Arbitration CAS 2015/A/4135 Kayserispor Kulübü Dernegi v. James Troisi, award of 30 March 2016

Panel: Mr Bernhard Welten (Switzerland), President; Mr Jan Räker (Germany); Mr Mark Hovell (United Kingdom)

Football
Termination of an employment contract
De novo review and counterclaim

Based on Article R55 of the CAS Code being in force since 2010, there is no longer the possibility of "any counterclaims" to be filed by the respondent in its answer. Therefore a CAS panel cannot review if a higher penalty amount than that awarded by the first instance adjudicating body should be considered proportional and reasonable. Raising such penalty amount above what was awarded must be considered as a counterclaim and cannot be considered within the panel's power of a *de novo* review of the facts and the law based on Article R57 of the Code.

I. THE PARTIES

1. Kayserispor Kulübü Dernegi (the "Club" or "Appellant") is a football club with its registered office in Kayseri, Turkey. It is affiliated to the Turkish Football Federation (the "TFF") and plays in the "Süper Lig", the highest professional league in Turkey and the country's primary football competition. The TFF is affiliated to the Fédération Internationale de Football Association ("FIFA"), world football's governing body.

2. Mr. James Troisi (the "Player" or "Respondent") is an Australian citizen and a professional football player, born in Adelaide, Australia, on 3 July 1988. Currently he is playing for Ittihad FC, Saudi Arabia.

II. FACTUAL BACKGROUND

A. Facts

3. The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the submissions of the Parties and the exhibits produced. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. Whilst the Panel

has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 8 July 2009, the Parties signed an employment contract (the "Employment Contract") for the period of 8 July 2009 until 31 May 2013. According to Article 3 of the Employment Contract, the Respondent was entitled to receive as net salary EUR 50,000 per month in addition to EUR 100,000 to be paid on 7 July 2009 and on 18 July 2009; EUR 250,000 on 18 July 2010 and 18 July 2011; and EUR 300,000 on 18 July 2012. Further payments of housing, car, air tickets and bonus were foreseen for the Player.

5. On 16 April 2012, the Respondent terminated the Employment Contract based on an outstanding amount of EUR 570,000 which he claimed on 2 April 2012. On 23 November 2011, the Respondent had previously claimed an outstanding amount of EUR 870,000 from the Appellant.

6. On 15 May 2012, the Respondent filed a request with the FIFA Dispute Resolution Chamber ("DRC"), which was amended by the Respondent on 8 June 2012, to receive a total amount of EUR 1,731,316.51 from the Appellant.

7. On 8 August 2012, the Parties signed a settlement agreement (the "Settlement Agreement") in order to solve the before mentioned dispute in front of the DRC. The Settlement Agreement stated:

"1. Subject to clause 3, below, the Club shall, in full and final settlement of its financial obligations to the Player, pay to the Player the amount of € 800,000.- (Eight Hundred Thousand Euros) net of all taxes related to the Turkish Tax Legislation (the "Agreed Amount"), in two (2) payments as follows:

(a) € 400,000.- (Four Hundred Thousand Euros) within 21 (twenty-one) days following the signing date of this Deed of Settlement by International Bank Transfer to the Player's nominated bank account; and

(b) € 400,000.- (Four Hundred Thousand Euros) on 20th December 2012 by International Bank Transfer to the Player's nominated account;

…

3. If the Club fails to make any of the payments in the time and manner set out in clause 1, above, and continues to do so after the Player has given the Club twenty-one (21) days notice in writing, the balance of the "Agreed Amount" determined in clause 1 above shall immediately become due and payable by the Club to the Player by International Bank Transfer to the Player's nominated account. In this case, the Club shall pay € 500,000 (Five Hundred Thousand Euros) net of all taxes as penalty payment and compensation for the default (the "Penalty Amount") by International Bank Transfer to the Player's nominated bank account in addition to the balance of the Agreed Amount.

4. If the balance of the Agreed Amount and the Penalty Amount due and payable by the Club to the Player, under the provisions of clause 3, above remains outstanding, the Player may, without prejudice to his right

to refer the matter to the civil courts, immediately refer the matter including the Club's breach of this Deed of Settlement to the DRC for enforcement in accordance with the FIFA Regulations for the Status and Transfer of Players (the "RSTP") and the Club shall not challenge the jurisdiction of DRC to hear the matter and enforce this Deed of Settlement.

5. The Club acknowledges and agrees that it shall be liable to pay interest in an amount not less than 5% per annum in respect to the outstanding amount as well as any costs reasonably incurred by the Player in enforcing the Club's debt, including legal costs.

…

14. This Deed of Settlement shall be governed by and interpreted in accordance with the Statutes and Regulations of FIFA, including the RSTP, and in accordance with Swiss law".

8. On 7 September 2012, Professional Footballers Australia ("PFA"), acting as the Player's representative, wrote to the Appellant notifying that it was in breach of the Settlement Agreement and that it must make the payment of EUR 400,000 immediately.

9. On 17 September 2012, the Appellant paid the Respondent an amount of EUR 400,000. The Respondent's bank deducted costs in the amount of EUR 120 from this wire transfer and therefore the Respondent only received an amount of EUR 399,880 in his account.

10. On 21 December 2012, the Respondent notified the Appellant of its failure to pay the amount of EUR 400,000 due on 20 December 2012.

11. On 14 January 2013, the Respondent confirmed to the Appellant that it remained in breach and therefore, based on clause 3 of the Settlement Agreement, it further has to pay the Penalty Amount of EUR 500,000. Therefore, the Respondent expected a payment of EUR 900,000.

12. On 17 January 2013, the Appellant paid an amount of EUR 400,000, from which the Respondent's bank deducted EUR 105 as transfer costs and therefore the Respondent only received EUR 399,895 in his account.

13. On 18 January 2013, the Respondent informed the Appellant that it will seek payment of the outstanding amounts (EUR 120, EUR 105 and EUR 500,000) in front of the DRC.

B. Proceedings before the Dispute Resolution Chamber of FIFA

14. On 5 February 2013, the Player initiated a procedure in front of the DRC and requested:

"1. Payment of € 500,225:
€ 500,000 as set out in Section 3 of the Settlement Agreement;
€ 120: the shortfall in the first payment; and
€ 105: the shortfall in the second payment.

2. *Interest in an amount not less than 5% per annum in respect to the outstanding amount.*

3. *Sporting sanctions under section 17 (5) of FIFA Regulations of the Status and Transfer of Players, banning the club from registering new players, either nationally or internationally, for two registration periods; and*

4. *Any other or further remedy that the FIFA Dispute Resolution Chamber deems appropriate".*

15. On 18 March 2013, the Appellant filed its statement of defence and requested:

"1. Dismiss the claim of EUR 500,000 as the penalty clause,

2. Dismiss all other requests and motions submitted by the Claimant".

16. On 3 March 2015, the DRC informed the Parties about the composition of the Dispute Resolution Chamber taking a decision in this matter on the occasion of its next meeting on 12 March 2015.

17. On 26 March 2015, the DRC sent the Parties the decision taken on 12 March 2015 (the "Decision"):

"1. The claim of the Claimant, James Troisi, is partially accepted.

2. The Respondent, Kayserispor Kulübü Dernegi, has to pay to the Claimant the amount of EUR 300,000 within 30 days as from the date of notification of this decision. In the event that this amount is not paid by the Respondent within the stated time limit, 5% interest p.a. falls due on this amount as of expiry of said 30 days' time limit 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, the amount of EUR 225 plus 5% interest p.a. as from 5 February 2013 until the date of effective payment.

4. In the event that the amounts due to the Claimant in accordance with the above-mentioned 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.

6. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

18. On 30 March 2015, the Appellant requested the grounds of the Decision based on Article 15 of the Rules governing the Procedures of the Players' Status Committee and Dispute

Resolution Chamber.

19. On 16 June 2015, the DRC sent the grounds of the Decision to the Parties and stated *inter alia*, the following:

- In this case the Regulations on the Status and Transfer of Players (the "RSTP"), edition 2012, are applicable;
- The Settlement Agreement clearly states that a total amount of EUR 800,000 net of all taxes shall be paid to the Player. EUR 225 was collected by the bank of the Player and such costs for the transfer of the said amount cannot be held against the Player. Therefore EUR 225 shall be paid to the Player;
- Based on the DRC's jurisprudence, the Parties may freely agree to penalty clauses if they are proportional and reasonable;
- The Club did not present any evidence that could lead to the conclusion that the Club had valid reasons for the late and partial payment of the Agreed Amounts. However, the second instalment was only paid six days late and the shortfall in the payment with EUR 225 is only 0.03% of the total amount. Considering all this, the penalty clause is considered disproportionate and not reasonable. Therefore, the penalty is reduced to the amount of EUR 300,000;
- The request for interest of 5% per year on the Penalty Amount is based on the Chamber's jurisprudence in similar cases rejected, but granted for on the outstanding amount of EUR 225 as of the date on which the claim was lodged with FIFA.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

20. On 7 July 2015, the Appellant filed its Statement of Appeal against the Respondent regarding the Decision pursuant to Article R47 et seq. of the Code of Sports-related Arbitration and Mediation Rules (the "Code"). In its Statement of Appeal, the Appellant nominated Dr. Jan Räker as arbitrator.

21. On 13 July 2015, the CAS Court Office acknowledged receipt of the appeal and it informed FIFA that such appeal was filed and requested FIFA to respond if it intends to participate as a party in the present arbitration.

22. On 10 July 2015, the Appellant filed its Appeal Brief pursuant to Article R51 of the Code.

23. On 21 July 2015, FIFA informed that it renounced its right to intervene in the present arbitration.

24. On 3 August 2015, the Respondent nominated Mr. Mark Hovell as arbitrator.

25. On 17 August 2015, the Respondent filed his Answer to the Appeal pursuant to Article R55 of the Code.

26. On 3 September 2015, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the Parties that pursuant to Article R54 of the Code, the Panel appointed to decide the present appeal had been constituted as follows: Mr. Bernhard Welten, attorney-at-law in Berne, Switzerland, as President; Dr. Jan Räker, attorney-at-law in Stuttgart, Germany and Mark Hovell, solicitor in Manchester, United Kingdom as Arbitrators.

27. On 24 September 2015, the CAS Court Office requested FIFA to provide the CAS with a copy of the whole case file in this matter.

28. On 8 October 2015, the CAS Court Office informed the Parties that the complete case file of FIFA was received; a copy of this file was sent to the Parties and the Panel.

29. On 11 November 2015 and on 16 November 2015, the Appellant and the Respondent, respectively, signed the Order of Procedure.

30. On 24 November 2015, the hearing was held at the CAS in Lausanne, Switzerland. The Appellant was represented by Mr. Juan de Dios Crespo Pérez and Mr. Sami Dinç. The Respondent was represented by Dr. Lucien W. Valloni and Mrs. Sophie Arnold. The Parties confirmed at the end of the hearing that their rights to be heard and to be treated equally had been respected, as they had been given ample opportunity to present their views, submit their arguments and answer to the questions from the Panel.

IV. SUBMISSIONS OF THE PARTIES

31. The following outline of the Parties' positions is illustrative and does not comprise every contention put forward by the Parties. The Panel has, however, considered all the submissions timely made by the Parties, even absent specific reference to those submissions in the following summary.

A. Appellant's Submission and Request for Relief

32. In its Appeal Brief, the Appellant submitted the following requests for relief:

> *"1. To uphold the present appeal of Kayserispor Kulübü Dernegi, in view of the several reasons pointed out in both Statement of Appeal and this Appeal Brief. To dismiss fully the decision of the FIFA Dispute Resolution Chamber in the case ref. nr. 13 – 00778/pam of 12 March 2015.*
>
> *2. To issue a new decision stating that the Club Kayserispor Kulübü Dernegi has not breached the Agreement concluded with the Player James Troisi on 08 August 2012 and paid the full amount provided by the contract, i.e. € 800,000 (Eight Hundred Thousand Euro). As a consequence of that – the Player had no legal grounds to file a claim to the FIFA DRC.*

3. *To state that the FIFA DRC has chosen wrong penalty clause out of the Agreement concluded between the parties, thus wrongfully applied the sanction on the Club.*

4. *To state the club is not obliged to pay to the Player any amount of the penalty.*

Or Alternatively:

5. *In the unlikely scenario that the most honourable members of the Panel deem that the Club has violated the Agreement and such violation only existed for 5 days, to fix the amount of contractual penalty payable by the Club to the Player according to provisions of clause 5 of the Agreement in the amount of € 274 (Two Hundred Seventy Four Euro) which is fair and proportional to unintentional delay conceded by the Club.*

But in any case:

6. *To fix a sum of 20,000 EUR to be paid by the Player to the Appellant, to help the payment of its legal fees costs.*

7. *To condemn the Player to the payment of the whole CAS administration costs and the Arbitrators fees".*

33. The Appellant principally submits that:

- The Club has paid the full amount of EUR 800,000 net of all taxes related to the Turkish tax legislation to the Player. The costs of EUR 225 were deducted by the Player's bank and not by the Club's bank. The DRC is wrong in granting the Player EUR 225 and stating that the total amount of EUR 800,000 has to be "net of all taxes". The amount of EUR 225 taken by the Player's bank as fee cannot therefore be seen as a missing payment by the Appellant or a type of "tax";
- Considering Article 160 Swiss Code of Obligations (CO) the penalty clause in the Settlement Agreement is a clear penalty for non-performance of an obligation. Clause 4 of the Settlement Agreement is drafted in the same spirit (*"if the balance of the Agreed Amount and the Penalty Amount due and payable by the Club to the Player under the provision of clause 3 above remains outstanding, …"*). The Player has therefore only a right to file a claim to DRC if both amounts are not paid (*"neither Agreed Amount nor Penalty Amount"*);
- The Settlement Agreement provides also for a contractual penalty for a delay of payment, *i.e.* for the case according to Article 160 para. 2 CO, which is the 5% interest per year. The Settlement Agreement clearly stipulates both types of penalties, for non-performance of obligation as well as for delay of performance. The Club has complied with performance of its obligations and therefore the Player has no right to claim and be awarded with the Penalty Amount;
- The Player shows his bad faith in asking the Penalty Amount only about three weeks after the full Agreed Amount was paid by the Appellant. He bases his request on the non-payment of the amount of EUR 225, taken by his bank as fees for the money wires;
- The delay of the second payment was only five days, caused by simple miscalculation by

the Appellant and two of these five days were weekend days and therefore non-banking days. The Player could have asked for 5% interest on the outstanding amount but instead, showing his bad faith, asked for the Penalty Amount. The interest calculated for the delay of five days would be equal to EUR 274. The Penalty Amount of EUR 300,000 is therefore 1'094 times more and therefore unfair and non-proportional. The CO grants the Panel the possibility to reduce such penalty. The Appellant never had any intention not to comply with the provisions of the Settlement Agreement.

B. Respondent's Submission and Request for Relief

34. In his prayers for relief, the Respondent requests as follows:

"(a) dismiss the appeal filed by the Appellant on 7 July 2015;

(b) award the Respondent the amount of EUR 500,225;

(c) award interest on the amount in paragraph (b) above at the prevailing rate awarded by the FIFA DRC of 5% p.a.;

(d) order the Appellant to pay all costs incurred in relation to the appeal; and

(e) order the Appellant to pay all legal expenses of the Respondent in relation to the appeal".

35. The Respondent's submissions, in essence, may be summarized as follows:

- The Club persistently failed to make the payments due to the Player in accordance to the Employment Contract. Accordingly the Player notified the Club of its breach on several occasions and he confirmed that on 23 November 2011 he was due EUR 870,000, on 25 January 2012 it was EUR 770,000 and on 2 April 2012 EUR 570,000 remained outstanding to him. On 16 April 2012, the Player therefore terminated the Employment Contract and filed a grievance with the DRC and requested a total payment of EUR 1,731,316.51 on 15 May 2012. Based on this request the Parties signed the Settlement Agreement on 8 August 2012 wherein the Player renounced to more than 50% of the claimed amount in view of the two instalments to be paid and assured with the Penalty Amount of EUR 500,000 as compensation for a possible default;
- The Club failed to make the first payment as agreed within 21 days of the signing of the Settlement Agreement. On 7 September 2012, the Player notified the Club that it was in breach of this Settlement Agreement. Only on 17 September 2012, the Club paid the first instalment of EUR 399,880 and therefore with a shortfall of EUR 120;
- The Club confirmed to pay its shortfall of payment on 17 September 2012 of EUR 120 with the payment scheduled to be made on 20 December 2012. Therefore, FIFA DRC rightly held that the fact that costs were charged for the transfer of said amount could not be held against the Player, who had no influence whatsoever on this process;
- The Club failed to pay the amount of EUR 400,120 on 20 December 2012. On 21 December 2012, the Player notified the Club of its failure to pay. On 14 January 2013, the Player confirmed that the Club remained in breach and asked for payment of the

outstanding amount as well as the Penalty Amount. Only on 17 January 2013, the Club paid an amount of EUR 399,895 and therefore with a shortfall of EUR 500,105;

- The Player notified the Club in accordance with Article 3 of the Settlement Agreement and gave a 21-days' notice to pay the second instalment. As the Club missed this deadline and it was informed accordingly by the Player, it has to pay the Penalty Amount in addition. The Club's breach of the Settlement Agreement is not ambiguous or uncertain. The alleged "miscalculation" of the expiry of the 21-day notice period cannot negate the Club's liability to pay the Penalty Amount;
- The Club was in a superior bargaining position when the Settlement Agreement was signed, as it was holding the Player's International Transfer Certificate;
- In addition to the payment of the requested amounts, sporting sanctions should also be imposed on the Club based on Article 17 (4) of the RSTP.

V. JURISDICTION

36. Article R47 of the Code provides as follows:

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

37. Articles 66 and 67 FIFA Statutes state that the CAS has jurisdiction to decide on appeals against final decisions passed by FIFA's legal bodies like the DRC. Furthermore, Article 24 para. 2 FIFA RSTP states that the decisions reached by the DRC may be appealed before the CAS.

38. In the case at hand, it is therefore clear that the CAS has jurisdiction to decide on the Appeal against the Decision based on before mentioned FIFA Rules.

VI. ADMISSIBILITY

39. The Appeal was filed within the 21-day deadline set by Article 67 para. 1 FIFA Statutes (2013 edition). The Appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office Fee.

40. Therefore, it follows that the Appeal is admissible.

VII. APPLICABLE LAW

41. Article R58 of the Code provides the following:

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

42. The Appellant pointed out to Article R58 of the Code and Article 66 para. 2 FIFA Statutes and stated that the Parties made a clear choice of law in favour of FIFA Regulations and therefore Swiss law shall be applied subsidiarily. The Respondent did not write anything regarding the applicable law. However, he referred in his answer to the FIFA Regulations and therefore implicitly agrees that such FIFA Regulations shall be applicable.

43. The Panel notes that the Appellant and the Respondent agree that the FIFA Regulations are applicable in this case.

44. The Panel points out to Article 14 of the Settlement Agreement which clearly states that *"This Deed of Settlement shall be governed by and interpreted in accordance with the Statutes and Regulations of FIFA, including the RSTP, and in accordance with Swiss law"*. Therefore, the Parties explicitly agreed that beside the FIFA Regulations Swiss law shall be applied additionally.

45. The case at hand was submitted to the DRC on 5 February 2013, thus before 1 April 2015, which is the date when the revised RSTP (edition 2014) came into force. Pursuant to Article 26 para. 1 and 2 of the revised RSTP (edition 2014), any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations, *i.e.* the 2012 edition. Accordingly, the 2012 edition of the RSTP, as already established by the DRC in the Decision, shall be applicable.

VIII. MERITS

A. Breach of the Settlement Agreement

46. It is undisputed that the Parties agreed and signed the Settlement Agreement on 8 August 2012 and the Appellant agreed to pay two installments of EUR 400,000 each on 29 August 2012 (21 days following the signing of the Settlement Agreement) and on 20 December 2012.

47. On 7 September 2012, the Respondent wrote to the Appellant notifying that it was in default of paying the first installment, which was due on 29 August 2012, at the latest. This first installment of EUR 400,000 was then paid by the Appellant on 17 September 2012. The Respondent's bank deducted an amount of EUR 120 as bank fees and the Player only received an amount of EUR 399,880.

48. The Panel holds that the first payment was therefore made within the extended deadline of 21 days set by the Respondent's fax letter of 7 September 2012 in accordance to Article 3 of the Settlement Agreement.

49. The Panel has noted that the legal representative of the Appellant confirmed in its email of 17 September 2012 that it had no idea its bank deducted an amount of EUR 120 wherefore it confirmed *"to make the second installment as 400,120-Euro free of any deductions"*. Therefore, the Appellant explicitly agreed to pay the deducted bank fee of EUR 120.

50. It is further undisputed that the Appellant did not pay the second installment on 20 December 2012 and therefore, the Respondent notified the Appellant on 21 December 2012 that it was in default in relation to the second payment and set the deadline of 21 days to receive such second installment in the amount of EUR 400,120.

51. It remained also uncontested that within this additional deadline of 21 days (in accordance to Article 3 of the Settlement Agreement), this means until 11 January 2013, the second installment was not paid by the Appellant and therefore the Respondent notified the Appellant with fax letter of 14 January 2013 that it remained in breach of the Settlement Agreement and requested the Penalty Amount to be paid too.

52. The Panel is of the opinion that these facts clearly show that the Appellant breached Articles 1 and 3 of the Settlement Agreement and remained in breach even after having received the confirmation from the Respondent on 14 January 2013, as the second installment of EUR 400,000 due on 20 December 2012 was only paid - with a bank fee deduction of EUR 105 and without the additional prior bank deduction of EUR 120 - on 17 January 2013. Therefore, the Panel has to decide if this breach of the Settlement Agreement is sufficient to trigger the Penalty Amount foreseen in Article 3 of the Settlement Agreement.

B. Penalty clause

53. Article 3 of the Settlement Agreement states *"if the Club fails to make <u>any</u> of the payments in the time and manner set out in clause 1, above, and continues to do so after the Player has given the Club twenty-one (21) days notice in writing… the Club shall pay € 500,000 (Five Hundred Thousand Euros) net of all taxes as penalty payment and compensation for the default…"*.

54. The wording of Article 3 of the Settlement Agreement is clear and in order for the Player to have the right to request the Penalty Amount, the following two conditions must be fulfilled:

- the Club fails to make any of the payments in time; and
- the Club continues to fail to make any of the payments after the Player has given the 21-day notice in writing.

55. The Panel notes that neither Party contests the facts that the Appellant did not pay the second installment of EUR 400,000 on 20 December 2012 and continued in default until 17 January 2013, after the elapse of the 21 days notice period ending on 11 January 2013.

56. Referring to the wording of Article 3 of the Settlement Agreement and the uncontested facts, the Panel is of the opinion that both conditions mentioned before are clearly fulfilled by the Appellant and therefore, the Player is entitled to request the Penalty Amount of EUR 500,000 from the Appellant.

57. As the Player is requesting the fulfillment of the Settlement Agreement, he is not acting in bad faith as alleged by the Appellant. The argument brought forward by the Appellant that it delayed paying the second installment as a result of a simple miscalculation of the deadline does not change anything in relation to the breach of the Settlement Agreement and the Penalty Amount to be paid to the Player.

58. The DRC reduced the Penalty Amount to an amount of EUR 300,000 as it considered the full Penalty Amount of EUR 500,000 to be disproportionate and not reasonable. As the Respondent did not appeal the Decision, and based on Article R55 of the Code being in force since 2010, where there is no longer the possibility of "any counterclaims" to be filed by the Respondent in its Answer, the Panel cannot review if the full Penalty Amount should be considered proportional and reasonable (see MAVROMATI/REEB, the Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, 2015, Article R55, N.14; RIGOZZI/HASLER, in ARROYO M., Arbitration in Switzerland, the Practitioner's Guide, 2013, Article R55 CAS Code, N. 21 and 22; CAS 2010/A/2202, N. 27). The Panel therefore rejects the Respondent's argument that raising such Penalty Amount above EUR 300,000 has to be considered within the Panel's power of a *de novo* review of the facts and the law based on Article R57 of the Code. Contrary to this argument, raising the Penalty Amount above EUR 300,000 as set by the DRC must be considered as a counterclaim and is rejected. For the avoidance of doubt, this also resulted in the Panel denying the Respondent's request for sporting sanctions against the Appellant.

59. Given that the Penalty Amount was already reduced by the DRC by 40 percent, the Appellant's appeal can only be successful if the Panel held, that an even bigger reduction was required to achieve proportionality. However, the Panel is of the opinion that such reduced Penalty Amount of EUR 300,000 is certainly proportional and reasonable when taking into account (i) the fact that the original claim of the Respondent filed with the DRC was EUR 1,731,316 whilst the payment to be received pursuant to the Decision is EUR 1,100,000, including such Penalty Amount, (ii) that the inclusion of the severe Penalty Amount was required to re-establish the Respondent's faith in the Appellant's willingness to honour its obligations under a Settlement Agreement only due to the Appellant's prior payment behavior towards the Respondent, (iii) that the negotiations of the Settlement Agreement were heavily influenced by the Respondent's bargaining position which was severely impaired by the pending closure of the registration window and the Appellant's allegations of a breach of contract by the Respondent and the threats to the Respondent's further playing career deriving from these circumstances, (iv) that the payment was agreed as due on 20 December 2012 and therefore made late by 27 days rather than only by 6 days, (v) that the payment was not made proactively, but only after the Appellant was informed by the Respondent that the notice period had expired, and (vi) that the Appellant, in light of its allegations that it planned to pay

the agreed amount on the last day of the notice period, apparently breached its primary obligation to pay on 20 December 2012 intentionally. Indeed the Panel is convinced that only the imminent threat of a severe Penalty Amount becoming payable, and not the obligation entered into by the Appellant, was the main cause for the Appellant's payment to the Respondent. If in such situation a debtor miscalculates the expiry date of the grace period granted by a creditor, the debtor must reasonably bear the consequences of such conduct.

C. Shortfall of Payments

60. Article 1 of the Settlement Agreement states that the amount of EUR 800,000 shall be paid *"net of all taxes related to the Turkish Tax Legislation"*. The Appellant has shown in its documents that it wired on 14 September 2012 as well as on 16 January 2013 the amounts of EUR 400,000 and therefore the full amounts without deducting any taxes related to the Turkish tax legislation. The Appellant, therefore, paid the full amounts of twice EUR 400,000 to the Respondent. The Settlement Agreement does not state that deductions other than such related to Turkish tax legislation should also be borne by the Appellant only. In particular no deductions were mentioned in the Settlement Agreement of which the Appellant could not be aware because such deductions were agreed between the Respondent and a third party as payable in return for services rendered by such third party to the Respondent, such as the fees payable by the Respondent to his own bank. In order for such amounts having to be borne by the Appellant, an explicit stipulation should have been included in the Settlement Agreement. The deducted bank fees were therefore not payable by the Appellant under the Settlement Agreement.

61. However, as the Panel has pointed out in paragraph 49 above, in its email of 17 September 2012, the legal representative of the Appellant confirmed that it did not know about the bank deduction of EUR 120 in relation to the first installment and stated that it would wire accordingly an amount of EUR 400,120 as the second installment. Such confirmation did not include any reservation of any kind, even though the Appellant would have had ample time for an investigation of the deducted amount's whereabouts. The Panel, therefore, understands this as an explicit obligation, not made under any specific condition and, therefore, the Appellant explicitly and in addition to the Settlement Agreement agreed in September 2012 to cover any fee taken by the bank (s) for the money wires.

62. Article 10 of the Settlement Agreement states that any notice to be given pursuant to the Settlement Agreement shall be given by fax and email. The Panel is therefore of the opinion that the Appellant's email of 17 September 2012 complies with this Article 10 of the Settlement Agreement and the Appellant therefore in a binding way agreed to cover the bank fees, regardless of which bank took these fees for the money wires. Based on this agreement, the second shortfall of payment of a further EUR 105 has to be covered by the Appellant as well.

63. The Panel, based on the Appellant's agreement of 17 September 2012, is of the opinion, that the Appellant is obliged to pay the total amount of EUR 225 to the Player.

D. Interests

64. Article 5 of the Settlement Agreement states that the Appellant agrees *"to pay interest in an amount of not less than 5% per annum in respect to the outstanding amount as well as any costs reasonably incurred by the Player in enforcing the Club's debt, including legal costs"*.

65. Based on the uncontested facts stated before, the first payment was made within the 21-day notice period given by the Respondent on 7 September 2012. Therefore, the Panel is of the opinion, that the first installment was made late in accordance to Article 1 lit. a of the Settlement Agreement, however, in looking at Article 3 of the Settlement Agreement no interest is due on the amount of EUR 399,880. On 28 September 2012, the 21-day deadline ended; therefore, starting on 29 September 2012, the amount of EUR 120 became overdue and the interest of 5% p.a. granted by the DRC starting on 5 February 2013 is confirmed by the Panel.

66. The Parties agree that the second installment was not made within twenty-one (21) days of the notice given by the Respondent on 21 December 2012. The Agreed Amount of EUR 400,000 became therefore due on 11 January 2013, based on Article 3 of the Settlement Agreement. The Panel, therefore, is of the opinion that based on Article 5 of the Settlement Agreement starting on 12 January 2013, the second installment of EUR 400,000 became overdue and 5% interest on the shortfall of EUR 105 - as started by DRC - shall be paid starting on 5 February 2013.

67. The DRC stated in its Decision that the Penalty Amount of EUR 300,000 shall be paid within 30 days as from the date of notification of the Decision and 5% interest p.a. fall due on this amount starting with the expiry of the 30 days' time limit. The Panel, therefore, decides that in accordance to the Decision, the Appellant shall pay 5% interests on the amount of EUR 300,000, starting on 26 April 2015, 30 days after having received the Decision.

E. Summary

68. Based on the facts, the Parties' allegations, proofs and statements made at the hearing, the Panel rejects the appeal and confirms the Decision. Therefore, the Appellant shall pay to the Respondent an amount of EUR 300,000 plus 5% interests starting on 26 April 2015, as well as EUR 225 plus 5% interest p.a. starting on 5 February 2013.

ON THESE GROUNDS

The Court of Arbitration for Sports rules that:

1. The appeal of Kayserispor Kulübü Dernegi against Mr. James Troisi regarding the Decision of the FIFA Dispute Resolution Chamber dated 12 March 2015 is dismissed.

2. The Decision of the FIFA Dispute Resolution Chamber dated 12 March 2015 is confirmed.

3. (…).

4. (…).

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