



Arbitration CAS 2016/A/4567 Al Jazira FSC v. FC Lokomotiv, award of 9 November 2016

Panel: Mr Nicolas Ulmer (Switzerland), Sole Arbitrator

Football

Failure of a club to pay an installment of a transfer fee

Error in the decision of the first instance body

Notice of default

Reduction of excessive penalty clause

1. **If both parties agree that the decision of the first instance body contains an error, it is appropriate to grant the appeal to the limited extent necessary to correct such error.**
2. **According to the general principle of Article 102 (1) of the Swiss Code of Obligations (CO), an obligor is put in default by the receipt of a formal notice from the obligee. However, where the date of performance had been determined by mutual agreement, the debtor is put on notice by the sole expiration of that date, without need for any formal notice.**
3. **In accordance with Swiss Law and CAS precedents, as well as FIFA jurisprudence, a very high penalty interest of 20% per annum for each day of lateness is excessive and can be reduced to the rate of 5% per year.**

I. PARTIES

1. Al Jazira FSC (“Appellant” or “Al Jazira”) is a football club based in Abu Dhabi, United Arab Emirates, and affiliated with the United Arab Emirates Football Association, which in turn is affiliated to the Fédération Internationale de Football Association (“FIFA”).
2. F.C. Lokomotiv (“Respondent” or “Lokomotiv”) is a football club based in Moscow, Russia, affiliated with the Russian Football Association, which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

3. This section of the Award contains a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out,

where relevant, in connection with the legal discussion that follows. The Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, but in this Award refers only to the submissions and evidence he considers necessary to explain his reasoning and decisions.

4. The Parties entered into a “Transfer Agreement”, dated 13 January 2014, and providing for the transfer of a professional football player (the “Player”) from Lokomotiv to Al Jazira. Clause 2.1 of the Transfer Agreement provided for a total transfer fee of EUR 4,737,000 broken out as follows: i) a First Instalment of EUR 3,158,000 to be paid on or before 25 January 2014; and ii) a Second Instalment of EUR 1,579,000 to be paid on or before 30 August 2014.
5. The Parties are in substantial agreement that the Appellant timely made the First Instalment payment by transferring EUR 3,000,000. This sum represented the First Instalment less a 5% “solidarity contribution”, provided for in § 2.4 of the Transfer Agreement, and an unexplained shortfall of EUR 100, which the Respondent has effectively waived.
6. It is common ground between the Parties that the Second Instalment provided for in the Transfer Agreement was not made, and this dispute involves that unmade payment, together with issues of interest and cost.
7. The Transfer Agreement provided, at § 2.6 thereof, for daily penalty interest at a rate of 20% per annum in the event of untimely payment by Al Jazira; the interest issues as actually played out in this case are discussed in Section VII, below.
8. Al Jazira failed to make the Second Instalment payment under the Transfer Agreement and sought an extension to pay without interest or penalty. On 3 September 2014, that is to say after it was due, the Appellant wrote the Respondent a letter purporting to thank the latter for agreeing to extend the period to pay the Second Instalment until 5 October 2014, without any penalty.
9. At this point the Parties’ interpretations differ, with the Appellant claiming it should have, but never did, receive a formal answer to its letter referencing an existing agreement to postpone payment without penalty. The Respondent, on the other hand, points out that it only agreed that it would provide the Appellant with a payment postponement to 5 October 2014, provided it received an official letter from Al Jazira, signed by its President and its Chief Financial Officer, guaranteeing that the payment would be made by 5 October 2014 and that any delay beyond that date would result in automatic penalty interest of 20% per year; the 3 September 2014 letter did not conform to the conditions the Respondent set for an extension of time to pay. The Respondent’s version of events is supported by a contemporaneous email.
10. It is in any event clear that no extension was agreed and no payment of the Second Instalment was received on 5 October 2014 or any other date. Lokomotiv proceeded to file a claim with FIFA.

B. Proceedings before FIFA

11. Lokomotiv's claim before FIFA was dated 21 October 2014 and requested: 1) EUR 1,579,000, less a 5% deduction for solidarity mechanism provided by the FIFA Regulations and echoed in the Transfer Agreement; 2) Interest at 20% per annum on the amount owed as from 30 August 2014; and 3) the award to it of all procedural costs incurred before FIFA.
12. Al Jazira submitted its statement of defence in the FIFA proceeding on 2 February 2015. It did not there dispute the failure to make the Second Instalment payment, but argued that no interest should run on that amount as Lokomotiv had never formally served a default notice (*mise en demeure*) within the meaning of art. 102(1) of the Swiss Code of Obligations ("CO"). Furthermore, argued Al Jazira, 20% penalty interest was disproportionate and incompatible with CAS jurisprudence.
13. After further correspondence, Lokomotiv, on 10 September 2015, responded on these points, defending the 20% penalty interest as validly agreed and pointing out that Al Jazira's 3 September 2014 letter (§§8-9, above) demonstrates that it was well aware of its payment obligation. The Single Judge of the FIFA Players' Status Committee rendered his decision on 13 October 2015. The operative part of that decision reads as follows:
 - *The claim of the Claimant, FC Lokomotiv Moskva, is partially accepted.*
 - *The Respondent, Al Jazira SC, has to pay to the Claimant, FC Lokomotiv Moskva, **within 30 days** as from the date of notification of this decision, the total amount of EUR 1,579, 000 as well as 5% interest per year on the said amount from 31 August 2014 until the date of effective payment.*
 - *If the aforementioned sum, plus interest, is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
 - *Any further claims lodged by the Claimant, FC Lokomotiv Moskva, are rejected.*
 - *The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Al Jazira SC, **within 30 days** as from the date of notification of the present decision as follows:*
 - ❖ *The amount of CHF 15,000 has to be paid to FIFA to the following bank account with reference to case nr. 15-00073/bsc: [...]*
 - ❖ *The amount of CHF 5,000 has to be paid directly to the Claimant, FC Lokomotiv Moskva.*
14. The Decision with grounds (the "Appealed Decision") was not communicated to the parties until 30 March 2016, despite a number of reminders from Lokomotiv.
15. In brief summary, the FIFA Single Judge found that it was uncontested that the sum of EUR 1,579,000 was due under the Transfer Agreement, but made no mention of the solidarity

deduction also foreseen in the Transfer Agreement. The Single Judge rejected, largely on the basis of the FIFA Regulations, the Al Jazira argument that it had not been formally notified of its debt under Swiss law. The Single Judge further found the 20% per year penalty interest claimed by Lokomotiv to be excessive under the established jurisprudence of the Players' Status Committee and reduced it to 5% per year from 31 August 2014, the day after the principal amount was due under Transfer Agreement. The rulings and content of the Appealed Decision are further discussed in Section VIII, below.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 18 April 2016 Al Jazira filed a Statement of Appeal before the CAS. The Appellant requested:

“FIRST – to partially dismiss the Appealed Decision

SECOND – To confirm it violates principle of laws (sic), the well-established applicable Swiss law, in particular the applicable public policy, fundamental and universal principles of law, as well as the well-established lex sportiva;

THIRD – to condemn the Respondent to the payment of legal expenses incurred by the Appellant; and

FOURTH – To establish that the costs of the ongoing arbitration will be born by the Respondents”.

These requests for relief were subsequently altered and their final iteration is set forth in Section IV, below.

17. The Appellant filed its Appeal Brief on 10 May 2016, within the extended deadline authorised by the CAS. That Brief contained a more extensive eight-part Requests of Relief, which is reproduced in Section IV, below, together with an additional underlined Request which was added later at the Sole Arbitrator's invitation in order to clear up what amounts, if any, were actually in dispute.
18. The CAS notified FIFA of this case, but FIFA did not seek to participate as a party to the arbitration.
19. On 3 June 2016, the Respondent filed its Answer in this arbitration. The Respondent's original Requests for Relief, as well the subsequent Request, added to on the Sole Arbitrator's invitation, are both set forth in Section IV, below. The Answer made clear that the Respondent was not contesting the 5% solidarity deduction, discussed below, or claiming interest beyond the 5% rate awarded in the Appealed Decision. The Answer also strongly suggested that the Appellant in appealing to the CAS was attempting to prolong proceedings in order to avoid payment.

20. On 24 June 2016 the Parties were informed that the President of the CAS Appeals Arbitration Division, in application of Article R54 of Code of Sports-related Arbitration (the “Code”), had decided to appoint the undersigned Nicolas Ulmer as Sole Arbitrator in this proceeding.
21. On 6 July 2016 the Sole Arbitrator requested that FIFA transmit its file concerning the case, which file was notified on 14 July 2016.
22. The Sole Arbitrator on 6 July 2016 directed both parties to resubmit their respective Requests for Relief with the inclusion of the specific principal amount and applicable interest, if any, of the Appealed Decision which each party believed should be confirmed or awarded.
23. The Respondent replied on 11 July 2016 and the Appellant did so on 13 July 2016. From these replies it was evident that both Parties agreed that the Appealed Decision should be confirmed in a principal amount of EUR 1,500.050 (i.e. the EUR 1,579,000 of the Second Instalment of the Transfer Agreement less the 5% solidarity payment.) The only monetary difference in the Parties’ positions being relatively minor interest and cost issues.
24. The Sole Arbitrator thereupon invoked the second paragraph of Article R56 of the Code and the Parties were, on 20 July 2016, directed to communicate directly for at least ten days with the objective of reaching a settlement, and informed that if no settlement were reached, a conference call would be held to determine what points still divided the Parties. The contents of the conference call were to be and remain confidential.
25. No settlement was achieved despite a slight extension of the deadlines to reach it and a conference call was ultimately scheduled and held on 22 August 2016, but no settlement was reached. In light of communication problems on the call, the Parties were accorded a further period to see if a settlement could be found, which period was extended at the request of the Respondent by letter dated 29 August 2016.
26. In its 13 July 2016 communication, the Appellant requested a hearing in order *“to ratify the main points raised in our Appeal Brief, in particular, that the Appealed Decision is clearly extra petita and as such, primarily, against the provisions set out in the transfer agreement”*. The Appellant did not propose that any witnesses be heard or evidence taken at the hearing it proposed. The Respondent, for its part, made clear that it did not wish a hearing or consider one to be necessary.
27. On 7 September 2016 the CAS informed that Parties that, in the absence of any news within the further deadline set on 29 August 2016, the Sole Arbitrator was going to proceed to render an Award on the basis of the Parties’ written submissions pursuant to Article R57 of the Code.
28. This was further confirmed in paragraph 7 of the Order of Procedure, where the Parties agreed that the Sole Arbitrator could decide the matter based on the Parties’ submissions, and that pursuant to Article R57 of the Code the Sole Arbitrator considered himself sufficiently well informed to decide the matter without the need to hold a hearing. This Procedural Order was signed by the Respondent and the Appellant on, respectively, 12 and 14 September 2016.

IV. SUBMISSIONS OF THE PARTIES

29. The Appellant's final Requests for Relief reads as follows:

The Appellant respectfully submits to the attention of the CAS the following requests for relief:

FIRST – To confirm that the Appealed Decision is clearly extra petita since ordered the Appellant to pay an amount higher than the one requested by the Respondent in its prayers for relief;

SECOND – To confirm that the Appealed Decision ignored the provisions set out in clause 4 of the Transfer Agreement, which granted to the Appellant the right to deduct the percentage due as solidarity contribution (cf. Art. 21 and Annexe 5 of the FIFA RSTP).

THIRD – To uphold that the Appealed Decision violated the principle of respect of the Transfer Agreement;

FOURTH – To uphold that the Appellant is entitled to deduct 5% due as solidarity contribution from the amount due as second instalment, in line with the provision set out in Art. 21, Annexe 5 of the FIFA RST, in combination clause 2.4 of the Transfer Agreement;

FIFTH – To confirm that the Respondent has never answered the facsimile addressed by the Appellant on 3 September 2014, as neither as claimed the imposition of any default interest whatsoever over the aforementioned alleged outstanding second instalment;

SIXTH – To uphold that the Panel has no legal basis to impose any default interest whatsoever on the Appellant since the Respondent has never claim it in front of the FIFA Players's Status Committee (cf. CAS 2003/O/527);

SEVENTH – To confirm in conclusion, that the Panel shall partially confirm the Appealed Decision, i.e. reducing the amount due to the Respondent to EUR 1,500,050 without the imposition of any default interest whatsoever in accordance to the CAS jurisprudence above quoted.

EIGHTH – To order the Respondent to pay the full amount of the CAS arbitration costs; and

NINTH – To order the Respondent to pay a significant contribution towards the legal costs and other related expenses of the Appellant, at least in the amount of CHF 20,000.

Paragraph 7 above, underlined in the original, was added in reply to the Sole Arbitrator's 6 July 2016 request for a clear statement of a monetary amount with respect to the Appealed Decision.

30. The Respondent's initial Requests for Relief read as follows:

Respondent kindly asks the CAS Panel to:

- *Conduct the case without holding a hearing (R57 of Code of Sports-related Arbitration)*

- Uphold the decision of Players' Status Committee (in respect that 5% of the solidarity contribution has to be automatically deduct from the transfer fee).
- Confirm that the Respondent shall not be responsible to pay any expense charge or legal costs regarding the disputes at hand.

After the Sole Arbitrator's direction of 6 July 2016 the Request for Relief was resubmitted to read as follows:

*The Appealed Decision should be confirmed in a **net amount**, after deduction of the 5% for the solidarity contribution, which is **EURO 1 500 050** (1 579 000 Euro according to the transfer agreement minus 5% for the solidarity contribution according to the Regulations on the Status and Transfer of Players), together with interest at 5% per year from the 31st August 2014 until the date of effective payment. Also we would like to emphasize that all costs of CAS arbitration should be imposed on the Appellant.*

31. The Appellant's submissions invoked or cited many theories of Swiss law arguing that the failure of the FIFA Single Judge to deduct the solidarity contribution was, among other things, *extra petita* and a violation of Swiss principles of *pacta sunt servanda*. As to the running of interest on the principal amount due the Appellant argued that the failure of Lokomotiv to answer Al Jazira's letter of 3 September 2014 left it in doubt as to when payment was due, and precluded an award of interest under the principles arising from bilateral contracts governed by Article 82 of the Swiss Code of Obligations ("CO"), and of formal notice requirements under Article 102 (1) CO.
32. Lokomotiv's pleading agreed to the deduction of the solidarity contribution from the amount due under the Second Instalment and stated that such a deduction was "*normal practice*" and had never been contested by the Respondent. Lokomotiv did refute Al Jazira's argument that it should have answered the 3 September 2014 letter, arguing that it was clear from the record that that letter did not conform to the clear requirements of Lokomotiv for any extension of the Second Instalment payment date, and that were Al Jazira sincere in its assertions as to that letter it would have paid on 5 October 2014, which it manifestly did not. As to the interest on the payment Respondent pointed out that, although it had originally claimed 20% per year penalty interest, it did not challenge the FIFA Single Judge's decision to reduce this to 5% per year. Finally, the Respondent stressed that the Appellant was avoiding a simple and evident solution by an "*overuse of law and the attempt to prolong a proceeding only for not paying*". Thereupon Respondent asserted that the Appellant should be taxed all costs.
33. The Parties positions and arguments are further discussed in Section VIII.

V. JURISDICTION

34. 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 the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific

arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

35. Neither Party has raised a jurisdictional exception or otherwise disputed jurisdiction, nor does the Sole Arbitrator see any jurisdictional issue that should be explored *sua sponte*.
36. The appeal properly relies on Article 67 of the FIFA Statutes as conferring jurisdiction on the CAS and, once again, this is not contested by the Respondent, but rather confirmed by the Parties' signature of the Procedural Order, paragraph 1 of which recites this jurisdictional basis.

VI. ADMISSIBILITY

37. Article R49 of the Code provides as follows:

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

38. The Appealed Decision was issued on 13 October 2015, but the grounds for this decision were only issued on 30 March 2016. It follows that the appeal is admissible in accordance with the above provision and Article 67 of the FIFA Statutes.

VII. APPLICABLE LAW

39. Article R58 of the Code provides as follows:

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

40. The text of Article 6 of the Transfer Agreement is consistent with the above Article R58 of the Code; reading, in its entirety, as follows:

6.1 This Transfer Agreement shall be governed by and construed in accordance with FIFA Regulations, as well the complementary rules enacted by FIFA from time to time, and the Swiss laws.

41. In view of the above, the Sole Arbitrator shall apply the FIFA Regulations and, subsidiarily as pertinent, Swiss law.

VIII. MERITS

42. The Appellant raises no less than nine Requests for Relief largely criticising the reasoning of the Appealed Decision; seven of the Requests bear on the merits, and of these two (4th and 7th) are substantially in conformity with the positions of the Respondent.
43. An analysis of the Appellant's positions reveals that its many requests for relief devolve into two actual material claims for relief:
- A. that the Appellant is entitled to deduct the 5% solidarity contribution from its principal payment to Lokomotiv, and
 - B. that interest should not run on the Appealed Decision.

The Appeal seeks, however, to state these points by advancing relatively lofty Swiss legal terms, asserting that the Appealed Decision is *extra petita*, violates *pacta sunt servanda*, fails to take into account a Swiss Law notice requirement and so forth.

44. The Respondent's Answer does not seek to reply on each of these grounds of appeal specifically but emphasises that it does not and did not object to the deduction of the 5% solidarity contribution, and that the 5% interest awarded in the Appealed Decision was a reduction from the 20% penalty interest claimed. As a consequence the Answer concludes that "*Respondent does not see a real subject for appeal*".
45. It is, however, appropriate to examine the Appellant's stated points of appeal in the context of the material claim that is put forward.

A. Should the 5% Solidarity Contribution Be Deducted?

46. The Appellant claims that the FIFA Single Judge acted *extra petita* in ordering the Appellant to pay "*an amount higher than the one requested by the Respondent in its prayer for relief*". In the Appellant's submission this violates both Article 14 (4) d) of the FIFA Procedural Rules (that the written decision contain "*the claims and/ or motions submitted by the parties*"), and principles of Swiss arbitration law.
47. This ground of appeal is based on the fact that the Appealed Decision awarded Lokomotiv the full unpaid Second Instalment of EUR 1,579,000, without any explicit deduction of the 5% solidarity contribution foreseen by Article 2.4 of the Transfer Agreement. The Respondent points out that it has never disputed Al Jazira's right or obligation to deduct the 5% solidary contribution from its Transfer Agreement payments to Lokomotiv and that this deduction is considered to be "automatic" under the FIFA Regulations on the Status and Transfers of Players. Moreover, the Appellant's First Instalment payment under the Transfer Agreement made such a deduction without comment or protest from the Respondent.

48. In short, the Respondent makes the practical point that the solidarity contribution deduction is agreed and not contentious and that there was no need for Al Jazira to launch a CAS appeal to have it respected.
49. An examination of the record of the case before the FIFA Single Judge does reveal that Lokomotiv's demand there was for: "[t]he remaining transfer fee amounting to EUR 1,579,000 deducted by 5% in accordance with the solidarity mechanism provision...". Al Jazira's 2 February 2015 statement of defence echoed the Lokomotiv position, requesting at §13, THIRD: "[t]o uphold that the Respondent shall be ordered to pay to the Claimant the Second Instalment, less 5% in respect of the solidarity contribution..." (emphasis added).
50. The Appealed Decision of the FIFA Single Judge, quoted above, omits to make this deduction for the solidarity contribution, awarding the full EUR 1,579,000 to Lokomotiv. The body of the Appealed Decision also fails to mention the solidarity contribution deduction, suggesting that it either was overlooked by the FIFA Single Judge, or was considered implicit.
51. It is therefore appropriate to grant the appeal to the limited extent necessary to correct this apparent error and make clear that the Second Instalment payment awarded and agreed to be due from Al Jazira to Lokomotiv does not include this agreed deduction. The ruling set forth in the operative part of this Award (*dispositif*) rewrites paragraph 2 of the operative part of the Single Judge's decision and effects this correction – making clear that the net principal amount to be paid is after deduction of the solidarity contribution.
52. This Award thus corrects the putative error complained of by the Appellant, as most clearly set forth in the FOURTH Request for Relief. The net effect of this correction is to make clear that the sum to be transferred to the Respondent is, after deduction of the 5% solidarity contribution, EUR 1,500,050 (1,579,000 less 5% = 1,500,050.)
53. It bears noting, however, that the Appellant's Requests for Relief contain three other requests essentially related to that same point (FIRST to THIRD Requests). Thus it is that the Appellant also requests that it be confirmed that the Appealed Decision is "*clearly extra petita*", "*ignored the provisions set out in in clause 4 of the Transfer Agreement*", and "*violated pacta sunt servanda*".
54. These Requests for Relief confuse possible legal grounds for granting relief with the actual relief sought; the gravamen of these requests for relief is that the 5% solidarity deduction should have been effected, and this request is granted. The further requests of the Appellant are overlapping and largely superfluous in light of the above findings, and do not merit extensive discussion as they cannot change the effective result.
55. As to the SECOND "confirmation" Request for Relief of the Appellant, it almost entirely overlaps with the Appellant's Request FOURTH, and is therefore both superfluous and granted as reflected in the first two paragraphs of the *dispositif*.
56. The Appellant's FIRST and THIRD Request for Relief – that the Appealed Decision violated the principles of *extra petita* and *pacta sunt servanda* by ignoring pleadings and the provisions set

out in clause 4 of the Transfer Agreement is both overbroad and unnecessary also in view of the above findings.

B. Should Interest Run on the Principal Amount Awarded?

57. The Appellant's FIFTH and SIXTH Requests for Relief both concern Al Jazira's argument against the imposition of interest on the principal amount due. The essence of the argument is that it was not given a proper Swiss law notification from which interest can run. To resolve these issues, it is first necessary briefly to touch on some pertinent facts, and then proceed to an analysis of the apposite Swiss law.
58. Specifically, the Appellant claims, in connection with interest, that, as it never received a formal answer to its 3 September 2014 letter and that this "*per se left [the Appellant] in doubt regarding the exactly [sic] date in which the Appellant had to effectively comply with the payment of the second instalment*". It is from this proposition that the Appellant seeks to advance a number of Swiss law constructs.
59. First, it should be noted that there is no ambiguity in the Transfer Agreement as to Al Jazira's obligation to make the Second Instalment payment "*on or before 30 August 2014*". Accordingly, Al Jazira was already late and in default on this payment as it sought an extension to be confirmed. Secondly, the 3 September 2014 letter of the Appellant appears quite self-serving as it references a prior email from Lokomotiv but does not reflect or recite the conditions which that prior email of 2 September 2014 set for any extension (a guaranty of payment and an explicit agreement that late payment would be accompanied by the Transfer Agreement's 20% default interest rate penalty.)
60. It is thus very difficult to see how the Appellant could have been under any legitimate doubt as to when payment of the Second Instalment was due: it was due on or before 30 August 2014 as per the Transfer Agreement unless and until the Respondent agreed to an extension, which they did not – a point made clear by a reading of the Respondent's 2 September 2014 email setting forth Lokomotiv's conditions for a payment extension.
61. Assuming, *arguendo*, that Al Jazira did in fact believe that there was an extension to pay until 5 October 2014, as its 3 September 2014 letter recites, it is telling that it never paid on that date either; this further underscores the self-serving nature of the Al Jazira letter of 3 September. The Appellant's FIFTH Request for Relief is accordingly rejected to the extent it is relevant.
62. Nevertheless, the Appellant advances Article 82 CO and its principle of *exceptio non adimpleti contractus*, as a putative basis to deny interest payment here. It is true that the Transfer Agreement is a bilateral contract and that, pursuant to Article 82 CO, a debtor may refuse to execute its obligation if its counterparty does not execute or offer to execute its corresponding obligation. But this principle has little or no application to the issue at hand.
63. In the instant case, Lokomotiv had long ago executed its primary performance under the Transfer Agreement: it had transferred the Player. It was Al Jazira that had failed to complete its payment obligation, and knowingly not made its Second Instalment payment. There is

therefore no objective basis to apply the *exceptio non adimpleti contractus* principle nor, it should be noted, does the Appellant's Appeal Brief explain how the principle should apply here.

64. Instead the Appeal Brief morphs into a citation of Article 102 (1) CO and its general principle that an obligor is put in default by the receipt of a formal notice from the obligee. The Appellant's position is that failing such a notice no interest should run.
65. But the Appellant fails to cite the provisions of the second part of Article 102 CO, which read as follows:

"2. Lorsque le jour de l'exécution a été déterminé d'un commun accord, (...) le débiteur est mis en demeure par la seule expiration de ce jour".

(in English: where the date of performance had been determined by mutual agreement, (...) the debtor is put on notice by the sole expiration of that date).

Article 102(2) CO, *cf.* TERCIER, P., *Le Droit des Obligations* (4ème Edition, 2009), p. 265 §1282 ("*...l'échéance a été fixée (...) dans le contrat (...) le débiteur est en retard, sans intervention supplémentaire du créancier, s'il n'exécute pas sa prestation à ce moment*").

66. As the Transfer Agreement had a clear set date for payment of the Second Instalment, when that payment was not made, the Respondent was entitled to claim payment, and interest thereon, without further notice to the Appellant.
67. This is essentially what the Respondent did: On 21 October 2014 it filed a claim with the FIFA Players' Status Committee for the EUR 1,579,000 remaining transfer fee, less the 5% solidarity mechanism contribution, together with interest at a rate of 20% per annum, as provided in Article 2.6 of the Transfer Agreement.
68. Article 2.6 of the Transfer Agreement provides for this high rate of interest as a penalty, and a reading of that Article confirms that it should be construed as a penalty clause (*Konventionalstrafe* or *clause pénale*) within the meaning of Article 160 CO *et seq.* Not only does Article 2.6 state that it is a "penalty", it also functions as a classic penalty to put pressure on the debtor in order to foster *in terrorem* compliance under threat of having to pay very high penalty interest of 20% per annum for each day of lateness. *Cf.* THEVENOZ/WERRO (eds), Commentaire Romand, Code des Obligations I, pgs. 1159-1160 (*effet répressif* and *effet préventif* role of penalty).
69. Lokomotiv claimed this penalty interest before the FIFA Single Judge as from 30 August 2014, as provided in Article 2.6 of the Transfer Agreement. Al Jazira argued *inter alia* that a 20% default interest penalty was excessive. The FIFA Single Judge agreed that such a rate was excessive under Players' Status Committee jurisprudence and reduced the rate to 5% per year, from 31 August 2014.
70. In reducing the penalty the FIFA Single Judge was acting in accordance with Swiss Law and CAS precedents, as well as FIFA jurisprudence. *Cf.* Art. 163 (3) CO ("*Le juge doit réduire les peines qu'il estime excessives*"); accord, CAS 2011/O/2397; CAS 2013/A/3419.

71. Thus the interest awarded by the FIFA Single Judge derives from a contractually agreed penalty clause validly plead by Lokomotiv, and then validly reduced by that Judge; this is another reason why the absence of notice argument plead by the Appellant is without basis. The Appellant's SIXTH Request for relief – *“that the Panel has no legal basis to impose any default interest whatsoever on the Appellant since the Respondent has never claim [sic] it in front of FIFA Player's Status Committee”* is unfounded and rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al Jazira FSC on 18 April 2016 against the Decision of the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 13 October 2015 is partially upheld.
2. The Decision taken by the Single Judge of the Players' Status Committee of FIFA on 13 October 2015 is confirmed, except for paragraph 2 of the operative part of that Decision which is replaced with the following: *“Al Jazira FSC shall pay FC Lokomotiv, Moscow, the net amount (after deduction of Al Jazira FSC's solidarity contribution) of EURO 1,500,050, together with interest at 5% per year on said amount from 31 August 2014 until the date of effective payment”*.
3. (...).
4. (...).
5. All other motions or prayers for relief not decided above are dismissed.