Arbitration CAS 2020/A/7187 Al Hilal Khartoum Club v. Chihebeddine Ben Fredj, award of 17 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) provides guidance as to what effect a party breaching a contract without just cause can have. At the same time, Article 17 RSTP is not applicable at all times. Article 17 RSTP itself provides for the primacy of contractual clauses regarding the calculation for compensation for breach of contract. In other words, the various parameters set out in Article 17 (1) RSTP apply only subsidiarily. Any agreement of the parties in this regard is to be considered first. Thus, in general, the will and the intention of the Parties must be respected. However, the wording of such contractual clauses 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 that shall apply in case of breach of contract and/or a unilateral termination of the contract. However, in order to be valid, the reciprocal obligations set forth shall not disproportionately favour one of the parties and give it an undue control over the other party. Such clauses are considered incompatible with the general principles of contractual stability and are 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 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. 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 (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 ("FIFA").

2. Mr Chihebeddine Ben Fredj (the "Respondent" or the "Player") is a Tunisian football player.

II. FACTUAL BACKGROUND

3. On 20 July 2019, the Parties concluded an employment contract valid as from 20 July 2019 until 19 July 2020 (the "Contract").

4. According to Articles 1 and 2 of the Schedule 1 to said Contract, the Player was entitled to receive a total amount of USD 160,000, to be paid as follows:

    a. Signing-on fee: USD 50,000 to be paid upon signing the Contract

    b. Monthly salary: USD 7,000 to be paid for ten months commencing from 20/08/2019 up to 20/12/2019 and from 20/02/2019 until 20/06/2020.

    c. Amount of USD 17,000 to be paid on 20/07/2019

    d. Sum of USD 23,000 to be paid at the end of the Contract.

5. Also, 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).

6. Pursuant to Article 10 (4) of the Contract, the Club would have to pay the Player USD 10,000 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 (Article 10 (5)).

7. The Parties further agreed that the compensation amounts mentioned under Article 10 (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 (6)).

8. On 6 October 2019, the Appellant unilaterally terminated the Contract with retroactive 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.

III. PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION CHAMBER

9. On 25 October 2019, the Player lodged a claim against the Club before the FIFA Dispute Resolution Chamber (as the "FIFA DRC") for outstanding remuneration and for breach of contract without just cause, requesting the following:

- *To consider the professional player's contract concluded between the player and the club as terminated due to the fault of the club.*
- *To require the club to pay him the amount of USD 7,000 as outstanding remuneration.*
- *To compel the club to pay him the amount of USD 89,000 as a compensation for the abusive and unilateral termination of the contract.*

10. On 15 April 2020, the FIFA DRC partially upheld the Player's claims (the "Appealed Decision"). The grounds of the Appealed Decision were notified to the Parties on 25 May 2020.

IV. THE APPEALED DECISION

11. In its decision of 15 April 2020, the FIFA DRC ruled the following:

1. The claim of the Claimant, Chihebeddine Ben Fredj, is partially accepted.

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

3. The Respondent has to pay the Claimant the amount of USD 85,530 as compensation for breach of contract.

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

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

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

7. In the event that the amounts due in accordance with points 2. and 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).

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

9. 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.

12. In its motivated decision notified on 25 May 2020, the FIFA DRC first noted that the parties concluded an employment contract valid between 20 July 2019 until 19 July 2020. It noted that the player lodged a claim before FIFA for breach of contract without just cause, and that, conversely, the club acknowledged that it terminated the contract based on a *"technical recommendation"*.

13. The FIFA DRC therefore analysed the issue whether the club had any just cause to terminate the contract. It observed that the termination, in the termination letter sent to the player on 6 October 2019 *"was not sufficiently justified nor augmented, as it appeared to be fundamentally arbitrary in its own nature"*.

14. It further reminded the parties that the alleged poor performance of a player could not justify a premature termination of an employment contract by a club, as it is the result of a purely subjective perception, not measurable in objective criteria and can therefore not be considered as a just cause for the premature termination of an employment contract. As a result, the FIFA DRC stated that the Respondent is to be held liable for the early termination of the contract.

15. The FIFA DRC then stated that the Respondent owed the Claimant one monthly salary in the amount of USD 7,000 for September 2019 at the date of termination of the contract and that this was fundamentally not denied by the Respondent. Therefore, it concluded that the Respondent shall pay one outstanding salary, as requested by the Claimant, in the amount of USD 7,000.

16. The FIFA DRC then turned to the consequences of the contractual breach, which imply the payment of compensation. It recalled the criteria for such payment set out in Article 17 (1) RSTP and pointed out that these only apply, if there is no provision by means of which the parties had beforehand agreed upon an amount of compensation to be paid in event of breach of contract. It therefore first assessed whether the Contract contained a compensation clause that should be taken into account.

17. After analyzing Article 10 of the Contract as a possible compensation clause, the FIFA DRC observed that there was a severe disproportion foreseen. It noted that said clause established a set-up where the payment by the club to the player corresponded to only 10% of the compensation payable by the player to the club. The FIFA DRC stated that said disproportion was clear, regardless of any other stipulation that the parties may have included in the Contract. Thus, the FIFA DRC established that *"the aforementioned clause is not reciprocal, as it appears to be clearly excessively established in favour of the club […]. It therefore cannot be seen as enforceable"*.

18. With reference to Article 17 (1) RSTP, the FIFA DRC then calculated that the player would have earned the amount of USD 89,000 (i.e. USD 49,000 as 7 monthly salaries; USD 17,000.00 payable on 20 January 2020 and USD 23,000 payable on 20 July 2020) if the Contract had been performed until the expected end in July 2020. Said amount was considered as the basis for the determination of the amount of compensation for breach of contract.

19. The FIFA DRC further noted that the Player subsequently signed an employment contract with CA Bizertin. It then deducted the amount received under said employment contract from the basis of the payable compensation. The FIFA DRC concluded that the final compensation therefore amounted to USD 85,530 (89,000 - 3,470). It further considered that said final amount was reasonable and proportionate as compensation for breach of contract in the case at hand.

20. 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.

V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION OF SPORT

21. On 15 June 2020 the Appellant filed its Statement of Appeal with the Court of Arbitration of Sport (the "CAS"). It requested the appointment of a sole arbitrator, suggesting Mr Jacopo Tognon, Attorney-at-law in Padova, Italy, 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 15 April 2020, by Stijn Boeykens (Belgium), DRC judge, on the claim presented by the player Chihebeddine Ben Fredj, Tunisia, represented by Mr. Ali Abbes and Mr. Moahmed x, against the club Al Hilal Khartoum, Sudan, regarding an employment-related dispute between the parties, CASE REF. 19-02100 (Exhibit 1) 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.*
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> 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.

22. On 25 June 2020, the Appellant informed the CAS Court Office that the Statement of Appeal shall, pursuant to Article 51 of the CAS Code of Sports-related Arbitration (the "Code"), be considered as its Appeal Brief.

23. On 26 June 2020, the Respondent requested that the time limit to file his Answer shall be set aside until the Appellant paid its share of the advance of costs. It also informed the CAS Court Office that it will not pay his share of the procedural costs due to his difficult financial situation. Furthermore, it drew the attention to the fact that the submitted case has the same facts as the procedure *CAS 2020/A/7011* pending before CAS, and that it therefore suggested that the matter at hand be referred to the same Sole Arbitrator, i.e. Mr Patrick Lafranchi, Attorney-at-Law in Bern, Switzerland. The Respondent further agreed that the proceedings be performed in English.

24. On 1 July 2020, the CAS Court Office acknowledged receipt of the undated letter of the Appellant, where the latter agreed that the matter be referred to Mr Patrick Lafranchi as Sole Arbitrator.

25. On 17 August 2020, the Parties were informed that no challenge had been filed against the nomination of Mr Patrick Lafranchi within the time limit set and that the Appellant had paid its advance of costs.

26. On 18 August 2020, the Respondent filed his Answer. It 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 to be dismissed.

2. To confirm the decision issued by FIFA DRC Judge of date 15 April 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.

27. On the same day, the CAS Court Office invited the Parties to communicate whether they wanted a hearing to be held in this matter.

28. On 19 August 2020, the Respondent informed the CAS Court Office that the Sole Arbitrator is allowed to issue an award based solely on the Parties' written submissions without the need to hold a hearing.

29. On 24 August 2020, the Appellant submitted that it preferred a hearing to be held in the matter and requested that such hearing be held on the same date as the one in *CAS 2020/A/7011*.

30. On 1 October 2020, the Respondent reiterated his request that no hearing be held in the matter. It stated that no hearing was going to take place in the case mentioned by the Appellant whatsoever and asked that the same procedure be followed.

31. On 2 October 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had noted that the Arabic version of the produced Contract (Exhibit 2 of the Appellant) sometimes seemed longer than the English one. The Parties were advised that, unless there was an objection, the English version would be considered as a faithful translation that the Sole Arbitrator exclusively can rely on.

32. On 12 October 2020, the Appellant stated that the Arabic version of the contract is the full version of the agreement between the Parties and that it is the one that the Sole Arbitrator shall rely on. Therefore, it requested a time limit to be set in order to submit a duly certified translation in English.

33. On the same day, the Parties were informed that – should the Respondent not object against the accuracy of the English version of the Player's employment contract within the time limit set – no certified translation will be needed.

34. On 14 October 2020, the Appellant submitted that the English version of the Player's employment contract is not accurate which is why it is essential to submit a new and correct version of the Arabic contract also in English.

35. On 21 October 2020, the Appellant submitted an English translation of the Player's employment contract.

36. On 26 October 2020, the Respondent was invited to inform the CAS Court Office whether he objects to the English translation of the Contract provided by the Appellant on 14 October 2020. No such objection was filed within the time limit set.

37. On 10 November 2020, the Parties were informed that the Sole Arbitrator considered himself sufficiently informed to render an arbitral award on the basis of their written submissions, without holding a hearing.

38. On the same day, respectively on 13 November 2020, both the Respondent and the Appellant signed and returned the Order of Procedure.

VI. SUBMISSIONS AND ARGUMENTS OF THE PARTIES

39. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator, indeed, has carefully considered all the written and oral submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

A. Appellant

40. The Appellant argues that, by terminating the Contract, it had followed 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.

41. The Appellant argues that it had tried to settle the issue following the termination of the Contract amicably. It had assured the Player its readiness to transfer the amounts - due to the economic sanctions in the country - from any neighbouring country as soon as the Player provided his bank account details. Yet, the Player had left the country and requested the Appellant to contact his agent instead. The Appellant stresses that it even provided the agent an entry visa to Sudan in order to solve the issue. However, after the latter had refused to come, the Appellant seized the non-amateur player's committee of the Sudan Football Association regarding the refusal of the Player and his Agent to collaborate. Before any solution could be found, the Player had lodged a claim before the FIFA DRC.

42. The Appellant acknowledges that he owes the Player a total amount of USD 19,333, 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. 2,333.00 USD (two thousand and hundred dollars) as a ten day salary.

43. The Appellant does not dispute that it unilaterally terminated the Contract with the Player on 6 October 2019 (with the termination being effective as from 1 October 2020), thus prematurely and before the initially previewed period of employment had come to its end on 19 July 2020.

44. The Appellant itself acknowledges that it had no just cause to terminate the Contract, taking into account the longstanding jurisprudence of the FIFA DRC according to which low performance is not considered a just cause for the termination of an employment contract.

45. However, the Appellant submits that the compensation for breach of contract in the amount of USD 85,530 shall be redefined. It considers this amount calculated in the Appealed Decision not to be reasonable and proportionate, as well as to be violating Article 17 (1) RSTP.

46. According to the Appellant, Article 17 (1) RSTP shall only be applied, if nothing else is provided for in the contract. Therefore, the true intention of the Parties must be the first parameter to be considered, when calculating a compensation after the termination of a contract without just cause.

47. The Appellant sees his view supported in several CAS decisions such as CAS 2015/A/4139, 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, the Appellant further argues that, even in the context of the *"contra proferentem"* principle, the common intention of the Parties is considered as 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"*.

48. Furthermore, the Appellant refers to CAS 2019/A/6143, proceedings that he himself was party to. It 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.

49. In light of the above, the Appellant considers the wording of Article 10 of the Contract, and its paragraph 4 in particular, to be a valid compensation clause that needs to be respected. The Appellant is of the opinion that said clause is balanced to the repartition of rights between the Parties. According to the Appellant, this is reflected in Article 10 (6), where the Parties agreed that paragraphs 4 and 5 of this same Article are fair and respect the principles of parity and reciprocity. Therefore, the payment of a compensation of USD 10,000 in case of a unilateral termination of the club without just cause, as foreseen in the Contract, is valid and should be respected. This was, however, not the case in the Appealed Decision.

50. Subsidiarily, the Appellant requests that the proceedings that took place before the FIFA DRC and the behaviour of the Parties during said proceedings should be taken into account. The Appellant alleges that the Player had not acted in good faith, as he had not told the truth in those proceedings. Also, there was no legitimate reason for dealing with his claim, which is why his claims should, pursuant to Article 5 (2), (3) and (4) of the Procedural Rules, have been rejected.

51. Subsidiarily, the Appellant argues that the Player breached the basic legal principle of *"pacta sunt servanda"* with his behaviour which is why even the FIFA DRC disrespected said principle in the Appealed Decision. The Appealed Decision shall therefore be overturned.

52. Subsidiarily, the Appellant invokes Swiss law. According to Article 99 (1) of the Swiss Code of Obligations (the "SCO"), which it considers applicable, an obligor is generally liable for any fault attributable to him. Furthermore, according to Article 97 (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 own control and responsibility, such as the difficulties of transferring money abroad due to the sanctions imposed on the country.

53. Based on the above, the Appellant submits that the Respondent's claims should have been rejected and the Appealed Decision shall be declared null and void.

B. Respondent

54. First of all, the Respondent states that the overall financial value of the contract equaling USD 160,000 would have been distributed according to the Contract as follows:

> *Point 2 of appendix 1 of the contract provides a payment of fifty-six [recte: fifty] thousand US dollars (50,000 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)*
>
> *Seventeen thousand USD dollars (17.000 USD) payable on 20/01/2020.*
>
> *Twenty three thousand USD dollars (23.000 USD) payable on 20/07/2020*

55. The Respondent points out that it is undisputed that in the moment of the unilateral termination of the Contract, the Appellant had not paid the monthly salary of September 2019 amounting to USD 7,000, but only the following amounts:

> *Fifty thousand US dollars (50,000 USD) in respect of the tranche due on signature*
>
> *Fourteen thousand US dollars (14,000 USD) for wages in July and August 2019*

56. The Respondent then highlights the general principle of contractual stability from which it follows that a contract cannot be terminated unless there is just cause or mutual agreement and submits that Article 14 RSTP sanctions any violations of this principle. The Respondent reiterates that the termination letter sent by the Appellant did not contain any objective reasons for the termination of the Contract. Therefore, and as it is not disputed by the Appellant himself, the termination of the Contract had been made without just cause. As a consequence, the Appellant was correctly found to be liable for a compensation towards to Respondent according to Article 17 RSTP.

57. The Respondent further argues that Article 10 of the Contract cannot be considered as a basis for the calculation of compensation as it is unbalanced and disproportional. 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:

The Respondent further submits that a clause providing for a compensation of USD 10,000 if the Club terminated the Contract whereas the compensation provided if the Player terminated the Contract would amount to USD 100,000, is of a punitive nature and violates the balance of rights between the Parties. The clause has therefore a unilateral character. As it is drafted only in the favour of the Club, 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 shows a totally unacceptable disproportion and 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 therefore considered null and invalid.

Referring to CAS jurisprudence, 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.

The Respondent further refers to Article 337c (1) SCO, according to which in case 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. If one were to apply the contractual clause, the Player would be entitled to a much smaller compensation compared to what would result from an application of Article 17 (1) RSTP.

- The jurisprudence quoted by the Appellant is not relevant in the matter at hand whatsoever.

58. The Respondent then points out that the compensation needs to be calculated according to the parameters set out in Article 17 (1) RSTP. He submits that the FIFA DRC applied the correct approach when it applied the criteria set out in Article 17 (1) RSTP for the calculation of the amount of compensation due.

59. Hence, the Respondent considers the Appealed Decision to be correct which is why it shall be upheld.

VII. JURISDICTION

60. 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 ("PILA"), whose provisions are thus applicable. Article 186 (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).

61. Article R47 of the Code provides the following:

> *"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".*

62. Article 58 (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".*

63. It is undisputed between the Parties that CAS has jurisdiction to adjudicate the matter at hand which is confirmed by their signature of the Order of Procedure.

64. Hence, the Sole Arbitrator is satisfied that CAS has jurisdiction to hear and decide on the present matter.

VIII. ADMISSIBILITY

65. According to Article R49 of the Code

> *"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".*

66. According to Article 58 (1) of the FIFA Statutes, an appeal shall be filed within 21 days from the notification of the Appealed Decision.

67. The Sole Arbitrator notes that Appealed Decision was rendered on 15 April 2020 and that the grounds of the Appealed Decision were notified to the Parties on 25 May 2020.

68. Filed on 15 June 2020, the Appeal was timely filed. It further complied with all other requirements of Article R48 of the Code and is therefore admissible.

IX. OTHER PROCEDURAL ISSUES

69. 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.

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

71. 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).

72. 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.

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

74. 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.

X. APPLICABLE LAW

75. Article R58 of the CAS-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".*

76. In the matter at hand, the Appeal was filed against a decision issued by the FIFA DRC.

77. Article 57 (2) of the FIFA Statutes, which is applicable, provides that:

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

78. The Parties further mutually agreed (Article 1 (2) of the Contract), that *the Statutes and Regulations […] of FIFA (including the Laws of the Game)* shall apply.

79. 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). As the appeal is directed against a decision issued by FIFA, which was passed applying the RSTP, the Sole Arbitrator agrees with the FIFA DRC that said regulations must be applied primarily. More so, the Sole Arbitrator concurs with the FIFA DRC, that in particular the RSTP (considering the fact that the matter was brought to FIFA on 25 October 2019, in its October 2019 edition) shall apply.

80. As the present dispute concerns in essence employment matters regarding the question of an unilateral, premature termination of the Contract and its (financial) consequences, in particular, Article 17 (1) of the RSTP applies. It 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".*

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

XI. MERITS

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

82. 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. The well-established legal principle of *"ne ultra petita"*, also applies in CAS proceedings (see e.g. SFT 4A_508/2017 of 29 January 2018) and the Sole Arbitrator is bound by the prayers for relief submitted by the Parties.

B. Issues for review

83. The Appealed Decision is only partly challenged. First and foremost, 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. The Sole Arbitrator further notes that while the Appellant deems that the FIFA DRC disrespected Article 17 RSTP in refusing to apply Article 10 (4) of the Contract, it does not challenge as such the calculation of the compensation due. In particular, there are no remarks regarding the calculation of the salary paid to the Player by his new club, CA Bizertin.

84. Furthermore, it is undisputed that the monthly salary for September 2019 in the amount of USD 7,000 had not been paid at the time the Contract was unilaterally terminated and that said sum is therefore owed by the Appellant.

85. The Parties have further agreed during the proceedings that the certified English translation of the Contract, submitted by the Appellant on 20 October 2020, is accurate and shall be considered by the Sole Arbitrator. For the sake of completeness, 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).

86. The dispute is therefore limited to the question of the amount of the compensation for the premature unilateral termination of the Contract owed by the Appellant. There is a disagreement between the Parties 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.

87. The following two questions are thus to be addressed by the Sole Arbitrator:

    a. *Is the compensation clause in Article 10 of the Contract (signed on 20 July 2019) valid?*

    b. *If not, what would be the fair compensation for the breach of the Contract?*

    The Sole Arbitrator will consider these two issues in turn.

a) Is the compensation clause in Article 10 of the Contract (signed on 20 July 2019) valid?

88. Article 17 RSTP, applicable to the dispute at hand, provides guidance as to what effect a party breaching a contract without just cause can have. At the same time, Article 17 RSTP is not applicable at all times.

89. The Sole Arbitrator agrees with the Appellant that Article 17 RSTP itself provides for the primacy of contractual clauses regarding the calculation for compensation for breach of contract. In other words, the various parameters set out in Article 17 (1) RSTP apply only subsidiarily. Any agreement of the parties in this regard is to be considered first (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, in general, the will and the intention of the Parties must be respected.

90. According to CAS jurisprudence, the wording of such clauses 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 & CAS 2008/A/1520, para. 68).

91. As correctly observed by the Appellant, Article 10 of the Contract provides a clause dealing with the consequences of a unilateral termination by one Party ("Termination by the Club or the Player"). The English translation submitted on 20 October 2020 and agreed on by both Parties, states as follows:

    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: Ten thousand dollars.*

5. *If the Player terminates the Contract without having just cause, the Player shall pay to the Club compensation equal to the total amount: Hundred thousand dollars.*

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.*

92. Article 10 (4) and (5) of the Contract thus provide for compensation in two different scenarios. In case of an unjustified termination by the Club, the Player would be entitled to a compensation in the amount of USD 10,000. In case of an unjustified termination by the Player, the Club would be granted a compensation in the amount of USD 100,000.

93. As stated above, parties to a contract of employment are free to stipulate a liquidated damages clause that shall apply in case of breach of contract and/or a unilateral termination of the contract. However, in order to be valid, CAS jurisprudence has set out criteria that must be met. For example, the reciprocal obligations set forth shall not disproportionately favour one of the parties and give it an undue control over the other party. Such clauses are considered incompatible with the general principles of contractual stability and are therefore null and void (see e.g. CAS 2016/A/4605).

94. Therefore, the Sole Arbitrator shall assess whether Article 10 (4) of the Contract, which the Appellant relies on, violates any of those criteria.

95. In this context, the Sole Arbitrator observes that Article 10 (4) of the Contract is drafted as a unilateral clause. However, it must be read in the context of Article 10 (5) of the Contract. Paragraph 5 of said article stipulates that, should it be the Player that was guilty of a groundless termination, the Club would be entitled to compensation as well. However, the Sole Arbitrator observes and agrees with the FIFA DRC, that the penalty for the Player would, compared to the penalty for the Club, be ten times higher according to these provisions. The compensation set-up in case of unilateral termination of the contract thus disproportionately favours the Appellant. Article 10 (4) of the Contract is, even read in conjunction with paragraph 5, unilateral in nature and solely for the benefit of the Club. The provision is unbalanced and burdensome to the Player.

96. That Article 10 (4) of the Contract is drafted in an unfair way also becomes clear, when comparing the amount of compensation that the Respondent would be entitled to according to the compensation clause, to the amount of compensation that would result from the application of Article 17 (1) RSTP, as will be discussed shortly.

97. The Sole Arbitrator agrees with the Appellant that the Parties explicitly agreed in Article 10 (6) of the Contract, that paragraphs 4 and 5 of Article 10 of the Contract are to be considered as fair and respecting the principles of parity and reciprocity. At the same time, the Sole Arbitrator notes that 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, without any amendments made by the Player. Thus, even though the Parties have stated otherwise, Article 10 (4) is not fair and does not comply with the principles of parity and reciprocity.

98. This leads to no contradiction to 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.

99. The Sole Arbitrator therefore confirms the assessment of the FIFA DRC in the Appealed Decision and considers Article 10 (4) to be null and void.

b) What would the fair compensation for the breach of Contract be?

100. If there is no valid contractual clause in this regard, 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 (1) RSTP. In particular, the principle of *"positive interest"* applies, 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).

101. The Sole Arbitrator notes that according to long-standing CAS jurisprudence, the criteria set out in Article 17 (1) RSTP are to be considered as a non-exhaustive list. The judging authority has therefore a 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).

102. According to the calculations of the FIFA DRC, the residual amount of the Contract, which was to run until 19 July 2020, was USD 89,000. This corresponds to seven monthly salaries in the total amount of USD 49,000, plus an amount of USD 17,000.00 payable on 20 January 2020 and USD 23,000 payable on 20 July 2020. Thus, said amount was considered to serve as the basis for of compensation for breach of contract.

103. The Sole Arbitrator notes that the Appellant objected to a calculation based on Article 17 (1) RSTP and to the amount of the compensation due. Furthermore, the Sole Arbitrator notes that the calculation of the residual amount of the Contract for the relevant period corresponds to what is stipulated in the Contract. The sign-on fee of USD 50,000 had undisputedly been paid.

Of the ten monthly payments owed under the contract, two had been paid (July and August 2019, in the amount of USD 14,000) and one (September 2019, USD 7,000) had been acknowledged as outstanding remuneration by the Appellant. Thus, the residual amount of the total stipulated in the Contract (USD 160,000, see Article 1 of the Schedule 1) corresponds to seven monthly payments as well as the amounts to be paid on 20 January 2020 as well as on 20 July 2020, i.e. USD 89,000.

104. The Sole Arbitrator therefore agrees with the assessment made by the FIFA DRC and concludes that the fair compensation owed, in principle, would amount to USD 89,000.

105. The Sole Arbitrator further notes in this context that the Respondent has limited his request for compensation to the amount of USD 89,000 even in the proceedings before CAS. In particular, no interest was claimed.

106. In this context the Sole Arbitrator observes 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).

107. In the Appealed Decision, the FIFA DRC then applied further criteria set out in Article 17 (1) RSTP and assessed whether the Appellant had signed an employment contract with another club during the relevant period of time, by means of which he was enabled to reduce his loss of income. It noted that the Player had indeed entered into an employment agreement with CA Bizertin, valid as from 30 January 2020 until 30 June 2021. The FIFA DRC observed that, according to said new employment contract, the Respondent would be entitled to a monthly salary of TND 2,000 (corresponding approximately USD 694.00).

108. The Sole Arbitrator notes that this has not been disputed by any Party in the present proceedings. He therefore concurs with the FIFA DRC that, for the remaining contractual period of the Contract, initially supposed to be running until 19 July 2020, the Player earned USD 694 per month, as of 30 January 2020.

109. The Sole Arbitrator notes that the FIFA DRC calculated that the total amount of USD 3,470 (five monthly salaries of USD 694 each) shall be deducted from the basis of the payable compensation. As this sum has not been disputed by either Party, it can be left open, whether it should not indeed have been four monthly and a 19-day salary that should have been deducted from the compensation of USD 89,000.

110. Therefore, the Sole Arbitrator concludes the same as the FIFA DRC. The compensation of USD 85,530 for breach of contract, to be paid by the Appellant to the Player, is the reasonable and proportionate compensation owed to the Player, as it complies with the criteria set out in Article 17 (1) RSTP.

C. Further Arguments of the Appellant

111. For the sake of completeness, the Sole Arbitrator also assesses the other "prayers for relief" submitted by the Appellant, while noting that the Appellant's claims set out in lit. b-d are, in fact, to be considered rather as legal arguments than as prayers for relief.

112. The Appellant first argues that the Player's behaviour before the FIFA DRC should have been taken into account as he did not act in good faith and did not tell the truth. According to the Appellant, that there was no legitimate reason for dealing with the claim to begin with.

113. The Sole Arbitrator observes that these accusations are general and unsubstantiated in nature and can therefore not be considered. The Appellant fails to substantiate and demonstrate how the Appealed Decision should have violated Article 5 (2) – (4) of the Procedural Rules. The Appellant does not show what impact the alleged behaviour of the Respondent had on the outcome of the proceedings. In the context of the allegation that there was a lack of legitimate reasons for dealing with the claim, the Appellant does not substantiate such assertion with any particular reasons. One of the missions of the FIFA DRC is specially to deal with claims relating to the termination of employment contracts with an international dimension. This unsubstantiated argument must therefore be disregarded.

114. Furthermore, the Appellant submits that the Respondent had violated the principle of *"pacta sunt servanda"*. However, the Sole Arbitrator notes that the Appellant does not substantiate this general allegation at all. In particular, it does not demonstrate in which way the Respondent violated said principle, as it was the Appellant himself who unilaterally and prematurely terminated the Contract.

115. Finally, the Appellant argues that it is not liable for the compensation as no fault can be attributed to him. 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 (1), 97 (1) and 119 SCO. Even if one were to assume that the Appellant struggled with the payment of a compensation in the past due to practical difficulties, he would only have paid the Player the acknowledged USD 19,333, which is – as set out above – not the total amount of compensation owed. Furthermore, the Respondent has never waived his right to compensation, which is why these arguments need to be discarded.

D. Conclusion

116. In light of the foregoing, the Sole Arbitrator is satisfied that a compensation of USD 85,530 is reasonable and proportionate which is why the Appealed Decision is to be confirmed.

117. The Appeal is thus to be dismissed in its entirety.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al Hilal Khartoum Club on 15 June 2020 against the decision of the FIFA Dispute Resolution Chamber Judge of 15 April 2020 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber Judge on 15 April 2020 is confirmed.

3. (…).

4. (…).

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