Arbitration CAS 2014/A/3555 FC Vojvodina v. Almami Samori Da Silva Moreira, award of 18 December 2014

Panel: Mr Hendrik Willem Kesler (The Netherlands), President; Mr Hans Nater (Switzerland); Mr Efraim Barak (Israel)

Football
Termination of a contract of employment between a player and a club
Nature of a clause defined by the parties as a "penalty clause"
Proportionality of the liquidated damages and amount due to the player

1. **The legal consequences of a clause defined by the parties as a "penalty clause" should be used in order to determine the nature thereof and not only the definition used by the parties, also because the legal consequences may indicate the true intention of the parties in respect of the specific clause. Therefore, and in consideration of the fact that the parties found it important to explain in the clause itself the way in which the amount at stake was calculated and determined, it appears that the clause in question is to be regarded as a liquidated damages clause valid under Swiss law, which concept is identical to the concept of a contractual penalty clause in Switzerland, under Article 160 of the Swiss Code of Obligations (SCO).**

2. **A penalty of twice the amount overdue is not an unreasonable nor disproportionate deterrent to ensure that the debtor would pay the overdue amounts. In view of the conclusion that the amount of the penalty is a liquidated damage and not compensation, there is no particular reason to take into account the salary the player earned with subsequent clubs as the amount of the penalty does not concern damages, which would have entailed a duty for the player to mitigate his damages and could potentially have led to a reduction of the compensation to be awarded. Moreover, article 161(1) of the SCO determines that liquidated damages are due even in the event that the creditor has not suffered damage.**

I. PARTIES

1. FC Vojvodina (the "Club" or the "Appellant") is a football club with its registered office in Novi Sad, Serbia. The Club is registered with the Football Association of Serbia (the "FAS"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Mr Almami Samori Da Silva Moreira (the "Player" or the "Respondent") is a professional football player of Guinea-Bissauan nationality who also has a Belgian passport.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeals arbitration proceedings and at the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On 19 January 2012, the Player and the Club concluded an employment contract (the "Employment Contract") for a period of two years, *i.e.* valid until 31 December 2013.

5. Also on 19 January 2012, the Player and the Club concluded an annex to the Employment Contract (the "Annex").

6. On 3 December 2012, the Player and the Club met and decided to mutually terminate the Employment Contract and the Annex. The *"minutes of termination of the contract"* (the "Minutes") were signed by the Player and by Mr Radisav Rabrenovic on behalf of the Club. These Minutes were certified by the Football Association of Novi Sad and were verified by the FAS. The Minutes contain, *inter alia*, the following relevant clause:

"[The Club] commits to [the Player] to pay the difference of not paid salaries in 2012 for a total amount of 77.415,00 euros (seventy-seven thousand four hundred fifteen euro). The Club will pay the above mentioned amount no later than 15. December 2012.

By fulfilling the above obligations to [the Player], the club has no further financial obligation to the professional player".

7. Also on 3 December 2012, the Player and Mr Rabrenovic on behalf of the Club signed a *"termination agreement"* (the "Termination Agreement"). The Termination Agreement contains, *inter alia*, the following relevant terms:

"Clause Two

The Club will compensate the Player for the termination of the employment contract with the net amount of € 77.415,00 (seventy-seven thousand four hundred and fifteen Euros).

Clause Three

1. *The Club will pay the above mentioned amount no later than 15 December 2012.*

2. *Payment will be made to the following bank account:* […]

Clause Four

1. *In the event of non performance as provided in clauses three and four, the Club undertakes to pay, as penalty clause, the amount of 150.000 € (one hundred and fifty thousand Euros), i.e. the*

remuneration due to the Player until the end of the contract signed between the parties on 19 January 2012, in addition to the amount in debt.

2. The stipulated in the previous paragraph is fundamental reason for the signing of the present agreement".

8. On 21 December 2012, the Player signed an employment contract with the Spanish football club FC Salamanca.

B. Proceedings before the Dispute Resolution Chamber of FIFA

9. On 14 January 2013, as the Club allegedly failed to pay the outstanding remuneration by 15 December 2012, the Player lodged a claim before the Dispute Resolution Chamber of FIFA (the "FIFA DRC") against the Club, claiming a total amount of EUR 227,415 (*i.e.* EUR 77,415 as outstanding salary and EUR 150,000 pursuant to Clause 4(1) of the Termination Agreement).

10. In spite of having been invited by FIFA to do so, the Club failed to respond to the Player's claim throughout the proceedings before the FIFA DRC.

11. On 29 November 2013, the FIFA DRC rendered its decision (the "Appealed Decision") with the following operative part:

"1. The claim of [the Player] is accepted.

2. The [Club] has to pay to the [Player] within 30 days as from the date of notification of this decision, the amount EUR 227,415 plus 5% interest p.a. as from 17 December 2012 until the date of effective payment. […]".

12. On 13 January 2014, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"*[…] *The DRC acknowledged that following the conclusion of an employment contract on 19 January 2012, the* [Player] *and the* [Club] *had concluded a termination agreement dated 3 December 2012, by means of which they agreed that the* [Club] *would pay to the* [Player]*, by no later than 15 December 2012, the amount of EUR 77,415 for the termination of the contract. The DRC further acknowledged that according to the termination agreement, the* [Club] *must pay to the* [Player] *an additional amount of EUR 150,000 in the event of non-compliance with the aforementioned provision.*

- *Subsequently, the DRC noted that the* [Player] *maintained that the* [Club] *had not fulfilled its obligations as established in the termination agreement, since it had not paid the* [Player] *the amount of EUR 77,415 within the stated time limit.*

- *Thus, based on the termination agreement, the* [Player] *requested to be paid the amount of EUR 77,415 as well as the compensation amount to EUR 150,000, plus interest at a rate of 5% p.a. on both amounts as "from the date of the instalment until full payment".*

- *Furthermore, the DRC noted that the* [Club] *had been given the opportunity to reply to the claim lodged by the* [Player]*, but that the* [Club] *had failed to present its response in this respect. In this way, so the DRC deemed, the* [Club] *renounced its right to defence and, thus, accepted the allegations of the* [Player].

- *As a consequence of the preceding consideration, the DRC established that in accordance with art. 9 par. 3 of the Procedural Rules it shall take a decision upon the basis of the documents on file.*

- *On account of the aforementioned considerations, the DRC established that the* [Club] *had failed to pay to the* [Player] *the amount of EUR 77,415 by 15 December 2012, as agreed upon in the termination agreement. The Chamber also established that as a consequence of the non-payment within the stated deadline, the amount of EUR 150,000 had fallen due in accordance with the termination agreement. Consequently, the DRC concluded that, in accordance with the general legal principle of "pacta sunt servanda", the* [Club] *is liable to pay the* [Player] *the amount of EUR 227,415.*

- *In continuation and with regard to the* [Player's] *request for interest, the DRC decided that the* [Player] *is entitled to receive interest at the rate of 5% p.a. on the total amount of EUR 227,415 as from 17 December 2012. In this respect, the DRC emphasized that the payment of EUR 150,000 which is stipulated in the termination agreement, is to be regarded as a compensation for the termination of the contract, and not as a penalty, since the amount corresponds to the value of the employment contract until its original date of expiry. Thus, the Chamber decided to award interest on said amount as well".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 9 April 2014, the Club filed a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the "CAS Code"), with the Court of Arbitration for Sport ("CAS"). In this submission, the Club nominated Dr. Hans Nater, attorney-at-law in Zurich, Switzerland, as arbitrator.

14. On 19 April 2014, the Club filed its Appeal Brief, pursuant to Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the challenge of the Appealed Decision, submitting the following requests for relief as set out in its Statement of Appeal:

"The Appellant's Appeal shall be accepted and the FIFA DRC Decision dated 29 November 2013 revised so that:

1. *The Claim of Almami Samori Da Silva Moreira is partially upheld in the amount of 77.415,00 EUR with 5% annual interest starting from 17 December 2012 until the payment.*
2. *The Claim of Almami Samori Da Silva Moreira exceeding the amount of 77.415,00 EUR plus interest and ordering FC Vojvodina to pay a further amount of 150.000, 00 EUR shall be dismissed.*
3. *The Respondent shall pay all costs in relation to the present procedure including the compensation of Appellant's expenses in this procedure and attorney's fees".*

15. On 5 May 2014, FIFA renounced its right to request its possible intervention in the present appeals arbitration proceedings.

16. Also on 5 May 2014, the Player nominated Mr Efraim Barak, attorney-at-law in Tel Aviv, Israel, as arbitrator.

17. On 19 May 2014, the Player filed its Answer, pursuant to Article R55 of the CAS Code, whereby he requested CAS to decide the following:

"According to the relevant arguments stated above, this Court shall issue a decision:

- *Rejecting the present appeal;*
- *Confirming the appealed decision of FIFA's Dispute Resolution Chamber, that made a correct evaluation of the evidence and decided accordingly within the legal framework applicable to this case;*
- *Obliging the Appellant to pay the costs of the appeal;*
- *Given that the Respondent was assisted in the present procedure by a professional legal adviser, to order the Appellant to contribute towards its costs".*

18. On 3 June 2014, the Club informed the CAS Court Office of its preference for a hearing to be held. The Player did not comment within the given deadline.

19. On 18 August 2014, 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 decide the present matter was constituted as follows:

- Mr Hendrik Willem Kesler, attorney-at-law, Enschede, the Netherlands, as President;
- Dr. Hans Nater, attorney-at-law, Zurich, Switzerland, and;
- Mr Efraim Barak, attorney-at-law, Tel Aviv, Israel, as arbitrators.

20. On 5 September 2014, upon request of the President of the Panel, pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the present matter.

21. On 14 and 15 October 2014 respectively, the Club and the Player returned duly signed copies of the Order of Procedure to the CAS Court Office.

22. On 20 October 2014, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed not to have any objection as to the constitution and composition of the Panel.

23. In addition to the Panel, Mr Brent J. Nowicki, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For the Appellant:

1) Dr. Marco Del Fabro, Counsel for the Appellant;

2) Mr Zoran Damjanovic, Counsel for the Appellant;
3) Ms Ksenija Damjanovic, Counsel for the Appellant;
4) Ms Jelena Lukic, Interpreter

b) For the Respondent:

1) Mr Almami Samori Da Silva Moreira, the Player; and
2) Mr José Duarte Reis, Counsel for the Respondent;

24. During the hearing, the Club objected to the examination of Mr Petar Nikolic, former Director of the Club and witness called by the Player, since the Player's Answer neither contained a witness statement, nor a brief summary of his expected testimony, as is required by Article R55 of the CAS Code. In addition, the Club presented two new documents (a press release and an investigative document) concerning an alleged criminal proceeding instigated against Mr Nikolic for fraud allegedly committed by him in the period he held a position with the Club.

25. Upon inquiry by the Panel, counsel for the Player did not object to the admission of the newly presented documents to the case file. The Player considered the documents to be of minor relevance since the documents only show that an investigation had commenced, but did not contain any decision in respect of Mr Nikolic. The Player further expressed his intention to hear Mr Nikolic as witness, which request was later voluntarily withdrawn.

26. In view of the above, Mr Nikolic was not heard and the Panel admitted the two newly presented documents to the case file.

27. The Panel heard evidence from Mr Radisav Rabrenovic, General Secretary of the Club as witness called by the Club. Mr Rabrenovic was invited by the President of the Panel to tell the truth subject to the sanctions of perjury. Each party and the Panel had the opportunity to examine and cross-examine the witness. The parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

28. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure and that their right to be heard had been respected.

29. The Panel confirms that it carefully heard and took into account in its discussions and subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

30. The Club's submissions, in essence, may be summarized as follows:

- The Club argues that according to the Minutes, it had to pay the outstanding salary of EUR 77,415, but nothing else. By concluding the Employment Contract with the Club, the Player was subject to Articles 57, 58 and 63 of the FAS Regulations, which regulate

the question of termination of contracts. Since the Minutes complied with the requirements of Article 57 of the FAS Regulations, only this document is to be taken into account.

- In the event that CAS would be of the opinion that the so-called Termination Contract is valid, the Club finds that the penalty is invalid pursuant to the applicable Serbian law (Article 270(3) of the Law of Obligations) and refers to Serbian jurisprudence in this respect. The Club maintains that the FIFA DRC was wrong in determining that the amount of EUR 150,000 was compensation for the contractual termination, and not a penalty.
- Even if CAS would follow the FIFA DRC's argument that the penalty has to be regarded as compensation for the termination of a contract, it would have to be taken into account what the Player earned with FC Salamanca and the compensation shall be reduced accordingly.

31. The Player's submissions, in essence, may be summarized as follows:

- The Player argues that the Termination Agreement, like the Annex to the Employment Contract, stipulates and provides the financial conditions related to the contractual termination. Also like the Annex, the Termination Agreement was drafted in English and signed by the same representative of the Club, Mr Rabrenovic, General Secretary of the Club. As such, the Player finds that the parties fully complied with the requirements of Article 58 of the FAS Regulations.
- The Player further maintains that when reading clause 4(1) of the Termination Agreement, it must be concluded that *"the so called penalty clause is a compensation clause and not a financial one"* and that this provision is in accordance with Article 17 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations"), but also with the FAS Regulations. Moreover, the Player reiterates that Serbian civil law does not apply to the present matter.
- As to the requested reduction of the amount of EUR 150,000, the Player maintains that he still received less than he would have earned if the Employment Contract would not have been terminated. In case the Employment Contract would not have been terminated, the Player would have received a total amount of EUR 270,000 over the season. If the salary the Player earned with FC Salamanca would be deducted, the compensation would still be EUR 240,000, *i.e.* a higher amount than the amount of EUR 150,000 requested.

V. ADMISSIBILITY

32. The appeal was filed within the time limit of 21 days set by Article 67(1) of the FIFA Statutes (2013 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

33. It follows that the appeal is admissible.

VI. JURISDICTION

34. The jurisdiction of CAS, which is not disputed, derives from Article 67(1) of the FIFA Statutes (2013 edition) as it determines that *"*[a]*ppeals 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"* and Article R47 of the CAS Code.

35. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

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

VII. APPLICABLE LAW

37. 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

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

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

39. The Club maintains that pursuant to Article R58 of the CAS Code and in accordance with the choice of the parties in Article 3(1) of the Employment Contract, the applicable regulations shall be the one of the Republic of Serbia, Statute and Regulations on registration, status and transfer of players of FAS, and additionally FIFA regulations.

40. The Player submits that the Termination Agreement is the relevant contract in this case and not the Employment Contract. In the Termination Agreement the parties did not choose an applicable law. Therefore, in accordance with Article R58 of the CAS Code, the Player finds that Swiss law is to be applied as this is the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled.

41. The Panel observes that Article 3(1) of the Employment Contract determines as follows:

> *"The Player shall comply with the rules and regulations of FIFA, UEFA, and the Football Association of Serbia, and in particular with the Statutes of the Football Association of Serbia, Regulations of the FA of Serbia for Player Registration, Status and Transfer, the Football Competition Rules of the FA of Serbia, as well as Club Statutes and other rules and regulations promulgated by the Club".*

42. The Panel observes that Article 7 of the Termination Agreement determines the following:

"Any dispute arising from or related to the present agreement will be submitted exclusively to the FIFA deciding bodies and resolved definitively in accordance with FIFA Regulations".

43. Noting the contradiction between these two contractual clauses, the Panel finds that the Termination Agreement in principle supersedes the Employment Contract. Indeed, by means of the Termination Agreement the parties terminated the contractual relationship as agreed upon in the Employment Contract. Since the present dispute solely arose from the terms in the Termination Agreement, the applicable law clause in the latter agreement shall govern the proceedings.

44. Consequently, the Panel will decide the present dispute primarily in accordance with the FIFA regulations and, subsidiarily, Swiss law should the need arise to fill a possible gap in the regulations of FIFA. However, the Panel takes due note of the relevant regulations of the SFA regarding national requirements regarding the registration of players and the termination of employment contracts.

VIII. MERITS

A. The Main Issues

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

i. Is the Termination Agreement validly concluded?

ii. If so, does Article 4(1) of the Termination Agreement concern a penalty fee or compensation?

iii. To what amount is the Player entitled?

i. Is the Termination Agreement validly concluded?

46. The Club argues that by concluding the Employment Contract with the Club, the Player was subject to Articles 57, 58 and 63 of the FAS Regulations, which regulate the question of termination of contracts. More specifically, the Club argues that the Termination Agreement is contrary to Article 57 of the FAS Regulations. Since the Minutes complied with the requirements of Article 57 of the FAS Regulations, only this document is to be taken into account. In addition, whereas the Minutes were concluded in the Serbian and English language, the Termination Agreement was only in English, which is not in accordance with the FAS Regulations.

47. The Player argues that the Termination Agreement, like the Annex to the Employment Contract, stipulates and provides the financial conditions related to the contractual termination. Also like the Annex, the Termination Agreement was made in English and signed by the same representative of the Club, Mr Rabrenovic. As such, the Player finds that the parties fully complied with the requirements of Article 58 of the FAS Regulations.

48. The Panel observes that Article 57 and 58 of the FAS Regulations, in translations submitted by the Club, determine respectively as follows:

"The contract is closed, mutually terminates and registers with the association competent for players' registration, with the presence of the player, authorized clubs' representatives, and after verification is mandatory to be published in "Fudbal" and on the day of publication produces legal effect. […]*".*

and

"The contracts are closed and terminated mutually in the relevant territorial association to which club belongs in 5 (five) copies.

Competent bodies may certify only the contract that is dully signed from the part of all subjects of that legal matter and if every page is dully signed by the player and authorizes representative of the club [sic]*".*

49. The Panel finds that the Termination Agreement is to be regarded as an Annex to the Minutes, just like the Annex to the Employment Contract. Whereas the Minutes are a standard document that needs to be registered with the FAS, the Termination Agreement contains additional non-obligatory details that govern the termination of the employment relationship between the parties. The Panel did not become aware of any provision in the relevant regulations of the SFA determining that it is not allowed to set out certain financial details in an additional document to the Minutes or that an Annex to the Minutes would have to be concluded in the Serbian language as well.

50. The Panel is not convinced by the testimony of Mr Rabrenovic that he was unaware of the additional details set out in the Termination Agreement in comparison with the Minutes. Without paying attention to the content of the clauses itself, the Panel observes that the Termination Agreement contains three pages, whereas the Minutes are only a one page document. The Panel is not convinced by the Club's position that Mr Rabrenovic assumed that the Termination Agreement was a mere confirmation of the Minutes with only some additional payment details, as the content of the Termination Agreement is clearly more extensive than a mere repetition of the Minutes with payment details.

51. In addition, although it may be true that Mr Rabrenovic does not speak English very well, the Panel finds that this does not prevent the Club from being bound by the Termination Agreement, particularly because it became clear at the hearing that at least one person assisting Mr Rabrenovic did speak English very well. Furthermore, the Panel noted that Mr Rabrenovic testified at the hearing that he used to discuss contracts with the President of the Club before signing. Acknowledging this practice of the Club, the Panel finds it doubtful that Mr Rabrenovic apparently did not discuss the content of this particular agreement with the President of the Club.

52. Furthermore, the Panel deems it important that page 3 of the Termination Agreement contains references to several numbers. The Panel finds Mr Rabrenovic' statement that he paid particular attention to the amount to be paid (*i.e.* the amount of EUR 77,415) irreconcilable with his statement that he apparently overlooked the reference to the amount

of EUR 150,000 on the same page of the Termination Agreement. Even without understanding English, the reference to this figure should reasonably have drawn his attention.

53. Finally, the Panel finds the Player's statement that he would only sign the Minutes if the Club would sign the Termination Agreement credible considering that there was a substantial amount of overdue salary to be paid by the Club and that the contractual penalty of EUR 150,000 provided some security to the Player that the overdue salary would be paid by 15 December 2012. This also appears from Article 4(2) of the Termination Agreement as it states that *"[t]he stipulated in the previous paragraph is fundamental reason for the signing of the present agreement"*.

54. Consequently, the Panel finds that the Termination Agreement was validly concluded and that the parties are bound thereto.

ii. If so, does Article 4(1) of the Termination Agreement concern a penalty fee or compensation?

55. The Panel observes that whereas the Club argues that the amount of EUR 150,000 mentioned in Article 4(1) of the Termination Agreement is a contractual penalty and that contractual penalties for untimely payment of a debt are not allowed under Serbian legislation, the Player argues that it concerns compensation for premature termination of the Employment Contract and that, in any event, Serbian law is not applicable.

56. The Panel observes that Article 4(1) of the Termination Agreement determines as follows:

> *"In the event of non performance as provided in clauses three and four, the Club undertakes to pay, as penalty clause, the amount of 150.000 € (one hundred and fifty thousand Euros), i.e. the remuneration due to the Player until the end of the contract signed between the parties on 19 January 2012, in addition to the amount in debt"*.

57. The Panel finds it important that the parties have specifically defined the above provision as a *"penalty clause"* in Article 4(1) of the Termination Agreement itself. However, the legal consequences of a clause should also be used in order determine the nature thereof and not only the definition used by the parties, also because the legal consequences may indicate the true intention of the parties in respect of the specific clause. Therefore, and also in consideration of the fact that the parties found it important to explain in the clause itself the way in which this amount was calculated and determined, the Panel finds that the clause in question is to be regarded as a liquidated damages clause under Swiss law, which concept is identical to the concept of a contractual penalty clause in Switzerland, which appears from both the German language of Article 160 of the SCO using the terms "Konventionalstrafe" and "Strafe" as well as the French language, using the terms "clause pénale" and "la peine".

58. The Panel finds that the amount mentioned in the clause is not compensation for a premature termination of the employment relationship because the amount of EUR 150,000 would only be payable in case the Club would fail to pay the Player the amount of EUR 77,415 in time. If the Club would have paid this amount in time, the Player would thus not be entitled thereto.

If the intention of the parties would indeed have been to compensate the Player for the premature termination they would not have made the payment subject to this condition.

59. In view of the Panel's considerations regarding the applicable law *supra* (cf. §37-45), the Club's argument that a contractual penalty is not allowed for untimely payment of a debt does not have to be dealt with by the Panel, instead this question is governed by Swiss law.

60. The Panel observes that Swiss law does not prohibit the use of liquidated damages clauses for untimely payment of debts. More specifically, the Panel observes that Articles 160(1) and (2) of the SCO provide the following:

"Wenn für den Fall der Nichterfüllung oder der nicht richtigen Erfüllung eines Vertrages eine Konventionalstrafe versprochen ist, so ist der Gläubiger mangels anderer Abrede nur berechtigt, entweder die Erfüllung oder die Strafe zu fordern".

Wurde die Strafe für Nichteinhaltung der Erfüllungszeit oder des Erfüllungsortes versprochen, so kann sie nebst der Erfüllung des Vertrages gefordert werden, solange der Gläubiger nicht ausdrücklich Verzicht leistet oder die Erfüllung vorbehaltlos annimmt".

Which can be translated as follows:

"If liquidated damages are provided for in the case of non-performance or improper performance of a contract, the obligee is only entitled to claim either the performance or liquidated damages in the absence of an agreement to the contrary".

If liquidated damages have been provided for in the case of non-compliance with the time of performance or with the place of performance, they may be claimed in addition to the performance of the contract, as long as the oblige has not made an express waiver, or has accepted performance without reservation".

61. Consequently, different from the conclusion reached by the FIFA DRC in its Appealed Decision, the Panel finds that Article 4(1) of the Termination Agreement is a liquidated damages clause and that this is not prohibited under Swiss law.

iii. To what amount is the Player entitled?

62. The Panel observes that Article 163 of the SCO determines the following:

1. *"Die Konventionalstrafe kann von den Parteien in beliebiger Höhe bestimmt werden.*

2. *Sie kann nicht gefordert werden, wenn sie ein widerrechtliches oder unsittliches Versprechen bekräftigen soll und, mangels anderer Abrede, wenn die Erfüllung durch einen vom Schuldner nicht zu vertretenden Umstand unmöglich geworden ist.*

3. *Übermässig hohe Konventionalstrafen hat der Richter nach seinem Ermessen herabzusetzen".*

Which can be translated as follows:

1. *"Liquidated damages may be agreed upon in any amount by the parties.*

2. *They cannot be claimed in order to enforce an illegal promise or one violating bonos mores, and, unless agreed upon to the contrary, if performance has become impossible because of circumstances for which the obligor is not answerable.*

3. *Excessively high liquidated damages shall be reduced at the discretion of the judge".*

63. Thus, whereas Article 163(1) of the SCO provides that parties may freely determine the amount of liquidated damage, on the basis of Article 163(3) of the SCO, the Panel considers that it has the duty to reduce the amount of EUR 150,000 set out in Article 4(1) of the Termination Agreement if it considers this amount to be excessive.

64. In several cases, the Swiss Federal Tribunal underlined that the discretion of the judge according to Article 163(3) of the SCO should be used with reluctance: The possibility to reduce liquidated damages by the judge is against the principles of contractual freedom and contractual loyalty and, therefore, should be applied with reluctance (SFT 4C.5/2003; 114 II 264; 103 II 135). According to legal commentators, there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages (GAUCH/SCHLUEP/SCHMID/REY, Schweizerisches Obligationenrecht, Allgemeiner Teil, 8th Ed. (2003), N 4049).

65. In CAS 2012/A/2202 the following is determined with reference to TAS 2008/A/1491, §97-101:

"Finally, Article 163 al. 3 CO provides that "excessively high liquidated damages shall be reduced at the discretion of the judge".

The Swiss Supreme Court held that this latter norm is part of public policy and that as a consequence the judge must apply it even if the debtor did not expressly request a reduction, whilst observing a degree of deference, in order to respect the contract as much as possible (ATF 133 III 201, c. 5.2).

As such, a reduction in the penalty clause by the judge is justified "when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place. To judge the excessive character of the contractual penalty, one must not decide abstractly, but, on the contrary, take into consideration all the circumstances of the case in hand" (ATF 133 III 201, c. 5.2).

The Swiss Supreme Court holds that various criteria play a determining role, such as the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties, as well as the potential interdependency between the parties (ATF 133 III 201, ibid.).

When proceeding to reduce the contractual penalty, the judge must make use of his discretion, but with a certain reserve, since the parties are free to fix the amount of the penalty (article 163 al. 1 CO) and the contracts must in principle be respected. The protection of the economically weak party authorises however more a reduction than if those affected are economically equal parties" (free translation)".

66. Considering the above legal background, the Panel finds that a liquidated damage of EUR 150,000 is not disproportionate considering the fact that an amount of EUR 77,415 was outstanding at the time. The Panel finds that a penalty of twice the amount overdue is not an unreasonable deterrent to ensure that the debtor would pay the overdue amounts. Although in this specific case the deterrent of twice the amount overdue did not prevent the Club from failing to pay, a lower penalty would most likely certainly not have prevented the Club from failing to pay.

67. The Panel also finds that the liquidated damages clause is not disproportionate in light of the violations committed by the Club. Not only did the Club fail to pay the Player the overdue amounts by 15 December 2012 as agreed in both the Minutes as well as in the Termination Agreement, it must also be taken into account that at the time of mutual termination of the employment relationship an amount of EUR 77,415 was outstanding, indicating that the Club had violated its obligations under the Employment Contract and the Annex already beforehand.

68. Moreover, the Panel observes that the Player would normally have been entitled to a total salary of EUR 270,000 in his second season with the Club (*i.e.* pursuant to Articles 4 and 5 of the Annex, the Player was entitled to a net amount of EUR 150,000 and a salary of EUR 120,000 to be divided in 12 equal monthly instalments) and the possibility to acquire certain bonuses. However, the Player voluntarily agreed to terminate the employment relationship prematurely because of the difficult financial situation of the Club. In view of the fact that the Player could have earned at least EUR 270,000 by staying one year longer with the Club, the Panel finds a liquidated damage of EUR 150,000 not disproportionate.

69. The Panel also considers the timeframe relevant. The Club agreed on 3 December 2014 to pay the overdue amount by 15 December 2014 and that in case of failure it would have to pay liquidated damages in an amount of EUR 150,000 to the Player. The Panel finds that considering this short time limit of less than two weeks, the Club had the possibility to carefully assess its financial situation at the time and was able to verify if it would be able to pay the overdue amount in time. Mr Rabrenovic testified at the occasion of the hearing that the Club did not have sufficient funds to pay the overdue salaries, but that the Club hoped to transfer some players on short notice in order to be able to do so. The Panel finds the fact that this (risky) plan of the Club did not succeed is the full responsibility of the Club and that this makes the Club's failure to pay the Player in time more severe.

70. Finally, as to the financial position of the parties, the Player testified at the hearing that in the 2013 season he effectively earned a total salary of around EUR 7,000 and is still entitled to an amount between EUR 16,000 and 17,000 because Salamanca as well as his subsequent club are in financial difficulties. Although the Club was also in a difficult financial situation, the fact that the Player agreed to mutually terminate the employment relationship saved the Club a substantial amount of future expenses, even taking into account the liquidated damage of EUR 150,000. As such, also in view of the financial positions of the parties, the Panel finds that there is no reason to reduce the liquidated damage of EUR 150,000.

71. In view of the Panel's conclusion that the amount of EUR 150,000 is a liquidated damage and not compensation, the Panel finds that there is no particular reason to take into account the salary the Player earned with Salamanca and subsequent clubs as the amount of EUR 150,000 does not concern damages, which would have entailed a duty for the Player to mitigate his damages and could potentially have led to a reduction of the compensation to be awarded. The Panel feels comforted in this conclusion by Article 161(1) of the SCO determining that:

"Die Konventionalstrafe ist verfallen, auch wenn dem Gläubiger kein Schaden erwachsen ist".

Which can be translated as follows:

"Liquidated damages are due even in the event that the obligee has not suffered damage".

72. Consequently, the Panel finds that the Player is entitled to an amount of EUR 77,415 as outstanding salary and an amount of EUR 150,000 as liquidated damages, with interest at a rate of 5% *p.a.* accruing as from 17 December 2012.

B. Conclusion

73. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

a. The Termination Agreement was validly concluded and the parties are bound thereto.
b. Article 4(1) of the Termination Agreement is a liquidated damages clause and this is not prohibited under Swiss law.
c. The Player is entitled to an amount of EUR 77,415 as outstanding salary and an amount of EUR 150,000 as liquidated damages, with interest at a rate of 5% *p.a.* accruing as from 17 December 2012.

74. 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 3 February 2014 by FC Vojvodina against the Decision issued on 29 November 2013 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The Decision issued on 29 November 2013 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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