186 para. 1 PILA, the Arbitral Tribunal shall itself decide on its jurisdiction.

81. In accordance with Article R47 of the CAS Code, an Appeal against the decision of a federation, association or sports-related body may be filed with the CAS provided that either the statutes or regulations of said body so allow or the parties have concluded a specific arbitration agreement and the Appellant has exhausted all legal remedies available to him prior to the Appeal, in accordance with the statutes or regulations of said sports-related body.

82. Article 24 of the Contract reads as follows:

*“It is expressly agreed between the Parties that the competent Committee of F.I.F.A and, in second instance, CAS will have jurisdiction to decide for any and all disputes that might arise from or in relation to the present contract and that F.I.F.A Regulations will apply to any such dispute”.*

83. In the case at hand, the jurisdiction of the CAS derives from the agreement between the Parties as well as from Article 58 of the FIFA Statutes (April 2016 edition) in force when the Single Judge of the FIFA Players’ Status Committee rendered the Appealed Decision. Moreover, the CAS’ jurisdiction is not challenged by any of the Parties which have confirmed it by signing the Order of Procedure.

84. The Appealed Decision was notified to the Club on 19 October 2017 which lodged the Statement of Appeal on 7 November 2017, i.e. within the time limit set forth in Article 58 of the FIFA Statutes. In addition, the Statement of Appeal which, upon the Appellant’s request shall be considered as the Appeal Brief, complies with all requirements of Article R48 and R51 of the CAS Code.

85. It therefore follows that the CAS has jurisdiction to decide on this Appeal and that such Appeal is admissible.

## VI. APPLICABLE LAW

86. In accordance with Article 187 para. 1 PILA, the Arbitral Tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection.

87. This Article foresees two possibilities, namely where the parties have chosen the applicable law or where such a choice of law clause has not been agreed upon.
88. The agreement on the CAS as the competent Court of Arbitration in the second instance entails an agreement in relation to the application of the conflict-of-law rules of the CAS Code, particularly of Article R58 which provides as follows:
- “The Panel shall 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”.*
89. It can be inferred from the wording of Article R58 of the CAS Code that the rules and regulations of a federation take precedence over any legal framework chosen by the Parties (see HAAS U., *Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law*, CAS Bulletin 2015/2, p. 14). This Article provides a mandatory hierarchy of the applicable legal framework. Consequently, *“the applicable regulations”* shall primarily apply, and the legal framework designated by the Parties will be applicable on a subsidiary basis.
90. FIFA’s rules and regulations shall apply in football-related disputes but also, and in particular, because the Appeal in the present case is directed against a decision issued by FIFA, which was passed in accordance with FIFA’s rules and regulations.
91. Article 57 para. 2 of the FIFA Statutes states as follows:
- “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”.*
92. A choice of law agreement is not subject to any formal requirements (see CAS/2006/A/1024, § 6.5; DUTOIT B., *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987*, 5<sup>ème</sup> édition, Bâle 2016, p. 837, N 2 ad. Art. 187 PILA). The Parties’ choice of law clause may have been tacitly or expressly accepted. Such choice of law could be found in the Contract between the Parties but it could also have been agreed upon at some later point in time (CAS/2006/A/1180, § 10).
93. In the case at hand, the Contract does not include an agreement on the applicable law in the event of a dispute. During the hearing, both Parties have indeed recognized that Article 25 of the Contract does not constitute such a clause but rather an undertaking of the Coach to comply with the rules and laws governing the Kingdom of Saudi Arabia.
94. In his Appeal Brief, the Appellant does not refer to any national law applicable to the ongoing litigation, whereas the Respondent makes reference to FIFA regulations, Saudi Arabian law, and Swiss law.
95. By having brought the dispute before the CAS in accordance with Article 24 of the Contract, the Parties also implicitly agreed to be bound by Article R58 of the CAS Code. It follows that

the FIFA regulations which are the “*applicable regulations*” *in casu* within the meaning of Article R58 of the CAS Code must be followed by the Sole Arbitrator.

96. These applicable federation rules provide that Swiss law is to be applied additionally to the rules and regulations of FIFA. During the course of the hearing, the Parties accepted the application of Swiss law. It can, therefore, be assumed that they agreed a subsequent choice of law. Consequently, it is pointless to define the nature of the relationship between the reference in Article 57 para. 2 of the FIFA Statutes to Swiss law and the explicit choice of law made by the Parties during the hearing, since both lead to the application of Swiss law.
97. It follows that the rules and regulations of FIFA are applicable and also take precedence over the legal framework designated by the Parties, i.e. Swiss law.
98. Although the Sole Arbitrator has established that the FIFA regulations are primarily applicable to this case and supplemented by Swiss law, it should be noted that FIFA regulations do not contain any provision regarding the status of coaches in general and the termination of an employment contract between clubs and coaches in particular. In particular, the Sole Arbitrator notes that the FIFA Regulations on the Status and Transfer of Players only applies to players and professionals, to the exclusion of coaches (CAS 2015/A/4161).
99. Reference must therefore be made to Swiss law in the case under scrutiny.
100. In light of the foregoing, the Sole Arbitrator will have recourse to Swiss law to settle the present dispute.

## VII. MERITS OF THE CASE

101. The main issues to be resolved by the Sole Arbitrator in this case are the following:
  - a. What is the nature of the Contract between the Club and the Coach under Swiss law?
  - b. Did the Club terminate the Contract without cause?
  - c. In the affirmative, what are the financial consequences of the dismissal?
- a) **What is the nature of the Contract between the Club and the Coach under Swiss law?**
102. The employment contract has some specific characteristics which distinguish it from other legal relationship existing in Swiss law. Article 319 para. 1 of the Swiss Code of Obligations (hereinafter referred to as “CO”) defines the individual employment contract as an agreement whereby the employee has the obligation to perform work in the service of the employer for a limited or unlimited period of time, during which the employer owes him a wage.
103. Four elements stem from this definition that must be present for an employment contract to exist: the performance which has to be personal, the time frame during which the work has



to be performed, the financial compensation and the subordination of the employee to the employer (CARRUZO P., *Le contrat individuel de travail*, Zurich et al. 2009, p. 1).

104. Pursuant to Article 334 para. 1 CO, a fixed-term employment contract ends without the requirement to give notice. Employees are on a fixed-term contract when the end of the contract has been fixed by agreement between the Parties and is determined by objective conditions such as a specific date, the completion of a task or the return of another employee who has been temporarily replaced (CARRUZO P., *op. cit.*, p. 463 ss; BERENSTEIN/MAHON/DUNAND, *Labour Law in Switzerland*, 3<sup>rd</sup> edition, Berne 2018, p. 92).
105. In the present case, none of the Parties have challenged the existence of a binding employment contract. In the Appealed Decision, the Single Judge of the FIFA Players' Status Committee noted that he had jurisdiction with respect to "*all employment-related dispute between a club or an association and a coach that has an international dimension*" and he incidentally admitted that the present case was a litigation regarding outstanding salaries based on an employment contract (Appealed Decision, p. 5 § 2-3). The Sole Arbitrator holds the same opinion. The agreement signed by the Parties is indeed, to all effects and purposes, a binding and valid agreement since it has all the necessary elements of an employment contract. The Contract provides that the Coach will be, practically and theoretically, responsible for the training of the Club's team (Article 5 of the Contract) for one year as of 1 July 2016 (Article 2 of the Contract) and that, in exchange, Al-Taawoun Football Club will pay the Coach a remuneration as defined in Article 4 of the Contract. The element of subordination can be observed in the hierarchy between the Parties; the Coach is accountable to the Club and both Parties have to run a weekly meeting to review the team situation (Article 9 of the Contract).
106. The Sole Arbitrator has therefore no doubt whatsoever that the Contract constitutes a valid and binding fixed-term employment contract.

**b) Did the Club terminate the Contract without cause?**

107. Generally, under Swiss law, an employer is not required to have a legitimate reason to terminate an employment contract, which means that the employer can end an employment relationship for any reason or for no reason at all, unless the genuine ground for termination of the contract is unlawful (ATF 125 III 70, p. 72, para. 2a and references cited therein).
108. Examples of wrongful terminations include: a termination given because of a quality inherent to the personality of the employee, because the employee exercises a constitutional right, because he joined a trade union, because he tried to enforce a right set out in the employment contract in good faith and solely in order to prevent claims under the employment relationship from accruing (see Article 336 CO; ATF 125 III 70, p. 72, para. 2a and references cited therein).
109. If an employer deems that the work of an employee is not satisfactory, he can terminate the contract without the dismissal being considered unfair (decision of 27 November 2000 of the Court of Appeal of the Canton of Ticino, in JAR 2001, p. 157).

110. In the present case, the termination letter was based on Article 15 let. c of the Contract and did not mention any specific reason for terminating the Contract. In the proceedings before the first instance authority, the Appellant never invoked any justification of the early termination of the Contract other than his right to do so at any time as per the wording of this above-mentioned provision, “*for the benefit of the club*”. Whereas, the Respondent had claimed that this unilateral right to terminate the Contract without any factual reason reserved to the Appellant should be considered null and void. After analysing the content of this clause, the FIFA Judge concluded that such clause could not be applied as it was arbitrary and contrary to the principle of contractual stability, to allow one party to terminate the contract for a completely non-objective reason. In his Appeal Brief, the Appellant justified the early termination of the Contract with the poor performance by the Coach as well as the lack of communication between him and the club administration committee on one hand, and the players on the other hand.
111. The questions as to whether such clause is admissible taking into account the principle of freedom of termination guaranteed by Swiss law or as to whether the argument put forward by the Club in the Appeal Brief constitutes a legitimate reason for the dismissal of the Coach, are of no relevance.
112. A different reasoning must indeed be made with regard to a fixed-term contract.
113. The main characteristic of a fixed-term contract is that it cannot be terminated by the parties before the fixed term expires, unless the party who terminates the contract can justify cause for dismissal with immediate effect or if the parties reach mutual agreement on the termination of the contract (Decision of the Federal Court 4A\_89/2007 of 29 June 2007, para. 3.2; WYLER/HEINZER, *Droit du travail*, 3<sup>ème</sup> édition, Berne 2014, p. 497-498; CARRON V., Art. 334 CO, in: DUNAND/MAHON (ed.), *Commentaire du contrat de travail*, Berne 2013, p. 558, N 5 ad. Art. 334 CO; BERENSTEIN/MAHON/DUNAND, *Labour Law in Switzerland*, 3<sup>rd</sup> edition, Berne 2018, p. 150).
114. The Coach indisputably concluded a Contract with the Club for a fixed term, namely for one year starting on 1 July 2016. The Club terminated the Contract by means of a termination letter dated 16 October 2016. Therefore, the question arises as to whether such early termination had occurred with or without cause.
115. Immediate termination of the contract with cause is an exceptional measure and therefore must be admitted on a restrictive basis (ATF 127 III 351, p. 352, para. 4a). Depending on the gravity of the grounds for dismissal, a previous formal warning is usually required before an immediate termination can be regarded as justified (ATF 127 III 153, p. 155, para. 1a). Only a particularly gross employee’s misconduct that affects mutual trust between the parties may justify immediate dismissal (Art. 337 para. 2 CO; ATF 127 III 351, p. 353, para. 4; Decision of the Court of Appeal of the Canton of Geneva dated 23 May 2014, *in* JAR 2015 p. 465-464, para. 3.2). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued (ATF 129 III 380, p. 382, para. 2).

116. In other words, early termination cannot be based on every alleged breach of the contract by the employee. Rather, the breach of the contract must have a certain level of severity in order to be admitted as “cause” (CAS 2006/A/1180, § 21). The question is whether this level was reached in the present case.
117. According to Swiss case law, whether there is just cause depends on the overall circumstances of the case, in particular on the type and the duration of the employment relationship, as well as the nature and the gravity of the employee’s misconduct (ATF 130 III 28, p. 31, para. 4. 1).
118. In principle, the parties can specify in the contract when there is “just cause” (CAS 2006/A/1180, § 21). Such specification had not been made in the Contract in question. Article 15 let. c which states that the Club have a right to terminate the contract for the benefit of the Club, at any time for any other reasons, does not refer to a just cause (*juste motif*) within the meaning of Article 337 CO that allows the termination of the contract with immediate effect. Regardless of whether this clause is arbitrary or not, it is rather a valid legitimate reason (*motif légitime*) on which the decision of termination is based that should not be confused with the notion of “just cause”.
119. The Sole Arbitrator notes that, in its termination letter of 16 October 2016, the Appellant did not provide any explanation as to why he was terminating the employment agreement with immediate effect. He just referred to Article 15 let. c of the Contract which gives him the right to do so for the benefit of the Club at any time and for any reason.
120. The Appellant has not presented nor evidenced any gross misconduct that could represent an irremediable breach of trust between the Parties. No previous objections or criticisms were made to the employee in regards to his performance or professional conduct. Furthermore, there is no evidence that the latter had undertaken any actions which were meant to be contrary to the Club interests.
121. Only in the Appeal proceedings did the Appellant mention that the Coach was dismissed because of his poor results and difficulty in communicating with the Club administrative committee and the players.
122. The Club had not provided any substantiated information on any such bad performance or lack of communication.
123. The alleged grounds for termination had not reached the level of gravity required to justify termination of the employment relationship without notice. Therefore, a previous formal warning should have been given to the employee before termination with immediate effect of the Contract could be considered as justified.
124. Neither evidence supporting the Appellant’s assertion nor warning letter or document that would establish the conduct of an internal disciplinary action were provided to the Sole Arbitrator.

125. Under these circumstances, the Sole Arbitrator considers the termination to have been harsh and conducted in a rather brutal manner.
126. One might have expected the Club to give an opportunity to the Coach to resolve the problem (if any) before going straight to the dismissal. Before taking any formal disciplinary action, the problem should have been brought to the attention of the employee. For instance, the Club could have raised the issue by sending a warning notice explaining why they were considering the relationship no longer in the Club interests or proposing to organize a meeting to discuss the issue. It would have justified moving on to a disciplinary action or a dismissal procedure if the situation persisted.
127. The grounds for termination are unclear and thus not sufficient to justify such a rather abrupt end of the employment relationship.
128. In view of the foregoing, the Sole Arbitrator finds that the Club has terminated the employment contract without cause.

**c) In the affirmative, what are the financial consequences of the dismissal?**

129. The Coach is demanding from the Appellant the payment of the outstanding salaries for September 2016 and half of October 2016, i.e. USD 30,000, the payment of a compensation for breach of the Contract, i.e. USD 310,000, the reimbursement of travelling costs, i.e. USD 1,500 and moral damages of USD 500,000.
130. Therefore, the following items are to be reviewed by the Sole Arbitrator:
  - i) Outstanding salaries and compensation for early termination;
  - ii) Additional compensation;
  - iii) Travel expenses;
  - iv) Possible penalty interest.

***i) Outstanding salaries and compensation for early termination***

131. Pursuant to Article 337c para. 1 CO, if the employer dismisses the employee with immediate effect without cause, the latter is entitled to compensation in the amount he would have earned, had the employment relationship ended after the required notice period or on expiry of its agreed duration (see BERENSTEIN/MAHON/DUNAND, *Labour Law in Switzerland*, 3<sup>rd</sup> edition, Berne 2018, p. 159).
132. Insofar as possible, the judge must determine, in a concrete and precise manner, what the employee would have actually earned if the contract had been terminated at the contractually agreed end date (ATF 125 III 14, p. 16, para. 2b).

133. Such damages are to be reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work (Article 337c para. 2 CO).
134. Article 337c para. 1 CO is a semi-mandatory provision from which the parties cannot derogate by means of an employment contract to the detriment of the employee. The compensation provided for in this Article may be extended but in no case can it be reduced. This obligation stems from legal rules, namely Article 362 para. 1 CO. Moreover, it is found in the case law of the Federal Court that:
- “L’obligation de payer le salaire (...) prévue par l’art. 337c al. 1 CO revêt un caractère relativement impératif (art. 362 al. 1 CO) en ce sens que l’accord des parties ne peut pas y déroger au détriment de la travailleuse ou du travailleur”.*
- (Decision of the Federal Court 4A\_608/2010 of 10 January 2011, para. 2.1)
135. The mandatory character of Article 337c al. 1 CO is unanimously recognized by the doctrine (see GLOOR W., Art. 337c CO, *in*: DUNAND/MAHON (ed.), *Commentaire du contrat de travail*, Berne 2013, p. 798, N 30 ad. Art. 337c CO; WYLER/HEINZER, *Droit du travail*, 3<sup>ème</sup> édition, Berne 2014, p. 603; VENTURI-ZEN-RUFFINEN M-N, *La résiliation pour justes motifs des contrats de durée*, Zurich 2007, p. 378; ABEGG A., Art. 337c CO, *in*: GAUCH/AEPLI/STÖCKLI, *Präjudizienbuch OR Die Rechtsprechung des Bundesgerichts (1875-2015)*, Zürich 2016, N 5 ad. Art. 337c CO). Therefore, the employee cannot validly waive the salary due pursuant to this provision (see SJ 1999 I p. 296).
136. According to the Contract, up until the agreed date of termination, i.e. 30 June 2017, the Player was entitled to:
- USD 120,000 to be paid upon signing of the Contract;
  - USD 240,000 to be paid through 12 monthly salaries of USD 20,000 each, payable within the first and fifteenth day of the month;
  - USD 70,000 on 31<sup>st</sup> January 2017 and
  - USD 70,000 on 31<sup>st</sup> May 2017.
137. Pursuant to Article 15 of the Contract, the Club has to pay 75% from the total remaining of the Contract as a compensation for losses resulting from the termination of the Contract before the contractually agreed date.
138. The Appellant admits that he owes the Respondent USD 30,000 for unpaid salaries for the months of September 2016 and half October 2016 and USD 232,500 which represents 75% of the remaining contractual value, as per Article 15 of the Contract.

139. It is not disputed that from the date the Contract was signed until the end of the employment relationship, the Appellant has paid the first instalment amounting to USD 120,000, the monthly salary of July 2016 amounting to USD 20,000 and the monthly salary of August 2016 amounting to 20,000.
140. As a result, the Appellant has paid the Respondent an aggregate amount of USD 160,000.
141. It is also undisputed that outstanding salaries for September 2016 and half October 2016 in the amount of USD 30,000 are due to the Coach. What is disputed between the Parties is whether the Appellant has to pay the total remaining amount of the Contract, namely the sum of USD 310,000, as submitted by the Coach or the equivalent of 75% of the remaining amount, namely USD 232,500 as submitted by the Club.
142. Assuming that the compensation provided for under Article 15 of the Contract is applied, the Coach would be in a less favourable situation than that which results from the application of the legal provision. Indeed, the Coach is entitled to the total remaining value under the legal regime, namely USD 310,000, whereas he would have been entitled to the equivalent of 75% of the total remaining amount of the Contract, namely USD 232,500 under the contractual regime.
143. Therefore, the Sole Arbitrator has no doubt that the contractual provision regarding the compensation in the event of an early termination of the employment contract is void and has to be disregarded.
144. On 5 July 2017, the Respondent has informed FIFA that he had not been able to enter into any agreement in the period covering the employment contract, i.e. from the termination date until the Contract end date. No evidence to the contrary or that he intentionally refused an offer of employment, thus failing to mitigate his damages, was supplied to the Sole Arbitrator. Consequently, the damages provided under Article 337c para. 1 shall not be reduced and the Respondent is entitled to full compensation.

***ii) Additional compensation (Article 337c para. 3 CO)***

145. In addition to the aforementioned amount, the judge can also award a compensation determined at his own discretion; however, such compensation shall not exceed the equivalent of six months of the salary due to the employee (Article 337c para. 3 of the Swiss Code of Obligations).
146. This compensation which shall be added to the compensation allocated under Article 337c para. 1 CO, serves both a compensating and a punitive purposes (WYLER/HEINZER, *Droit du travail*, 3<sup>ème</sup> édition, Berne 2014, p. 609 and references therein). It does not constitute a purely punitive damage as it is due even if the employee did not suffer any damages. This indemnity of *a sui generis* character, which is similar to a penalty clause, is to be determined equitably by the judge (Decision of the Federal Court 4A\_135/2013 of 6 June 2013, para. 3.2).

147. In doing so, the judge must not only consider the gravity of the breach committed by the employer but also the overall circumstances, in particular the infringement of the employee's personality rights, his age, his social and personal situation, the duration of the employment relationship and the way the dismissal was handled (ATF 135 III 405, p. 407, para. 3.1; Decision of the Federal Court 4A\_711/2016 of 21 April 2017, para. 5.2).
148. Such compensation is the rule. It may be waived only in exceptional circumstances in which, despite the unlawful nature of the dismissal, the payment of an additional punitive compensation by the employer appears to be unjustified (Decision of the Federal Court 4A\_474/2010 of 12 January 2011, para. 2.3 and references cited therein; Decision of the Federal Court 4C.100/2004 of 24 June 2004, para. 4.2.; see BERENSTEIN/MAHON/DUNAND, *Labour Law in Switzerland*, 3<sup>rd</sup> edition, Berne 2018, p. 159). These exceptions entail the absence of fault from the employer and any other grounds that he cannot be held responsible for (Decision of the Federal Court 4C.100/2004 of 24 June 2004, para. 4.2).
149. A concurrent misconduct of the employee may result in a reduction or withdrawal of the compensation (ATF 120 II 243, p. 246, para. 3d).
150. In the Federal Court case law and in the legal doctrine, Article 337c para. 3 CO is also a semi-mandatory provision within the meaning of Article 362 CO even if this provision is not expressly mentioned (WYLER/HEINZER, *Droit du travail*, 3<sup>ème</sup> édition, Berne 2014, p. 612; ATF 124 III 469, p. 471, para. 2a).
151. In his claim before FIFA, the Respondent had requested a compensation for moral damages amounting of USD 500,000 for the inclusion of disproportional rights in the agreement, the non-payment of monies due under this agreement, the brutal interruption of the employment relationship, his complete abandon in a foreign country after such interruption as well as the failure to provide him with any means of transportation to return home to Europe.
152. The FIFA Judge rejected this request in the Appealed Decision given the lack of evidence supporting the allegation that the Coach would have suffered a further damage in this amount.
153. In the proceedings before the CAS, the Respondent requested the mere confirmation of the Appealed Decision. He did not claim any additional indemnity outside of those stipulated under the Contract.
154. Pursuant to Article 190 para. 2 let. c PILA, the arbitral award can be challenged if the Arbitral Tribunal ruled on matters beyond the claims submitted. The Arbitral Tribunal shall be bound by the subject matter and amount of the submissions it has to deal with, in particular where the person concerned qualifies or limits his claims in the submissions themselves (Decision of the Federal Court 4A\_50/2017 of 11 July 2017, para. 3.1).
155. The interdiction of *ultra petita* under which the court may not award a party anything more than or different from what the party has requested, nor less than what the opposing party has acknowledged, is well-established in Swiss rules of civil procedure (see Article 58 of the Swiss Civil Procedure Code). This also applies to the rules of mandatory law (GEHRI M., Art.

58 of the Swiss civil procedure code, in: SPÜHLER/INFANGER (ed.), *Schweizerische Zivilprozessordnung*, (Basler Kommentar), Basel 2017, p. 366, para. 3 ad. Art. 58 of the Swiss Civil Procedure code).

156. Under these circumstances, in spite of the fact that the Coach is actually entitled to receive a compensation pursuant to Article 337c para. 3 CO, the Sole Arbitrator is, in accordance with the *ultra petita* principle, unable to award a compensation that exceeds the amounts awarded by the Single Judge of the FIFA Players' Status Committee.

**iii) Travel expenses**

157. The employee's claim based on Article 337c para. 1 CO includes not only wages but also compensation for other benefits resulting from the employment contract (Decision of the Federal Court 4C.321/2005 of 27 February 2005, para. 8.3).
158. In accordance with Article 14 of the Contract, the Club bears the traveling expenses of the Coach and his family and the amount that must be paid to the Coach shall not exceed USD 6,000 per year.
159. The Respondent submitted a claim for the Club to reimburse his travel costs for the itinerary Saudi Arabia – Netherlands, of USD 1,500, which the Single Judge of the FIFA Players' Status Committee reduced significantly in the Appealed Decision. The Sole Arbitrator concurs with the ruling of the Single Judge of the FIFA Players' Status Committee in this respect, and thus considers that the Appellant must pay to the Respondent an amount of USD 265, corresponding to the price of a one-way air ticket in economic class from Riyadh to Amsterdam.
160. Considering the aforementioned, the Appellant is to pay the Respondent USD 30,000 for unpaid salaries for the months of September 2016 and half October 2016.
161. In addition, the Sole Arbitrator holds that the Appellant must compensate the Respondent for the consequences of the early termination of the Employment agreement with USD 310,000.
162. Besides, the Sole Arbitrator holds that the Appellant must reimburse to the Respondent the amount of USD 265, as travel expenses.

**iv) Penalty interest**

163. Under Swiss law, unless the Parties otherwise agree, a debtor in default of payment must pay an interest of 5% per annum (Article 104 CO).
164. In the Appealed Decision, the Single Judge of the FIFA Players' Status Committee ordered that a penalty interest of 5% per annum shall apply to the amount payable by the Appellant



and that such interest becomes due as from the date of submission of the claim before FIFA, i.e., 29 November 2016 until the date of effective payment.

165. According to the Federal Court jurisprudence, the penalty interest shall be due as from the date of notification of the claim for payment, unless the creditor has sent a prior formal notice to the debtor (JdT 1972 I 541, p. 546, para. 6).
166. In the present case, by letter of 22 October 2016, the Appellant has been granted a deadline until 26 October 2016 to settle the outstanding debts. Furthermore, the Respondent warned the Appellant that in case of failure by the Club to fulfil such obligations, he would initiate judicial proceedings before the competent committee of FIFA.
167. Therefore, a penalty interest should have accrued at the legal default rate from the expiry of the deadline, i.e., 26 October 2016 until the date of effective payment.
168. Since the Respondent did not request such a correction by appealing against the Appealed Decision for this reason, the Sole Arbitrator will not correct the due date of the penalty interest. Otherwise, he would breach the principle "*ne eat index ultra petita partium*".
169. Hence, a penalty of 5% p.a. is due on the above-mentioned amount as from 29 November 2016 until the date of effective payment.

### VIII. CONCLUSION

170. As a result, the decision of the Single Judge of the FIFA Players' Status Committee is upheld in its entirety and Al-Taawoun Saudi Club is to make to Darije Kalezic the followings payments:
  - As unpaid salaries for the months of September 2016 and half of October 2016, USD 30,000, plus 5% interest p.a. on said amount as from 29 November 2016 until the date of effective payment.
  - As compensation for the early termination of the Contract, USD 310,000, plus 5% interest p.a. on said amount as from 29 November 2016 until the date of effective payment.
  - As reimbursement of travel expenses, USD 265, plus 5% interest p.a. on said amount as from 29 November 2016 until the date of effective payment.

## ON THESE GROUNDS

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

1. The appeal filed on 6 November 2017 by Al-Taawoun Saudi Club against the decision adopted by the FIFA Dispute Resolution Chamber on 11 July 2017 is dismissed.
2. The decision adopted by the FIFA Dispute Resolution Chamber on 11 July 2017 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.