Arbitration CAS 2012/A/2847 Hammarby Fotboll AB v. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S, award of 22 March 2013

Panel: Mr Stuart McInnes (United Kingdom), President; Judge Conny Jörneklint (Sweden); Mr Efraim Barak (Israel)

Football
Transfer of a player
Amount of a penalty clause
Condition for the reduction of the penalty clause
Factors relevant to the reduction of the penalty

1. **According to Article 161(1) of the Swiss Code of Obligations (CO), the amount of a penalty shall not be fixed according to the extent of the damage, but according to the agreement of the parties. In accordance with the general principle of freedom of contract, Article 163(1) allows the parties to freely determine the amount of the penalty. They can decide on a fixed amount or an amount in proportion with the importance of the breach.**

2. **Article 163(3) CO provides that the judge may reduce penalties which he finds excessive. However, the reduction of the penalty is reserved for exceptional cases only when the penalty is considered as grossly unfair. As a rule, the parties are bound by their agreement and the principle of freedom of contract commands that the tribunal abides by the parties' agreement. Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation. According to the Swiss Federal Tribunal, a penalty is excessive when the stipulated amount is unreasonable and flagrantly exceeds the amount admissible with regard to the sense of justice and equity.**

3. **When deciding whether a reduction of the penalty is admissible, and if so, to what extent, the judge should take into account all the circumstances of the case, in particular a series of criteria, such as (i) the creditor's interest in the other's party compliance with the undertaking (ii) the severity of the default or breach, (iii) the intentional failure to breach the main obligation, (iv) the business experience of the parties, and (v) the financial situation of the debtor.**

I. THE PARTIES

1. Hammarby Fotboll AB (hereinafter referred to as the "Appellant" or "Hammarby") is a Swedish football club, affiliated to the Swedish Football Association which in turn is affiliated to the Fédération Internationale de Football Association (FIFA).

2. Hammarby is a limited liability company registered in 2001. Hammarby operates the business of Hammarby male elite football team, the under-21 football team and the junior team.

3. Hammarby's majority owner is Hammarby IF Fotbollförening, a non-profit organization which operates the youth teams of the club, except those set out in para. 2 above.

4. The A-squad played until 2009 in the First League in Sweden. At the end of the 2009 season, the A-squad was relegated and the A-squad has since played in the Second League in Sweden.

5. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S. (hereinafter referred to as the "Respondent" or "Besiktas") is a Turkish football club, affiliated to the Turkish Football Federation (TFF), which in turn is affiliated to FIFA.

6. Besiktas is a professional football club which has been playing in the Turkish First League – now the Turkish Super League – for more than 50 years. Besiktas is quoted on the Istanbul Stock Exchange since 2002. The Turkish Super League is one of the top leagues in the UEFA Confederation, entitling the winner to be automatically qualified for the UEFA Champions League.

II. FACTUAL BACKGROUND

7. The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the Parties, the exhibits filed, the decision rendered by the FIFA Single Judge of the Player's Status Committee (hereinafter referred to as the "Single Judge") on 30 January 2012 (hereinafter referred to as the "Appealed Decision") in the case between the Appellant and the Respondent, as well as the oral pleadings and comments made during the hearing. Additional facts may be set out, where relevant, in the legal considerations of the present award.

8. E. is a Swedish football player, born in 1985 (hereinafter referred to as the "Player").

9. On 16 January 2009, Hammarby and Besiktas signed a Loan Agreement regarding the Player (hereinafter referred to as the "Loan Agreement"), who then remained under contract with Hammarby. The agreed loan term was for the period 20 January – 30 June 2009 and the loan fee was set to EUR 100,000.

10. The Loan Agreement included a permanent transfer option according to which Besiktas had an option, to be called upon no later that on 15 May 2009, to request a permanent transfer of the Player upon the expiry of the loan term. If Besiktas wanted to call on this option, the transfer fee for the Player was set to EUR 400,000.

11. In May 2009, Hammarby requested that Besiktas state if they wanted to call upon the option for a permanent transfer of the Player.

12. On 8 June 2009 the Respondent, declared that it was interested in a permanent transfer of the Player, but only for a transfer fee of EUR 300,000.

13. The Parties entered into negotiations and ultimately agreed on a transfer fee of EUR 300,000.

14. In an email dated 10 June 2009, Besiktas informed Hammarby that it required that payment of the transfer fee be divided into two equal instalments, of which the second instalment should be paid on 12 October 2009. In this regard, Besiktas responded *"Total transfer fee of Euro 300,000, to be paid as follows: 150,000 Euro as we sign the agreement with Hammarby & with the player, second instalment due on 12/10/2009 (we will receive our CL* [Champions League] *attendance payment on the first week of October then we can make your payment from this amount)".*

15. On 12 June 2009, Hammarby sent a draft transfer agreement to Besiktas. The draft agreement included a transfer fee of EUR 300,000, to be paid in two equal instalments of EUR 150,000 each. In the draft agreement Hammarby inserted a penalty clause (hereinafter referred to as the "Penalty Clause") providing that if the second instalment of EUR 150,000 has not been made on 12 October 2009 at the latest Besiktas shall be subject to pay a penalty fee of EUR 100,000 (hereinafter referred to as the "Penalty Fee").

16. In an email dated 16 June 2009, Besiktas commented on the draft agreement as follows: *"Secondly you put a penalty clause which we did not discuss but thats fine only the penalty date cannot be the same date of 2nd instalment. You can say for example if BJK delays the second instalment for more that one week over the due date the penalty come in force. If there is banking problem and we pay on 13/10 instead of 12/10 we cannot tolerate to pay 100,000 euro".*

17. Hammarby rejected Besiktas' request to postpone the due date for the Penalty Fee and, on 18 June 2009, the Parties concluded the permanent transfer agreement regarding the Player (hereinafter referred to as the "Transfer Agreement").

18. The relevant financial terms of the Transfer Agreement are as follows:

> *"The transfer fee shall be EUR 300,000.*
>
> *The payment of the Transfer Fee shall be made in two instalments […]:*
>
> *The first instalment of EUR 150,000 shall be made upon 30 June 2009 at the latest.*
>
> *The second instalment of EUR 150,000 shall be made upon 12 October 2009 at the latest.*
>
> *[…]*
>
> *If the second instalment of EUR 150,000 has not been paid on 12 October 2009 at the latest, Besiktas shall be subject to pay a penalty fee of EUR 100,000.*
>
> *[…]*

If Besiktas were to loan and/or permanently transfer the Player to a third party, Hammarby shall have the right to receive 15% of the gross loan and/or transfer fee. Hammarby's share of the loan and/or transfer fee shall be paid by Besiktas to Hammarby within 14 days upon the third party's payment to Besiktas".

19. The first instalment was paid by the Respondent to the Appellant in accordance with the Transfer Agreement.

20. Following this first payment, the Player was duly registered with Besiktas and remained at it's disposal, on a permanent basis.

21. The payment of the second instalment was not made by the Respondent on 12 October 2009, as provided in the Transfer Agreement.

22. On 26 November 2009, the Appellant lodged a claim in front of FIFA against the Respondent for breach of the Transfer Agreement indicating that the second instalment had not been paid. The Appellant requested payment of the second instalment in the amount of EUR 150,000 as well as the payment of the Penalty Fee.

23. On 2 February 2010, FIFA communicated the claim to Besiktas.

24. On 24 August 2010, the Respondent transferred the amount of EUR 135,000 to the Appellant.

25. In a fax of the same date, the Respondent informed the Appellant that the amount of EUR 135,000 which was paid constituted the payment of the second instalment, after deduction of EUR 15,000 as solidarity contribution.

26. On 20 September 2010, the Respondent addressed a written submission to FIFA in which it rejected the Appellant's request for the payment of the Penalty Fee, on the following grounds:

"Besiktas had now fulfilled its contractual obligations towards Hammarby, leading to that the penalty clause was no longer enforceable and that Hammarby could only claim a default fine, in line with ordinary interest rates. The objective of a penalty clause is to secure due performance of a contract and not to take advantage of the financial situation of Besiktas. The penalty fee of EUR 100,000 is excessive and should therefore, according to article 163(1) of the Swiss Code of Obligations, be mitigated if not declared invalid. It is the player who is subject to a contract between two clubs, and the transferring club cannot be permitted to abuse its powerful position, by holding the transfer rights of the player and imposing exorbitant penalty on the new club".

27. The Appellant was not afforded the opportunity to comment on the Respondent's submission before the decision of the Single Judge was rendered.

28. On 30 January 2011, the Single Judge rendered his decision, the operative part of which was as follows:

1. The claim of the Claimant, Hammarby Fotbol AB, is partially upheld.

2. The Respondent Besiktas JK, has to pay to the Claimant the amounts of EUR 15,000 and Turkish Lira (TRY) 7,5000 within 30 days as from the date of notification of this decision.

3. Within the same time limit, the Respondent has to pay to the Claimant default interest of 5% p.a. as follows:

- *on the amount of EUR 150,000, as from 13 Ocotber 2009 until 24 August 2010;*
- *on the amount of EUR 15,000, as from 25 August 2010 until the date of effective payment.*

4. If the aforementioned sums plus interest are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

5. Any further claims lodged by the Claimant are rejected.

[…].

29. On 17 April 2012, the Respondent paid the Appellant a total amount of EUR 25,230.18 in accordance with the decision of the Single Judge, of which EUR 15,000 represented the remainder of the transfer fee in dispute and EUR 7,712 as default interest.

30. On 19 June 2012, the Appellant was provided with the grounds of the Single Judge's decision.

31. With regard to the issue of the Penalty Fee, the Single Judge stated the following:

Turning his attention to the argumentation put forward by the parties in relation to the penalty clause, the Single Judge took, once more, note of the fact that, according to the transfer agreement, concluded between the parties, the Respondent was supposed to pay a penalty fee of EUR 100,000 to the Claimant in case that the payment of the amount of EUR 150,000, corresponding to the second instalment, was paid after 12 October 2009. In other words, according to the transfer agreement, in the case of late payment, the Respondent would need to pay a penalty fee to the Claimant pertaining to approximately 2/3 of the corresponding payment.

In view of the foregoing, the Single Judge considered that the penalty clause was clearly disproportional and decided that, as an alternative and in accordance with the longlasting practice of the Players' Status Committee, the Respondent has to pay 5% default interest over the amount paid late. Consequently, the Single Judge decided that the Respondent is liable to pa to the Claimant default interest of 5% p.a. on the amount of EUR 150,000, as from 13 October 2009 until 24 August 2010, i.e. the date on which the payment of the amount of EUR 135,000 was made.

III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

32. On 9 July 2012, the Appellant filed a Statement of Appeal with CAS against the decision rendered by the Single Judge on 30 January 2011.

33. On 10 July 2012, the CAS Court Office informed the Parties of the receipt of the Statement of Appeal filed by the Appellant and, in particular, the appointment by the Appellant of Mr Conny Jörneklint, Chief Judge, Sweden, as arbitrator.

34. On 18 July 2012, the Appellant filed its Appeal Brief.

35. On 19 July 2012, the Respondent appointed Mr Efraim Barak, Attorney-at-law, Israel, as arbitrator.

36. On the same date, the CAS Court office informed the Respondent of the filing of the Appeal Brief by the Appellant and set a deadline of twenty days to the Respondent to file its Answer.

37. On 20 August 2012, the CAS Court Office informed the Parties that unless they agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the Parties shall not be authorized to supplement or amend their requests or their arguments, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and the answer.

38. On 21 August 2012, the Appellant requested that the Respondent provides a witness statement from Mr Usta, who was called as a witness by the Respondent. This witness statement was provided by the Respondent on 16 August 2012.

39. On 27 August 2012, the Parties requested a hearing to be held in the present matter.

40. On 21 September 2012, the Parties were informed that the following persons had been appointed as Arbitrators: Mr Stuart C. McInnes, Solicitor, United Kingdom, as President of the Panel, sitting with Mr Conny Jörneklint, Chief Judge, Sweden and Efraim Barak, Attorney-at-Law, Israel as Members of the Panel.

41. On 10 October 2012, the Parties were informed that a hearing would be held in the present dispute on 5 December 2012.

42. On 15 and 20 November 2012, the Respondent and the Appellant signed the Order of Procedure.

43. On 5 December 2012, a hearing was held at CAS Court Office in Lausanne, Switzerland (hereinafter referred to as the "Hearing").

IV. HEARING

44. A hearing was held on 5 December 2012 at the CAS Court Office in Lausanne, Switzerland. The following persons attended the hearing:

- For the Appellant: Mr Lars Nilsson, Attorney-at-law.
- For the Respondent: Mr Özgün Öztung, Lawyer, assisted by counsel Mr M. Emin Ozkurt, Attorney-at-law.

45. The Panel heard evidence from the following persons:

- Mr Thomas Andersson, Sports Manager of Hammarby at the time of the events.
- Ms Semi Usta, in charge of transfers and registration of players for Besiktas.

46. Each person heard by the Panel was invited by its President to tell the truth subject to the consequences of perjury provided by law and was examined and cross-examined by the Parties, and answered questions by the Panel.

47. The Parties were then afforded the opportunity to present their cases, submit their arguments and to answer the questions asked by the Panel.

48. The Parties explicitly agreed at the end of the Hearing that their right to be heard and to be treated equally in these arbitration proceedings had been fully observed.

V. POSITION OF THE PARTIES

49. The following outline 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 there is no specific reference to those submissions in the following summary.

A. Hammarby Fotboll AB (Appellant)

50. The Appellant's position on the merits is summarized in its appeal brief and is the following:

The Transfer Agreement provides that Besiktas shall pay Hammarby the Penalty in the event the second instalment of the Transfer Fee is not paid on 12 October 2009. Besiktas did not pay on this date, and did in fact not pay until 24 August 2010, several months after Hammarby initiated FIFA-proceedings against Besiktas. The Penalty Fee clause is valid and enforceable under Swiss law, which shall govern the Transfer Agreement. There are no grounds for reducing the Penalty Fee. The Penalty Fee is not "excessive", within the meaning of Swiss law, in particular considering the financial status of both Hammarby and Besiktas, the nature of the breach, the importance to Hammarby that the agreement was honoured and the potential damage to Hammarby of not being paid on time.

B. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S (Respondent)

51. The Respondent's position can be summarized as follows:

- The Appealed Decision is correct and should be upheld;
- The only possible payment that Besiktas could be asked to make is the default interest on the sum which was not paid on due time;
- The Penalty clause must be proportionate to the damage suffered otherwise it would operate as an undue enrichment, instead of discharging the damages for delayed payment;
- A penalty fee of EUR 100'000 shall be viewed as disproportionate if the amount to be paid is EUR 150'000;

- A penalty clause exists only to secure the due performance of the payment and not to take advantage of the financial difficulties of a party;
- Under Swiss law, a penalty clause can be reduced if it is deemed excessive;
- There is an "extravagant" disproportion between the amount of the penalty clause and the actual damages incurred by the Appellant;
- The penalty clause should be deemed excessive and declared invalid.

VI. THE PARTIES' REQUESTS FOR RELIEF

52. The Appellant's requests for relief are the following:

In the first place, Hammarby requests CAS to order Besiktas to promptly pay EURO 92,288, representing the remaining amount of the agreed penalty fee of EURO 100,000 after deduction for the payment of EURO 7,712 in default interest.

In the event CAS finds that the penalty fee agreed excessive and that it should therefore be reduced, Hammarby requests it is reduced with a significantly lesser amount than the reduction made in the Decision.

53. The Respondent's requests for relief are the following:

In the light of the above mentioned facts and legal considerations, Besiktas respectfully requests from CAS to:

REJECTING the claims of Hammarby and dismissing the Appeal;

ORDERING Hammarby to pay all costs and legal fees incurred by Besiktas in these arbitration proceedings on a full-indemnity basis;
AWARDING any such other relief as the Panel may deem necessary and appropriate.

VII. JURISDICTION OF THE CAS

54. Pursuant to Article R47 of the Code:

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.

55. The jurisdiction of the CAS to hear this dispute derives from Articles 62 and 63 of the FIFA Statutes and was confirmed by the Parties when signing the Order of Procedure. The jurisdiction of the CAS in the present case was not disputed by the Parties.

56. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the appealed one.

VIII. ADMISSIBILITY

57. The appeal was filed within the deadline provided by the FIFA Statutes and the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber. It complied with all other requirements of Article R48 of the Code.

58. It follows that the appeal is admissible.

IX. APPLICABLE LAW

59. Article R58 of the Code provides that 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.

60. The Transfer Agreement does not contend any provision as to the applicable law and the Parties have not entered into any agreement in this regard.

61. The Panel therefore decided that it was the FIFA Statutes (and to the extent necessary, Swiss law) that would be applicable to this dispute. Article 60 para. 2 of the FIFA Statutes, in its applicable version to this case, provides that CAS shall primarily apply the various Regulations of FIFA, and, additionally, Swiss law.

62. Considering that the present matter was submitted to FIFA on 26 November 2009, it is undisputed that the 2008 version of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "Regulations") are applicable. Those Regulations shall thus apply primarily, together with the other applicable rules of FIFA. Swiss law would be applied complementarily.

X. MERITS

63. It is not disputed by the Parties that they entered into in agreement regarding the transfer of the Player on 18 June 2009 under which the Player was transferred from the Appellant to the Respondent. Under the terms of Clause 2.1 of the Transfer Agreement, the transfer compensation of EUR 300,000 had been agreed for the transfer of the Player, and would be paid in two instalments: EUR 150,000 payable no later than 30 June 2009 and, EUR 150,000 payable no later than 12 October 2009.

64. It is also not disputed by the Parties that the entirety of the above-mentioned sum was paid at the moment the Hearing was held.

65. The only issue which is still pending between the Parties is the payment of the Penalty Fee set out in Clause 2.1 of the Transfer Agreement, which states the following:

If the second instalment of € 150,000 not has been made on 2009-10-12 at the latest, BJK shall be subject to pay a penalty fee of € 100 000 (one hundred thousand Euros).

66. The Regulations do not contend any provisions regarding penalty clauses. Swiss law is therefore applicable to this issue, which is expressly agreed by the Parties. Under Swiss law the provisions regarding penalty clauses are set out in articles 160 et seq. of the Swiss Code of Obligations.

A. Applicable provisions of the Swiss Code of obligations

67. Articles 160, 161 and 163 of the Swiss Code of obligations (hereinafter referred to as CO) state as follows:

Art. 160

1 Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.

2 Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.

3 The foregoing does not apply if the debtor can prove that he has the right to withdraw from the contract by paying the penalty.

Art. 161

1 The penalty is payable even if the creditor has not suffered any loss or damage.

2 Where the loss or damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault.

Art. 163

1 The parties are free to determine the amount of the contractual penalty.

2 The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.

3 At its discretion, the court may reduce penalties that it considers excessive.

68. The amount of the penalty shall not be fixed according to the extent of the damage (Article 161(1) CO), but according to the agreement of the parties. In accordance with the general principle of freedom of contract, Article 163(1) allows the parties to freely determine the amount of the penalty. They can decide on a fixed amount or an amount in proportion with the importance of the breach[1].

69. The Respondent considers that the amount of the penalty is excessively high and should be subject to reduction by the Panel pursuant to Article 163(3) CO. Article 163(3) CO provides that the judge may reduce penalties which he finds excessive. However, the reduction of the

[1] MOOSER M., Commentaire Romand, Code des obligations I, 2012, para. 1 ad Article 163 CO.

penalty is reserved for exceptional cases only when the penalty is considered as grossly unfair. This follows from Article 163(1) CO, which expressly provides that a penalty can be set at any amount by the parties. As a rule, the parties are therefore bound by their agreement and the principle of freedom of contract commands that the tribunal abides by the parties' agreement.

70. Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation[2].

71. According to the Swiss Federal Tribunal, a penalty is excessive when the stipulated amount is unreasonable and flagrantly exceeds the amount admissible with regard to the sense of justice and equity[3]. The doctrine prescribes that it is not sufficient that the penalty be too important to be reduced: the penalty shall flagrantly exceed any amount admissible with regard to the sense of justice and equity. The excess shall exceed what is reasonable. The quantum of the penalty shall not be justifiable[4].

72. When deciding whether a reduction of the penalty is admissible, and if so, to what extent, the Panel should take into account all the circumstances of the case, in particular a series of criteria, such as (i) the Claimant's interest in the other's party compliance with the undertaking (ii) the severity of the default or breach, (iii) the intentional failure to breach the main obligation, (iv) the business experience of the parties and (v) the financial situation of the debtor[5].

73. Higher amounts are appropriate for penalties that are not only intended as liquidated damages but, in addition, prevent the debtor from breaching its contractual obligation in the first place (punitive function of a penalty clause).

74. The Panel will hereunder analyse each of the applicable criteria in order to determine if the Penalty Fee agreed in the Transfer Agreement shall be reduced, or not, in accordance with the above-mentioned provisions of the CO.

B. The alleged excessiveness of the Penalty Fee

a) The main criterion: the creditor's interest

75. The creditor's interest is the main criterion to be taken into consideration to evaluate the quantum of the penalty ("la quotité de la peine"), as the latter is the expression of the creditor's will to strengthen the main obligation. The creditor's interest shall be widely construed. It is determined in the light of any legitimate inconvenience which the creditor would suffer in case of breach of the main obligation[6]. The agreed penalty fee protects the creditor's interest: the greater the creditor's interest in the performance of the main obligation, the greater a heavy

[2] Decision of the Swiss Federal Tribunal, 11.03.2003, 4C.5/2003; ATF 114 II 264; 103 II 129; ZBJV 1990, 262.
[3] ATF 82 II 142 para. 3, JdT 1957 I 104. See also ATF 133 III43, para. 3.3.1; JdT 2007 I 231; ATF 114 II 264 para. Ia, JdT 1989 I 74; ATF 103 II 135 para. 4, JdT 1978 I 155.
[4] COUCHEPIN G., La clause pénale – Etude générale de l'institution et de quelques applications pratiques en droit de la construction, 2008, para. A.2.1. p. 169.
[5] Decision of the Swiss Federal Tribunal, 16.01.2002, 4C.249/2001.
[6] Id., para. C.1. p. 173.

punishment is justified (function of preventive pressure of the penalty clause)[7]. When the penalty fee is related to a single breach, and therefore a single payment, the reasons which lead the creditor to insert a penalty clause in the contract is the main criterion to assess the creditor's interest[8].

76. In the instant case, the Penalty Clause was inserted in the Transfer Agreement by the Appellant in the last days of the negotiations in order to secure the timely payment of the second instalment.

77. At the time of conclusion of the Transfer Agreement, the Player was already playing for the Respondent having been subject to a loan agreement since January 2009. The Loan Agreement provided the possibility to permanently transfer the Player at the end of the loan period for a sum of EUR 400,000. The Respondent decided to call on the option, but negotiated a lower price and the possibility to discharge the transfer fee in two instalments. After some negotiation it was decided that the payment of the first instalment, would trigger the permanent transfer of the Player. However, in view of its difficult financial situation, and the requirement of funds to facilitate future transfers to replace the Player and thus to secure the timely payment of the second instalment, the Appellant required that the non-payment of the second instalment would trigger the payment of a Penalty Fee. The Respondent accepted this provision without condition.

78. The Panel is of the opinion that timing of the payment of the second instalment of the transfer fee was of the essence, justifying inclusion of the Penalty Clause in the Transfer Agreement. Furthermore, the amount of the Penalty Fee set by the Appellant was agreed to by the Respondent, at EUR 100'000 in consideration of the reduction of the transfer fee from EUR 400,000 as set out in the Loan Agreement to EUR 300,000.

79. The Panel is of the view that the Appellant had a greater interest in securing the timely payment of the second instalment of the transfer fee, given its difficult financial situation and the fact that the Player was already permanently transferred to the Respondent. The Appellant manifestly needed money to face its critical financial situation and to make transfers in order to replace the Player.

80. The Panel notes that the Appellant not only alleges that he was facing important financial difficulties at the time of the events, but that it has substantiated its allegations by providing the Panel with evidence, such as the club's 2009 Annual Report, including income statement, balance sheet, cash flow statement and accounting principles and notes.

b) The severity of the breach

81. In itself, the penalty is triggered regardless of the importance of the breach of the contract (Art. 160 (1) CO). However, the severity of the violation should be taken into consideration. It has to be appreciated to what extent the debtor breached the protected interest or interests in

[7] Id, para. 2. P. 175
[8] Id, para. C.3., p. 176

breaching the contract. If the violation of the primary obligation is objectively serious, the penalty fee will rarely be viewed as excessive[9].

82. In the instant case, the protected interest is the timely payment of the second instalment given that the Appellant was in urgent need of money and no longer enjoyed the Player's services.

83. The violation of the Transfer Agreement shall therefore be considered objectively as severe.

c) The Respondent's fault and the intentional failure to execute the main obligation

84. The severity of the parties' fault is related to the punitive aspect of the penal clause: the debtor shall be sanctioned for its behaviour. One shall take into consideration the importance of the subjective reproach ("reproche subjectif") which can be made to each party in the non execution of the main obligation[10].

85. The intentional failure to execute the main obligation constitutes "aggravating circumstances". In principle, this shall prevent any reduction of the penalty fee[11].

86. In the instant case, the Respondent convinced the Appellant to accept payment of the transfer fee in two instalments, by giving assurance that it would receive money from UEFA for its participation in the Champions League in the week before the due date for payment of the second instalment. The Appellant accepted the Respondent's representation and accordingly the payment in two instalments, subject to the inclusion of the Penalty Clause in the Transfer Agreement. The Penalty Clause, and thus the Penalty Fee, were expressly accepted by the Respondent.

87. The Panel is of the opinion that the Respondent intentionally breached the Transfer Agreement in failing to pay the second instalment.

88. In this regard the Panel takes note of the evidence of Mr Usta, who for ten years had responsibility for the Respondent's transfer and registration of players.

89. In its email dated 10 June 2009, the Respondent stated the following: *"*[…] *we will receive our CL attendance payment on the first week of October then we can make our payment from this amount"*. This representation was confirmed at the hearing by Mr Usta, who also confirmed that the Respondent was at the time of negotiation with the Appellant facing financial difficulties. Mr Usta further stated that on the Respondent's receipt of the UEFA payment it's management elected to make choices regarding the payment of the club's creditors. This was further confirmed at the hearing by the Respondent in its closing submissions.

90. The Panel is of the view that the representation made to the Appellant by the Respondent that it would discharge the second instalment due under the Transfer Agreement on its receipt of

[9] Id., para. D.1., p 177-178.
[10] Id., para. D.5., p. 179.
[11] Id., para. D.5., p. 179.

the UEFA payment was misleading and/or false. The Respondent elected not to make payment of the second instalment on receipt of the UEFA payment and indeed delayed making payment until after the Appellant had issued the proceedings before FIFA. The Panel views such conduct as unacceptable. The financial terms of the Transfer Agreement are unequivocal and the Respondent cannot unilaterally resile from those terms and must accept the consequences.

91. The Panel also noted that Mr Usta confirmed that he was well aware, at the time the Penalty Clause was inserted in the Transfer Agreement, of the *"longlasting practice of the Player's Status Committee"* of considering penalty fees as disproportional and to be replaced in cases of breach by the imposition of 5% default interest. It therefore appears to the Panel that from the outset the Respondent's acceptance of the Penalty Clause was made in bad faith, in that it knew that FIFA would not uphold the Penalty Clause or that it would be obliged to honour its terms in the event of breach.

92. The Panel therefore considers that the intentional acts of the Respondent, as well as the evidence of bad faith, shall be taken into consideration as aggravating circumstances when determining the overall situation and any reduction in the Penalty Fee.

d) The business experience of the Parties

93. The business experience of the parties plays a dual role in assessing the conduct of any party breaching the contract: (a) it is far less excusable for a party with experience of business to have concluded a penalty fee subject to onerous consequences than for a party inexperienced in business, and (b) it is far less excusable for a party with experience of business to have committed serious misconduct than for a party inexperienced in business[12].

94. The Respondent is, and has for many years been, participating in European competition and should therefore be considered as having great experience in international transfers and in the negotiation and drafting of transfer agreements.

95. The Appellant, although successful in domestic Swedish competition, however has not regularly participated in European competitions, and thus cannot be considered as experienced as the Respondent.

96. Given the Respondent's greater international business experience, it should not escape the consequences of its serious misconduct in the instant case.

e) The Respondent's financial situation

97. In principle, assessment of the penalty fee is independent of the economic position of the debtor; although exceptionally, in case of extreme disproportion between the penalty and the

[12] Id., para. D.2.6., p. 180.

financial position of the debtor, a judge can apply the principle of equity in the exercise of his discretion when determining its validity[13].

98. The Respondent alleged in the course of the proceedings that it was at the time of the conclusion of the Transfer Agreement, and is still, in a very poor financial situation.

99. The Panel notes that the Respondent did not provide any documentation or any other evidence justifying such contention. In CAS arbitration, a party wishing to discharge the burden of proof, must substantiate its allegations and affirmatively prove the facts on which it seeks to rely with respect to that issue[14]. This jurisprudence derives from the application of Article 8 of the Swiss Civil Code which states that unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its rights. The Panel considers that the Respondent did not discharge its burden of proof in this regard.

100. Furthermore, the Panel concludes that the Respondent did not adduce any evidence of disproportion between the Penalty Fee and its financial situation.

101. The Panel likewise does not accept the Respondent's contention that it should be considered as the weaker party in the proceedings, given its experience compared to that of the Appellant and the substantiated important financial difficulties of the Appellant.

102. Furthermore, should the Respondent have satisfied the burden of proof that it was in fact in a difficult financial situation, a reduction of the Penalty Fee would still not be applicable as the doctrine states that taking into account the financial situation of the debtor principally addresses the need to prevent a case of usury ("usure") and that the financial situation of the debtor should not relegate the creditor's interest to a secondary level[15].

103. The Panel notes that the Respondent's alleged financial difficulties shall in any circumstances be put into perspective in the light of the money which was received by the Respondent for its participation in the Champions League (approx. EUR 4'000'000, i.e. 27 times more than the Penalty Fee) just before the expiry of the deadline to pay the second instalment of the Transfer Agreement.

104. The Panel is therefore of the opinion that the Respondent should not benefit from a reduction of the Penalty Fee on the basis of its alleged difficult financial situation.

XI. CONCLUSION

105. The Panel stresses the need to thoroughly analyse the provisions and application of Articles 160 et seq. CO before any assessment of the enforceability and proportionality of a penalty clause is made and concludes that the apparent disproportion in value of a penalty is not of itself

[13] Id., para. D.3., p. 180.
[14] See for instance CAS 96/159 & 96/166, published in Digest of CAS Awards II 1998-2000, pp. 434 ff. or CAS 2009/A/2009.
[15] COUCHEPIN, para. D.3.1. p. 181.

sufficient to trigger the application of the reduction of the Penalty Fee according to Article 163(3) CO.

106. On the contrary, the Panel is of the opinion that considering all the circumstances of the instant case, there is no room for a reduction of the Penalty Fee in accordance with Article 160 et seq. CO.

107. The Panel bases its decision mainly on the following facts:

- The Loan Agreement included an option of permanent transfer of the Player for an amount of EUR 400,000;
- The Respondent negotiated a reduction of this sum to EUR 300,000 payable in two instalments, the first instalment triggering the permanent transfer of the Player;
- The Respondent committed itself to pay the second instalment by a date certain, after giving assurance of its ability to discharge that instalment from anticipated funds to be received from UEFA for its participation in the Champions League;
- The Appellant, in reliance on this representation, accepted the reduction in the transfer fee and the payment by two instalments, but subject to the insertion in the Transfer Agreement of a penalty clause, providing that the Respondent should make payment of the sum of EUR 100,000 if the second payment was not made on time;
- The Respondent expressly accepted the insertion of the Penalty Clause, and the amount of the Penalty Fee, in the Transfer Agreement;
- Although it had received the money from UEFA, the Respondent decided not to pay the second instalment, and to use the money for other purposes.

108. Therefore, considering the criteria applicable to the reduction of an excessive penalty clause under Article 163(3) CO, in particular (a) the Appellant's interest, (b) the severity of the breach, (c) the intentional failure by the Respondent to execute the timely payment of the second instalment, (d) the business experience of the Parties and (e) the Respondent's financial situation, the Panel considers that there are no exceptional circumstances which permit the Panel to set aside the Parties' mutual agreement to include the Penalty Clause in the Transfer Agreement and when determining the appropriate amount of the Penalty Fee. The Panel is of the opinion that the general principles of freedom of contracts and *pacta sunt servanda* are fully applicable to the present case.

109. The Panel believes that it is appropriate in International Football to recognise the enforceability of mutually and freely agreed penalty clauses. This is a remedy, acknowledged by Swiss law and by most Civil jurisdictions, which is intended to prevent any misapprehension during negotiation between the parties that the only sanction that may be faced if debts are not honoured and/or paid on time is the imposition of penalty interest otherwise set forth by the applicable laws or regulations in cases where an agreement does not contain a penalty clause.

110. It follows that the Respondent should pay Appellant residual amount of the penalty clause being EUR 92,288, plus 5% interest.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by Hammarby Fotboll AB against the decision issued by the Single Judge of the FIFA Players' Statutes Committee on 30 January 2011 is upheld.

2. The decision of the Single Judge of the FIFA Players' Statutes Committee on 30 January 2011 is set aside.

3. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S. is ordered to pay to Hammarby Fotboll AB the amount of EUR 92,288, plus 5% interest p.a. from 18 April 2010 until the effective date of payment.

4. (…).

5. (…).

6. All other claims are dismissed.