Arbitration CAS 2015/A/3883 Al Nassr Saudi Club v. Jaimen Javier Ayovi Corozo, award of 26 August 2015

Panel: Mr Georg von Segesser (Switzerland), Sole Arbitrator

Football
Termination agreement to a contract of employment
Waiver of the right to challenge the jurisdiction of FIFA bodies
Non-objection to jurisdiction and violation of the principle "venire contra factum proprium"
Refusal to disclose documents in arbitration proceedings without a reasonable excuse
Calculation of the legal interest under the Swiss Code of Obligations

1. **There is no provision in the CAS Code or the FIFA Rules which states that a party must object to the jurisdiction of the FIFA Dispute Resolution Chamber (DRC) during the proceedings before the DRC and, having failed to do so, shall be excluded with raising a jurisdictional objection in the appeal proceedings. In lack of such a regulation, CAS has developed jurisprudence according to which a party proceeding before the FIFA Players' Status Committee or the FIFA DRC without raising any objection on the jurisdiction of such legal bodies of FIFA must be deemed to have waived its right to challenge their jurisdiction in appeal proceedings. This principle of deemed waiver is also applied by the Swiss Federal Tribunal which has held constantly that objections to jurisdiction must be raised at the earliest possible opportunity.**

2. **The fact that a party participated in the proceedings before the DRC without raising any jurisdictional objection and resorting to that defence only in the appeal proceedings also violates the principle of *"venire contra factum proprium"* recognized by CAS precedents and Swiss law, whereby *"when the conduct of a party has led to raise legitimate expectations on the part of the second party, the first party is barred from changing its course of action to the detriment of the second party"*.**

3. **It is generally accepted in international arbitration that if a party after being ordered to do so refuses to disclose documents without a reasonable excuse, the arbitral tribunal is likely to infer that the party has something to hide and is likely to treat that party's future evidence with a degree of scepticism. The authority to draw adverse inferences is also recognised in sport arbitration.**

4. **In Swiss law, the triggering date for the legal interest is governed by Article 102 CO, pursuant to which the interest is due from the day notice to pay is given to the debtor. However, when the parties' agreement provides for a time limit to perform the obligation, the interest automatically falls due when the time limit elapses without a notice of default being necessary. Default interest without notice also becomes due with the termination of an employment relationship.**

I. FACTUAL BACKGROUND

1. Below follows a summary of the relevant facts on the Parties' written and oral submissions, pleadings, and evidence. References to additional facts found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, reference thereto in the award will only be made where and to the extent this is deemed to be necessary in the reasoning.

1) The Employment Contract

2. On 1 July 2012, Mr Jaimen Javier Ayovi Corozo (the "Player" or the "Respondent") and Al Nassr Saudi Club (the "Club" or the "Appellant") entered into an employment contract valid until 30 June 2013 (the "Employment Contract").
3. Under the Employment Contract, the Parties agreed upon a monthly salary of USD 41,666.67.
4. Clause 24 of the Employment Contract included the following dispute resolution clause (the "Dispute Resolution Clause"):

> *"The professionalism [sic] Committee and Board of Directors of the federation shall be considered the only reference to solve all disputes [sic] may occur between clubs and professional players, such disputes shall not be forwarded to any non-sport or civil courts".*

2) The Termination Agreement

5. On 19 February 2013, following an injury of the Player, the Parties signed a termination agreement (the "Termination Agreement") whereby:

> *"1. The two parties agreed to end the employment contract … before the due date of 30.06.2013.*
>
> *2. The Club … committed to pay the player all his salaries until the end of his contract (30th June 2013)".*

6. However, according to the Player, the Club abstained from paying any of the salaries from January to June 2013.
7. On 8 April 2014 and again on 21 April 2014, the Respondent requested the Club to comply with the Termination Agreement and to pay the outstanding salaries which in total amounted to USD 250,000.02. The Club did not proceed to payment.
8. On 29 April 2014, the Player's legal counsel sent an email to the Saudi Arabia Football Federation (the "SAFF") referring to the dispute with the Club and indicating that his client would seize the competent bodies at FIFA if the Club persisted in not paying the amount due. The email enclosed a notification dated 28 April 2014 describing the background of the dispute and seeking the assistance of the SAFF to resolve the matter amicably. The SAFF transmitted this email to the Club which did not take any further action.

9. On 19 May 2014, the Player's legal counsel wrote again to the SAFF to inform them that since *"no answer ha[d] been received from neither the club nor the Saudi Arabian Federation … [his client] had no other option but to initiate legal actions against the club before the competent bodies in Fifa"*.

3) The decision of the FIFA Dispute Resolution Chamber ("DRC")

10. On 22 July 2014, the Player filed a claim against the Club before the DRC, claiming the total amount of USD 250,000.02 for the six months salaries of January 2013 to June 2013. The Player also requested 5% interest as from 19 February 2013 (date of the Termination Agreement) as well as compensation for his legal costs.

11. On 25 August 2014, the Club submitted its reply where it acknowledged that the Club *"did always and still does accept and agree to pay to Mr Ayovi the due amount of USD 250,000"* but due to its difficult financial situation it would only be able to make the payment by 31 December 2014. This payment was never performed.

12. In its Decision of 6 November 2014 (the "Appealed Decision"), the DRC ruled in favor of the Player and concluded that:

> *"The Respondent, Al Nassr, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, the amount of USD 250,000,02 plus 5 % interest until the date of effective payment as follows:*
>
> *a. 5% p.a. as of 19 February 2013 on the amount of USD 41,666.67;*
>
> *b. 5% p.a. as of 1 March 2013 on the amount of USD 41,666.67;*
>
> *c. 5% p.a. as of 1 April 2013 on the amount of USD 41,666.67;*
>
> *d. 5% p.a. as of 1 May 2013 on the amount of USD 41,666.67;*
>
> *e. 5% p.a. as of 1 June 2013 on the amount of USD 41,666.67;*
>
> *f. 5% p.a. as of 1 July 2013 on the amount of USD 41,666.67"*.

13. The findings and the grounds of the Appealed Decision were notified to the Parties respectively on 13 November 2014 and 17 December 2014.

14. By letters of 18 November, 18 December and 31 December 2014, the Player requested payment of the amount granted by the Appealed Decision, to no avail.

II. PROCEEDINGS BEFORE THE CAS

1) The Parties' written submissions

15. On 6 January 2015, pursuant to Article R47 and R48 of the Code of Sports-related Arbitration and Mediation Rules (the "Code"), the Club filed a Statement of Appeal. On 15 January 2015, pursuant to Article R51 of the Code, it filed its Appeal Brief (the "Appeal").

16. Both Parties were in agreement with the appointment of a sole arbitrator in this case and, on 26 March 2015, they were informed that the appointed Sole Arbitrator was Dr. Georg von Segesser, attorney-at-law in Zurich, Switzerland.

17. On 1 April 2015, pursuant to Article R55 of the Code, the Player filed its Answer to the Appellant's Appeal (the "Answer").

2) Production of originals

18. On 27 April 2015, following the Respondent's allegation that certain documents submitted by the Appellant, in particular the "Receipt Acknowledgment" for the January and February 2013 salaries (Enclosure 9 to the Appeal), had been forged or fabricated by the Appellant, the Sole Arbitrator ordered the Appellant to produce the original of the document submitted in copy as well as the original invoice n. 10002448 referred to in the table of Enclosure 10 to the Appeal.

19. By email of 7 May 2015, the Appellant requested an extension of the time-limit to produce the requested originals. The Respondent objected to such extension. By letter of 8 May 2015, the Sole Arbitrator extended the time-limit to 12 May 2015.

20. On 12 May 2015, the Appellant requested a second extension of time which was again contested by the Respondent on 13 May 2015. On 18 May 2015, the Sole Arbitrator indicated that the Appellant was granted a last and ultimate time limit until 21 May 2015 to produce the documents. The Appellant was further advised that the Sole Arbitrator might infer an adverse impact on the Appellant's burden to substantiate the alleged facts if it failed to submit the requested documents.

21. By letter of 26 May 2015, the Appellant indicated that the Club's accountant was abroad and was thus not able to provide the requested documents. It added that in any event, the original receipt of the salaries for the months of January and February 2013 had been provided to the Player. Regarding the invoice n. 10002448, the Appellant indicated that it could not be provided because Enclosure 10 referring to it was *"an electronic payment produced from a specific accounting software"* and *"therefore the relevant document is considered as the original one"*.

22. On the same day, the Sole Arbitrator noted that the Appellant failed to produce the documents requested within the last and ultimate time limit granted. The Respondent was invited to confirm whether, as alleged by the Appellant, it had duly received the original of Enclosure 9.

23. On 29 May 2015, the Respondent denied having ever received this document and alleged that Enclosures 9 and 10 constituted *"fraudulent evidence fabricated by the Appellant"*.

3) Hearing

24. On 15 April 2015, the Respondent indicated that, in his view, a hearing was not necessary as the case could be decided solely on the documents submitted by the Parties. It reiterated its request on 7 May 2015. On 16 April 2015, the Appellant indicated that it wished to reserve the right to call for a hearing depending on the Respondent's Answer (which he allegedly had not received). The Appellant indicated that it was open to have the Respondent participate via video conference.

25. On 27 April 2015, the Counsel to the CAS indicated that the Answer had been duly notified to the Appellant on 12 April 2015. An extra copy was nonetheless exceptionally sent to the Appellant.

26. On 26 May 2015 and further to a request from the Sole Arbitrator, FIFA transmitted its complete case file in relation with the present matter.

27. On 27 May 2015, the Appellant requested a hearing. On 29 May 2015, the Respondent maintained its objection to holding a hearing. On 3 June 2015, having considered the Parties' respective observations, the Sole Arbitrator decided, pursuant to Article R57 of the Code, to hold a hearing.

28. On 16 June 2015, the Appellant indicated that it was not available at the proposed date and alternatively requested to take part in the hearing via video-conference.

29. On 19 June 2015, both requests were denied by the Sole Arbitrator on the basis that Skype communications with the Appellant had been dissatisfying in the past and that the Appellant had not presented any convincing argument for not attending the hearing at the proposed date. Thus, should the Appellant remain unavailable on such date, no hearing would be held and the Sole Arbitrator would render an award solely based on the Parties' respective written submissions.

30. On 24 and 30 June 2015, the Respondent and the Appellant respectively confirmed that they would be represented by their legal counsel at the hearing scheduled on 17 July 2015.

31. On 10 July 2015, both the Appellant and the Respondent signed the Order of Procedure issued on 6 July 2015.

32. On 16 July 2015, the Appellant informed the Secretariat of CAS that his legal representative, Mr Lucas Ferrer, would not be available to attend the hearing scheduled on the following day. It also informed that the Appellant itself would not be able to participate due to VISA issues and thus asked permission to participate by video conference. However, when the Secretariat of CAS contacted the Appellant's announced legal representative Mr Lucas Ferrer, the latter indicated that he had never been mandated on this case by the Appellant. On the same day, the Sole Arbitrator advised the Parties that the hearing fixed on the following day, 17 July 2015, was maintained and that the Appellant was requested to be available by Skype at 8.00 am on that day.

33. On 17 July 2015, the hearing took place in Lausanne, Switzerland and was attended by the following persons (the "Hearing"):

- Dr Georg von Segesser as the Sole Arbitrator
- Mr Fabien Cagneux as Counsel to the CAS
- The Appellant, represented by its General Secretary Mr Khlaid Al Rasheedan (by video conference)
- The Respondent, represented by its legal counsel Mr Iñigo de Lacalle Baigorri.

4) The Appellant's unsolicited submission of 17 July 2015

34. On 17 July 2015, after the Hearing, the Appellant submitted an additional submission without requesting prior permission from the Sole Arbitrator.

35. On 20 July 2015, the Sole Arbitrator informed the Parties that in accordance with Article R56 of the Code, the Appellant's submission of 17 July 2015 was too late and would thus not be considered by the Sole Arbitrator.

5) The Parties' submissions on costs

36. The Appellant and the Respondent filed their submission on costs respectively on 20 July and 24 July 2015.

III. SUBMISSIONS OF THE PARTIES

A. The Appellant's submissions and prayers for relief

37. The submissions of the Appellant can be summarized as follows:

- Pursuant to the Dispute Resolution Clause, the SAFF Professionalism & Player's Status and Transfer Committee (the "National Committee"), not the DRC, is the competent body to determine any dispute between the Player and the Club (Appeal, § 5/12-13).

- The Player bears the burden of showing *"the original of the receipt of each payment done by the club"* (Appeal, § 15).

- The Player is only entitled to USD 166,666.67 because the salaries of January and February 2013 have already been paid to him in cash (Appeal, § 2/5).

- The Appealed Decision on interest contradicts (i) Article 105(1) of the Swiss Code of Obligations ("CO") which provides that the default interest is only payable as of the day when legal action is initiated, as well as (ii) Article 102(2) CO according to which the interest starts running from the day the debtor is given formal notice to pay (Appeal, § 4/5).

38. On this basis, the Appellant makes the following prayers for relief (Appeal, § 6):

> *"As a provisional measure:*
>
> *1. To grant an interim stay of the effects of the Appealed Decision;*
>
> *2. The amount of USD 250,000.02 requested by the Player has to be taking into account the payment of both salaries of January and February 2013 and the accounting document presented in the file.*

3. Equally the respondent requested [sic] of 5% interest as from 19 February 2013 is to be rejected because the claim is lodged on 22 July 2014, therefore the delay of interest has to be applied as from the notification of the grounds of the decision (i.e. 17 December 2014) on the total amount of USD 166,666 owed as from the new decision of the CAS.

4. Equally the respondent requested [sic] of 5% interest as from 19 February 2013 is to be rejected and because the claim is lodged on 22 July 2014, therefore the delay of interest has to be applied as from the notification of the grounds of the decision (i.e. 17 December 2014) or as from the new decision of the CAS.

5. Due to the lack of notification of the Appellant of the delay of any payment of the full amount in one instalment in the end of the season and NOT TO BE PAID each month as agreed with the player.

6. As well, the request of the respondent of legal costs to be paid by the appellant has to be discarded.

To partially

7. To decide that the costs and the legal expenses of the provisional measure will follow the decision on the merits.

As to the merits:

7. [sic] To quash the decision of 6 December [sic November] 2014 by the FIFA Dispute Resolution Chamber until a new decision will be born [sic] on the exact amounts owed of a total amount of amount [sic] of USD 166,666 of the exact and correct debt as well with the correct default of interest as from 17 December [sic November] 2014 [i.e., date of the notification of the grounds of the decision] OR as from the new decision of the CAS.

8. To order the respondent to bear the FIFA proceeding cost incurred on the FIFA DRC decision on the misleading amounts presented on the claim of the respondent.

9. To order the Respondent to bear the costs incurred with the present arbitration and to pay to the Appellant an equitable contribution towards its legal fees and expenses".

B. The Respondent's submissions and prayers for relief

39. In essence, the Respondent argues that :

- The Appellant was duly notified of its duty to pay the outstanding salaries (Answer, § 17);
- The DRC was the competent body of first instance to settle the dispute (Answer, § 27).
- Alternatively, even if the National Committee was the competent body pursuant to the Dispute Resolution Clause, the latter does not meet the minimum procedural standards required to qualify as an "independent arbitral tribunal" pursuant to Article

22b) of the 2012 edition of FIFA Regulations for the Status and Transfer of Players (the "FIFA-RSTP (2012)") (Answer, § 27(e)).

- The salaries of January and February 2013 were never paid and the receipt provided by the Appellant (Enclosure 9) is forged (Answer, § 30).
- The legal interest of 5% starts running from the due date of the payment, namely on 19 February 2015 when the Termination Agreement was signed (Answer, § 38).

40. On this basis, Respondent makes the following prayers for relief (Answer, p. 24)

> *"A. The appeal filed by the* ***AL NASSR SAUDI CLUB OF RIYADH*** *is* ***dismissed****.*
>
> *B. The Decision issued by the FIFA Dispute Resolution Chamber in the matter with reference* ***rov 14-01134*** *is entirely* ***confirmed****.*
>
> *C. The Appellant shall bear* ***all the procedural costs*** *of the present proceeding.*
>
> *D. The Appellant shall compensate Mr Jaimen Javier Ayovi Corozo for the* ***costs and the legal fees*** *incurred in connection with this arbitration in an amount to be determined at the discretion of this Hon. Sole Arbitrator".*

IV. CONSIDERATIONS AND FINDINGS

A. Jurisdiction of CAS

41. The jurisdiction of CAS is not disputed by the Parties who signed the Order of Procedure comprising the following statement:

> *"The Appellant relies on Article 67 of the FIFA Statutes as conferring jurisdiction on the CAS. The jurisdiction of the CAS is not contested by the Respondent and is confirmed by the signature of the present order".*

42. The jurisdiction of CAS over FIFA's decisions, derives from Article 67 of the FIFA Statutes and Article R47 of the Code which respectively read as follows:

> Article 67 of the FIFA Statutes (2014)
>
> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".*
>
> Article R47 of the Code
>
> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.*

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

43. It follows that the CAS has jurisdiction to review the Appealed Decision.

44. Under Article R57 of the Code, the Sole Arbitrator has full power to review the facts and the law.

B. Admissibility

45. The Appeal is admissible as it was submitted within the deadline provided by Article R49 of the Code as well as by Article 67 of the FIFA Statutes (August 2014 edition) (the "FIFA Statutes"). The Appeal further complies with all other requirements set forth by Article R48 of the Code.

C. Applicable Law

46. Article R58 of the Code provides the following:

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

47. As a first step, the Sole Arbitrator shall thus determine what regulations are applicable and as a second step which law can be applied on a subsidiary basis.

48. Regarding the applicable regulations, both Parties agree that the FIFA-RSTP (2012) shall apply.

49. Regarding the law applicable on a subsidiary basis, in their respective submissions, both Parties made references to Swiss law which indicates an agreement to apply Swiss law. This is also in line with Article 66.2 of the FIFA Statutes which provides for CAS to apply the various regulations of FIFA and, additionally Swiss law.

V. MERITS

A. Jurisdiction of the DRC

50. The Appellant submits that the DRC was not competent to rule on the matter. It refers to the Dispute Resolution Clause which in its view confers exclusive jurisdiction to the National Committee of SAFF. As a result, the Appealed Decision should be annulled and the National Committee of SAFF should instruct the case and issue a decision.

51. In this regard, the Sole Arbitrator notes that the Club participated to the proceedings before the DRC without raising the argument of lack of jurisdiction. This argument was brought up for the first time before CAS in the appeal proceedings.

52. There is no provision in the Code or the FIFA Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber ("FIFA Rules") which states that a party must object to the jurisdiction of the DRC during the proceedings before the DRC and, having failed to do so, shall be excluded with raising a jurisdictional objection in the appeal proceedings. In lack of such a regulation, CAS has developed jurisprudence according to which a party proceeding before the FIFA Players' Status Committee or the FIFA DRC without raising any objection on the jurisdiction of such legal bodies of FIFA must be deemed to have waived its right to challenge their jurisdiction in appeal proceedings (CAS 2005/A/937; CAS 2011/A/2331; CAS 2012/A/2899). This principle of deemed waiver is also applied by the Swiss Federal Tribunal which has held constantly that objections to jurisdiction must be raised at the earliest possible opportunity (ATF 4P.298/2005 reason 2.3), *i.e.* prior to or, at the latest simultaneously with alternative pleadings of defence on the merits (see ATF 128 III 50, reason 2c/aa), otherwise the party forfeits its right to have the award set aside for lack of jurisdiction. This rule, also reflected in Art. 186(2) of the Swiss Private International Law Act, shall apply in the present proceedings and the Appellant's plea of lack of jurisdiction of the DRC can thus not be heard on appeal.

53. In addition, at the Hearing, the Appellant confirmed that the SAFF had transmitted to them the Player's letter of 29 April 2014 notifying the dispute. However, at that time, the Club did not follow up with the SAFF nor did it take any steps to bring the matter to the attention of the National Committee. The objection submitted today that the Player should have filed a claim and started the proceedings before the National Committee of SAFF instead of the DRC is raised against the principle of good faith. The fact that the Appellant participated in the proceedings before the DRC without raising any jurisdictional objection and resorting to that defence only in the appeal proceedings also violates the principle of *"venire contra factum proprium"* recognized by CAS precedents and Swiss law, whereby *"when the conduct of a party has led to raise legitimate expectations on the part of the second party, the first party is barred from changing its course of action to the detriment of the second party"* (CAS 2002/O/410; CAS 2011/A/2375). In the present case, the Club's inaction before the SAFF as well as its participation in the DRC proceedings without objecting to its jurisdiction precludes it from contesting jurisdiction in the present proceedings before CAS.

54. In view of the above, the Sole Arbitrator considers that the DRC rightly retained jurisdiction over the matter. The Appellant's jurisdictional objection is therefore rejected.

B. Payment of the Player's salaries

1) *Uncontested amount*

55. It is undisputed that by way of the Termination Agreement dated 19 February 2013, the Club committed to pay the Player his salaries from January until 30 June 2013.

56. The Appellant contests owing the salaries of January and February 2013 but recognizes owing the amount of USD 166,666.67, representing the salaries from March to June 2013.

57. At the end of the Hearing, the Appellant mentioned that it was willing to settle the dispute with regard to the uncontested amount, *i.e.* USD 166,666.67. The Sole Arbitrator indicated that the Appellant was free to make such payment any time now and that it would certainly be

appreciated by the Player to at least receive the uncontested amount, but that he would render an award irrespective of the Appellant's statement. Up to the date of this award, the Sole Arbitrator has not been made aware of such payment having been received by the Respondent.

2) *Contested amount*

58. What the Appellant contests owing are the salaries of January and February 2013 which were allegedly paid in cash to the Respondent. In support, the Appellant submitted an acknowledgement of receipt of SR 312,500 cash corresponding to the salaries of January and February 2013 allegedly signed by the Player and dated 31/01/2013 (Enclosure 9). The Appellant also relied on a table accounting for all the payments allegedly made by the Club to the Player and which shows that the salaries of January and February 2013 were paid on 31/01/2013 (Enclosure 10).

59. The Respondent contests the authenticity of Enclosure 9, alleging that the Player's signature was forged. It also asserts that Enclosure 10 is a fabrication.

60. In view of the Respondent's allegations of forgery and fabrication, the Sole Arbitrator ordered the Appellant to produce the original of Enclosure 9 and of invoice n° 100024482448 mentioned in Enclosure 10. Apparently this invoice was established by the Club's accountant for the salaries of January and February 2013.

61. Despite several extensions of the time limit, the Appellant failed to produce the requested documents (see above § 21) on the basis of arguments which, in the Sole Arbitrator's view, are not convincing.

62. In its letter of 26 May 2015, the Appellant indeed explained that it was not able to provide the documents requested because *"the club's accountant is still abroad and he doesn't provide us with the documents"*. It further contended that the original of Enclosure 9 was delivered to the Player, implying that the latter should produce such document.

63. With regard to the burden of proof, it is for the Appellant, not the Respondent, to prove and adduce evidence of its claims. In that respect, the Appellant must evidence that it paid the salaries of January and February 2013, irrespective of whether the Respondent holds an original of Enclosure 9 (which the latter alleges to have never received).

64. With respect to the Appellant's failure to produce Enclosures 9 and 10, it is generally accepted in international arbitration that *"if a party after being ordered to do so refuses to disclose documents without a reasonable excuse, the arbitral tribunal is likely to infer that the party has something to hide and is likely to treat that party's future evidence with a degree of scepticism"*[1]. The authority to draw adverse inferences is also recognised in sport arbitration (CAS 2004/O/645, 2013/A/3097 para. 39).

65. Here, the fact that the Appellant failed to produce Enclosures 9 and 10 without a valid excuse casts a serious doubt on their authenticity. As a result, the Sole Arbitrator cannot rely on these documents as a valid and conclusive receipt for the payment of the salaries of January and February 2013.

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1 SHARPE J., Drawing Adverse Inferences from the Non-Production of Evidence, *Arbitration International*, Vol. 22, No.4. 2006, p. 549.

66. The Sole Arbitrator also notes a number of inconsistencies in the Appellant's position which comforts his view that the disputed salaries were never paid:

- In its brief submitted to the DRC on 25 August 2014, the Club formally acknowledged owing the amount of USD 250,000.02 to the Player. It later tried to retract with the explanation that the General Secretary of the Club had never verified the exact amount owed to the Player. This must be qualified as a rather unconvincing attempt to withdraw from the acknowledgment of debt and as being a rather astonishing reaction coming from the General Secretary.
- There is also an inconsistency regarding the date on which the Appellant alleges to have paid the salaries. In its Appeal, it claims that *"the amount equivalent of two (2) salaries of January and February 2013 [41,666.67 USD X2] [was] received by the player* ***when signing the termination agreement****"* (emphasis added), *i.e.* on 19 February 2013. However, the date indicated on the alleged receipt of those salaries is "31 January 2013" (Enclosure 9), not 19 February 2013. As a matter of fact, it is actually highly unlikely that the January and February 2013 salaries were paid on 31 January 2013 as the Termination Agreement was not yet in place.
- It is also unlikely that the salary of February was paid in advance considering the Club's track record of paying the salaries with some delay (salaries of July and August 2012 paid in October 2012 – see Enclosures 1-4; salary of September 2012 paid in November 2012 – see Enclosure 5; salary of October 2012 paid in December 2012 and January 2013 – see Enclosures 6 and 7; salaries of November and December 2012 paid in January 2013 – Enclosure 8).
- On several occasions, the Appellant asserted that payment of the disputed salaries was made in cash. However, when ordered to produce the original of invoice n° 100024482448 referred to in Enclosure 10 which could have established the payment of the disputed salaries, the Appellant suddenly claimed that such document *"is an electronic payment produced from a specific accounting software, therefore the relevant document is to [be] considered as the original one"*. This sudden change in the description of the payment method sheds furthermore a dubious light on the Appellant's presentation of its case and adds to the many inconsistencies related to its evidence.

67. In conclusion, the Sole Arbitrator considers that the Appellant has not produced conclusive evidence showing that the salaries of January and February 2013 were paid. As a result, the amount contractually agreed as per the Termination Agreement, *i.e.* six month salaries amounting to USD 250,000.02 remain due to the Player. The ruling of the Appealed Decision which granted this amount to the Player is upheld to its full extent.

C. Default interest

68. It is undisputed between the Parties that the legal interest of 5 % per annum provided under Swiss law (Article 104(1) CO) applies to the amount due. The Parties however disagree on the date when the interest starts to run.

69. In the Appealed Decision, the DRC ordered the Club to pay *"interest at the rate of 5% p.a. on the amount of USD 250,000.02* ***as from the respective due dates of the salaries as stipulated in the employment contract****"* (emphasis added). In this respect, the DRC clarified that *"it could not be established from the content of the termination agreement that the amount of USD 250,000.02 fell immediately due, but rather that it was agreed upon that the Respondent [the Club] would continue to pay the monthly salaries to the Claimant on the basis of the employment contract"*. As a result, the Club was condemned to pay interest in the following manner:

> *"a. 5% p.a. as of 19 February 2013 on the amount of USD 41,666.67;*
>
> *b. 5% p.a. as of 1 March 2013 on the amount of USD 41,666.67;*
>
> *c. 5% p.a. as of 1 April 2013 on the amount of USD 41,666.67;*
>
> *d. 5% p.a. as of 1 May 2013 on the amount of USD 41,666.67;*
>
> *e. 5% p.a. as of 1 June 2013 on the amount of USD 41,666.67;*
>
> *f. 5% p.a. as of 1 July 2013 on the amount of USD 41,666.67"*

70. The Appellant challenges the DRC's ruling above. It argues that pursuant to Article 105 (1) CO, the interest is only payable as of the day when legal action is initiated. The Appellant has not specified a particular date but the Sole Arbitrator assumes that such date would be **22 July 2014, the date when the Player lodged its claim before the DRC** (emphasis added by the Sole Arbitrator).

71. The Appellant also invokes Article 102(2) CO to plead that the interest should start running from the day the debtor is given formal notice to pay. Here, it refers to the date of **13 November 2014, the day when the grounds of the Appealed Decision were notified** (emphasis added by the Sole Arbitrator), as this was allegedly the first time that it was formally given notice of the default payment.

72. The Respondent submits that the default interest of 5% per annum applies *"from the signature of the Termination Agreement, this is, from* ***February 19h, 2013*** *until the effective day of payment of the whole amount as fixed in the [Appealed] Decision"*. The Sole Arbitrator however notes that in the Appealed Decision, the interest is applied at the end of each month when the salary was deemed to fall due, not from 19 February 2013.

73. In Swiss law, the triggering date for the legal interest is governed by Article 102 CO which reads as follows:

> *"Art. 102 – Default of Obligor – Requirement*
>
> *1. Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee.*
>
> *2. Where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right of termination reserved by one party, the obligor is automatically in default on expiry of the deadline".*

74. Pursuant to Article 102(1) CO, the interest is due from the day notice to pay is given to the debtor. However, when the parties' agreement provides for a time limit to perform the obligation, the interest automatically falls due when the time limit elapses without a notice of default being necessary (Article102(2) CO). Default interest without notice also becomes due with the termination of an employment relationship (Basler Kommentar, OR I, Art. 339 n 1).

75. As rightly outlined by the DRC in the Appealed Decision, the Parties agreed that the Club would continue to pay the salaries from January to June 2013 on a monthly basis as per the Employment Contract. At least, one would expect that if the Parties had contemplated otherwise, for instance an immediate payment of all salaries – which would have differed from the usual *modus operandi* – this would have been expressly specified in the Termination Agreement.

76. With regard to the requirement of a notice to be able to claim default interest, the Sole Arbitrator considers that the Termination Agreement equals a notice of termination due to the injury suffered by the Player and that a special notice is thus not required. Default interest becomes due on the day the salaries must be paid. Clause 2 of the Termination Agreement states that the Club is committed to pay the salaries until the end of the Employment Contract. As a consequence, applying the normal contractual regime, the monthly salary payments are due as provided for in Clause 19 of the Employment Contract, *i.e.* at the end of each month. Default interest is thus due for each monthly salary from the first day of the following month. With the above analysis the Sole Arbitrator concludes that the Appealed Decision is correct and is to be upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Al Nassr Saudi Club on 6 January 2015 against the decision issued by the FIFA Dispute Resolution Chamber on 6 November 2014 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 6 November 2014 is upheld.

3. (…).

4. (…).

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