



**Arbitration CAS 2014/A/3852 Ascoli Calcio 1898 S.p.A v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club, award of 11 January 2016**

Panel: Mr José María Alonso Puig (Spain), President; Mr Michele Bernasconi (Switzerland); Mr Jirayr Habibian (Lebanon)

*Football*

*Termination of the employment contract without just cause*

*CAS jurisdiction*

*Validity of a unilateral option clause*

*Liability under Article 17.2 RSTP*

*Criteria to be taken into consideration when calculating the compensation*

*Request for sporting sanctions*

1. To initiate proceedings with the FIFA Dispute Resolution Chamber (“DRC”), a club or player has to be a valid member of FIFA. However, this test, whether a player or a club are members of FIFA, must only be done at the time of determining the DRC’s jurisdiction, and not CAS’ jurisdiction. Put differently, once a proceeding is initiated, a party does not lose *per se* the subsequent right to appeal before CAS, as recognized in the FIFA Statutes, for loss of its FIFA membership, provided such appealing party has an interest worthy of protection.
2. Unilateral clauses for the extension of contracts could interfere with a party’s fundamental freedom of movement. However, these clauses are not invalid *per se*: on the contrary, a case-by-case assessment must be carried out in order to determine the validity of specific clauses. Two main issues should be considered when analysing the initial validity of an unilateral option: whether the total duration of the contractual relationship is reasonable and according with the applicable regulations; and whether the ensuing terms and conditions of employment are fair and adequately reflect the right that the player has granted to the club without the need of further negotiation.
3. Liability under article 17.2 RSTP is of an objective nature and does not require that the new club be considered as instigator of the player’s breach. As long as a club can be identified as the “new club” of the player, joint liability can be established.
4. The criteria established in article 17 of the RSTP are not the sole criteria to be taken into consideration when calculating the amount of compensation. Other relevant criteria, on a case-by-case basis, may be found, such as evidence that opportunities for a transfer are envisaged or indicative amounts showing the value attributed by the club to the services of the player.
5. Sporting sanctions are decisions inherent to FIFA and its relationship with its members.

**As a consequence, an Appellant that requests that the CAS impose sporting sanctions not imposed by FIFA must call FIFA as a respondent to the proceedings. Failure to call FIFA as a respondent impedes CAS from entering into the matter. In fact, for such a request for imposing a sanction, neither a club nor a player have standing to be sued: only FIFA has it.**

## **I. PARTIES**

### **A. Appellant: Ascoli Calcio 1898 Spa**

1. Ascoli Calcio 1898 SpA (hereinafter, the “Appellant” or “Ascoli”) is an Italian football club based in the city of Ascoli Piceno. It is currently under bankruptcy proceedings.

### **B. First Respondent: Papa Waigo N'diaye**

2. Papa Waigo N'diaye (hereinafter, the “First Respondent” or the “Player”) is a Senegalese international football player.

### **C. Second Respondent: Al Wahda Sports and Cultural Club**

3. Al Wahda Sport Cultural Club (hereinafter, the “Second Respondent” or “Al Wahda”) is a football club based in Abu Dhabi, United Arab Emirates.
4. The Appellant and both Respondents are referred to collectively as the “Parties”.

## **II. FACTUAL BACKGROUND**

5. On 9 August 2011, Ascoli and the Player signed an employment agreement (hereinafter, the “Contract”), valid as from the date of signature until 30 June 2012.
6. Pursuant to clause 2 of the Contract, *“the player grants to the club a right of option to extend this agreement up to 30/06/2014 - right to be exercised via certified mail with return receipt to be send to both the player and the Serie B League within the 25/06/2012”*.
7. That same clause 2 provides the remuneration due to the Player, pursuant to which:
  - a) For season 2011/2012, the Player would receive EUR 90,000 net;
  - b) For season 2012/2013 and 2013/2014 (i.e. if Ascoli exercised the option), the Player would receive EUR 240,000 net if Ascoli played in the Serie B or EUR 490,000 if Ascoli played in the Italian Serie A;
  - c) In both cases, the Player was also entitled to receive EUR 10,000 for travel benefits and a variable bonus depending on the number of goals scored by him.

8. At the end of season 2011/2012, the Player had scored 15 goals and Ascoli remained in the Italian Serie B. For 15 goals, the Player was entitled to receive a EUR 50,000 bonus, net.
9. On 30 May 2012, Ascoli sent a letter to the Player, exercising its right of option. The letter sent by Ascoli could not be delivered to the Player as, apparently, he had changed domicile.
10. Ascoli holds that in any case the Player signed receipt of the exercise of the option by Ascoli in Ascoli's office. The Player denies this and states that the signature affixed to it is not his.
11. On 7 July 2012, the Player signed a new employment contract with Al Wahda.
12. When the United Arab Emirates Football Association ("UAEFA") requested the Player's international transfer certificate from the Italian Football Federation (Federazione Italiana Giuoco Calcio "FIGC"), the FIGC denied the transfer, as the Player appeared to be duly registered with Ascoli, following its exercise of the right of option.
13. On 31 July 2012, the Fédération Internationale de Football Association ("FIFA") contacted the FIGC asking whether it insisted on rejecting the international transfer certificate. As the FIGC failed to respond despite numerous attempts by FIFA, the matter was submitted to the FIFA Single Judge of the Players' Status Committee (hereinafter, the "FIFA Single Judge"). On 14 August 2012, the FIFA Single Judge issued his decision to allow the provisional registration of the Player with Al Wahda.
14. On 16 May 2013, Ascoli filed a claim before the FIFA Dispute Resolution Chamber ("DRC") against the Player and Al Wahda, for breach of contract. The Player, in response, filed a counterclaim, requesting payment for due salaries and the goal bonus owed by Ascoli, totalling EUR 66,788.42.
15. On 17 December 2013, Ascoli entered into bankruptcy proceedings and was declared bankrupt by the Court of Ascoli Piceno.
16. On 25 April 2014, the DRC issued the decision under appeal, the grounds of which were notified to the Parties on 21 November 2014 (the "Appealed Decision"). Pursuant to the Appealed Decision:
  1. *The claim of the Claimant/ Counter-Respondent [Ascoli] is rejected.*
  2. *The claim of the Respondent 1/ Counter-Claimant [the Player] is partially accepted.*
  3. *The Claimant/ Counter-Respondent has to pay to the Respondent 1/ Counter-Claimant within 30 days as from the date of notification of this decision the amount of EUR 57,500 plus 5% interest p.a. on said amount from 21 July 2012 until the date of effective payment.*
  4. *In the event that the abovementioned amount plus interests is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

5. *Any further claim lodged by the Respondent 1/Counter-Claimant is rejected.*
6. *The Respondent 1/Counter-Claimant is directed to inform the Claimant/Counter-Respondent immediately and directly of the account number to which the remittances are to be made and to notify the Dispute Resolution Chamber of every payment received.*

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

17. On 12 December 2014, Ascoli filed a Statement of Appeal before the Court of Arbitration for Sport (“CAS”) against the Appealed Decision.
18. On 15 December 2014, CAS invited FIFA to participate in the proceedings.
19. On 21 December 2014, Al Wahda informed CAS that it did not consider itself to be implicated in this dispute, as it had signed a contract with the Player with the understanding that the Player was a free agent. It thus requested CAS to disregard it as a party to these proceedings. In any case, Al Wahda requested that a hearing be held in Abu Dhabi and agreed with the nomination of an arbitrator by the Player. On 24 December 2014, the CAS requested that Al Wahda file a formal request to be excluded from the procedure, which would be dealt with upon receipt.
20. On 22 December 2014, Ascoli filed its Appeal Brief.
21. On 26 December 2014, the First Respondent requested that a hearing be held in Abu Dhabi.
22. On 9 January 2015, FIFA informed the CAS that it did not intend to be a party to these proceedings. However, it also informed CAS that only FIFA had standing regarding the hypothetical imposition of sporting sanctions.
23. On 18 January 2015, the Player filed his Answer.
24. On 2 February 2015, the CAS informed the Parties of the formation of the Panel, seating in the following composition:  
  
President: Mr. José María Alonso Puig, Attorney-at-law in Madrid, Spain  
  
Arbitrators: Mr. Michele A. R. Bernasconi, Attorney-at-law in Zurich, Switzerland  
                  Mr. Jirayr Habibian, Attorney-at-law in Dubai, United Arab Emirates
25. On 2 February 2015, considering that the Player raised certain objections to the jurisdiction of CAS, the Appellant filed its submission on jurisdiction.
26. On 3 February 2015, Al Wahda informed CAS that it did not intend to be a part to these proceedings and enclosed its defense to the case as submitted to the DRC. The CAS informed Al Wahda that, unless the Appellant accepted Al Wahda’s letter, Al Wahda’s submission would be deemed inadmissible.

27. On 9 February 2015, Al Wahda requested that the CAS reconsider its decision on the admissibility of the letter, further informing CAS that it wished a hearing to be held.
28. On 10 February 2015, the Player informed the CAS that it wished a hearing to be held.
29. On 27 February 2015, the CAS informed the Parties that the Panel had decided that:
  - a) Pursuant to Article R55 of the Code of Sports-related Arbitration (the “CAS Code”), the Panel would rule on jurisdiction in the final award;
  - b) A hearing would be held in Lausanne, Switzerland;
  - c) An independent expert would be appointed, as requested by the Appellant, to determine whether the signature mentioned at paragraph 10 above was the Player’s. The decision regarding who would bear the costs of the expert would be done in the final award;
  - d) The Second Respondent’s letter of 3 February 2015 was accepted into the file.
30. On 10 March 2015, in order to advance in the assignment to the expert, the Parties were requested to present original samples of the Player’s signatures, for the expert’s perusal. On 13 March 2015, the Appellant informed CAS of the filing of the original documentation requested. On 18 March 2015, the Player filed additional documentation. On 8 April 2015, the CAS requested that the documentation presented be filed in its original form. On 13 April 2015, the Player filed the required documentation.
31. On 14 April 2015, the CAS appointed Mr. Christian Jaccard as an independent expert, to determine whether the Player’s signature affixed to Exhibit n° 3 of the Appeal Brief was, or not, that of the Player. On that same day, the CAS informed the Parties of this appointment.
32. On 22 April 2015, the CAS sent to the Parties the expert’s acceptance and statement of independence. No objection was raised against the appointment of the expert.
33. On 1 July 2015, the CAS sent to the Parties the expert report of Mr. Christian Jaccard. Mr. Jaccard concluded that the signature affixed to Exhibit n° 3 of the Appeal Brief was not the Player’s.
34. On 13 July 2015, the CAS confirmed that the hearing would be held at the CAS Headquarters in Lausanne, on 10 February 2015.
35. On 21 July 2015, the CAS sent to the Parties the Order of Procedure, for their signature. On 3 August 2015, the First Respondent returned the Order of Procedure signed by him. On 4 August 2015, the Appellant sent to CAS its signed copy of the Order of Procedure.
36. On 5 August 2015, the Second Respondent informed the CAS that it would not be attending the hearing, filing a witness statement instead, signed by Mr. Essam Mohamed Ali, Executive Director. On that same date, the Second Respondent sent to CAS its signed copy of the Order of Procedure.

37. On 10 September 2015, a hearing was held at the CAS Headquarters in Lausanne, Switzerland. The Appellant and the First Respondent attended the hearing, duly represented. They confirmed that they had no objection as to the composition of the Panel. The witnesses proposed by the Parties were heard and each party had the possibility of questioning the witnesses. The expert, Mr. Christian Jaccard, was also heard by telephone conference. At the end of the hearing, the Appellant and the First Respondent confirmed that their rights to be heard and to be treated equally had been respected.

#### IV. THE PARTIES' SUBMISSIONS AND PRAYERS FOR RELIEF

##### A. Appellant: Ascoli Calcio 1898 Spa

###### 1. Jurisdiction of the CAS

38. The Appellant invokes Article 67 of the FIFA Statutes (2013 edition), and Article R47 of the CAS Code to recognize the jurisdiction of the CAS over this dispute.

39. In response to the Player's objection to jurisdiction, the Appellant holds that:

- a) Although currently under bankruptcy, Ascoli is still a company duly incorporated under Italian law and can be the holder of rights and obligations;
- b) When Ascoli filed its claim against the Player before the DRC it was still affiliated to the FIGC and, therefore, had complete standing to present its case before the DRC;
- c) When submitting to the DRC, parties also accept the possibility that the decision be appealed before CAS. The FIFA Statutes provide in article 67.1 that decisions of the DRC can be appealed before CAS, without further conditions of any nature;
- d) That Ascoli was no longer affiliated to the FIGC at the time of the appeal before CAS is undisputed but is also irrelevant as that issue carries no weight on the fact that DRC decisions can be appealed before CAS without restrictions;
- e) It may be accepted that, as Ascoli is now outside the scope of FIFA, FIFA enforcement procedures for an eventual CAS award would not be available. However, other means of enforcement (e.g. voluntary compliance and via the judicial system) will still be available;
- f) To reject jurisdiction by CAS would be illogical from the standpoint of the FIFA dispute resolution system that provides for internal procedures and an external appeal to CAS. As the proceedings were validly initiated by Ascoli, it would be illogical and damaging to Ascoli that it loses its procedural right to appeal because of a disaffiliation that occurred in the meantime.

###### 2. Merits of the dispute

40. On 30 May 2012, Ascoli holds that it exercised its right of option to extend the duration of its contract with the Player until 30 June 2014. Having moved to Al Wahda in spite of this extension, the Appellant holds that the Player has breached the Contract.

41. The Club holds that the right of option was a unilateral right that, therefore, did not require acknowledgement or receipt by the Player. In any case:
  - a) On 30 May 2012, Ascoli sent the notice by registered mail with return receipt. Such notice apparently was not received because the Player had moved without any prior notice in breach of the Contract. The Contract provided for a specific contractual domicile, which the Player changed without notifying Ascoli (as the Contract required);
  - b) On the same date, the Player signed the notice, acknowledging receipt of Ascoli's exercise of the option;
  - c) On 9 July 2012, the Player's agent sent an e-mail to Ascoli in order to negotiate his release. At the time, the Player had, apparently, already signed his contract with Al Wahda and was, nonetheless, negotiating with Ascoli to liberate him;
  - d) On 22 July 2012 the Player gave an interview to Mr. Valerio Rosa where he confirmed that he was "*bound with the club till 2014, with no chance to do anything*" even though he pretended to move due to personal issues.
42. There can therefore be no doubt that, according to the Appellant, on 7 July 2012, when he signed for Al Wahda, the Player was bound to Ascoli until June 2014.
43. As during the FIFA proceedings the Player has argued that the option clause is null and void as it compromises the equal treatment of the parties to the employment contract, Ascoli addresses the issue. First, it states that the Player has expressly accepted the exercise of the right of option by Ascoli by signing the Notice and cannot now raise unfounded allegations. Furthermore, the option provided for a substantial increase of the annual remuneration due to the Player starting from the first year after the exercise of the right of option.
44. Pursuant to CAS case law, unilateral options are not automatically null and void but must be assessed considering the circumstances of the case. Particular note is given to whether a player explicitly accepts the exercise of the option by the club and the terms of employment after the option (i.e. if the terms are fair, containing a predetermined increase in salary), as happens in this case.
45. Following on the above, as Ascoli exercised a valid option for the extension of the Contract, when the Player signed with Al Wahda, he unilaterally terminated the Contract without just cause. The Player has argued that he had not received three monthly instalments of his fixed remuneration and bonuses for EUR 50,000 related to the number of goals scored during the season. However, according to article 5 of the collective bargaining agreement "*the fixed remuneration shall be paid in deferred monthly instalments of equal amount, each of them with the 20th day of the following month [...]*" and bonuses were due on 20 July 2012.
46. The Club holds that payments due for April and May 2012 were transferred to the Player on 4 June and 6 July 2012, respectively. Regarding bonuses and the June 2012 salary, they were due to be paid on 20 July 2012 but, as the Player signed with Al Wahda, Ascoli was entitled not to pay as the Player was in breach of his obligations.

47. Ascoli thus holds that a breach of contract, induced by Al Wahda, has occurred. As a consequence, compensation under article 17.2 of the FIFA Regulations on the Status and Transfer of Players (the “RSTP”) is due. Consideration must be given, according to the Appellant, to the fact that the breach occurred during the protected period, as only one year of contractual relationship had elapsed.
48. Ascoli understands that, in order to determine the amount of compensation, several of the criteria established in article 17 RSTP have to be taken into account:
- a) The remunerations due to the Player under the Contract were equal to EUR 500,000 (EUR 250,000 per year for the two seasons 2012/2013 and 2013/2014), while the new contract between the Player and Al Wahda provided for an overall remuneration (for the two seasons) of USD 1,800,000.
  - b) The costs sustained by Ascoli to replace the Player following his unilateral termination of the Contract, amount to EUR 213.500 per season, for an overall amount of EUR 427,000.
  - c) Ascoli suffered a considerable loss in its capabilities, that led to the relegation to the lower division and then to the bankruptcy of the club due to less funds being available.
  - d) The compensation due should be net of the amount that Ascoli has saved in the Player’s salary.
  - e) The amounts should be increased on the basis of “specificity of sport” and the fact that the breach occurred during the protected period.
49. As a consequence of the above, Ascoli claims compensation for EUR 1,500,000.
50. Additionally, considering that the breach happened during the protected period and that, according to the Club, the breach was instigated by Al Wahda, Ascoli is requesting the imposition of sporting sanctions on both the Player and Al Wahda.

### 3. Prayers for relief

51. The Appellant thus requests that the CAS rules that:
1. *The appeal of Ascoli is admissible;*
  2. *The decision of the DRC of 25 April 2014 is set aside;*
  - 3.1 *Both the Player and Al Wahda are condemned, jointly and severally, to pay Ascoli compensation of € 1,500,000 plus a 5% interest rate per annum since the date when the Player terminated the Contract without just cause; or alternatively.*
  - 3.2 *Both the Player and Al Wahda are condemned, jointly and severally, to pay Ascoli compensation in the amount that the CAS deems appropriate;*
  4. *Impose on the Player the sporting sanction of six month restriction on playing in official matches, because the breach of the contract with Ascoli that occurred during the protected period;*



5. *Impose on Al Wahda the sporting sanction of the ban from registering new players, both nationally and internationally, for two entire and consecutive registration periods;*
6. *Condemn the Player and Al Wahda, jointly and severally, to support the entire procedural costs and to reimburse Ascoli its own fees and expenses related to procedural costs and to reimburse Ascoli its own fees and expenses related to both these proceedings and the proceedings before the DRC in the amount of € 30,000.*

## **B. First Respondent: Papa Waigo N'diaye**

### **1. CAS jurisdiction**

52. On a preliminary basis, the First Respondent objects to CAS jurisdiction, as the Appellant's membership to the FIGC has been revoked.
53. As a consequence of having its membership to the FIGC revoked, the Appellant is no longer a valid member of FIFA and cannot, therefore, resort to CAS to appeal against FIFA decisions. Article 62.1 of the FIFA Statutes exclusively enumerates the parties that can be part to disputes as far as FIFA is concerned: *"FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed march agents and player's agents"*.
54. As the Appellant is no longer a club affiliated to the FIGC (and therefore, to FIFA) it has no standing to raise an appeal against a decision of a FIFA body. The Appellant is a company under bankruptcy with no affiliation to any football body so it would be unconceivable that it would have access to a sports arbitration court.

### **2. Merits of the dispute**

55. The Player firstly notes that he has not accepted the extension of the Agreement beyond 30 June 2012; he was not duly notified of the exercise of the option by the Appellant nor has he given his consent in any way or form to the validity of the renewal in compliance with clause 2 of the Contract. Further, he claims that he has not signed any document acknowledging receipt of the option as claimed by the Appellant. The signature affixed to the notice is not his.
56. The option, as regulated by the Parties in the Contract, was conditional upon effective notification by the Appellant of the exercise of its right. As this notification was not carried out, the option was not validly exercised.
57. In any case, the unilateral option for the extension of the duration of the Contract was invalid as it limited the Player's freedom in an excessive manner. In this regard, the DRC and CAS have explicitly stated that unilateral options that have not been explicitly accepted by the Player cannot be taken into consideration. An option that gives a unilateral (i.e. not reciprocal) right to extend the duration of a contract to a club must, in principle, be held to be invalid.

58. Should the Panel consider that it has jurisdiction and that the extension of the Contract via the option was valid, the Player holds that it had just cause to terminate the Contract pursuant to article 14 RSTP. Indeed, on June 2012 the Club had not paid the Player's monthly salaries for April and May 2012 nor the bonuses to which he was entitled and that formed a substantial portion of his salary. The Club only paid the April and May 2012 salaries (not June nor bonuses) in July 2012, when the dispute had already been escalated and was under discussion.
59. Furthermore, the Player holds that it is evident that the Appellant had no interest in retaining his services but merely intended to obtain an economical gain. This can be seen from the fact that (i) the Club hired an agent to try to transfer the Player in the Middle East; and (ii) the Club failed to answer all the requests by the Single Judge of FIFA when Al Wahda asked for the Player's international transfer certificate.
60. Following on the above, the Player holds that Ascoli's claim shall be rejected in its entirety.

3. Prayers for relief

61. The First Respondent thus requests that the CAS issue an award:

1. *Dismissing the Current Appeal for Lack of Jurisdiction; Otherwise in case the Panel established its jurisdiction to:*
2. *Confirm the outcome of the decision of the DRC dated April 25 2014; and*
3. *Dismiss all the prayers for relief brought forward by the Appellant due to the following:*
  - *Respondent 1 was not duly notified of the renewal option.*
  - *Respondent 1 never signed on any document that would lead to the extension of the Agreement by virtue of the exercise of the Option to Renew*
  - *The non validity of the Unilateral Option to renew as per CAS and DRC established Jurisprudence*
  - *There is no breach of Art 17 of FIFA RSTP by Respondent 1*
  - *The Agreement was terminated in compliance with art 14 of the RSTP*
4. *Subsequently, to bound the Appellant to pay Respondent 1 the amounts awarded by virtue of the DRC decision of April 25 2014.*
5. *Finally to have the Appellant bear all legal costs associated with this case suffered by the Respondent 1 including attorney fees.*
6. *Ordering the Appellant to pay the arbitration costs in full.*

**C. Second Respondent: Al Wahda Sports and Cultural Club**

62. The Second Respondent has filed a response, stating that it should not be held responsible as it was not a party to the relationship between the Player and Ascoli. In any case, it holds that when

it signed its contract with the Player, the latter was a free agent. As a consequence, Al Wahda holds that it cannot be held liable for any breach, requesting that the Panel:

- a. Consider Al Wahda as not being part of these proceedings; ultimately
- b. Consider the Agreement between the Player and Ascoli ended on the 30th of June 2012
- c. Consider the Player when he approached Al Wahda as a free agent.

Accordingly Al Wahda requests that:

- a. The claims submitted by Ascoli be rejected for it being unfounded as exposed above namely:
  - There is no breach of art. 17 of the Regulation by Al Wahda
  - Al Wahda contracted with a free agent player (*bona fide*).

## V. CAS JURISDICTION

63. Pursuant to Article 47 of the CAS Code:

*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.*

64. Article 66.1 of the FIFA Statutes provides that:

*FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials, intermediaries and licensed match agents.*

65. Pursuant to article 67 of the same:

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

66. In principle, there is no issue on the fact that the Appealed Decision can be subject to appeal before the CAS, as decisions of the DRC are appealable.

67. The First Respondent, however, holds that having lost its status as an associated club to the FIGC, the Appellant is no longer a member of FIFA and cannot, therefore, obtain the benefit of appealing against a FIFA decision before the CAS, granted by the FIFA Statutes only to its members.

68. The Panel finds that the First Respondent's objections to jurisdiction are not grounded and must, therefore, be dismissed for the reasons set below.

69. The following facts appear uncontested in these proceedings:

- a) On 16 May 2013, the Appellant filed a claim before the DRC, against the First and Second Respondents;
  - b) At that time, the Appellant had not yet entered into bankruptcy and was a full member of the FIGC and, thus, of FIFA;
  - c) Pending the DRC proceedings, on 17 December 2013, the Appellant's bankruptcy proceedings were initiated and Appellant was subsequently excluded as a member of the FIGC;
  - d) The Appellant's bankruptcy was communicated to the DRC;
  - e) On 25 April 2014, the DRC issued its decision, the grounds of which were communicated to the Parties on 21 November 2014.
70. Article 24.2 *in fine* of the RSTP provides that:
- Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS).*
71. It is evident that the DRC's decisions are appealable by the parties of the corresponding proceedings. Neither the FIFA Statutes nor the RSTP require specific qualifications to file the appeal. A specific redress against DRC decisions is provided to the parties of said proceedings without requiring anything else.
72. To initiate DRC proceedings, it can be accepted that a club or player has to be a valid member of FIFA. However, this test, whether a player or a club are members of FIFA, must only be done at the time of determining the DRC's jurisdiction and not CAS' jurisdiction. For parties that participate in a procedure before the DRC, the FIFA Statutes and RSTP provide a right to appeal the decision of FIFA to the CAS. Consent to arbitration before CAS is therefore provided to all members of FIFA: and indeed, parties of a procedure before the DRC accept that pursuant to article 24 of the RSTP and article 66 of the FIFA Statutes, CAS is competent to hear appeals against the relevant decision.
73. To reject the right to appeal to a party that was a party before the DRC but, for whatever reason, has been excluded from FIFA, would mean to effectively eliminate the appeal procedure specifically established by FIFA in its Statutes and accepted by all FIFA members and parties submitting to the DRC. Absent specific wording in this regard, the Panel cannot interpret the FIFA Statutes to justify such an exclusion.
74. It must be noted that the Player's reference to article 62 of the FIFA Statutes is not applicable in this case, as article 62 exclusively refers to decisions taken by the FIFA Disciplinary Committee which, as is obvious, can only apply the FIFA Disciplinary Code to members of FIFA that are under its jurisdiction. This said, even in this case it could be easily argued that once a proceeding is initiated, a party does not lose per se the subsequent right to appeal before CAS, as recognized in the FIFA Statutes, for loss of its FIFA membership, provided such appealing party has an interest worthy of protection.

75. It follows that the CAS has jurisdiction to decide on the present dispute. Under Article R57 of the CAS Code, the Panel has the full power to review the facts and the law.

## **VI. ADMISSIBILITY**

76. Pursuant to article 67.1 of the FIFA Statutes:

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

77. The grounds of the Appealed Decision were notified to the Parties on 21 November 2014. The Appellant filed its Appeal on 12 December 2014, within the provided time limit.

78. It follows that the Appeal is admissible.

## **VII. APPLICABLE LAW**

79. Article R58 of the CAS Code provides the following:

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

80. Article 66 par. 2 of the FIFA Statutes provides that “[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

81. The Panel notes that the Parties have not chosen a specific applicable law. As a result, subject to the primacy of applicable FIFA’s regulations, Swiss law shall apply complementarily.

## **VIII. MERITS**

### **A. Validity of the option clause**

82. On a preliminary basis, the Panel must address the issue of whether the option clause contained in the Contract, allowing the Club to extend the duration of the Contract until June 2014, is valid under the applicable regulations and law.

83. Whilst the Player holds that it is invalid, as it limits his freedom of movement, Ascoli understands that pursuant to the applicable case law, the option is valid.

84. Firstly, the Panel notes that unilateral clauses for the extension of contracts tend to have their validity questioned because, as the Player states, they could interfere with a party’s fundamental freedom of movement. However, these clauses are not invalid per se: neither the RSTP nor any

case law provided by the Parties holds that unilateral clauses are invalid under all circumstances. On the contrary, a case-by-case assessment must be carried out in order to determine the validity of specific clauses. As stated in CAS 2013/A/3260:

*The Panel shares the views expressed in CAS 2005/A/973, which held that whether or not an extension clause is acceptable must be assessed on a case by case basis, with the deciding body having to not only look at the wordings of the said clause, but also at the factual background and circumstances which contributed to its insertion, in particular the parties' attitude during the negotiations and the performance of the Employment Agreement.*

85. In this regard, for example, the panel in case CAS 2013/A/3260 held that several elements should be taken into consideration:

*Looking at the FIFA DRC jurisprudence, it is apparent that in order to determine whether or not a unilateral extension clause is valid, the following elements have been taken into consideration:*

- 1. The potential maximal duration of the labour relationship should not be excessive;*
- 2. The option should be exercised within an acceptable deadline before the expiry of the current contract;*
- 3. The salary reward deriving from the option right should be defined in the original contract;*
- 4. One party should not be at the mercy of the other party with regard to the contents of the employment contract;*
- 5. The option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract;*
- 6. The extension period should be proportional to the main contract; and*
- 7. It would be advisable to limit the number of extension options to one.*

86. The Panel considers that these criteria may be taken into consideration and are important, but that they are not absolute rules, the failure of which would determine the absolute invalidity of the option clause. The overall circumstances of the underlying contract, and the parties' equilibrium in it, must be assessed. In the case at hand, the Panel does note that:

- a) The potential maximum duration of the Contract (3 years) is a reasonable duration for a contract, considering that the maximum duration of a contract pursuant to article 18 of the RSTP is 5 years;
- b) The option was exercised by Ascoli within the time frame provided in the Contract itself (if it is considered to be validly exercised, as it will be seen below). The moment of exercise was reasonable: the Player was still under contract with Ascoli and the exercise of the option granted him sufficient time to plan his upcoming season. In that time frame, for example, he managed to sign with Al Wahda;
- c) The Player's salary for upcoming seasons was clearly identified in the Contract;

- d) The content of the subsequent employment contract was clearly determined in the original Contract and, thus, Ascoli had no specific power over its determination;
- e) The option clause is clearly established in clause 2 of the Contract, in plain words that are easily understandable by any lay person;
- f) The two-year extension of the Contract, considering the overall duration of the extended contract can be understood to be reasonable, even if the original duration was for only one year;
- g) Only one extension is established in the Contract.

87. Apart from the above, special note must be given to the fact that, upon exercise of the option by Ascoli, the Player's fixed salary would have substantially increased from EUR 90,000 to EUR 240,000 in the case of Ascoli playing in Serie B (an increase of nearly three times the original salary) or EUR 490,000 in the case of Ascoli playing in Serie A (an increase of over five times the original salary). As stated by the panel in case CAS 2005/A/973:

*The Panel is of the opinion that the important remuneration increases linked to the extension of the Contract must be considered as the price paid to the Player in order for the Appellant to exert the options. In other words, the Player has been contractually rewarded with a substantial compensation in consideration of the right of unilateral extension given to the Appellant.*

88. Two main issues, in the Panel's opinion, should be considered when analysing the initial validity of an unilateral option: whether the total duration of the contractual relationship is reasonable and according with the applicable regulations; and whether the ensuing terms and conditions of employment are fair and adequately reflect the right that the player has granted to the club without the need of further negotiation. In this case, both requirements are amply met: (i) the total duration of the Contract is reasonable, remaining below the maximum duration allowed by the RSTP; and (ii) due consideration is given in the Contract to the granting of the right of option, leading to a substantial increase in the Player's remuneration.

89. As a consequence of the above, the Panel holds that the option granted to Ascoli by the Player is valid.

## **B. Exercise of the option by Ascoli**

90. Clause 2 of the Contract provides that *"the player grants to the club a right of option to extend this agreement up to 30/06/2014 -right to be exercised via certified mail with return receipt to both the player and the Serie B League within the 25/06/2012"*.

91. In order to deem the option clause to be validly executed, the Contract requires that:

- a) The option be exercised before 25 June 2012;
- b) The extension is sent to the Player by certified mail with return receipt; and
- c) The extension is sent to the Serie B League by certified mail with return receipt.

92. Fulfilment of requirements a) and c) appears undisputed: the exercise of the option was sent on 30 May 2012 and the FIGC duly acknowledged receipt of the same.
93. The only issue under discussion is whether the option clause was duly exercised *vis á vis* the Player, as he did not receive the notice sent on 30 May 2012. The Panel notes that it must disregard the notice allegedly signed by the Player at Ascoli's headquarters, as the independent expert, Mr. Christian Jaccard, concluded that the signature affixed to it was not the Player's.
94. On 30 May 2012, Ascoli sent the notice of exercise of option, with receipt mail, to the Player, at the address *Via Sirtori 14, 50100, Firenze*. The Player did not receive this notice, as he had apparently moved and no longer lived at that place.
95. The Panel, however, notes that, under the Contract:
- a) The Player was domiciled at Via Sirtori 14, 50100, Firenze (page 1 of the Contract);
  - b) Pursuant to clause 9: *"the club hereby elects domicile at its legal offices, while the player at the address indicated above, with the right of both parties to change such addresses by giving written notice to the other party. Any variation shall not be effective until its notification to the other party"*;
  - c) The Player has not provided any evidence that he notified Ascoli of any change in his address under the Contract. Although during the hearing the Player declared that both Ascoli and Ascoli's personnel knew of his change of location, no specific evidence has been filed before this Panel in this regard and, in particular, no evidence that the contractual requirements were met. Although of a formal nature, the Panel must uphold the importance given to this notification by the parties: the exercise of the option by Ascoli has to be done in a specific contractual manner and cannot be denied its right if, having correctly notified the option in the contractual manner, the Player has failed to adequately inform of a change of domicile.
96. As a consequence of the above, the Panel holds that the exercise of the option by Ascoli was in accordance with the Contract: by duly certified mail with return receipt, to the address provided in the Contract. The clause itself is unilateral and does not require the effective acceptance by the Player for its effectiveness. As long as the contractual requirements are duly met, the option must be deemed validly exercised.
97. The Panel must take note of the acknowledgement of receipt allegedly signed by the Player and filed by Ascoli in this case. Following an independent expert report requested by Ascoli itself, the Panel may conclude that the signature affixed to this acknowledgement was not the Player's, but rather affixed by someone else. The Panel strongly condemns this situation and has taken it into consideration when reaching its decision. However, the overall analysis of the evidence, even factoring this decision, leads the Panel to the understanding that the option was duly exercised under the contractual terms. Notwithstanding this, the filing of an apparently forged document and the fact that a significant amount of time and money were employed in an expert report confirming that it was forged shall be taken into account when deciding on costs.



98. The Panel further takes into consideration the fact that on 9 July 2012 (i.e. after the expiry of the original term of the Contract), the Player's agent was trying to negotiate a transfer for the Player to another club. It is evident from this that the extension option had been exercised and, at least, acknowledged by the Player.

**C. Was the Contract terminated by the Player with just cause?**

99. The Player holds that, even if the option was deemed to have been validly exercised, he terminated the Contract with just cause, as Ascoli owed him certain amounts for his salary and bonus.

100. In particular, the Player holds that Ascoli had not paid:

- a) The Player's salary from April to June 2012;
- b) The Player's bonus for the number of scored goals.

101. Regarding salaries for May and April 2012, the Panel, as the DRC did, considers that Ascoli has provided sufficient evidence to understand that they were effectively paid by Ascoli on 4 June 2012 and 6 July 2012, respectively. The Panel notes that, even though these two payments were delayed, under the circumstances of this case, in particular in lack of an explicit reminder, the Panel cannot consider this slight delay as justifying the termination of the Contract with just cause.

102. Regarding the June 2012 salary and the Player's bonus, it appears undisputed that they remained unpaid.

103. However, pursuant to article 5 of the collective bargaining agreement concluded between the FIGC, the Italian Serie B and the Italian Footballers association (the "Collective Agreement" - applicable to the Contract), provides that<sup>1</sup>:

*The fixed remuneration shall be paid in deferred monthly instalments of equal amount, each of them within the 20th day of the following month and cannot be unilaterally reduced or suspended, save when provided by this agreement. The variable remunerations shall be paid according to the terms and conditions provided for under this agreement or in the Supplementary Agreements. Without prejudice to any different arrangements between the parties, the variable remunerations accrued during the first half of the championship shall be paid together with the first monthly instalment that is due after the end of the first half of the championship; the variable remunerations accrued during the second half of the championship shall be paid together with the June monthly instalment.*

104. Following on the above, and absent any evidence by the Player that it accrued any of the bonus during the first half of the sporting season, both the June 2012 salary and the bonus for scored goals were due by 20 July 2012. The Player, however, signed his contract with Al Wahda on 7 July 2012. At that moment, no salaries were due to him from Ascoli.

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<sup>1</sup> Following the translation provided by the DRC: page 2 of the Appealed Decision.

105. Under the present circumstances, in particular the behaviour of the Parties and the lack of a reminder, the minor delay in the payment of two monthly instalments cannot be considered as sufficient just cause for the termination of the Contract by the Player. Furthermore, it must be noted that the June 2012 salary and bonuses were not even due and cannot, therefore, be taken into consideration.
106. As a consequence of the above, the termination of the Contract by the Player was without just cause and must, therefore, give rise to compensation.
107. Notwithstanding the above, even though at the time of termination of the Contract the payment of the June 2012 salary and the Player's bonus were not due, and the fact that the Player terminated the Contract without just cause, the Player is in any case entitled to receive the amounts corresponding to the same. The DRC found that this amount due was EUR 57,500. No party has contested this finding and, in any case, it is in conformity with the Contract.
108. The amount due to the Player by Ascoli, of EUR 57,500 shall be taken into consideration when calculating the total amount of compensation due.

#### **D. Al Wahda's liability**

109. Pursuant to article 17.2 of the RSTP:

*Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.*

110. As is generally admitted by CAS and by DRC case law, liability under article 17.2 RSTP is of an objective nature and does not require that the new club be considered as instigator of the player's breach. As long as a club can be identified as the "new club" of the player, joint liability can be established.
111. Pursuant to the definitions provided in the RSTP, the new club is "*the club that the player is joining*".
112. It is undisputed that Al Wahda was the club that the Player joined upon leaving Ascoli.
113. As a consequence of the above, Al Wahda is jointly and severally liable for payment of any compensation that is due following the Player's breach of the Contract.
114. The Panel wishes to note that this finding does not, in any way, mean that Al Wahda did not act *bona fide* or that it otherwise instigated the Player's breach. In fact, whether or not Al Wahda acted in such way is not a matter of the present dispute.

#### **E. Compensation**

115. Pursuant to article 17 of the RSTP:

*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.*

116. Ascoli requests payment of EUR 1,500,000 arising from:
- a) EUR 1,377,000 corresponding to the sum of the value of the contract between the Player and Al Wahda plus the costs sustained by Ascoli to replace the Player, minus the costs saved by Ascoli for the salary of the Player for two seasons; and
  - b) EUR 123,000 for sporting and financial damages, the Player's and Al Wahda unfair conduct, the specificity of sport and the fact that the breach occurred during the protected period.
117. The Panel notes that the criteria established in article 17 of the RSTP are not the sole criteria to be taken into consideration. Other relevant criteria, on a case-by-case basis, may be found. In this particular case, the Panel considers that two issues must be taken into consideration:
- a) Ascoli had, in fact, engaged a players' agent to search for opportunities to transfer the Player in the Middle East, thus showing that it did not intend to keep the Player; and
  - b) On 9 July 2012, as seen in the Player's agent's email of that date, Ascoli valued the services of the Player at EUR 500,000, being this the amount that it required to transfer the Player.
118. As a consequence of the above, considering the value of the Player's new contract (USD 1,800,000 for two seasons, even though the contract was terminated after the first season- EUR 1,450,000 according to Ascoli), the salary costs that Ascoli saved (over EUR 900,000 net for two years: two seasons at EUR 429,000 gross per season, plus EUR 10,000 per season as travel benefits, plus any bonus that the Player could have obtained for each season), the fact that Ascoli intended to transfer the Player and that at the time of the breach by the Player, Ascoli itself valued his services at EUR 500,000, the Panel holds that fair compensation can be set at EUR 500,000. This amount takes already into consideration also any and all salaries paid or not paid by Ascoli to the Player, so as namely the June 2012 salary and the Player's goal bonus.
119. The Panel thus holds that the Player shall pay EUR 500,000 to Ascoli. As seen above, Al Wahda is jointly and severally liable for payment pursuant to article 17.2 RSTP.
120. The above amounts shall carry interest of 5% per annum since the date of termination of the Contract until the date of effective payment as established in article 73 of the Swiss Code of Obligations.

## **F. Imposition of sporting sanctions**

121. Ascoli initially requested that, apart from monetary compensation, sporting sanctions be imposed on both the Player and Al Wahda. During the hearing, however, Ascoli informed the Panel that it no longer requested the imposition of any sporting sanctions.
122. In any case, as established in consistent CAS case law, sporting sanctions are decisions inherent to FIFA and its relationship with its members. As a consequence, an Appellant that requests that the CAS impose sporting sanctions not imposed by FIFA must call FIFA as a respondent to the proceedings. Failure to call FIFA as a respondent impedes CAS from entering into the matter. In fact, for such a request for imposing a sanction, neither a club nor a player have standing to be sued: only FIFA has it.

## **IX. CONCLUSION**

123. On the basis of the above, the Panel considers that:
- CAS has jurisdiction to hear this dispute;
  - The option clause contained in the Contract is valid;
  - Ascoli validly exercised its right of option;
  - The Player terminated the Contract without just cause;
  - Al Wahda, pursuant to article 17.2 of the RSTP is jointly and severally liable for any compensation due to Ascoli;
  - The Player and Al Wahda shall jointly and severally pay EUR 500,000 to Ascoli;
  - No sporting sanctions can or shall be imposed by CAS on the Player or on Al Wahda.
124. The Panel therefore concludes that the Appeal shall be partially upheld and the Appealed Decision shall be revised accordingly. Against this background, any other requests of the Parties shall be dismissed.

## **ON THESE GROUNDS**

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

1. The Appeal filed on 12 December 2014 by Ascoli Calcio 1898 SpA is partially upheld.
  2. The decision issued by the FIFA Dispute Resolution Chamber on 25 April 2014 is set aside.
  3. Papa Waigo N'diaye shall pay to Ascoli Calcio 1898 SpA an amount of EUR 500,000 plus 5% interest per annum from 7 July 2012 until the date of effective payment.
  4. Al Wahda Sports and Cultural Club is jointly and severally liable to pay the amount established in sec. 3. above to Ascoli Calcio 1898 SpA.
- (...)
8. All other motions or prayers for relief are dismissed.