Arbitration CAS 2017/A/4977 Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & Fédération Internationale de Football Association (FIFA), award of 4 February 2019

Panel: Mr Manfred Nan (The Netherlands), President; Prof. Petros Mavroidis (Greece); Mr Mark Hovell (United Kingdom)

Football
Joint and several liability to pay compensation for termination of contract without just cause
Independence of joint defendants
Legality of art. 17 para. 2 of the FIFA RSTP
Disapplication of art. 17 para. 2 of the FIFA RSTP on the basis of the specific circumstances of a case
Doctrine of the positive interest
Inapplicability of art. 17 para. 2 of the FIFA RSTP in case of lack of a jointly and severally liable club
Preservation of the principle of contractual stability in spite of a disapplication of art. 17 para. 2 of the FIFA RSTP

1. **The joint defendants remain independent from each other. The behavior of one of them, and in particular a withdrawal, a failure to appear or to appeal, is without influence upon the legal position of the others. As to the judgment to be issued, it may be different as to one of the joint defendants or the other. The independence of joint defendants will continue before the appeal body. A joint defendant may independently appeal the decision affecting him regardless of another's renouncing his right to appeal the same decision. Similarly, he will not have to worry about the appeals of the other joint defendants being maintained if he intends to withdraw his own. Among consequences, this means that the *res judicata* effect of the judgment concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendants. There are as many *res judicata* effects as couples of claimant/defendant, even if this could lead to contradictory outcomes.**

2. **Art. 17 para. 2 of the FIFA Regulations on the Status and Transfer of Players (RSTP) establishes between a professional player and his new club a joint liability with regard to the payment of compensation for termination of contract without just cause. This passive joint liability between the author of a contractual violation and the one who has profited from said violation is established irrespective of any involvement on the part of the latter in the contractual breach. Art. 17 para. 2 of the FIFA RSTP does not necessarily violate any fundamental principle of substantive law to the extent that it would no longer be compatible with the juridical order and the system of decisive values. The alleged excessive nature of such joint liability imposed on the new club is equally not proven.**

3. **In order to validly apply art. 17 para. 2 of the FIFA RSTP, one of the justifications set forth for an application of its automatic joint liability should be present. Such justifications traditionally consist of the following: to create an additional guarantee in relation to the payment of the professional player's former club; to relieve the financial**

and sportive burden placed on such player so as not to hinder his football career; to prevent said player's new club unjust enrichment; to preserve contractual stability; to avoid evidentiary difficulties; to compensate the professional player's former club's damage. Faced with a specific case where none of such justifications is present, said case is to be distinguished from the cases of player's termination of contract without just cause where the application of the automatic joint liability would be appropriate.

4. **It is generally accepted that a compensation to be awarded for termination of contract without just cause is to be based on the principle of positive interest. In respect of quantifying the damages incurred in a situation where a player terminated his employment contract without just cause, the calculation starts by calculating the unamortised part of said player's transfer fee. The next step is ordinarily to deduct the player's salary saved by the club suffering from the termination.**

5. **The principle of joint and several liability established in art. 17 para. 2 of the FIFA RSTP cannot be applied by the FIFA Dispute Resolution Chamber in case a player who terminated his employment contract without just cause has not signed any new contract after said termination and until its decision regarding such termination is passed.**

6. **The preservation of the legitimate objective of maintaining contractual stability is not jeopardised by a disapplication of art. 17 para. 2 of the FIFA RSTP. The prospect of a professional player personally having to pay compensation for termination of contract without just cause to his former club may actually serve as a broader deterrent for professional players willing to terminate their employment contracts than if a new club were to be found jointly and severally liable for such payment.**

I. PARTIES

1. Smouha SC (the "Appellant" or "Smouha") is a football club with its registered office in Alexandria, Egypt. Smouha is registered with the Egyptian Football Association (the "EFA"), which in turn is affiliated to the *Fédération Internationale de Football Association*.

2. Ismaily SC (the "First Respondent" or "Ismaily") is a football club with its registered office in Ismaïlia, Egypt. Ismaily is also registered with the EFA.

3. Mr Aziz Abdul (the "Second Respondent" or the "Player") is a professional football player of Ghanaian nationality.

4. Club Asante Kotoko FC (the "Third Respondent" or "Asante Kotoko") is a football club with its registered office in Kumasi, Ashanti, Ghana. Asante Kotoko is registered with the Ghana Football Association (the "GFA"), which in turn is also affiliated to the *Fédération Internationale de Football Association*.

5. The *Fédération Internationale de Football Association* (the "Fourth Respondent" or "FIFA") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

6. Ismaily, the Player, Asante Kotoko and FIFA are hereinafter jointly referred to as the "Respondents".

II. FACTUAL BACKGROUND

7. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeals arbitration proceeding and at the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

A. Background Facts

8. On 31 December 2012, the Player and Asante Kotoko entered into an employment contract for a period of three years, valid as from the date of signing until 30 December 2015.

9. On 17 July 2014, Ismaily presented a written offer to Asante Kotoko to acquire the services of the Player for an amount of USD 100,000 as well as *"20% from the next transfer"*, which offer was accepted on the same day.

10. Also on 17 July 2014, the Player signed a document named *"Formal Offer for: Abdul Aziz Yusif"* (the "Formal Offer") sent to him by Ismaily, according to which the Player was offered an employment contract for a period of five sporting seasons for a total remuneration of USD 570,000.

11. On 20 July 2014, Ismaily informed Asante Kotoko that it would pay the amount of USD 100,000 *"once the player passes the medical test scheduled once he reaches Egypt as we are preparing his papers to enter the country nowadays"*.

12. On 1 August 2014, Asante Kotoko informed Smouha that its management had accepted their *"offer of ABDUL AZIZ YUSIF for a transfer fee of USD 100,000 (one hundred thousand dollars) and 20% as onward transfer"*.

13. On 2 August 2014, Ismaily informed Asante Kotoko that the Player had received the visa to enter Egypt, confirming its interest in the Player and stating that *"the money transfer once the player passes his medical check"*.

14. On 11 August 2014, Smouha paid the transfer fee of USD 100,000 to Asante Kotoko.

15. On an unknown date, Smouha and the Player concluded an employment contract for a period of three years for a total remuneration of USD 973,230.

B. Proceedings before FIFA's Dispute Resolution Chamber

16. On 28 July 2015, Ismaily lodged a claim against the Player for breach of contract with the FIFA Dispute Resolution Chamber (the "FIFA DRC"). Ismaily also called Smouha and Asante Kotoko as respondents, arguing that they induced the Player to breach his employment contract with Ismaily. Ismaily claimed an amount of USD 615,000 (USD 570,000 corresponding to the value of the formal offer and USD 45,000 for the specificity of sport) from the Player and requested that Smouha and Asante Kotoko were to be held jointly and severally liable. Finally, Ismaily requested the FIFA DRC to impose sporting sanctions on the Player, Smouha and Asante Kotoko.

17. The Player, Smouha and Asante Kotoko replied to Ismaily's claim arguing that its arguments were unjustified and that the claim had to be rejected.

18. On 13 October 2016, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

> *"1. The claim of* [Ismaily] *against* [the Player] and [Smouha] *is partially accepted.*
>
> *2. The claim of* [Ismaily] *against* [Asante Kotoko] *is rejected.*
>
> *3.* [The Player] *is ordered to pay to* [Ismaily] *within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 615,000 plus 5% interest p.a. on said amount as from 28 July 2015 until the date of effective payment.*
>
> *4.* [Smouha] *is jointly and severally liable for the payment of the aforementioned compensation.*
>
> *5. In the event that the aforementioned amount is not paid within the above-mentioned time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *6.* [Ismaily] *is directed to inform* [the Player] *and* [Smouha] *immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
>
> *7. A restriction of four months on his eligibility to play in official matches is imposed on* [the Player]. *This sanction applies with immediate effect as of the date of notification of the present decision. The sporting sanction shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.*
>
> *8. Any further claim lodged by* [Ismaily] *is rejected".*

19. On 10 January 2017, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- As to whether the Formal Offer established a final and binding employment contract between Ismaily and the Player, the FIFA DRC *"recalled its well-established jurisprudence which dictates that in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the essentialia negotii of an employment contract, such as the parties to the contract and their role, the duration of the employment relationship, the remuneration and the signature of both parties.*

- *With the above in mind, the Chamber acknowledged that the Formal Offer consisted of a document dated 17 July 2014, drafted on* [Ismaily's] *headed paper, signed by* [the Player] *and stamped by* [Ismaily]. *According to such document, the parties established that the contract period would last five years and that* [the Player] *would be entitled to receive a total salary of USD 570,000. Moreover, the Chamber wished to underline that, from the contents of the Formal Offer, it is evident that the agreement of the parties related to the rendering of* [Player's] *services as a football player against the payment of a salary by* [Ismaily].

- *Consequently, the Chamber continued that all the essentialia negotii are included in the Formal Offer, in order to be considered as a valid employment contract concluded between* [Ismaily] *and* [the Player].

- *Furthermore, and as to the argument of the Respondents that the Formal Offer was not a valid contract as it was not registered either at the* [EFA] *and/or on TMS, the Chamber wished to emphasize that, as a general rule, the registration of an employment contract at a federation and/or on TMS does not constitute a condition for its validity. In this regard, the Chamber considered relevant to recall its jurisprudence in accordance with which the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player, which are of the sole responsibility of a club and on which a player has no influence".*

- As to the question of the alleged breach of contract without just cause by the Player, *"the Chamber was eager to highlight that based on the parties' respective statements and the documentation available on file, it was undisputed that* [the Player] *never joined* [Ismaily] *in order to offer his services to the latter in accordance with the relevant employment contract. Also, it is undisputed that, in August 2015,* [the Player] *signed an employment contract with* [Smouha] *covering partially the same period of time as the employment contract the* [Player] *signed with* [Ismaily]. *By acting as such, the Chamber concurred that* [the Player] *had acted in breach of the employment contract concluded with* [Ismaily] *and is therefore to be held liable for breaching the contract without just cause".*

- After having established that the Player's breach took place within the "protected period" as defined in item 7 of the "Definitions" section of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), the FIFA DRC turned its attention to the question of the consequences of such breach.

- *"In doing so, the Dispute Resolution Chamber established that, in accordance with art. 17 par. 1 of the Regulations,* [the Player] *is liable to pay compensation to* [Ismaily]. *Furthermore, in accordance with the unambiguous contents of article 17 par. 2 of the Regulations, the Chamber established that* [the Player's] *new club, i.e.* [Smouha]*, shall be jointly and severally liable for the payment of compensation. In this respect, the Chamber was eager to point out that the joint liability of* [the Player's] *new club is independent from the question as to whether the new club has induced the contractual breach. This conclusion is in line with the well-established jurisprudence of the Chamber and has been repeatedly confirmed by the CAS. Notwithstanding the aforementioned, the Chamber recalled that according to art. 17 par. 4 sent. 2 of the Regulations, it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. In any event, the Chamber determined that it would attend to the question of the possible inducement to breach of contract by* [Smouha] *at a later stage of its deliberations, i.e. after having discussed the issue of the compensation due to* [Ismaily]*".*

- As to the compensation for breach of contract to be paid, *"the DRC established, on the one hand, that the total value of the* [Player's] *employment agreement with* [Ismaily] *for the remaining contractual period amounted to USD 570,000. On the other hand, the members of the Chamber established that should* [the Player] *have stayed with* [Smouha] *until the end of the contract concluded with* [Ismaily]*, i.e. for five years, he would have been entitled to receive an amount equivalent to USD 1,622,050.*

- *Subsequently, the members of the DRC noted that* [Ismaily] *is requesting the amount of USD 615,000 as compensation for breach of contract.*

- *Consequently, on account of the above-mentioned considerations, the Chamber decided that* [the Player] *must pay the amount of USD 615,000 to* [Ismaily] *as compensation for breach of contract, which is considered by the Chamber to be a reasonable and fair amount. Furthermore,* [Smouha] *is jointly and severally liable for the payment of the relevant compensation* […].

- *In addition and with regard to* [Ismaily's] *request for interest, the Chamber decided that* [Ismaily] *is entitled to 5% interest p.a. on said amount as of 28 July 2015 until the date of effective payment".*

- As to whether sporting sanctions were to be imposed on any of the respondents, and with reference to Article 17(3) FIFA RSTP, *"the Dispute Resolution Chamber recalled that the breach of contract by* [the Player] *had occurred during the applicable protected period. Consequently, the Chamber decided that, by virtue of art. 17 par. 3 of the Regulations,* [the Player] *had to be sanctioned with a restriction of four months on his eligibility to participate in official matches.*

- *In continuation, the Chamber focused on the issue of inducement by* [Smouha] *and held that, considering the small time frame between the signature of the Formal Offer by* [the Player] *and the signature of the contract between* [the Player] *and* [Smouha] *as well as the fact that the Formal Offer was never executed, it could not be reasonably expected from* [Smouha] *to have been aware that* [the Player] *had signed another contract, i.e. the Formal Offer, covering the same period. In view of the above, the Chamber decided that the issue of inducement as regard* [Smouha] *is not to be further considered.*

- *Furthermore, as to* [Ismaily's] *claim with respect to* [Asante Kotoko]*, the Chamber was eager to recall that, in accordance with art. 17 par. 2 of the* Regulations*, if a professional is required to pay compensation, it is the new club to be held jointly and severally liable for such payment. Moreover, the Chamber also recalled that, according to art. 17 par. 4 sent. 2 of the* Regulations*, it is the new club to be presumed, unless established to the contrary, to be held liable for the inducement to the breach of contract. On account of the above, the Chamber considered that* [Asante Kotoko]*, being the* [Player's] *former club, cannot be held liable for the breach of contract by* [the Player] *for lack of regulatory basis. Consequently, the DRC decided to reject* [Ismaily's] *claim with respect to* [Asante Kotoko]*".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 31 January 2017, Smouha lodged a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2017) (the "CAS Code"). In this submission, Smouha nominated Prof. Petros Mavroidis, Professor of Law, Neuchatel, Switzerland, as arbitrator.

21. On 10 February 2017, Smouha filed its Appeal Brief, pursuant to Article R51 of the CAS Code. This document contained a statement of the fact and legal arguments giving rise to the appeal. Smouha challenged the Appealed Decision, submitting the following requests for relief:

> *"1. State that the FIFA Dispute Resolution Chamber has wrongly interpreted the legal situation currently existing in the case at stake as regards their particular situation.*
>
> *2. As a consequence of the above, declare that the decision taken by the FIFA Dispute Resolution Chamber of FIFA on 13 October 2016 as regards Smouha SC (point 4 of the decision) is purely and simply cancelled and that Smouha SC are consequently relieved of any obligations whatsoever with respect to the case under review.*
>
> *3. Order to FIFA to compensate Smouha SC for the legal costs incurred as a consequence of the wrong interpretation stated under point 1".*

22. On 7 March 2017, the Player filed its Answer, pursuant to Article R55 of the CAS Code. The Player did not submit any specific requests for relief, but the Panel infers from his submission that he requested Smouha's appeal to be dismissed.

23. On 8 March 2017, the CAS Court Office informed the parties that another appeal had been filed against the Appealed Decision by the Player. The parties were therefore requested to indicate whether they would agree to consolidate the present procedure with *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC.*

24. On 9 and 13 March 2017 respectively, Smouha and FIFA indicated to agree with the consolidation, whereas Ismaily objected.

25. On 14 March 2017, the CAS Court Office informed the parties that in light of Ismaily's objection, and in accordance with Article R52 para. 4 of the CAS Code, the issue of the

consolidation would be submitted to the President of the CAS Appeals Arbitration Division, or her Deputy. The CAS Court Office also informed the parties that Asante Kotoko had failed to file an Answer within the prescribed time limit, but that, pursuant to Article R55 par. 2 of the CAS Code, the Panel could nevertheless proceed with the arbitration and deliver an award.

26. On 3 April 2017, FIFA filed its Answer, pursuant to Article R55 of the CAS Code. FIFA submitted the following request for relief:

> *"1. That the CAS rejects the present appeal and confirms the presently challenged decision passed by the Dispute Resolution Chamber (hereinafter: the DRC) on 13 October 2016 in its entirety.*
>
> *2. That the CAS orders the Appellant to bear all the costs of the present procedure.*
>
> *3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand".*

27. On 4 May 2017, Ismaily filed its Answer, pursuant to Article R55 of the CAS Code. Ismaily submitted the following request for relief:

> *"a) Reject the Appeal filed by the Appellant Smouha SC.*
>
> *b) In application or* [sic] *article 17.2 fully confirm the decision rendered on the 13th of October 2016 by the FIFA DRC.*
>
> *c) Condemn the Appellant to the payment of the whole CAS administration costs and Panel fees.*
>
> *d) Fix a sum to be paid by the Appellant to Ismaily in order to cover its defence fees and costs in the amount of CHF 25,000".*

28. On 8, 9 and 12 May 2017 respectively, upon being invited by the CAS Court Office to express their views in this respect, FIFA indicated that it did not consider it necessary to hold a hearing, whereas Smouha and Ismaily indicated that they wished a hearing to be held. The Player and Asante Kotoko did not submit their views in this respect.

29. On 4 July 2017, the CAS Court Office informed the parties that, given the similarities between the present case and the procedure *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC*, the Division President decided to submit the present procedure to a Panel composed of three arbitrators. The procedure *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC* would be referred to a sole arbitrator, who would also act as President in the present case.

30. On 25 July 2017, following the nomination by Ismaily and FIFA of Mr Mark Hovell, solicitor in Manchester, United Kingdom, as arbitrator, the CAS Court Office requested the Player and Asante Kotoko to confirm whether they agreed with the nomination and that their silence would be deemed as acceptance.

31. On 27 July 2017, the Player confirmed his agreement with the appointment of Mr Hovell as arbitrator. Asante Kotoko remained silent in this respect.

32. On 24 August 2017, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the parties were informed that the arbitral tribunal appointed to decide the present matter was constituted by:

- Mr Manfred Nan, Attorney-at-Law, Arnhem, the Netherlands, as President;
- Prof. Petros Mavroidis, Professor of Law, Neuchatel, Switzerland; and
- Mr Mark Andrew Hovell, Solicitor, Manchester, United Kingdom, as arbitrators

33. On 29 August 2017, the CAS Court Office informed the parties that the Panel had decided to hold a hearing.

34. On 8, 11 and 12 September and 23 October 2017 respectively, FIFA, Ismaily, Smouha and the Player returned duly signed copies of the Order of Procedure to the CAS Court Office. Asante Kotoko failed to return a duly signed copy of the Order of Procedure.

35. On 5 November 2017, counsel for the Player informed the CAS Court Office that he and the Player encountered great difficulty in securing a flight to Switzerland and requested the hearing to be postponed.

36. On 6 November 2017, the CAS Court Office informed the parties that it is their own responsibility to make the necessary arrangements to attend the hearing at the date and time scheduled and that the hearing could not be postponed. The Player and his counsel were nevertheless informed that they were authorised to attend the hearing by video-conference.

37. On 7 November 2017, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, each party present confirmed that it had no objection to the constitution and composition of the Panel.

38. In addition to the Panel, Mrs Delphine Deschenaux-Rochat, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

For Smouha:

- Mr Amr Khamis Ahmed Ismail, Administrative Director of Smouha;
- Mr Michel Zen Ruffinen, Counsel;

For Ismaily:

- Mr Juan de Dios Crespo Pérez, Counsel;
- Mr Enric Ripoll González, Counsel;
- Mr Nasr Eldin Azzam, Counsel;

For the Player:

- Mr Alhassan-Abu Jones Abdul-Fataahu, Counsel (by telephone);

For Asante Kotoko:

- Mr Richard Osei Akoto (by video conference);
- Mrs Rose Padmore Yeboah (by video conference);

For FIFA:

- Mr Matthijs Withagen, Counsel;
- Mr Ennio Bovolenta;

39. Although the Player and his counsel could not attend the hearing in person due to delays in their flight schedule, counsel for the Player did attend the hearing by telephone.

40. No witnesses or expert witnesses were heard. The parties were afforded full opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

41. During the hearing reference was made to a decision of the Swiss Federal Tribunal that was only available in French. With the agreement of all parties present, FIFA was invited to provide a translation into English, following which the other parties would be permitted to comment on the accuracy of the translation.

42. Before the hearing was concluded, all parties present expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

43. On 21 November 2017, FIFA provided the Panel with a translation into English of the decision with reference SFT 4A_32/2016 and dated 20 December 2016. Neither of the other parties made any comments on the accuracy of the translation.

44. On 26 June 2018, the CAS Court Office provided the parties with the arbitral award issued in the proceedings with the reference *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily FC*, in which the sole arbitrator overturned the Appealed Decision and determined that the Player was not liable to pay compensation for breach of contract to Ismaily. The parties were invited to comment on the potential impact and/or consequences of such award for the present procedure.

45. On 2 July 2018, Ismaily provided its comments in respect of the CAS Court Office letter dated 26 June 2018. With reference to jurisprudence of the Swiss Federal Tribunal (the "SFT"), Ismaily submitted that a joint and several debtor not involved in the proceedings cannot invoke a judgment which has rejected the claim of the creditor against another joint and several debtor. This limitation of the legal effect on the parties involved corresponds to the substantive legal

situation that in the case of the solidarity debts there exist several single contractual obligations. If the judgment becomes final against one of the joint and several debtors, the SFT must treat it *"as a separate judgment"* in the assessment of the claim against the other debtor.

46. On 3 July 2018, FIFA provided its comments in respect of the CAS Court Office letter dated 26 June 2018. FIFA emphasised that the present matter solely pertains to the issue of the joint liability for the payment of compensation for breach of contract imposed on Smouha, which is specifically set out in Smouha's Appeal Brief. FIFA indicated that, *"from a strictly procedural and legal point of view, the award rendered in the matter CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC should not have any influence on the award which is yet to be rendered in the present proceedings"*. At the same time, FIFA however indicated that, *"[o]bviously, to try to defend that the joint liability for the payment of compensation for breach of contract imposed on* [Smouha] *by the DRC should be maintained where the player does not have to pay the same compensation, appears pointless and we come to the conclusion that point 4. of the relevant decision of the DRC has become obsolete through the conclusions of the Sole Arbitrator as described above"*.

47. On 4 July 2018, the Player provided his comments in respect of the CAS Court Office letter dated 26 June 2018. The Player principally objected to the conclusion reached in *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC* that the Player was not held to pay compensation to Ismaily, but that still sporting sanctions were imposed on him.

48. On 7 August 2018, Smouha provided its comments in respect of the CAS Court Office letter dated 26 June 2018. Smouha argued that *"the point of the same decision against which* [Smouha] *had appealed in the case CAS 2017/A/4977, namely point 4, may obviously not be upheld since a party (Smouha SC, who, we repeat had furthermore clearly been found by FIFA as not being guilty of having induced the player to any incorrect behavior) may not held be jointly and severally liable for a payment of which the cause has ceased to exist by a Court decision and that is not due any more by the party who had been ordered to pay the amount in question"*.

49. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

50. Smouha's submissions, in essence, may be summarised as follows:

- Smouha has at no time been informed by Asante Kotoko that Ismaily had also presented an offer for the Player and that the Player accepted to enter into negotiations with Ismaily. The Player neither informed Smouha on any occasion that he had been or was in negotiations with Ismaily. Only when Ismaily lodged a claim before FIFA, Smouha learned that Ismaily had apparently also made an offer concerning the Player to Asante Kotoko. Smouha was therefore simply not in a position to induce the Player to breach a contract of whatever formal commitment he would have signed previously with another club. This has also been duly accepted by the FIFA DRC in the Appealed Decision, as it

stated that *"it could not be reasonably expected from* [Smouha] *to have been aware that* [the Player] *had signed another contract, i.e. the Formal Offer, covering the same period"* and that *"*[i]*n view of the above, the Chamber decided that the issue of inducement as regards* [Smouha] *is not to be further considered"*.

- FIFA has hence clearly excluded any liability of Smouha with respect of having signed the Player, despite the existence of an alleged contractual commitment that the Player had apparently taken upon himself prior to signing a contract with Smouha. It is not relevant for Smouha to know whether the situation that has led to the Appealed Decision was the responsibility of Asante Kotoko or the Player. Relevant is exclusively the undisputed fact that Smouha had no liability whatsoever in all what happened.

- Rather, the role of Asante Kotoko, the Player and, to some extent, Ismaily should be considered by CAS when looking at the Appealed Decision. The consequences of the Appealed Decision for Smouha are totally incorrect. Smouha therefore requests CAS to review the liability of all the other parties involved in this case and to take appropriate action against those who have effectively violated existing contractual obligations or existing regulations.

- The FIFA DRC seems to sustain in the Appealed Decision that the implementation of Article 17(2) FIFA RSTP towards clubs who have signed a player who would allegedly have committed a breach of contract is in a way "automatic", irrespective of knowing whether the club in question would have or not induced the player to act as he did. This interpretation of FIFA of the will of its internal legislator is certainly wrong and may certainly not be upheld in the case under review.

51. Ismaily's submissions, in essence, may be summarised as follows:

- As to Smouha's insistence on its lack of knowledge about other negotiations, Ismaily maintains that Asante Kotoko did inform Smouha about it, since in his answer dated 23 November 2015, and forwarded to the parties by FIFA on 25 January 2015, the Player stated the following:

> *"Player signed with* [Smouha] *because it was the club whom* [Asante Kotoko] *wished to complete a transfer. In transfers a player cannot ignore the preferences of his current club for a certain new club.* [Smouha] *was de facto the preferred club by* [Asante Kotoko]. *A take it or leave it situation for the player"*.

- From this statement of the Player it is crystal clear that Asante Kotoko preferred Smouha over Ismaily as future destination for the Player. Being men of football, we all know that if that happened, it is because Asante Kotoko and Smouha had several conversations about it where *"Asante Kotoko after request of Smouha ended up committing to convince the Player to breach his agreement with Ismaily"*.

- The argument that Smouha was not aware of the situation should not have been considered. The whole position during the FIFA proceedings was based on the non-existence of a valid employment contract between the Player and Ismaily, instead of demonstrating their lack of knowledge.

- Despite the fact that the Player terminated his employment contract with Ismaily without just cause and the clear content of Article 17(2) FIFA RSTP, Smouha still argues that this provision shall not be applied in the present case. Ismaily maintains that this position is contrary to the longstanding jurisprudence of FIFA and CAS.

- The opinion of the FIFA DRC in respect of the inducement of Smouha is not shared by Ismaily, but in any case, it helped Smouha to not receive sporting sanctions as were imposed on the Player, *i.e.* a four month suspension. The content of Article 17(2) FIFA RSTP is perfectly clear and Smouha has to be condemned jointly and severally with the Player to pay the established compensation.

52. The Player's submissions, in essence, may be summarised as follows:

- The Player lodged an independent appeal against the Appealed Decision, calling only Ismaily as a respondent.

- Smouha did not mention the Player's name among the relief sought from CAS in its Appeal Brief, despite having asked that he and/or Ismaily and/or Asante Kotoko bear the costs of the appeal procedure and also compensate it for the costs in connection with the appeal proceedings. It is against the request of Smouha that CAS orders the Player to pay part of the costs of Smouha's appeal procedure as well as compensate it.

- Smouha's appeal has no merit and should be dismissed because i) the Player had no hand in the Appealed Decision and should therefore be absolved of any liability for the payment of any costs and compensation to Smouha; ii) by its own admission, *"the basics* [sic] *decision taken by the FIFA Dispute Resolution Chamber the player Abdul Aziz was wrong "Given* [sic] *this declaration by the appellants themselves on what basis would the player be held culpable for paying any compensation and costs associated with the appeal procedure of the appellants""*; iii) it is trite law that a transfer of a player involves three parties, namely the player, his current club and the prospective new club, all of whom must concur before the transfer can validly take place.

- With reference to Article 17(4) FIFA RSTP, the Player argues that a player can only agree terms with a prospective club if that club has agreed a transfer deal with his current club. Therefore, by making the payment of the transfer fee of USD 100,000 contingent upon the passing of a medical examination by the Player, Ismaily was not acting in good faith. Besides, Ismaily still had not paid Asante Kotoko the agreed transfer fee two weeks after agreeing the transfer deal, compelling a cash-strapped Asante Kotoko to look elsewhere for a willing buyer of the Player. The Player was therefore bound to ignore Ismaily's offer

and engage with Smouha at the behest of Asante Kotoko since Ismaily had not demonstrated sufficient seriousness to complete the deal.

53. Asante Kotoko did not file any written submissions, but it put forward, *inter alia*, the following arguments during the hearing:

- Asante Kotoko disassociates it from the present matter as it did not break any contract.

- Smouha was held jointly liable on the basis of the FIFA RSTP and their responsibility was conditional. Asante Kotoko is not guilty in this matter and should be set free.

54. FIFA's submissions, in essence, may be summarised as follows:

- It is important to note that Smouha is not disputing the Player's breach of contract, nor the validity of the employment contract signed with Ismaily in the context of the present procedure. Smouha merely challenges the fact that it was held jointly and severally liable for the payment of the compensation for breach of contract awarded to Ismaily, despite the clear wording of Article 17(2) FIFA RSTP.

- The idea of the principle established in Article 17(2) FIFA RSTP is to make sure that, on the one hand, the club victim of the player's unjustified breach of contract obtains an additional guarantee that it will be paid the relevant compensation as per Article 17(1) FIFA RSTP. On the other hand, it also takes into account the financial but also sportive burden that the decision to award compensation to the club victim of the breach of contract without just cause by the player might place on the latter and which could, potentially, hinder him in his football career. It is, generally speaking, assumed that a club has more financial means than a football player and would therefore be less affected by the decision to be ordered to pay, jointly and severally with the player, compensation for breach of contract than a player. The intention behind Article 17(2) FIFA RSTP is not a punitive one. It is merely a mechanism aimed at ensuring, to the furthest extent possible, that the club victim of the breach of contract without just cause can have recourse against either the player or his new club.

- That being said, should the club victim of the breach choose to claim the relevant compensation from the player's new club, nothing prevents the new club from demanding a contribution from the player at a later stage. This in accordance with the legal mechanism of joint and several liability, which is a universal principle of law and governed, notably, by Article 51 in combination with Article 143 of the Swiss Code of Obligations (the "SCO"). The right of the new club to seek redress against the player has also been recognised by CAS.

- With regard to this point it is underlined that the SFT has ruled that the joint and several liability principle enshrined in Article 17(2) FIFA RSTP is not per se incompatible with Swiss public order as it does not violate any fundamental right. It also established that the said principle is not excessive. Indeed, the SFT underlined that the new club may, once

established that it must pay the relevant compensation, have recourse against the other debtor who was jointly and severally liable, *i.e.* the player. Finally, according to the SFT in such case, the new club had not demonstrated that the payment of the compensation for breach of contract would gravely endanger its economic existence.

- Although Smouha dedicates several paragraphs to the fact that it did not have any involvement whatsoever in the events surrounding the Player's breach of contract, the lack of involvement of Smouha is not contested by anyone; this is a clear established fact, which is not being presently challenged. The fact that Smouha has not anyhow induced the Player to breach his contract with Ismaily is irrelevant in the assessment of the applicability of Article 17(2) FIFA RSTP. With reference to CAS jurisprudence, it is maintained that the joint and several liability of the payment of compensation for breach of contract in case of breach of contract by a player without just cause is independent of a possible inducement for breach of contract by the new club. The joint and several liability principle is, indeed, *de facto* automatic.

- For the sake of completeness, the only situation in which a player would be condemned to pay compensation for breach of contract without just cause on his own would be one where, in practical terms, the joint and several liability principle cannot be applied since the player did not sign any new contract after the said breach and until the decision of the FIFA DRC was passed.

V. JURISDICTION

55. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) of the FIFA Statutes (2016 edition), providing that *"*[a]*ppeals 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"* and Article R47 of the CAS Code.

56. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by Smouha, Ismaily, the Player and FIFA. Although Asante Kotoko did not sign the Order of Procedure, the Panel finds that this has no particular consequences, as Asante Kotoko also did not object to the jurisdiction of CAS.

57. It follows that the CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

58. The appeal was filed within the deadline of 21 days set by Article 58(1) of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

59. It follows that the appeal is admissible.

VII. APPLICABLE LAW

60. None of the parties made any specific submissions in respect of the applicable law.

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

> *"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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

62. Article 57(2) of the FIFA Statutes determines as follows:

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

63. The Panel is satisfied that the various regulations of FIFA are primarily applicable, in particular the FIFA RSTP, and subsidiarily Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. PRELIMINARY ISSUE

64. In the Appealed Decision issued by the FIFA DRC, Smouha was declared jointly and severally liable with the Player to pay compensation for breach of contract to Ismaily, without Smouha itself being at fault.

65. Simultaneously with the present appeal arbitration proceedings, the Player lodged an independent appeal with CAS against Ismaily. These proceedings were referenced as *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC*.

66. The Panel observes that the sole arbitrator in the proceedings referenced as *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC* overturned the Appealed Decision and determined that the Player was not liable to pay compensation for breach of contract to Ismaily.

67. Faced with such situation, one would in principle be inclined to say that since the Player is no longer held liable to pay compensation to Ismaily, Smouha should neither be held (jointly and severally) liable, particularly because it was determined by the FIFA DRC that the latter was not at fault itself, but was only declared jointly and severally liable because Article 17(2) FIFA RSTP provides for such automatic joint liability.

68. Being cognisant of certain jurisprudence of the SFT on the formal separation between joint debtors/creditors, the Panel deemed it important to have the views of the parties in this respect, to assess whether the CAS Award issued in the matter referenced *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC* could have any impact on the present appeals arbitration proceedings.

69. After taking note of the parties' positions in this respect, the Panel finds that the outcome of the proceedings in *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC* can play no role in the present proceedings, even if this would lead to contradicting outcomes.

70. According to the jurisprudence of the Swiss Federal Tribunal, defendants lodging separate appeals against a first instance decision remain independent from each other:

> *"The joint defendants remain independent from each other. The behavior of one of them, and in particular his withdrawal, failure to appear or appeal, is without influence upon the legal position of the others (judgment 4P.226/2002 of January 21, 2003 at 2.1; Hohl, op. cit., n. 525; Schaad, op. cit., p. 76 f.; Gross and Zuber, op. cit., n. 19 ad Art. 71 CPC). As to the judgment to be issued, it may be different as to one of the joint defendants or the other (Jeandin, op. cit., n. 11 ad Art. 71 CPC). The independence of joint defendants will continue before the appeal body: a joint defendant may independently appeal the decision affecting him regardless of another's renouncing his right to appeal the same decision; similarly, he will not have to worry about the appeals of the other joint defendants being maintained if he intends to withdraw his own (Schaad, op. cit., p. 281 ff.). Among other consequences, this means that the res judicata effect of the judgment concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendants because there are as many res judicata effects as couples of claimant/defendant (Schaad, op. cit., p. 317 ff.).*
>
> *In the light of these principles, the Appellant was blatantly wrong to deny that the CAS had any jurisdiction to address the Respondent's appeal against the DRC decision of June 15, 2011, on the basis of the Player's appeal against the same decision. Indeed, the withdrawal had no impact on the appeal proceedings between the Respondent and the Appellant. In other words, the Respondent could argue before the CAS, among other things, that the DRC was wrong to find the Player in breach of his contract with the Appellant by demonstrating, for instance, that the contract had not become enforceable between these two parties, with a view to establish the extinction of the Player's obligation which had been jointly imposed upon the Respondent by Art. 17(2) RSTP (judgment 4A_304/2013 of March 3, 2014 at 3). It is immaterial that this may result in an award incompatible with the enforceable decision of the DRC as to the fate of the Player sued by the Appellant"* (SFT 4A_6/2014 consid. 3.2.2).

71. As such, although both the Player and Smouha challenged the Appealed Decision by lodging an appeal before CAS, the appeals shall be dealt with separately. The Panel is therefore to render a decision on the basis of Smouha's requests for relief, regardless of the outcome of the arbitration in CAS *2017/A/5019 Abdul Aziz Yusif v. Ismaily SC* and the fact that this may potentially lead to contradictory decisions.

72. In its requests for relief, Smouha requests the Panel to decide as follows:

> *"1. State that the FIFA Dispute Resolution Chamber has wrongly interpreted the legal situation currently existing in the case at stake as regards their particular situation.*
>
> *2. As a consequence of the above, declare that the decision taken by the FIFA Dispute Resolution Chamber of FIFA on 13 October 2016 as regards Smouha SC (point 4 of the decision) is purely and*

simply cancelled and that Smouha SC are consequently relieved of any obligations whatsoever with respect to the case under review".

73. By formulating its requests for relief in this way, Smouha prevented the Panel from assessing whether the Player was liable to pay damages to Ismaily, as it accepted the Player's liability as a matter of fact, while it only challenged its own joint and several liability as a matter of law.

IX. MERITS

74. Having reached the above conclusion as to the scope of the present appeal arbitration proceedings, the Panel will assess the principal issue raised by Smouha, *i.e.* whether, on the basis of Article 17(2) FIFA RSTP, it can be held jointly and severally liable for the Player's debt towards Ismaily.

75. Article 17(2) FIFA RSTP determines the following:

"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".

76. The Panel observes that the question whether such joint liability is permissible, even if any fault is absent, has been extensively addressed in the decision of the Swiss Federal Tribunal that was translated into English by FIFA upon request of the Panel:

"Art. 17 par. 2 RSTP establishes a joint liability with regard to the payment of compensation for breach of contract without just cause between the professional player and his new club. This provision establishes a passive joint liability between the author of the contractual violation and the one who has profited from said violation, irrespective of any involvement on the part of the latter in the contractual breach. Within the external relations between creditor and debtors, this regulatory provision, which, besides, has been applied for a long time, is self-sufficient, so that it is not necessary, at this stage, to apply Swiss law subsidiarily in accordance with art. 58 of the Code of Sports-related Arbitration combined with art. 66 par. 2 of the FIFA Statutes in their version as applied in casu. The interpretation, in itself, of art. 17 par. 2 RSTP, which the Panel made is not subjected to examination by this Court. The very rule of passive joint liability, which FIFA has created to the benefit of the former club and at the expense of the new club has certainly not remained uncontested (cf. e.g. MARKUS ZIMMERMANN, Rechtsprechung zur Solidarhaftung gemäss FIFA-Transferreglement: Die CAS-Entscheidung in der Mutu-Saga (…), in SpuRt 2016 p. 148 ss) and has indeed been set aside in a case where the former club had parted ways with a player who had not honoured its contractual obligations (cf. point 4.2.1 above, the awards CAS 2013/A/3365 and 3366, which the Appellant wrongly deems applicable to its own situation); however, it does not necessarily violate any fundamental principle of substantive law to the extent that it would no longer be compatible with the juridical order and the system of decisive values. To argue otherwise would be difficult, besides, as Swiss law knows roughly similar rules, as the Respondents have pointed out in their respective briefs. Therefore, nothing would command an immediate intervention of the Federal Tribunal in a field which, first and foremost, has to do with sports politics and where the competent bodies of world football are better equipped than itself to intervene efficiently, in a calm manner.

> *The alleged excessive nature of the joint liability imposed on the new club is equally not proven. First of all, the new club cannot ignore its liability for the acts of a third party and the consequences that it might incur on its financial situation; this should lead the latter to do all in its power in order to escape from such joint liability. For instance, it should enquire by all means about the legal situation of the player it wishes to contract with, without relying blindly on the statements of the latter. Equally, it should, if necessary, conclude an employment contract upon the suspensive condition that would allow it to clarify the situation. Secondly, the joint debt is individualized as it corresponds to the compensation, calculated on the basis of the criteria listed in art. 17 par. 1 RSTP, which the player who terminated the employment contract without just cause will have to pay to his former club. It will, furthermore, be determined if the parties to the contract in question, as it is often the case, used the possibility mentioned in art. 17 par. 2 RSTP to stipulate the amount of compensation that the player would have to pay. Finally, the new club should be in a position to defend itself against the former club's allegations by putting forward the reasons for which the joint liability should not be applicable due, for instance, to the fact that the player had a valid reason justifying the premature termination of the employment contract (cf. award 4A_304/2013 quoted hereinbefore point. 3). Moreover, once condemned to pay, the new club should be able, under certain conditions, to turn against the other joint debtor, i.e. the player at fault"* (SFT 4A_32/2016, consid. 4.3).

77. Having carefully considered the reasoning of the SFT in this decision, the Panel finds that there are some distinguishing features with the matter at hand.

78. From FIFA's Answer it appears that the purpose of Article 17(2) FIFA RSTP is i) that the party suffering from the breach obtains an additional guarantee that it will be paid the relevant compensation; and ii) to relieve the financial and sportive burden placed on the player so as not to hinder his football career.

79. During the hearing, when asked by one member of the Panel to comment on the thesis that there are only three areas where joint liability could be applied (based on a contract (Article 1-40 SCO); based on tort (Article 41-61 SCO); and based on unjust enrichment (Article 62-67 SCO)), FIFA answered that the provision may be based on unjust enrichment. Therefore, iii) unjust enrichment will also be taken into account as a possible justification for Article 17(2) FIFA RSTP.

80. In CAS jurisprudence and legal doctrine other reasons have been advanced: iv) ensuring contractual stability in combination with unjust enrichment (*CAS 2013/A/3365 Juventus Football Club S.p.A. v. Chelsea Football Club Ltd & CAS 2013/A/3366 A.S. Livorno Calcio v. Chelsea Football Club Ltd* (the "Mutu case"), para. 159 of the abstract published on the CAS website); and v) avoiding evidentiary difficulties in establishing the joint liability (cf. CAS Bulletin 2018/1, p. 60, with further reference to CAS 2013/A/3149, para. 99).

81. The Panel agrees with the reasoning of the SFT in 4A_32/2016 that the automatic joint liability as set out in Article 17(2) FIFA RSTP is not illegal *per se* and that, in principle, in light of the justifications put forward above, it serves a legitimate purpose. The Panel also finds that a fault of the acquiring club is not necessarily required in order for the automatic joint liability to be applied. However, the Panel finds that, in order to validly apply Article 17(2) FIFA RSTP in a

specific case, at least one of the justifications for the application of the concept of automatic joint liability in general should indeed be present.

82. After analysing the reasons advanced by FIFA in the matter at hand and the reasons advanced in legal doctrine, the Panel finds that such justification is not present in the matter at hand. Indeed, the situation in the matter at hand is to be distinguished from the large majority of breach of contract cases in football, where the application of the automatic joint liability would be appropriate.

83. First of all, Smouha paid a transfer fee to Asante Kotoko of USD 100,000 and promised an additional payment of 20% of any transfer fee received in case the Player would subsequently be transferred by Smouha to a third club. This transfer fee appears to reflect the market value of the Player at the time, as both Smouha and Ismaily were apparently prepared to pay this amount to acquire the services of the Player.

84. As mentioned by the SFT in the decision set out above (SFT 4A_32/2016), Article 17(2) FIFA RSTP appears to be intended to establish *"a passive joint liability between the author of the contractual violation and* ***the one who has profited*** *from said violation"* (emphasis added). The Panel does not disagree with this interpretation, but deems it essential to point out that, unlike in the majority of breach of contract cases where Article 17(2) FIFA RSTP comes into play, in the present case Smouha did not "profit" from the alleged contractual violation of the Player, because it paid a transfer fee in the amount of USD 100,000. As such, unlike a situation where the acquiring club would not have to pay a transfer fee after a breach of contract by the player, but would be able to transfer the player for a transfer fee in the future, there is no such "unjust enrichment" of Smouha here.

85. Following the reasoning of the SFT in 4A_32/2016, FIFA argued in its Answer that Smouha can demand a contribution from the Player at a later stage. This is however also not the case for Smouha, because the Player is not held liable anymore due to the award issued in *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC*. Insofar the outcome of *CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC* cannot be taken into account in the present appeal arbitration proceedings, the Panel finds that, applying such legal fiction, it can at least not be said with certainty that Smouha can demand a contribution from the Player at a later stage.

86. Insofar Article 17(2) FIFA RSTP is aimed at *"avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player's decision to terminate his former contract"* (cf. CAS Bulletin 2018/1, p. 60, with further reference to CAS 2013/A/3149, para. 99), there is no such difficulty in the present case. The FIFA DRC explicitly confirmed in the Appealed Decision that *"it could not be reasonably expected from* [Smouha] *to have been aware that* [the Player] *had signed another contract, i.e. the Formal Offer, covering the same period"*. This goes further than leaving the possible involvement of Smouha in doubt, as it explicitly exonerates Smouha from any wrongdoing.

87. Finally, although not specifically argued by Smouha, the Panel considers it doubtful whether Ismaily incurred any damages at all. Starting from the presumption that it signed a valid employment contract with the Player, which is not disputed and in fact specifically

acknowledged by Smouha, Ismaily never paid him any salary and it never paid a transfer fee for him. Although Ismaily may have incurred certain costs in the process of concluding an employment contract with the Player, it failed to establish such costs as a matter of damages.

88. The Panel finds it difficult to follow the reasoning of the FIFA DRC in the Appealed Decision with respect to the compensation awarded. It is generally accepted that the compensation to be awarded for breach of contract is to be based on the principle of "positive interest", *i.e.* the judging authority shall aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur (CAS 2017/A/5111, para. 137 of the abstract published on the CAS website, with further references to CAS 2008/A/1519-1520, nos. 85 *et seq.*; CAS 2005/A/801, no. 66; CAS 2006/A/1061, no. 15; CAS 2006/A/1062, no. 22; and CAS 2014/A/3527, no. 78).

89. The Panel notes that the FIFA DRC appears to argue that the value of the Player's employment contract with Ismaily was USD 570,000 and that the value of the Player's employment contract with Smouha was USD 1,622,050 and that Ismaily is therefore entitled to USD 615,000 in compensation for breach of contract. FIFA fully granted Ismaily's claim by awarding USD 570,000 as the value of the employment contract and an additional amount of USD 45,000 for the specificity of sport.

90. The Panel however finds that the amount of USD 570,000 is in principle not a damage incurred by Ismaily, but rather an amount that Ismaily saved because it never had to pay any salary to the Player.

91. The Panel understands that the general position in the jurisprudence of CAS and the FIFA DRC and PSC in respect of quantifying the damages incurred in a situation where a player breached his employment contract is that the calculation starts by calculating the unamortised transfer fee (*i.e.* by considering the transfer fee paid for the player, the moment of the breach and the time lift under the employment contract), because the club suffering from the breach incurred these costs while being deprived of the opportunity to transfer the player to a third club for a transfer fee in the future. The next step would then ordinarily be to deduct the salary saved by the club suffering from the breach (in the present case USD 570,000).

92. The situation in the matter at hand is however that Ismaily never paid a transfer fee for the Player and saved itself the financial burden of having to pay the Player a salary of USD 570,000. As indicated above, although the Panel is willing to concede that Ismaily may have incurred certain expenses in the process of acquiring the Player and that they would have benefitted from his sporting performance, such damages are however not quantified or proven by Ismaily, as a consequences of which the Panel fails to see the damages incurred by the latter.

93. The Panel finds that the above arguments together take away any justifications put forward for the application of an automatic joint liability principle in the matter at hand, and the Panel finds that the application of such automatic joint liability would clearly lead to an unreasonable outcome in the circumstances of this specific case and (although the Panel is not convinced that

Smouha's existence would be endangered if it would have to pay EUR 615,000 to Ismaily in the absence of any evidence being filed in this respect) would pose an excessive burden on Smouha. Under such exceptional circumstances, the Panel finds that Article 17(2) FIFA RSTP should be disapplied.

94. Acknowledging that the majority of the jurisprudence of the FIFA DRC and CAS have consistently applied the automatic joint liability principle enshrined in Article 17(2) FIFA RSTP also to acquiring clubs that acted without fault, the Panel wishes to emphasise that it does not disagree with such jurisprudence, but that it finds that the circumstances in the present matter are truly exceptional and therefore justify another outcome.

95. The Panel also feels itself comforted in its conclusion by the fact that, be it for different reasons, two other exceptions to the automatic application of Article 17(2) FIFA RSTP have already been established.

96. First, it is acknowledged by FIFA in its Answer (para. 3.6) that *"the joint and several liability principle cannot be applied* [if] *the player did not sign any new contract after the said breach and until the decision of the DRC was passed"*. This principle was applied by the FIFA DRC in its decision of 10 April 2015 in a contractual dispute between [club A] and [player B], which decision was subsequently confirmed by CAS in *CAS 2015/A/4094*, although the CAS panel did not explicitly determine that the principle of joint and several liability was not applied due to the fact that the player's new club was not a party in the CAS proceedings and further, which resulted in legal proceedings before […] state courts because a […] club initially interested in hiring the services of [player B] was no longer interested when it found out that it could potentially be held jointly and severally liable with [him] to pay [club A] compensation for breach of contract in the amount of EUR 10,500,000, due to the potential application of Article 17(2) FIFA RSTP (BELLIA O., CAS 2015/A/4094, Award of 27 May 2016, in: DUVAL / RIGOZZI (Eds.), Yearbook of International Sports Arbitration 2016, 2018).

97. Another exception has been developed by CAS (under the 2001 FIFA RSTP) in the Mutu case, where the CAS panel held the following:

> *"If Chelsea's interpretation were to be followed, it would mean that Article 14.3 would result in the imposition upon the New Club of an automatic and unconditional liability, without a finding of a fault or negligence and without a contractual basis – and hence without causation. Swiss law does not countenance such a result (SFT 105 II 183 and TEVINI S., op. cit., ad art. 17, n 4, p. 129 and numerous references).*
>
> *(…)*
>
> *On the basis of the above considerations, the Panel finds that Article 14.3 does not apply in cases where it was the employer's decision to dismiss with immediate effect a player who, in turn, had no intention to leave the club in order to sign with another club and where the New Club has not committed any fault and/or was not involved in the termination of the employment relationship between the old club and the Player. These findings do not compromise contractual stability, as a player will still be dissuaded from unilaterally breaching his contract (in some other way than terminating it), because he will then face the burden of a potential*

compensation awarded in favour of his previous club. The prospect of having to pay a high compensation may actually serve as a broader deterrent for players willing to put an end to their employment contracts than if a New Club were to be found jointly and severally liable" (*CAS 2013/A/3365 Juventus Football Club S.p.A. v. Chelsea Football Club Ltd & CAS 2013/A/3366 A.S. Livorno Calcio v. Chelsea Football Club Ltd*, para. 170 and 177 of the abstract published on the CAS website).

98. One legal author clarified why, in his view, *"*[player B]*'s case should be distinguished from Adrian Mutu's cause célèbre in as far as the question of the validity, interpretation and application of Article 17(2) RSTP is concerned"*. The author held that *"it is true that Mutu's and* [player B]*'s cases have some elements in common, in particular the fact that in both cases it was the old club and not the player who terminated the contract (with just cause, which is a rare occurrence). However, it is important to note that the Mutu case arose from a completely different situation: Mutu's contract was terminated for doping, at a time when he had no intention of leaving Chelsea, whereas* [player B] *– as ascertained by the CAS award – intended to leave* [club A] *and breached his contract in an attempt to avoid having to return to play for that club while he was looking for alternative employment. In other words, if one follows the CAS award's reasoning in Mutu (as the* […] *Tribunal purported to do), the fact that* [player B] *breached his contract with the intention of leaving* [club A] *makes his case one where the RSTP's legitimate objective of preserving contractual stability is relevant and should be taken into account. Accordingly, it is submitted that the* […] *Tribunal was incorrect in assimilating* [player B]*'s case with Mutu's in as far as the correct interpretation of Article 17(2) RSTP is concerned"* (RIGOZZI A., Addendum to: BELLIA, CAS 2015/A/4094, Award of 27 May 2016, in: DUVAL / RIGOZZI (Eds.), Yearbook of International Sports Arbitration 2016, 2018).

99. In this respect, the Panel wishes to add that it adheres with the reasoning of the CAS panel in the Mutu case that *"[t]he prospect of having to pay a high compensation may actually serve as a broader deterrent for players willing to put an end to their employment contracts than if a New Club were to be found jointly and severally liable"* and therefore finds that the preservation of the legitimate objective of preserving contractual stability is not jeopardized by the Panel's disapplication of Article 17(2) FIFA RSTP in the present matter.

100. In light of the exceptional circumstances set out above, and regardless of the Panel's view that Article 17(2) FIFA RSTP is not *per se* invalid as such, the Panel finds that in the present case Smouha cannot be held (jointly and severally) liable to pay compensation for breach of contract to Ismaily.

101. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 31 January 2017 by Smouha SC against the decision issued on 13 October 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is upheld.

2. The items 1 and 4 of the decision issued on 13 October 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* are annulled.

3. (…).

4. (…).

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