**Arbitration CAS 2020/A/7011 Al Hilal Khartoum Club v. Mohamed El Hadi Boulaouidat, award of 23 March 2021**

Panel: Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

*Football*
*Termination of the employment contract*
*Proof of relevant and disputed facts*
*Primacy of liquidated damages clauses over Article 17 RSTP in the calculation of the compensation for damages*
*Validity of a liquidated damages clause*
*Criteria for the assessment of the compensation for damages and principle of the "positive interest"*

1. **According to Swiss Law and its Article 184 of the Swiss Private International Law Act (PILA), only relevant and disputed facts must be proven.**

2. **Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP) governs the consequences of a party breaching a contract without just cause. However, said provision cannot be applied *per se* at all times. In fact, the provision itself allows the parties to provide for the consequences of such a breach in the contract itself. The RSTP thus provides for the primacy of a contract regarding the calculation mode for compensation for breach of contract, and that the various criteria listed in Article 17 para. 1 RSTP regarding calculation of compensation apply only subsidiarily. However, the wording of such a clause should leave no room for interpretation and must clearly reflect the true intention of the parties. Regardless of the name of such provisions, they legally correspond to liquidated damages clauses.**

3. **Parties to a contract of employment are free to stipulate a liquidated damages clause to be referred to in case of termination of said contract without any just cause. However, if the reciprocal obligations set forth actually disproportionately favour one of the parties and give it an undue control over the other party, such clause is incompatible with the general principles of contractual stability and therefore null and void.**

4. **In the absence of a valid liquidated damages clause, the amount of compensation for termination of contract without just cause needs to be assessed in application of the criteria set out in Article 17 para. 1 RSTP and in the light of the principle of "positive interest", under which compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end. The criteria are to be considered as a non-exhaustive list and the judging authority has considerable scope of discretion when establishing the amount of compensation due, as long as it is set in a fair and comprehensible manner.**

## I. PARTIES

1. Al-Hilal Khartoum Club (hereinafter referred to as "the Appellant" or "the Club") is a Sudanese football club based in Omdurman. The Club is affiliated with the Sudan Football Association, which is in turn affiliated with the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. Mohamad El Hadi Boulaouidat (hereinafter referred to as "the Respondent" or "the Player") is an Algerian football player.

## II. FACTUAL BACKGROUND

### A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 21 July 2019, the Appellant and the Respondent (hereinafter together referred to as "the Parties") concluded an employment contract valid as from 21 July 2019 until 20 July 2020 (hereinafter referred to as "the Contract").

5. According to Article 2 of the Schedule 1 to said Contract, the Player was entitled to receive a total amount of USD 140,000.00, payable as follows:

   *i. USD 56,000 as signing-on fee*

   *ii. USD 7,000 as monthly salary, payable at the end of each month*

   [These amounts are the ones indicated in the English translation accepted by both Parties, see infra § 91].

6. In addition, the Player was entitled to a car/transportation and a house as well as return flight tickets per each season (Article 6 of the Schedule 1).

7. Pursuant to Article 10 para. 4 of the Contract, the Club would have to pay the Player USD 10,000.00 in the event it terminated the Contract without just cause. In case it was vice versa, i.e. that the Player terminated the Contract without just cause, the Player would have to pay the Club USD 100,000.00 (Article 10 para. 5).

8. The Parties further agreed that the compensation amounts mentioned under Article 10 paras. 4 and 5 are fair and respect the principles of parity and reciprocity of the parties in light of the overall circumstances related to the contract's conclusion and execution (Article 10 para. 6).

9. On 6 October 2019, the Appellant unilaterally terminated the Contract with retrospective effect as of 1 October 2019. After the termination of the Contract, a dispute arose between the Parties regarding the payment of compensation owed to the Respondent due to the early termination of the Contract.

## B. Proceedings before the FIFA Dispute Resolution Chamber

10. On 6 November 2019, the Player lodged a claim against the Appellant before the FIFA Dispute Resolution Chamber (hereinafter referred to as "the FIFA DRC") for outstanding remuneration and for breach of contract, claiming a total amount of USD 70,000.00, broken down as follows:

*USD 7,000 as outstanding remuneration, corresponding to the salary of September 2019*

*USD 63,000 as compensation for breach of contract, corresponding to the residual value of the contract.*

11. On 21 January 2020, the FIFA DRC decided in favor of the Player and approved the claim in its entirety (hereinafter referred to as "the Appealed Decision"). The Appellant requested a motivated decision which was issued on 26 March 2020.

## C. The Appealed Decision

12. In its decision of 21 January 2020, the FIFA DRC ruled the following:

*1. The claim of the Claimant, Mr Mohamed El Hadi Boulaouidat, is accepted.*

*2. The Respondent, Al Hilal Khartoum, has to pay outstanding remuneration to the Claimant in the amount of USD 7,000.*

*3. Furthermore, the Respondent has to pay compensation for breach of contract to the Claimant in the amount of USD 63,000.*

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

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

*6. In the event that the amounts due in accordance with point 2 & 3 above are not paid by the Respondent within 45 days as from the notification by the Claimant of the relevant bank details to the Respondent, the*

*Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amounts are paid and for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

*7. The ban mentioned in point 6 above will be lifted immediately and prior to its complete serving, once the due amounts are paid.*

*8. In the event that the aforementioned sums are still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

13. In its motivated decision notified on 26 March 2020, the FIFA DRC first noted that the Appellant acknowledged a debt in the amount of USD 19,100.00. It then examined whether the reasons put forward by the Appellant could justify the termination of the Contract as of 1 October 2019.

14. It assessed that *"only a breach or misconduct which is of a certain severity justifies the termination of a contract. In other words, only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence, if there are more lenient measures which can be taken in order for an employer to ensure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only ever be an ultima ratio measure"*. It further pointed out the Appellant himself had stated that the termination of the Contract had been a decision of the coach. According to the FIFA DRC, *"this allegation alone can by no means be considered as a just cause for termination"*. For the sake of completeness, the DRC judge also referred to his longstanding jurisprudence, according to which low performance is not considered a just cause for the termination of an employment contract, due to the unilateral and arbitrary character of such assessment.

15. Thus, the FIFA DRC concluded that the Appellant had terminated the Contract unilaterally without just cause as of 1 October 2019.

16. Furthermore, the FIFA DRC held that the salary for September 2019 in the amount of USD 7,000.00 had – as acknowledged by the Appellant – not been paid and is therefore owed.

17. The FIFA DRC then assessed how the rest of the compensation to be paid shall be calculated. It recapitulated that the parameters set out in Article 17 of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as "the RSTP") shall apply unless otherwise provided in the contract at the basis of the dispute. It therefore, in a first step, analyzed the relevant provisions contained in the Contract at hand (i.e. Article 10 paras. 4, 5 and 6). In this context, it noted that in case of an unjustified termination by the Club the latter would have to pay the Player compensation in the amount of USD 10,000.00, whereas in case of an unjustified termination by the Player, the latter would have to pay the Club compensation in the amount of USD 100,000.00. The FIFA DRC pointed out that these provisions were clearly not balanced to the repartition of rights between the Parties. Thus, the calculation could not be based on those provisions contained in the Contract.

18. The FIFA DRC therefore applied Article 17 para. 1 RSTP instead. It noted that the residual amount of the Contract, originally supposed to run until 20 July 2020 but terminated nine months earlier, i.e. on 1 October 2019, would have been USD 63,000.00 (9 monthly salaries) plus the amounts of USD 17,000.00 payable on 20 January 2020 as well as of USD 23,000.00 payable at the end of the Contract on 20 July 2020 [The Sole Arbitrator notes here that the FIFA DRC based its Decision on another translation of Article 2 of the Schedule to the Contract according to which the total value would still be of USD 140,000 but which provides for the payment of: a signing fee of USD 56,000, 10 months salaries of USD 7,000, USD 17,000 due on 20 January 2020 and USD 21,000 due on 20 July 2020, which represents a total aggregated amount of USD 166,000 (and not 140,000). These discrepancies are however in fine not relevant, see infra § 109 ff]. The FIFA DRC noted *"that the Claimant limited his request for compensation to the amount of USD 63,000"*.

19. The FIFA DRC observed that the Respondent had not concluded any new employment contract that could be taken into account in the calculation of the amount of compensation for breach of contract in connection with the Respondent's duty to mitigate his damages. Instead, it had remained unemployed during the relevant period of time.

20. The FIFA DRC therefore ruled that the compensation to be paid by the Appellant shall amount to USD 63,000.00, as this sum was considered reasonable and proportionate as compensation for breach of contract in the case at hand.

21. Finally, the FIFA DRC also put forward its reasons regarding the possible ban from registering any new players in case the Appellant would not make the payments within the time limit set.

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

22. On 16 April 2020 the Appellant filed its Statement of Appeal with the Court of Arbitration of Sport (hereinafter referred to as "the CAS"). It requested the appointment of a sole arbitrator, suggesting Mr Michele Bernasconi, Attorney-at-law in Zurich, Switzerland, and made the following prayers for relief:

> 1. *The present appeal has to be considered admissible and accepted, and consequently the Appellant requests to the Court of Arbitration for Sport to declare the nullity of the Decision of the Dispute Resolution Chamber (DRC judge), passed in Zurich, Switzerland, on 21 January 2020, by Omar Ongaro (Italy), DRC judge, on the claim presented by the player Mr Mohamed El Hadi Boulaoidat, Algeria, represented by Mr Ali Abbes and Mr Moahmed Rokbani, against the club Al Hilal Khartoum, Sudan, regarding an employment-related dispute between the parties, CASE REF. 19-02099/SVI and:*
>
> 2. *To decide that the compensation agreed by the parties for the unilaterally termination of the contract by the club without just cause shall be in the amount of 10,000 USD that is fair and respects the principles of parity and reciprocity of the Parties in light of the overall circumstances related to the Contract's conclusion and execution.*

3. *If not so, subsidiarily:*

   *To decide that the claim before FIFA' s DRC had to be rejected, pursuant article 5, ns. 2,3 and 4 of the Procedural Rules, so DRC judge disrespected Article 5, ns. 2,3 and 4 of the Procedural Rules.*

4. *If not so, subsidiarily:*

   *To decide that DRC judge disrespected the basic legal principle of packt [sic] sunt servanta (recte: pacta sunt servanda).*

5. *If not so, subsidiarily:*

   *To decide that DRC judge disrespected Articles 97, n.1; 99, n. 1; 119 of Swiss Code of Obligations.*

23. On 24 April 2020, the Appellant informed the CAS Court Office that the Statement of Appeal shall, pursuant to Article R51 of the Code of Sports-related Arbitration (hereinafter referred to as "the Code"), be considered as the Appeal Brief.

24. On 24 April 2020, the CAS Court Office informed the Appellant, that it had received the Statement of Appeal by e-mail on 16 April 2020, that however, the original copies had not yet been received.

25. On 27 April 2020, the Appellant informed the CAS Court Office, that according to ctt expresso / EMS Internacional, the Statement of Appeal had been duly filed on 17 April 2020.

26. On 28 April 2020, the CAS Court Office confirmed receipt of the Statement of Appeal, serving as the Appeal Brief, filed on 16 April 2020, initiated the present arbitration procedure and invited the Respondent to express its view on the appointment of a sole arbitrator (and/or the suggested one) and to file its Answer.

27. On 28 April 2020, the Respondent requested that the time-limit to file his Answer be set aside until the Appellant paid its share of the advance of costs. It also informed the CAS Court Office that it would not pay its share in the procedural costs due to its difficult financial situation. Furthermore, it agreed to the language of the present proceeding being English, however, it objected to the suggested Sole Arbitrator and requested the appointment of an arbitrator from the Football arbitrator list by the President of the CAS Appeals Arbitration Division.

28. On 29 April 2020, the CAS Court Office informed the Parties i.a., that a new time-limit for the filing of the Answer would be fixed upon the Appellant's payment of its share of the advance of costs and that the Sole Arbitrator would be appointed by the President of the Appeals Arbitration Division pursuant to Article R54 of the Code.

29. On 12 June 2020, the Respondent was invited to submit his Answer and the Parties were informed that the Sole Arbitrator appointed to decide the above-referenced case had been designated as follows:

30. Sole Arbitrator: Mr Patrick Lafranchi, Attorney-at-Law in Bern, Switzerland

31. On 25 June 2020, the Respondent filed his Answer. He requested the CAS to issue an award as follows:

    1. *The appeal filed by the Appellant, Club Al Hilal Khartoum Club, Sudan, against the Decision taken by FIFA Judge date 21 January 2020 to be dismissed.*

    2. *To confirm the decision issued by FIFA DRC Judge of date 21 January 2020.*

    3. *The arbitration costs to be carried out by the Appellant, Al Hilal Khartoum Club - Sudan.*

    4. *To oblige the Appellant, Al Hilal Khartoum Club – Sudan, to reimburse the Respondent, with the advocacy costs, amounting to CHF 10,000.00.*

32. On 29 June 2020, the CAS Court Office invited the Parties to communicate whether they wanted a hearing to be held in this matter.

33. On 1 July 2020, the Respondent informed the CAS Court Office, that he kindly requested that the Sole Arbitrator issues an award based solely on the Parties' written submissions without need that a hearing be held in the present matter.

34. On 6 July 2020, the Appellant informed the CAS Court Office, that it requested a hearing to be held in this matter.

35. In its letter of 16 July 2020, the Appellant wanted to know whether the Respondent had already provided a response in this regard and reiterated its request that a hearing be held.

36. On 4 August 2020, the Parties were informed that no hearing would be held in the matter and that the Sole Arbitrator, pursuant to Article R57 of the Code, would decide this case based solely on the Parties' written submissions, as he deemed himself sufficiently well informed to decide solely based on the Parties' written submissions. The Sole Arbitrator also noted that the Arabic version of the produced Contract sometimes seemed longer than the English one (cf. e.g. Article 10, "Schedule 1"). Since both Parties are Arabic speaking, they were requested to file their comments regarding the English version, as this English version would be considered as a faithful translation which the Sole Arbitrator would exclusively rely on if there was no objection. The Parties were further invited to signed an Order of Procedure. This Order confirmed the Parties' agreement with the issuance of a decision based on their written submissions as well as the respect of their right to be heard.

37. On 10 August 2020, the Appellant observed that the English version of the produced Contract does not contain values and therefore cannot be considered complete.

38. On the same day, both Parties returned a signed copy of the Order of Procedure.

39. On 11 August 2020, in light of its submission of the day before, the Appellant was invited by the CAS Court Office to submit a certified English version of the Contract.

40. On 18 August 2020, the Appellant submitted such certified English version of the Contract.

41. On 24 August 2020, the Respondent was invited to inform the CAS Court Office whether it objects to the English translation of the Contract provided by the Appellant on 18 August 2020.

42. On the same day, the Respondent objected to the English translation of the Contract. It argued that the Contract was already drafted in two languages (Arabic and English). It therefore did not consider it necessary to provide any other translation to the Contract.

43. On 25 August 2020, the Sole Arbitrator pointed out that his query referred to a possible discrepancy between the Arabic version of the Contract and the English translation submitted by the Appellant on 18 August 2020 and noted that the Respondent had only objected in principle. He therefore invited the Respondent, again, to object – if he considered the translation submitted on 18 August 2020 by the Appellant not to be accurate – in a more substantiated way.

44. On the same day, the Respondent informed the CAS Court Office that he did not object to the accuracy of the translation of the Contract submitted by the Appellant on 18 August 2020.

## IV. SUBMISSIONS AND ARGUMENTS OF THE PARTIES

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

### A. Appellant

46. The Appellant does not dispute that it unilaterally terminated the Contract with the Player as of 1 October 2019 before the initially previewed period of employment had come to its end on 20 July 2020.

47. It submits that its board of directors did so, based on the recommendation of the new technical director and his team, confirming that the Player – considering his performance in the training sessions and friendly matches – had not added any value to the team.

48. The Appellant argues that it had done all it could to solve the dispute amicably and in good faith. The Appellant states that it had tried to settle the disagreement that followed the early termination of the Contract, while the Player still was in Sudan. It had asked the Player to stay until the entitlements were paid. The Appellant submits that the Player refused, arguing that he needed to go back home urgently, requesting the Appellant to contact his agent instead. The Appellant had then asked for a bank account in order to transfer to him his money from abroad, as Sudan is under sanctions and no money can be transferred outside the country. After the Player had left the country without providing any details, the Appellant had

contacted the Player's agent and had even provided him an entry visa to Sudan in order to solve the issue. However, not only the Respondent did not cooperate, but also no solution could be achieved with the Respondent's agent.

49. The Appellant acknowledges that he owes the Player a total amount of USD 19,100.00, which is made up as follows:

i. 10,000.00 USD (ten thousand dollars) for the termination of the contract;

ii. 7,000.00 USD (seven thousand dollars) for the salary of September;

iii. 2,100.00 USD (two thousand and hundred dollars) as a ten-day salary.

50. The Appellant does not challenge the Appealed Decision with regard to the conclusion that he had no just cause to unilaterally terminate the Contract, taking into account the longstanding jurisprudence of the FIFA DRC according to which low performance is not considered as a just cause for the termination of an employment contract.

51. However, the Appellant submits that the amount of the compensation for the breach of contract of USD 63,000.00 to be paid to the Player, is not reasonable or proportional and that the Appealed Decision therefore violates Article 17 para. 1 of the RSTP.

52. It further argues that Article 17 para. 1 RSTP and the criteria to calculate a compensation listed therein are only applicable, unless otherwise provided for in an employment contract. From that, the Appellant derives that the first and essential parameter to decide on any compensation arising from the termination of a contract without just cause is what the Parties agreed on in the Contract. The first factor when determining the compensation must therefore be the true intention of the Parties.

53. According to the Appellant, this view is supported in several CAS decisions such as CAS 2015/A/4139, award of 20 January 2016, where it was held that the amount of the penalty shall not be fixed according to the extent of the damage, but *"according to the agreement of the parties"* and that, as a general principle of freedom of contract, *"the parties can decide on a fixed amount or an amount in proportion with the importance of the breach"*. With reference to CAS 2013/A/3379, award of 8 May 2014, the Appellant further stresses that even in the context of the *"contra proferentem"* principle, the common intention of the Parties is the relevant element: *"However, if the contractual arrangements containing the relevant terms were negotiated between the parties, a party cannot be held liable for an unclear formulation. Instead of resorting to the "contra proferentem" principle, the common intention of the parties to the contractual arrangements shall be sought according to Article 18, paragraph 1 of the Swiss Code of Obligations"*.

54. Finally, with reference to CAS 2019/A/6143, the Appellant (who actually was a party in these proceedings) submits that a compensation for breach of contract may be agreed on and seems to consider that, as in the case CAS 2019/A/6143, the compensation due shall be calculated pursuant to the agreed clause.

55. In view of the above, the Appellant considers the wording of Article 10 of the Contract, and its para. 4 in particular, to be a valid compensation clause that needs to be respected as it is balanced to the repartition of rights between the Parties. According to the Appellant, this is particularly the case because the Parties explicitly agreed in Article 10 para. 6, that paras. 4 and 5 of this same Article are fair and respect the principles of parity and reciprocity in light of the overall circumstances related to the conclusion and execution of the Contract. Therefore, the payment of a compensation of USD 10,000.00 in case of a unilateral termination of the club without just cause, as foreseen in the Contract, is valid and should be respected, which is why the Appealed Decision should be overturned.

56. Subsidiarily, the Appellant stresses that the behaviour of the Parties in the proceedings that took place before the FIFA DRC should be taken into consideration. As the Player had not acted in good faith, as he has not told the truth during the proceedings before the FIFA DRC and as there would be no legitimate reason for dealing with his claim, his claims should have been rejected pursuant to Article 5 no. 2, 3 and 4 of the Procedural Rules.

57. Subsidiarily, the Appellant argues that the Player had violated the basic legal principle of *pacta sunt servanda*, which is why the Appealed Decision should have been rejected and needs to be overturned.

58. Subsidiarily, the Appellant invokes Swiss law. According to Article 99 para. 1 of the Swiss Code of Obligations (hereinafter referred to as the "SCO"), which it considers applicable, an obligor is generally liable for any fault attributable to him. Furthermore, according to Article 97 para. 1 SCO, an obligor who fails to discharge an obligation at all or as required, must make amends for the resulting loss or damage unless he can prove he was not at fault. Additionally, an obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor (Article 119 SCO). The Appellant considers in particular, that it does not bear any fault because of circumstances beyond its control and responsibility, such as the difficulties of transferring money abroad due to the sanctions imposed on Sudan.

59. Based on the above, the Appellant submits that the Appealed Decision shall be declared null and void.

**B. Respondent**

60. First of all, the Respondent states that the overall financial value of the contract would have been distributed as follows:

> *Point 2 of appendix 1 of the contract provides a payment of fifty-six thousand US dollars (56,000 USD) payable upon signature*
>
> *A monthly salary of seven thousand US dollars (7,000 USD) for a total of eighty-four thousand US dollars (84,000 USD)*

61. The Respondent points out that it is undisputed that in the moment of the unilateral termination of the Contract, the Appellant had not paid to the Respondent the monthly salary of September 2019 amounting to USD 7,000.00 (seven thousand American dollars), but only the following amounts:

> *Fifty-six thousand US dollars (56,000 USD) in respect of the tranche due on signature*
>
> *Fourteen thousand US dollars (14,000 USD) for wages in July and August 2019*

62. The Respondent then states that, as a general principle, a contract cannot be terminated unless there is just cause. Article 14 RSTP sanctions any violations of this principle. The Respondent reiterates that in the matter at hand, the termination letter sent by the Appellant did not contain any objective reasons for the termination of the Contract. The Respondent further stresses that it is not disputed by the Appellant himself, that the termination of the Contract had been made without just cause. For the violation of said principle, the Appellant had been considered liable by the FIFA DRC for compensating the Respondent in accordance with Article 17 RSTP, and rightly so.

63. The Respondent further argues that Article 10 of the Contract must be considered null and void. Contrary to the Appellant's allegations, said Article is unbalanced, disproportional and cannot be considered as the basis for the calculation of compensation. The Respondent bases this argument on the following reasons:

- Unclear and standardized Contract:

  The English version of the Contract diverges from the Arabic version, *i.e.* no compensation is mentioned in the English version. In accordance with the principle *"contra proferentem"*, any clause considered to be ambiguous should be interpreted against the interests of the party that created, introduced, or requested that a clause be included.

- Unbalanced, disproportional and not reciprocal clause:

  According to the Respondent, a clause stating that a compensation of USD 10,000.00 should be due if the Club terminated the Contract whereas the compensation should be USD 100,000.00 if the Player terminated the Contract, is of a punitive nature and violates the balance of rights between the Parties. Said clause has a unilateral character and is only in the favour of the Club since it deprives the Player of his right to a reasonable and fair compensation.

  That the Player needs to pay the Club ten times the amount that should be paid to the Player if the Club committed such an early termination manifests a contradiction between justice and fairness on the one hand and the said clause on the other hand. In line with the well-established jurisprudence of the FIFA DRC, such clause is null and invalid due to lack of reciprocity, proportionality and because it is in favour of one

Party (generally a club towards the player who is considered the weak party to the contract).

The Respondent stresses that the respect of contractual freedom cannot in any way go to the detriment of the principle of a proportionate repartition of the rights of the Parties, which is confirmed by CAS jurisprudence.

The Respondent further refers to Article 337c para. 1 SCO, which states that 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.

- The jurisprudence quoted by the Appellant is not relevant.

64. The Respondent then goes on to argue that, in the light of the above, the compensation needs to be calculated according to Article 17 para. 1 RSTP. It states that the previous instance correctly applied the criteria set out in Article 17 para. 1 RSTP when calculating the amount of compensation.

65. In sum, the Respondent considers the Appealed Decision to be lawful which is why it needs to be upheld.

## V. JURISDICTION

66. Given that CAS has its seat in Switzerland and that when the purported arbitration agreement was executed the Appellant did not have its domicile in this country, this is an international arbitration procedure governed by Chapter 12 of the Swiss Private International Law Act (hereinafter referred to as the "PILA"), whose provisions are thus applicable. Article 186 para. 1 of the PILA states that the arbitral tribunal shall itself decide on its jurisdiction. This general principle of Kompetenz-Kompetenz is a mandatory provision of the lex arbitri and has been recognized by CAS for a long time (see e.g. CAS 2004/A/748, award of 27 June 2006, para. 6).

67. Article R47 of the Code provides as follows:

*"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body. An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

68. Article 58 para. 1 of the FIFA Statutes reads as follows:

*"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

69. It is further undisputed between the Parties that CAS has jurisdiction to adjudicate the matter at hand. Both Parties signed the Order of Procedure.

70. Accordingly, the Sole Arbitrator is satisfied that CAS has jurisdiction to hear and decide on this matter.

## VI. ADMISSIBILITY

71. Article R49 of the Code reads as follows:

*"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

72. Article 58 para. 1 of the FIFA Statutes also provides for a 21-day time limit from the notification of the Appealed Decision.

73. The Sole Arbitrator notes that the FIFA DRC rendered the Appealed Decision on 5 December 2019 and that the grounds of the Appealed Decision were notified to the Parties on 26 March 2020.

74. Filed on 16 April 2020, the Appeal was timely filed. It further complied with all other requirements of Article R48 of the Code and is therefore admissible.

## VII. OTHER PROCEDURAL ISSUES

75. In its Statement of Appeal, serving as the Appeal Brief, the Appellant requested, as an evidentiary measure, that Dr. Hassam Ali Eissa, the General Secretary of Al Hilal Club Sudan, shall be heard as a witness.

76. The Appellant stated that said witness is aware of all the facts set out in the Appeal Brief and can help to proof them.

77. The Sole Arbitrator observes that, according to Swiss Law and its Article 184 PILA, which is applicable in the matter at hand, only relevant and disputed facts must be proven (SCHNEIDER/SCHERER, Basler Kommentar IPRG, Art. 184 N 6).

78. As will be set out below, the main and relevant questions of the dispute are not of factual, but much rather of purely legal nature. Furthermore, the facts laid out by the Appellant are largely not disputed by the Respondent.

79. The Sole Arbitrator notes that hearing the witness as requested by the Appellant is not necessary. Therefore, said request is rejected.

80. The Sole Arbitrator further notes that the Appellant signed the Order of Procedure and thus confirmed its agreement with the issuance of an award based on the Parties' written submissions as well as the respect of its right to be heard.

## VIII. APPLICABLE LAW

81. Article R58 of the Code reads as follows:

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

82. The present proceedings concern an appeal against a decision issued by the FIFA DRC.

83. Article 57 para. 2 of the FIFA Statutes, which is applicable, stipulates that

*"the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

84. The Parties further mutually agreed (Article 1 para. 2 of the Contract), that the Statutes and Regulations of FIFA (including the Laws of the Game) shall apply.

85. In the present case, the "applicable regulations" for the purposes of Article R58 of the Code as well as those the Parties agreed on are, indisputably, the RSTP (in the edition applicable *ratione temporis* to the facts of the case), which must be primarily applied, because the appeal is directed against a decision issued by FIFA, which was passed applying the RSTP. More precisely, the Sole Arbitrator agrees with the FIFA DRC that the regulations concerned are particularly the RSTP, edition October 2019, considering that the matter was brought to FIFA on 6 November 2019.

86. As the present dispute concerns in essence employment matters regarding the question of a unilateral, premature termination of the Contract and its (financial) consequences, in particular, Article 17 para. 1 of the RSTP applies which provides the following:

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

1. *In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annex 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

87. The Sole Arbitrator will therefore decide this matter based on the above-mentioned regulations and provisions. Subsidiarily, Swiss law shall be applied, should the need arise to fill a possible gap in the various regulations of FIFA.

## IX. MERITS

### A. Scope of the Sole Arbitrator's review on the merits

88. The core principle applicable by CAS in appeals proceedings in terms of the scope of review is the *de novo* principle arising from Article R57 of the Code. According to Article R57 of the 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.

### B. Issues for review

89. The Sole Arbitrator observes that the Appellant only partly challenged the Appealed Decision. It is undisputed that the Contract was unilaterally terminated by the Appellant. The Appellant further explicitly acknowledges that there was no just cause for the early termination of the Contract. Neither is the disciplinary sanction towards the Appellant challenged.

90. Furthermore, it is undisputed that the monthly salary for September 2019 in the amount of USD 7,000.00 had not been paid at the time the Contract was unilaterally terminated and that said sum is therefore owed by the Appellant.

91. The Parties have further agreed during the proceedings that the certified English translation of the Contract, submitted by the Appellant on 18 August 2020, is accurate and shall be considered by the Sole Arbitrator. The Sole Arbitrator points out that this translation was presented after the Statement of Appeal / Appeal Brief as well as the Answer were submitted (and, of course after the Appealed Decision was issued). This leads to some minor contradictions to those documents mentioned, especially regarding the time of payment and the breakdown of the total salary. However, the Sole Arbitrator observes that the total amount of the Contract of USD 140,000 as well as the sign-on fee of USD 56,000 and the *"monthly salaries of USD 7,000, to be paid at the end of each month for the period from 2019 and 2020"* are undisputed and that in any event the Player could not be entitled to more than the amount of USD 63,000 he was awarded by the Appealed Decision (see infra §§ 109 to 113).

92. The dispute revolves around and is limited to the question of what amount of the compensation for the premature unilateral termination of the Contract is owed by the Appellant. In particular, the Parties are not in agreement regarding the validity and the legal consequences of Article 10 of the Contract, including the question regarding which impact said provision has on the determination of the amount of compensation to be paid by the Appellant to the Respondent.

93. The following two questions are thus of fundamental importance:

*a. Is the compensation clause in Article 10 of the Contract (signed on 21 July 2019) valid?*

*b. If not, what is the compensation due for the breach of the Contract?*

These two issues will be considered in turn.

***a) Is the compensation clause in Article 10 of the Contract (signed on 21 July 2019) valid?***

94. Article 17 RSTP, applicable to the dispute at hand, governs the consequences of a party breaching a contract without just cause. The Sole Arbitrator notes however, that said provision cannot be applied *per se* at all times. In fact, the provision itself allows the parties to provide for the consequences of such a breach in the contract itself.

95. The RSTP thus provides for the primacy of a contract regarding the calculation mode for compensation for breach of contract, and that the various criteria listed in Article 17 para. 1 RSTP regarding calculation of compensation apply only subsidiarily (see, e.g. CAS 2012/A/2910, para. 73; CAS 2009/A/1880 & 1881, para. 73; CAS 2008/A/1519 & 1520 ("Matuzalem case"), para. 66). Thus, the will of the parties must, in principle, be considered.

96. The wording of such a clause should leave no room for interpretation and must clearly reflect the true intention of the parties (cf. CAS 2013/A/3091, CAS 2013/A/3092 & CAS 2013/A/3093, para. 259). Regardless of the name of such provisions, they legally correspond to liquidated damages clauses (cf. CAS 2008/A/1519 & 1520, para. 68).

97. In the matter at hand, in its Article 10, as rightly pointed out by the Appellant, the Contract deals with the consequences of an unilateral termination by one Party ("Termination by the Club or the Player"). Said clause provides, in its English translation submitted on 18 August 2020 and agreed on by both Parties, the following:

1. *SFA regulations governing the termination of the contract and, where applicable, FIFA regulations in force from time to time apply.*

2. *This Contract may be terminated before its expiry by mutual agreement.*

3. *This Contract may be terminated by either party, without consequences for the terminating party, without consequences for the terminating party, where there exists just cause at the time of the contract termination by the knowledge and concern of SFA.*

4. *If the Club terminates this Contract without having just cause, the Club shall pay to the Player compensation equal to the total amount of: USD 10,000*

5. *If the Player terminates the Contract without having just cause, the Player shall pay to the Club compensation equal to the total amount: USD 100,000*

6. *The Parties expressly agree that the compensation amounts stipulated under the provisions of paragraphs 4 and 5 of this Article 10 above are fair and respect the principles of parity and*

*reciprocity of the Parties in light of the overall circumstances related to the Contract's conclusion and execution.*

98. In Article 10 paras. 4 and 5 of the Contract it is thus stated that in case of an unjustified termination by the Club, the latter would have to pay the Player a compensation in the amount of USD 10,000.00. However, in case of an unjustified termination by the Player, the latter would have to pay the Club a compensation in the amount of USD 100,000.00.

99. As set out above, according to CAS jurisprudence, parties to a contract of employment are free to stipulate a liquidated damages clause to be referred to in case of termination of said contract without any just cause. However, it is also a longstanding CAS practice, that if the reciprocal obligations set forth actually disproportionately favour one of the parties and give it an undue control over the other party, such clause is incompatible with the general principles of contractual stability and therefore null and void (see e.g. CAS 2016/A/4605, award of 22 February 2017).

100. As a first step, the Sole Arbitrator therefore assesses whether the clause of Article 10 para. 4 of the Contract, which the Appellant relies on, is valid or not.

101. The Sole Arbitrator notes that the clause in Article 10 para. 4 of the Contract is unilateral. However, there is a similar clause in favour of the Player, should it be the Club that was guilty of a groundless termination in para. 5. Still, the Sole Arbitrator observes that, as already observed by the FIFA DRC in the Appealed Decision, the penalty for the Player would be ten times as high as for the Club according to these provisions. The way the provisions have been drafted imply a set-up which disproportionately favours the Appellant. Article 10 para. 4 of the Contract is, even read in conjunction with para. 5, unilateral in nature and solely for the benefit of the Club. The provision is thus clearly unbalanced and burdensome to the Player.

102. That Article 10 para. 4 of the Contract is drafted in an unfair way also becomes clear when looking at what amount of compensation the Respondent would be entitled to, would the compensation clause be applied, compared to what amount of compensation would result from the application of Article 17 para. 1 RSTP, as will be discussed shortly.

103. It is true that the Parties explicitly agreed that they deemed paras. 4 and 5 of Article 10 of the Contract to be fair and respecting the principles of parity and reciprocity (Article 10 para. 6 of the Contract). However, the unequal power of bargain in the negotiation of the terms of an employment contract and the circumstances must be taken into account in this context. The matter at hand does in fact represent a typical situation where there is unbalanced power of bargain and where a standardized contract was used as a foundation. That the Parties have stated otherwise in Article 10 para. 6 of the Contract, does not change the fact that Article 10 para. 4, objectively, clearly is not fair and not respecting the principles of parity and reciprocity.

104. Nothing changes when looking at the jurisprudence quoted by the Appellant. In particular, the Sole Arbitrator notes that CAS 2019/A/6143 is irrelevant here, since it does not appear from the award that the clause then applied to fix the compensation due for early termination

of the employment contract without just cause would have been unbalanced, the appeal before CAS having been relating only to the deduction of a previously over paid amount.

105. The Sole Arbitrator therefore agrees with the FIFA DRC and considers Article 10 para. 4 to be null and void.

***b) What is the compensation due for the breach of the Contract?***

106. In the absence of a valid liquidated damages clause inserted in the relevant contract of employment, the amount of compensation for termination of contract without just cause payable by the relevant party needs to be assessed in application of the other parameters set out in Article 17 para. 1 RSTP and in the light of the principle of "positive interest", under which compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end (see e.g. CAS 2012/A/2698, award of 28 November 2012).

107. It should be pointed out that the criteria set out in Article 17 para. 1 RSTP, according to CAS jurisprudence, are to be considered as a non-exhaustive list and that the judging authority has considerable scope of discretion when establishing the amount of compensation due, as long as it is set in a fair and comprehensible manner: *"*[…] *such compensation is to be calculated in accordance with all those elements of art. 17 FIFA Regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in para. 1 of said article that, based on the circumstances of the single case, the panel will consider appropriate to apply"* (see CAS 2008/A/1519 & 1520, para. 82).

108. According to the calculations of the FIFA DRC, the residual amount of the Contract from 1 October 2019 to 20 July 2020, was USD 63,000.00. According to the FIFA DRC, this corresponds to nine monthly salaries, plus an amount of USD 17,000.00 payable on 20 January 2020 and USD 23,000.00 payable at the end of the Contract on 20 July 2020.

109. The Sole Arbitrator notes that the Appellant objected to a calculation based on Article 17 para. 1 RSTP and to the amount of the compensation due. However, as there is no contractual compensation clause to be relied on, the Sole Arbitrator will assess whether the amount of compensation as calculated by the DRC is reasonable and fair according to the conditions provided for under Article 17 para. 1 RSTP. At the same time, the Sole Arbitrator notes that bearing in mind the prayers for relief of the Parties, it can in any event, only confirm but not increase the amount reached by the FIFA DRC.

110. The Sole Arbitrator notes that the total value of the Contract amounts to USD 140,000.00 (Schedule 1 Article 1). According to Schedule 1 Article 2 of the Contract, the Player is entitled to receive the total amounts of USD 56,000.00 (on-signing fee, lit. a) and a monthly salary of USD 7,000.00 (lit. b). Whereas the on-signing fee was supposed to be paid upon signing the Contract, the monthly salaries were to be paid at the end of each month from the period from 2019 until 2020.

111. The Sole Arbitrator observes that undisputedly, only the on-signing fee in the amounts of USD 56,000.00 as well as of USD 14,000.00 (two monthly wages for July and August 2019)

had been paid. Thus, USD 70,000.00 of the total value of the Contract were outstanding at the time of its unilateral, premature termination. However, from these USD 70,000.00 in total, the monthly salary of USD 7,000.00 for September 2019 which is acknowledged by the Appellant, must be deduced as the claimed outstanding remuneration. The residual amount of the Contract at the time of the termination, and thus the compensation for breach of contract, amounts, as correctly stated by the FIFA DRC, to USD 63,000.00.

112. The Sole Arbitrator notes that the Respondent has limited his request for compensation to USD 63,000.00 even in the proceedings before CAS. In particular, it did not claim any interest.

113. The Sole Arbitrator underlines in this context that, since the Respondent did not challenge the Appealed Decision before the CAS, it could in any event not have obtained more than what he was granted by the Appealed Decision (see e.g. CAS 2016/A/4852).

114. In its decision, the FIFA DRC then addressed a further parameter that needs to be taken into account when applying Article 17 para. 1 RSTP. It considered whether the Respondent had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. It noted that the Respondent still seemed to be unemployed, thus no reduction of his loss had taken place and the compensation in the amount of USD 63,000.00, remained.

115. The Sole Arbitrator observes that the Appellant has not put forward any arguments regarding the Respondent's duty to mitigate the damage. Neither has he demonstrated, or even alleged, that the Respondent had signed a new employment contract during the relevant period (October 2019 until July 2020) or that he would have been able to do so, had he complied with his obligation to mitigate damages. Instead, the Appellant simply states that the Appealed Decision violates Article 17 para. 1 RSTP.

116. Based on the above said, the Sole Arbitrator does not see any reason to deviate from the assessment made by the FIFA DRC. More so, he comes to the same conclusion as the previous instance: A compensation of USD 63,000.00 to be paid to the Respondent is reasonable and proportionate as it complies with the criteria set out in Article 17 para. 1 RSTP.

### C. Further Arguments of the Appellant

117. For the sake of completeness, the Sole Arbitrator will shortly address the other "prayers for relief" submitted by the Appellant. First of all, the Sole Arbitrator observes that the claims set out in paras. b to d are, in fact, to be considered rather as legal arguments and not as prayers for relief.

118. The Appellant argues that the Player's behaviour before the FIFA DRC, not acting in good faith and not telling the truth, should be taken into account. Also, the Appellant states that there was no legitimate reason for dealing with the claim.

119. The Sole Arbitrator notes that such general and unsubstantiated accusations against the Respondent and the FIFA DRC cannot be considered. The Appellant fails to substantiate and

demonstrate how the Appealed Decision should have violated Article 5 paras. 2 to 4 of the Procedural Rules. In particular, the Appellant does not show what impact the alleged behaviour of the Respondent had on the outcome of the proceedings. The Sole Arbitrator found that the compensation was calculated correctly and according to the parameters set out in Article 17 para. 1 RSTP. Also, the Appellant stated that there was a lack of legitimate reason for dealing with the claim to begin with. However, the Appellant does not substantiate such assertion with any particular reasons, while one of the missions of the FIFA DRC is especially to deal with claims relating to the termination of employment contract with an international dimension. This unsubstantiated argument shall thus clearly be disregarded.

120. Furthermore, the Appellant submits that the Respondent had violated the principle of *pacta sunt servanda*. However, it fails to substantiate this general allegation and to demonstrate in which way the Respondent violated said principle, as it was the Appellant himself who unilaterally and prematurely terminated the Contract.

121. Finally, the Appellant argues that it is not liable for the compensation as no fault can be attributed to it. The Sole Arbitrator observes that the Appellant cannot infer anything in its favour from this argument and the very general and unsubstantiated reference to Articles 99 para. 1, 97 para. 1 and 119 SCO. Even if one assumes that the Appellant struggled with the payment of a compensation in the past due to practical difficulties, the Appellant would only have paid the acknowledged USD 19,000.00, which is – as set out above – not the total amount of compensation owed. Furthermore, the Respondent has never waived his right to compensation. Therefore, this argumentation does not get the Appellant any further and must be disregarded.

### D. In sum

122. In the light of the above, the Sole Arbitrator is satisfied that the compensation of USD 63,000.00, as calculated in the Appealed Decision, is reasonable and proportionate and that the Appealed Decision has no legal flaws.

123. Therefore, the Appeal is dismissed in its entirety and the Appealed Decision is upheld.

## ON THESE GROUNDS

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

1. The appeal filed by Al Hilal Khartoum Club against the decision issued by the FIFA DRC Judge of 21 January 2020 is dismissed.

2. The decision issued by the FIFA DRC Judge on 21 January 2020 is confirmed.

3. (…).

4. (…).

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