Arbitration CAS 2013/A/3123 Steel Azin Club v. Ljubisa Tumbakovic, award of 17 January 2014

Panel: Mr José Juan Pintó (Spain), President; Mr Jahangir Baglari (Iran); Mr Hans Nater (Switzerland)

Football
Contract of employment between a club and a coach
Deadline for the execution of a payment
Just cause
Compensation for damages

1. **If the contract provides that a signing on fee will be paid after the signature of the contract but does not provide a specific deadline for the execution of the payment, the signing on fee, according to article 75 of the Swiss Code des Obligations (CO), is immediately claimable from the very moment of signing the contract. Therefore a club not paying a substantial part of that signing on fee during a significant period of time in spite of having been claimed to do so by the opposite party to the contract is in breach of its contractual obligations.**

2. **Not every breach of a contractual obligation by a party justifies the early termination of a contract. Rather, the breach of contract must have a certain degree of seriousness to constitute "just cause". If (i) the club failed to comply with the timely payment of a substantial part of the signing on fee during a significant period of time and (ii) the coach warned the club about the breach and gave a reasonable opportunity to remedy such breach, there is just cause to terminate the contract.**

3. **In principle, the harmed contractual party should be restored to the position in which the same party would have been had the contract been properly fulfilled. The judging authority shall be led by the principle of the so-called 'positive interest' (or 'expectation interest'), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly. This principle is not entirely equal, but is similar to the praetorian concept of *in integrum restitutio*, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.**

I. THE PARTIES

1. Steel Azin Club (hereinafter also referred to as "Steel Azin" or "the Club" or "the Appellant") is a football club with its registered office in Tehran, I.R. of Iran. It is a member of the Football Federation of I.R. of Iran (hereinafter also referred to as "FFI"), affiliated to the Fédération Internationale de Football Association (hereinafter also referred as "FIFA").

2. Mr. Ljubisa Tumbakovic (hereinafter also referred to as the "Coach" or the "Respondent") is a football coach of Serbian nationality.

II. FACTS OF THE CASE. THE PROCEEDINGS BEFORE FIFA AND THE CAS

3. A summary of the facts and background giving rise to the dispute will be developed below based on the parties' submissions and the evidence taken. Additional background may be also mentioned in the legal considerations of the present award. In any case, the Panel has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings, but it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

II.1 THE AGREEMENT SIGNED BY STEEL AZIN AND THE COACH. THE EVENTS GIVING RISE TO THE DISPUTE.

4. On 5 July 2010, the Coach and Steel Azin entered into an agreement (hereinafter referred to as the "Agreement") comprising, among others, the following clauses:

"2 – SUBJECT OF THE CONTRACT

The Club which is involved in the highest performance football competition in Iran (League-e Bartar) engages the services of Mr. Lubisa (sic) Tumbakovic as their "FOOTBALL HEAD COACH".

3 – DURATION OF THE CONTRACT

This contract after signing by both parties will be Valid for Twelve Months; starting from July 5th 2010 and expiring on 5th July 2011.

4 – VALUE OF THE CONTRACT:

The value of the contract is 1.200.000 USD (One Million and Two Hundred Thousand US Dollars) and will be paid as follows:

4-1 The First payment is 480.000 USD (Four Hundred and Eighty Thousand US Dollars) and will be paid to the Coach after signing the contract.

4-2 The Second Payment is 240.000 USD (Two Hundred and Forty Thousand US Dollars) which will be paid on 5th of November 2010..(sic)

4-3 The Third Payment is 240.000 USD (Two Hundred and Forty Thousand US Dollars) which will be paid on 15th of January 15th (sic), 2011.

4-4 The Forth (sic) Payment is 185.000 USD (One Hundred and eighty five Thousand US Dollars) which will be paid on March 25th, 2011.

4-5 Every month an amount of 5.000 USD (Five thousand US Dollars) for 11 months starting July 2010.

Note 2: All the payments will be paid Net to the Head Coach and all kind of taxes will be paid by the Club.

5 – DUTIES AND OBLIGATIONS OF THE HEAD COACH

5-1 THE HEAD COACH is engaged full time to train and guide the Senior Football team (Team A) of THE CLUB under the supervision of THE CLUB. In addition, He would supervise the activities of the youth levels and would instruct the coaches of youth levels and will do his best to teach the players of theses(sic) teams to enable them to play for the First team in short future.

5-2 In any kind of Media interview by THE COACH he has to consider the benefit and respect of The Club and these (sic) interviews should not cause any direct or indirect harm to The Club.

5-3 THE HEAD COACH is obliged to observe all regulations and instructions of Football Federation of the I.R. of Iran and should not do any action whatsoever which may cause damage and harm to THE CLUB or himself.

5-4 THE HEAD COACH as a professional coach shall respect professional rules and do his best for preparing the team and keeping the readiness of the team.

6 – OBLIGATIONS OF THE CLUB

[…]

6-3 To sign the Assistance who have been introduced by the Head Coach and the other required persons including an experienced translator for THE HEAD COACH to perform his duties. Approval of THE HEAD COACH for employing of any of these persons by THE CLUB is necessary.

6-4 Obtaining Work Permit and legal residence according to the laws and regulations of I.R. Iran (sic).

[…]

6-6 During the Contract THE HEAD COACH who is fully healthy when signing the Contract will be under full coverage of health and medical services according to the rules of the Sports-Medical Federation of IR Iran provided by THE CLUB free of charge.

[…]

7 – BONUSES

7-1 For each winning Match the Coach will receive 2.000 USD (Two thousand US Dollars) as bonus.

7-2 In case of achieving champion title of the FA Cup 2010-2011 THE COACH will receive 150.000 USD (One Hundred and Fifty Thousand US Dollars) as bonus.

7-3 In case of winning the championship of the League in season 2010-2011 THE COACH will receive 250.000 USD (Two Hundred and Fifty Thousand US Dollars) as bonus.

8 – GENERALITIES

8-1 The governing law of this Contract is the law of the Islamic Republic of Iran and the regulations of FIFA as well as the regulations of the Football Federation of I.R.Iran (sic).

8-2 In case of any dispute in any part of contract, both parties will try to solve the problem in friendly way by dialog (sic) and then arbitration and in case of un satisfaction (sic) of each party the issue will be taken to FIFA.

8-3 The present contract as well as the previous negotiations will be held in secret.

8-4 If THE CLUB terminates the Contract unilaterally before the expiry date, it has to pay all the amount of the contract until the end of the contract to The Coach.

8-5 If THE HEAD COACH wants to leave THE CLUB before the expiry of the Contract, he is obliged to return all the amounts he has received from the club.

[…]

8-10 This contract is provided in two languages, Farsi and English and in case of any dispute, English language will be valid".

5. On 14 September 2010, Steel Azin paid the Coach the sum of USD 100.000 as partial payment of the USD 480.000 foreseen in clause 4-1 of the Agreement.

6. On 20 September 2010, the Coach travelled to Serbia.

7. On 23 September 2010, the Coach obtained an extension of his Iranian work permit until 22 December 2010.

8. On 25 September 2010, the Coach returned to Iran.

9. On 5 October 2010, Steel Azin paid the Coach the amount of USD 15.000.

10. By letter dated 6 October 2010, the Coach's counsel notified Steel Azin about its delay in paying the outstanding amount foreseen in clause 4-1 of the Agreement. The pertinent part of this letter reads as follows:

"I am writing to you as powered attorney of Mr (sic) Ljubisa Tumbakovic, coach from Serbia. We are forced to worn (sic) you about settlement of yours due obligations.

Article 4 of mutually stipulated Contract determines payment of I instalment to the coach in the amount of 480,000 $, right after the signing of the Contract. Contract is stipulated and firmed on 5 July 2010. Three months after contract signing you made a payment to the coach of only 100,000$, so you are in debt of due amount of 380,000$.

ARGUMENT: Employment contract from 5 July 2010, stipulated between Steel Azin Athletic and cultural club from Tehran, Iran and the coach Ljubisa Tumbakovic.

Unless you make a payment of the due amount of ***380,000$*** *within 7 days from the day receiving this notice,* ***we will be forced to end this Contract with an immediate effect,*** *because of the unilateral breach of the Contract from the Club's side, without justify reason.*

We consider that this dispute should be solved in a friendly way for both side benefit, so that we can avoid procedure in at (sic) FIFA's organs".

11. In a letter dated 11 October 2010, Steel Azin responded to the Coach contending that he was the party in breach of the Agreement and that the Club had decided to impose a fine on him. This letter, in the pertinent part, reads as follows:

"1. I would like to clarify that your client [the Coach] *is not performing his duties and obligations as the head coach as required per the signed contract between him and the club. The management has noticed that the head coach failed to fulfil and provide to the youth level teams with training schedules and instructions to date as it is mentioned in clause 5-1 of the signed contract.*

2. As per clause 5-2 of the signed contract the head coach did an interview with the media without the clubs consent, and this has caused a lot of damages to the club.

Argument: Employment contract from 5 of July 2010, stipulated between the coach Ljubisa Tumbakovic and Steel Azin athletic and cultural club.

As aforementioned justified reasons, I assist my client by bringing a claim in at FIFA's organ's on its rights and remedies in order to secure damages, although, it will be perfectly evident what the client's rights are. As you know, because of not performing the said obligations, your client is the perpetrator of the breach as aforementioned in (No. 1 & 2).

However, I would like to propose terms of settlement without the need for the legal proceeding.

The clubs management has concluded for all that you have done and not respecting the signed contract shall penalize you as follows,

- *A) 15% of the total contract amount for not fulfilling and providing training schedules for the youth Levels and the necessary professional assistance.*
- *B) 10% of the total contract amount for holding a media interview without the club's consent.*

C) 5% of the total contract amount of also not proceeding training schedules for the 1st senior team.

In view of the above, we also consider that this dispute should be resolved by negotiation in a friendly manner for both side benefits, so that we can avoid procedure in at(sic) FIFAs(sic) organs".

12. By way of a letter dated 16 October 2010, the Coach notified Steel Azin of his decision of terminating the Agreement and of filing a claim against the Appellant before FIFA. The pertinent part of this letter reads as follows:

"Football coach Ljubisa Tumbakovic, hereby terminates Contract with Cultural and Sport Club Steel Azeen (sic) from Teheran (sic), Iran, with immediate effect, as a consequence of the breach of the contractual obligations of the Club.

[…], we sent the last warning – Notice before legal prosecution on 6 of October 2010, to Cultural and Sport Club Steel Azeen (sic) (via e-mail and fax) in which we stated due debt of 380,000 $ and a time limit for settling of the same. Despite the last warning, Club gives simple and groundless explanation and propose friendly way for dispute resolving. Further more (sic), Club without any power decides about execution of penalty toward Coach, in the amount of nearly identical amount of the due debt, because of the so called "breach of the contrat" by Coach's guilt. That decision of the Club is without any legal and contractual base and without appropriate procedure. We underline that Coach fulfilled all his duties from the article 5 of the mentioned contract, entirely and faithfully.

It is clear that Club broke the contract unilateral, without justifiable reason and therefore enforced the Coach to terminate the contract with immediate effect, because the Club did not settled all his due obligations toward the coach.

Because of the all above mentioned, the Coach announced immediate termination of the contract by the Clubs fault and he will send the request to FIFA Committee for Player's Status, for payment of the outstanding amount, which Contract entitles him by the expiry date of the Contract, in accordance with article 14 of the FIFA Regulation of the Status and Transfer of Players.

Finally, the Coach will request FIFA organs imposing adequate sports sanctions towards Cultural and Sport Club Steel Azeen (sic) from Teheran (sic) because of the breach of the contract in accordance with FIFA Regulations".

II.2 THE PROCEEDINGS BEFORE FIFA

13. On 14 December 2010, the Coach filed a claim against Steel Azin before FIFA requesting a compensation of USD 1.070.000 plus 5% interest as of 16 October 2010 and the reimbursement of unspecified *"costs in connection with the present proceedings including attorney fees".*

14. On 16 April 2011, after FIFA had already closed the investigation stage of the proceedings, Steel Azin filed its response to the Coach's claim before FIFA, rejecting it in its entirety and lodging a counterclaim against the Coach in which it asked for the payment of an unspecified compensation *"due to breach of contract without just cause"*, the reimbursement of USD 130.000 and a compensation for *"all the damages due to breach of contract".*

15. On 24 April 2012, the Single Judge of the FIFA Players' Status Committee (hereinafter also referred as to the "Judge of the PSC") decided to partially uphold the Coach's claim and to dismiss the Club's counterclaim. The operative part of this decision reads as follows:

> *1. The claim of the Claimant / Counter-Respondent, Ljubisa Tumbakovic, is partially accepted.*
>
> *2. The Respondent / Counter-Claimant, Steel Azin, has to pay to the Claimant / Counter-Respondent, Ljubisa Tumbakovic, outstanding remuneration in the amount of USD 365,000 as well as 5% interest per year on the said amount from 16 October 2010 until the date of effective payment,* ***within 30 days*** *as from the date of notification of the decision.*
>
> *3. Furthermore, the Respondent / Counter-Claimant, Steel Azin, has to pay to the Claimant / Counter-Respondent, Ljubisa Tumbakovic, compensation for breach of contract in the amount of USD 705,000, as well as 5% interest per year on the said amount from 24 April 2012 until the date of effective payment,* ***within 30 days*** *as from the date of notification of this decision.*
>
> *4. Any further claims lodged by the Claimant / Counter-Respondent, Ljubisa Tumbakovic, are rejected.*
>
> *5. If the aforementioned sums, plus interest, are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *6. The counter-claim of the Respondent / Counter-Claimant, Steel Azin, is rejected.*
>
> *7. The final costs of the proceedings in the amount of CHF 15,000 are to be paid by the Respondent / Counter-Claimant, Steel Azin,* ***within 30 days*** *as from the date of notification of the present decision as follows:*
>
> - *The amount of CHF 10,000 has to be paid to FIFA. Considering that the Respondent / Counter-Claimant, Steel Azin, already paid an amount of CHF 3,000 as advance of costs, the latter has to pay the amount of CHF 7,000* ***within 30 days*** *as from the date of notification of the present decision to the following bank account (…).*

16. The Judge of the PSC considered sufficiently proven that the Coach terminated the Agreement with just cause on 6 October 2010 and held that Steel Azin had to compensate the Coach for the entire amount of the Agreement. As a result of finding just cause on the Coach's part and the lack of evidence proffered by the club in support of its allegations, Steel Azin's counterclaim was rejected.

17. On 12 September 2012, Steel Azin and the Coach entered into a "Settlement Agreement" to resolve their claims and disputes whereby the parties agreed that the Club would pay to the Coach the amount of USD 600.000 in three separate instalments of USD 200.000 respectively due on 21 September 2012, 21 October 2012 and 21 November 2012. The Settlement Agreement stipulated that if the instalments foreseen therein were not paid in due time, the Settlement Agreement would automatically become null and void and would not produce any legal effect, and that in such case, the Coach would be free to enforce the Decision of the Judge

of the PSC dated 24 April 2012 and the Club reserved the right to appeal the referred decision with the CAS as long as the time limit to do so had not yet expired.

18. After signing the Settlement Agreement, the Appellant paid the Coach the amount of USD 200.000 corresponding to the first instalment. However, the Appellant failed to pay the following instalments.

II.3 THE PROCEEDINGS BEFORE THE CAS

19. On 16 March 2013, Steel Azin decided to appeal the abovementioned decision of FIFA (hereinafter referred to as the "Appealed Decision") before the CAS and thus filed the relevant Statement of Appeal.

20. On 3 April 2013, Steel Azin filed its Appeal Brief before the CAS with the following request for relief:

> 1. *We respectfully ask to accept and upheld (sic) the rejected counterclaim by the FIFA [Players' Status Committee][1] dated 24 April 2012.*
>
> 2. *To set aside the challenged [Players' Status Committee][2] decision dated 24 April 2012.*
>
> 3. *To establish that no compensation is due by the Appellant to the Respondent or that the compensation is equal to zero;*
>
> 4. *To condemn the Respondent to the payment in the favor of the Appellant of the legal expenses incurred;*
>
> 5. *Appellant shall request the Panel to grant an order that the Respondent shall be liable for all costs and expenses incurred by the Appellant in bringing this appeal, including the costs and expenses of the CAS.*
>
> *Subsidiarily, only in the event the above is rejected: to establish that for the calculation of the late payment in the amount of 200,000 USD according to the settlement agreement dated 12 September 2012 shall be taking into account* (sic).

21. On 16 May 2013, the CAS sent a copy of the Appeal Brief to the Respondent and granted him a term of 20 days for filing the Answer.

22. On 4 June 2013, the Respondent's counsel requested the CAS to grant a 14-day extension of the term to file his Answer. Thereafter, the CAS inquired whether the Appellant agreed with such request.

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[1] On page 1 of its Appeal Brief, Steel Azin mistakenly referred to the Dispute Resolution Chamber as the FIFA body that rendered the decision being appealed.
[2] On page 1 of its Appeal Brief, Steel Azin mistakenly referred to the Dispute Resolution Chamber as the FIFA body that rendered the decision being appealed.

23. On 10 June 2013, in light of the Appellant's silence, the CAS granted the Respondent an extension of 14 days for filing the Answer.

24. On 20 June 2013, the Coach filed his Answer to the Appeal before the CAS, requesting an award be rendered in the following terms:

> *1. The appeal of the Appellant shall be dismissed.*
>
> *2. The Decision issued by the Single Judge of the Player's(sic) Status Committee on 24 April 2012 shall be upheld insofar as it is not amended hereafter.*
>
> *3. The counterclaim procedure shall not be initiated, subsidiary, the counterclaim shall be dismissed.*
>
> *4. Taking into consideration that the Appellant paid the Respondent USD 200,000 on 20 September 2012, the Appellant shall be obliged to pay the Respondent USD 870,000 plus interest of 5%:*
>
> - *On USD 365,000 since 16 October 2010 until the effective payment;*
> - *On USD 705,000 from 16 October 2012 until 20 September 2012;*
> - *On USD 505,000 since 21 September 2012 until the effective payment.*
>
> *5. The Appellant (sic) shall pay for the costs of the CAS and the FIFA proceedings and shall compensate the Respondent for its legal fees incurred in relation to the CAS and FIFA proceedings.*

25. On 19 July 2013, the CAS requested the Respondent (i) to clarify the amounts and concepts referred to in point 4 of the Prayers for Relief of his Answer to the Appeal, and (ii) if he would be satisfied in the event that the Panel eventually dismissed the appeal in order to clarify whether or not a counterclaim was filed by him.

26. On 26 July 2013, the Respondent answered that the figures contained in point 4 of his Prayers for Relief are related to the calculation of interests and are not meant to be added up and, therefore, confirmed that he would be satisfied if the Panel dismissed the appeal filed by Steel Azin and that he was not filing any counterclaim.

27. The Panel dealing with this case is composed of Mr. Jahangir Baglari, who was nominated by the Appellant, Dr. Hans Nater, who was nominated by the Respondent, and the President, Mr. José Juan Pintó Sala. None of the parties raised any objection as to the appointment of the Panel.

28. The hearing took place in Lausanne on 23 October 2013. The Panel was assisted by Mr. Fabien Cagneux, CAS Counsel, and Mr. Antonio de Quesada, *ad-hoc* clerk.

29. Despite having been duly called for to such purpose, the Appellant did not appear at the hearing. Before starting the hearing, the CAS called the Appellant's counsel by telephone several times without obtaining any answer from him. In the end, the secretary to the Appellant's counsel informed the CAS that he was in Iran and, therefore, he would not appear at the hearing.

Pursuant to article R57 of the CAS Code, the Panel decided to go ahead with the hearing. At the beginning of the hearing, the Respondent's Counsel requested to amend a typo included in the second dash of point 4 of the Respondent's Prayer for Relief so that the date "16 October 2012" shall be changed to "24 April 2012". This slight amendment was accepted by the Panel. Thereafter, the Respondent's counsel made his opening statement, following which the witness Mr. Aleksandr Jankovic, assistant coach of the Respondent at the time he rendered services for Steel Azin, answered the questions from the Panel and the Respondent's counsel. Finally, the Respondent's counsel made his closing statement.

30. Both at the beginning and at the end of the hearing, the Respondent expressly declared that he was satisfied with the way which proceedings had been conducted. The Club has not expressed any complaint on the way which proceedings had been conducted.

III. SUMMARY OF THE PARTIES' POSITIONS

III.1 STEEL AZIN

31. The Coach breached the Agreement by not appearing at the Appellant's premises on 20 September 2010 without the permission of the latter and without giving proper notification of his absence. Additionally, the Coach breached the Agreement by failing to appear to two of Steel Azin's official matches and by not supervising the activities of the club's youth teams.

32. The Appellant only paid part of the amount foreseen in clause 4-1 of the Agreement because the remaining part was not due until 5 November 2010, the date of the second instalment under the Agreement, and because the Club was suffering severe financial problems at the time.

33. Under Swiss law, both the employer and the employee have the right to immediately terminate the employment relationship at any moment as long as they have just cause to do so. Furthermore, the party terminating the employment relationship must provide the reasons for termination in writing if the other party so requires. Therefore, the Coach had no right to terminate the Agreement immediately because he did not provide the Appellant with his reasons for termination in writing.

34. The Coach had problems with his vision and did not use corrective lenses during matches to address the issue, which constitutes professional negligence on the Coach's part and entitles the Appellant to receive compensation from the Coach.

35. The Club was not in continuous breach of the Agreement for a prolonged period of time. In fact, the Appellant fulfilled, at least partially, its obligations under the Agreement.

36. The Coach granted an interview to the media without the Appellant's authorization and caused the Appellant damages as a result.

III.2 THE COACH

37. The amount foreseen in clause 4-1 of the Agreement was due and payable on 5 July 2010, the day the Coach started to render his services to the Appellant; however, 3 months after this date, the Appellant still had not paid USD 365.000 over the USD 480.000 stipulated in the clause. As a result of it, the Respondent had just cause to terminate the Agreement and is to be compensated as regards of it.

38. The Appellant has not provided any evidence to demonstrate the Coach's alleged breach of the Agreement. In any case, the outstanding amount in accordance with clause 4-1 of the Agreement should have been paid in full with no consideration whatsoever given to the Coach's alleged breach.

39. The Coach was in Serbia from 20 to 25 September 2010 with the Appellant's permission in order to extend his work permit at the Iranian embassy in Belgrade. Additionally, there were no matches scheduled or played during the Coach's absence because the Iranian Championship was on break.

40. The Appellant has not proven that the Coach has any problems with his vision. In any case, the fact that the Coach has never used corrective lenses of any sort attests to his excellent eyesight.

41. Likewise, the Appellant has not proven the existence of the interview that the Coach allegedly gave to the media which apparently would have caused damages to the Club.

42. The parties signed a Settlement Agreement on 12 September 2013, after the FIFA decision was rendered, under which the Appellant executed a payment of USD 200.000 in favour of the Coach. However, the club later refused to execute the rest of the payments stipulated under the Settlement Agreement and therefore owes the outstanding amounts foreseen in the Appealed Decision.

43. The Coach was unemployed from 16 October 2010 until July 2011, i.e. until the original expiration date of the Agreement.

IV. LEGAL CONSIDERATIONS

IV.1 CAS JURISDICTION

44. The jurisdiction of the CAS to decide on the present case arises out of Article 67 of the FIFA Statutes and Article R47 of the CAS Code. In addition, CAS jurisdiction has been expressly accepted by the parties by signing the order of procedure.

45. Therefore, the Panel considers that CAS is competent to decide over this case.

IV.2 APPLICABLE LAW

46. Article R58 of the CAS Code reads as follows:

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

47. The Panel notes that in the Agreement, the Appellant and the Coach made reference to a choice of law.

48. Clause 8–1 of the Agreement states the following:

"The governing law of this Contract is the law of the Islamic Republic of Iran and the Regulations of FIFA as well as the regulations of the Football Federation of I.R.Iran".

49. In spite of it, the Panel shall point out that both parties expressed in their written submissions that the present dispute shall be resolved in accordance with FIFA Regulations and Swiss Law.

50. Therefore, the Panel understands that the present dispute shall be resolved in accordance with FIFA Regulations and Swiss Law, subsidiarily.

IV.3 ABOUT THE DISPUTE SUBMITTED TO THE COURT BY THE PARTIES

IV.3.1. The object of the dispute

51. According to the parties' written submissions and the arguments raised at the hearing, the object of the dispute may be briefly summarized as follows: the Appellant contends that the Coach terminated the Agreement without just cause and that (i) no amount is due to the Coach and (ii) the Coach shall compensate the Appellant as regards of such a breach, while the Coach sustains that he had valid grounds to terminate the Agreement, and thus seeks indemnification from the Club as a result of such termination.

IV.3.2. The termination of the Agreement by the Respondent. Just cause or not.

52. In light of the petitions and arguments of the parties, the Panel shall firstly examine whether the Respondent terminated the Agreement with just cause or not.

53. The Coach contends that on 16 October 2010, he terminated the Agreement with just cause due to the lack of payment of a substantial part of the sum foreseen in clause 4-1 of the Agreement. The Appellant contests this allegation and argues that the referred amount was not due until 5 November 2010 (i.e. date in which the second instalment was due) as clause 4-1 of the Agreement did not specify a date for the execution of the payment.

54. In order to assess whether the mentioned amount was due and payable when the Coach terminated the Agreement, the Panel shall turn its attention to clause 4-1 of the Agreement, which reads as follows:

1. *The First payment is 480.000 USD (Four Hundred and Eighty Thousand US Dollars) and will be paid to the Coach after signing the contract.*

55. The Panel notes from the wording of the abovementioned contractual provision that, as the Appellant sustains, indeed the clause does not provide a specific deadline for the execution of the payment of the sum of USD 480.000.

56. In light of the inexistence of the referred deadline, the Panel shall seek the remedy to it in Swiss contractual Law, and in particular in article 75 of the Swiss Code des Obligations (hereinafter the CO), which reads as follows:

"A défaut de terme stipule ou résultant de la nature de l'affaire, l'obligation peut être exécutée et l'exécution peut en être exigée immédiatement".

The abovementioned article can be informally translated into English as follows:

"Where no term is established or it does not clearly result from the nature of the contractual relationship, the obligation can be executed and execution can be compelled immediately".

57. Following THÉVENOZ/WERRO (Commentaire Romand, Code des Obligations I, article 75) in this respect, *"Considérée du point de vue du créancier, la créance est donc exigible immédiatement et du point de vue du débiteur, elle est exécutable immédiatement»* (in English – free translation – *"from the creditor's perspective, the debt is immediately demandable, and from the debtor's perspective, the debt is immediately due"*).

58. In absence of a contractual deadline and in accordance with the referenced article, it appears clear to the Panel that the amount foreseen in clause 4-1 of the Agreement was immediately claimable by the Coach from the very moment of signing the Agreement. Therefore, the Coach was entitled to claim it (which in fact did) and the Club could not contest to it by arguing that the remaining amount was not due until 5 November 2010.

59. Therefore the Club, by not paying the referred amount in spite of having been claimed to do so by the Coach, was in breach of its contractual obligations.

60. This being clear, the Panel shall determine whether the non-payment of the outstanding part of the instalment foreseen in clause 4-1 of the Agreement constituted *per se* just cause to terminate the Agreement.

The FIFA Regulations do not define when there is "just cause" to terminate a contract. Therefore, the Panel must refer to Swiss Law and CAS jurisprudence in order to determine the content of the term "just cause".

61. In particular, the Panel shall refer to article 337 CO, which reads as follows:

"1. L'employeur et le travailleur peuvent résilier immédiatement le contrat en tout temps pour des justes motifs; la partie qui résilie immédiatement le contrat doit motiver sa décision par écrit si l'autre partie la demande.

2. Son notamment considérées comme des justes motifs toutes les circonstances qui, selon les règles de la bonne foi, ne permettent pas d'exiger de celui qui a donné le congé la continuation des rapports de travail".

The abovementioned article can be informally translated into English as follows:

"1. The employer and the employee may immediately terminate the contract at any time for just cause; the party who immediately terminates the contract must give its reasons for terminating in writing if the other party so requests.

2. A valid reason is considered to be, in particular, any existing circumstance under which the terminating party cannot in good faith be expected to continue with the employment relationship".

62. Additionally, before analyzing whether the Coach had just cause to terminate the Agreement in the case at stake, the Panel remarks that not every breach of a contractual obligation by a party justifies the early termination of a contract. Rather, the breach of contract must have a certain degree of seriousness to constitute "just cause". This is in line with jurisprudence of the Swiss Federal Tribunal (ATF 104 II 28 JT 1978 I 514) which provides: *"Les faits doivent être si graves qu'ils ont pour effet de rompre irrémédiablement le rapport de confiance nécessaire".* This can be informally translated into English as follows: *"the facts must be so severe as to cause the irremediable loss of confidence necessary between the parties".*

63. Therefore, the question at this stage is whether the Appellant's non-payment of a part of the amount foreseen in clause 4-1 of the Agreement passed the mentioned threshold of severity.

64. In this respect the Panel deems it convenient to refer to CAS jurisprudence on this issue. For instance, in the decision of the case CAS 2006/A/1180 it is stated that *"the non-payment or late payment of remuneration by an employer does in principle […] constitute 'just cause' for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa, CAS 2003/O/540-541, of 6 August 2004), for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet his obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in the future. Whether the employee falls into financial difficulty by reason of the late or non-payment is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of the late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract".*

65. Applying this jurisprudence to the case at stake, the Panel notes that (i) the Appellant failed to comply with the timely payment of a substantial part of the signing on fee during a significant period of time (i.e. non-payment of USD 365.000 out of USD 480.000 for more than three months after its due date) and (ii) the Coach warned the Appellant about the breach and gave a reasonable opportunity to remedy such breach before terminating the Agreement.

66. Taking into account the aforementioned circumstances, the Panel concludes that the Coach terminated the Agreement with just cause.

67. Before finalizing the considerations about the termination of the Agreement, the Panel, even for dialectical purposes, deem convenient to stress that (i) the Appellant has not proven that the Coach breached the Agreement or that he behaved negligently in any way or that he caused any damage to the Club (it simply alleges so), (ii) even if it had been proven, it is to be noted that on the basis of article 82 of the CO, the Club could hardly request compliance when it was not complying with its obligations and (iii) the declaration of termination of the Agreement with just cause by the Coach, together with the considerations made in sections (i) and (ii) of this paragraph, leads to the rejection of the counterclaim filed by the Club at FIFA stage and requested to be reconsider at these proceedings.

IV.3.3. The consequence of the termination of the Agreement with just cause

68. At this stage, the Panel shall analyze the financial consequences, if any, resulting from the termination of the Agreement with just cause.

69. Article 97 of the CO establishes that the injured contractual party must receive integral reparation of his damages:

> *"Lorsque le créancier ne peut obtenir l'exécution de l'obligation ou ne peut l'obtenir qu'imparfaitement, le débiteur est tenu de réparer le dommage en résultant, à moins qu'il ne prouve qu'aucune faute ne lui est imputable".*

The abovementioned provision can be informally translated into English as follows:

> *"The debtor who fails to perform his obligation or does not fulfil it properly is liable for damages, unless he proves that there is no fault on his part".*

70. Furthermore, the Panel notes that CAS jurisprudence has consistently confirmed that: *"in principle, the harm party should be restored to the position in which the same party would have been had the contract been properly fulfilled"* (see CAS 2005/A/1871, CAS 2006/A/1061, CAS 2006/A/1062 and CAS 2008/A/1517). More specifically, the CAS jurisprudence has declared that:

> *"As it is the compensation for the breach […], the judging authority shall be led by the principle of the so-called 'positive interest' (or 'expectation interest'), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitutio, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred"* (CAS 2008/A/1519 and CAS 2008/A/1520).

71. Additionally, article 337 (b) CO is also relevant to this case as it addresses the consequences of termination of employment contracts with just cause. This article reads as follows:

> *"Si les justes motifs de la résiliation immédiate du contrat consistent dans son inobservation par l'une des parties, celle-ci doit réparer intégralement le dommage causé, compte tenu de toutes les prétentions découlant des rapports de travail".*

The abovementioned provision can be informally translated into English as follows:

> *"If the just cause claimed by one party for the immediate termination of a contract is a breach by the counterparty, the breaching party must entirely repair the damages caused, taking into account all claims derived from the employment relationship".*

72. Taking into account to the abovementioned provisions and CAS jurisprudence, the Panel considers that under Swiss Law, the Coach is entitled to the entire amount he could have expected under the Agreement.

73. Therefore, the Appellant shall be ordered to pay to the Coach the outstanding amount foreseen in clause 4-1 of the Agreement, i.e. USD 365.000, plus a compensation equal to the entire remaining value of the Agreement, i.e. USD 705.000, minus the sum of USD 200.000 that the Appellant paid to the Coach under the Settlement Agreement signed on 12 September 2013, this payment to be applied, in accordance with article 87 CO[3], to the amount foreseen in clause 4-1 of the Agreement as it is the debt which became due first.

74. In addition, interest is to be applied to the aforementioned amounts.

75. In light of (i) the relevant provisions of the Swiss CO (art. 102 *et seq.*), (ii) the Appealed Decision calculation of interest and (iii) the fact that the Respondent did not appeal the referred decision, the Panel decides that the following interest shall be applied to the amounts that the Club shall pay to the Coach:

    (i) 5% interest per year on USD 165.000 (365.000 – 200.000 already paid) from 12 September 2012 until the date of effective payment since interest accrued between the termination date of the Agreement (i.e. 16 October 2010) and 12 September 2012, where the Appellant paid USD 200.000 to the Respondent, was considered as subsumed with USD 200.000 payment.

    (ii) 5% interest per year on USD 705.000 from 24 April 2012 until the date of effective payment.

IV.3.4 Decision

76. Taking the above mentioned legal considerations into account, the Panel has decided to partially uphold the appeal, and thus, to confirm the Appealed Decision in whole except for point 2 of the operative part. In this respect, the amount of USD 365.000 shall be replaced for the amount of USD 165.000 and date which interest begins to accrue shall be changed to 12 September 2012. Therefore Steel Azin Club is ordered to pay to the Coach the following amounts:

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[3] *"Lorsqu'il n'existe pas de déclaration valable, ou que la quittance ne porte aucune imputation, le paiement s'impute sur la dette exigible; si plusieurs dettes sont exigibles, sur celle qui a donné lieu aux premières poursuites, sur la dette échue la première".* Free translation into English: *"If there are several debts, but none have matured, payment shall be allocated to the debt which has the least security in favor of the obligee".*

– US$ 165.000 plus 5% interest per year starting from 12 September 2012;

– US$ 705.000 plus 5% interest per year starting from 24 April 2012;

77. The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties to the Panel. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Steel Azin Club against the decision issued by the FIFA Single Judge of the Players' Status Committee on 24 April 2012 is partially upheld.

2. The counterclaim filed by Steel Azin Club is rejected.

3. The decision issued by the FIFA Single Judge of the Players' Status Committee on 24 April 2012 in the dispute between Steel Azin Club and Mr. Lijubisa Tombakovic is confirmed, except for point 2 of this decision in the sense that the amount of USD 365.000 is to be replaced for the sum of USD 165.000 and interest shall accrued as of 12 September 2012 instead of 16 October 2010.

4. Steel Azin Club is ordered to pay to Mr. Lijubisa Tombakovic the following amounts:

   – USD 165.000 plus 5% *per annum* interest starting from 12 September 2012;

   – USD 705.000 plus 5% *per annum* interest starting from 24 April 2012;

(…)

7. All other prayers for relief are rejected.