Arbitration CAS 2015/A/4139 Al Nassr Saudi Club v. Trabzonspor FC, award of 20 January 2016

Panel: Mr Marco Balmelli (Switzerland), President; Mr Pedro Tomás Marqués (Spain); Mr Stuart McInnes (United Kingdom)

Football
Solidarity contribution
Agreement on a "net" transfer fee
Determination of the amount of the penalty in a penalty clause
Freedom of contract and reduction of a penalty fee
Characterisation of a penalty fee as excessive
Admissibility of the reduction of a penalty fee
Interest of the creditor
Business experience of the parties
Financial situation of the debtor

1. **There is no legal obstacle preventing clubs from agreeing that the new club shall bear the solidarity contribution in addition to the transfer fee. As long as the new club remains responsible for paying the solidarity contribution, an "internal arrangement" between the clubs involved in a transfer is not prohibited by the RSTP.**

2. **The amount of the penalty shall not be fixed according to the extent of the damage (Article 161 para. 1 of the Swiss Code of Obligations – CO), but according to the agreement of the parties. In accordance with the general principle of freedom of contract, Article 163 para. 1 CO 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.**

3. **Under Swiss law, the reduction of the penalty is reserved for exceptional cases only, when the penalty is considered as grossly unfair. This follows from Article 163 para. 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. Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation.**

4. **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. 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.**

5. When deciding whether a reduction of the penalty fee is admissible, and if so, to what extent, a CAS panel 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. 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).

6. 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. 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 punishment is justified (function of preventive pressure of the penalty clause). 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.

7. 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.

8. 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 financial position of the debtor, a judge can apply the principle of equity in the exercise of his discretion when determining its validity. Taking into account the financial situation of the debtor principally addresses the need to prevent a case of usury ("usure"); however, the financial situation of the debtor should not relegate the creditor's interest to a secondary level.

I. INTRODUCTION

1. The appeal is brought by Al Nassr Saudi Club ("Al Nassr" or the "Appellant") against the decision of the Single Judge of the Fédération Internationale de Football Association ("FIFA") Players' Status Committee (the "Single Judge") dated 22 April 2015 (the "Appealed Decision").

II. PARTIES

2. Al Nassr is a professional football club from Saudi Arabia, currently competing in the Saudi Professional League. The Appellant is affiliated to the Saudi Arabia Football Federation, which is, in turn, affiliated to FIFA.

3. Trabzonspor Football Club ("Trabzonspor" or the "Respondent") is a professional football club from Turkey, currently competing in the Süper Lig. Trabzonspor is affiliated to the Turkish Football Federation, which is, in turn, affiliated to FIFA.

III. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While 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 he considers necessary to explain its reasoning.

5. On 12 June 2014, Trabzonspor and Al Nassr concluded an agreement for the transfer of the player A. (the "Player") from Trabzonspor to Al Nassr (the "Agreement").

Article 2 of the Agreement reads as follows:

"2.) In consideration of such transfer of registration of AL NASSR SFC agrees and obligates to pay the net amount of € 3.200.000 (Three Million and Two Hundred Thousand Euros), to TRABZONSPOR A.Ş. as follows:

a) Net € 2.000.000 upon signing the contract to be paid before sending the International Transfer certificate (ITC)

b) Net € 1.200.000 on or before the 31st of December 2014.

§1: The payment referred in 2a) above must be made prior to the TMS conclusion and the issue of the International Transfer Certificate of the Player.

§2: AL NASSR SFC shall provide a bank guarantee from Vakifbank A.Ş. via national Commercial Bank as corresponding bank for the second instalment. The content of the bank guarantee shall be subject to approval of TRABZONSPOR A.Ş. The bank guarantee shall be send to TRABZONSPOR A.Ş. until 01st of July 2014. If AL NASSR SFC does not provide a bank guarantee until 01st of July 2014 and does not pay the second instalment on 31st of December 2014 then a penalty payment in the amount of € 500.000 (Five Hundred Thousand Euros) shall be paid by AL NASSR SFC to TRABZONSPOR A.Ş.; further AL NASSR

SFC agrees to pay an additional amount of € 50.000 (Fifty Thousand Euros) per each period of 30 days delay, starting of the 01/01/2015 until the second instalment is fully paid.

§3: Payments to TRABZONSPOR A.Ş. are net [which means that the amounts referred above are the sums to be paid to TRABZONSPOR A.Ş. after all legal and/or – deductions including but not limited to solidarity contributions] and made via Bank transfer to TRABZONSPOR A.Ş's Bank Account which details are as follows: […]" (emphasis added).

6. On 4 August 2014, the Player's transfer was registered in the TMS after Al Nassr had paid the first instalment in due time.

7. On 28 December 2014, the Appellant wrote a letter to the Respondent, stating that it will deduct 5% of the whole transfer fee from the second instalment and requested for an adjusted invoice.

8. On 30 December 2014, the Respondent refused the Appellant's allegations and insisted on the payment of EUR 1,200,000 with reference to article 2 para. 3 of the Agreement.

9. On 31 December 2014, Al Nassr wrote another letter to Trabzonspor in which it claimed article 2 para. 3 of the Agreement as void. Furthermore, it insisted on receiving an invoice in the amount of EUR 1,040,000.

B. Proceedings before the Single Judge of the Players' Status Committee

10. On 7 January 2015, Trabzonspor lodged a claim in front of the FIFA Players' Status Committee against Al Nassr requesting from the latter to pay the following:

- EUR 1,200,000 regarding the second instalment;
- EUR 500,000 regarding the contractual payment;
- EUR 50,000 for each period of 30 days starting from 1 January 2015;
- 5% interests as from the due date of the transfer fee, the penalty fee and the *"monthly penalty"*; and
- legal costs.

11. On 22 April 2015, the Single Judge, ruled that:

- Al Nassr shall pay the second instalment (EUR 1,200,000) to Trabzonspor plus 5% interest *p.a.* as from 1 January 2015.

- Al Nassr shall pay the penalty fee (EUR 500,000) to Trabzonspor within 30 days. If the fee is not paid within the stated time limit, interest at the rate of 5% *p.a.* shall apply.

- The request for the "monthly penalty" of EUR 50,000 for each period of 30 days is denied.

- Al Nassr shall pay the costs of the proceedings in the amount of EUR 18,000.

12. The Single Judge considered, in essence, the following:

- Referring to the payment of the second instalment:

  - The fact that a party might, in principle, be entitled to deduct 5% corresponding to the solidarity contribution according to article 21 of the Regulations on the Status and Transfer of Players (the "RSTP") and article 1 of its Annexe 5 does not justify for the failure to pay – at least – the remaining 95% of the transfer fee.

  - Al Nassr did not provide any evidence which confirmed that it had indeed distributed 5% of the transfer compensation to the clubs involved in the player's training and education.

- The penalty fee in the amount of EUR 500,000 is neither excessive, nor disproportionate or grossly unfair.

- Considering the request for a "monthly penalty fee" in the amount of EUR 50,000 per 30 days of delay, the Single Judge held that this would correspond to a default interest of approximately 50% *p.a.* As such interest rate is considered excessive, the Single Judge rejected this prayer for relief.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 8 July 2015, the Appellant filed its statement of appeal with respect to the Appealed Decision with the Court of Arbitration for Sport (the "CAS") in accordance with articles R47 and R48 of the Code of Sports-related Arbitration (2013) (the "CAS Code"). It must be emphasised that the aforementioned statement of appeal shall be considered as the Appellant's appeal brief.

14. In its statement of appeal, the Appellant nominated Mr Pedro Tomás Marqués, attorney-at-law in Barcelona, Spain, as arbitrator.

15. On 27 July 2015, FIFA informed the CAS Court Office that it renounced its right to intervene in the present arbitration.

16. On 29 July 2015, the Respondent designated Mr Stuart C. McInnes, Solicitor in London, UK, as arbitrator.

17. On 3 September 2015, the CAS Court Office advised the parties that the Panel appointed to adjudicate the present case was constituted as follows:

President:	Dr Marco Balmelli, attorney-at-law in Basel, Switzerland
Arbitrators:	Mr Pedro Tomás Marqués, attorney-at-law in Barcelona, Spain
	Mr Stuart C. McInnes, Solicitor in London, United Kingdom

18. On 7 September 2015, the Respondent filed its answer in accordance with article R55 para. 1 of the CAS Code.

19. On 15 and, respectively, 16 September 2015, the parties indicated that they preferred for a hearing to be held in the present matter.

20. On 1 October 2015, the CAS Court Office informed the parties that a hearing will be held on 25 November 2015.

21. On 5 October 2015, the Appellant confirmed its participation at the hearing and announced that it will be represented by its legal representatives, Mr Boughrara Khaled and Mr Khalid Al Rasheedan.

22. On 25 October 2015, the OP was duly signed by both parties. In the OP, the Appellant stated that the General Secretary of the Club, Mr Khalid Al Rasheedan, as well as Mr Khaled Boughrara will be present at the hearing.

23. On 19 November 2015, the Appellant requested that the Panel allow its participation at the hearing via skype-conference, due to a prior commitment of the Appellant's representatives. On 20 November 2015, the Respondent opposed to such request, stating that there was no valid reason for the Appellant not to participate at the hearing. On 21 November 2015, the Appellant claimed, (without providing any evidence), that its General Secretary could not participate at the hearing due to military duties. Furthermore, there was insufficient time to arrange a visa for the legal representative of the Club, notwithstanding that the Appellant has announced his presence, which was confirmed in the OP. It is noted by the Panel that as at this date, CAS Court Office had not received any request to issue an invitation letter to support visa application for the Appellant's legal representatives. Al Nassr further failed to provide evidence of any effort made to obtain visas in due time.

24. On 23 November 2015, the Panel, nevertheless, informed the parties that the Appellant should be allowed to exceptionally participate at the hearing via skype-conference. On 24 November

2015, the Appellant confirmed that its representative, Mr Khaled Boughrara would be available via skype.

25. On 25 November 2015, a hearing was held at the CAS Headquarters in Lausanne, Switzerland. The Appellant initially participated via skype-conference, but technical problems occurred with the Appellant's device and consequently, the Panel allowed the Appellant's representative to participate by telephone conference call. The Appellant's representative specifically confirmed twice that the Appellant's procedural rights, as well as its right to be heard, were respected throughout the procedure and particularly during the hearing. The Respondent also expressly declared that it was satisfied with the way in which the proceedings had been conducted, particularly with regard to its right to be heard, which was duly respected during the whole procedure.

V. SUBMISSIONS OF THE PARTIES

26. 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 no explicit reference has been made in what immediately follows. The parties' written submissions, their verbal submissions at the hearing and the contents of the Appealed Decisions were all taken into consideration.

A. The Appellant

27. The Appellant filed the following prayers for relief:

"In view of the above, the Appellant respectfully request to this Court of Arbitration for Sport the following:

a. To declare the jurisdiction over the present dispute.

b. To accept the appeal against the decision adopted by FIFA on 18 June 2015.

c. To annul the decision issued by FIFA on 18 June 2015 and issue a new decision establishing that:

i. The amount claimed by the Respondent is incorrect, since 5% of solidarity contribution should be deducted.

ii. The entitlement of EUR 1,040,000 is due to Trabzonspor since the amount stipulated in para.III.2 of the FIFA decision is incorrect due to lack of the panel to consider the right of the Appellant to retain 5% of the total transfer compensation, due to lack of consent of the appellant since there was no "mutually agreed real intention of the parties" in the sense of Article 18 CO regarding the meaning of the words used by Trabzonspor AS. Therefore, in application of the principle "in dubio contra stipulatorem", it was for the club having drafted the transfer agreement, in casu the Turkish club, to prove the existence of an agreement to shift the final internal financial

obligation for the solidarity contribution from the right of Al Nassr club to deduct 5% of the Solidarity Contribution, and in the alternative;

Or subsidiary, that

iii. The penalty fee of EUR 500,000 is not applicable in this dispute;

iv. To annul clause III.4 of the FIFA decision and to replace the disproportioned penalty fee of EUR 500,000 by compensation of 5% on default interest which should apply over the disputed amount of EUR 1,040,000 paid late as from the CAS award until the date of effective payment , due to the lack of consent of the appellant since there was no "mutually agreed real intention of the parties"

And in any case, that:

v. Trabzonspor football Club shall reimburse the CHF 18,000 paid by Al Nassr Saudi Club as administrative costs within FIFA.

vi. The costs related to the present arbitration shall be borne by the Respondent.

vii. Trabzonspor Football Club shall pay the legal fees and other expense incurred by Al Nassr Saudi Club in connection with the present arbitration procedure".

28. The Appellant's submissions, in essence, may be summarized as follows:

- According to article 21 of the FIFA regulations on the Status and Transfer of Players ('RSTP') in connection with article 1 of Annexe 5, the new club shall pay a solidarity contribution of 5% to the clubs which trained the Player during his youth. Being the "new" club in the case at hand, Al Nassr did not give its consent to waive its right to deduct 5% from the transfer fee corresponding to the solidarity contribution. Therefore, there was no *"mutually agreed real intention of the parties"* in accordance to article 18 of the Swiss Code of Obligations (the "CO").

- Due to the use of some specific Turkish words and letter symbols, it is clear and obvious that the Respondent drafted the Agreement. With respect to the principle *"in dubio contra stipulatorem",* the Respondent shall prove the existence of a clear agreement or otherwise be burdened with the fact that the Agreement to shift the financial obligation regarding the solidarity contribution was not drafted precisely.

- The penalty fee in the amount of EUR 500,000 is excessive (either disproportionate or unfair) and should be reduced according to article 163 CO.

B. The Respondent

29. The Respondent filed the following prayers for relief:

"In view of all the above factual and legal arguments, by keeping our rights reserved for future claims we hereby respectfully request the Committee:

1. to reject all the requests and claims of the Appellant,

2. to confirm the decision of the Single Judge of the FIFA Players' Status Committee on 22.04.2015,

3. to order the costs of the arbitration to be borne by Al Nassr SFC,

4. to order Al Nassr SFC to pay all the legal costs of the Trabzonspor A.Ş in connection with this arbitration".

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

- According to the jurisprudence of the CAS (e.g. 2012/A/2707), there is no legal obstacle which prevents the clubs from agreeing that the new club, apart from paying the transfer fee, additionally bears the solidarity contribution. Therefore, the Agreement shall be considered valid.

- The Agreement clearly states that the payment is a *"net"* payment. Furthermore, Al Nassr is an experienced club regarding international transfers and shall be considered sufficiently professional to negotiate a transfer fee.

- The principle of *"in dubio contra stipulatorem"* will only apply if a contract is not clearly drafted. In the case at hand the clause regarding the transfer fee does not leave any room for interpretation, the principle of *"in dubio contra stipulatorem"* should not apply.

- With respect to the payment in the amount of EUR 500,000 and EUR 50,000 per month, the Respondent pointed out that, by rejecting its claim for payment in the amount of EUR 50,000 per month, the penalty aspect of the fee has already been reduced in the Appealed Decision.

VI. JURISDICTION

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

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

32. The jurisdiction of the CAS, which was not disputed by the parties, derives from articles 66 and 67 of the FIFA Statutes, which state in particular that CAS has jurisdiction to consider appeals against a decision of the Single Judge. Therefore, the Panel concludes that CAS is competent to adjudicate the present case.

VII. ADMISSIBILITY

33. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties".

34. Article 67.1 of the FIFA Statutes provides as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".

35. The grounds of the Appealed Decision were notified to the parties on 18 June 2015. The appeal filed by the Appellant on 8 July 2015 is therefore admissible.

VIII. APPLICABLE LAW

36. It is generally accepted that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Private International Law Act (the "PILA") is the relevant arbitration law for an arbitration pursued in Switzerland (DUTOIT B., Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 1 on article 176 PILA; TSCHANZ P-Y., in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n° 1, p. 1627, ad article 186 PILA). Article 176 para. 1 PILA provides that the provisions of Chapter 12 of PILA regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

37. The CAS has its seat in Lausanne, Switzerland. Therefore, the PILA is applicable. Article 187 para. 1 of the PILA provides – *inter alia* – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. In agreeing to arbitrate the present dispute according to the CAS Code, the parties have submitted to the conflict-of-law

rules contained therein, in particular to article R58 of the CAS Code (CAS 2008/A/1705, para. 9 and references; CAS 2008/A/1639; para. 21 and references; CAS 2006/A/1141, para. 61).

38. 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

39. Article R58 of the CAS Code indicates how the Panel must determine which substantive rules/laws are to be applied to the merits of the dispute. This provision recognizes the pre-eminence of the *"applicable regulations"* to the *"rules of law chosen by the parties"*, which are only applicable *"subsidiarily"*. Article R58 of the CAS Code does not admit any derogation and imposes a hierarchy of norms, which implies for the Panel the obligation to resolve the matter pursuant to the regulations of the relevant *"federation, association or sports-related body"*. Should this body of norms leave a lacuna, it would be filled by the *"rules of law chosen by the parties"*.

40. The parties in the present case have submitted themselves to the FIFA Statutes, including article 66 para. 2, which provides that *"[t]he 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"*. Therefore, in the present case and with respect to the applicable substantive law, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply to the extent warranted.

IX. MERITS

41. Taking the parties' submissions into due consideration, the main issues to be resolved by the Panel are:

- Is the Appellant obliged to pay the transfer fee in the total amount of EUR 3,200,000?
- If the Appellant failed to pay the transfer fee in due time, is the contractual penalty in the amount of EUR 500,000 proportionate and due?

A. Transfer fee

42. The Appellant deems itself not bound by the Agreement, making reference to article 4, which holds that the Agreement shall be null and void in case the Player and the Appellant cannot reach an agreement by 16 June 2014. Indeed, the Appellant and the Player reached an agreement only after this date, which is undisputed by both parties. Despite these circumstances, the Appellant paid the first instalment in due time without any reservation. The Panel deems it evident that by paying and accepting the first instalment, the parties implicitly agreed that the resolutive condition (article 4 of the Agreement) shall not apply. Therefore, the Panel considers that the Appellant's argument shall not be accepted, as it violates the principle of *"venire contra factum proprium"*. Since the Appellant does not provide further evidence or arguments why the

Agreement should not be binding, the Panel concludes that the Agreement is valid. The Agreement is signed by the Appellant's President and each page of the Agreement is initialled by both parties.

43. The Panel considers that the wording of the Agreement is clear and cannot be misinterpreted. Article 2 para. 3 defines the meaning of the agreed transfer fee as "net" being the amount after all legal deductions, including but not limited to solidarity contributions. The Panel therefore recognizes, that the parties actually agreed on a net transfer fee of EUR 3,200000, which corresponds to a gross amount of EUR 3,368,421, inclusive of the amount to be distributed as solidarity contribution.

44. With respect to the question whether the parties may agree on a "net" transfer fee, the Panel adopts the decision rendered in the case CAS 2012/A/2707, which holds that there is no legal obstacle preventing clubs from agreeing that the new club shall bear the solidarity contribution in addition to the transfer fee. As long as the new club remains responsible for paying the solidarity contribution, an internal agreement such as that in the case at hand is not prohibited by the RSTP (also see CAS 2013/A/3403-3404 & 3405, para. 7.3; CAS 2008/A/1544, para. 71 and 72; CAS/2009/A/1773 & 1774 para. 7.3). The Panel notes, that this is explicitly recognized by the Appellant in para. 17 of its appeal brief.

45. Furthermore, the Panel considers that the Appellant paid the first instalment without reservation. The Appellant has not provided any justified reason why the contract has not been validly concluded or why it should have interpreted the Agreement differently with regard to the solidarity contribution.

46. Taking account all the circumstances of the present case, the Parties' behaviour and the clear wording of the Agreement, into account, the Panel deems it evident that the parties agreed on a transfer fee in the amount of EUR 3,200,000, meaning that, the Appellant shall additionally be burdened with the payment of the solidarity contribution. As the wording of the Agreement is distinct and no doubts remain, the principle of *"in dubio contra stipulatorem"* does not apply in the case at hand. The Panel therefore concludes that the Appellant had no valid reason to deny the payment of the second instalment of EUR 1,200,000.

B. Penalty fee in the amount of EUR 500,000

a. Relevant provisions of the CO and jurisprudence

47. With respect to the Appellant's prayer for relief to declare the penalty fee in the amount of EUR 500,000 invalid, the Panel holds that the Appellant neither paid the second instalment in due time, nor did it provide the bank guarantee. Therefore, the Panel considers the conditions for the payment outlined in article 2 para. 2 of the Agreement to be met.

48. The RSTP do not contend any provisions regarding penalty clauses. Swiss law is therefore applicable to this issue. Under Swiss law, the provisions regarding penalty clauses are set out in articles 160 et seq. of the Swiss Code of Obligations (the "CO").

49. Articles 160, 161 and 163 of the CO state as follows:

"Article 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.

Article 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.

Article 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".

50. 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.

51. The Appellant 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 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. Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation (Decision of the Swiss Federal Tribunal, 11.03.2003, 4C.5/2003).

52. 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 (ATF 133 III 43, para. 3.3.1). 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 (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).

53. When deciding whether a reduction of the penalty fee 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 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 (Decision of the Swiss Federal Tribunal, 16.01.2002, 4C.249/2001).

54. 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).

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

b. Alleged excessiveness of the penalty fee

i. The main criterion: the creditor's interest

56. 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. 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 punishment is justified (function of preventive pressure of the penalty clause). 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.

57. In the case at hand, the Respondent claims that it insisted on a bank guarantee, as the Appellant had a fragile financial structure. To secure the Respondent's claim, the parties agreed on the penalty fee. The Panel considers this argument, which is not disputed by the Appellant, reasonable. Therefore, the Panel concludes that the penalty fee was agreed in order to motivate the Appellant to hold the contract, rather than intended as liquidated damages.

ii. The severity of the breach, the Respondent's fault and the intentional failure to execute the main obligation

58. In itself, the penalty is triggered regardless of the importance of the breach of the contract (Article 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 breaching the contract. If the violation of the primary obligation is objectively serious, the penalty fee will rarely be viewed as excessive.

59. In the case at hand, the protected interest was the timely payment of the second instalment. The Appellant's argument of being entitled to deduct 5% of the transfer fee may not justify the non-payment of the second instalment. Considering that the Appellant did not even pay the amount which was undisputed (*i.e.* EUR 1,040,000) in due time, the Panel concludes that violation of the Agreement shall be considered objectively as severe. Furthermore and for the same reasons, the Panel holds that the Appellant acted intentionally at least with respect to the amount which was undisputed. Therefore, the Panel considers the Appellant's fault severe.

iii. The business experience of the parties

60. 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.

61. The Appellant is, and has for many years been, a successful club, regularly participating in the Champions League of the Asian Football Confederation and should therefore be considered experienced in international transfers and in the negotiation and drafting of transfer agreements. Therefore, the Panel does not see any reasons to reduce the penalty fee with regard to this criterion.

iv. The Respondent's financial situation

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

63. The Appellant alleged that it was in a very poor financial situation. However, the Panel notes that the Appellant did not provide any documentation or any other evidence justifying such contention. Furthermore, the Panel concludes that the Appellant did not adduce any evidence of disproportion between the penalty fee and its financial situation.

64. Furthermore, should the Appellant 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 (COUCHEPIN, para. D.3.1. p. 181). The Panel is therefore of the opinion that the Appellant should not benefit from a reduction of the penalty fee on the basis of its alleged difficult financial situation.

65. For these reasons, the Panel agrees with the Single Judge, stating that the penalty fee was proportionate and shall not be reduced.

C. Conclusion

66. In conclusion, the Panel holds that:

- The Agreement is valid and clear with respect to the amount of the transfer fee being "net". As the meaning of "net" is lined out precisely, Al Nassr is obliged to pay the second instalment in the amount of EUR 1,200,000.

- The conditions for the payment of the penalty fee are met. The amount is neither disproportionate nor grossly unfair. The Appellant shall therefore pay the penalty fee in the amount of EUR 500,000.

67. The Panel therefore concludes that the appeal shall be fully dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al Nassr Saudi Football Club on 8 July 2015 with respect to the decision of the Single Judge of the FIFA Players' Status Committee dated 22 April 2015 is dismissed.

2. The decision issued by the Single Judge of the FIFA Players' Status Committee on 22 April 2015 is confirmed.

(…)

5. All other prayers for relief are rejected.