Arbitration CAS 2018/A/5677 Al Nassr Saudi Club v. Ivan Tomecak & Fédération Internationale de Football Association (FIFA), award of 5 April 2019

Panel: Mr Mark Hovell (United Kingdom), President; Mr Diego Ferrari (Argentina); Mr Bernhard Welten (Switzerland)

Football
Employment-related dispute
Burden of proof under Article 8 Swiss Civil Code
Behaviour of the player as an objective criterion to be considered in the assessment of the damages

1. **Based on the general principle stated in Article 8 Swiss Civil Code, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.**

2. **Pursuant to Article 17 para. 1 of the FIFA Regulations on the Status and Transfer of Players, the compensation *"shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria".* The player's behaviour is certainly such an objective criteria to be considered, as *e.g.* Article 44 of the Swiss Code of Obligations confirms. Therefore, even if a player had just cause to terminate the employment contract, if his behaviour was a contributory factor to such termination, a CAS panel has wide discretion as to how it determines to use this behaviour to reduce the compensation for damages.**

I. PARTIES

1. Al Nassr Saudi Club (the "Club" or the "Appellant") is a football club with its registered office in Riyadh, Saudi Arabia. The Club is a member of the Saudi Arabia Football Federation (the "SAFF"), which in turn is affiliated to Fédération Internationale de Football Association.

2. Ivan Tomecak (the "Player" or the "First Respondent") is a professional football player born in Zagreb, Croatia on 7 December 1989 who currently plays for Club Brugge KV, in Belgium.

3. Fédération Internationale de Football Association ("FIFA" or the "Second Respondent") is the governing body of world football and has its registered office in Zurich, Switzerland.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. 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.

5. On 18 July 2016, the Player and the Club concluded an employment contract (the "Contract") valid as from 18 July 2016 until 17 July 2018.

6. According to Article 4 of the Contract, the Player was entitled to receive the following amounts:

> *"1.* ***Remuneration:***
>
> *1.1* ***For the season 2016/2017****: An annual wage of USD 1,100,000 net (one million one hundred thousand American dollars) equivalent to an annual* [sic – monthly] *wage of USD 91,666 net (ninety one thousand sixty six American dollars net), payable as follows:*
>
> *1.1.1 30% of the annual wage or 330,000 $ Net (three hundred thirty thousand American dollars Net) paid in advance against the monthly wages after signing the contract (no later than 1-8-2016).*
>
> *1.1.2 The remaining 70% of the annual wage or 770,000 $ (seven hundred seventy thousand American dollars) in equal twelve (12) instalments of USD 64,166 Net (sixty four thousand one hundred sixty six American dollars Net) at the end of each subsequent month.*
>
> *1.2* ***For the season 2017/2018****: An annual wage of USD 1,200,000 net (one million two hundred thousand American dollars net) equivalent to an annual [sic] wage of USD 100,000 net (one hundred thousand American dollars net), payable as follows:*
>
> *1.2.1 30% of the annual wage or 360,000 $ Net (three hundred thirty thousand American dollars Net) paid in advance against the monthly wages after signing the contract (on 1-8-2016).*
>
> *1.2.2 The remaining 70% of the annual wage or 840,000 $ (eight hundred forty thousand American dollars) in equal twelve (12) instalments of USD 70,000 Net (seventy thousand American dollars Net) at the end of each subsequent month".*

7. Article 6 of the Contract contained the following clause:

> *"The first party may not delay payment of the second party's salaries or terminate the contract due to player's injury during play or training. The second party may terminate this contract only with just cause according to FIFA Regulations. Delay of payment of an aggregate of three (3) monthly wages would be considered as a just cause for termination without prior notice".*

8. The Player alleged that from the beginning of the Contract, the Club delayed the payment of his remuneration.

9. On 4 April 2017, the Player threatened the Club with further action before FIFA if it did not settle 4 outstanding monthly instalments (for December 2016 and January to March 2017).

10. On 19 April 2017, in response to the Player's letter, the Club settled all its debts towards the Player up to the month of March 2017. On the same day, the Player acknowledged receipt and confirmed he was happy to continue with the Contract.

11. On 3 May 2017, the Player requested in writing an exit visa from the Club, *"so he could return to Croatia for annual leave"* by no later than 6 May 2017. The Club issued him with the exit visa.

12. On 9 June 2017, the Club requested in writing that the Player join the pre-season camp in Riyadh, Saudi Arabia, due to start on 14 June 2017.

13. On 13 June 2017, the Player informed the Club that due to illness, he could only return to Riyadh on 18 June 2017 and also requested that the Club deliver to him the relevant flight tickets. In addition, he referred to being due his instalments for April and May 2017 and threatened to take the matter further if not paid.

14. On 14 June 2017, the Club provided him with the flight tickets, but it also referred by its letter to an alleged *"unauthorized absence for vacation"* during the period between 6 and 31 May 2017, which was the reason for the Club to withhold the payment of his salary instalments for the months of April and May 2017.

15. On 10 July 2017, the Player put the Club in default for an amount of USD 552,498, corresponding to the unpaid salaries for the months of April, May and June 2017, as well as the second advance in the amount of USD 360,000 for the season 2017/2018. Payment was demanded within 10 days, else the Player would turn to FIFA.

16. On 14 July 2017, during the Club's pre-season training camp, the Player and the Club allegedly discussed a mutual termination of the Contract. On the same day, the Player's advisors wrote to the Club and confirmed that he would accept USD 1.2m to leave the Club. He further reminded the Club that he believed the Club owed USD 552,498 and that if no settlement was agreed before 17 July 2017, then the Player would terminate the Contract.

17. On 16 July 2017, the Club informed him about disciplinary proceedings to be held because of his alleged unauthorized absence in May 2017.

18. On 17 July 2017, the Club informed him about the payment of his salary for April 2017, which it would now pay. In addition, the Club also explained that the second advance of salary for the season 2017/2018 was only due on 1 August 2017, as the Contract contained *"a typographical error"*. Further, the Club informed him that the salaries for May and June 2017 would be suspended *"pending the investigation for unauthorized absence"*.

19. On 22 July 2017, the Player took part in a disciplinary hearing which was held at the Club's offices. During this meeting he alleged he received a verbal proposal for a mutual termination of the Contract.

20. On 25 July 2017, the Club wrote again to the Player summonsing him to the disciplinary proceedings.

21. On 26 July 2017, the Player replied to the Club, indicating that he refused to take part in any further disciplinary proceedings, and put the Club again in default for the payment of *"all outstanding debts"*. Finally, the Player indicated that if he failed to receive the outstanding amounts by 2 August 2017, he would initiate proceedings before FIFA and would terminate the Contract.

22. On 2 August 2017, after not having heard from the Club, the Player unilaterally terminated the Contract pursuant to Article 6 of the Contract, due to outstanding remuneration in the total amount of USD 558,332.

23. On 2 and 3 August 2017, the Club responded to the Player. The Club stated that the July 2017 instalment was not yet due and that it was authorised to withhold the May instalment. It disputed the Player's claim that he had just cause to terminate the Contract.

24. On 4 August 2017, the Player received an exit visa and subsequently left Saudi Arabia.

25. On 9 August 2017, the Club requested the Player to return and to continue with the Contract.

26. On 31 August 2017, the Player lodged a claim against the Club in front of the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting that the Club be ordered to pay the following amounts to the Player:

    Outstanding remuneration in the amount of USD 558,332 as follows:

    - the monthly salaries for May and June 2017, in the amount of USD 64,166 each, plus 5% interest p.a. as of 2 August 2017;
    - the monthly salary for July 2017 in the amount of USD 70,000, plus 5% interest p.a. as of 2 August 2017;
    - the amount of USD 360,000 as sign-on fee for the 2017/2018 season, as per Article 4 of the contract, plus 5% interest p.a. as of 2 August 2016.

    Compensation for breach of contract in the amount of USD 840,000 as follows:

    - USD 840,000 as residual value of the contract in the period between August 2017 and July 2018, corresponding to twelve monthly payments of USD 70,000 each, plus 5% interest p.a. as of the date of the arbitration decision.

    Finally, the Player requested that sporting sanctions be imposed on the Club and that the Club be ordered to pay his legal costs.

27. On 4 September 2017, FIFA sent the Player's claim to the Club and it was invited to submit its reply to the Player's claim before 24 September 2017.

28. On 21 September 2017, the Club asked for a deadline extension which was granted until 4 October 2017.

29. On 4 October 2017, the Club contacted FIFA stating that parts of the Player's claim and evidence was illegible and asked FIFA to resend the claim. The Club also informed FIFA that it was preparing a counterclaim in this matter.

30. On 5 October 2017, FIFA replied to the Club's request which it interpreted as a second request for an extension of the deadline, *"denying it based on art. 16 par. 12 of the Procedural rules"* and simultaneously closed the investigation phase.

31. On 5 October 2017, the Club replied to FIFA claiming it had not requested a second extension but rather a clear, readable and acceptable copy of the Player's claim in order to lodge a counterclaim against the Player for breach of contract without just cause.

32. On 30 October 2017, the Player informed FIFA that he had signed an employment contract with the Belgian club KV Mechelen, valid as from 12 October 2017 until 30 June 2019 (the "Mechelen Contract") and provided FIFA with a copy of the Mechelen Contract. Based on this document, the Player was entitled to receive a monthly salary of EUR 10,000 net, as well as a signing-on fee of EUR 210,000 gross. According to the Player this amounted to EUR 172,143 net for the 2017/2018 season.

33. On 8 January 2018, the Player left Mechelen and signed a new employment contract with Club Brugge NV (the "Brugge Contract"). The details of the Brugge Contract were not sent to FIFA.

34. On 25 January 2018, the FIFA DRC issued a decision in this case partially accepting the claim of the Player (the "Appealed Decision") as follows:

> *"1. The claim of the Claimant Ivan Tomecak, is partially accepted.*
>
> *2. The Respondent, Al Nassr FC, has to pay to the Claimant within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of USD 558,332, plus 5% interest p.a. as of 2 August 2017 until the date of effective payment.*
>
> *3. The Respondent has to pay to the Claimant within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 560,000, plus 5% interest p.a. on said amount as from 25 January 2018 until the date of effective payment.*
>
> *4. In the event that the amounts due to the Claimant in accordance with the abovementioned numbers 2. and 3. are not paid by the Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *5. Any further claim lodged by the Claimant is rejected".*

35. On 22 March 2018, FIFA notified the grounds of the Appealed Decision to the Parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

36. On 12 April 2018, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), the Club filed a Statement of Appeal at the CAS against the Player and FIFA challenging the Appealed Decision. The Club requested a sole arbitrator for the present proceeding pursuant to Article R40.1 of the CAS Code. The Club also requested the suspension of the time limit for filing the Appeal Brief until production of a complete clean copy of the Player's claim before the FIFA DRC by registered mail pursuant to Article R32.3 of the CAS Code. The Club also requested the following prayers for relief:

> *"(a) To declare the jurisdiction over the present dispute.*
>
> *(b) To accept the appeal against the decision adopted by FIFA on 25 January 2018.*
>
> *(c) to set aside the decision by the DRC and referred the case back to FIFA as Court of first instance, or in the alternative*
>
> *(d) To annul the challenged decision and issue a new decision establishing whether the PLAYER or the CLUB terminated or not the Employment Contract, and, in the affirmative, whether the termination was with or without just cause, and therefore to consider that the amount of compensation is obviously wrong, excessive, disproportionate, incorrectly determined and in violation of the law applicable to the dispute and relevant jurisprudence because FIFA did not take into account the contract signed with CLUB BRUGGE valid from January 2018 until 30 June 2021 in breach of the doctrine of mitigation or article 337 of the Swiss code of obligations.*
>
> *And in any case, that:*
>
> *(i) The costs related to the present arbitration shall be borne by the Respondent.*
>
> *(ii) The Respondent shall pay the legal fees and other expenses incurred by Al Nassr Saudi Club in connection with the present arbitration procedure".*

37. On 20 April 2018, the Player informed the CAS Court Office that he opposed the request by the Club for the suspension of the time limit for filing its Appeal Brief as well as opposing the Club's request for the case to be submitted to a sole arbitrator preferring it to be submitted to a panel of arbitrators.

38. On 23 April 2018, the FIFA informed the CAS Court Office that they too opposed the Club's request for the suspension of the time limit for filing its Appeal Brief and concurred with the Player on the case being submitted to a panel.

39. On 27 April 2018, the CAS Court Office informed the Parties that the request by the Club in relation to suspending the time limit for filing its Appeal Brief was denied and ordered that the Appeal Brief be filed within 5 days. The CAS Court Office also informed the Parties that the

Division President had decided to submit the matter to a three-member panel pursuant to Article R50 of the CAS Code.

40. On 27 April 2018, the Club requested a 5 day extension to file its Appeal Brief pursuant to Article R32 (2) of the CAS Code and nominated Diego Ferrari as an arbitrator pursuant to Article R40.2 of the CAS Code.

41. On 30 April 2018, the CAS Court Office informed the Parties that the Club's request for a 5 day extension to file its Appeal Brief had been granted pursuant to Article R32.

42. On 4 May 2018, the Player informed the CAS Court Office that he nominated Bernhard Welten as an arbitrator.

43. On 7 May 2018, FIFA agreed to the nomination of Bernhard Welten.

44. On 7 May 2018, pursuant to Article R51 of the CAS Code, the Club submitted its Appeal Brief with the CAS Court Office. The Appeal Brief contained the following prayers for relief:

> *"(a) Accept this appeal against the decision passed by the FIFA Dispute Resolution Chamber on 25 January 2018, grounds of which were duly notified to the parties on 22 March 2018 (Ref. Nr. 17-01310/pam);*
>
> *(b) Annul the Decision and refer the case back to the previous instance, in particular, to the FIFA Dispute Resolution Chamber;*
>
> *(c) Alternatively, and only in the event the above requests are not granted, decide that Mr. Ivan Tomecak terminated the Employment Contract without just cause and condemn Mr. Ivan Tomecak to pay compensation to the Club in the amount of USD 1,914,996 (one million nine hundred fourteen thousand nine hundred ninety-six dollars); In addition, ban Mr. Ivan Tomecak from playing official matches for a period of six months in accordance with Article 17.3 of the FIFA RSTP;*
>
> *(d) On a further alternative, and only in the event the above requests are rejected, and it is considered that Al Nassr breached the Employment Contract without just cause, decide that Al Nassr has no overdue payables towards Mr. Ivan Tomecak and decide that Mr. Ivan Tomecak is not entitled to receive any compensation from Al Nassr. Alternatively, and only in the event the Panel decides that Mr. Ivan Tomecak is entitled to compensation, decide that all amounts received by Mr. Ivan Tomecak under his new employment contracts shall be deducted from any compensation awarded in favour of Mr. Ivan Tomecak.*
>
> *(e) Condemn the Respondents to pay the whole CAS administration and the Arbitrator fees.*
>
> *(f) Fix a minimum sum of 30,000 CHF to be paid by the Respondents as a contribution to the Appellants legal fees and costs".*

45. On 18 June 2018, pursuant to Article R55 of the CAS Code, FIFA submitted its Answer to the CAS Court Office requesting the following prayers for relief:

"1. That the CAS rejects the present appeal and confirms the presently challenged decision passed by the Dispute Resolution Chamber (hereinafter: the DRC or the Chamber) on 25 January 2018 in its entirety.

2. That the CAS orders the Appellant to bear all the costs of the present procedure.

3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand".

46. On 18 June 2018, pursuant to Article R55 of the CAS Code, the Player submitted his Answer to the CAS Court Office. His Answer contained the following prayers for relief:

"A. The present statement of defence dated 18 June 2018 is admissible.

B. The Appeal Brief lodged by Al Nassr Saudi Club is dismissed.

C. The challenged decision passed on 25 January by the Dispute Resolution Chamber of the Federation Internationale de Football Association (hereinafter: "The FIFA DRC") is confirmed in its entirety.

D. All the legal expenses and costs of the Respondent must be borne by the Appellant Al Nassr Saudi Club.

E. The First Respondent reserves its right to amend, explain, complement, add and/or expand upon the allegations set out in its Statement of defence and/or the relief sought".

47. On 1 June 2018, pursuant to Article R54 of the CAS Code and on behalf of the Deputy 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, United Kingdom
Arbitrators:	Mr. Diego Ferrari, Attorney-at-law in Buenos Aires, Argentina
	Mr. Bernhard Welten, Attorney-at-law in Bern, Switzerland.

48. On 20 June 2018, the Player confirmed to the CAS Court Office that he did not consider a hearing to be necessary in this matter.

49. On 21 June 2018, FIFA also confirmed to the CAS Court Office that they did not consider a hearing to be necessary in this matter.

50. On 22 June 2018, the Club confirmed to the CAS Court Office that they wanted a hearing to be held in this matter.

51. Also on 22 June 2018, the CAS Court Office wrote to FIFA requesting its case file and to the Player requesting a copy of the Brugge Contract.

52. On 27 June 2018, the Player provided a copy of the Brugge Contract to the CAS Court Office and the day after, on 28 June 2018, FIFA provided it with a copy of its case file. Both were then forwarded to the Parties.

53. On 28 June 2018, the CAS Court Office pursuant to Article R57 of the CAS Code informed the Parties that the Panel had decided that a hearing would be held in this matter.

54. On 5 July 2018, the CAS Court Office informed the Parties that the hearing would take place on 11 September 2018.

55. On 9 July 2018, the CAS Court Office wrote to the Appellant requesting a translation of exhibits 10, 12, 16, & 21 and legible copies of exhibits 10 & 16.

56. On 11 July 2018, the CAS Court Office sent the Order of Procedure to the Parties for signature.

57. On 16 July 2018, the CAS Court Office received the documents requested from the Appellant on 9 July 2018 and gave the Respondents 7 days to comment.

58. On 11, 12 and 18 July 2018, FIFA, the Player and the Club have signed the Order of Procedure. The Club corrected the amount in dispute from USD 1'118'332 to an amount of USD 1'914'996.

59. On 19 July 2018, FIFA responded to the CAS Court Office correspondence of 16 July 2018 by confirming that they had nothing to add to what had been filed in their Answer.

60. On 25 July 2018, the Player responded to the CAS Court Office correspondence of 16 July 2018 concluding that *"On the basis of the foregoing and the First Respondent's allegations from Statement of defence, it therefore remains clear a) that the Appellant was, as from the very beginning of the Employment Contract, constantly and in a fully non-justified manner in significant delay with the salary payment, (b) that the Appellant did not pay the First Respondent's salaries for the months of May 2017, June 2017 and July 2017, as well as also the signing-on fee premium for 2017/18 season, facts which for themselves represent a grounded just cause for the termination of the employment contract"*.

61. The hearing was held on 11 September 2018 in Lausanne, Switzerland. In addition to the Panel and CAS Counsel, Mr. Antonio de Quesada, the following persons attended the hearing:

The Club: Mr. Daniel Muñoz Sierra, legal counsel;

The Player: Messrs. Nikola Badovinac and Johann Weiss, legal counsel;

FIFA: Ms. Livia Silva Kägi, internal counsel.

62. At the hearing, the Club sought to produce a new chart that aided its submissions on the payments it had made to the Player, however, the Respondents objected to this. The Panel determined that there were no exceptional circumstances that would justify the late filing of this chart, so determined to refuse to accept it to the CAS file.

63. The Parties had the opportunity to present their factual and legal arguments, as well as to answer the Panel's questions. At the end of the hearing, all Parties confirmed that their rights to be heard and to be treated equally had been respected in the present proceedings.

64. Following a request from the CAS Court Office on 14 January 2019, the Player confirmed on 17 January 2019 that his gross variable income (bonus payments) from the Brugge Contract for the 2017/18 season was EUR 42,851.24.

IV. THE PARTIES' SUBMISSIONS

65. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Club's Submissions

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

1. FIFA's violation of the Club's procedural rights and of the principle of due process

66. The Club submitted that there were serious procedural flaws committed by the FIFA DRC in this matter in that they ignored the basic principles of procedural fairness. It cited Article 5 of the FIFA Procedural rules as follows: *"Subject to any provision to the contrary, all parties in the proceedings shall be granted the right to be heard, the right to present evidence, the right for evidence leading to a decision to be inspected, the right to access files and the right to a motivated decision".*

67. The Club submitted that its request on 4 October 2017 for a legible copy of the Player's claim was ignored by FIFA and prevented them from providing their position on the claim by the deadline set on 5 October 2017. The deadline had already been extended to submit their response to the claim and FIFA rules do not permit a further extension. Notwithstanding this, the Club maintained that they never requested a second extension merely a legible copy of the claim.

68. The Club further submitted that as a consequence of their actions, *"FIFA divested the Club from all the procedural rights and thus, did not endeavour the fundamental principles of procedural fairness in accordance with Swiss Law* (see Swiss Federal Tribunal in the Judgement 11 Jun 2001, 4p. 64/2001, ATF 127 III 429, consid. 2d ibidem) *and its own regulations".*

69. The Club also submitted that in the light of the above *"the present case must be, in accordance with Article R57 of the Code dismissed and referred back to FIFA in view of the (i) serious violations of the fundamental procedural rights of the Club, (ii) the severe procedural flaws and in essence, (iii) to avoid denying one level of justice to the Club by depriving the Club of the right of having the case heard by a first instance body".*

2. The Player's unilateral termination of the Employment Contract without just cause

70. The Club submitted that *"despite the player being aware that the Club had complied with all its contractual obligations, on 2 August 2017, the Player decided to unilateral terminate the Employment Contract without just cause".*

71. The Club submitted a chart in order to *"highlight that until this moment, the Club had complied with all its financial obligations towards the player".*

Date of Payment	Monthly Instalment	Amount in SAR	Amount in USD	Proof of Payment
1 Aug 16	Advance Payment		330,000	Exhibit 4
3 Nov 16	August 2016	240,623	64,166	Exhibit 10
3 Nov 16	September 2016		64,166	Exhibit 11
17 Nov 16	October 2016	240,819	64,166	Exhibit 12
1 Dec 16	November 2016 December 2016	349,290	64,166 64,166	Exhibit 13
8 Feb 16	January 2017	240,943	64,166	Exhibit 14
18 Apr 17	February 2017 March 2017 April 2017 May 2017	962,490	256,664	Exhibit 15
17 Jul 17	June 2017	249,943.33	64,616	Exhibit 16

72. The Club submitted that the chart and its contents demonstrated that *"the Player's full entitlements until the date of the contractual termination without just cause of the Player"* were met. At the hearing, the Club's position was that only USD 35,000 was due to the Player, as the 1 December 2016 payment in the chart was actually for 1 ½ instalments, so that remaining ½ instalment remained outstanding. The Club also submitted that as the first advance was paid on 2 August 2016, the Player had accepted that the second advance would be paid on 2 August 2017.

73. So the actual outstanding sum of USD 35,000 was not enough to meet the requirements of Article 6 of the Contract, as such, to argue he had "just cause" under Article 14 of the RSTP, then, following CAS jurisprudence, he must give the Club notice of his intention to terminate the Contract. However, his demands were made in relation to sums that had not fallen due yet (such as the second advance). Once that was due, on 1 August 2017, then the notice should have come, but instead the Player simply terminated the Contract the next day.

74. The Club further submitted that the Player's *"unauthorised leave"* in May 2017 and his failure to return on time for pre-season training on 14 June 2017 were serious contractual violations for which disciplinary proceedings were initiated.

75. The Club further submitted that in relation to Article 6 of the Contract where the delay of *"an aggregate three wages"* would be considered as a just cause to terminate the Contract, the amount equivalent to three wages is USD 274,999 and not USD 192,498. The rationale for this argument is that although the Contract includes an advance of USD 330,000, the monthly wage is still technically USD 91,666 (Annual wage is USD 1,100,000). The Club concluded on this point that, *"even if the Club would not have paid the monthly instalments of May, June and July, it would not have constituted a just cause in accordance with the definition of three delayed wages pursuant to the Employment Contract"*.

3. Compensation due to the Club for the Player's breach of contract without just cause

76. The Club submitted that it is entitled to receive financial compensation from the Player as a result of his termination of the Contract without just cause.

77. Further, the Club submitted that in this regard, Article 17 of the FIFA RSTP provides the consequences of terminating the contract without just cause. In line with Article 17 of the FIFA RSTP, the amount of compensation *"shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, 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"*.

78. The Club cited the award CAS 2008/A/1519 and CAS 2008/A/1520 to submit that the principle of *"positive interest"*, *i.e.* putting the injured party in the position it would have been in, had there been no breach, shall be applied to calculate the compensation in the present case.

79. Further, the Club submitted that as a starting point in order to calculate the compensation, the market value of the Player needed consideration. The Club calculated this at USD 1,200,000 based on the remuneration left on the Contract and the initial transfer fee paid being zero.

80. Further, the Club submitted that total fees and expenses incurred by the Club were USD 165,000 and should be included in any compensation awarded.

81. The Club also cited the awards CAS 2013/A/3411 and CAS 2008/A/1519-1520 (see above) in relation to compensation based on specificity of sport and concluded that *"Considering the particular circumstance of the case, the unexpected behaviour of the Player and the unilateral breach of contract during the protected period, it is irrefutable that the principle of specificity of sport shall be considered in the present case. In this regard, the Appellant considers, in line with CAS Jurisprudence that an additional indemnity of 6 months of the salary – USD 91,666*6 - shall be included to the compensation. Therefore, an amount equivalent to USD 549.996 (five hundred forty-nine thousand nine hundred and ninety-six dollars) shall be awarded as specificity of sport"*.

82. Finally, in relation to the total amount of compensation, the Club submitted, *"it is undisputed that in accordance with Article 17 FIFA RSTP, the Club is entitled to receive from the Player the amount of USD 1,914,996 (one million nine hundred fourteen thousand nine hundred ninety-six dollars) as compensation for the Player's unilateral termination without just cause prior to the expiring term of the Employment Contract".*

4. Sporting Sanctions for the Player for terminating the Contract without just cause

83. The Club cited Article 17.3 of the FIFA RSTP and submitted *"The Employment Contract was signed on 18 July 2016, prior to the 28th birthday of the Player. Therefore, the three-year protected period had yet to expire when the Player unilaterally terminated the contract without just cause on 2 August 2017. In accordance with the aforementioned regulations and considering the particular circumstances of the case the Player must be banned from playing official matches for a period from four to six months".*

5. Alternatively, the Player's termination of the Employment Contract with just cause

84. The Club cited the awards CAS 2015/A/4206, CAS 2015/A/4209 and CAS 2015/A/3891 in relation to the consideration given to the signing of new employment contracts when calculating compensation for termination by a player with just cause.

85. Further, the Club submitted that *"in accordance with Swiss law and the well-established CAS jurisprudence, it is irrefutable that the new remuneration under all the new employment contracts must be deducted from the final compensation calculated by CAS in order to mitigate damages in accordance with Swiss Law and CAS Jurisprudence".*

86. Finally, the Club concluded *"in the unlikely event Al Nassr has to pay any compensation to Mr. Tomecak, the new remuneration under the new employment contracts signed up until today shall be definitely used to mitigate the final amount of compensation and thus, reduced from the amount of compensation USD 560.000 (five hundred sixty thousand dollars) awarded by FIFA".*

87. At the hearing, the Club also submitted that the Player had shown bad faith in his attempts to leave the Club. He delayed his return for the second season due to "illness", he then sought to claim his second advance from his letter 10 July 2017, looking to rely on an obvious typo in the Contract, claiming it was due on 1 August 2016. It was obvious that the second advance was not due until August 2017. The Player made termination proposals to the Club, not the other way round, as he clearly had another club to join.

B. The Player's Submissions

In summary, the Player submitted the following in its Answer to the Appeal of the Club.

1. As to FIFA's alleged procedural flaws

88. Further, the Player submitted that, notwithstanding the extension of 10 days given to the Club to file its reply to his claim, *"the First Respondent also found it quite odd - to say the least - that the Appellant had only raised the fact that everything, that was received from FIFA, was allegedly not entirely*

legible, on the very last day of the granted time limit, this after having had 30 (thirty) days - that is, one month! - in total, in order to analyse the relevant documentation".

89. The Player concluded on the basis of what had transpired that *"FIFA acted in perfect accordance with the most fundamental legal and regulatory provisions governing its proceedings, guaranteeing consequently to both parties the possibility to be formally heard".*

2. As to the First Respondent's termination for just cause

90. The Player noted that the Club considered that he did not have just cause to terminate the Contract as he:

> *"a) apparently did not have permission to leave the club on Saturday 6 May 2017,*
>
> *b) allegedly did not resume his duty as a football player to the club on Wednesday 14 June 2017, but only on Sunday 18 June 2017, and*
>
> *c) was allegedly paid all his financial dues, as per the employment contract signed between the parties".*

91. Taking these in turn, in relation to a) the Player submitted that the Club did indeed issue an exit visa following several requests by the Player and by doing so *"obviously authorised the First Respondent's absence as from that date".*

92. Next, in relation to b) the Player submitted that he had a valid reason for returning to the Club for pre-season training on the 18 June 2017 instead of 14 June 2017 as he was ill (and a medical certificate dated 12 June 2017 was forwarded to the Club). This was communicated to the Club on 13 June 2017 and subsequently new flight tickets were issued by the Club.

93. Finally, in relation to c) the Player submitted that the *"Appellant club pretends to have paid the player his entire due remuneration as per the Contract and provides - as alleged evidence of such - several receipts. After a careful examination of the whole documentation, the Panel will easily deduct and conclude that none of those receipts proves in fact the payment of the salaries of May, June and July 2017, as well as of the signing-on fee premium for the 2017/18 season, by the Appellant club in favour of the Player. First of all, it remains rather evident that from the 7 (seven) receipts provided (cf Exhibits 10 to 16 of the Appeal Brief), 6 (six) of them relating to payments never claimed by the Player in front of the FIFA DRC, as they are dated from 3 November 2016 until 18 April 2017. The seventh receipt, dated 17 July 2017, "clearly" - it is relative (sic) because it is the only clear element of said document - refers to the payment of the "salary of April 2017", which the First Respondent confirmed to have received, after he had put the Saudi club in default on Monday 10 July 2017".*

94. Further, the Player submitted *"therefore, one can and will easily notice and deduct that the Appellant club was incapable to prove the payment of the Player's salaries for the months of May, June and July 2017, as they had obviously remained outstanding by the time the Player had notified his termination of the Contract to his employer, the Appellant".*

95. At the hearing, the Player's lawyers took the Panel through the various exhibits produced by the Club and referred to in its chart of alleged payments. It was acknowledged that the 30%

advance payment was made at the beginning of August 2016. Then, as regards the instalments: the receipts showed that the Club made an instalment payment for ½ of July 2016; one for the August instalment; another one that wasn't expressly specified (but the Player asserted was for the September instalment); the October one was made at the same time as the July part payment; the November instalment was paid separately in January; with the December, January, February and March instalments all paid in one payment; and with the final payment being made covering the April instalment. The Club's own exhibits confirmed that the May, June and July 2017 instalments were never paid. At the hearing, the Player's lawyers denied that two payments were made on 3 November 2016, with one being in cash. Their position was that the payment was made to the coach of the Club by cheque (as the Player didn't have a bank account) and he then gave the cash to the Player. It was just one payment.

96. The Player submitted that the advance of salary for the second year was also outstanding albeit by one day when he terminated the Contract with just cause.

97. Notwithstanding the failure to pay the Player's remuneration above, the Player cited the award CAS 2013/A/3330 and submitted that he had another justified reason to terminate the Contract as a result of the Club's *"permanent behaviour of continuously delaying the payment of the Player's salaries"*.

98. Further, the Player submitted that it was only on 18 April 2017 that the Club finally paid the Player's salaries for the months of December 2016, January 2017, February 2017 and March 2017 despite various default notices being sent by the Player to the Club. The Player also submitted that there were also earlier delays in that his salary for the months of August 2016 and September 2016 were only paid on 3 November 2016.

99. In conclusion, the Player submitted that *"On the basis of the foregoing, it therefore remains clear a) that the Appellant club was, as from the very beginning of the Employment Contract, constantly and in a fully non-justified manner in significant delay with the salary payment, b) that the Appellant club did not pay the Player's salaries for the months of May 2017, June 2017 and July 2017, as well as also the signing-on fee premium for the 2017/18 season, facts which for themselves represent a grounded just cause for the termination of the employment contract"*.

3. Financial and sporting consequences of the breach of contract

100. The Player submitted that *"according to the general legal principle of "pacta sunt servanda", which in essence means that contracts must be respected and their binding clauses complied with, the Appellant club is liable for the premature termination of the Employment Contract and should therefore bear the financial consequences of this breach"*.

101. The Player further submitted that *"regarding the compensation due for breach of contract, in the absence of any reciprocal and legitimate termination clause, this honourable Court will have to establish the amount to be awarded to the First Respondent, in accordance with the applicable disposition of article 17 of the FIFA RSTP"*.

102. Moreover, *"According to article 17 paragraph 1 of the FIFA RSTP, the amount of compensation shall be assessed and calculated - unless otherwise provided for in the contract at the basis of the dispute - with a) due consideration for the law of the country concerned, b) the specificity of sport and c) further objective criteria,*

including in particular i) the remuneration and other benefits owed to the player under the existing contract and/or a new contract, ii) the time remaining on the existing contract up to a maximum of five years, and iii) depending on whether the contractual breach falls within the protected period".

103. Consequently, the Player submitted that the amount of compensation due was USD 560,000 plus interest at a rate of 5% from the date of the FIFA DRC decision. This figure reflected the Mechelen Contract which reduced the compensation down from USD 770,000.

104. At the hearing, the Player acknowledged that there had been further mitigation due to the Brugge Contract, but he requested that the Panel calculate the mitigation.

105. The Player concluded on this point with the following, *"it remains evidently clear that the Appellant club was granted a due and lawful process and that the relevant Right To Be Heard in front of the FIFA DRC was fully respected, and that the latter correctly as well as in accordance with the FIFA RSTP, with the most well-established jurisprudence of the FIFA DRC - confirmed on several occasions by this honourable Court - and with the legal principles of burden of proof (cf. article 8 of the Swiss Civil Code) and "pacta sunt servanda", concluded that the First Respondent had terminated the contract with just cause on 2 August 2017, was therefore entitled to his outstanding remuneration, as per the Contract, as well as to an amount of compensation due for the unlawful breach committed by the Appellant club".*

C. FIFA's Submissions

In summary, FIFA submitted the following in its Answer to the Club's Appeal.

1. Due process of law

106. FIFA submitted that *"the Chamber always acted in accordance with its procedural regulations and in the sense of providing for a due process of law for both parties. Furthermore, it becomes obvious that the Appellant, however, acted in procedural bad faith from the beginning of the procedure and continues to do so in the context of the present appeal, by attempting to delay the most it can the final resolution of the case, based on mere assumptions, without a legal basis and without any type of supporting evidence".*

107. Further, FIFA submitted that the Club's main arguments are *"very improbable"* as their claim that the documentation was not legible was not supported by any type of documentary evidence and was only flagged up after thirty days and one day before the extended deadline.

108. FIFA submitted that it rejected the Club's claim that no second extension of the deadline had been requested, but rather a confirmation that a counterclaim could still be lodged and therefore it misinterpreted the Club's letter of 4 October 2017. FIFA submitted that *"At this point, we deem it important to refer to the wording of art. 224 of the Swiss Civil Procedure Code (hereinafter: the Swiss CPC), applied subsidiarily to the various regulations of FIFA (cf. art. 57 par. 2 of the FIFA Statutes), which we here quote:*

"Art. 224 Counterclaim

1. The defendant may file a counterclaim in the statement of defence if the claim made by the defendant is subject to the same type of procedure as the main action.

In this same context, we also refer to the clear wording of art. 9 par. 3 of the Procedural Rules, which second and third sentences stipulate the following:

"If no Statement or reply is received before the time limit expires, a decision shall be taken upon the basis of the documents already on file. Submissions received outside the time limit shall not be taken into account".

109. Further, FIFA submitted that, *"from the combination of both aforementioned legal and regulatory provisions it is clear that a counterclaim must be submitted together with the reply to a claim and that, in case this is not done before the time limit expires, a decision shall be taken upon the basis of the documents already on file. As per art. 16 par. 12 of the Procedural Rules (edition 2017), "if a substantiated request is submitted before the time limit expires, an extension of ten days may be granted, but only once". And in accordance with art. 9 par. 4 of the Procedural Rules, "the parties shall not be authorised to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the Closure of the investigation". Having said that, it is obvious that, even though the words "deadline extension" were not explicitly mentioned by the Appellant in its letter of 5 October 2017, this is the only logical conclusion that can be drawn from its content. In any case, we must point out that, in spite of the threatening tone of the Appellant's letter, it never lodged a counterclaim against the player in front of the DRC".*

110. Consequently, FIFA concluded that *"the DRC proceedings leading to the appealed decision were conducted in perfect accordance with the regulatory and legal provisions governing them, and that the appealed decision must be confirmed in its entirety".*

2. Breach of Contract

111. FIFA submitted that *"in the present appeal, the Appellant does not provide any type of substantial documentary evidence which would justify a change in the conclusion reached by the FIFA DRC that the Contract was terminated by the player with just cause on 2 August 2017".*

112. Further, FIFA submitted that it rejected the Club's arguments that the First Respondent did not have a just cause to terminate the contract for the three grounds cited above. FIFA's arguments on points a), b) and c) were in line with those submitted by the Player.

113. FIFA further concluded that in regard to point c) - *"absolutely no evidence of the payment of the player's salaries for May, June and July 2017 was submitted by the Club and, as the DRC correctly concluded, they remained outstanding by the time of termination. We also take note of the Appellant's argument that the sign-on fee for the 2017/2018 season was in fact due on 1 August 2017 and not 2016 as stated in the contract and that this is the result of a clear clerical mistake. This is exactly the same conclusion reached by the DRC in point II.15 of the appealed decision. Therefore, the Chamber correctly concluded that on 2 August 2017, not only the salaries for May to July 2017 had remained unpaid, but also the sign-on fee due, which fell due on 1 August 2017".*

114. Finally, FIFA submitted that in line with a previous CAS award involving the Club Al Nassr Saudi Club v. Clube de Regatas Flamengo and because of its *de novo* competence, the CAS should refuse the Appellant's request to refer the entire case back to the FIFA DRC to start anew its analysis.

3. Financial and sporting consequences of the breach of contract

115. FIFA submitted that although Article 17 paragraphs 3 and 4 obligates the imposition of a sporting sanction on a player or a club for breach of contract without just cause there is well-established jurisprudence of the FIFA DRC that creates a more flexible approach. Further, FIFA submitted that *"CAS has deemed that there is a well-accepted and consistent practice of the DRC not to apply automatically the sanctions stipulated in ar. 17 par. 3 and 4 of the Regulations (cf. CAS 2007/A/1359 FC Pyunik Yerevan v. E., AFC Rapid Bucaresti & FIFA). In particular, in paragraph 57 of said decision, CAS deemed that such an interpretation of the Regulations "represents the real meaning of the provision as it is interpreted, executed and followed within FIFA".*

116. FIFA further submitted that clubs have no standing (see CAS 2014/A/3707 (cf. paras. 168, 169 and 170)) to request a sporting sanction on a player as the imposition of such sanctions is *"an exclusive prerogative of the DRC"*. In light of this FIFA submitted that it deems that no sporting sanction should be applied to the Player.

117. Finally, FIFA submitted that *"In case new information regarding the player's contractual situation after the termination, during the relevant period until the original expiry date of the contract concluded with the Appellant, is brought up only during the course of the appeal proceedings, we leave it up to the appreciation of CAS".*

V. JURISDICTION

118. Article R47 of the CAS Code provides as follows:

> *"An appeal against a 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".*

119. The jurisdiction of the CAS, which was not disputed, derives from Article 67.1 of the FIFA Statutes (2015 edition) as it determines 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".*

120. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by the Parties.

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

VI. ADMISSIBILITY

122. The Statement of Appeal, which was filed on 12 April 2018, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee. Further, it was filed within the 21-day time limit required by both the Article 58.1 of the FIFA Statutes and Article R49 of the CAS Code.

123. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

124. Article R58 of the CAS 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".*

125. Article 57(2) of the FIFA Statutes provides 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".*

126. Further, the Parties unanimously submitted that the various regulations of FIFA should apply, with Swiss law applying on a subsidiary basis.

127. In light of the above, the Panel is satisfied that the various regulations of FIFA are applicable, with Swiss law applying to fill in any gaps or *lacuna* within those regulations.

VIII. MERITS

A. The Main Issues

128. The Panel notes that the main issues before it are:

a. Whether the Panel should enter into the merits or send the matter at hand back to the FIFA DRC;

b. If the Panel determined to enter into the merits, which party breached the agreement and was this with or without just cause?

c. What are the financial implications of the breach?

d. What are the sporting implications of the breach?

a. Should the Panel enter into the merits or send the matter at hand back to the FIFA DRC?

129. At the hearing, the Club withdrew its requests for the matter to be sent back to the FIFA DRC. It was content for the Panel to enter into the merits, pursuant to Article R58 of the CAS Code.

130. The Panel has all it needs to render its decision and sees no need to send the matter back to the FIFA DRC.

b. Which party breached the agreement and was this with or without just cause?

131. The Panel notes that there was a marked difference between the positions of the Club and the Player as to how much monies had been paid to the Player by the Club as at 2 August 2017, when the Player terminated the Contract. The Club's position was that everything had been paid, whereas the Player claimed that 3 instalments were due and that the advance for the second year had fallen due too. This was partly due to the poor drafting of the Contract and fully understanding when payments fell due.

132. At the hearing, the Panel requested the Parties to state when they believed the payments fell due under the Contract and then asked them to allocate the various payments made to the contractual instalments.

133. It was common ground that the Contract commenced on 18 July 2016. It was also common ground that an advance of salary (not a signing on fee, as the Player did at times refer to in his written submissions) of 30% of the first year's salary was due on 1 August 2016. The Club, in its chart contained in its written submissions suggested this was paid on the due date, but at the hearing, the Club submitted it was paid on 2 August 2016. It was further common ground that the remaining 70% of the salaries were divided into 12 equal instalments to be paid at the end of the subsequent month.

134. Where the Club and the Player differed was on whether the instalments should relate to a calendar month (with the first being for the month of August 2016, to be paid at the end of September 2016) or should be monthly (so should run from the 18th of one month until the 17th of the next month, to be paid at the end of that next month or even the month after – by example, the first could run from 18 July to 17 August 2016, to be paid at the end of August or at the end of September 2016, depending on the interpretation of the Contract). A further alternative was to pay a ½ month as the first instalment, followed by 23 full instalments and a final ½ month at the end of the second year.

135. Whilst this last alternative would seem to ignore the wording of the Contract (which envisaged 12 instalments each year, so 24 in total, rather than 23 full and 2 part instalments), the Panel noted that the receipts and proofs of payments showed that the Club did pay ½ a month for July, when it also made the full October payment.

136. The Panel interpreted the Contract as obliging the Club to pay a ½ monthly instalment for July 2016 at the end of the subsequent month, which would be by the end of August 2016; then a

full instalment for August 2016, by the end of September 2016, and so forth, so that the May 2017 instalment would be due by the end of June 2017 and the June 2017 instalment would be due by the end of July 2017, meaning that the July 2017 instalment would not be due on 2 August 2017 when the Player terminated the Contract.

137. In relation to the second advance, the Player accepted the position that FIFA took, that there was an obvious mistake in the Contract. There had been a copy/paste of the date for the payment of the first advance included with wording relating to the second advance. It was accepted by the Panel that the second advance would be due on 1 August 2017, not on 1 August 2016.

138. Following on from that, the Club submitted that the Player accepted the first year's advance a day late and therefore this allowed the Club to also pay the second year's advance a day late, on 2 August 2017. As such, this sum was not overdue when the Player terminated.

139. The Panel rejected this line of argumentation from the Club. Firstly, there was no clear evidence that the Player received the first advance a day late (and the Club contradicted itself on this point in its own chart), and even if this was the case, secondly, this would not mean that the Player had agreed to a variation of the payment date of 1 August 2017.

140. Having established the due dates for the various payments, the Panel's next task was to consider the payments that were actually or allegedly made, in an attempt to determine what sums were due on 2 August 2017 and whether these triggered Article 6 in the Contract or otherwise constituted "just cause".

141. As a general comment, it did appear to the Panel that the Club did not pay in accordance with the Contract and that the Player was perhaps not totally aware of what payments he was supposed to receive and when. The Player also took some time to open a bank account, so some payments were made to third parties on his behalf, which did not help the confusion.

142. In total, the Club claims it made 9 payments to the Player, as set out in its chart copied above at paragraph 71. Whilst this chart claims that the Club had paid USD 1,035,826 out of the first year's salaries of USD 1.1m in total, at the hearing the Club claimed that it was only ½ of an instalment in arrears, roughly USD 32,000.

143. Also, at the hearing, the Player acknowledged that perhaps the July 2017 instalment was not due until the end of August 2017, but the instalments of approximately USD 64,000 each for May and June 2017 were due, as was the second advance in the sum of USD 360,000. The Player claimed that only 8 payments had been paid and that the 2 payments the Club claimed were made on 3 November 2016 were in fact the same payment. The instalment (for September) was paid to his coach's bank account by the cheque made out to him, who then gave the Player the same amount in cash. He signed to acknowledge the instruction to pay approximately USD 64,000 to the coach and then he signed a receipt to say he had received the cash, but it was not two payments.

144. The Panel recalls, that the wording in the Contract, at Article 6, was as follows:

"Delay of payment of an aggregate of three (3) monthly wages would be considered as a just cause for termination without prior notice".

145. Further, that the monthly salaries for the first year were USD 91,666 and for the second year were USD 100,000. The instalments were less, as 30% of the wages were paid up front as an advance and the 12 instalments were an equal 1/12th of the 70% balance. The Panel accepted that for Article 6 to be triggered the amount due would have to be equal or greater to 3 monthly salaries (*i.e.* 3 x USD 91,666 or USD 100,000 depending on when the Player looked to trigger Article 6) not 3 instalments (*i.e.* 3 x USD 64,166 or USD 70,000, again depending on the date of triggering the clause). The Panel noted that the Player terminated the Contract just into the second year, so to avoid any dispute and to favour the Club, there would need to be USD 300,000 due to the Player on 2 August 2017 when he terminated the Contract, if this was to be in accordance with Article 6 of the Contract.

146. Ultimately, the Panel concluded that the Player was owed in excess of this sum and was able to terminate the Contract on that date pursuant to Article 6. The Panel concluded that the second advance had fallen due and was not paid on time. The Panel noted that the Player sought to claim this sum in advance of it falling due on both 10 and 14 July 2017, which should have acted as an additional reminder to the Club that it needed to pay this second advance on time.

147. Further, from the receipts produced, the Panel were convinced that:

    a. the first year's advance of USD 330,000 was paid in early August (on the 1st or 2nd);

    b. the August 2016 instalment in the sum of approximately USD 64,000 was paid on 3 November 2016;

    c. the September 2016 instalment again in the sum of approximately USD 64,000 was paid on 17 November 2016;

    d. the ½ instalment for July 2016 was paid along with the October 2016 instalment as a total of approximately USD 96,000 on 1 January 2017;

    e. the November 2016 instalment again in the sum of approximately USD 64,000 was made on 8 February 2017;

    f. the 4 instalments for December 2016 and January to March 2017, in the total sum of approximately USD 256,000 was paid on 18 April 2017;

    g. with the April 2017 instalment again in the sum of approximately USD 64,000 being paid on 17 July 2017.

148. The Panel also notes that the correspondence between the Parties in July and early August 2017 repeatedly refers to the unpaid instalments being for May, June and July. This conflicts with the chart produced for these proceedings, in which the Club claims that the May 2017 instalment was paid on 18 April 2017 and that the June 2017 instalment was paid on 17 July 2017. The Panel rejects the Club's chart accordingly.

149. This then left the alleged second payment the Club claims it made in November 2016. The Panel had to determine whether the Player received two payments (one into his coach's bank account and one made to the Player direct in cash) or just one payment (that was to the coach by cheque and he then withdrew the cash and gave it to the Player).

150. The Panel noted that the Club was able to produce 2 documents of which the one dated 3 November 2016 was signed by the Player (the Player never submitted that this was not signed by him). The first one not being signed by the Player was dated 2 November 2016 and stated:

> *"As I still not open a national bank account, I … hereby order my employer Al-Nassr Saudi Football club to transfer my cash received salary on the date of 2 November 2016 in amount of … $64,166 … to following Bank account: Beneficiary name: Zoran Mamic …".*

151. The other, signed by the Player was dated 3 November 2016 and stated:

> *"… I have received an amount of $64,166… in cash from Nassr Saudi Club administration, this amount representing one salary according to the* [C]*ontract …".*

152. However, the receipts the Club produced did not reflect the alleged second payment and the translation of the wire instruction given to the bank and dated 3 November 2016 referred to *"Salary of August 2016 G to: MR. IVAN"*. The next wire of 17 November 2016 going to the coach's bank account referred to *"Advance on wage"*. The bank wire of 1 January 2017 is the first one going to the Player's bank account and it referred to *"Salary of July 2016 – Oct. 2016 G"* and it was in the amount of approximately USD 96,000.

153. Based on the general principle stated in Article 8 Swiss Civil Code, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact. This means that it is up to the Club to bring the evidence showing that on 2/3 November 2016 it paid the amount of USD 64'000 twice to the Player. One might have expected the Club to bring the coach to the hearing to testify or at least show an extract of the Club's bank account that it was debited twice with the amount of approximately USD 64'000. However, the Club did not bring any such evidence. Further, the remarks on the bank wires made by the Club clearly show that there was only one salary paid on 3 November 2016 to the coach which handed the amount over to the Player in cash. Therefore, as the Club did not prove this double payment of USD 64,000 on 2/3 November 2016, the Panel is of the opinion that the Player did receive on 3 November 2016 only once the amount of approximately USD 64,000 for the August salary.

154. The Panel further notes that there was the ongoing disciplinary process which the Club (despite in their chart at para. 71 above indicating that both the May and June 2017 instalments had been made) stated was sufficient for it to be entitled to withhold the May and June 2017 instalments, pending the outcome of that disciplinary process. It appears that the process was never concluded before the Player terminated the Contract. The Panel agreed with the position of the Player and FIFA, that he had given notice of his intention to go on holiday at the end of the season and even if 15 days' notice was supposed given in accordance with the wording of the Contract, the Club accepted lesser notice when it provided him with his exit visa to go home for the end of season break. The exact notice period is unclear, however, the Club in its written

submissions did refer to the Player having made "several requests". The Player also notified the Club of his illness, provided medical evidence and the Club again seemed to accept this when it changed his return air tickets. The Panel felt that these disciplinary proceedings were without merit and rejects the Club's position that it gave it grounds to withhold any monthly instalments

155. That said, ultimately whether he received the second payment or not in November 2016, did not affect his right to trigger Article 6 of the Contract. In this regard the Panel is satisfied that on 2 August 2017, there was the aggregate sum in excess of at least 3 monthly salaries due to the Player from the Club, as such he was able to terminate the Contract on that day, with just cause.

156. Additionally, the Panel notes that the Club submitted there was insufficient notice given. However, the Panel notes that notice was given of this possibility on 14 and 25 July 2017 by the Player and, further, Clause 6 of the Contract expressly states that "no notice" is actually required, so dismisses the Club's argumentation in this regard.

c. What are the financial implications of the breach?

157. The Panel has determined that as at 2 August 2017, the sum of USD 488'332, as salaries for May and June 2017 in the total amount of USD 128'332 as well as the 30% advance payment for the season 2017/18 in the amount of USD 360'000, was due to the Player. Further, based on Article 339 Swiss Code of Obligations ("CO"), with the termination of the Contract also the July salary, being a total of USD 67,083 (USD 32,083 – for 1 to 17 July 2017 – and USD 35,000 – for 18 to 31 July 2017) became due. Accordingly, para. 2 of the Appealed Decision has to be reduced to USD 555'415 plus interests of 5% p.a. as of 2 August 2017.

158. Additionally, the balance of the Contract was 11 ½ months salaries, from 1 August 2017 to 17 July 2018, *i.e.* USD 805,000 to be considered for the calculation of the compensation based on Article 17 para. 1 of the Regulations.

159. However, the Panel also notes that the Player managed to mitigate his losses with two new clubs during over the period the Contract would have run for, had it not been terminated with just cause.

160. Firstly was the Mechelen Contract. The Player was with Mechelen between 31 August 2017 and 8 January 2018, *i.e.* for 4.3 months. The arrangements were to run until 30 June 2018, so ceased 5.7 months early. FIFA accepted the certificate from Mechelen's chairman that during the entire year, it would have paid EUR 344,286 gross to the Player which corresponds to EUR 172'143 net. This net amount was used in the Appealed Decision and was not challenged by the Parties in these proceedings. As such, the Panel takes a *pro rata* share of this as what the Player would have received during his time at Mechelen *i.e.* approximately EUR 74,000 net which corresponds to approximately USD 90'300.

161. Then came the Player's contract with Brugge, which ran from 8 January 2018 to beyond the term of the Contract. As such, the Panel looks to see what the Player would have earned under the Brugge Contract up until 17 July 2018, when the Contract (with the Club) would have

expired. The Panel notes that the Player was to receive a signing on fee of EUR 135,000 and 6.3 months of a gross monthly salary of EUR 12,500 per month, so an additional EUR 78,750. There were additional benefits under the Brugge Contract, as *e.g.* the variable bonuses. The Player confirmed that such bonus payments were a total of EUR 42,851.24 gross. As such, the Panel would assess the additional mitigation during the relevant period under the Brugge Contract as EUR 256,601.24 gross which is, considering the tax rate of around 50% as stated by the Mechelen chairman (see above), a net amount of EUR 130,000. Taken the same exchange rate as the FIFA DRC has considered in the Appealed Decision, this corresponds to approximately USD 158,600.

162. The total net amount to deduct from the compensation would therefore be EUR 204,000 or approximately USD 248,900 as at the date of the termination of the Contract. Deducting this amount from the USD 805,000 (see para. 157 above) brings the calculation of the compensation to an amount of USD 556,100.

163. Additionally, the Panel felt that the Player had sought to engineer a breach and the Panel were left with the impression that the Player and his advisers had already determined that he would leave the Club and certain of their actions showed an element of bad faith – playing with the Club and waiting for the moment that he could leave the Club, but to do so with the blame being attributed to the Club. In particular, the Panel were left with the impression that the Player thought that a third instalment would be due on 1 August 2017 along with the second advance (which the Player had attempted to claim twice before its due date for payment), so waited until the very next day to terminate. The Panel additionally wondered why the Player had not updated FIFA when he entered into the Brugge Contract before the FIFA DRC had sat to come to its Appealed Decision, so it could be fully aware of his mitigation.

164. As such, the Panel is satisfied that the behaviour of the Player was a contributory factor to the termination of the Contract. Pursuant to Article 17 para. 1 of the Regulations, the compensation *"shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria"*. The Player's behaviour is certainly such an objective criteria to be considered, as *e.g.* Article 44 CO confirms, giving the Panel wide discretion as to how it determines to use these actions to reduce the USD 556,100 damages referred to above. The Panel weighed up these actions and has determined to reduce the sum awarded as compensation by 10% to USD 500,500.

d. What are the sporting implications of the breach?

165. Having determined that the Player had just cause to terminate the Contract, the Panel notes that the Club's request for sporting sanctions against the Player falls away.

B. Conclusion

166. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel partially upholds the Appeal of the Club and confirms the Appealed Decision, save for para. 2 and 3 of the operative part, which shall read as follows:

"2. The Respondent, Al Nassr FC, has to pay to the Claimant within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of USD 555,415, plus 5% interest p.a. as of 2 August 2017 until the date of effective payment.

3. The Respondent has to pay to the Claimant within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 500,500, plus 5% interest p.a. on said amount as from 25 January 2018 until the date of effective payment".

167. 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 Al Nassr Saudi Club against the decision issued on 25 January 2018 by the FIFA Dispute Resolution Chamber is partially upheld.

2. The decision issued on 25 January 2018 by the FIFA is Dispute Resolution Chamber is confirmed, save for paras. 2 and 3 of the operative part, which shall read as follows:

"2. The Respondent, Al Nassr FC, has to pay to the Claimant within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of USD 555,415, plus 5% interest p.a. as of 2 August 2017 until the date of effective payment.

3. The Respondent has to pay to the Claimant within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 500,500, plus 5% interest p.a. on said amount as from 25 January 2018 until the date of effective payment".

(…)

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