Arbitrations CAS 2015/A/4046 & 4047 Damián Lizio & Bolivar Club v. Al-Arabi SC, award of 10 November 2015

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Juan Pablo Arriagada (Chile); Mrs Svenja Geissmar (Germany)

Football
Termination of a contract of employment with just cause
Burden of proof and indirect proof according to Swiss law
Pacta sunt servanda in football and Article 13 of the RSTP
Termination of a contract for just cause as an exception to the fundamental principle of contractual stability
Non-payment or late payment of salaries as just cause
Principles and method of calculation of the compensation due by a party for breach of contract
Application of the positive interest principle

1. **In CAS arbitration, and in accordance with Article 8 of the Swiss Civil Code, any party wishing to prevail on a disputed issue must discharge its *"burden of proof"*, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. At the same time, if a direct proof is not possible, the judge can rely on indications or high degree of likelihood.**

2. **The principle *pacta sunt servanda* lies at the basis of the football system, since it gives legal foundation to the stability of contractual relations, which would be severely jeopardized if the parties to employment contracts could all too easily get rid of the obligations undertaken thereunder: while clubs make investments in players, to be recovered over the term of the contract, the players derive their living from the contract. Both parties' expectations, objectively understood, are therefore that contracts are respected until their expiry. Such principle of contractual stability is expressly recognized by Article 13 of the FIFA Regulations on the Status and Transfer of Players (RSTP).**

3. **The principle of contractual stability is not absolute as Article 14 RSTP provides that *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause"*. Such exception to a fundamental principle is to be interpreted narrowly: therefore, only if there is *"just cause"* can a binding employment contract be terminated by either the player or the club.**

4. **Under Swiss law, a *"just cause"* exists whenever the terminating party can in good faith not be expected to continue the employment relationship. The definition of *"just cause"*, as well as the question whether *"just cause"* in fact existed, shall be established in accordance with the merits of each particular case. As it is an exceptional measure,**

the immediate termination of a contract for *"just cause"* must be accepted only under a narrow set of circumstances. Only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter. In the presence of less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after being warned. The judging body determines at its discretion whether there is *"just cause"*. According to well-established CAS jurisprudence, non-payment or late payment of a player's salary by his club may constitute *"just cause"* for termination of the employment contract. It is immaterial to assess the precise number of monthly salary instalments (and any other aspects of remuneration) actually unpaid: the key element is whether, in light of the overall circumstances of the case and the breach committed by a party, the continuation of the employment relationship under the breached contract can be expected.

5. Article 17.1 RSTP sets the principles and the method of calculation of the compensation due by a party because of a breach of a contract for which it is responsible. A primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. Then, if the parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for: the law of the country concerned, the specificity of sport and any other objective criteria.

6. There is a consensus in the CAS jurisprudence as to the application of the *"positive interest"* principle approach. The application of the criteria indicated by Article 17.1 RSTP should *"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"*.

1. BACKGROUND

1.1 The Parties

1. Damián Lizio (hereinafter also referred to as the "Player") is an Argentinean professional football player, born on 30 June 1989.

2. Bolivar Club (hereinafter referred to as "Bolivar"; the Player and Bolivar are jointly referred to as the "Appellants") is a football club, with seat in La Paz, Bolivia. Bolivar is affiliated to the Bolivian Football Federation (*Federación Boliviana de Fútbol*) (hereinafter referred to as "FBF"), the governing body of football in Bolivia. FBF is a member of the Fédération Internationale de Football Association (hereinafter referred to as "FIFA"), the world governing body of football.

3. Al-Arabi SC (hereinafter referred to as "Al-Arabi" or the "Respondent") is a football club, with seat in Kuwait City, Kuwait. Al-Arabi is affiliated to the Kuwait Football Association (الإتحاد الكويتي لكرة القدم) (hereinafter referred to as "KFA"), which in turn is a member of FIFA.

1.2 The Dispute between the Parties

4. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence given in the course of the proceedings.[1] Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

5. On 1 July 2011, the Player and Bolivar signed an employment contract (hereinafter referred to as the "First Bolivar Employment Contract"), under which the former was to provide to the latter his services as a professional football player for a term starting on 1 July 2011 and ending on 30 June 2015. Under the First Bolivar Employment Contract and its Annexes the Player was to receive salaries of USD 132,000 per season, as well as yearly bonuses of USD 30,000 and a monthly accommodation allowance of USD 400.

6. On the 2 July 2013, the Player, Bolivar and Al-Arabi signed a "Loan Transfer Agreement" (hereinafter referred to as the "Loan") under which the Player would be transferred, on a loan basis, from Bolivar to Al-Arabi for a period starting on 15 July 2013 and ending on 15 July 2015.

7. The Loan contained, *inter alia*, the following provisions:

> *"2. … After the loan period is finished and the preferential right to buy full transfer rights for the PLAYER is not taken by AL ARABI, the PLAYER must return immediately to CLUB BOLIVAR.*
>
> *3. AL ARABI binds that, for the transfer of the PLAYER, will effect the payment of the compensation on a loan basis on the net amount of US$.250.000.-(Two Hundred and Fifty Thousand American Dollars). That payment will be made effective through a bank transfer, with the corresponding banking instructions. …*
>
> *Once the total net amount is accreditated in CLUB BOLIVAR'S bank account, the International Certificate Transfer (ITC) of the PLAYER will be send to AL ARABI, CLUB BOLIVAR shall cover fees, expenses, commissions and any compensation related to this CONTRACT, following the next order:*
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> *U.S. $ 75.000.- Loan fee.*
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> *U.S. $ 50.000.- Player's percentage;*
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> *U.S. $ 75.000.- Agents commissions;*
>
> *U.S. $ 50.000.- Player's debts with CLUB BOLIVAR.*
>
> *In case that the total net amount is not accredited in said bank account until July 10, 2013, this CONTRACT will be considered null, and the PLAYER must return to CLUB BOLIVAR immediately.*
>
> *4. AL ARABI has a preferential right option to buy full transfer right of the PLAYER:*
>
> *a) Until June 30, 2014. The transfer fee of the full transfer rights is 600.000 $US (Six Hundred Thousand American Dollars) net.*
>
> *b) Until June 30, 2015. The transfer fee of the full transfer rights is 750.000 $US (Seven Hundred*

[1] Several of the documents submitted by the parties and referred to in this award contain various misspellings: they are so many that the Panel, while quoting them, could not underscore them all with a *"sic"* or otherwise.

and Fifty Thousand American Dollars), net. …

If AL ARABI decides to use and take the preferential right to buy full transfer right for the PLAYER, AL ARABI agrees to pay the PLAYER's 20% of the total amount of the option, and in the same order about a future transfer.

5. *AL ARABI and the PLAYER will sign a professional Agreement, where they will arrange their mutual relations. During the loan period of this CONTRACT AL ARABI will be sole responsible of all expenses and salary payments and others related to the PLAYER.*

6. *In the case of any remarks or any kind of relations which could occur from this CONTRACT, FIFA Rules and Regulations will be taken in consideration. For eventual disputes, FIFA Regulations in this present matter will be taken in consideration".*

8. On the basis of the Loan, the Player and Al-Arabi signed a *"Professional Player's Contract"* (hereinafter referred to as the "Al-Arabi Employment Contract") under which the Player (therein defined as the *"second party"*) would render his services as a professional football player of Al-Arabi (therein defined as the *"first party"*) for *"two sporting seasons 2013/2014 – 2014/2015"* from 15 July 2013 to 30 June 2015.

9. The Al-Arabi Employment Contract contained, *inter alia*, the following provisions:

Article (3)

If the second party (player/Damian Emanuel Lizio) leave Al-Arabi Sporting Club before the end of the term of this contract without the consent of the first party or laze on its implementation shall be responsible before the Club for the payment of all expenses incurred by the club either those paid against obtaining the approval on his transfer to the club, or those incurred by the club for any other purpose, in addition to compensation for damage to The Club and at the discretion of the club.

Article (4)

First:

The first party shall pay the second party total value of the contract a sum of ($1150000) One million one hundred and fifty thousand U.S. dollars only) By (575000 $) only five hundred and seventy-five thousand dollars for each season is divided as follows:

1. *a sum of 200000 $ (Two hundred thousand U.S. dollars only) as advance payment for the first season 2013/2014 paid when the contract is signed.*
2. *a sum of 200000 $ (Two hundred thousand U.S. dollars only) as advance payment for the second season paid at the beginning of the second season 2014/2015 on 01/08/2014.*
3. *a sum of 37500 $ (Thirty seven thousand five hundred U.S. dollars only) as monthly salary for ten months pay at the end of each month for the first season 2013/2014.*
4. *a sum of 37500 $ (Thirty seven thousand five hundred U.S. dollars only) as monthly salary for then months pay at the end of each month for the second season 2014/2015.*

Second:

The first party shall pay the original club for the player (Atletico de Bolivar club) a sum of ($ 250000) only (two hundred and fifty thousand dollars) for loan the player to the Al-Arabi Sporting Club for two athletes

seasons 2013/2014 – 2014/2015.

Article (5)

The first party undertakes to provide a furnished accommodation for the second party and his family, the second party shall not have the right to request the change of accommodation or furniture.

Article (6)

The first party undertakes to provide a mean of transport for the second party during the matches and training or travel allowance.

Article (7)

The first party shall provide the second party Two tickets for business class travel to and from his country for him and his wife twice, and one economy class ticket for two members from his family every season. …

Article (21)

If the player convicted by preaching the regulations and laws of the country or this contract provisions, this club may terminate the contract and the first party reserves its right to claim compensation equivalent all the money paid and to the contract once payment and his due salaries for the period from the date of termination contract until the end of this term. …

Article (23)

The first party is entitled to individually terminate the contract at the end of each season without reference to the second party. …

Article (26)

Every dispute arising between the two parties around the execution or interpretation of his contract shall fall under the football international federation association.

10. On 30 June 2013, the Player received from Al-Arabi a cheque in the amount of KWD 55,000 (fifty-five thousand Kuwaiti Dinars), corresponding, according to the Player's calculations, to USD 192,173[2], as *"advance payment for the first season 2013/2014"* under Article 4, first paragraph 1 of the Al-Arabi Employment Contract.

11. On 10 October 2013, the Player received from Al-Arabi a second cheque in the amount of KWD 2,720 (two thousand seven hundred twenty Kuwaiti Dinars), corresponding, according to the Player's calculations, to USD 9,594.36[3], to complete the *"advance payment for the first season 2013/2014"* due under Article 4, first paragraph 1 of the Al-Arabi Employment Contract. As a result of this second cheque, the Player received, according to his calculations, a total amount

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2 See Exhibit 2 to the Player's appeal brief in these CAS proceedings, containing a reference to the exchange rate applicable on 30 June 2013.

3 See Exhibit 2 to the Player's appeal brief in these CAS proceedings, containing a reference to the exchange rate applicable on 10 October 2013.

corresponding to USD 201,767.26[4].

12. On 21 October 2013, the Player allegedly sent a telegram to Al-Arabi as follows:

"Intimate ended 48 hours paid the sum of U.S.$ 112,500.- due under the provisions of art. 4 paragraph 3 of the contract concluded between the parties last 15/07/2013, under penalty for non-compliance to request my freedom of action and to appeal to FIFA to obtain payment of the contract".

13. On 27 October 2013, the Player allegedly sent a second telegram to Al-Arabi as follows:

"Under no response to my previous request, notify you that I will take a legal action on FIFA and/or Kuwait Football Asociation to request may freedom of action and to obtain the full payment of the contract".

14. In a letter of 15 November 2013 sent by telefax to Al-Arabi, the Player wrote the following:

"Under no response to my previous request (sent 21 oct and 27 oct) your party has failed to fulfill the corresponding obligations required by the profesional player's contract signed.

Such default in payment salaries obviously consist a material breach of the contract signed, and seriously violated laws and FIFA regulations.

According with that, notify I have no choice but to resolve the dispute by means of legal actions and I will further claim all indemnifications and the full payment under the contract concluded, including but no limited to the those arising from art. 4 of the contract, as well as any legal fees and other expenses, such as accommodation as stipulated in the art. 5".

15. On 16 November 2013, at 8:30 am, the Player left Kuwait.

16. On 4 December 2013, Al-Arabi lodged a claim with FIFA against the Player and Bolivar, requesting compensation in the total amount of USD 1,400,000, plus interest, arising out of the Player's alleged breach of contract.

17. On 9 December 2013, the Player filed with FIFA a petition requesting that Al-Arabi be ordered to pay the amount of USD 958,825.64, plus interest.

18. On 23 January 2014, the FBF submitted to the KFA a request for the issuance of an International Transfer Certificate (ITC) for the return of the Player from the loan to Al Arabi.

19. On 21 February 2014, the Single Judge of the FIFA Players' Status Committee authorized the FBF to provisionally register the Player with Bolivar.

20. On 26 May 2014, the Player and Bolivar signed a new contract (hereinafter referred to as the "Second Bolivar Employment Contract") extending the term of employment of the Player with

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[4] The Panel notes however that, at § LXVII of his appeal brief, the Player converts the total amount of KWD 57,720 into USD 202,597, by applying to it the exchange rate which was quoted at the time the first portion of that amount was received. The Panel considers that a more correct calculation should take into account the exchange rates applicable at the time each payment was received. The resulting figure, based on the documents provided by the Player, it the one mentioned in the text.

Bolivar to 30 June 2019. Under the Second Bolivar Employment Contract and its Annexes the Player was to receive for the season 2014/2015 a salary of USD 132,000, as well as a bonus of USD 30,000 and a monthly accommodation allowance of USD 400, *i.e.* the same amounts stipulated in the First Bolivar Employment Contract.

21. On 24 June 2014, the Player, Bolivar and O'Higgins F.C., a Chilean football club, signed a contract under which the Player would be transferred, on a loan basis, from Bolivar to O'Higgins F.C. for a period starting on 1 July 2014 and ending on 30 June 2015.

22. On 1 July 2014, the Player and O'Higgins F.C. signed an employment contract for the period between 1 July 2014 and 30 June 2015 (hereinafter referred to as the "O'Higgins Employment Contract"). Under such contract the Player was to receive for the season 2014/2015 a monthly salary of USD 12,000 and a monthly accommodation allowance of USD 500.

23. On 21 January 2015, the FIFA Dispute Resolution Chamber (hereinafter referred to as the "DRC") issued a decision (hereinafter referred to as the "Decision"), holding as follows (emphasis in the original):

> *"1. The claim of the Claimant/Counter-Respondent, Al Arabi SC, is partially accepted.*
>
> *2. The Respondent I/Counter-Claimant I, Mr Damián Lizio, is ordered to pay to the Claimant/Counter-Respondent* [Al-Arabi] *compensation for breach of contract in the amount of USD 650,000, plus 5% interest p.a. as from 4 December 2013 until the date of effective payment,* ***within 30 days*** *as from the date of notification of this decision.*
>
> *3. The Respondent II/Counter-Claimant II, Club Bolivar, is jointly and severally liable for the payment of the aforementioned amount.*
>
> *4. In the event that the amount due to the Claimant/Counter-Respondent* [Al-Arabi] *in accordance with numbers 2. and 3. Above, plus interest, is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *5. Any further claims lodged by the Claimant/Counter-Respondent* [Al-Arabi] *are rejected.*
>
> *6. The Claimant/Counter-Respondent* [Al-Arabi] *is directed to inform the Respondent I/Counter-Claimant I* [the Player] *and the Respondent II/Counter-Claimant II* [Bolivar] *immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
>
> *7. The claim of the Respondent I/Counter-Claimant I* [the Player] *is partially accepted.*
>
> *8. The Claimant/Counter-Respondent* [Al-Arabi] *is ordered to pay to the Respondent I/Counter-Claimant I* [the Player] *outstanding remuneration in the amount of USD 75,000, plus 5% interest p.a. as from 16 November 2013 until the date of effective payment,* ***within 30 days*** *as from the date of notification of this decision.*
>
> *9. In the event that the amount due to the Respondent I/Counter-Claimant I* [the Player] *in accordance with the above-mentioned number 8. plus interest is not paid by the Claimant/Counter-Respondent* [Al-Arabi] *within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a forma decision.*

10. Any further claims lodged by the Respondent I/Counter-Claimant I [the Player] *are rejected.*

11. The Respondent I/Counter-Claimant I [the Player] *is directed to inform the Claimant/Counter-Respondent* [Al-Arabi] *immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*

12. The counter-claim of the Respondent II/Counter-Claimant II [Bolivar] *is rejected".*

24. On 30 March 2015 the Decision, together with the grounds supporting it, was notified to the Appellants.

25. In the Decision, the DRC first found that the 2012 edition of the Regulations on the Status and Transfer of Players (hereinafter referred to as the "RSTP") was applicable to the merits of the dispute. The DRC, next, stated the following:

"11. Having established the aforementioned, the Chamber deemed that the underlying issue of this dispute, considering the respective claims of the Claimant/Counter-Respondent [Al-Arabi]*, the Respondent I/Counter-Claimant I* [the Player] *and the Respondent II/Counter-Claimant II* [Bolivar]*, was to determine whether the contract had been unilaterally terminated with or without just cause by the Respondent I/Counter-Claimant I* [the Player] *on 15 November 2013.*

12. In view of the above, the DRC first of all took into consideration the content of art. 14 of the Regulations, which provides that "a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".

13. The Chamber stressed that the definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case.

14. In this context, the Chamber took due note that the agreement of the parties to the contract was for the Respondent I/Counter-Claimant I [the Player] *to receive, inter alia, 10 (ten) monthly salaries at the end of each month of the season 2013/2014.*

15. The members of the DRC recalled at this point that the Respondent I/Counter-Claimant I [the Player] *originally claimed that the first monthly salary of the season 2013/2014 fell due on 30 July 2013 …. However, the Chamber took due note that he later amended his petition in that regard and argued that, as of the contract's termination date, i.e. 15 November 2013, the Claimant/Counter-Respondent* [Al-Arabi] *owed him his monthly salaries of September and October 2013 and part of his salary of November 2013 ….*

16. Therefore, the Chamber concluded that the parties to the contract admitted that the monthly salaries of the season 2013/2014 fell due as from September 2013, which is the statement of the Claimant/Counter-Respondent [Al-Arabi] *in this respect. Likewise, the members of the Chamber deemed it appropriate to recall that the Claimant/Counter-Respondent* [Al-Arabi] *acknowledged to owe the Respondent I/Counter-Claimant I* [the Player] *the monthly remuneration corresponding to September 2013 and October 2013… and that the pay dates of the Respondent I/Counter-Claimant I's* [the Player's] *salaries were "the end of each month".*

17. Based on the aforementioned, the members of the Chamber established that, until the contract's termination date, i.e. 15 November 2013, in addition to the advance payment for the season 2013/2014, two monthly salaries – September and October 2013 – had fallen due. In this regard, the DRC made it clear that the salary of November 2013 was not due by the date the contract was terminated, as it was

only payable on 30 November 2013.

18. *The foregoing consideration is in line with the information contained in the Transfer Matching System (TMS), according to which the Kuwaiti season 2013/2014 started on 3 September 2013 and ended on 31 May 2014, i.e. 9 months, and with the information provided by the KFA, according to which said season started on 30 August 2013 and ended on 26 April 2014, i.e. 8 months.*

19. *In continuation, the DRC noted that, on the one hand, the Respondent I/Counter-Claimant I* [the Player] *argues that he put the Claimant/Counter-Respondent* [Al-Arabi] *in default twice, by means of two telegrams allegedly sent to the Claimant/Counter-Respondent* [Al-Arabi] *on 21 and 27 October 2013. On the other hand, the Claimant/Counter-Respondent* [Al-Arabi] *rejects to have received them.*

20. *The members of the Chamber deemed it appropriate to refer the parties to art. 12 par. 3 of the Procedural Rules, which stipulates that "any party claiming a right on the basis of an alleged facts shall carry the burden of proof.*

21. *Subsequently, the Chamber confirmed that, whereas the Respondent I/Counter-Claimant I* [the Player] *satisfactorily proved that the Claimant/Counter-Respondent* [Al-Arabi] *received on 15 November 2013, at 20:00 hrs, a fax sent by him to the fax number of the Claimant/Counter-Respondent* [Al-Arabi] *that appears in the contract, he failed to evidence that the telegrams … were actually received by the Claimant/Counter-Respondent* [Al-Arabi].

22. *In respect, of the aforesaid consideration, the DRC noted that the only documentation provided by the Respondent I/Counter-Claimant I* [the Player] *in support of his allegation was a personal statement apparently issued by a person connected to the Respondent I/Counter-Claimant I* [the Player].

23. *In this regard, the Chamber was eager to emphasize that the information contained in a personal statement, not supported by any additional documentation whatsoever, is of mainly subjective perception and might be affected by diverse contextual factors; therefore, the credibility of such type of documentation is quite limited. Bearing in mind the aforementioned, the DRC highlighted that this personal statement presented by the Respondent I/Counter-Claimant I* [the Player] *was not consistent with the rest of the evidence found on file and, therefore, could not be considered as substantial evidence of the dispatch and receipt of the telegrams.*

24. *Moreover, the Chamber noted that the Respondent I/Counter-Claimant I* [the Player], *in spite of having allegedly sent his two reminders of 21 and 27 October 2013 by telegram, changed his communication method, faxed his notice to the Claimant/Counter-Respondent* [Al-Arabi] *– instead of sending a third telegram – using the fax number he had since the beginning of the contractual relationship, and kept the relevant fax report.*

25. *In addition to the foregoing, the DRC observed that, notwithstanding the fact that the fax sent by the Respondent I/Counter-Claimant I* [the Player] *on 15 November 2013, at 20.00 hrs, does not appear to be a default notice because its content is rather vague and ambiguous and does not mention any clear and specific claim for payment of outstanding remuneration, he left Kuwait at 8:30 in the morning of the next day. In this sense, the Chamber concluded that, had the notice of 15 November 2013 been a default notice, still 12 (twelve) hours – especially like in the present dispute where those correspond to the night in between – cannot be considered a reasonable time limit granted to a party in order to comply with pending obligations.*

26. *Finally, the Chamber took into consideration that the Claimant/Counter-Respondent* [Al-Arabi] *paid*

to the Respondent I/Counter-Claimant I [the Player] *the amount of KWD 57,720, which corresponds to his advance payment for the season 2013/2014. This amount correspond to approx 5% of its value. Hence, the DRC found that the existence of two outstanding monthly salaries, although acknowledged by the Respondent I/Counter-Claimant I* [the Player] *…, was not enough in order for the Respondent I/Counter-Claimant I* [the Player] *to terminate the contract without a previous warning to the Claimant/Counter-Respondent*[Al-Arabi].

27. *In summary and still bearing in mind the wording of art. 12 par. 3 of the Procedural Rules, the Chamber established that on 15 November 2013 the Respondent I/Counter-Claimant I* [the Player] *terminated the contract without any prior warning to the Claimant/Counter-Respondent* [Al-Arabi] *and based on a non-material default.*

28. *In view of the foregoing, the DRC concluded that, in accordance with art. 17 par. 1 of the Regulations and its long-standing jurisprudence, the Respondent I/Counter-Claimant I* [the Player] *is liable for the termination of the contract without just cause on 15 November 2013 and, consequently, must pay an amount of compensation to the Claimant/Counter-Respondent* [Al-Arabi]. *Furthermore, in accordance with the unambiguous contents of article 17 par. 2 of the Regulations, the Chamber established that the Respondent I/Counter-Claimant I's* [the Player's] *new club, i.e. the Respondent II/Counter-Claimant II* [Bolivar]*, shall be jointly and severally liable for the payment of compensation.*

29. *In continuation, prior to establishing the consequences of the breach of contract without just cause by the Respondent I/Counter-Claimant I* [the Player] *in accordance with art. 17 par. 1 of the Regulations, the Chamber held that it had to address the issue of any unpaid remuneration at the moment the contract was terminated by the Respondent I/Counter-Claimant I* [the Player].

30. *Indeed, after amending his claim, the Respondent I/Counter-Claimant I* [the Player] *alleges that his salaries of September, October and November 2013 were outstanding at the time he terminated the contract. The Chamber drew its attention, once again, to the fact that the Respondent I/Counter-Claimant I's* [the Player's] *salaries fell due "at the end of each month". Thus, considering that he terminated the contract on 15 November 2013, only his salaries of September and October 2013 were due at that time. Furthermore, the Chamber noted that the Claimant/Counter-Respondent* [Al-Arabi] *expressly acknowledged that said salaries were outstanding …*

31. *Consequently, the Chamber took into account that, as of the contract's termination date, the Claimant/Counter-Respondent* [Al-Arabi] *had not paid to the Respondent I/Counter-Claimant I* [the Player] *the total amount of USD 75,000 in salaries.*

32. *In accordance with the principle pacta sunt servanda, the Chamber decided that the Respondent I/Counter-Claimant I* [the Player] *is, therefore, entitled to outstanding remuneration in the total amount of USD 75,000 pursuant to art. 4.3. of the contract, which corresponds to his monthly salaries of September and October 2013.*

33. *In addition, taking into account the Respondent I/Counter-Claimant I's* [the Player's] *request as well as the constant practice of the Dispute Resolution Chamber in this regard, the members of the Chamber decided to award the Respondent I/Counter-Claimant I* [the Player] *interest at the rate of 5% p.a. on the outstanding amount of USD 75,000 as of 16 November 2013, which is the date following the termination of the contract, until the date of effective payment.*

34. *Having stated the above, the Chamber focused its attention on the calculation of the amount of compensation for breach of contract in case at stake. In doing so, the members of the Chamber firstly*

reiterated that, in accordance with art. 17 par. 1 of the Regulations, *the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including in particular the remuneration and other benefits due to the* Respondent I/Counter-Claimant I [the Player] *under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years as well as the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within the protected period. The DRC recalled that the list of objective criteria is not exhaustive and that the broad scope of the indicated criteria tends to ensure that a just and fair amount of compensation is awarded to the party which suffered the damage.*

35. *In application of the relevant provision, the Chamber held that it first of all had to clarify whether the contract contains any provision by means of which the parties to it had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the DRC noted that the contract contained the following provisions:*

Art. 3: "If the [Respondent I/Counter-Claimant I] [the Player] *leave[s] [the Claimant/Counter-Respondent]* [Al-Arabi] *before the end of the term of this contract without the consent of [the Claimant/Counter-Respondent]* [Al-Arabi] *or laze on its implementation shall be responsible before the [Claimant/Counter-Respondent]* [Al-Arabi] *for the payment of all expenses incurred by the [Claimant/Counter-Respondent]* [Al-Arabi] *either those paid against obtaining the approval on his transfer to the [Claimant/Counter-Respondent]* [Al-Arabi], *or those incurred by the [Claimant/Counter-Respondent]* [Al-Arabi] *for any other purpose, in addition to compensation for damage to the [Claimant-Counter-Respondent] and at the discretion of the [Claimant/Counter-Respondent]* [Al-Arabi]*".*

Art. 21: "If the [Respondent I/Counter-Claimant I] [the Player] *convicted by preaching the regulations and laws of the country or this contract provisions, the [Claimant-Counter-Respondent] may terminate the contract and [the Claimant/Counter-Respondent]* [Al-Arabi] *reserves its right to claim compensation equivalent all the money paid and to the contract advance payment and his due salaries for the period from the date of termination until the end of this term".*

36. *The members of the Chamber agreed that these clauses are not clear and are, in any case, to the benefit of the Claimant/Counter-Respondent* [Al-Arabi] *only. Therefore, they cannot be taken into consideration in the determination of the amount of compensation.*

37. *As a consequence, the members of the Chamber determined that such amount of compensation payable by the Respondent I/Counter-Claimant I* [the Player] *to the Claimant/Counter-Respondent* [Al-Arabi] *had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. In this regard, the DRC emphasised beforehand that each request for compensation for contractual breach has to be assessed by the Chamber on a case-by-case basis, taking into account all specific circumstances of the respective matter.*

38. *Consequently, in order to estimate the amount of compensation due to the Claimant/Counter-Respondent* [Al-Arabi] *in the present case, the Chamber turned its attention to the remuneration and other benefits due to the Respondent I/Counter-Claimant I* [the Player] *under the contract and the new contract, which criterion was considered by the Chamber to be essential. In this context, the members of the Chamber deemed it important to emphasise that the wording of art. 17 par. 1 of the Regulations allows the DRC to take into consideration both the contract and the new contract in the calculation of the amount of*

compensation, thus enabling the Chamber to gather indications as to the economic value attributed to a player by both his former and his new club.

39. *In this regard, the DRC established, on the one hand, that the employment contract between the Claimant/Counter-Respondent* [Al-Arabi] *and the Respondent I/Counter-Claimant I* [the Player] *had been set to run as from 15 July 2013 until 30 June 2015. Since the breach occurred on 15 November 2013, i.e. the contract's termination date, the total value of his employment agreement with the Claimant/Counter-Respondent* [Al-Arabi] *for the remaining contractual period amounts to USD 875,000 … . On the other hand, the members of the Chamber established that the value of the employment contract concluded between the Respondent I/Counter-Claimant I* [the Player] *and the Respondent II/Counter-Claimant II* [Bolivar] *amounts to a total of USD 254,000 for the period starting from the unilateral termination of the contract by the Respondent I/Counter-Claimant I* [the Player] *until its contractual expiry, i.e. from 16 November 2013 until 30 June 2015 … . On the basis of the aforementioned financial contractual elements, the Chamber concluded that the average of remuneration between the contracts concluded by the Respondent I/Counter-Claimant I* [the Player] *respectively with the Claimant/Counter-Respondent* [Al-Arabi] *and the Respondent II/Counter-Claimant II* [Bolivar] *over the relevant period amounted to USD 564,500.*

40. *The members of the Chamber then turned to the further essential criterion relating to the fees and expenses paid by the Claimant/Counter-Respondent* [Al-Arabi] *for the acquisition of the Respondent I/Counter-Claimant I's* [the Player's] *services insofar as these have not been amortised over the term of the relevant contract. The Chamber recalled that a loan compensation of USD 250,000 had been paid by the Claimant/Counter-Respondent* [Al-Arabi] *to the Respondent II/Counter-Claimant II* [Bolivar] *for the Respondent I/Counter-Claimant I's* [the Player's] *transfer on loan … . According to article 17 par. 1 of the Regulations, this amount shall be amortised over the term of the relevant employment contract. As stated above, the Respondent I/Counter-Claimant I* [the Player] *was still bound to the Claimant/Counter-Respondent* [Al-Arabi] *for twenty further months of contract when he terminated the contract, which was signed by the parties with a view to remain contractually bound for a total period of two seasons. As a result of the Respondent I/Counter-Claimant I's* [the Player's] *breach of contract on 15 November 2013, the Claimant/Counter-Respondent* [Al-Arabi] *has thus been prevented from amortising the amount of approx. USD 208,000, i.e. 5/6 of USD 250,000, relating to the loan compensation that it paid in order to acquire the Respondent I/Counter-Claimant I's* [the Player's] *services, which the Claimant/Counter-Respondent* [Al-Arabi] *spent with the intention to benefit from the Respondent I/Counter-Claimant I's* [the Player's] *services for the period of time that would then be established by means of the contract.*

41. *Thus, the Chamber concluded that the amount of approx. USD 772,500 serves as the basis for the final determination of the amount of compensation for breach of contract that the Respondent I/Counter-Claimant I* [the Player] *has to pay to the Claimant/Counter-Respondent* [Al-Arabi].

42. *At this point, the DRC highlighted that, notwithstanding the fact that it appears to be clear that the first monthly salary of the Respondent I/Counter-Claimant I* [the Player] *fell due on 30 September 2013 …, the Chamber was eager to emphasise that the payment of 10(ten) monthly salaries at the end of each month of the season 2013/2014 could not be complied with by the Claimant/Counter-Respondent* [Al-Arabi] *because if TMS were to be followed, the tenth salary would have been paid after the end of said season and if the information provided by the KFA were to be followed, the ninth and tenth salaries would have been paid after the end of the aforementioned season …*

43. At this point, the DRC highlighted that since the contract was drafted in both English and Arabic and bears the letterhead of the Claimant/Counter-Respondent [Al-Arabi], *it seems that the Claimant/Counter-Respondent* [Al-Arabi] *was the party who drafted it.*

44. The members of the Chamber agreed that, given the particularities of the matter at hand, attenuating circumstances are applicable taking into consideration the principle in dubio contra proferentem. For these reasons, the Chamber decided to reduce the compensation for breach of contract at the total amount of USD 650,000.

45. All in all, on account of the aforementioned considerations, the Chamber decided that the claim of the Claimant/Counter-Respondent [Al-Arabi] *is partially accepted and that the Respondent I/Counter-Claimant I* [the Player] *must pay the amount of USD 650,000 to the Claimant/Counter-Respondent* [Al-Arabi] *as compensation for breach of contract. Furthermore, the Respondent II/Counter-Claimant II* [Bolivar] *is jointly and severally liable for the payment of the relevant compensation ….*

46. Taking into account the Claimant/Counter-Respondent's [Al-Arabi's] *request and considering that its claim was lodged on 4 December 2013, the Chamber concluded that the Respondent I/Counter-Claimant I* [the Player] *must pay interest of 5% p.a. on the amount of USD 650,000 as from 4 December 2013 until the date of effective payment".*

26. At the end of the period of loan to O'Higgins, and upon expiration of the O'Higgins Employment Contract, the Player returned to Bolivar, by whom he is currently employed.

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

27. On 20 April 2015, the Player filed a statement of appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the "Code") against Al-Arabi to challenge the Decision. The statement of appeal contained the appointment of Mr Juan Pablo Arriagada Aljaro as arbitrator and was accompanied by 3 exhibits. The arbitration proceedings so started were registered by the CAS Court Office as CAS 2015/A/4046 *Damián Lizo v. Al-Arabi SC.*

28. On the same 20 April 2015, Bolivar also filed a statement of appeal with the CAS pursuant to Article R47 of the Code against Al-Arabi to challenge the Decision. The statement of appeal contained the appointment of Mr Juan Pablo Arriagada Aljaro as arbitrator and was accompanied by 3 exhibits. These second arbitration proceedings were registered by the CAS Court Office as CAS 2015/A/4047 *Bolivar Club v. Al-Arabi SC.*

29. In separate letters of 27 April 2015, the Player and Bolivar confirmed their agreement to the consolidation of CAS 2015/A/4046 *Damián Lizo v. Al-Arabi SC* and CAS 2015/A/4047 *Bolivar Club v. Al-Arabi SC.*

30. On 29 April 2015, the Respondent also expressed its consent to the consolidation of the two arbitration proceedings.

31. On the same 29 April 2015, as a result, the CAS Court Office informed the parties that the proceedings CAS 2015/A/4046 *Damián Lizo v. Al-Arabi SC* and CAS 2015/A/4047 *Bolivar Club v. Al-Arabi SC* would be consolidated.

32. In a letter dated 30 April 2015, the Respondent raised an objection regarding the compliance by Bolivar of the deadline to submit an appeal against the Decision, seeking its dismissal because it was received by CAS after the expiration of the applicable time limit.

33. On 30 April 2015, the CAS Court Office indicated to the Respondent that, pursuant to Article R32 of the Code, it is the date on which the documents are sent to the CAS and not the date of receipt, which has to be taken into consideration in order to see whether a deadline is met or not. As a result, the CAS Court Office informed the Respondent that the appeal appeared to be filed on time, and that the objection of inadmissibility would not be considered at that stage of the proceedings, but that it *"may restate its objection when filing its answer and it will be for the Panel to decide this issue"*.

34. In a letter of 12 May 2015, FIFA informed the CAS Court Office that it renounced its right to apply for intervention in the two consolidated arbitration proceedings.

35. In a letter dated 13 May 2015, the Respondent designated Ms Svenja Geissmar to be an arbitrator in these consolidated arbitration proceedings.

36. On 15 May 2015, the Player lodged with CAS his appeal brief, together with 13 exhibits, pursuant to Article R51 of the Code.

37. On the same 15 May 2015, Bolivar also lodged with CAS, pursuant to Article R51 of the Code, its appeal brief, with 5 exhibits, which included a witness statement signed by Mr Kamal Odeh Mohammad.

38. By communication dated 18 May 2015, the CAS Court Office informed the parties on behalf of the President of the CAS Appeals Arbitration Division, that the Panel in the two consolidated proceedings had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Juan Pablo Arriagada Aljaro and Ms Svenja Geissmar, arbitrators.

39. On 16 July 2015, the Respondent lodged with CAS its answers in accordance with Article R55 of the Code. The answer attached 13 exhibits and contained, *inter alia*, the request that the Panel reject the documents filed by the Appellants not translated into English, and to exclude a witness statement submitted by the Player, because it was not signed *"under oath"* and *"it is just a letter from one friend to his close friend"*.

40. In a letter to FIFA dated 27 July 2015, the CAS Court Office requested from FIFA, on behalf of the Panel, a copy of the entire file of the case which led to the Decision.

41. On the same 27 July 2015, the CAS Court Office, writing on behalf of the Panel, invited the Appellants *inter alia* to file English translations of those documents already on file on which they intend to rely and which were filed in another language. At the same time, the parties were informed that the Panel had decided to reserve for the continuation of the proceedings any

evaluation regarding the witness statement provided by Mr Kamal Odeh Mohammad.

42. On 27 July 2015, the Player filed 5 new exhibits, requesting their admission pursuant to Article R56 of the Code. In his application, the Player explained that those new exhibits, consisting in printouts of text communications, could be collected only upon return of the Player to Bolivia for the new season, as they were stored on a *"phone chip"* which he had left in Bolivia.

43. On 28 July 2015, the Respondent objected to the filing by the Player of the new exhibits.

44. On 30 July 2015, Bolivar confirmed that it agreed to the filing by the Player of the new exhibits.

45. In a letter of 30 July 2015, the CAS Court Office informed the parties that the Panel had decided to accept the documents filed by the Player on 27 July 2015, without prejudice to any evaluation as to their relevance. At the same time, the Panel granted the Respondent a deadline to file any comment to those documents and/or to offer evidence in their rebuttal.

46. On 4 August 2015, the Appellants submitted English translations of the documents which had been filed in another language.

47. On 6 August 2015, the Respondent lodged with CAS its comments, with 4 exhibits, on the new documents filed by the Player.

48. On 7 August 2015, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the "Order of Procedure"), which was accepted and countersigned by the parties. However, while returning the signed Order of Procedure, the Respondent commented on the amounts in dispute in the two arbitration proceedings, indicated to be lower than those mentioned in the Order of Procedure.

49. On 11 August 2015, FIFA provided copy of the entire case file, which was then forwarded to the parties.

50. On 17 September 2015, pursuant to notice given to the parties in the letter of the CAS Court Office dated 7 August 2015, a hearing was held in Lausanne. The Panel was assisted at the hearing by Mr William Sternheimer, Counsel to CAS. The following persons attended the hearing:

    i. for the Player: Mr José Lasa Azpeitia, counsel;

    ii. for Bolivar: Mr Augustin Amorós and Mr Marco Cusumano, counsel;

    iii. for Al-Arabi: Mr Emad Hanayeneh, counsel, assisted by Mr Sami Al Sharif, interpreter.

51. At the opening of the hearing, both parties confirmed that they had no objections to the composition of the Panel. Thereafter, the Panel noted that the arbitration proceedings started by the Player had been registered by the CAS Court Office, on the basis of the information contained in the statement of appeal as CAS 2015/A/4046 *Damián Lizo v. Al-Arabi SC*, while the correct spelling of the name of the Player is "Lizio" and not "Lizo". Therefore, the caption of the case should read as CAS 2015/A/4046 *Damián Lizio v. Al-Arabi SC*.

52. After introductory statement by counsel, the Panel heard the declarations rendered on the phone by the Player, by Mr Guido Loayza Mariaca, President of Bolivar, and by Mr Kamal Odeih Mohammad, as follows[5]:

    i. the Player declared, *inter alia*, that he complained on several occasions to his agent, to the coach and to the management of Al-Arabi about Al-Arabi's failure to comply with its payment obligations. He also mentioned the point to another foreign player of Al-Arabi. The Player, in addition, confirmed that he sent the two telegrams of 21 and 27 October 2013 to Al-Arabi, after receiving legal advice indicating that the sending of telegrams was the "legal" way to notify his request for payment. For such purposes, he visited the post office twice, accompanied by Mr Kamal Odeih Mohammad, the only person who helped him while he was staying in Kuwait. Mr Kamal Odeih Mohammad, fluent in Spanish, assisted him in the preparation and transmission of the telegrams. On his visits to the post office , the personnel of the post office confirmed that, should the delivery of the telegrams meet any difficulty, the Player would be informed of the problem;

    ii. Mr Loayza confirmed that a portion of the amount paid by Al-Arabi for the loan of the Player was intended to satisfy preceding debts of the Player with Bolivar, as indicated in the text of the Loan;

    iii. Mr Odeih Mohammad confirmed his witness statement.

53. The parties next, by their counsel, made cogent submissions in support of their respective cases. At the conclusion of the hearing, finally, the parties expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

2.2 The Position of the Parties

54. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

a. The Position of the Appellants

a1. The Position of the Player

55. In its appeal brief, the Player requested that:

    "a. The Court would accept this Brief of Appeal within the current consolidated proceeding against Al-Arabi SC before CAS.

    b. The Court would render an award annulling the Decision issued by FIFA Dispute Resolution Chamber

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5 The summary which follows is intended to give an indication of only a key few points touched at the hearing. The Panel emphasises that it considered the entirety of the declarations made at the hearing and/or contained in the relevant witness statements.

hereby appealed;

c. The Court would upheld this Appeal, and pursuant to the terms presented, would render a final Award whereby it will be determined that Appellant terminated the employment agreement with just cause and, consequently, Respondent would be declared the exclusive party liable for the early termination of the employment agreement.

d. Respondent is therefore held liable for breach of the employment agreement signed between the Parties with the inherent legal consequences;

e. Respondent is ordered to pay the amount of ***NINE HUNDRED FIFTY EIGHT THOUSAND EIGHT HUNDRED AND TWENTY FIVE US DOLLARS AND SIXTY FOUR CENTS OF US DOLLARS (958,825.64$),*** *as follows:*

- ***NINE HUNDRED FORTY EIGHT THOUSAND TWO HUNDRED AND THIRTY TWO US DOLLARS AND SIXTY FOUR CENTS OF US DOLLARS (USD 948,232.64)*** *corresponding to the outstanding salaries.*
- ***TEN THOUSAND FIVE HUNDRED AND NINETY THREE US DOLLARS (USD 10.593)*** *corresponding to the costs of the player's apartment rent and two flight tickets.*

f. Respondent is ordered to pay Appellant interest of 5% per annum;

g. Respondent is ordered to pay the entire sum related to CAS administration costs and Panel fees;

h. The Court to render a decision whereby Respondent shall be disbursing Appellant a sum in order to cover the legal defense fees, expenses and costs already disbursed in the FIFA proceeding in the amount of SEVENTEEN THOUSAND SWISS FRANCS (CHF 17,000);

i. The Court render a decision whereby Respondent shall be disbursing Appellant a sum in order to cover its legal defense fees, expenses and costs in the amount of TWENTY FIVE THOUSAND SWISS FRANCS (CHF 25,000)".

56. In other words, the Player submits that the DRC rendered an *"erroneous decision"*, because Al-Arabi, and not the Player, breached the Al-Arabi Employment Contract. Therefore, the Decision should be set aside and the Respondent be ordered to pay compensation to the Player.

57. In support of such conclusion, the Player notes that the Decision was based on two critical assumptions:

i. that the Player had recognized in the course of the FIFA proceedings that, at the time of the termination of the Al-Arabi Employment Contract, the Respondent owed him only the monthly salaries of September, October and half of November 2013; and

ii. that the Player had failed to prove that he had requested the payment of the overdue salaries by giving advance notice to the Respondent before terminating the Al-Arabi Employment Contract.

58. In the Player's opinion, both assumptions are wrong. In fact:

i. as to the first point, the Player refers to the various submissions filed before FIFA (dated 3 December 2013, 26 March 2014, 24 April 2014 and 19 May 2014) to confirm that his constant position was that the Respondent had not paid the salaries corresponding to the months of July, August, September, October and November 2013;

ii. as to the second point, the Player mentions the two telegrams sent in October 2013, warning Al-Arabi that in the event that the outstanding salaries were not paid, he would take the case to FIFA. The Player submits that those telegrams were received by Al-Arabi, since the post office sent him no communication that any problem had prevented their delivery.

59. In any case, and with respect to the foregoing, the Player adds that:

i. the DRC considered, in other cases, that the lack of payment for a period of two months was sufficient for a termination of an employment contract with *"just cause"*. Therefore, even if Al-Arabi had not paid only the salaries of September and October, still the Player was entitled to terminate the Al-Arabi Employment Contract for *"just cause"*;

ii. the Respondent was late in meeting all its payment obligations: indeed, the advance salary for the season 2013/2014 was fully paid only on 10 October 2013, while the Player should have received that payment on 30 June 2013;

iii. as confirmed in some text messages, he complained on several occasions with his agent, with the coach and with the management of Al-Arabi about Al-Arabi's failure to comply with its payment obligations;

iv. the Respondent cannot maintain that the salaries had been deposited with Al-Arabi's offices, waiting for the Player to collect them. No communication was given to the Player in that respect. In addition, Kuwaiti (as well as Swiss) law does not provide for such a method of payment;

v. Kuwaiti labour laws allow the termination of an employment contract without prior notice in the event of breach of contract by the employer. In addition, the FIFA jurisprudence allows the termination of the contract without prior notification in the event of a severe breach.

60. In summary, the Respondent breached the contract with the Player, who was entitled to terminate it with *"just cause"* pursuant to Article 14 RSTP. As a consequence, compensation is to be paid to the Player.

61. Such compensation is quantified by the Player in the amount of USD 948,232.64, *"corresponding to the outstanding salaries owed to the Appellant [Player] in virtue of the Agreement"*. In addition, compensation is to be paid for the expenses sustained by the Player *"for the rent of his apartment and two flight tickets, corresponding to USD 10,593, which were never reimbursed to the Player by the Club notwithstanding Articles 5 and 7"* of the Al-Arabi Employment Contract. Finally, according to the Player, Al-Arabi should be ordered to pay interest, at 5% per annum, since 16 November 2013 on the amount of USD 948,232.64, and since 8 June 2013 on the amount of USD 10,593.

a2. The Position of Bolivar

62. In its appeal brief, Bolivar requested the CAS:

> *"1. To uphold the present appeal of Bolivar Club and annul the decision of the FIFA Dispute Resolution Chamber in the case ref. fes 14-00593 of 21 January 2015;*
>
> *2. To issue a new decision stating that the Club Bolivar could not be held responsible jointly and severally for the breach of employment contract between the player Damian Lizio and Al Arabi SC;*
>
> *3. To state that Al Arabi should pay the compensation to Bolivar in relation to the breach of the contract, should it been considered that the Player had just cause to terminate the contract, in amount of USD 244,000 (Two hundred forty four thousand US Dollars) calculated on the basis of salaries that Bolivar could have saved if the Player remained in Al Arabi until the end of loan agreement.*
>
> *4. To fix a sum of 20,000 CHF to be paid by the Respondent to the Appellant, to help the payment of its legal fees costs.*
>
> *5. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees".*

63. It is in fact Bolivar's position that:

i. it did not commit any action which led to a breach of contract by the Player, and therefore cannot be *"found liable for any termination of contract between the Player and … Al-Arabi"*. In any case, Bolivar cannot be considered to be the *"new Club"* of the Player pursuant to, and for the purposes of, the "RSTP;

ii. the Player had *"just cause"* for the termination of the Al-Arabi Employment Contract, and therefore no compensation should be awarded to Al-Arabi;

iii. the DRC *"wrongly evaluated certain facts of the case"*: the Decision is based on the wrong assumption that the Player only claimed the payment of two months; and it is mistaken where it *"put in doubt the fact that the Player warned Al-Arabi twice about the unpaid salaries"*.

64. More specifically, Bolivar submits that it was not involved in the breach of the Al-Arabi Employment Contract: it *"made nothing that could influence the Player to leave the Kuwaiti Club"*. Actually, Bolivar benefitted from the Loan, since not only did it receive a loan fee, but also was released of the obligation to pay the Player's salary. Therefore, it *"was the last party interested in the return of the Player"*. In addition, the return of the Player to Bolivar was not caused by a free decision of Bolivar, but by a clause in the Loan: therefore, Bolivar was obliged to accept the return of the Player. As a consequence, Bolivar *"cannot be sanctioned for not doing anything in connection with the contractual breach of the Player"*. In any case, it cannot be considered to be the *"new club"* after the termination of the Al-Arabi Employment Contract, and therefore should not be held jointly liable with the Player, even if the Player were considered responsible of a breach of contract.

65. At the same time, Bolivar contends that *"it was the Player who had the just cause to terminate the employment with Al-Arabi, and not the Kuwaiti Club"*. In fact, the DRC wrongly considered that the first instalment fell due at the end of September 2013. Indeed, on 15 November 2013, either (i)

four monthly instalments were due, if the first of them was to be paid by 15 August 2013, *i.e.* one month after the signature of the Al-Arabi Employment Contract, or (ii) salaries for at least three and a half months were outstanding, if their payment had to be made at the end of each calendar month, starting from the end of August 2013. As a result, more than three months of salary were due by the Respondent, and such failure to pay the Player entitled him to terminate the Al-Arabi Employment Contract.

66. Finally, Bolivar submits that Al-Arabi, if found responsible for breach of contract, should be ordered to pay compensation to Bolivar, in an amount of USD 244,000 based on the expenses that Bolivar sustained following the return of the Player, corresponding to the salaries that it could have saved if the Player had remained in Kuwait.

67. In any case, Bolivar submits that the clause in the Al-Arabi Employment Contract, allowing Al-Arabi to decide, at the end of the first season, whether to extend its term for a second season, is null and void. Therefore, in the event the Player is found responsible for breach of contract, this second season should not be taken into account as the basis for any *"hypothetical"* compensation for Al-Arabi.

b. The Position of the Respondent

68. In its answer, Al-Arabi sought from the Panel the following relief:

> *"71. To accept the answer of the Respondent and the statement of defense …*
>
> *72. Kindly asking the panel to reject any documents/evidences not translated to English as the parties agreed the arbitration language in English.*
>
> *73. Kindly rejects the witness statement of Mr. Kamal Odeih Mohammad for the reason not done under oath, and for the seasons mentioned in this answer/statement defense of the respondent.*
>
> *74. Kindly rejects Mr. Lizios' Appeal and evidences/arguments.*
>
> *75. Kindly rejects Club Bolivar Appeal and evidences/arguments.*
>
> *76. To confirm the FIFA Dispute Resolution Chamber decision (case ref. fes 14-00593) in this matter and to order Mr. Lizio and Club Bolivar jointly and severally to pay the said amount (650,000 US Dollars plus 5% interest p.a. as from 4 December 2013 until the date of effect payment).*
>
> *77. To fix a sum of 25,000 CHF to be paid by the Appellants (Damian Lizio and Club Bolivar) to the Respondent, to help the payment of its legal fees costs.*
>
> *78. To condemn the Appellants (Damian Lizio and Club Bolivar9 to the payment of the whole CAS administration costs and the Arbitration fees".*

69. In essence, the Respondent is seeking the dismissal of the appeals filed by the Player and by Bolivar, with the consequent confirmation of the Decision.

70. In support of such request, Al-Arabi submits the following:

> i. *"Mr. Lizio received car for his transportation in Kuwait according to the contracts terms, in contrary he*

did not accept the accommodation which [was] offered by Al-Arabi and preferred to live in his own choices, moreover he never complained to Al-Arabi about his accommodation situation during his time in Kuwait, moreover Mr. Lizio did not proof he paid accommodation fees to other party";

ii. according to the Al-Arabi Employment Contract, *"20 months were payable for the two seasons"*, while *"3 months 15 days of the contract period are not payable no matter the season period"*;

iii. the fact that the Player took part in friendly matches and training camps in the period before the beginning of the 2013/2014 season with the first official match is not an indication of the fact that he had to receive payments for that period, since he had to be paid only at the end of each month of the "season" in accordance with the provisions of the Al-Arabi Employment Contract;

iv. the Al-Arabi Employment Contract did not clarify the methods of payment and the Player did not provide details of his bank account. Therefore, the only way for Al-Arabi to pay was to make available the salary (from the end of September 2013) *"from the club's offices"*. As a confirmation of the point, the Respondent makes reference to a written declaration dated 1 November 2103 signed by Mr Abdullah Al-Jassen, the Player's agent, as follows:

"Reference to what you notified me concerning the due financial rights of the Argentinean player Damian Lizio, I have informed the above player about all his dues tell the end of October 2013, in addition to rest of the advance at the Arabi Club which he could received it all and he is already notified about it many times";

v. the Player offered no evidence that he requested payments from Al-Arabi: the text messages exchanged with Mr. Abdullah Al-Jassen are not relevant;

vi. there is no proof that the two *"alleged telegrams"* were delivered to Al-Arabi, that in fact did not receive them;

vii. the declarations rendered by Mr Kamal Odeh Mohammad are not reliable and in any case do not prove that the telegrams were received;

viii. no termination of the Al-Arabi Employment Contract was properly notified in accordance with Kuwaiti law and FIFA rules;

ix. the Player had no *"just cause"* for termination of the Al-Arabi Employment Contract without prior warning; and

x. Bolivar is responsible for damages, since it terminated the Loan, by accepting the Player back without *"just cause"* and without prior notification. Indeed, Bolivar requested through the FBF to the KFA the issuance of the ITC for the return of the Player only on 23 January 2014, without any prior inquiry with Al-Arabi. In any case, Bolivar did not incur into any expenses, because the Player was transferred on loan to O'Higgins.

3. LEGAL ANALYSIS

3.1 Jurisdiction

71. CAS has jurisdiction to decide the present dispute between the parties.

72. In fact, the jurisdiction of CAS is not disputed by the parties, has been confirmed by the Order of Procedure, and is contemplated by the Statutes of FIFA, which provide materially as follows:

Article 66

"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

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

Article 67

"1. 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.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. […]".

3.2 Appeal Proceedings

73. As these proceedings involve an appeal against a decision rendered by FIFA, brought on the basis of rules providing for an appeal to the CAS, in a dispute relating to a contract, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, within the meaning -and for the purposes- of the Code.

3.3 Admissibility

74. The admissibility of the appeal is not challenged by the Respondent, as it did not maintain in front of the Panel the objection contained in the letter to CAS of 30 April 2015. In any case, as noted by the CAS Court Office in its letter of 30 April 2015, the statement of appeal was filed within the deadline set in Article 67.1 of the FIFA Statutes. Accordingly, the appeal is admissible.

3.4 Scope of the Panel's Review

75. According to Article R57 of the Code,

"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. …".

3.5 Applicable Law

76. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

77. Pursuant to Article R58 of the Code, the Panel is required to 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".

78. In the present case the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA's rules and regulations. More specifically, the Panel agrees with the DRC that the particular regulations concerned – apart from the FIFA Statutes – are the RSTP in their 2012 edition, in force since 1 December 2012, given that the petitions to FIFA by the Appellant and the Player were received in December 2013, before the entry into force (on 1 August 2014) of the subsequent edition of the same regulations.

79. The Panel notes that, pursuant to Article 66.2 of the FIFA Statutes,

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

80. As a result, in addition to FIFA's regulations, the Panel shall apply Swiss law to the merits of the dispute, and chiefly for the interpretation and application of the FIFA's regulations. According to Article 66.2 of the FIFA Statutes, Kuwaiti law, in the Panel's opinion, plays no role in that respect.

3.6 The Dispute

81. The object of these proceedings is the Decision. The Decision, in fact, is challenged by the Appellants and defended by the Respondent: the former seek to have it set aside; the latter requests the Panel to confirm it.

82. In the Decision, the DRC found (i) that the Player breached the Al-Arabi Employment Contract, and (ii) that compensation has to be paid. More specifically:

i. as to the first point, it was held that:

- the Player terminated the Contract on 15 November 2013, and
- there was no *"just cause"* for termination, because (a) the Player had recognized that only two monthly salaries were outstanding at the time of the termination, and (b) there was no evidence of a previous warning to Al-Arabi;

ii. as to the second point, the DRC concluded that:

- compensation has to be established on the basis of the criteria set by Article 17 RSTP,
- in the absence of a valid "compensation clause" in the Al-Arabi Employment Contract, the application of the criteria set by Article 17 RSTP leads to the amount of EUR 650,000, plus 5% interest p.a. as from 4 December 2013 until the date of effective payment, determined on the basis of the average remuneration for the Player under the Al-Arabi Employment Contract and the Bolivar Employment Contract, the acquisition costs not amortized over the term of the contract and the specificity of sport,
- Bolivar is the "new club" of the Player after his breach of contract, and is therefore jointly liable for the payment of the compensation.

83. At the same time, the DRC held that some payments due by Al-Arabi were outstanding at the time of the termination of the Al-Arabi Employment Contract, even though in a measure insufficient to give *"just cause"* for termination. As a result, Al-Arabi was ordered to pay USD 75,000 to the Player.

84. Contrary to the approach taken by the DRC in the Decision, the Appellants submit in essence that the Player had *"just cause"* to terminate the Al-Arabi Employment Contract, because, as constantly claimed before FIFA, at the time of termination, four and a half monthly salaries were due, and by means of the October telegrams Al-Arabi had already been warned about its breach of contract. As a result, in the Appellants' opinion, Al-Arabi should be ordered to pay compensation, to be determined on the basis of the salaries the Player would have earned if the Al-Arabi Employment Contract had been complied with for its entire duration.

85. The points so listed identify the issues that this Panel has to examine for the determination of the dispute. More specifically, the Panel has to answer the following main questions:

i. did the Player terminate the Al-Arabi Employment Contract with or without *"just cause"*?

ii. what are the financial consequences of the Panel's answer to the first question?

86. The Panel shall answer each of those questions separately.

87. A preliminary point however has to be made, regarding some evidentiary principles.

88. Pursuant to Article 8 of the Swiss Civil Code:

"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit"[6].

89. Such principle applies also in CAS proceedings (see for instance CAS 96/159 & 96/166, published in Digest of CAS Awards II 1998-2000, pp. 434 ff.). As a result, in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its "burden of proof", *i.e.* it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. At the same time, it must be stressed, as made clear in the CAS jurisprudence (CAS 96/159 & 96/166, at § 16, pp. 441-442), that:

"selon la jurisprudence fédérale suisse, dans le cas où une preuve directe ne peut pas être rapportée, le juge ne viole pas l'art. 8 CC … en fondant sa conviction sur des indices ou sur un haut degré de vraisemblance (ATF 104 II 68 = JdT 1979 I 738, à la p. 545). En outre, des faits dont on doit présumer qu'ils se sont déroulés dans le cours naturel des choses peuvent être mis à la base d'un jugement, même s'ils ne sont pas établis par une preuve, à moins que la partie adverse n'allègue ou ne preuve des circonstances de nature à mettre leur exactitude en doute (ATF 100 II 352, à la p. 356"[7].

i. Did the Player terminate the Al-Arabi Employment Contract with or without "just cause"?

90. The first question to be addressed by the Panel concerns the termination of the Al-Arabi Employment Contract, as declared by the Player on 15 November 2013. In essence, the Player argues that, contrary to the Decision's findings, he was entitled to terminate the Al-Arabi Employment Contract with *"just cause"* because Al-Arabi had failed to comply with its payment obligations under it.

91. As such, therefore, the question turns on the existence of the asserted *"just cause"*. In fact, the Panel notes that it is common ground between the parties that, in the absence of a *"just cause"*, the termination declared by the Player would amount to a breach of the Al-Arabi Employment Contract.

92. In that regard, and by way of preliminary observation, the Panel emphasises that the principle *pacta sunt servanda* lies at the basis of the football system, since it gives legal foundation to the stability of contractual relations, which would be severely jeopardized if the parties to employment contracts could all too easily get rid of the obligations undertaken thereunder: while clubs make investments in players, to be recovered over the term of the contract, the players derive their living from the contract. Both parties' expectations, objectively understood, are therefore that contracts are respected until their expiry. Such principle of contractual stability is expressly recognized by Article 13 of the RSTP, which confirms that *"a contract between a professional and a club may only be terminated on expiry of the term of the contract or by mutual agreement"*.

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6 Translation: *"Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right"*.

7 Translation: *"According to the Swiss federal case law, in the event direct evidence cannot be offered, a judge does not violate Article 8 of the Civil Code … if he bases his decision on clues or on a high degree of likelihood …. In addition, facts whose existence must be presumed according to the normal course of events can be indicated as a basis of a judgment, even if these facts are not confirmed by evidence, if the opposing party does not indicate or prove circumstances suitable to put their existence in doubt"*.

93. However, the principle of contractual stability is not absolute as Article 14 of the RSTP provides that *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause"*. Such exception to a fundamental principle is to be interpreted narrowly: therefore, only if there is *"just cause"* can a binding employment contract be terminated by either the player or the club.

94. However, no provision in the RSTP defines what constitutes a *"just cause"*. On the other hand, the Commentary to the RSTP (N2 to Article 14) states the following with regard to the concept of *"just cause"*:

"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally".

95. According to well-established CAS jurisprudence, non-payment or late payment of a player's salary by his club may constitute *"just cause"* for termination of the employment contract (see *inter alia* CAS 2006/A/1180; CAS 208/A/1589; CAS 2013/A/3165; CAS 2013/A/3426; CAS 2014/A/3643). In this regard, the Panel in CAS 2006/A/1180 (at § 8.4.1):

i. specified that:

"[…] the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the later non-payment, is irrelevant. The only relevant criteria is whether the breach of the 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", and

ii. indicated that:

"[…] 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 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".

96. The RSTP Commentary (N3 to Art. 14) takes the same line: to illustrate the concept of *"just cause"*, and give a non-binding guidance for the interpretation of the RSTP, it refers to the situation of a player who has not been paid his salary for more than three months, despite having informed his club of its default. In this case, the RSTP Commentary points out that:

"The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

97. The Panel notes that the rule contained in the RSTP, allowing termination of a contract for *"just*

cause", corresponds to a provision of Swiss law, *i.e.* to the law which, as noted (§ 80 above) applies for the interpretation of the RSTP: Article 337, para. 1, first sentence, of the Swiss Code of Obligations ("CO"), in fact, provides that *"Both employer and employee may terminate the employment relationship with immediate effect at any time for just cause"*.

98. Under Swiss law, such a *"just cause"* exists whenever the terminating party can in good faith not be expected to continue the employment relationship (Article 337 para. 2 CO). The definition of *"just cause"*, as well as the question whether *"just cause"* in fact existed, shall be established in accordance with the merits of each particular case (ATF 127 III 153 consid. 1 a). As it is an exceptional measure, the immediate termination of a contract for *"just cause"* must be accepted only under a narrow set of circumstances (*ibidem*). Only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter. In the presence of less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after being warned (ATF 129 III 380 consid. 2.2, p. 382). The judging body determines at its discretion whether there is *"just cause"* (Article 337 para. 3 CO).

99. As a result, only a violation of a certain severity justifies the early termination of a contract; and a breach is sufficiently severe only if it excludes the reasonable expectation of continuation of the employment relationship. In such context therefore it is, in this Panel's opinion, immaterial to assess the precise number of monthly salary instalments (and any other aspects of remuneration) actually unpaid: the key element is whether, in light of the overall circumstances of the case and the breach committed by a party, the continuation of the employment relationship under the breached contract can be expected.

100. In light of the foregoing, and contrary to the DRC's conclusions, the Panel finds that *"just cause"* existed for the Player to terminate the Al-Arabi Employment Contract and that such termination was properly declared. Both conditions, as mentioned also by the Panel in CAS 2006/A/1180 (§ 95(ii) above), are therefore satisfied.

101. First, the Panel notes that, in light of Al-Arabi's failure to meet its payment obligations, the continuation of the employment relationship under the Al-Arabi Employment Contract could not expected: such breach, in the circumstances in which it occurred, caused the confidence, which the Player could have in future performance by Al-Arabi in accordance with the Al-Arabi Employment Contract, to be lost.

102. The Panel, in fact, finds it decisive that no monthly salary was ever paid to the Player, and with no explanation given by Al-Arabi to the Player. The parties, indeed, dispute as to the moment in which such salaries became due in accordance with the Al-Arabi Employment Contract. Further, if the Respondent's submissions were to be accepted, then by 15 November 2013 a material portion of salaries would have accrued and not a single instalment would have been paid (or offered) to the Player. In that respect, while the Player filed some documents (the telegrams of October: see § 104 below, and some text messages) to confirm that he was seeking the payment of the salaries, there is no evidence of efforts made by the Respondent to comply with its payment obligations. The declaration filed in this arbitration (§ 70(iv) above) is rather generic, unconvincing and was not confirmed in a deposition: no other communication (for

instance inquiring about the Player's banking details) has been provided with regard to the payment of salaries to a Player who was attending the Respondent's facilities (at least for training purposes) and could easily be reached by Al-Arabi. Indeed, the Respondent filed in this arbitration declarations regarding the offer of a car and of an apartment but no direct communication to the Player about payment of his salary.

103. In the Panel's opinion, the above shows that Al-Arabi had for unknown reasons lost interest in the Player's services: Al-Arabi was late in completing the payment of the lump sum due at the time of the signature of the Al-Arabi Employment Contract and did not react in any way to the Player's actions to obtain his remuneration, even before the Al-Arabi Employment Contract was terminated. Such attitude justifies, according to the Panel, the Player's subsequent actions: he could reasonably expect no future performance by Al-Arabi in accordance with the Al-Arabi Employment Contract. Therefore, he had *"just cause"* to terminate it.

104. Second, the Panel is satisfied that Al-Arabi had been warned of a possible termination of the Al-Arabi Employment Contract. In fact:

i. the Player offered sufficient evidence to prove that the telegrams of 21 and 27 October 2013 were sent. Indeed, in the letter of 15 November 2013 the Player made express reference to his *"previous request"* as sent on dates corresponding to those of the telegrams (§ 14 above), the copies of such telegrams filed in these proceedings bear some stamps, evidencing their presentation to the relevant Kuwaiti post office. Such evidence corroborates the statements of the Player and the testimony of Mr Kamal Odeih Mohammad, that the Panel has no reason to disbelieve: the friendship between the Player and Mr Kamal Odeih Mohammad is not a reason in the CAS system to exclude *per se* the reliability of the witness' declarations. In addition, the fact that those telegrams were sent is not expressly disputed by the Respondent, that only denies their receipt;

ii. on such basis, the Panel is satisfied that such telegrams, sent by the Player, can also be deemed to have been received by Al-Arabi. As mentioned above (§ 89), according to Swiss law, facts whose existence must be presumed according to the normal course of events can be indicated as a basis of a judgment, even if these facts are not confirmed by evidence, if the opposing party does not indicate or prove circumstances suitable to put their existence in doubt. In that regard, the Panel notes that a telegram, sent through a post office, is ordinarily received, and that Al-Arabi did not offer any indication, in addition to its own word, to confirm that those telegrams had not been delivered;

iii. the Respondent offered no compelling indication that any mandatory rule of Kuwaiti law required a different way of notification of the Player's communications insisting on the Respondent's compliance with the Al-Arabi Employment Contract.

105. In other words, both prerequisites for the early termination with *"just cause"* of the Al-Arabi Employment Contract because of the Respondent's failure to pay the due salaries are satisfied: the amount paid late by Al-Arabi was not "insubstantial" or completely secondary; the Player gave a warning, drawing Al-Arabi's attention to the fact that its conduct was not in accordance with the Al-Arabi Employment Contract.

106. As a result, the Panel concludes that Al-Arabi is responsible for a breach of contract and that

the Player properly terminated the Al-Arabi Employment Contract with *"just cause"*. As a consequence, the Decision has to be set aside.

107. Such conclusion implies also that, contrary to the Respondent's submissions, Bolivar cannot be held responsible for breach of the Loan, having accepted back the Player following the termination of the Al-Arabi Employment Contract. In fact, as also indirectly evidenced by Article 2 of the Loan, there could be no Loan without the Al-Arabi Employment Contract: Al-Arabi has no interest and title to insist in the compliance by Bolivar of the Loan in the absence of the employment contract on which the Player on loan would render his services for the Loan period, and which was terminated due to Al-Arabi's breach. Any claim against Bolivar in this respect must therefore be dismissed.

ii. What are the financial consequences of the answer to such question?

108. As a result of the findings above, no payment is to be made by the Player and/or Bolivar. The question whether Bolivar could be considered as the Player's *"new club"* following the termination of the Al-Arabi Employment Contract is irrelevant.

109. On the other hand, Article 17.1 RSTP sets the principles and the method of calculation of the compensation due by a party because of a breach of a contract for which it is responsible. In light of the conclusion reached above, the Panel finds that the breach of the Al-Arabi Employment Contract by the Respondent falls within the scope of application of Article 17 RSTP: therefore, Al-Arabi has to compensate for the damages caused by its contractual breach.

110. According to Article 17.1 RSTP, a primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. Then, if the parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for:

- the law of the country concerned,
- the specificity of sport,
- any other objective criteria, including in particular
  - √ the remuneration and other benefits due to the player under the existing contract and/or the new contract,
  - √ the time remaining on the existing contract up to a maximum of five years,
  - √ the fees and expenses paid or incurred by the former club (amortised over the term of the contract), and
  - √ whether the contractual breach falls within a protected period.

111. Against that framework, the Panel notes the Al-Arabi Employment Contract did not provide for an amount agreed by the parties to be paid to the Player in the event of breach by Al-Arabi. As a result, the compensation to be paid to the Player has to be calculated on the basis of the remuneration payable to the Player under the Al-Arabi Employment Contract for its applicable term, less the amount payable to the Player under a contract with a different club in the same period.

112. Indeed, the Panel notes that there is a *consensus* in the CAS jurisprudence as to the application of the "positive interest" principle approach followed in the case of CAS 2008/A/1519 & 1520, and applied in CAS 2009/A/1880 & 1881. This Panel agrees with such approach and emphasises that the application of the criteria indicated by Article 17.1 RSTP should *"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"* (CAS 2008/A/1519 & 1520, § 86).

113. For such purposes, it is this Panel's role to consider each of the criteria within Article 17.1 RSTP and any other objective criteria, in light of the specific facts of this case and to determine how much weight, if any at all, to apply to each in determining the amount of compensation due in this particular case. It is also the Panel's role to ensure that *"the calculation made … shall be not only just and fair, but also transparent and comprehensible"* (CAS 2008/A/1519 & 1520, § 89), with a view to putting the injured party in the position it would have been in, had no breach occurred.

114. In this case, however, in which a breach by the club (and not by a player) is involved, the *"remuneration factor"*, together with *"the time remaining on the existing contract"* plays a major role. In addition, the salaries and other benefits earned by the player in question under any new contract signed (also to mitigate the damages sustained) have to be taken into account by way of deduction from the amount the player can claim.

115. On the basis of the foregoing, the Panel notes that :

i. under the Al-Arabi Employment Contract, the Player:

- was entitled to receive:
  - √ a total amount of USD 575,000 for the season 2013/2014, and
  - √ a total amount of USD 575,000 for the season 2014/2015. However, as also emphasized by Bolivar in its submissions (§ 67 above), the Respondent was entitled to terminate the Al-Arabi Employment Contract, under its Article 23, at the end of the season 2013/2014. As a result, the Player could not legally expect the ordinary continuation of the employment relationship into the second season;
- but actually received only the payment of an amount corresponding to USD 201,767.20 for the season 2013/2014;
- therefore, the "remaining value" of the Al-Arabi Employment Contract, *i.e.* the salaries the Player would have received if that contract had not been breached, corresponds to USD 373,232.80;

ii. under the Bolivar Employment Contract, the Player:

- was entitled to receive, for the season 2013/2014, a yearly salary of USD 132,000 (corresponding to USD 11,000 per month), plus yearly bonus of USD 30,000 and a monthly accommodation allowance of USD 400;
- therefore, having terminated the Al-Arabi Employment Contract on 15 November 2013, the Player was entitled to receive from 16 November 2013 to 30 June 2014 (*i.e.*, for the remainder of the 2013/2014 season) salaries and bonuses for 7 and a

half months corresponding in total to USD 82,500 as salaries, USD 18,750 as *pro rata* yearly bonus, and USD 3,000 as accommodation allowance, for a total of USD 104,250[8];

iii. as a result, the breach by Al-Arabi caused a loss for the Player of USD 268,982.80.

116. The Player, in addition to the salaries lost, is claiming in this arbitration also reimbursement of USD 10,593 for *"the costs of the … apartment rent and two flight tickets"*. The Panel, however, notes that the Player offered in this arbitration no evidence concerning the amounts spent for the *"apartment rent and two flight tickets"*, while the Respondent filed a communication, dated 1 August 2013, indicating that the Player had refused the accommodation offered, notwithstanding the provision set at Article 5 of the Al-Arabi Employment Contract (*"… the [Player] shall not have the right to request the change of accommodation …"*). Such request is therefore to be dismissed.

117. In light of the foregoing, the Panel finds that a total compensation of USD 268,982.80, corresponds to a measure suitable to put the Player in the position he would have been in had no breach occurred. Such measure is therefore to be applied.

118. In fact, the Panel sees no reason either to reduce or to increase that amount in light of the *"specificity of sport"* or of the *"law of the country concerned"*: no compelling indications have been given by the parties as to any role any of such factors might have on the calculation of the damages to be compensated by the Respondent.

119. At the same time, the Panel holds that Bolivar's request for compensation has to be dismissed. Bolivar, indeed, requested that Al-Arabi, if found responsible for breach of contract, be ordered to pay compensation, in an amount of USD 244,000 for the expenses that Bolivar sustained following the return of the Player, corresponding to the salaries that it would have saved if the Player had remained in Kuwait. The Panel finds that such request cannot be accepted because:

i. Bolivar had the Player back following the termination of the Al-Arabi Employment Contract, as it had accepted following the end of the Loan in accordance with its Article 2, and therefore was in the position to enjoy his services: any salary it paid to the Player was in consideration of the services received and cannot therefore be considered a "damage" sustained by Bolivar;

ii. Bolivar was paid for the Loan a fee that it is not bound to reimburse;

iii. Bolivar had the possibility to transfer the Player to another club, even for a fee: Bolivar's decision to transfer the Player to O'Higgins on a *"free of charge"* loan should not be held against Al-Arabi.

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8 In the Panel's opinion, the circumstance whether the Player actually received that payment from Bolivar is irrelevant. Under Article 2 of the Loan, in fact, upon termination of the loan period, the employment relationship between the Player and Bolivar would "*immediately*" resume. The Player's failure, if the case, to obtain from Bolivar immediate compliance with that provision, and be paid as under the Bolivar Employment Contract should not be held against Al-Arabi.

3.7 Conclusion

120. In light of the foregoing, the Panel holds that the appeal brought by the Player and by Bolivar is to be partially upheld and the Decision to be set aside so that the Al-Arabi SC is ordered to pay to the Player an amount of USD 268,982.80, with interest at 5% *per annum* starting on 9 December 2013, the date on which the Player lodged a claim with FIFA requesting that payment. All other prayers for relief are to be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeals filed on 20 April 2015 by Mr Damian Lizio and by Bolivar Club against the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 21 January 2014 are partially upheld.

2. The decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 16 October 2014 is set aside and Al-Arabi SC is ordered to pay to Mr Damian Lizio an amount of USD 268,982.80 (two hundred sixty-eight thousand nine hundred eighty-two/80 cents US Dollars), with interest at 5% per annum starting on 9 December 2013.

3. The claim for compensation filed by Bolivar Club is dismissed.

4. (…).

5. (…).

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