Arbitration CAS 2022/A/9170 Royal Antwerp FC v. Wydad Athletic Club, award of 25 July 2023

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Football
Contractual dispute for failure to pay various amounts in relation to a loan agreement
CAS panels' margin of discretion to exclude evidence that was already available before the first instance
Interpretation of a contractual clause on the basis of art. 18 CO
Subsidiary recourse to the principle of interpretation "in dubio contra proferentem"/ "in dubio contra stipulatorem"
Reallocation of the procedural costs of the proceedings before the FIFA PSC

1. **Article R57 (3) of the CAS Code provides for an exception to the CAS panels' *de novo* power of review. The provision, however, accords them with a wide margin of discretion whether to exclude evidence that was already available at the first instance. The provision is interpreted restrictively and is designed for cases only in which the party requesting the exclusion of evidence that was not presented in the first instance (non-arbitral) proceedings will have to establish (i) not only that the new evidence was already available or could reasonably have been discovered at the first instance level, but also (ii) why admitting the evidence would constitute an abuse of process.**

2. **Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances. Recent case law has modified the principle according to which the rules of interpretation should apply only if the terms of the agreement between the parties leave room for doubt or are unclear. One cannot state that in the presence of a "clear text" one must exclude all other means of interpretation. It derives from Article 18 para. 1 of the Swiss Code of Obligations that the meaning of a text, even a clear one, is not necessarily determining and that the purely literal interpretation is on the contrary prohibited. Even if a contractual clause appears clear at first view, it can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances that the text of such contractual clause does not convey exactly the content of the agreement that was concluded. Consequently, even in case the terms used in a contract have a clear literal (i.e., unambiguous) meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used.**

3. **In Swiss law, the principle *"in dubio contra proferentem"* (or *"in dubio contra stipulatorem"*) is applied but its application only comes into play if an ambiguity persists in case all other means of interpretation fail.**

4. If, considering the wording of Art. 25 (5) of the Procedural Rules Governing the FIFA Football Tribunal and the outcome of the case, it has been found that the party in breach of parties' contract, *in casu* the respondent, should bear the costs of the proceedings of the previous instance, and considering that the contract at the basis of the parties' dispute *inter alia* reads in connection with *"[i]ndemnity"* that *"[p]arties agree to fully and effectively defend, indemnify and keep indemnified, any other party, on demand, from and against any and all claims, liabilities, costs, expenses, damages, losses or judgments (including any legal costs of other professional costs or expenses) suffered or incurred by that party as a result of a breach by the defaulting party of any term of this agreement"* and, additionally, that it has been found that the causal link required according to said clause was not interrupted by the appellant's procedural omission to adduce evidence in support of its claim before the FIFA PSC, should the appellant have paid already to FIFA any portion of the FIFA PSC's procedural costs, it is entitled to the respective reimbursement by the respondent.

I. THE PARTIES

1. Royal Antwerp Football Club N.V. ("Antwerp FC" or the "Appellant") is a Belgian company operating a professional football club with its registered offices in Antwerp, Belgium. Antwerp FC is affiliated to the Royal Belgian Football Association, which is a member of the Union of the European Football Associations ("UEFA") and of the Fédération Internationale de Football Association ("FIFA").

2. Wydad Athletic Club ("Wydad AC" or the "Respondent") is a Moroccan football club with its registered offices in Casablanca, Morocco. Wydad AC is affiliated to the Royal Moroccan Football Federation, which is a member of the Confederation of African Football ("CAF") and of FIFA.

3. Antwerp FC and Wydad AC are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings, and evidence adduced in these proceedings. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence he deems necessary to explain his reasoning.

A. Negotiations between Antwerp FC and Wydad AC

5. On 29 August 2021, Wydad AC made an offer to Antwerp FC regarding the loan of the player

[G.] (the "Player") for the 2021/2022 season. This offer – *inter alia* – included a bonus of *"100,000 EUR Champions league"* (sic).

6. On 31 August 2021 at 18:13 CEST, Antwerp FC sent a draft of the loan agreement to Wydad AC. Clause 5 of this draft provided the payment of the following bonus:

   "If Wydad Athletic Club qualifies for the group stage of the UEFA Champions League during the 2021-2022 season: ***EUR 100,000 (one hundred thousand euro)****"*.

7. On the same day at 18:16 CEST, Wydad AC sent an executed version of the loan agreement to Antwerp FC in which Clause 5 was amended in its relevant part as follows:

   "If Wydad Athletic Club wins the CAF Champions League during the 2021-2022 season: ***EUR 100,000 (one hundred thousand euro)****"*.

8. Still on the same day at 18:34 CEST, Antwerp FC asked Wydad AC to sign the draft of the loan agreement that it had sent to Wydad AC at 18:13 CEST because the executed version previously sent by Wydad AC at 18:16 CEST did not mention the intermediary in Clause 14.

9. Finally, at the same day at 23:14 CEST, Wydad AC sent an executed version of the loan agreement to Antwerp FC which stated in Clause 5 that Wydad AC shall pay a bonus of EUR 100,000 if it wins the 2021/2022 UEFA Champions League.

B. The loan agreement signed between the Parties

10. On 4 September 2021, Antwerp FC and Wydad AC entered into the final version of the loan agreement (the "Loan Agreement") regarding the temporary transfer of the Player from Antwerp FC to Wydad AC for the 2021/2022 season.

11. According to Clause 3 of the Loan Agreement, Wydad AC was obliged to pay a loan fee of EUR 150,000 to Antwerp FC payable in three instalments as follows:

    - EUR 50,000 on 30 October 2021;
    - EUR 50,000 on 30 January 2022; and
    - EUR 50,000 on 30 March 2022.

12. Clause 5 of the Loan Agreement which provides for certain bonus payments reads as follows:

    *"****Clause 5. Conditional Transfer Fee***

    Wydad Athletic Club shall pay RAFC the following bonuses (cumulative) (each a ***Conditional Transfer Fee****):*

    - *If Wydad Athletic Club becomes the champion of Morocco during the 2021-2022 season:* ***EUR***

50,000 (fifty thousand euro);

- *If Wydad Athletic Club wins the Royal Cup during the 2021-2022 season:* ***EUR 50,000 (fifty thousand euro)***;

- *If Wydad Athletic Club wins the UEFA Champions League during the 2021-2022 season:* ***EUR 100,000 (one hundred thousand euro)***;

- *If Wydad Athletic Club wins the Arab Cup during the 2021-2022 season:* ***EUR 100,000 (one hundred thousand euro)***.

Any Conditional Transfer Fee shall be payable within 7 days after the qualification has been achieved".

13. Clause 11 of the Loan Agreement stipulates the following:

*"**Clause 11. Indemnity***

Parties agree to fully and effectively defend, indemnify and keep indemnified, any other party, on demand, from and against any and all claims, liabilities, costs, expenses, damages, losses or judgments (including any legal costs or other professional costs or expenses) suffered or incurred by that party as a result of a breach by the defaulting party of any term of this agreement".

C. The time between the signing of the Loan Agreement and 7 July 2022

14. On 1 March 2022, Antwerp FC lodged a first claim against Wydad AC before the FIFA Players' Status Chamber (the "FIFA PSC"), as Wydad AC had failed to pay the first two instalments of the loan fee under the Loan Agreement.

15. On 25 March 2022, the FIFA General Secretariat issued a confirmation letter (the "Confirmation Letter") according to which Wydad AC was ordered to pay the two instalments of the loan fee in the amount of EUR 50,000 each plus interest at a rate of 5% *p.a.*

16. On 30 March 2022, Antwerp FC issued an invoice to Wydad AC for the payment of the third instalment of the loan fee in the amount of EUR 50,000.

17. On 30 May 2022, FIFA imposed a ban from registering new players internationally on Wydad AC due to its failure to comply with the Confirmation Letter.

18. On the same day, Wydad AC won the 2021/2022 CAF Champions League finale with 2-0 against the Egyptian club Al Ahly.

19. On 1 June 2022, Antwerp FC issued an invoice to Wydad AC for the *"Conditional Transfer Fee (bonus)"* in the amount of EUR 100,000 for the *"Winner of Champions League during the 2021-2022 season"* and an additional invoice for another *"Conditional Transfer Fee (bonus)"* in the amount of EUR 50,000 for Wydad AC being *"Champion of Morocco during the 2021-2022 season"*.

20. On 8 June 2022, the Antwerp FC's counsel sent a default notice to Wydad AC and requested payment of the total amount of EUR 200,000 by no later than 19 June 2022.

21. On 5 July 2022, the 2021/2022 season of the first Moroccan men's professional football league, Botola Pro, (the "Moroccan Championship") ended with Wydad AC being the winner of this championship.

D. The proceedings before the FIFA PSC

22. On 7 July 2022, Antwerp FC filed a second claim before the FIFA PSC against Wydad AC requesting this time the payment of EUR 200,000 plus 5% interest *p.a.* as from the respective due dates until effective payment.

23. Wydad AC failed to reply to Antwerp FC's claim.

24. On 16 August 2022, the FIFA PSC rendered its decision (the "Appealed Decision"). The operative part of which reads in its relevant part as follows:

> *"**Decision of the Players' Status Chamber***
>
> *1. The claim of the Claimant, R. Antwerp F.C., is partially accepted.*
>
> *2. The Respondent, Wydad Athletic Club, has to pay to the Claimant, the following amount(s):*
>
> *EUR 50,000 as outstanding remuneration plus 5% interest p.a. as from 31 March 2022 until the date of effective payment.*
>
> *3. Any further claims of the Claimant are rejected.*
>
> *(…)*
>
> *8. The final costs of the proceedings in the amount of **USD 25,000** are split between the parties and shall be paid to FIFA in the following manner (cf. note relating to the payment of the procedural costs below):*
>
> *a) USD 18,750 by the Claimant. As the Claimant already paid the amount of USD 5,000 to FIFA as advance of costs at the start of the proceedings, the residual amount of USD 13,750 is still to be paid as procedural costs.*
>
> *b) USD 6,250 by the Respondent".*

25. On 8 September 2022, the FIFA PSC notified the grounds of the Appealed Decision to Antwerp FC only, as Wydad AC failed to pay its part of the final costs of the proceedings before FIFA. According to the grounds of the Appealed Decision, the Single Judge dismissed the Appellant's claim with regard to the bonus payment because of the Appellant's failure to prove the underlying facts. In addition, the Single Judge held that the claim for the bonus payment for Wydad AC allegedly winning the title of the 2021/2022 CAF Champions League is lacking a

clear contractual basis, as Clause 5 of the Loan Agreement refers to the UEFA Champions League as condition for the bonus payment.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 28 September 2022, Antwerp FC filed an appeal against the Appealed Decision with the Court of Arbitration for Sport (the "CAS") against Wydad AC in accordance with Article R48 of the Code of Sports-related Arbitration (2021 edition) (the "CAS Code"). In its Statement of Appeal, the Appellant requested the appointment of a Sole Arbitrator to decide on this matter and nominated Prof. Ulrich Haas as arbitrator if the case was to be decided by a three-member panel.

27. On 3 October 2022, the CAS Court Office sent a copy of the Statement of Appeal to the attention of the Respondent and invited the Appellant to file an Appeal Brief. The CAS Court Office also invited the Respondent to comment on the Appellant's request that the case be submitted to a Sole Arbitrator.

28. On the same day, the CAS Court Office invited FIFA to file an application with the CAS if it intends to participate as a party in this proceeding within the applicable deadline. In addition, FIFA was asked to provide a clean copy of the Appealed Decision at its earliest convenience.

29. On 5 October 2022, the Respondent informed the CAS Court Office that it agrees to the appointment of a Sole Arbitrator and asked that Prof. Ulrich Haas be appointed as Sole Arbitrator. In addition, the Respondent agreed to submit the present dispute to CAS Mediation.

30. On the same day, the CAS Court Office acknowledged receipt of the Respondent's submission and invited the Appellant to confirm that it agrees to the appointment of Prof. Haas as Sole Arbitrator and to provide its position with regard to CAS Mediation.

31. On 7 October 2022, the Appellant expressed its consent with the appointment of Prof. Haas as Sole Arbitrator and objected to the referral of this matter to CAS Mediation.

32. On 8 October 2022, the Appellant filed its Appeal Brief.

33. On 10 October 2022, the CAS Court Office sent a copy of the Appeal Brief to the attention of the Respondent and invited the Respondent to submit its Answer within the applicable time limit.

34. By email of 12 October 2022, the Respondent informed the CAS Court Office that it will not pay its share of the advance on costs and requested that a new time limit for the filing of its Answer be fixed after the Appellant paid its share of the advance on costs.

35. On the same day, the CAS Court Office set aside the time limit for the Respondent to file its Answer as set out in the CAS Court Office letter of 10 October 2022 and noted that a new deadline shall be fixed upon the Appellant's payment of its share of the advance on costs.

36. On 21 October 2022, the Respondent submitted its Answer.

37. On the same day, the CAS Court Office acknowledged receipt of the Respondent's Answer and invited the Parties to indicate by 28 October 2022 whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

38. On 26 October 2022, the CAS Court Office noted – *inter alia* – that the Appellant had paid the full advance on costs. In addition, the CAS Court Office informed the Parties that the Panel appointed to decide on the present matter was constituted as follows:

Sole Arbitrator: Prof. Ulrich Haas, Professor of law in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany.

39. On 28 October 2022, the Appellant informed the CAS Court Office that it does not insist on an oral hearing and that the award may be rendered on the basis of the Parties' written submissions.

40. On 31 October 2022, the CAS Court Office acknowledged receipt of the Appellant's letter and noted that the Respondent did not provide its position within the prescribed time limit.

41. On 7 November 2022, the CAS Court Office issued an order of procedure (the "OoP") and invited the Parties to return a signed copy of it.

42. On 8 and, respectively, 10 November 2022, the Parties returned a signed copy of the respective OoP.

IV. SUBMISSIONS OF THE PARTIES

43. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's position

44. In its Appeal Brief, the Appellant requested as follows:

"(i.) to uphold the present Appeal of R. ANTWERP FC against the Appealed Decision of the FIFA Players' Status Chamber passed on 16 August 2022 (Ref.: FPSD-6653);

(ii.) to set aside paragraphs 1,2,3 and 8 of the Appealed Decision of the FIFA Players' Status Chamber passed on 16 August 2022 (Ref.: FPSD-6653), and to replace them as follows:

1. The claim of the Claimant, R. *Antwerp F.C., is fully accepted.*

2. The Respondent, *Wydad Athletic Club, has to pay to the Claimant, the following amount(s):*

- *EUR 50,000 as outstanding remuneration plus 5% interest p.a. as from 31 March 2022 until the date of effective payment; and*

- *EUR 150,000 as outstanding remuneration plus 5% interest p.a. as from 7 June 2022 until the date of effective payment.*

3. [intentionally left blank] *(…).*

8. The final costs of the proceedings in the amount of USD 25,000 are to be borne by the Respondent, *Wydad Athletic Club.*

(iii.) to confirm the remainder of the Appealed Decision of the FIFA Players' Status Chamber passed on 16 August 2022 (Ref.: FPSD-6653);

(iv.) to order WYDAD ATHLETIC CLUB to reimburse R. *ANTWERP FC its part of the procedural costs of the procedure before the FIFA PSC in the amount of USD 18,750 (cf. Clause 11 of the loan agreement);*

and

(v.) to rule (i) that WYDAD ATHLETIC CLUB shall bear the costs of arbitration, as calculated by the CAS Court Office (cf. Clause 11 of the loan agreement), and (ii) that each party shall bear its own costs and other expenses incurred in connection with these CAS arbitration proceedings".

45. The Appellant's submissions in support of its appeal against the Appealed Decision may be summarized as follows:

- As to Wydad AC's sporting victories during the 2021/2022 season:

  - Wydad AC won both the 2021/2022 season of the Moroccan Championship and the 2021/2022 CAF Champions League.

  - The achievement of these sporting goals are well-established facts and can be proven by the additional evidence submitted by the Appellant in this proceeding. This additional evidence may not be excluded because it was not submitted in an abusive way or retained in bad faith.

- As to Wydad AC's tacit acceptance of Antwerp FC's claims:

- The Appellant issued invoices to Wydad AC regarding the bonus payments for winning the Moroccan Championship and the CAF Champions League, which were never contested by the Respondent.

- The Appellant sent to the Respondent several payment reminders including a formal default notice dated 8 June 2022. Again, the Respondent did not protest the default letter and its content.

- Also, the Respondent failed to reply to the Appellant's claims during the proceeding before the FIFA PSC.

- When invoices are not protested in a *"B2B-relationship"*, one may reasonably assume that these invoices have been tacitly accepted by the addressee (*a fortiori* if the protest is not forthcoming after a formal notice of default and/or after the initiation of arbitration proceedings).

- Therefore, the Sole Arbitrator may be comfortably satisfied that the Respondent has tacitly accepted the invoices and allegations of Antwerp FC as well as the fact that the relevant sporting goals were achieved.

- As to the interpretation of Clause 5 of the Loan Agreement:

  - It is true that Clause 5 of the Loan Agreement refers to *"UEFA"* instead of *"CAF"* Champions League. However, it is necessary to consider the Parties' real intention at the time of the conclusion of the Loan Agreement.

  - Under Swiss law, a contract must be interpreted in the first place in accordance with the so-called *"principle of will"* (subjective interpretation) as laid down in Article 18 para. 1 of the Swiss Code of Obligations, which reads as follows: *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement"*.

  - The primacy of subjective interpretation implies that the objective meaning of the terms used by the parties is irrelevant if *"the real and common intention of the parties"* differs from it ("*falsa demonstration non nocet*"). Accordingly, if the contract incorrectly refers to term/object X instead of Y (*in casu "UEFA"* instead of *"CAF"*), the common intention of both parties overrides the wording used in the contract.

  - Only if the common will of the parties cannot be determined, the contract must be interpreted on the basis of the *"principle of good faith"* in the light of all circumstances of the case (objective interpretation). According to this principle, a declaration of intent is to be understood as the way the other party could and did, in good faith, understand it. Therefore, even if one disregards the Parties common will, Wydad AC could not reasonably interpret in good faith the condition for the payment as referring to the UEFA Champions League. By contrast, reference to the CAF

Champions League is the only sensible interpretation of this condition of Clause 5 of the Loan Agreement.

- The principle of *"clara non sunt interpretenda"* has been abandoned by the Swiss Federal Court and should not serve as a rule for interpretation of the Loan Agreement.

- According to the principle of *"ut res magis valeat quam pereat"*, an interpretation, which makes the contract lawful or effective, shall be applied if there is doubt about the meaning of a contractual term. *In casu,* the parties did not intend or contemplate to make the bonus payment conditional on Wydad AC winning the UEFA Champions League, as Wydad AC was not even eligible to participate in such competition.

- At the time of the execution of the Loan Agreement, Wydad AC was registered for the participation in the CAF Champions League. Thus, the Parties clearly intended to make the respective bonus conditional on Wydad AC's winning of the CAF Champions League.

- Moreover, Wydad AC never disputed this interpretation of Clause 5 of the Loan Agreement.

- This interpretation is also corroborated by the Parties' pre-contractual discussions.

B. The Respondent's position

46. In its Answer, the Respondent requested as follows:

> *"1. The appeal filed by the Appellant, Club* ***Royal Antwerp Football Club,*** *against the Decision taken by FIFA PSC on 17 Aout 2022 to be dismissed.*
>
> *2. To confirm the decision issued by FIFA PSC of 17 Aout 2022.*
>
> *3. The arbitration costs to be carried out by the Appellant.*
>
> *4. To oblige the Appellant, to reimburse the Respondent, with the advocacy costs, amounting to CHF 10,000.00".*

47. The Respondent's submissions may be summarised as follows:

- As to Antwerp FC's claim for a bonus payment due to Wydad AC's winning of the 2021/2022 season of the Moroccan Championship:

  - The FIFA PSC held that Antwerp FC failed to meet its burden of proof because it had not filed any evidence for Wydad AC's alleged victory in the 2021/2022 season of the Moroccan Championship.

- As to Antwerp FC's claim for a bonus payment for Wydad AC's winning of the

2021/2022 CAF Champions League:

- The Loan Agreement was drafted by the Appellant and sent to the Respondent only for signing without any change or modification.

- The Appellant included a bonus in the amount of EUR 100,000 for the winning of the UEFA Champions League in the Loan Agreement and requested the Respondent to pay this amount although it did not win this title.

- There is no contractual basis for claiming any payment related to Wydad AC's winning of the CAF Champions League.

- During the whole contractual period of the Loan Agreement, the Appellant never asked the Respondent to modify or clarify Clause 5 of the Loan Agreement.

- The Appellant likewise never requested the Respondent to sign an *addendum* or any other document that could serve as alternative contractual basis for the Appellant's claim.

- The Respondent never had the intention to pay the Appellant an additional amount for winning the CAF Champions League.

- *"It's absurd that the respondent pays 150.000 EUR as a loan transfer and accept also to pay 150.000 EUR as conditional fees"*.

- The only time that the Appellant asked for the payment of the bonus was on 8 June 2022 when its counsel sent a default notice to the Respondent.

- As to the reimbursement of Antwerp FC's procedural costs of the FIFA PSC proceedings:

  - The decision passed by the FIFA PSC was based only on the documents provided by the Appellant, as the Respondent did not participate in this proceeding. The Appellant failed to submit substantial evidence to prove its claims.

  - The FIFA PSC has already determined the procedural costs that each party shall bear.

V. JURISDICTION

48. This arbitral proceeding is governed by the Articles 176 *et seq.* of the Swiss Private International Law Act ("PILA"), since both Parties are domiciled outside Switzerland and because the seat of the arbitration is in Switzerland (Article R27 of the CAS Code). Furthermore, the Parties have not opted out of the applicability of chapter 12 of the PILA.

49. Article R47 para. 1 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of 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 it prior to the appeal, in accordance with the statutes or regulations of that body".*

50. Article 57 (1) of the FIFA Statutes (May 2022 edition) states as follows:

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

51. The Appealed Decision qualifies as a final decision passed by FIFA's legal bodies, and as such, it can be appealed before CAS. The Sole Arbitrator further notes that the Parties have not disputed the jurisdiction of CAS and both Parties have signed the OoP.

52. It follows from the above that CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

53. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for the appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the parties".*

54. In addition, Article 57 (1) of the FIFA Statutes refers to a time limit of 21 days to file an appeal.

55. Furthermore, the Appealed Decision provides as follows:

> *"According to article 57 par. 1 of the FIFA Statues, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision".*

56. The Sole Arbitrator notes that the grounds of the Appealed Decision were notified to the Appellant on 8 September 2022. As the Appellant filed its Statement of Appeal on 28 September 2022, the appeal was filed within the deadline of 21 days and is, therefore, admissible.

VII. OTHER PROCEDURAL ISSUES

57. The Appellant submitted evidence in this CAS proceeding, which it had not filed during the

proceeding before the FIFA PSC.

58. According to Article R57 (3) of the CAS Code, *"the Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered"*.

59. The Respondent does not explicitly request that the new evidence submitted by the Appellant is excluded in accordance with Article R57 (3) of the CAS Code. However, the Respondent refers in its Answer to the findings of the FIFA PSC in the Appealed Decision stating that the Appellant failed to discharge its burden of proof because it did not submit evidence to establish its factual allegations. Whether by making this reference, the Respondent implicitly objected to the acceptance of the Appellant's new evidence in this proceeding can be left open, since the objection – in any way – would have to be dismissed.

60. The Sole Arbitrator notes that according to Article R57 (1) of the Code and in line with consistent CAS jurisprudence, the Sole Arbitrator has, in principle, full power to review the facts and the law of the case. Article R57 (3) of the Code provides for an exception to the *de novo*-power of the Sole Arbitrator. The provision, however, accords the Sole Arbitrator with a wide margin of discretion whether to exclude evidence that was already available at the first instance. The provision is interpreted restrictively in CAS jurisprudence (RIGOZZI/HASLER, in Arroyo (ed.) Arbitration in Switzerland, 2nd ed. 2018, Art. 57 CAS Code no, 11 *et seq.*) and is designed for cases only in which

> *"(i.) the party requesting the exclusion of evidence that was not presented in the first instance (non-arbitral) proceedings will have to establish (i) not only that the new evidence was already available or could reasonably have been discovered at the first instance level, but also (ii) why admitting the evidence would constitute an abuse of process"* (RIGOZZI/HASLER, in ARROYO M. (ed.) Arbitration in Switzerland, 2nd ed. 2018, Art. 57 CAS Code, no 13).

61. In the present case, the Sole Arbitrator finds that the Appellant did not withhold the evidence in the FIFA PSC proceeding in bad faith. To the contrary, the Appellant's submissions show that it considered the Respondent's sporting success in the 2021/2022 season to be a well-established fact which did not require the filing of corroborating evidence. Thus, the filing of the relevant evidence before the CAS does not constitute an abusive behavior by the Appellant. Therefore, fairness requires that the Sole Arbitrator considers the new evidence in the context of these CAS proceedings.

VIII. APPLICABLE LAW

62. 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 absence of such 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".

63. Article 56 (2) of the FIFA Statutes sets forth 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"*.

64. In addition, Clause 16 of the Loan Agreement states as follows:

> *"This agreement shall be governed by and interpreted in accordance with the FIFA Regulations"*.

65. The Sole Arbitrator is satisfied that primarily the various regulations of FIFA apply to the merits of this appeal. In addition, pursuant to Article 56 (2) of the FIFA Statutes, Swiss law shall apply as a frame of reference when interpreting the FIFA rules and regulations. This finding is also confirmed by the Parties' submissions, as both Parties submit that the rules and regulations of FIFA shall apply and subsidiarily, Swiss law.

IX. MERITS

66. The main issues that the Sole Arbitrator needs to decide on in this appeal are the following:

    A. Is Antwerp FC entitled to receive a bonus payment for Wydad AC's winning of the 2021/2022 season of the Moroccan Championship?

    B. Is Antwerp FC entitled to receive a bonus payment for Wydad AC's winning of the 2021/2022 CAF Champions League?

    C. Is Antwerp FC entitled to the claimed interest?

    D. Is Antwerp FC entitled to a reimbursement of its procedural costs before the FIFA PSC?

A. Bonus payment for Wydad AC's victory in the Moroccan Championship

67. Antwerp FC submits that it is entitled to receive a bonus payment in the amount of EUR 50,000 in accordance with Clause 5 of the Loan Agreement. According to this clause, Antwerp FC is entitled to the bonus payment of EUR 50,000 *"[i]f Wydad Athletic Club becomes the champion of Morocco during the 2021-2022 season"*. It is not disputed between the Parties that this wording refers to the 2021/2022 season of the Moroccan Championship. Accordingly, Antwerp FC is entitled to receive the requested bonus payment if it can proof that Wydad AC won the Moroccan Championship in the 2021/2022 season. In this regard, the Sole Arbitrator notes that Article 8 of the Swiss Civil Code states that *"[u]nless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact"*.

68. Antwerp FC submitted in the present proceedings clear and convincing evidence that Wydad

AC won the 2021/2022 season of the Moroccan Championship. As this fact is also not contested by Wydad AC, the Sole Arbitrator finds that the only prerequisite for this bonus payment is fulfilled. Accordingly, Antwerp FC is entitled to receive the bonus payment in the amount of EUR 50,000 by Wydad AC.

B. Bonus payment for Wydad AC's victory in the CAF Champions League

69. The Parties are in dispute whether Antwerp FC is entitled to receive an additional bonus payment in the amount of EUR 150,000 for Wydad AC's victory in the 2021/2022 CAF Champions League in accordance with Clause 5 of the Loan Agreement.

70. Clause 5 of the Loan Agreement reads in its relevant part as follows:

> *"If Wydad Athletic Club wins the UEFA Champions League during the 2021-2022 season:* ***EUR 100,000 (one hundred thousand euro)****".*

71. Wydad AC argues that since the wording of Clause 5 of the Loan Agreement explicitly refers to the UEFA Champions League, its victory in the CAF Champions League does not trigger the requested bonus payment. Antwerp FC, to the contrary, submits that this wording is an error and does not reflect the Parties' real intentions at the time of the conclusion of the Loan Agreement. Since the Parties dispute the meaning of Clause 5 of the Loan Agreement, the Sole Arbitrator finds that it is necessary to interpret this clause in the light of all the circumstances of the present case in order to decide its real meaning. Such interpretation shall be made in accordance with the subsidiarily applicable Swiss law considering that the FIFA regulations do not contain any rule regarding the interpretation of player contracts.

1. The subjective intent of the Parties

72. Article 18 of the Swiss Code of Obligations (the "CO") provides as follows:

> *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement".*

73. Article 18 CO has been applied and interpreted by the CAS in many cases. For instance, the panel in CAS 2019/A/6525 at para. 67 stated the following:

> *"As a result, the interpretation of a contract in accordance with Article 18 CO aims at assessing the intention the parties had when they concluded the contract. On this basis, Swiss scholars (WIEGAND, in Basler Kommentar, No. 7 et seq., ad Art. 18 CO) and case law (decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) have indicated that the primary goal of interpretation is to ascertain the true common intention (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances".*

74. At first sight, it seems that the wording of Clause 5 of the Loan Agreement clearly reflects the Parties' intention, *i.e.* Wydad AC shall pay a bonus of EUR 100,000 to Antwerp FC if it wins the UEFA Champions League. There is no dispute about the unambiguous literal meaning of the term UEFA Champions League as such. However, the Sole Arbitrator may not stop his analysis by a purely literal interpretation of this Clause. In this regard, reference is made to SFT 127 III 444 para. b) where the Swiss Federal Tribunal held the following:

> *"A cet égard, la jurisprudence récente a nuancé le principe selon lequel il y aurait lieu de recourir à des règles d'interprétation uniquement si les termes de l'accord passé entre parties laissent planer un doute ou sont peu clairs. On ne peut ériger en principe qu'en présence d'un "texte clair", on doit exclure d'emblée le recours à d'autres moyens d'interprétation. Il ressort de l'art. 18 al. 1 CO que le sens d'un texte, même clair, n'est pas forcément déterminant et que l'interprétation purement littérale est au contraire prohibée. Même si la teneur d'une clause contractuelle paraît claire à première vue, il peut résulter d'autres conditions du contrat, du but poursuivi par les parties ou d'autres circonstances que le texte de ladite clause ne restitue pas exactement le sens de l'accord conclu".*
>
> Free translation: In this respect, recent case law has modified the principle according to which the rules of interpretation should apply only if the terms of the agreement between the parties leave room for doubt or are unclear. One cannot state that in the presence of a "clear text" one must exclude all other means of interpretation. It derives from Article 18 para. 1 CO that the meaning of a text, even a clear one, is not necessarily determining and that the purely literal interpretation is on the contrary prohibited. Even if a contractual clause appears clear at first view, it can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances that the text of such contractual clause does not convey exactly the content of the agreement that was concluded. Consequently, even in case the terms used in a contract have a clear literal (*i.e.*, unambiguous) meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used.

75. This is also confirmed by the legal literature (BK-OR I/WIEGAND W., Art. 18 N. 25). Article 18 CO prohibits an *"interpretation by means of letters"* (Verbot der reinen "Buchstabenauslegung", cf. SFT 131 III 287, see also SFT (14.12.2011) 5A_677/2011, E. 3.2; (31.5.2011) 4A_370/2010, E. 5.3; SFT BGE 128 III 212; SFT (24.10.2002) 5C.87/2002, E. 2.2; KuKo-OR/WIEGAND/HURNI, Art. 18 N. 30; BK-OR I/WIEGAND W., Art. 18 N. 25 and 37 with further references). Only in the very limited circumstances in which there are no objective grounds to think that the plain text does not reflect the parties' will, there is no reason to depart from it (SFT 136 III 188 E. 3.2.1; BK-OR I/WIEGAND W., Art. 18 N. 25). Doubts that the wording used by the parties in the contract truly reflects their will may arise from a multitude of different circumstances, such as the drafting history of the agreement, its purpose, or the overall content of the contract.

76. The Sole Arbitrator notes that Wydad AC is affiliated to the Royal Moroccan Football Federation which in turn is a member of CAF but not of UEFA. With regard to the eligibility of clubs in the UEFA Champions League, Article 3 of the Regulations of the UEFA Champions League states that *"UEFA member associations (hereinafter associations) may enter a certain number of clubs for the competition* [UEFA Champions League] *through their top domestic championship".*

Accordingly, only clubs of UEFA member associations may participate in the UEFA Champions League. Hence, Wydad AC, not being a member of a UEFA member association, could under no circumstances participate in the 2021/2022 UEFA Champions League. Already this fact alone is sufficient to raise doubts that the wording used by the Parties truly reflects their intentions when executing the Loan Agreement. It simply makes no sense to agree on a bonus payment if the condition precedent for the bonus payment can never be fulfilled.

77. That the Parties mistakenly referred to *"UEFA"* in the Loan Agreement also follows from the history of the agreement. The first offer for the Player's loan was made by Wydad AC. Therein, Wydad AC offered the payment of a bonus in the amount of EUR 100,000 for the winning of the champions league. Wydad AC did neither refer to *"UEFA"* nor to *"CAF"*. However, the competition intended by the Appellant must have been – from an objective standpoint of a reasonable person – a competition that Wydad AC is eligible to participate in, *i.e.*, the CAF Champions League. This understanding is supported also when looking at the first executed version of the Loan Agreement by Wydad AC. When the latter received the draft from Antwerp FC it amended the wording of Clause 5 substituting the term *"UEFA"* with *"CAF"*. Thereby, Wydad AC unequivocally showed its intention to offer a bonus payment for the winning of the CAF Champions League.

78. It is true that the final version signed by the Parties again referred to the *"UEFA Champions League"*. However, this was not due to the fact that the Parties wanted to modify the Loan Agreement with respect to the bonus payments. Instead, Antwerp FC explained that it insisted on Wydad AC signing the original version of the Loan Agreement, because it provided a clause regarding the intermediary involved in the transfer that was missing in the first executed version by Wydad AC. The Parties, thus, by using the old draft did not want to change the bonus payment scheme.

79. Finally, the Sole Arbitrator also takes note of the context in which the *"Champions League"* bonus is embedded. All the other bonuses mentioned in Clause 5 of the Loan Agreement refer to competitions which take place in the country respectively continent where Wydad AC has its registered seat and in which Wydad AC is in principle entitled to participate in. Clause 5 of the Loan Agreement refers to *"Arab Cup"*, *"Royal Cup"* and *"Champion of Morocco"* (*i.e.*, the Moroccan Championship). Thus, there is no reason to assume that the Parties intended to refer to any other championship than the CAF Champions League. This finding is further corroborated by Antwerp FC's behavior after the execution of the Loan Agreement. Antwerp FC promptly sent an invoice for the bonus of EUR 100,000 to Wydad AC after the latter had won the 2021/2022 CAF Champions League. It is also telling that Wydad AC never objected to such claim (before the initiation of these CAS proceedings).

80. In conclusion, the Sole Arbitrator finds that the reference to the UEFA Champions League in Clause 5 of the Loan Agreement does not truly reflect the Parties' will. Instead, the circumstances of this case show that the Parties' mutual intention was to agree on a bonus payment for Wydad AC's winning of the CAF Champions League.

2. No room for the application of the contra proferentem principle

81. The Respondent in its submissions pointed to the fact that it was the Appellant who drafted the Loan Agreement and that, therefore, doubts as to its contents must be construed to the Appellant's disadvantage.

82. It is true that Swiss law applies the *contra proferentem* (or *contra stipulatorem*) principle in the context of contract interpretation (BSK-OR/WIEGAND W., 7th ed. 2020, Art. 18 no. 40). However, the scope of application of this principle is rather restricted, since it only comes into play if an ambiguity persists in case all other means of interpretation fail. The SFT (4A_327/2015, para. 2.2.1) has stated as follows in this respect:

> *"Die Unklarheitenregel gelangt dann zur Anwendung, wenn die übrigen Auslegungsmittel versagen. Danach sind mehrdeutige Klauseln gegen den Verfasser bzw. gegen jene Partei auszulegen, die als branchenkundiger als die andere zu betrachten ist und die Verwendung der vorformulierten Bestimmungen veranlasst hat"* (emphasis added).
>
> Free translation: The ambiguity rule applies if the other means of interpretation fail. According to this rule, ambiguous clauses are to be interpreted against the author or against the party who is considered to be more knowledgeable in the industry than the other and who has caused the use of the pre-formulated provisions.

83. This also complies with CAS jurisprudence according to which the *"contra stipolatorem principle may apply on a subsidiary basis, i.e if the primary interpretation in application of the principle of good faith does not lead to a clear result (BSK-OR I/WIEGAND, Art. 18 N. 40)"* (cf. CAS 2017/A/5172, para. 84).

84. In the case at hand the Sole Arbitrator finds that the intention of the parties when executing Clause 5 of the Loan Agreement were clear and that, therefore, there is no room for the application of the principle *in dubio contra stipulatorem*.

3. Summary

85. Consequently, the Sole Arbitrator finds that Antwerp FC is entitled to receive the bonus payment in the amount of EUR 100,000 from Wydad FC for winning the 2021/2022 CAF Champions League in accordance with Clause 5 of the Loan Agreement.

C. Interest

86. The Appellant claims payment of interest on the outstanding bonus payments at a rate of 5% *per annum* starting on 7 June 2022.

87. The Sole Arbitrator notes that neither the Loan Agreement nor the applicable FIFA Regulations provide any obligation of the defaulting party to pay interest on outstanding amounts. However, Article 104 (2) CO foresees that a debtor is required to pay interest on any overdue payment at a rate of 5 % *per annum*. Accordingly, the Appellant is in principle entitled to receive interest at

such rate on the unpaid bonuses of EUR 50,000 for Wydad AC's winning of the Moroccan Championship and EUR 100,000 for Wydad AC's victory in the CAF Champions League.

88. With regard to the starting date of the interest, Clause 5 of the Loan Agreement states that the individual bonus payments shall be payable within seven days after the respective sporting goals were achieved. Thus, in accordance with Articles 102 and 104 CO, interest shall start running on the day after the seven days period has expired.

89. As Wydad AC won the CAF Champions League on 30 May 2022, the bonus payment of EUR 100,000 had to be paid at the latest on 6 June 2022. Hence, the Sole Arbitrator finds that interest on this amount shall start running on 7 June 2022.

90. Wydad AC won the title of the Moroccan Championship on 5 July 2022 and as such, the bonus payment of EUR 50,000 had to be paid at the latest on 12 July 2022. Therefore, the Sole Arbitrator finds that, in contrast to the Appellant's request, interest on this amount shall start running only as of 13 July 2022. Thus, insofar as the Appellant requests interest on the aforementioned amount as of 7 June 2022, the appeal has to be partially dismissed.

D. Procedural costs of the proceedings before the FIFA PSC

91. The Appellant requests that the Respondent be ordered to reimburse the Appellant its share of the procedural costs of the FIFA PSC proceedings in the amount of USD 18,750. The Respondent argues that the Appellant is not entitled to claim this amount because FIFA PSC's decision was, in particular, based on the Appellant's failure to provide any evidence for the alleged facts.

92. The Appellant's appeal is also directed against the operative part of the Appealed Decision that deals with costs (operative part no. 8). Article 25 (5) of the Procedural Rules Governing the Football Tribunal reads as follows:

> *"The chamber will decide the amount that each party is due to pay, in consideration of the parties' degree of success and their conduct during the procedure, as well as any advance of costs paid. In exceptional circumstances, the chamber may order that FIFA assumes all procedural costs".*

93. In view of the above provision and considering the outcome of this case, the Sole Arbitrator finds that the Respondent should bear the costs of the previous instance. This is all the more true in light of Clause 11 of the Loan Agreement. The provision reads as follows:

> *"Indemnity*
>
> *Parties agree to fully and effectively defend, indemnify and keep indemnified, any other party, on demand, from and against any and all claims, liabilities, costs, expenses, damages, losses or judgments (including any legal costs of other professional costs or expenses) suffered or incurred by that party as a result of a breach by the defaulting party of any term of this agreement".*

94. The costs incurred by the Appellant before the FIFA PSC are the *"result of a breach by the defaulting*

party of any term of this agreement", since the Respondent has defaulted on its obligation arising from the Loan Agreement. Thus, the Appellant was forced to initiate the proceedings before the first instance. The Sole Arbitrator finds that the causal link required according to Clause 11 of the Loan Agreement is not interrupted by the Appellant's procedural omission to adduce evidence in support of its claim before the FIFA PSC.

95. Consequently, no. 8 of the operative part of the Appealed Decision must state that the costs of the proceedings in the total amount of USD 20,000 must be borne by the Respondent.

96. It is unclear whether the Appellant has paid any of the procedural costs to FIFA so far. No evidence was provided by the Appellant to this effect. Should the Appellant have paid already any portion of the procedural costs incurred before the FIFA PSC to FIFA, it is entitled to the respective reimbursement by the Respondent.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 28 September 2022 by Royal Antwerp Football Club N.V. against the decision of the FIFA Player Status Chamber of 16 August 2022 is partially upheld.

2. The decision of the FIFA Player Status Chamber of 16 August 2022 is confirmed, save for points n. 2 and n. 8, which are amended as follows:

   "2. The Respondent, Wydad Athletic Club, has to pay to the Claimant the following amount(s):

   - *EUR 50,000 as outstanding remuneration plus 5% interest p.a. as from 31 March 2022 until the date of effective payment;*

   - *EUR 100,000 as outstanding bonus plus 5% interest p.a. from 7 June 2022 until the date of effective payment; and*

   - *EUR 50,000 as outstanding bonus plus 5% interest p.a. from 13 July 2022 until the date of effective payment* […].

   8. The final costs of the proceedings in the amount of USD 25,000 are to be borne by the Respondent [Wydad Athletic Club]*".*

3. Should Royal Antwerp Football Club N.V. have paid any of the procedural costs incurred before the FIFA Player Status Chamber to FIFA, Royal Antwerp Football Club N.V. is entitled to reimbursement of the paid amounts from Wydad Athletic Club.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.