

CAS 2023/A/9602 Hamad Binhaidar et al. v. Al-Arabi SC

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Manfred Nan, Attorney-at-law in Amsterdam, The Netherlands

Arbitrators: Dr. Marco Balmelli, Attorney-at-law in Basel, Switzerland

Mr. Markiyana Kliuchkovskiy, Attorney-at-law in Kyiv, Ukraine

Ad hoc Clerk: Mr. Vishakh Ranjit, Advocate in Kerala, India

in the arbitration between

Mr. Hamad Bin Haidar, Kuwait

Represented by Mr. Alessandro Oliverio and Mr. Antoine Bechara, Attorneys-at-law in Roma, Italy and Ms. Nicola Noth, Attorney-at-law in Zurich, Switzerland

- First Appellant -

Mr. Naser Alsaffar, Kuwait

Represented by Mr. Alessandro Oliverio and Mr. Antoine Bechara, Attorneys-at-law in Roma, Italy and Ms. Nicola Noth, Attorney-at-law in Zurich, Switzerland

- Second Appellant -

Mr. Hamad Alawadh, Kuwait

Represented by Mr. Alessandro Oliverio and Mr. Antoine Bechara, Attorneys-at-law in Roma, Italy and Ms. Nicola Noth, Attorney-at-law in Zurich, Switzerland

- Third Appellant -

Al-Arabi SC, Kuwait

Represented by Mr. Georgi Gradev and Mr. Marton Kiss, Attorneys-at-law in Sofia, Bulgaria

- Respondent -

I. PARTIES

1. Mr. Hamad Bin Haidar (“Appellant”), Mr. Naser Alsaffar (“Second Appellant”) and Mr. Hamad Alawadh (“Third Appellant” and collectively the “Appellants”) are Kuwaiti citizens.
2. Al-Arabi SC (the “Respondent” or “AASC”) is a sports club from Kuwait, founded in 1953, which has a football team which competes in the Kuwait Premier League.
3. The Appellants and the Respondent are hereinafter jointly referred to as the “Parties”.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, the hearing and the evidence examined in the course of the proceedings. This background information is given 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 discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background Facts

5. The Appellants held memberships of AASC – Mr. Hamad Bin Haidar became a member in 2001, Mr. Naser Alsaffar in 2015 and Mr. Alawadh in 2017. Mr. Bin Haidar was also elected as a member of the Board of Directors of AASC on 12 January 2019.
6. On 6 October 2019, 280 members of the AASC general assembly including the Appellants, requested the Secretary General to convene an Extraordinary General Assembly (“EGA”), as per Article 21 of the AASC Bylaws (“Bylaws”), with the agenda item to revoke the membership in the board of directors of AASC of Mr. Abdul Aziz Ahmad Hasan Ashur, Mr. Ali Ismail Itch, Mr. Ali Husayn Al-Nasr, Mr. Fahd Sayf Al-Fahd, Mr. Ismail Mouhammad al-Habib and Mr. Ali Abdallah Mandane (collectively, the “Board”) for violations of the Bylaws.
7. On 4 November 2019, following a request of the Board, Kuwait’s Public Authority for Sport (“PAS”) replied to the Board, confirming that the request for the EGA was in compliance with Article 21 of the Bylaws, and clarifying that copies of the applicants’ ID cards, or membership numbers, are not a statutory requirement for the request of the EGA. PAS concluded its reply ordering the Board to take all the necessary procedural steps to convene and hold the EGA.
8. On 29 December 2019, the AASC electoral committee (“AASC EC”) convened the EGA at 5 PM at the Iqraa Bilingual School. The agenda of the EGA, as requested by the 280 members, was the dismissal of six members of the Board.
9. In December 2019, the Board convened certain gatherings of some AASC members.

PAS sent a letter to the Board expressing its reservations and objections to these gatherings.

10. On 29 December 2019, the EGA requested by the 280 members was not conducted due to the lack of quorum. In compliance with Article 22 of the Bylaws, the AASC EC rescheduled the EGA on 5 January 2020.
11. On 5 January 2020, the quorum required to validate the EGA was not met and thus, the EGA was rescheduled to 9 January 2020.
12. On the same date, the Board and some AASC members gathered at the AASC headquarters and adopted a resolution to replace the AASC EC with a new one.
13. On 7 January 2020, the AASC EC sent a letter to PAS expressing concerns regarding the alleged irregularities and multiple statutory violations committed by the Board during its gatherings.
14. On 9 January 2020, the EGA took place and adopted the following resolutions:
 - a. to remove six members of the Board for alleged violations of Article 36 no. 1-2-3 of the Bylaws (“*Session two: Terms of reference of the board directors*”);
 - b. to establish an interim committee which shall exercise the powers of the board of directors, in compliance with Article 20 of the Bylaws, for the duration of the transitional period until the next election, which shall take place within 90 days (“**Interim Board**”).
15. On 9 February 2020, the Board continued to keep its office and resolved to remove the First Appellant and the Second Appellant from the Board for alleged violations of Article 36.12, invoking Article 44 of the Bylaws (“*Session four: meetings of the board*”).
16. On 17 February 2020, the Interim Board sent the invitations for the General Assembly of 5 April 2020 and initiated the application process for candidates, with a deadline of 5 March 2020 for filing the candidacy.
17. On 5 March 2020, the Interim Board announced the eligibility of twelve candidates for the election of the new Board.
18. On 19 March 2020, one of the candidates withdrew his candidacy, leaving eleven candidates for eleven spots on the Board of Directors.
19. On 2 April 2020, the Interim Board enforced Article 35 of the Bylaws, which expressly provides that if the number of candidates is equal to the number of available seats on the Board, the candidates shall be elected by acclamation. Accordingly, the eleven candidates for the eleven available seats of the new board of directors were declared elected by the interim Board.
20. On 5 August 2020, the Board resolved to terminate the membership of 3762 AASC

members including the Third Appellant, for allegedly not having paid the annual membership fee for the year 2020.

21. On 19 August 2020, PAS authorized the sports clubs to resume their activities after the shutdown caused by the pandemic, and established that members of clubs, who were prevented from settling their membership fees in the period 12 March to 18 August 2020 were allowed to pay the fees.
22. On 1 February 2021, the Appellants filed a request for arbitration before the NSAT seeking the acknowledgement of the validity of the procedures and decisions of the AASC EGA convened on 9 January 2020.
23. On 28 February 2023, the NSAT issued a decision (the “Appealed Decision”) as follows:

“For all the aforementioned reasons:

The Arbitration Chamber unanimously decides to dismiss the arbitration case, as it was filed by unqualified party. It also binds the claimants to settle the fees of the request for arbitration and the expenses of arbitration.

The final arbitration decision was made in an electronic closed session.”

C. Proceedings before the Court of Arbitration for Sport

24. On 27 April 2023, the Appellants filed a Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) against the Appealed Decision, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”) and named “Al-Arabi SC” and the “Board of Al-Arabi” as “Respondents”. In the Statement of Appeal, the Appellants nominated as arbitrator Dr. Marco Balmelli, Attorney-at-Law in Basel, Switzerland.
25. On 1 May 2023, the CAS Court Office acknowledged receipt of the Statement of Appeal and notified it to the Respondents, inviting them to jointly nominate an arbitrator. On the same day, the CAS Court Office issued a letter to the NSAT notifying it of the Statement of Appeal and pursuant to Article R41.3 of the Code, inviting it to file an application for intervention with the CAS if it intended to participate as a party in the present arbitration.
26. On 8 May 2023, the NSAT confirmed that it did not intend to participate in the present arbitration as a party.
27. On 6 June 2023, the CAS Court Office informed the Parties that the Respondents were granted a new deadline to proceed with the joint nomination of an arbitrator, failing which it would be for the Division President, or her Deputy, to proceed with such nomination *in lieu* of the Respondents.
28. On the same day, in accordance with Article R51 CAS Code, the Appellants filed their Appeal Brief.

29. On 11 June 2023, the Respondents jointly nominated as arbitrator Mr. Markiyan Kliuchkovskiy, Attorney-at-Law in Kyiv, Ukraine. A request was also presented, on behalf of the “Board of Al-Arabi”, requesting to be excluded from the proceeding as they had no autonomous legal personality and since the appeal against the “Board of Al-Arabi” was inadmissible.
30. On 12 June 2023, the CAS Court Office invited the Appellants to provide their position on the request for exclusion from the proceeding submitted by the “Board of Al-Arabi”.
31. On 13 June 2023, the Appellants expressed their objections to the request for exclusion by the “Board of Al-Arabi”.
32. On 14 June 2023, the CAS Court Office notified the Appeal Brief to the Respondents, inviting them to file their Answers and informed them that if they failed to submit their Answers, the Panel might nevertheless proceed with the arbitration and deliver an award.
33. On 18 June 2023, the Respondents submitted a request for bifurcation of the proceedings and for issuance of a preliminary award declaring the appeal inadmissible.
34. On 19 June 2023, the CAS Court Office acknowledged receipt of the Respondents’ request for bifurcation and invited the Appellants to file their comments in this regard.
35. On 22 June 2023, the Appellants filed their comments on the Respondents’ request for bifurcation, requesting that the Respondent’s arguments be disregarded.
36. On 23 June 2023, the CAS Court Office acknowledged receipt of the Appellants’ comments on the request for bifurcation and informed the Parties that it would be for the Panel, once constituted, to decide whether the proceedings shall be bifurcated.
37. On 7 July 2023, the Respondents sent an email inviting the Appellants to withdraw their appeal against the “Board of Al-Arabi” for financial and procedural economy and reiterating the request for bifurcation of the proceedings.
38. On 12 July 2023, the Appellants submitted a letter stating, inter alia, that they wished to withdraw the appeal against the “Board of Al-Arabi”. On the same day, the CAS Court Office acknowledged receipt of the same and informed the Parties of the new reference for the proceeding, i.e., “CAS 2023/A/9602 Hamad Binhaidar et al. v. Al-Arabi SC”.
39. On 27 July 2023, in accordance with Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

President: Prof. Dr. Martin Schimke, Attorney-at-law in Düsseldorf, Germany

Arbitrators: Mr. Marco Balemlli, Attorney-at-law in Basel, Switzerland
Mr. Markiyan Kliuchkovskiy, Attorney-at-law in Kyiv, Ukraine

40. On 14 August 2023, the CAS Court Office informed the Parties that Mr. Vishakh Ranjit, Attorney-at-law in Kerala, India, had been appointed as *Ad hoc* Clerk.
41. On 22 August 2023, Prof. Dr. Martin Schimke, President of the Panel, made an additional disclosure.
42. On 28 August 2023, the Respondent submitted its comments on the disclosure made by Prof. Dr. Schimke.
43. On 29 August 2023, the CAS Court Office informed the Parties that Prof. Dr. Schimke, while reaffirming his total impartiality and independence, had decided, in the interest of the proceedings, to step down from this case.
44. On 10 October 2023, in accordance with Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

President: Mr. Manfred Nan, Attorney-at-law in Amsterdam, the Netherlands
Arbitrators: Mr. Marco Balemlli, Attorney-at-law in Basel, Switzerland
Mr. Markiyan Kliuchkovskiy, Attorney-at-law in Kyiv, Ukraine
45. On 17 October 2023, the CAS Court Office informed the Parties that the Panel, after careful consideration of the Parties' rival positions in this respect, decided to reject the request for bifurcation of these proceedings. The Panel came to this decision because it considered that a bifurcation would likely not advance the efficiency of the proceedings. In particular, the Panel considered on a *prima facie* basis that the merits of the case, including the standing of the Appellants, was intertwined with the Respondents' objections to the jurisdiction of CAS and the admissibility of the appeal. Finally, notwithstanding the Panel's decision to reject the request for bifurcation, at the end of the hearing the Respondents indicated that they had no objection to the procedure adopted and that their right to be heard was respected.
46. On 19 November 2023, the Respondent filed its Answer in accordance with Article R55 of the CAS Code, containing, inter alia, an objection to the jurisdiction of CAS.
47. On 20 November 2023, the CAS Court Office acknowledged receipt of the Answer and notified it to the Appellants. The Parties were also invited to inform whether they prefer a hearing to be held in this matter. The Appellants expressed their preference for a hearing to be conducted whereas the Respondent stated that a hearing was not necessary in its view.
48. On 27 December 2023, the CAS Court Office invited the Appellants to comment on the objection to the jurisdiction of CAS as put forward by the Respondent.
49. On 8 January 2024, the Appellants filed their comments on the Respondents'

objection to jurisdiction, requesting ‘*to reject any claim of lack of jurisdiction*’.

50. On 10 January 2024, the CAS Court Office informed the Parties that the Panel had considered the issue of jurisdiction which, in line with the previous decision not to bifurcate the proceedings, would be assessed in the final award. The Parties were further informed that the Panel had decided to hold a hearing in this matter.
51. On 9 February 2024, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the Appellants on 14 February 2024 and by the Respondent on 13 February 2024.
52. On 6 March 2024, a hearing was held in Lausanne, Switzerland.
53. The following persons attended the hearing, either in person or remotely, in addition to the Panel, Mr. Giovanni Maria Fares and Ms. Amelia Moore, both CAS Counsel, and Mr. Vishakh Ranjit, *Ad hoc* Clerk:
 - a) For the Appellants:
 - 1) Alessandro Oliverio, Counsel;
 - 2) Antoine Bechara, Counsel;
 - 3) Kostantin Lachenauer, Trainee Lawyer;
 - 4) Hamad Bin Haidar, First Appellant;
 - 5) Naser Alsaffar, Second Appellant;
 - 6) Hamad Alawadh, Third Appellant;
 - 7) Joukhadar Doumit, Interpreter.
 - b) For AASC:
 - 1) Georgi Gradev, Counsel;
 - 2) Marton Kiss, Counsel;
 - 3) Mohammed bin Hussein, Representative.
54. At the outset of the hearing, all Parties confirmed that they had no objection as to the constitution and composition of the Panel.
55. The witnesses were invited by the President of the Panel to tell the truth subject to the sanction of perjury under Swiss law.
56. The Parties were given full opportunity to present their cases, submit their arguments in opening and closing statements, and to answer the questions posed by the members of the Panel.
57. Before the hearing was concluded, the Parties expressly stated that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.
58. On 8 March 2024, the CAS Court Office informed the Parties that, in order to have a better understanding of the alleged NSAT practice of individually naming members of a corporate entity’s board with the intention of including the relevant corporate entity

itself, the Panel invited submissions (limited to 5 pages) from the Appellants to further substantiate this alleged customary practice.

59. On 18 March 2024, the Appellants filed their submissions as per the instructions of the Panel. On the same day, the CAS Court Office invited the Respondent to file its comments in this respect.
60. On 28 March 2024, the Respondent filed its comments as per the Panel's instructions.

III. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

61. The following outline of the Parties' requests for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel, however, 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 summarized or referred to in the present arbitral award.

A. Appellants

62. In their Appeal Brief, the Appellants sought the following relief:

“Firstly: to find the NSAT Award null and void.

Secondly: to find that (i) the resolution of the EGA of January 9, 2020, to remove the membership of six Board members (the chairperson Mr. Abdul Aziz Ahmad Hassan Ashoor, Ali Ismail Itch, Ismail Mouhammad al-Habib, Ali Husayn Al-Nasr, Fahd Sayf al-Fahd, and Ali Abdallah Mandane) – who stand as Second Respondent in the present proceeding – is legitimate and enforceable.

In the alternative: to find that the Appellants paid their membership fees in 2020 and had the legal standing before the NSAT.

In the more alternative: to find that the Appellants were members of the First Respondent on or after March 31, 2020.

In any event: to order the Respondents to pay in full, or, in the alternative, a contribution, towards the cost and legal fees of the present proceeding.”

63. The Appellants' submissions, in essence, may be summarized as follows:

1. Breach of the NSAT Procedural Rules

- a. The Appealed Decision shall be found null and void by the Panel for the breaches of the NSAT Procedural Rules which cannot be cured.
- b. The NSAT Procedural Rules provide (i) the regulatory framework to adjudicate a dispute before the NSAT and (ii) the procedural rules a NSAT panel shall abide by to render a binding award. The following provisions are to be noted:
 - i. Article 5.1 which provides that arbitrators shall abide by the NSAT

Procedural Rules.

- ii. Article 27.4 which provides that the chairperson of the NSAT panel is appointed by the NSAT Board among the arbitrators listed before CAS.
 - iii. Article 41.1 which provides that the NSAT panel shall take the decision and issue the award in a closed session.
 - iv. Article 41.2 which provides the formal and substantive requirements of an award, the signatures of the arbitrators assigned to the proceeding and the reasons for the decision.
- c. With respect to the above requirements, the NSAT panel must (i) meet in a closed session to deliberate its decision and must (ii) render the award providing reasons and signing it.
- d. The Appealed Decision was rendered without a duly appointed chairperson of the NSAT Panel and with the signatures of only two arbitrators, namely Mr. Ahmad Hamad Al-Ubaydali (chairperson) and Mr. Shiryan Marzuq al-Matiri. The breaches of the NSAT Procedural Rules are self-evident: Mr. Ahmad Hamad Al-Ubaydali is not a CAS arbitrator as required by Article 27.4 of the NSAT Procedural Rules, and was by no means entitled to chair the panel. Even more alarmingly, the signature of the third arbitrator Dr. Fahd Muhammad A-Habini is missing on the Appealed Decision.
- e. NSAT awards are normally signed by the arbitrators, as shown by the available NSAT jurisprudence. The missing signature of Dr. A-Habini is not caused by forgetfulness or negligence, but by other serious and disturbing reasons. In fact, Dr. A-Habini after the hearings of the NSAT Proceeding, was never called to a meeting with the other arbitrators. Hence, the NSAT Panel never gathered in a closed session to deliberate and decide the case (as mandatorily requested by the NSAT Procedural Rules). The manifest infringement of the NSAT Procedural Rules is aggravated by the fact that Dr. A-Habini had not even received a draft of the Appealed Decision before it was formally issued, nor had he had the chance to provide any contribution to the decision-making process of the case. Dr. A-Habini has provided an affidavit in this regard which clearly shows that the Appealed Decision was rendered in violation of the NSAT Procedural Rules as (i) in its form one mandatory signature is missing, and (ii) in its substance the case was never deliberated or decided in a closed session with the attendance of the entire Panel.

2. Legal standing of the Appellants

- f. In relation to the EGA of 9 January 2020, all procedural requirements provided in the Bylaws were met. The uncontested resolutions of the EGA shall therefore be deemed valid and binding.
- g. In light of the reasoning provided in the Appealed Decision, according to which the Appellants “[...] *have no legal connection with AASC, as their membership was revoked on March 31, 2020, due to unpayment of subscription fees*”, the

core of the dispute comes down to once single issue, i.e., whether the Appellants paid the AASC renewal membership fee for the year 2020 within the deadline provided in the Bylaws.

- h. The NSAT Panel assumed that the renewal fees for the year 2020 were not settled within the required timeframe, i.e., 31 March of every year pursuant to Article 47 of the Bylaws, but without providing a substantiated reasoning of such finding.
- i. The finding of the NSAT shall be challenged for the following reasons:
 - i. Preliminarily, the Appealed Decision should have been well-reasoned as required by Article 41.3 of the NSAT Procedural Rules.
 - ii. On the merits, the Appellants actually paid the membership fee.
- j. At AASC, it was, and it still is, standard practice that one or a few members may collect the renewal membership fee from other members and deliver the relevant amount to the AASC, providing the names of the members that renew the membership and the amount paid by each member. Besides, it is also admissible, yet standard, to pay the membership for several years in advance.
- k. First Appellant, holding one of the oldest memberships (2001), is very familiar with these payment procedures, which are evidently accepted by AASC. *A contrario*, if prior to 2020, the Board did not want members to pay membership fees for more than one year or with a specific methodology, it would/could have easily proposed to amend the Bylaws and prohibit it, but ultimately it did not.
- l. The Appellants made payments towards membership renewal fees as follows:
 - i. in 2019, First Appellant made a payment of 70 KD, covering the renewal fee for a period of seven years, until 31 March 2026. As part of its accounting and management functions, AASC tracks and keeps records of each membership. First Appellant's statement of account confirms the payment of 70 KD made by him for a seven-year membership renewal.
 - ii. Second Appellant paid a renewal fee of 50 KD which covers the membership fees until 31 March 2024.
 - iii. Third Appellant paid his renewal fee for 2020 on 23 February 2020, through a cheque of 8030 KD, which settled the fees for himself and other 802 members. The cheque was accompanied by the list of members whose membership was renewed with the payment and the Third Appellant is identified as no. 681 of the list.
- m. Thus, there is hard evidence that, contrary to the finding in the Appealed Decision, the Appellants paid their renewal fees for 2020, entitling the Appellants to exercise their statutory rights, including the right to request the arbitration before the NSAT. It is also proven that the membership revocation

of the Third Appellant (as well as that of a large number of members) on 5 August 2020, was unfounded and purely motivated by political reasons, dismantling any legal argument that AASC may have against the Appellants. Most importantly, it shall give the CAS Panel the grounds to reverse the outcome of the Appealed Decision, which was entirely based on the alleged non-payment of the fees of 2020.

- n. In addition, even if the Panel were to find that the Appellants failed to renew their membership fees before 31 March 2020, the resolution of AASC to revoke the memberships of 3762 members on 5 August 2020, remains illegitimate. By circular issued on 19 August 2020, PAS clarified that the deadline to settle the membership fees had been suspended between 12 March and 18 August 2020, and that members of sports clubs who could not pay or renew the membership fee during that period were still allowed to pay the fees.
- o. In the case at hand, due to governmental restrictions, AASC members were unable to pay their membership fees during the period 12 March to 31 March 2020. Consequently, the revoked 3762 members should have been granted additional nineteen days, as of 19 August 2020, to settle their membership fees.
- p. Instead, the Board was not compliant with the PAS circular and maintained the revocation of the memberships. The Board, after 19 August did not inform or notify members of the voidance of the resolution and of their rights and opportunity to pay the membership fees. There was no letter, bulletin or circular received by the Third Appellant, and many AASC members were unlawfully stripped of their rights to renew their memberships. Notwithstanding the PAS circular, the board of AASC exclusively looked at its own turf without considering the greater interest of the AASC members.
- q. The Board resolution of 5 August 2020 was clearly an attempt to remove members who were loyal to or supportive of the Appellants. In this context, it is noteworthy that the Board had already tried to manipulate the memberships in the attempt to have full control of the AASC General Assembly, but it had been already reproached by PAS. In December 2019, PAS objected against the cancellation of 3246 memberships during that year, and the subsequent validity of the AASC book of registered members. Additionally, PAS showed its concerns in relation to the denial of attendance rights of AASC members who registered in 2018 and who were deprived of their right to attend the ordinary general assembly in 2019. The pattern to revoke memberships of those who do not align with the political address of the Board is manifest, and the 280 members, including the Appellants, decided to react against this arbitrary and non-democratic conduct requesting the EGA. Hence, it is established that the Board resolution of 5 August 2020, being non-compliant with the PAS circular, is void.
- r. The Panel shall find that the EGA of 9 January 2020, its resolutions and all the actions that followed were legitimate, as the Appellants and all of the members who requested the EGA were entitled to do so. Despite its incurable procedural breaches, a confirmation of this arises from the Appealed Decision as it states

that “it is established by the Panel that the procedures are valid pursuant to the provisions of the bylaws and the AASC statute, as detailed above”.

- s. Even if the Panel finds that the Appellants failed to renew their membership fees before 31 March 2020, the Appellants were undisputedly members at least until that date. Consequently, as the request for arbitration before the NSAT arises out of facts and claims prior to 31 March 2020, the Appellants did have legal standing in the NSAT proceeding in accordance with Article 60 of the Bylaws.
- t. The Board operated arbitrarily by disregarding and stripping the members of their statutory rights to renew their memberships.

3. *The illegitimate gatherings of the Board*

- u. The NSAT Panel decided *tout court* not to enter into any legal discussion on the claims made by the Appellants. Even though the Appealed Decision provides a clear description of the facts and grounds behind the claims, these were all left out of the legal discussion blocked by the challenged reasoning of the NSAT Panel, which found that the Appellants did not have legal standing to submit their request for arbitration before the NSAT, because their AASC membership was revoked on 31 March 2020.
- v. The Board was not, under any circumstance, entitled to (i) convene and conduct a general assembly meeting on 19 December 2019, 22 December 2019 and 5 January 2020 at the AASC headquarters and (ii) to replace the members of the AASC EC with a new one.
- w. It has been proven that the extraordinary general assembly meeting compliant with the Bylaws was the EGA requested by 280 members on 6 October 2019, and which was held on 9 January 2020 at the Iqraa Bilingual School. The statutory requirements for the request for the EGA, the notification of members and the convening advertised in local daily newspapers were all met. The Board, instead, held gatherings whose legitimacy were questioned and objected by PAS for manifest statutory violations, and in disregard of PAS’ findings it claimed the gathering of 5 January 2020, to be an extraordinary general assembly meeting.
- x. The gatherings, as underlined by the PAS, are in manifest breach of the requirements included of Article 21 and 22 of the Bylaws, namely (i) the invitations to general assembly meetings shall be sent by the Secretary General, (ii) the quorum of the assembly to be met and (iii) the advertisements on daily local newspapers. According to these requirements, the Secretary General had the statutory duty to invite the members to attend the meeting with 15 days’ notice. Practically, it means that the notice for the gathering of 5 January 2020, should have been sent no later than 21 December 2019, which is logically and chronologically not possible as the other procedure to convene the EGA had already been taking place. Nonetheless, the Board simply acted in spite of the well-established legitimate procedure. This proves that the Board’s sole intent was to prioritise its own agenda and interests, and stop the EGA from being

celebrated by removing the AASC EC.

- y. According to Article 26 of the Bylaws, general assemblies are expressly prohibited from considering items that are not included in the agenda. In the present case, even in the denied assumption that the gathering was properly convened and could be considered as the EGA, the agenda item for discussion could not have been the removal of the members of the AASC EC. This is because such an item is not included among the list of items for discussion at extraordinary general assemblies, as stipulated in Article 19 of the Bylaws. In relation to removal of members, Article 19 only, explicitly, refers to the Board of Directors and not to the EC.
- z. The said conduct of the Board and its consistent violations of the Bylaws show that the intent of the Board was to stop or sabotage the EGA and to avoid a vote on the motion resulting in its disbandment.
- aa. Considering this arbitrary and unlawful conduct, the CAS Panel shall find that the Board could not have convened and conducted the gatherings at the AASC headquarters, or that, at least, they could have not been considered as a legitimate AASC General Assembly, given the breach of statutory requirements as prescribed by Article 19, 20, 22 and 27 of the Bylaws. Consequently, any alleged decision/resolution arising out thereof shall be deemed void, in particular the resolution to replace the AASC EC with other members.
- bb. The CAS Panel shall find that the AASC EC rightfully followed the statutory procedures to convene and hold the EGA i.e., the meetings of 29 December 2019, 5 January 2020 and 9 January 2020 were duly convened at the Iqraa Bilingual School and met all the requirements. On 9 January 2020, the quorum was reached and the EGA could legitimately adopt resolutions. The meeting was chaired by the eldest member in attendance, i.e., Mr. Abdul-Kareem Bin Haidar, as prescribed by Article 28 of the Bylaws. On that account, the resolution adopted by the EGA to revoke the membership of the six members of the Board is legitimate and effective, and the Board should immediately be removed from office.

B. Respondent

- 64. In its Answer, the Respondent seeks the following reliefs in these proceedings:
 - “1. Rule that CAS does not have jurisdiction to decide on the appeals filed by the Appellants and render them inadmissible.*
 - 2. Alternatively, refer this case back to the National Sports Arbitration Tribunal to assess and decide on the dispute’s merits.*
 - 3. Order the Appellants to bear all costs incurred with the present procedure.*
 - 4. Order the Appellants to pay the Respondent a contribution towards its legal and other expenses determined at the Panel’s discretion.”*
- 65. AASC’s submissions, in essence, may be summarized as follows:

1. CAS does not have jurisdiction

- a. Article 49 of the Kuwaiti Sports Law 87-2017, construed objectively, refers to the “binding” nature of the NSAT arbitral awards and their “implementation”, i.e., the enforceability of the arbitral awards rendered by the NSAT. It has nothing to do with the right to appeal and CAS jurisdiction. For that, the provision in question refers to “*the regulations and rules related to the jurisdiction of [CAS], as well as the rules of jurisdiction related to International Sports*”.
- b. The Appellants should have relied on related regulations and rules, binding the Parties, conferring jurisdiction on CAS to hear the Appellants’ appeal against the Appealed Decision.
- c. Even assuming that Article 49 of the Kuwaiti Sports Law 87-2017 would confer jurisdiction on CAS to hear the Appellants’ appeal, *quod non*, such a normative statutory act does not comply with the requirements of Articles R27 and R47 of the Code.
- d. Pursuant to Articles R27 and R47 of the Code, an arbitration agreement conferring jurisdiction on CAS must be based on a private act between the parties, not a normative statutory act (CAS 2017/A/5209).
- e. Under Article R48 of the Code, the Appellant had to adduce to CAS with the Statement of Appeal “*a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS*”. Article R49 of the Kuwaiti Sports Law 87-2017, adduced by the Appellants as Exhibit 3 to the Statement of Appeal, does not satisfy that requirement. Consequently, CAS does not have personal and material jurisdiction to hear the Appellants’ appeal.
- f. One of the main requirements under Article R47 of the Code for CAS to have jurisdiction *ratione personae* over AASC is that the Appellants have exhausted the legal remedies available to them prior to the appeal. CAS panels have regularly applied this principle (CAS 2019/A/6144, 6145; CAS 2017/A/5054).
- g. The Appellants have directed their initial claim before the NSAT at the “*President and members of the board of directors of Al Arabi Sports Club*” as clearly stated in the Appealed Decision. Further, the Appellants initially directed their appeal against “*the Board of Al-Arabi*” and AASC. However, after receiving and considering the findings in the award in CAS 2022/A/8760, the Appellants withdrew the appeal against the “*Board of Al-Arabi*”, which had no subjective legal capacity to sue AASC. Such conclusive behavior by the Appellants clearly implies the difference between “*the Board of Al-Arabi*” and AASC in terms of legal capacity.
- h. It is an irrefutable fact that the Appellants had not directed their initial claim before the NSAT against the legal entity AASC, which was not a party in the proceedings before the NSAT that resulted in the Appealed Decision. Indeed, NSAT has so far not decided on the claim between the Appellants and AASC. The Appellants must exhaust the legal remedies available to them, i.e., file a

claim against AASC before the NSAT and submit that AASC is liable for the challenged decisions. Consequently, CAS does not have jurisdiction *ratione personae* over AASC.

- i. Jurisdiction *ratione personae* concerns a court's power to adjudicate the parties' rights and obligations and make decisions that affect the parties. Personal jurisdiction must exist to bind the parties to a lawsuit. A court's decision cannot be enforced on the parties without personal jurisdiction.
- j. Jurisdiction *ratione personae* concerns the so-called subjective arbitral capacity of the parties, which is the capacity to conclude an arbitration agreement and appear as a party in an arbitration (SFT 4A_50/2012).
- k. Whether or not a party has the capacity to be a party to an arbitration proceeding is a question of jurisdiction (SFT 4A_50/2012; CAS 2022/A/8760; CAS 2020/A/6769).
- l. As a general rule, a party's capacity in international arbitration in Switzerland is determined under Chapter 12 of the Swiss PILA. However, Chapter 12 PILA does not contain specific provisions regarding the issue in dispute as to the standing of non-state parties. The capacity to act as a party in arbitration depends upon the substantial preliminary legal issue of the legal capacity (SFT 4A_50/2012; SFT 4A_428/2008; CAS 2020/A/6769).
- m. A party's legal capacity in an international arbitration seated in Switzerland is determined in view of the legal status of the person or entity based on the applicable law (SFT 4A_50/2012; SFT 4A_428/2008; CAS 2022/A/8760; CAS 2020/A/6769).
- n. Moreover, legal capacity is the person's capacity to hold rights and obligations. Legal capacity exists when a person can be allocated rights and obligations. In the present case, CAS would have jurisdiction *ratione personae* only if each Appellant can prove that he holds membership rights. That was not proved to the NSAT, which correctly decided, based on the evidence on file, that the Appellants have no subjective legal capacity to sue AASC.
- o. In particular, the NSAT found that the Appellants have no legal connection to AASC, as their membership was revoked on 31 March 2020. Moreover, the First and Second Appellant's membership in AASC's Board of Directors was revoked on 9 February 2020. AASC concurs with the NSAT for the reasons stated in the Appealed Decision that the Appellants have no legal connection to AASC and thus, no subjective legal capacity to sue and submits that CAS does not have jurisdiction *ratione personae* to rule on the appeal.
- p. It is common ground that the applicable law is AASC's Statutes and Kuwaiti law. As a matter of Kuwaiti law, the Panel has to decide whether the Appellants have subjective legal capacity to sue AASC.
- q. In CAS 2022/A/8760, the Panel stated "*the date on which these matters are to be assessed is the date on which the Appellants filed their challenge against*

the EGA Decisions with the NSAT". In the present case, the date on which this matter is to be assessed is the date on which the Appellants filed their requests for arbitration before the NSAT i.e., 1 February 2021. The Appellants bear the burden of proof to demonstrate that they had subjective arbitral capacity on 1 February 2021, i.e., that they were members of AASC on the said date.

- r. In the present case, the chronology of events is as follows:
- i. On 9 February 2020, AASC's Board of Directors met and decided to dismiss Hamad Bin Haidar and Naser Alsaffar from the Board of Directors.
 - ii. On 19 February 2020, AASC sent a letter dated 16 February 2020 to Mr. Alsaffar and Mr. Bin Haidar with the subject line "*Notice on Revocation of Board of Directors Membership*".
 - iii. As the Appellants correctly stated in the Appeal Brief. "*By Circular issued on August 19, 2020 PAS clarified that the deadline to settle the membership fees had been suspended between March 12 and August 18, 2020, and that members of sports clubs who could not pay or renew the membership fee during that period were still allowed to pay the fees*".
 - iv. On 2 September 2020, AASC sent letters dated 27 August 2020 to the three Appellants with the subject line "*Notice on Payment of Annual Subscription*" and invited them to pay their annual membership fee "*so that [they] can maintain [their] membership in the club*" and informed them that "*anyone fails to pay on this date, their membership will be terminated in accordance with the provisions of the Club's Statute*".
 - v. On 12 October 2020, AASC sent letters dated 8 October to the three Appellants with the subject line "*Notice on Termination of your Membership in the Club*".
- s. The Appellants never challenged the relevant Board of Directors' decision to terminate their membership with AASC. These decisions are final and binding and vested with *res judicata* effects. So, the Appellants have not been AASC's members since October 2020. Whether the Appellants have paid their memberships in 2020 and whether AASC has followed the protocol in its Statutes when dismissing them can be left moot as these matters fall outside the scope of the present appeal.
- t. For the sake of completeness, the Appellants have not paid their membership fees as of 2020, contrary to what they claim. The payment evidence they adduced with the Appeal Brief does not name them as payers of membership fees for 2020 onwards to AASC. No evidence on file proves that the Appellants were prevented from paying the subscriptions to AASC if they wished to do so.
- u. The burden of proving their membership status lies with the Appellants. Yet,

they have not provided a single shred of evidence that they are currently members of AASC, let alone proof of payment of their membership fees from 2020 onwards, as required by Article 48.1 (B) of AASC's Statutes. Hence, as per Article 8.1 (C) of AASC's Statutes, the Appellants have forfeited their membership, for which the Board of Directors has passed final and binding decisions.

- v. Consequently, the three Appellants do not have the status of members of AASC or the Board of Directors and, therefore, do not – as a matter of Kuwaiti law – have the subjective arbitral capacity to sue AASC (CAS 2022/A/8760). As a result, CAS does not have jurisdiction *ratione personae* over the three Appellants.

2. *The case should be referred back to the NSAT*

- w. The NSAT did not enter into an analysis of the relevant decisions. As such, it is not appropriate for the Panel to render a final and binding decision with major consequences for AASC (who did not participate in the proceedings at NSAT) in a situation where the NSAT has not reviewed and assessed the substance of such decisions. If the Panel is to issue a decision based on the merits of this case, it would deprive AASC of one level of adjudication. AASC deems that its defense rights should be fully respected and that the NSAT is the primary forum for this and only subsequently CAS.
- x. A new examination of the dispute by the NSAT would allow a unitary assessment of all the relevant aspects, including AASC's position on the merits, as it did not raise any argument related to the merits in the previous instance.
- y. Therefore, if the Panel decides to annul the Appealed Decision, in the circumstances of this case and to preserve the existence of two levels of decision, as well as considering the technical nature of the relevant decisions and the intricacies of the Kuwaiti legal order, AASC concludes that the NSAT is better placed to assess the contents of the relevant decisions and the arguments raised by the Parties. Hence, AASC deems it more appropriate to refer the case back to the NSAT (CAS 2020/A/7019, 7035; CAS 2020/A/6617; CAS 2013/A/3155).

3. *Appellants do not have a legal interest to sue*

- z. AASC's new Board of Directors for 2023-2027 was elected by acclamation in line with Article 35 lit. A of AASC's Statutes, as they ran unopposed since the number of candidates was equal to the number of vacant seats on the board. So, the AASC EC announced the results per Article 12 of AASC's Statutes, and the new Board of Directors was lawfully constituted.
- aa. Consequently, on 14 January 2023, the new Board of Directors held their first meeting and confirmed their election by acclamation.
- bb. For these reasons, the Appellants have no personal or practical interest in the

award they seek.

C. Appellants’ post-hearing submissions

66. In their post-hearing submissions, the Appellants submitted that:

- a. The awards of the NSAT in other cases demonstrate the validity of the practice of naming or addressing corporate entities by referring to their chairperson acting in his/her capacity.
- b. This practice is also customary in ordinary proceedings before national courts in Kuwait such as the Kuwait Court of Cassation and the Kuwait Constitutional Court.
- c. In NSAT award 202221226001, Mr. Abdul Aziz Ashoor acted and represented AASC in his capacity of chairman which shows that the AASC endorsed such practice and did not challenge it.
- d. The arguments of the Appellants are also supported by the affidavit provided by Prof. Ebrahim Al-Homoud, professor of public law at the faculty of law of University of Kuwait.

D. Respondent’s post-hearing submissions

67. In its post-hearing submissions, the Respondent submitted that:

- a. The national court decisions cited by the Appellants and Prof. Al-Homoud’s affidavit are beyond the narrow scope of the Panel’s directions for post-hearing submissions and are inadmissible.
- b. The same issue was dealt with in CAS 2022/A/8760 wherein the panel rejected the argument that “the added parenthetical (“in their capacity”) was an effective means by which to bring a claim against the Club”.
- c. Since the Appellants rely on an alleged custom, the considerations related to customary law should be applied. For customary law to exist, three requirements have to be met: (i) the applicable regulations contain a loophole, which may be supplemented by customary law; (ii) there is a constantly and consistently applied practice; and (iii) there is a conviction that such practice is legally mandatory or necessary.
- d. There is no loophole in the NSAT Procedural Rules as the requirements are provided in Articles 25.1.3 and 25.1.4 of the NSAT Procedural Rules. The Appellants failed to include the “full name of the respondent” and as a consequence, AASC was not a party to the NSAT proceedings. The Appellants are trying to rectify their mistake in the present proceedings.
- e. The alleged practice before the NSAT is neither constant nor consistent. The NSAT awards submitted by the Appellants are only partially produced and translated and have the involved parties redacted. The only full award produced by the Appellants does not concern membership rights and does not support

their argument.

- f. The alleged practice is not legally mandatory or necessary and as such, the existence of a custom has not been proved.

IV. PRELIMINARY ISSUES

68. The Panel notes that the Club has argued that certain evidence provided by the Appellants as part of their post-hearing submissions, is inadmissible as they are beyond the narrow scope of the Panel’s request for such post-hearing submissions. The evidence submitted by the Appellants that the Club has objected to are certain national court decisions from Kuwait and an affidavit of Prof. Ebrahim Al-Homoud, professor of public law at the faculty of law of University of Kuwait.

69. The letter of the CAS Court Office dated 8 March 2024, whereby the Panel invited post-hearing submissions from the Parties read as follows:

“At the hearing the Appellants referred to an alleged NSAT practice of individually naming, in NSAT proceedings, the members of a corporate entity’s board with the intention of including the relevant corporate entity itself (e.g., in sports-related matters, a club).

Although the Panel recalls that it is the responsibility of the parties to provide evidence supporting their submissions, the Panel, in order to have better understanding of the matter at stake, prefers to give the Parties the opportunity to file submissions in this respect.

*Accordingly, the Appellants are given **10 days** from the receipt of this letter by email to further substantiate this alleged customary practice, providing any supporting documentation available (translated into English). This submission shall be limited to 5 pages (excluded the exhibits) and the above deadline will not be extended.*

The Respondent will be given the same deadline to comment on the Appellants’ submission.”

70. The Panel notes that it invited post-hearing submissions, as provided under Article R56 of the Code, with certain strict instructions with regard to its scope, form and time limit, to better understand the alleged customary practice before NSAT. Although the Respondent objected to certain documents provided by the Appellants, the Panel finds that the documents submitted by the Appellants are admissible as they are within the scope of the directions issued by the Panel as per the letter of the CAS Court Office dated 8 March 2024.

V. APPLICABLE LAW

71. Article R58 CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations

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

72. Accordingly, the applicable regulations in the present case are AASC’s Statutes, which concern AASC’s internal procedures and, subsidiarily, Kuwaiti law. The Panel notes that the Parties agree that these are the applicable regulations.

VI. JURISDICTION

73. Article R47 CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.”

74. In light of the objections submitted by AASC to the jurisdiction of CAS in the present matter, the Panel shall address this matter first and only if it considers that the CAS is competent to deal with the case at hand, will it then deal with the remaining issues and the merits of the case.

75. The Panel notes that as stated in Article R55 of the CAS Code and in CAS jurisprudence, the Panel has the authority to decide on its own jurisdiction. In this regard, the Panel refers to CAS 2021/A/8031, para 73 of the abstract as published on the CAS website, in which that panel considered that “[t]he Panel has the authority to decide on its own jurisdiction pursuant to article 186 of the Swiss Act on Private International Law (“PILA”), which reflects the principle *KompetenzKompetenz* extensively recognized in international arbitration and in the CAS jurisprudence (among others, CAS 2004/A/748, CAS 2005/A/952, CAS 2006/A/1190 or CAS 2011/A/2363). This principle is also reflected in article R55 of the CAS Code (“The Panel shall rule on its own jurisdiction”).”

76. AASC’s objection to the jurisdiction of CAS is based on three arguments:

- a. There is no arbitration agreement between the Parties conferring jurisdiction on CAS;
- b. The Appellants have failed to exhaust the legal remedies available to them prior to the appeal to CAS; and
- c. The Appellants lack subjective legal capacity to sue AASC.

77. The Panel accepts that the first argument raised by AASC is indeed an issue of jurisdiction but finds that the second and third argument do not concern the

jurisdiction of CAS.

78. Although debatable, a failure to exhaust legal remedies available to a party before turning to CAS is generally considered as an issue of admissibility of the appeal, rather than an issue concerning the jurisdiction of CAS:

“It is debated in legal doctrine whether exhausting internal legal remedies is an admissibility requirement (pro: RIGOZZI/HASLER, Article R47 CAS Code, in: Arroyo (Ed.), Arbitration in Switzerland, Vol. II, 2018, p. 1583) or a matter of jurisdiction (pro: MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, 391). According to Rigozzi/Hasler ‘[i]t must be emphasized that although the ‘exhaustion of internal remedies rule’ constitutes a mere admissibility requirement, it is treated as a precondition for CAS jurisdiction in the context of actions to set aside CAS awards based on Art. 190(2) (b) PILS, meaning that the issue can be reviewed with unfettered powers by the Swiss Supreme Court.’ (RIGOZZI/HASLER, Article R47 CAS Code, in: Arroyo (Ed.), Arbitration in Switzerland, Vol. II, 2018, p. 1584).

The Panel favours considering the issue as an admissibility requirement. First, this is in line with the Parties’ written and oral submissions that considered it to be an issue of admissibility. Second, because the requirement does not serve to distinguish the Panel’s mandate from the Parties’ access to justice before state courts. By submitting to CAS jurisdiction, the Parties wanted to exclude any kind of recourse to state courts. In particular, they did not want to enable a party to file an appeal before state courts in all matters, in which a CAS panel finds that the requirements for a ‘decision’ within the meaning of Article R47 CAS Code are not fulfilled. Consequently, the issue whether or not a decision is appealable (within the meaning of Article R47 of the CAS Code) is not aimed at limiting the CAS jurisdiction vis-à-vis state courts. Instead, it is an admissibility issue, since – at the end of the day – the response to the question at stake is dictated by procedural principles such as procedural efficiency. This Panel finds itself comforted in its view by a comparison with the procedural rules regulating appeals before state courts. In such context whether or not a (preliminary) decision from a previous instance is appealable or not to a higher instance is a procedural matter of admissibility.” (CAS 2019/A/6298, paras. 77-78)

79. Although the Parties in the matter at hand did not treat this argument as an admissibility argument, but as an issue of jurisdiction, the Panel finds that the requirement that internal legal remedies must be exhausted before an appeal can be filed with CAS is an issue of admissibility and will treat it as such.
80. Furthermore, the AASC argues that the Appellants lack subjective legal capacity to sue. This is neither an issue of jurisdiction, nor of admissibility, but it is an issue of standing to sue, which is an issue related to the merits of the case:

“The Panel recalls the established CAS jurisprudence that the issue of standing to sue is a matter of substantive law, and is treated as an issue of merits and not as a question relating to the admissibility of an appeal (CAS 2016/A/4787, para 106 and ATF 126 III 59, 1(a)).” (CAS 2022/A/8865, 8866, 8867 & 8868, para. 74)

No arbitration Agreement

81. The Panel notes that AASC’s argument that there was no arbitration agreement between the parties was based on the Appellants’ apparent reliance on Kuwaiti law to argue that CAS had jurisdiction in the present matter. However, during the course of the hearing, AASC stated that it no longer wished to pursue this argument as jurisdiction of CAS is provided for within Article 45 of the NSAT Procedural Rules. Accordingly, the Panel finds that this argument of AASC need not be considered.
82. The Panel is therefore satisfied to accept that CAS has jurisdiction to adjudicate and decide on the matter at hand.

VII. ADMISSIBILITY

83. Article R49 CAS Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.”

84. In accordance with Article R49 of the CAS Code, the time limit for filing the appeal is 21 days. The present appeal was filed within this deadline since the Appellants received the Appealed Decision on 6 April 2023. The Respondent argues that for CAS to have jurisdiction *ratione personae* over AASC, as per Article R47 of the CAS Code, the Appellants should have exhausted the legal remedies available to them prior to the appeal. AASC states that since it was not a party before the NSAT which resulted in the Appealed Decision, the claim between the Appellants and AASC has not yet been decided by the NSAT and as such, the available legal remedies have not been exhausted by the Appellants before approaching CAS.
85. In response to the arguments raised by AASC, the Appellants submitted that AASC was indeed a party before the NSAT as the request for arbitration was filed against *“the Chairperson (and the members of the board of directors) of Al Arabi SC in his capacity of Chairperson of Al Arabi SC”*. According to the Appellants, the usage of the term *“in his capacity”* shows that the claim was not filed against Mr. Abdel Aziz Ahmed Hassan Ashour personally. Further, the Appellants argued that in Kuwait, legal entities or collective bodies are addressed referring to their representatives in their respective capacities. The Appellants also pointed out that the Chairperson is the only legal and judicial representative of AASC as per Article 39 of the AASC

Bylaws and this was respected by the Appellants while filing the request for arbitration before the NSAT. Finally, the Appellants also argued that AASC accepted NSAT jurisdiction by not raising any objections during the proceedings.

86. The Panel notes that the issue at the center of the Parties' arguments with regard to the exhaustion of legal remedies is whether AASC was a party in the first instance proceedings before NSAT which resulted in the Appealed Decision. AASC entirely denies being a party to the said NSAT proceedings, while the Appellants allege that there exists a practice in Kuwait, whereby an individual (who is a legal representative of an entity) is to be named as the respondent "in their capacity" while filing any claims against such entity. In order to give this contention of the Appellants its due consideration, the Panel invited the Parties to submit post-hearing submissions on this alleged practice. The Panel notes the following based on the documents on record:
- a. In the request for arbitration filed by the Appellants before the NSAT (i.e., the translation provided by the Appellants which has not been contested by AASC), the respondent is described as "*Chairman and members of the Board of Directors of Alarabi Sports Club which is represented by Mr. Abdul Aziz Ahmad Hassan Ashoor – a Kuwaiti national – holder of ID no/ 269052600755 in his capacity as Chairman of the Board of Directors of Arabi Sports Club.*"
 - b. In the defence memorandum filed before the NSAT (i.e., the translation provided by the Appellants which has not been contested by AASC), the respondent is described as "*Mr. Abdel Aziz Ahmed Hassan Ashour : respondent in his capacity as Chairman of the Board of Al-Arabi Club*".
 - c. In the Appealed Decision (i.e., the translation provided by the Appellants which has not been contested by AASC), the Respondent has been described as "*President and members of the board of directors of Al Arabi Sports Club (AASC)*".
87. Based on the submissions and documents provided by the Parties, the Panel shall examine whether the provisions of the NSAT Procedural Rules are unambiguous and clear on the details to be included in the claims to be filed before the NSAT, and, if not, whether there is a "loophole" which requires supplementing through a customary practice such as the one alleged by the Appellants.
88. Art 1 Swiss Civil Code, which establishes the source of law to be applied, provides as follows:
- "in the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator."*
89. In CAS 2019/A/6330, the panel discussed the recognition of customary law in associations:

“The majority of Swiss scholars agree that a custom consists of two elements: objective and subjective. The ordinary meaning of the term “custom” presupposes the existence of widespread practice for a very long time (longa consuetudo). The practice should emerge out of the spontaneous and unforced behaviour of various members of a group. The parties involved must subjectively believe in the obligatory or necessary nature of the emerging practice (opinio juris sive necessitatis) (WERRO F., in PICHONNAZ/FOËX (eds.), Commentaire romand, Code civil I, Basel, 2010, ad art. 1 CC, N. 7, p. 6 and N. 27, p. 12). In this context, the concerned party must objectively demonstrate the existence of its allegations with regard to a longstanding and undisputed practice that acquired force of customary law (Article 8 of the Swiss Civil Code; ATF 123 III 60 consid. 3a); ATF 130 III 417 consid. 3.1.). In order to convince that such customary law indeed was established it is not sufficient to simply assert a statement of such a practice.” (CAS 2019/A/6330, para. 101)

90. The Panel observes that the Appellants have not established the prerequisites for the application of customary law (or the existence of such concept) under Kuwaiti law. In the absence thereof, the Panel considers the application of Swiss law appropriate as the *lex arbitri*.
91. In order to identify whether any “loophole” exists in the NSAT Procedural Rules, which requires such a custom to be followed, the relevant provisions of the NSAT Procedural Rules may be referred to:
 - a. Article 25 provides the information that the request for arbitration shall include.
 - b. Article 25.1.3 states that the request for arbitration shall contain “*the full name of the respondent, their description, profession or occupation, residence, place of work, and any other contact information, including their email address, phone and fax numbers.*”
 - c. Article 25.1.4 states that the request for arbitration shall contain the relevant details of the respondent’s legal representative.
 - d. Article 25.1.11 states that the claimant shall mention “*the full names, descriptions, professions or job titles, domiciles, places of work, and any other contact information of all natural and juridical persons who are mentioned in the arbitration request, including their email addresses and phone and fax numbers.*”
 - e. Article 26 provides the information that the response to the request for arbitration shall contain.
92. The Panel considers the said provisions of the NSAT Procedural Rules to be unambiguous and clear on the details to be included in the claims to be filed before the NSAT. No provision in the NSAT Procedural Rules suggests that a claimant

should not mention the actual legal entity it seeks to obtain a right from, but that it should instead only mention the legal representatives of such legal entity.

93. As such, in the opinion of the Panel, there was no “loophole” which required supplementing through a customary practice such as the one alleged by the Appellants. This in itself is considered sufficient ground by the Panel to declare the Appellants’ appeal inadmissible.
94. Upon an evaluation of the evidence presented by the Appellants, the Panel finds that the Appellants have not been able to prove that there was such a constant and consistent practice before the NSAT or that such practice was legally mandatory. While the Appellants put forward, in their post-hearing submissions, certain other NSAT awards wherein the term “*in his capacity*” had been used while apparently naming respondents which were legal entities, the Panel does not consider this to be sufficient evidence of a consistent or mandatory practice. No evidence has been placed before the Panel of any case wherein a different approach was not accepted by the NSAT. In fact, the two NSAT awards submitted by the Club clearly demonstrate that it was possible for the claimant to name entities such as “Gentlemen Salmiya Sports Club” and “Al-Nasr Sports Club” as respondents without any apparent objection. The Appellants also submitted evidence that allegedly shows that such practice is followed even in national court proceedings in Kuwait, however the Panel finds that the said evidence does not establish any ‘custom’. The Panel has also considered the affidavit of Professor Al-Homoud submitted by the Appellants along with their post-hearing submissions but the Panel does not consider the affidavit to be, by itself, conclusive evidence demonstrating the existence of the alleged customary practice before the NSAT.
95. In particular, Professor Al-Homoud’s states that the procedure of “[c]ommunicating with, and serving legal entities in all judicial procedures shall be through their legal representative in his capacity”. He submits that “[t]his procedure is followed in Kuwait in accordance with the laws”. However, no legal basis for such procedure is provided.
96. Further, the Panel also considers it necessary to refer to the award in CAS 2022/A/8760 which involved similar factual circumstances and wherein the panel came to the conclusion that there was no evidence available of such a practice before the NSAT.
97. Having reached the conclusion that the Appellants failed to prove the fulfilment of the requirements for the acceptance of a customary practice, the Panel finds that AASC was not a party before the NSAT in the first instance proceedings and as such, the Appellants’ claims against AASC are yet to be adjudicated. The Panel considers relevant the jurisprudence cited by AASC (CAS 2019/A/6144, 6145, para. 70 to 77 and CAS 2016/A/4777 para. 109) wherein it has been held that when a party has not been summoned as respondent in the first Instance proceeding, CAS cannot exercise jurisdiction *ratione personae* over that party in appeal proceedings. As such, in the present case, considering that AASC was not a party before the NSAT in the proceedings which resulted in the Appealed Decision, the Panel is constrained to find

that it cannot exercise jurisdiction *ratione personae* over AASC in the present appeal. Hence, the Panel cannot enter into adjudication of the merits of the present dispute. The Panel also notes that having concluded that the Appellants' appeal is inadmissible, it does not consider it necessary to examine the third argument of the Appellants on standing to sue.

VIII. CONCLUSION

98. In view of all the above considerations, the Panel holds and determines that the Appellants' appeal is inadmissible.

IX. COSTS

(...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 April 2023 by Hamad Bin Haidar, Naser Alsaffar and Hamad Alawadh against Al-Arabi SC is inadmissible.
2. (...).
3. (...).
4. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 19 December 2024

THE COURT OF ARBITRATION FOR SPORT

Manfred P. Nan
President of the Panel

Marco Balmelli
Arbitrator

Markiyan Kliuchkovskiy
Arbitrator

Vishakh Ranjit
Ad hoc Clerk