Arbitration CAS 2016/A/4403 Al Ittihad Football Club v. Marco Antonio de Mattos Filho, award of 24 January 2017

Panel: Mr Mark Hovell (United Kingdom), President; Mr José María Cruz (Spain); Prof. Petros Mavroidis (Greece)

Football
Termination of employment contract by player
Just cause to terminate contract
Warning as prerequisite to terminate employment contract

1. **Not every breach of a contractual obligation by a party justifies the early termination of a contract. Rather, the breach of contract must have a certain degree of seriousness; *i.e.* to constitute "just cause" the facts must be so severe as to cause the irremediable loss of confidence necessary between the parties. *E.g.* the non-payment or late payment of remuneration by an employer – provided the amount in question is not insubstantial or completely secondary – does in principle constitute "just cause" for termination of the contract, for the employer's payment obligation is his main obligation towards the employee. It is irrelevant whether the employee falls into financial difficulty by reason of the late or non-payment. Decisive only is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost.**

2. **As a prerequisite for terminating a contract because of late or non-payment the employee must have given a warning, *i.e.* the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract and that failure to remedy the breach will result in the contract being terminated. A football club that is late in paying remuneration to a player should be given a realistic chance to remedy the breach; generally, a deadline of 24 hours to pay a considerable sum is not sufficient.**

I. PARTIES

1. Al Ittihad (the "Club" or the "Appellant"), is a football club with its registered office in Jeddah, Saudi Arabia. The Club currently competes in the Saudi Professional League and is a member of the Saudi Arabian Football Federation ("SAFF"), which is in turn affiliated to Fédération Internationale de Football Association ("FIFA").

2. Mr. Marco Antonio de Mattos Filho (the "Player" or the "Respondent") is a Brazilian citizen and professional football player, born on 3 July 1986 in Passo Fundo, Brazil. He currently plays for Fluminese Football Club, Brazil.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background Facts

4. On 25 June 2014, in the framework of a loan, the Player and the Club concluded an employment contract (the "Contract"), valid as from 1 July 2014 until 30 June 2015.

5. In accordance with Article 4 of the Contract, the Player was entitled to the following:

> *"1. - For season 2014/2015 the Basic wage shall be €2,700,000 (Two million seven hundred thousand Euros) NET per season, payable in the form of advance payment and monthly*
>
> - ***Advance payment**: an amount of €800,000 (Eight hundred thousand Euros) to be paid after player passing the medical exam and arrive Jeddah.*
> - ***Monthly salary**: an amount of €1,900,000 (One million and nine hundred thousand Euros) will be divide and paid as monthly salary for 12 months (€158,333) one hundred and fifty-eight thousand, three hundred and thirty-three Euros".*

6. Sometime in July 2014, the Club made a payment of EUR 158,333 cash to the Player, representing a monthly salary payment.

7. On 23 December 2014, the Club made a payment of EUR 453,985.35 into the Player's bank account in Saudi Arabia, representing monthly salary payments.

8. On 19 March 2015, the Player and the Club signed a memorandum of understanding (the "MOU"), which reads as follows:

> *"1. - The First Party* [the Club] *shall pay to the Second Party* [the Player] *the sum of Euros Four Hundred thousand (Euros 400,000/-) which represents fifty per cent (50%) of the Second Party's entitlements upon the signature of this MOU and the Second Party hereby accepts and agrees to such payment. In addition, one month's salary of Euros One hundred and Fifty Eight Thousand (Euros 158,000/-) will be payable at the same time of signature of this MOU.*

2. - The remaining balance shall be payable following the opening of the bank account of the Second Party/First Party".

9. On 23 March 2015, the Club made a payment of EUR 154,162.89 into the Player's bank account in Saudi Arabia, representing a monthly salary payment.

10. On 24 March 2015, the Club made a payment of EUR 386,426.72 into the Player's bank account in Saudi Arabia (which should have amounted to EUR 400,000 according to the MOU), representing part of his EUR 800,000 signing on fee.

11. On 20 April 2015, the Club made a payment of EUR 158,373.91 into the Player's bank account in Saudi Arabia, representing a monthly salary payment.

12. On 15 May 2015, the Club played its last match of the Saudi Arabian Premier League for the 2014/15 season.

13. Between 15 and 18 May 2015, all the players of the Club were granted a short holiday.

14. On 15 May 2015, the Player's attorneys sent a fax and an e-mail to the Club, putting it on notice of default for outstanding salaries, and requested payment of these outstanding amounts within 72 hours:

> *"6. However, the Player does not acknowledge receipt, until the present date, of an outstanding remuneration amounting EUR 1,388,719 (one million three hundred eighty eight thousand seven hundred nineteen euros).*
>
> *7. In light of the above and considering the seriousness of the matter, the present fax letter and e-mail serve to put Ittihad Club* ***ON NOTICE*** *to provide us its official position regarding the present affair, as well as proceed with the prompt and immediate payment of the due amounts detailed in paragraph 6,* ***within 72 (seventy-two) hours*** *from the receipt of the present notification via fax or e-mail in the following bank account …".*

15. On 19 May 2015, the Club replied to the Player's attorneys' correspondence by claiming that by signing the MOU, the Player accepted he would wait for the overdue payments until the Club would be authorized by the Minister of Finance to open a new bank account or to reactivate its frozen account. Additionally, the Club outlined that it did not receive any complaints from the Player regarding a delay of payment and stressed that a default notice is one of two conditions required to terminate a contract with just cause. Finally, the Club stated:

> *"(…) we kindly request in urgency the player either to join the team within the next 72 hours to settle this dispute by receiving a check on his name for the performance from the Sponsor or to retake his work".*

16. On 19 May 2015, the Player's attorneys sent another fax and e-mail titled "Final Notification" to the Club stating that the notification of 15 May 2015 remained unanswered. They insisted that:

"In view of the previous Notification sent to Ittihad Club, we hereby clarify the amounts due to the Player by the Club and grant it a ***final time limit of 24 (twenty-four) hours*** *to proceed with the due payments to the Player, failing which judicial measures shall be taken against Ittihad Club".*

17. Additionally, the Player referred to Article 12bis of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") and stated that if the Club did not comply with its financial obligations towards him, it would be sanctioned under Article 12bis by FIFA.

18. On 20 May 2015, the Player acknowledged receipt of the Club's letter and email, but stated that as he had not received any payment within the specified time limits, he informed the Club that he was terminating the Contract with just cause.

19. On 21 May 2015, the Club responded to the Player's letter of 15 May 2015. The Club contested the content of the Player's letter and alleged that the fax version of the letter was only sent on 18 May 2015 and four further correspondences were sent within a 24-hour period. The Club stated that this 'unfair' behaviour from the Player's representatives was undertaken so that the Player could evade his commitments under the Contract towards the Club.

20. On 23 May 2015, the Club wrote a further letter to the Player stating *inter alia*, that the Player's conduct was not in accordance with the Contract and that he had not made any previous complaints regarding late payments of his salaries. Additionally, the Club stated that the grounds on which the Player contented to terminate the Contract should be disregarded, as the Player knew that the Club's bank account was closed or frozen and that the Club was deprived of its financial resources.

21. The Club finally concluded in its letter that:

"(…), without prejudice it required from the player, as well the other players, to be present in order to get a check on the player's name from the Sponsor (TV Incomes) in order to allow the performance for the overdue payment until the date of 19 May 2015, in this respect, It should be take into account the presence of force majeure related to this special circumstances (i.e frozen bank account), the club has thus a valid reason justifying the delay of payment of the salaries in question to the player as it is stated in the agreement of 13 March 2015".

B. Proceedings before the Single Judge of the FIFA Dispute Resolution Chamber

22. On 25 May 2015, the Player lodged a claim with the FIFA Dispute Resolution Chamber (the "DRC") against the Club for breach of the Contract, asserting that he terminated the Contract with just cause.

23. In its reply to the Claim, the Club stated to the DRC that there was no valid reason for the Player to have terminated the Contract since i) the Parties agreed to defer the payments as stipulated in the MOU; ii) the Player did not provide adequate notice; and iii) in the alternative, late payment on its own does not justify the unilateral termination of the Contract.

24. Concerning the MOU, the Club held that the reason behind the renegotiation of the payment dates was the Club's banking issues, in particular, the Club could only pay the Player once it was authorized by the Minister of Finance to open a new bank account. At the time of the termination, the Club had not yet resolved the issue with the Minister of Finance but had been working towards a solution so that it could fulfil the terms of Contract.

25. On 15 October 2015, the DRC held as follows (the "Appealed Decision"):

> *"1. The claim of the Claimant/Counter-Respondent, Marco Antonio de Mattos Filho, is partially accepted.*
>
> *2. The counterclaim of the Respondent/Counter-Claimant, Al Ittihad, is rejected.*
>
> *3. The Respondent/Counter-Claimant is ordered to pay to the Claimant/Counter-Respondent **within 30 days** as from the date of notification of the present decision, outstanding remuneration in the amount of EUR 1,072,048.13 plus 5% p.a. interest until the date of effective payment as follows:*
>
> *- 5% p.a. as of 2 July 2014 on the amount of EUR 413,573.28;*
>
> *- 5% p.a. as of 1 January 2015 on the amount of EUR 25,142.85;*
>
> *- 5% p.a. as of 1 February 2015 on the amount of EUR 158,333;*
>
> *- 5% p.a. as of 1 March 2015 on the amount of EUR 158,333;*
>
> *- 5% p.a. as of 1 April 2015 on the amount of EUR 158,333;*
>
> *- 5% p.a. as of 1 May 2015 on the amount of EUR 158,333.*
>
> *4. The Respondent/Counter-Claimant is ordered to pay to the Claimant/Counter-Respondent **within 30 days** as from the date of notification of the present decision, compensation for breach of contract in the amount of EUR 316,666 plus 5% p.a. interest on said amount from 25 May 2015 until the date of effective payment.*
>
> *5. ….*
>
> *6. Any further claim lodged by the Claimant/Counter-Respondent is rejected.*
>
> *7. …".*

26. On 7 January 2016, the Appealed Decision was notified to the Parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 18 January 2016, in accordance with Article R47 of the Code of Sports-related Arbitration (the "Code"), the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Player challenging the Appealed Decision and requesting the following prayers for relief:

> *"1. To accept this appeal and annul the Decision rendered by the FIFA DRC on the following basis:*

a. That the Player is deemed to have terminated the employment relationship with the Club without just cause pursuant to article 17 of the FIFA RSTP.

b. That the Player and the Club renegotiated the terms of payment of and that the Club was not late in its obligations towards the Player.

c. In terminating the employment relationship with the Club the Player failed to provide the Club with sufficient notification.

2. In the alternative, should the Panel determine the Club was late in satisfying its obligations with the Player that the Player is deemed to have breached the contract without just cause pursuant to artide 17 of the FIFA RSTP as late payment under the circumstances of this case is not a justification in unilaterally terminate the employment relationship.

3. In any event, the Player violated article 17 of the FIFA RSTP and it is requested that the Panel issue an award where the Player is to compensate the Club the amount of €290,276 pursuant to article 17 of the FIFA RSTP.

4. Independently of the type of the decision to be issued, the Appellant requests the Panel:

a. To fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant, to help the payment of his legal fees and costs.

b. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees".

28. In its Statement of Appeal, the Club nominated Dr. Theodore Giannikos, Attorney-at-Law, Athens, Greece, as arbitrator, and requested that the matter be submitted to a panel of three arbitrators.

29. On 26 January 2016, the Player filed two letters at the CAS Court Office, inter alia, challenging the Appellant's appointment of Dr. Giannikos in this dispute.

30. On 28 January 2016, the Club wrote to the CAS Court Office stating that in light of the Player's letter dated 26 January 2016, the Club wished to withdraw its nomination of Dr. Giannikos, and instead elected to nominate Mr. José María Cruz, Attorney-at-Law, Sevilla, Spain, as arbitrator.

31. On 1 February 2016, in accordance with Article R51 of the Code, the Club filed its Appeal Brief with the CAS reiterating the same prayers for relief stated in its Statement of Appeal.

32. On the same day, the Player wrote to the CAS Court Office stating that he nominated Mr. Petros C. Mavroidis, Professor of Law, Commugny, Switzerland, as arbitrator in this dispute.

33. On 4 February 2016, FIFA wrote to the CAS Court Office stating that it renounced its right to intervene in these CAS proceedings.

34. On 17 February 2016, the Player wrote to the CAS Court Office requesting that the time limit for filing the Answer be fixed after the payment by the Club of its share of the advance of costs in accordance with Article R64.2 of the Code.

35. On 7 March 2016, in accordance with Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

President:	Mr. Mark A. Hovell, Solicitor, Manchester, England
Arbitrators:	Mr. José María Cruz, Attorney-at-Law, Sevilla, Spain
	Dr. Petros C. Mavroidis, Professor of Law, Neuchâtel, Switzerland.

36. On 28 March 2016, the Player filed his Answer, in accordance with Article R55 of the Code. The Player submitted the following requests for relief:

> *"(i) That the Club's appeal is rejected in its entirety;*
>
> *(ii) That the decision issued by the FIFA DRC on 15 October 2015 (ref. nr. Rov 15-00673) be upheld; and additionally*
>
> *(iii) Consider the Appellant liable for breach without just cause of the Employment Contract;*
>
> *(iv) Order the Appellant to pay the Respondent the amount of EUR 1,388,719 (one million three hundred eighty eight thousand seven hundred nineteen euros) as compensation for the breach of the Employment Contract committed by the Club;*
>
> *(v) Order the Appellant to pay the Respondent an additional amount of EUR 1,350,000.00 (one million three hundred fifty thousand euros) or any other sum estimated by the CAS as its best discretion as damages for the specificity of sport and because the contractual breach fell within the Protected Period;*
>
> *(vi) Order the payment of legal interest at a rate of 5% p.a. to the values due by the Appellant to the Respondent, starting to count on the date when the each of them became due until effective payment;*
>
> *(vii) Impose sporting sanctions on the Club, banning it from registering any new players, either nationally or internationally, for two registration periods under article 17, paragraph 4 of the FIFA RSTP;*
>
> *(viii) Impose on the Club with whatever sanction this Honourable Court deems fit under article 12 bis of the FIFA RSTP;*
>
> *(ix) Order Appellant to reimburse the Respondent for legal costs to be determined ex aequo et bono by the CAS, but no less than CHF 35,000.00 (thirty five thousand Swiss Francs);*
>
> *(x) Order that Appellant shall bear all administrative and procedural costs in relation to the present dispute".*

37. On 16 May 2016, the Player filed a signed Order of Procedure with the CAS Court Office.

38. On 23 May 2016, the Club filed a signed Order of Procedure with the CAS Court Office.

39. A hearing was held on 28 June 2016 at the CAS premises in Lausanne, Switzerland. The Parties did not raise any objection as to the composition of the Panel. The Panel was assisted by Mr. Brent J. Nowicki, Managing Counsel to the CAS. The following persons attended the hearing:

    i. The Club: Mr. Juan de Dios Crespo Pérez, counsel;

    ii. The Player: Mr. Pedro Fida and Mr. Stefano Malvestio, both counsels.

40. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. After the Parties' final, closing submissions, the hearing was closed and the Panel reserved its detailed decision to this written Award.

41. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their right to be heard and that they had been treated equally in this arbitration proceeding. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

IV. THE PARTIES' SUBMISSIONS

A. The Club's Submissions

42. In summary, the Club submitted the following in support of its Appeal:

43. It was the Player that had terminated the Contract without just cause. He had renegotiated the Contract and entered into an MOU. In addition he had given insufficient notice to terminate the Contract. In the alternative, that is, if the Panel were to reject the two claims mentioned so far, the Player had no just cause to terminate the contract because of late payment because of the specific circumstances of this case. The good faith that the Club had shown throughout the life of their contractual relationship postulated to this effect.

1. The MOU

44. As the Club had certain banking issues, pursuant to which its bank accounts had been frozen, it negotiated with the Player and he agreed to allow it to defer payment of the sums that the Club owed to him, and he signed the MOU to this effect.

45. At the hearing, the Club argued that the MOU was an annex to the Contract. The rationale for the MOU was the acknowledgment that the Club could not pay at the due date. The Club and the Player met, and reached, an "understanding" regarding the modalities of payments of due amounts, and this was embodied in the MOU. The arrears due under the Contract as of the date of the MOU were now payable in accordance with the MOU, but the Contract otherwise remained in force, dealing with the Parties' ongoing obligations, including the Club's obligations to pay monthly salaries and the Player's obligation to play for the Club.

46. The Player was willing to accept late payments until the bank accounts were unfrozen by the Saudi Arabian Minister of Finance, or the Minister allowed new accounts to be opened. When the Player gave notice to terminate, he violated the Contract as he left before the expiration of the Contract term. There were still the King's Cup matches to play in May 2015.

47. Further, the Player was aware that some payments came from the Club's sponsors and that he needed to be present in Saudi Arabia to receive these. While the Club acknowledged it made smaller payments in March and April 2015, the larger ones required the Player's presence, so the DRC was mistaken when it assumed these payments were an indication that the bank accounts had been unfrozen. At the hearing, the Club's attorney explained that often the Club's sponsors (usually companies or businesses owned or controlled by the Prince that ran the Club) would make payments for the Club. At the hearing, it was claimed that the payments made in March and April were by a sponsor on behalf of the Club.

2. Just cause

48. The Club acknowledged that it owed monies to the Player when he terminated the Contract in May 2015, however, the arrears had been rescheduled by the MOU and the Club had made 3 significant payments, in 1 month and 5 days, in accordance with clause 1 of the MOU (EUR 8,000 less than required), and the last of these payments had been made, and accepted by the Player, just 19 days before the Player's attorney's first notification.

49. At the hearing, the Club submitted that the Player simply "preferred" to leave the Club when he saw his chance, when the players went on a short holiday. The Club preferred that he returned to play in the King's Cup match and requested him to do so in its reply to his attorneys. It wanted the employment relationship to remain in being.

50. There was no just cause existing at the time of termination by the Player.

3. The Notice

51. The Club underlined that the Player did not provide due notice of any breach and a clear warning of termination, as is required by Swiss law and as is the consistent jurisprudence of the CAS (the Club cited CAS 2006/A/1100 and CAS 2008/A/1464 & 1467).

52. The Player had never complained about late payments until the letter of 15 May 2015 from the Player's attorneys. It merely asked the Club to provide its position on the outstanding sums within 72 hours, it contained no warning of a termination. The Club responded and asked the Player to return, so the matter could be discussed amicably. He had accepted the payments would be made late.

53. The second letter of 19 May 2015, provided the Club with a warning, but only gave the Club 24 hours before the Contract would be terminated.

54. Further, the first letter had only been received by the Club on 19 May 2015. The fax was not delivered on 15 May 2015 (at a time when the Player would know all the Club's employees, like

him, had been given a 3-day holiday), but rather on 18 May 2015 as clearly indicated on the third page of the letter (the fax stipulates "MAY-18-2015 17:18" in the top left corner, which accords to 23:18 Saudi Arabian time). As a result, the fax was only seen by the Club on 19 May 2015, *i.e.* after the 72-hour deadline expired. The emailed version was not received, perhaps due to the employee in question being on a 3-day holiday, but in any event, it was for the Player to prove that the email had been received (CAS 2014/A/3858 was relied upon). Once the fax was received by the Club, the Club immediately wrote back to the Player saying "we are going to pay you" and asking for him to return, however he ultimately chose to terminate the Contract on 20 May 2015.

55. In reality, the Club had one day in which it received a notification, then a warning and then the termination letter. This notification was insufficient to justify termination of the Contract.

4. Compensation

56. As it was the Player who terminated the Contract without just cause, the Club was entitled to compensation. The Club submitted that it was entitled to the sum of EUR 290,276.

57. The Player "absconded" from his duties from 19 May 2015, until the end of the Contract on 30 June 2015. He missed the important King's Cup semi-final, which the Club ended up losing. The Club should be awarded the residual value of the Contract (being EUR 211,110) and a sum for the specificity of sport, under Article 17 of the FIFA RSTP in the sum of EUR 79,166 (representing half of a month's salary).

58. In the alternative, if the Panel was to agree with the DRC and determine that the Player had terminated with just cause, then the Club submitted that the Player was not able to ask for more money than he had been awarded, as he had chosen not to appeal against the Appealed Decision.

5. Good faith of the Club

59. In the alternative, if the Panel determines that the Club was late in satisfying its performances towards the Player, then, as the Club, in good faith, demonstrated an attempt to maintain the employment relationship, such a breach should not be seen as one that would provide the Player with just cause to terminate the Contract and the notice/warning provided was simply insufficient.

60. At the hearing, the Club urged the Panel to concentrate on the case at hand, not all the other cases involving the Club and other players that were cited by the Player. This was the only one with a MOU, so the Panel should "follow the evidence, not the history".

6. Sporting Sanctions/Article 12bis

61. Finally, the Club, at the hearing was able to address the Player's requests made in his Answer for the Panel to impose sanctions on the Club. The Club noted that the Player had not appealed

against the Appealed Decision and that counterclaims were no longer allowed at CAS, so the Panel must disregard the Player's requests in this regard too.

B. The Player's Submissions

62. In summary, the Player submitted the following in support of his Answer:

63. Much as the Club sought to portray itself as the victim, the reality is the Player was owed a considerable amount of money, equivalent to 6 months' salary, a fact the Club was clearly aware of; the MOU was not a new contract or a variation, merely an acknowledgement that the Club had difficulties; however, after that was signed, the Club made some (but not all the due) payments, so was clearly over its banking difficulties; due notice and warnings were given.

1. The MOU

64. The Club acknowledged by the MOU that it was in breach of the Contract and owed substantial sums to the Player. However, the MOU was not an addendum to the Contract. It was merely a letter from the Club with a promise to pay the outstanding sums. It was not a waiver, nor intended to operate to reduce the amount of indebtedness from the Club, as that would offend Swiss law.

65. The Player pointed out that the MOU expressly confirmed that certain arrears should be paid immediately and, once the bank account was unfrozen or a new one was set up, then all outstanding sums would be settled. After the MOU, the Club made 3 payments to the Player, in March and April 2015. These sums should have been paid immediately, so the MOU was breached. It was clear that the Club's bank account (the Player's account was always open) was operating once more, as from 23 March 2015, so from that date there was a continuing breach, as the balance of the outstanding were not paid either.

66. The Player noted that the Club now stated that the Player had to be present in Saudi Arabia to receive the payments from sponsors – this was never mentioned to the Player, it was not a condition in the Contract, nor had it ever been an issue when previous payments were made. The Player had been with the Club all season; it had plenty of opportunities to pay him in person.

2. Just Cause

67. While the Club seemed happy to play down that 50% of the remuneration had not been paid to the Player and, instead, to claim it was the victim, as the Player didn't play in the last cup game, having played and trained all season; the Club was clearly in breach of the Contract by such non-payments and the breach was significant.

68. At the date of termination, the Player had been paid EUR 1,311,281.87 meaning EUR 1,388,719 was due. The Player cited the FIFA RSTP, Swiss law and CAS jurisprudence (CAS 2006/A/1062, CAS 2006/A/1180 and CAS 2015/A/3999 & 4000 were all cited by the Player),

in support of its position that these arrears of payments clearly resulted in "just cause" which entitled the Player to terminate the Contract.

69. The Player submitted that the Club was claiming that the Player left and missed 1 match, so he had breached without just cause. However, the reality was that he had 6 months' worth of unpaid salaries, which was more than enough to provide "just cause".

3. The Notice

70. The Player submitted that he had complained to the officials at the Club and it was as a result of these complaints that the Club prepared the MOU.

71. Further, the Player doubts that the Club's claims that they only received the first notification dated 15 May on 18 May and then only read it on 19 May 2015, after the 72-hour period had expired. It had been sent by email as well as fax, to the usual email address that had been used between the Parties before. The Player has no way of knowing if the employee that receives the emails was or was not on holiday. The player had always used the football@ittihad.com address. No "out of office" message was received.

72. In addition, the Player sent various communications on 19 May 2015, when the 72 hours expired and granted the Club an additional 24 hours to bring the payments up to date. The Player relied upon a recent decision of the DRC (reference number 02131190) where 24 hours' notice was deemed sufficient.

73. But, in any event, the Club needed no notifications. It was well aware that it owed 50% of the Player's remuneration. The MOU is proof enough of that fact.

4. Compensation

74. As it was the Player that terminated the Contract with just cause, the Club is not entitled to anything.

75. The DRC had not awarded enough compensation to the Player. It had awarded him EUR 1,072,048.13 in the Appealed Decision; however, it had missed 2 monthly instalments, so the true total should be EUR 1,388,719. It is normal for FIFA and the CAS to award the balance of the contractual payments.

76. Further, looking at Article 17 of the FIFA RSTP, the Player submitted that he should receive more still, under the specificity of sport criteria, especially as the Club's breach occurred during the Protected Period, and the Panel should award a further sum equal to six months' remuneration under the Contract i.e. EUR 1,350,000.

5. Good faith of the Club

77. It was the Player that showed good faith in this instance. He continued to train and he played all league matches, despite only receiving half of the money due to him. There was no "good faith" by a club that lets a player be treated this way.

78. The Club showed bad faith, by signing the MOU and then failing to comply with it and the Contract.

79. The Player was aware of other players that experienced similar problems with the Club. In their instances, the Club held onto passports, so the Player had no wish to return to Saudi Arabia, once he had terminated the Contract. At the hearing, the Player cited many cases (and pointed out that in the Club's own Statement of Appeal it had referred to a number of ongoing disputes the Club had with other players at the CAS) which demonstrated the behaviour of this Club and was a reason why the Player's attorneys had advised him to terminate the Contract.

6. Sporting Sanctions/Article 12bis

80. Finally, the Player, in his Answer, requested the Panel to impose sporting sanctions in the form of a two-transfer window ban against the Club, pursuant to Article 17.4 of the FIFA RSTP and to issue sanctions against the Club pursuant to Article 12bis of the FIFA RSTP for having overdue payables to a player.

V. JURISDICTION

81. Article R47 of the Code provides as follows:

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

82. The jurisdiction of the CAS, which is not disputed, derives from Article 67(1) of the FIFA Statutes (2015 edition) as it determined that:

> *"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".*

83. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

84. It follows that the CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

85. The Appeal was filed within the 21 days set by Article 67(1) of the FIFA Statutes (2015 edition). The Appeal complied with all other requirements of Articles R48 of the Code, including the payment of the CAS Court Office fee.

86. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

87. Article R58 of the Code provides the following:

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

88. The Panel notes that Article 66(2) of the FIFA Statutes stipulates the following:

> *"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".*

89. The Parties agreed to the application of the various statutes and regulations of FIFA, and in particular the FIFA RSTP and that Swiss law applied on subsidiary basis.

90. The Panel is therefore satisfied to accept the subsidiary application of Swiss law should the need arise to fill a possible gap in the various statutes and regulations of FIFA.

VIII. MERITS OF THE APPEAL

A. The Main Issues

91. The Panel observes that the main issues to be resolved are:

- What is the legal nature of the MOU?
- Did just cause exist at the termination date?
- Was sufficient notice given?
- The "good faith" arguments of the Club?
- What are the financial consequences of the termination?
- Additional sanctions?

1. The MOU

92. The legal nature of the MOU was not made particularly clear until the hearing. The Club was initially treating it as part of the Contract, a document that had varied the payment terms of the Contract, whereas the Player considered it more as a notification that confirmed the arrears outstanding under the Contract.

93. The Parties accepted at the hearing that it had not replaced the Contract, and the Contract remained in force after the date of the MOU, with the continuing obligations upon the Club (primarily to pay monthly wages for April to June 2015) and upon the Player (primarily to train and play football). However, at the date of the MOU, considerable amounts of remuneration were due to the Player. It was these outstanding sums that were the subject of the MOU.

94. The Panel was happy to accept the MOU as an annex to the Contract. It did not replace the Contract, but had modified the dates for payment of the arrears under the Contract that existed at the time the MOU was signed. The Player was not giving up on any amounts due to him by signing the MOU. In March 2015, the Club should have paid 9 monthly salaries of EUR 158,333 each, i.e. EUR 1,424,997 in total. It had made 2 payments against these that totalled EUR 612,318.35, so the arrears of monthly salaries (putting the unpaid signing on fee to one side for now) amounted to EUR 812,678.65.

95. While the Panel determined that the MOU was not particularly well drafted, it held the view that the MOU reflected the Parties' common intention that (1) 50% of the EUR 800,000 signing on fee and 1 month's salary would be paid on signing the MOU (i.e. EUR 558,333); and (2) that the balance that was owed (i.e. EUR 1,054,345.65 being the total arrears of salary of EUR 812,678.65 less one month's of EUR 158,333, but added to the other 50% of the signing on fee, being EUR 400,000) at that time, would be paid as soon as the bank accounts were unfrozen and working again.

96. That aside, the Panel noted that while the Club's sponsors might have made payments for or on behalf of the Club from time to time and that those sponsors may have required the Player's attendance in Saudi Arabia, it was neither a condition for the legal validity of the MOU, nor for that of the Contract.

2. Just cause

97. As has been commented upon in numerous CAS cases in the past, there is no definition in the RSTP of what constitutes "just cause", instead the Panel has to refer to Swiss law. In particular, the Panel shall refer to Article 337 of the Swiss Code of Obligations (the "CO"), which reads as follows:

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

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

98. The abovementioned Article can be informally translated into English as follows:

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

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

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

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

101. The Panel therefore needs to first examine the grounds the Player relied upon at the time he terminated the Contract, and second whether he had given a sufficient warning to the Club.

102. The Panel notes that rather than pay the agreed sums on the signing of the MOU, the Club instead paid the signing on fee in March 2015. With a second payment, in the sum of EUR 154,162.99 the Club settled the month's salary of EUR 158,333 that was also due on the signing of the MOU. While these payments may have been slightly late and "short" by an amount of EUR 17,743.39 (slightly more than the Club submitted), the Panel did deem this a breach of the MOU which might justify a termination of the Contract.

103. However, from these payments and the one made in April 2015, it was clear to the Panel that despite the Club's submission that these were made on behalf of the Club, not by the Club (the evidence produced by the Player showed that the payments came from an Al Ittihad bank account into his own one), the Club's bank accounts were functioning normally as from 23 March 2015. The Panel notes that as at that time the balance of monies due to the Player, being EUR 1,054,345.65, were due. Only one payment was made against this in April 2015 in the sum of EUR 158,373.91. Further, the salaries for the 2 months between the MOU being signed and the Player's termination of the Contract were never paid either.

104. In the Panel's determination, as of the date of termination, the Player was due the sum of EUR 1,177,603.46 (being EUR 1,054,345.65 plus the entire monthly salary of April and 2/3's of the monthly salary of May, totalling EUR 263,888.33 plus the shortfall of EUR 17,743.39 less the April payment of EUR 158,373.91). This equates to half the signing on fee and roughly 5 monthly salaries that had largely been due since the date of the MOU, some 2 months before. This was a significant breach of the Contract and the MOU, and one that provided the Player with the *prima facie* just cause to terminate the Contract. However, this is just one of the 2 requirements. A proper warning must be given too.

3. The Notice/Warning

105. The Panel is aware that Swiss law and consistent CAS jurisprudence, referred to above, states that the Player, before using the just cause to terminate the contractual relationship, should give the Club due notice to remedy the breach and a warning that a failure to do so will result in the Contract being terminated.

106. The Club maintained that it wanted the relationship to continue and requested the Player to come back and to play. The Player, on the other hand, was advised by his attorneys, taking, in part, the payment history of the Club and the way it had treated some of its other players in the past and the amounts that were outstanding into consideration, to give two notices to the Club before terminating the Contract.

107. The Panel notes that the first notification contained no warning/threat of termination, and that it appears the decision to terminate was made before the Player received the Club's reply to that notification. There was a dispute between the Parties as to when the Club actually received the first notification. Was it by email on 15 May 2015 or by fax, read on 19 May 2015? While there was no "out of office" received from the email address, the Player's attorneys would have been better advised to have requested a "read receipt" to be able to prove when the Club actually read their first notification. However, it matters not, as the warning came in the Player's second notification. This gave the Club 24 hours to pay a considerable sum. The Panel notes the decision of the DRC (reference number 02131190) where the DRC accepted a short warning, however, the CAS jurisprudence in matters such as this tends to expect a longer period of notice (see the recent decision CAS 2015/A/4292 & 4321 as an example). The Club should be given a realistic chance to remedy the breach.

108. In the opinion of the Panel, it can be dangerous for players to follow advice to apply such an aggressive/short-notice period. The Player in this instance would have been within his rights to

stay away while the Club was not paying him, but to have given the Club a reasonable period of warning before terminating the Contract. Perhaps a week; perhaps 10 days, as is the requirement under Article 12bis of the FIFA RSTP. If the Club then failed to pay, a sufficient warning would have been given, but, in the case at hand, the Panel determines that the 24-hour warning was unreasonable.

4. Good faith arguments

109. It is hard for the Panel to conclude that the Club acted in good faith. The breaches of the Contract and the MOU were of a serious nature. However, the Panel has recognised that the Club did attempt to maintain the Contract and requested the Player to return, even if its correspondence was not quite as welcoming as the Club submitted at the hearing. The reasons why the Panel still finds in favour of the Player, his short notice notwithstanding in this respect, are summed up as follows. The MOU had been signed two months before the second notice, namely on 19 March 2015. During these two months, the Club had had ample opportunity to honour its original commitment (reiterated through the MOU), but it did not do so. Although the Club would have preferred a longer notice, it is unclear whether the Club received the first notice on 15 May 2015. If it had indeed received it, then almost one week had effectively passed by the time the deadline embedded in the second notice had expired. As of 23 March 2015, the bank accounts had been unfrozen. The Panel explained that, in its view, the MOU did not replace the contractual obligations of the Club in their entirety. Between 23 March and 15 May 2015 the Club had enjoyed ample opportunity to honour its obligations. Instead, all it did was pay the initial sums indicated to be paid upon signing the MOU, without paying any part of its remaining pre-existing debt to the Player. The sums indicated in the MOU were all the due and unpaid amounts and it seems to the Panel that the Club did not make any effort to pay more than part of the amounts and the Club did not provide any evidence that there were reasons out of its control for not paying all the arrears. The Panel acknowledges of course that the Club did make an effort to pay back some of its debt to the Player, but these payments were too little, and came too late.

5. The financial consequences

110. The fact is that on 20 May 2015, the Player brought the Contract to an end. There were effectively breaches by both Parties at that moment in time. On the one hand, the considerable sums owed to the Player by the Club under the Contract and the MOU; on the other hand, the Player had ended the Contract, without giving the Club a sufficient opportunity to remedy its breaches.

111. The Panel determines to award the Player the sums that were due to him at the time of the termination, i.e. the sum of EUR 1,177,603.46.

112. The Panel notes that the DRC also awarded a sum for compensation for the breach of the Contract to the Player of a sum equivalent to the salaries that remained due until the expiry of the Contract, from the termination date. Additionally, the Club claimed a similar sum, together with an extra half of a month's salary, under the "specificity of sport" criteria in Article 17 of

the FIFA RSTP. In the circumstances where both Parties were in breach (the Club for non-payment; the Player for insufficient notice), the Panel determines to award neither any sum as compensation for the other's contractual breaches.

113. Finally, the Panel notes that the DRC awarded the Player interest on the arrears of remuneration due to him at the rate of 5% p.a. until the date of effective payment and determines to apply such interest rate too, from the relevant due dates, as set out below.

6. Additional Sanctions

114. The Panel has already noted that the claim for compensation over and above the sums awarded by the DRC in the Appealed Decision constitute a counterclaim, which is not admissible in the proceedings at hand. In 2010, Article R55 of the Code was changed, so as to remove the ability for a respondent to include a counterclaim in his answer. If the Player was dissatisfied with the amounts awarded or the lack of sanctions issued, then he should have appealed against the Appealed Decision.

115. Similarly, the Player's initial requests for sanctions under both Article 17 and Article 12bis of the FIFA RSTP are counterclaims and inadmissible. Additionally, it would be for the DRC to determine whether such sanctions were appropriate and to have dealt with the same in the Appealed Decision. The Panel noted that no such sanctions were issued. Had the Player chosen to appeal the Appealed Decision, then he would have needed to include FIFA as a respondent, for the CAS to consider the sanctions.

116. In any event, in his closing submissions at the hearing, the Player withdrew both his counterclaims seeking these sanctions against and additional compensation from the Club, over and above that the DRC awarded, as such, the Panel need deal no further with these requests from the Player, save for the issue of costs, as below.

B. Conclusion

117. Based on the foregoing, and after taking into due consideration all the evidence, the Panel determined to replace the Appealed Decision, as follows:

- The Club shall immediately make the following payments of arrears of remuneration as follows:
    i. The sum of EUR 913,715.13 together with interest thereon at the rate of 5% p.a. as from 23 March 2015 until the date of effective payment;
    ii. The sum of EUR 158,333 together with interest thereon at the rate of 5% p.a. as from 1 April 2015 until the date of effective payment;
    iii. The sum of EUR 105,555.33 together with interest thereon at the rate of 5% p.a. as from 1 May 2015 until the date of effective payment;
- Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 18 January 2016 by Al Ittihad Football Club against the decision rendered by the FIFA Dispute Resolution Chamber on 15 October 2015 is partially accepted.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 15 October 2015 is set aside and replaced as follows:

   Al Ittihad Football Club shall immediately make the following payments of arrears of remuneration to Marco Antonio de Mattos Filho as follows:

   i. The sum of EUR 913,715.13 together with interest thereon at the rate of 5% p.a. as from 23 March 2015 until the date of effective payment;

   ii. The sum of EUR 158,333 together with interest thereon at the rate of 5% p.a. as from 1 April 2015 until the date of effective payment;

   iii. The sum of EUR 105,555.33 together with interest thereon at the rate of 5% p.a. as from 1 May 2015 until the date of effective payment.

(…)

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