Arbitration CAS 2015/A/4144 Newell's Old Boys v. Al Ain FC, award of 26 April 2016

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Breach of a transfer agreement
Time limit to claim contractual penalties
Notion of force majeure preventing a club to comply with its financial obligations
Reduction of the contractual penalties

1. **Article 25(5) of the FIFA RSTP allows for 2 years for a party to bring claims through FIFA. And even if Swiss law – which only applies on a subsidiary basis if there is a lacuna in the FIFA Regulations – and the legal principle of *venire contra factum proprium* were to be deemed applicable, a delay of 30 days before claiming contractual penalties under a transfer agreement would not estop or otherwise affect a creditor/club's *prima facie* claim to the contractual penalties.**

2. **According to article 163.2 of the Swiss Code of Obligations (SCO) a penalty may not be claimed where *"performance has been prevented by circumstances beyond the debtor's control"*. In this respect, a debtor hampered by an insolvency process which may not have been able to control the balance of payments in its country but which did not on the other hand do everything under its control to pay the creditor earlier cannot invoke force majeure.**

3. **According to article 163 SCO, an excessive amount of penalties might be reduced by the hearing panel taking into consideration all evidence produced and all submissions made.**

I. PARTIES

1. Newell's Old Boys ("Newell's" or "the Appellant") is a football club based in Rosario, Sante Fe, Argentina and participates in the Argentine Primera División.

2. Al Ain FC ("Al Ain" or "the Respondent") is a football club based in Al-'Ayn, United Arab Emirates and participates in the UAE Arabian Gulf League.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 24 July 2012, the Appellant and the Respondent entered into a loan agreement ("the Loan Agreement") for the player I. ("the Player"). The loan period was for one season (i.e. 1 August 2012 to 30 June 2013) and for a total consideration of EUR 600,000, with the Player being loaned by the Respondent to the Appellant.

5. Clause 2.1 of the Loan Agreement stated as follows:

"The Loan fee is 600,000Euros (six hundred thousand Euros). Newell's Old Boys will pay $500,000 (five hundred thousand US Dollars). This equates to 412,691Euros (four hundred and twelve thousand, six hundred and ninety one Euros). Al Ain will deduct 85,606Euro (eighty five thousand, six hundred and six Euros) from the 600,000Euros (six hundred thousand Euros) for the Solidarity Mechanism payment outstanding to Newell's Old Boys. The Player shall pay 101,703Euros (one hundred and one thousand, seven hundred and three Euros) to Al Ain".

6. Further, Clause 2.2 of the Loan Agreement stated as follows:

"In Consideration of the Loan of the Player to Newell's Old Boys, Newell's Old Boys shall pay Al Ain a guaranteed net fee of $500,000 (five hundred thousand US Dollars) ("the Guaranteed Loan Fee"). The Guaranteed Loan Fee shall be paid in instalments as follows:

(i) $100,000 (one hundred thousand US Dollars) to be paid by Newell's Old Boys to Al Ain on 31st August 2012.

(ii) $100,000 (one hundred thousand US Dollars) to be paid by Newell's Old Boys to Al Ain on 31st January 2013.

(iii) $100,000 (one hundred thousand US Dollars) to be paid by Newell's Old Boys to Al Ain on 30th April 2013.

(iv) $100,000 (one hundred thousand US Dollars) to be paid by Newell's Old Boys to Al Ain on 31st May 2013.

(v) $100,000 (one hundred thousand US Dollars) to be paid by Newell's Old Boys to Al Ain on 30th June 2013".

7. Clause 2.3 of the Loan Agreement stated as follows:

"A penalty of $50,000 (fifty thousand US Dollars) shall be payable by Newell's Old boys to Al Ain each and every time a payment is late".

8. The Loan Agreement contained an option for a definitive transfer for the amount of EUR 1,800,000 ("the Transfer Option"). Clause 3 of the Loan Agreement stated as follows:

"3. Option to Purchase

3.1 Newell's Old Boys shall have the option to purchase the Player from Al Ain further to the Loan Period by notifying Al Ain of their intention to do so by 30th April 2013 ("the Option").

3.2 Should Newell's Old Boys decide to exercise the Option, and the Player consents to such, then the players registration will be permanently transferred to Newell's Old Boys.

3.3 In consideration of the Option, Newell's Old Boys shall pay to Al Ain a guaranteed net fee of 1,800,000Euros (one million, eight hundred thousand Euros)".

9. On 18 October 2012, the Respondent claims it sent the Appellant a notice claiming the payment of the first instalment and the associated penalty.

10. On 22 November 2012, the Respondent wrote to the Appellant stating that they still had not received the first instalment of USD 100,000 which was due to them on 31 August 2012 under the Loan Agreement. The Respondent requested the payment of this amount plus the penalty amount of USD 50,000.

11. On 4 December 2012, the first instalment under the Loan Agreement of USD 100,000 was paid to the Respondent by bank transfer.

12. On 11 December 2012, the Respondent claims it sent the Appellant a further notice.

13. On 17 December 2012, the Respondent wrote to the Appellant confirming receipt of the first instalment of USD 100,000 on 16 December 2012. However, the Respondent also noted that the Appellant had not yet paid the penalty amount of USD 50,000 pursuant to their notices dated 18 October 2012, 22 November 2012 and 11 December 2012.

14. On 6 February 2013, the Respondent wrote to the Appellant stating that they had still not received the penalty of USD 50,000 they were owed on the late first instalment but noted that the second instalment was also late as it was due on 31 January 2013 and had not yet been paid. As such, an additional USD 50,000 penalty was payable pursuant to clause 2.3 of the Loan Agreement, bringing the total amount due to USD 200,000. The Respondent stated that if the Appellant did not pay the outstanding amount due of USD 200,000 within 10 days of receipt of the letter, they would be pursuing legal action to protect their rights.

15. On 14 February 2013, the Appellant wrote to the Respondent stating *inter alia*, that they did not have to pay the USD 50,000 penalty for the first instalment as *"the delay was exclusively attributable to the entry in force of a series of rules in Argentina imposing a lot of requirements and paperwork to transfer funds abroad, rules that were not in place at the time of the agreement and delay the remittance of the funds"*. Further, the Appellant stated that in relation to the second instalment which was due on 31 January 2013, the Appellant stated that they only received an invoice from the Respondent on 12 February 2013 and as the provision of an invoice was a *"sine qua non condition for processing the*

transfer of funds", the second instalment was not overdue. The Appellant also tried to explain the delays by stating that the conditions in Argentina had changed substantially since the Loan Agreement was entered into, and this had affected all the contracts entered into by Argentine residents and their counterparts.

16. On 18 February 2013, the second instalment under the Loan Agreement of USD 100,000 was paid to the Respondent.

17. On 26 February 2013, the Respondent wrote to the Appellant in response to their letter dated 14 February 2013 stating that, *inter alia*, no invoice was required in order for the amount to become due and payable and reiterated their request for the outstanding penalty amounts of USD 100,000 to be paid.

18. On 28 February 2013, the Appellant wrote to the Respondent reiterating that the invoice was an essential element in obtaining the payment. Further, the Appellant reiterated the new rules in Argentina in relation to the transfer of funds abroad were passed after the parties entered into the Loan Agreement and while they were not claiming that the Respondent responsible for this, they had nevertheless notified the Respondent as soon as it became applicable and any delay in payments made since were not attributable to the Appellant. Further, the Appellant rejected the Respondent's claim for USD 100,000 in penalties and appealed to the good faith and understanding of the Respondent in ceasing to issue claims for penalties.

19. On 25 April 2013, the Appellant wrote to the Respondent to notify them of its intention to exercise the Transfer Option and stated that they *"will make the payment agreed prior to the opening of the international registration period determined by FIFA in order to allow* [the Respondent] *to upload the relevant documents into TMS in favour of the* [Appellant]*"*.

20. On 30 April 2013, the third instalment under the Loan Agreement of USD 100,000 was paid to the Respondent.

21. On 30 May 2013, the fourth instalment under the Loan Agreement of USD 100,000 was paid to the Respondent.

22. On 28 June 2013, the fifth and final instalment under the Loan Agreement of USD 100,000 was paid to the Respondent.

23. A summary of the due dates of the instalments under the Loan Agreement and their eventual payment dates are as follows:

Instalment	Due Date	Payment Date	Amount
1	31/08/2012	04/12/2012	USD 100,000
2	31/01/2013	18/02/2013	USD 100,000
3	30/04/2013	30/04/2013	USD 100,000
4	30/05/2013	30/05/2013	USD 100,000
5	30/06/2013	28/06/2013	USD 100,000

24. On 30 June 2013, the loan period for the Player ended.

25. On 19 July 2013, the Player completed a transfer from the Appellant to the Brazilian club Sport Club Internacional ("Internacional") for a transfer fee of EUR 4,000,000 ("the Internacional Transfer"). The transfer fee was to be paid by the Appellant in two instalments, USD 3,200,000 within 48 hours of the receipt of the International Transfer Certificate ("the ITC") by Internacional and USD 800,000 to be paid on 10 January 2014 (of which USD 600,000 would go to the Appellant and USD 200,000 to an agent involved in the transfer).

26. On 20 July 2013, the Appellant and the Respondent entered into an agreement for the transfer of the Player ("the Transfer Agreement") for a fee of EUR 1,800,000 (net).

27. Clause 2 of the Transfer Agreement stated as follows (emphasis added by the Sole Arbitrator):

> *"2.2 In addition to the Transfer Fee of 1,800,000 Euros (one million, eight hundred thousand Euros), there is a penalty of 150,000USD (one hundred and fifty thousand United States Dollars) in late fees for the instalments of payments in the Loan Agreement between the two clubs as stipulated in Article 2.3 of the Loan Agreement. This equates to 115,000 Euros (One Hundred and Fifteen Thousand Euros) in today's exchange rate.*
>
> *2.3 The total amount due, in one payment is 1,915,000 Euros (one million, nine hundred and fifteen thousand Euros).*
>
> *2.4 Newell's Old Boys will credit the account of Al Ain with the total amount of 1,915,000 Euros (one million, nine hundred and fifteen thousand Euros) on or before Monday 12th August 2013.*
>
> *2.5 There is a penalty of 200,000 Euros (two hundred thousand Euros) if this total amount is received late.*
>
> *2.6 There is a penalty of 200,000 Euros (two hundred thousand Euros) for each subsequent 7 (seven) day period that passes without the total amount not being received by Al Ain.*
>
> *2.7 Newell's Old Boys shall provide Al Ain with a bank guarantee or managers cheque for the total amount of 1,915,000 Euros (one million, nine hundred and fifteen thousand Euros) on 20 July 2013".*

28. On 22 July 2013, as the Appellant was then subject to insolvency proceedings in Argentina, the Internacional Transfer was authorised by the judge in charge of these Newell's insolvency proceedings ("the Insolvency Judge").

29. On 26 July 2013, the ITC for the Player was issued by the Argentine Football Association allowing the Player to transfer from Newell's to Internacional.

30. On 7 August 2013, the Appellant received the money owed to it by Internacional under the Internacional Transfer.

31. On 7 August 2013, the Appellant requested the Insolvency Judge to authorize the payment it was required to make to the Respondent under the Transfer Agreement and to order the transfer of the funds.

32. On 8 August 2013, the Appellant requested authorisation from the relevant fiscal authorities and their bank - the National Central Bank ("the NCB") - to process the bank transfer.

33. On 12 August 2013, the transfer fee and prior penalties became due to the Respondent from the Appellant pursuant to the Transfer Agreement.

34. On 29 August 2013, the Insolvency Judge authorised the payment required under the Transfer Agreement and the transfer of the funds. On the same day, the Appellant requested the NCB to proceed with the transfer of the funds to the Respondent.

35. On 10 September 2013, the NCB cleared the transfer of the funds and the money was transferred to the Respondent.

36. On 20 October 2013, the Respondent wrote to the Appellant stating that the payment required under the Transfer Agreement was late and the applicable penalty was EUR 1,000,000. The Respondent requested the payment of this penalty within 7 days. However, the Respondent never paid this penalty.

III. PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS COMMITTEE

37. On 3 April 2014, the Respondent lodged a claim in front of the FIFA Players' Status Committee ("the FIFA PSC") against the Appellant for breach of the Transfer Agreement and requested as relief, the payment of penalty fees amounting to EUR 1,000,000.

38. On 20 November 2014, the Single Judge of the FIFA PSC rendered a decision as follows ("the Appealed Decision"):

> *"1. The claim of the Claimant, Al Ain FC, is partially accepted.*
>
> *2. The Respondent, Newell's Old Boys, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, the amount of EUR 200,000.*
>
> *3. If the aforementioned sum is not paid within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the stipulated time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claim lodged by the Claimant is rejected.*
>
> *5. The final costs of the proceedings in the amount of CHF 20,000 are to be paid* ***within 30 days*** *as from the date of notification of the present decision as follows:*
>
> *5.1. The amount of CHF 12,000 has to be paid by the Respondent.*
>
> *5.2. The amount of CHF 8,000 has to be paid by the Claimant. Given that the Claimant has already paid the amount of CHF 5,000 as advance of costs at the start of the present proceedings, the additional amount of CHF 3,000 has to be paid by the Claimant to FIFA.*
>
> *5.3. The above-mentioned amounts have to be paid to FIFA to the following bank account with reference to case nr. 14-00788/wit:*

…

6. *The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance under point 2. above is to be made and to notify the Single Judge of the Players' Status Committee of every payment received".*

39. On 22 June 2015, the grounds of the Appealed Decision were notified to the parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

40. On 13 July 2015, pursuant to Article R48 of the Code of Sports-related Arbitration ("the CAS Code"), the Appellant filed a Statement of Appeal against the Appealed Decision at the Court of Arbitration for Sport ("the CAS"). The Statement of Appeal contained the following requests for relief:

"a) To revoke the decision of the FIFA Player's Status Committee.

b) To reject the respondents claim in its entirety.

c) Alternatively, to reduce the penalty to a maximum of Euro 24,000.-

d) In any case, to allocate to respondent the costs of this procedure, the procedure before FIFA and a contribution of CHF 15.000.- towards the appellant's costs".

41. On 28 July 2015, pursuant to Article R51 of the CAS Code, the Appellant filed its Appeal Brief, requesting the following requests for relief:

"a) To revoke the decision of the FIFA Player's Status Committee as requested here.

b) On a subsidiary basis to reduce the penalty to a proportionate amount according to the Court's experience and the circumstances of the present case.

c) To allocate to respondent the costs of this procedure, the procedure before FIFA and a contribution of CHF 5.000.- towards the appellants' costs".

42. On 17 August 2015, pursuant to Article R55 of the CAS Code, the Respondent filed its Answer, requesting the following requests for relief:

"a) Reject and dismiss this Appeal.

b) Confirm the decision passed by the FIFA.

c) Decide that the Appellant must compensate the legal costs and attorney fees of the Respondent in the present proceedings in their full amount.

d) Decide that the Appellant has to pay and reimburse the costs of the proceedings before the FIFA an amount of CHF 8,000".

43. On 26 August 2015, the Appellant wrote to the CAS Court Office stating that it preferred to have this matter heard by a Sole Arbitrator and an award to be issued solely on the parties' written submissions.

44. On 1 September 2015, the Respondent wrote to the CAS Court Office stating that it agreed to have an award be issued solely on the parties' written submissions.

45. On 18 September 2015, the CAS Court Office wrote to the parties informing them that Mr Mark A. Hovell, Solicitor, Manchester, United Kingdom was appointed as a Sole Arbitrator in this matter.

46. On 23 September 2015, the CAS Court Office wrote to the parties on behalf of the Sole Arbitrator stating, *inter alia*, that a complete copy of the FIFA file on this matter had been requested from FIFA and confirming that an award would be rendered solely on the parties' written submissions. The Sole Arbitrator also made determinations on the admissibility of the appeal (discussed in detail below).

47. On 30 September 2015, the CAS Court Office sent a copy of the complete FIFA file in relation to the matter to the parties.

48. On 16 October 2015, the CAS Court Office wrote to the parties on behalf of the Sole Arbitrator stating that the Sole Arbitrator had decided to issue a request for a second round of written submissions. Both parties were provided with a copy of *CAS 2013/A/3205 Maritimo da Madeira Futebol SAD v. AEP Paphos* and were invited to provide their views on the applicability (or non-applicability) of that award on this case. The Appellant was also invited to submit an expert report if it wished to, in relation to any issue the Appellant deemed relevant to the dispute within the given deadline for the second round of submissions. Further, the Appellant was also asked to respond to the following questions:

"Questions for the Appellant

1) Please clarify whether the Appellant is submitting that the insolvency proceedings played a part in the delay in payment of the EUR 1,915,000 due under the Transfer Agreement? If so, please provide further details.

2) The Transfer Agreement was concluded on 20 July 2013 and the required payment was due on 12 August 2013. If you were aware of the problematic nature of international bank transfers from Argentina, why did you apparently wait until 8 August to request the insolvency judge to authorise the contract and the payment?

3) Pursuant to Annex 4 of the Appeal Brief, the final 3 payments under the loan agreement appear to have been paid on time. If the rules regarding international transfers from Argentina made it problematic to make bank transfers on time, how were you able to make the final 3 payments exactly on the due date or earlier?

4) If the Appellant had managed to make 3 different international transfers to the Respondent on time leading up to June 2013, why was it not able to make the Transfer Agreement payment on time in August 2013? Had something changed in between June and August 2013 to cause such a delay?".

49. On 29 October 2015, the Appellant submitted its second round of written submissions.

50. On 12 November 2015, the Respondent submitted its second round of written submissions.

51. On 12 November 2015, the Appellant submitted a signed Order of Procedure to the CAS Court Office.

52. On 23 November 2015, the Respondent submitted a signed Order of Procedure to the CAS Court Office.

V. SUBMISSIONS OF THE PARTIES

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

A. The Appellant's Submissions

54. In summary, the Appellant submitted the following in support of its claim:

55. The Respondent accepted the payments under the Transfer Agreement without reservation and only claimed the penalties more than 30 days after receiving the money. To claim the penalties after such a delay was against the principle of *"venire contra factum proprium non valet"* or promissory estoppel.

56. The performance of their obligations under the Transfer Agreement was impossible due to circumstances which were out of the Appellant's control.

57. On a subsidiary basis, if the Sole Arbitrator deemed that penalties should apply, the penalties applicable under the Transfer Agreement were excessive and should be heavily reduced.

a) Acceptance of performance without reservation and promissory estoppel

58. The Appellant noted that Article 160.2 of the Swiss Code of Obligations ("the Swiss CO") provides that (emphasis added by the Appellant):

> *"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".*

59. The Appellant stated that the Respondent made no reservation or complaint when it received the money due from the Appellant. If it did deem the payment to be insufficient or out of time, it should have rejected the transfer. The Appellant cited *CAS 2007/A/1388* and *CAS 2011/A/2451* as examples of when creditors rejected late payments.

60. In this case, the Respondent received the payment on 16 September 2013 but only more than 30 days later (on 20 October 2013) did the Respondent write to the Appellant claiming the penalties. This sudden change of mind took the Appellant by surprise and was against the principle of trust and the *venire contra factum proprium* doctrine.

61. The Appellant argues that once the principal obligation is extinguished by its completion, if no reservations are made by the recipient at the time of payment then the penalty (which is ancillary to the main obligation) is also extinguished. Therefore, by not making a timely reservation to the late payment, the Respondent withdrew any further claims against the Appellant.

b) Performance prevented by circumstances beyond the debtor's control

62. The Appellant stated that there were numerous factors beyond its control which prevented it from performing its obligations on time. The Appellant noted that Article 163.2 of the Swiss CO stated (emphasis added by the Appellant):

"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".

63. Firstly, the Appellant was under a special insolvency regime in Argentina entitled *"trust for administration of sporting entities in financial crisis"*. Under this regime, any transfer or registration of a football player is subject to the previous authorisation of a committee in charge of the trust and the Insolvency Judge.

64. The Appellant was aware of this and argued that it gave sufficient notice of its intention to exercise the Transfer Option by notifying the Respondent in April 2013. However, the Respondent only replied to the Appellant in late July 2013. When it did finally reply, the Respondent demanded to insert an inflexible payment date and a clearly abusive penalty, taking advantage of its leverage given the Appellant's urgency in wanting to complete the transfer.

65. Despite this, the Appellant still made every effort to attempt to make the required payment on time by requesting the authorisation from the judge and requesting the NCB to process the payment. The delay in the transfer was solely attributable to the delay of the NCB in granting the transfer clearance. Contrary to what was stated by FIFA in the Appealed Decision, it was not possible for the Appellant to begin the procedure earlier, as the Respondent waited until July to respond to their request to exercise the Transfer Option. The Respondent knew about the procedure that the Appellant had to go through, yet still waited till July 2013 to complete the Transfer Agreement even though there was nothing to negotiate.

66. Pursuant to Article 119(1) of the Swiss CO:

"An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor".

67. The Appellant noted that there were restrictions on international transfers of funds in Argentina and these measures made it impossible for the Appellant to complete the transfers on time. The obstacles that impeded the reception of the funds in time is clearly demonstrated in the present case.

68. The Appellant further noted that under Swiss law, parties are free to include risk allocation clauses in their contract which apply in the event of force majeure. The Respondent, who was the party which drafted the contract, chose not to include such a clause in the Transfer Agreement. Therefore, the creditor must assume the risk of force majeure.

69. The Appellant cited a case from the UEFA Club Financial Control Body (*Decision in case AC-02/2014 FC Dnipro*) in which national restrictions on the transfer of funds constituted a force majeure event and stated that the circumstances in this case were analogous. Accordingly, the late payment of the amount due under the Transfer Agreement in this case should also constitute a case of force majeure.

c) Excessive penalties

70. On a subsidiary basis, if the CAS were to consider that penalties were applicable, any penalties should be significantly reduced for being clearly excessive based on the circumstances of the case. Pursuant to Article 163(3) of the Swiss CO:

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

71. Further, 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.

72. The Appellant argued that the severity of the violation should be taken into consideration. In this case, the protected interest was the timely payment of the amounts for the definitive transfer of the player and the penalty clause was clearly imposed to prevent any delay in payment. At the time of the transfer, the Player was already playing for the Appellant so the Respondent had no real need or urgency to replace him with another player. Moreover, the Respondent received a loan fee of EUR 600,000, a high fee when considering it was a third of his eventual transfer value of EUR 1,800,000. Prior to his loan, the Player was not a star player in the Respondent's team, hence why he was loaned. The Respondent never claimed it was in financial difficulty either. The penalty only reflected the bargaining power of the Respondent, which it exercised with evident abuse.

73. The Appellant also argues that in any event, a default of less than 30 days without any prior warning is not a severe breach in the football industry. The Appellant noted that under Article

12bis of the FIFA Regulations on the Status and Transfer of Players ("RSTP"), only delays of over 30 days without a prior warning to comply in 10 days can be subject to sanctions.

74. There was no intention by the Appellant to delay the payment. It attempted to process the payments through all the administrative and judicial procedures it had to fulfil prior to the transfer of funds as quickly as possible. Conversely, the Respondent was extremely inflexible with its position, demanding an almost immediate payment of the transfer amount while also including old and disputed penalties in case of late payment. The Respondent abused its position and took unfair advantage of the will of the parties. The Respondent waited till the very end of the transfer window in order to force the Appellant to accept the payment of the previously objected penalties and to introduce a new penalty as abusive as the previous one. The Respondent even imposed these heavy penalties for late payment without the need of a prior warning. Moreover, by imposing a penalty over the entire debt (which included previous penalties), the Respondent was in effect imposing a penalty on a penalty.

75. The Respondent delayed concluding the Transfer Agreement to put pressure on the Appellant as the transfer window was closing in Brazil. In clear bad faith, the Respondent waited till the very last day of the transfer window in Brazil and the Appellant had no choice but to accept the situation.

76. The penalty is also excessive taking into account the economic position of the Appellant. As the club was under a special insolvency process, the Appellant was clearly in a difficult financial situation. A penalty of EUR 200,000 for a delay of less than 30 days given the circumstances is clearly disproportionate. The Appellant cited *CAS 2013/A/3419* which stated, *inter alia*, that:

"… where there is an evident disproportion between the damage caused by the Appellant and the penalty stipulated, this penalty amount shall be reduced in accordance with article 163(3) CO".

77. A penalty of EUR 200,000 for the late payment of EUR 1,800,000 would represent a yearly interest rate of 150% for a delay of 20 days. Therefore, the penalty should be reduced to a maximum of EUR 10,000.

d) Applicability of CAS 2013/A/3205 to this case

78. The Appellant stated that while some general principles of *CAS 2013/A/3205* would apply to this case, the situations were not analogous.

79. An essential difference was that in *CAS 2013/A/3205*, the amount in dispute was never paid but in this case, the amount due was paid 20 days late, before the Respondent even made any claims for the sums. Moreover, the Respondent was not prevented from acquiring a replacement player and had no cash flow problems.

80. Further, the Appellant noted that *"the payment default by Paphos was unexplained, intentional and not justifiable, while in this case, the default was explained, justifiable and unintentional and only lasted 20 days. It is important to note that in the case of Paphos the penalty was reduced anyway despite all these facts".*

e) Summary of second round of submissions

81. In addition to the arguments raised above, the Appellant also submitted the following arguments in its second round of written submissions.

82. The main reason for the delay in payment was the conduct of the NCB, which waited weeks to issue the requested authorisation. The Appellant was aware of the situation which is why it informed the Respondent as early as April 2013. However, the Respondent, despite knowing that delays would occur in payment, waited almost 90 days to reply and requested the payments to be made within a month, which was clearly abusive and cannot be supported by the court. Pursuant to Article 44.1 of the Swiss CO:

"Where the injured party consented to the action which caused the loss or damage or circumstances attributable to him helped give rise to or compound the loss or damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or dispense with it entirely".

83. The reason why the Appellant requested the transfer to be processed only on 8 August 2013 and not before, was that they only had the transfer agreement with Internacional on 7 August 2013. The Appellant offered to pay the transfer in two instalments, one in August and the second in September but the Respondent never replied to such an offer. By the time the Transfer Agreement was concluded, the Appellant did not have the money to pay the requested amount, but nevertheless made every effort to comply with the Respondent's abusive demands.

84. In relation to the Sole Arbitrator's question on why some of the loan payments were paid on time if there were significant hurdles in getting payments processed, the Appellant stated that the authorisation from the NCB was absolutely discretional. In principle, smaller payments are usually authorised faster than bigger sums which explains why the payment under the Transfer Agreement took longer than the Loan Agreement instalments (which were only USD 100,000 each). In any event, once the documentation has been submitted by the Appellant, how quickly the payment is processed is entirely out of their hands.

85. The Appellant concluded that the Respondent had no real damage exposure and not only never claimed the money before receiving it, but even accepted the credit in its account and only claimed the penalty a month later. This proved that the 20 days delay did not damage the Respondent in any way.

B. The Respondent's Submissions

86. In summary, the Respondent submitted the following in support of its claim:

a) Acceptance of performance without reservation and promissory estoppel

87. The Respondent denied that it had accepted the payment without reservation. It noted that the Appellant neither notified the Respondent about the payment nor submitted any transfer remittance.

88. Further, the Respondent noted that clause 2.7 (i.e. the bank guarantee) was included in the Transfer Agreement to protect the Respondent due to the repeated delays in payment by the Appellant during the Loan Agreement. Both parties agreed to include this clause. Therefore, the Appellant is wrong to suggest that the Respondent had a 'sudden change of mind or future conduct'.

89. It is undisputed that the payment required under the Transfer Agreement was 5 weeks late and therefore the penalty, which was agreed by both parties at the time of entering into the contract, is applicable.

b) Performance prevented by circumstances beyond the debtor's control

90. The Respondent stated that the avoidable delay was not due to force majeure as the Appellant claims, but rather due to questionable financial planning. The Appellant was aware of its ongoing bankruptcy situation and status under the Argentina bankruptcy proceedings during the relevant period. However, there is no excuse for delaying payments because the payments could have been made on a timely basis with advanced planning and pre-emptive actions.

c) Excessive penalties

91. In relation to whether the penalties were excessive, the Respondent noted that they had originally claimed EUR 1,000,000 in penalties as per the Transfer Agreement at FIFA. However, FIFA reduced the applicable penalty to EUR 200,000 in the Appealed Decision. As the penalty had already been reduced, there was no need to reduce it any further.

d) Applicability of CAS 2013/A/3205 to this case

92. The Respondent stated that *CAS 2013/A/3205* was partly applicable in this case. The Transfer Agreement clearly stipulated the applicable penalty and the payment was undeniably late. Moreover, as the agreed penalty in the Transfer Agreement was EUR 1,000,000, then the reduced penalty in the Appealed Decision of EUR 200,000 should not be considered excessive.

e) Summary of second round of submissions

93. In its second submission, the Respondent reiterated that the Appellant was well aware of all the financial difficulties and problems it faced when having to make such a payment, yet still agreed to enter into the Transfer Agreement anyway.

94. The Respondent also noted that in the Internacional Transfer, Internacional had to pay the Appellant USD 3,200,000 within 48 hours. As such, the Respondent was very flexible when giving the Appellant 22 days to make the required payments.

VI. ADMISSIBILITY

95. The Respondent claimed that the Appeal was filed late under Article R32 of the CAS Code, as the required CAS Court Office fee was not paid on time, pursuant to Article R64.1 of the CAS Code.

96. However, the Sole Arbitrator notes that the Appeal was, in fact, filed within the 21 day deadline set by Article 67(1) of the FIFA Statutes (2013 edition) and Article R32 of the CAS Code. Further, the CAS Court Office confirmed that the required CAS Court Office fee was, in fact, paid within the required deadline pursuant to Article R64.1 of the CAS Code. The Appeal also complied with all other requirements of Articles R48 of the CAS Code.

97. It follows that the Appeal is admissible.

VII. JURIDICTION

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

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

99. The jurisdiction of the CAS, which was not disputed by either party, derives from Article 67(1) of the FIFA Statutes (2014 edition) as it determines that:

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

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

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

VIII. APPLICABLE LAW

102. Article R58 of the CAS Code provides the following:

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

103. According to Article 3.1 of the Transfer Agreement:

"FIFA rules and regulations apply to this contract, including and not limited to: the FIFA Regulations on the Status and Transfer of Players".

104. Accordingly, the Sole Arbitrator rules that FIFA Regulations would apply, with Swiss law applying to fill in any gaps or *lacuna*, when appropriate.

IX. LEGAL DISCUSSION

A. Merits

105. The Sole Arbitrator observes that the main issues to be resolved are:

a) Did the Respondent accept the late payment without reservation? If so, is the Respondent *estopped* from claiming penalties?

b) Was the Appellant prevented from complying with its obligations due to an event of force majeure?

c) If penalties are applicable, should they be reduced for being excessive or for any other reason?

a) Did the Respondent accept the late payment without reservation? If so, is the Respondent estopped from claiming penalties?

106. The Sole Arbitrator notes that the Appellant relies upon Article 160.2 SCO and the legal principle of *venire contra factum proprium* in the case at hand. In essence, as the Respondent received the Transfer monies for the Player, along with a sum for the late payment of some of the Loan monies on 16 September 2013, yet waited for over a month before claiming late penalties under the Transfer Agreement, it had failed to make a reservation of its right to claim such penalties. Its conduct had led the Appellant to believe it had accepted the monies paid in full settlement of the Appellant's obligations under the Transfer Agreement.

107. The Sole Arbitrator notes that the FIFA Regulations, at Article 25(5) of the RSTP allows for 2 years for a party to bring claims through FIFA, which the Respondent ultimately did, so should it lose any rights to bring such claims under Swiss law? Swiss law should only apply on a subsidiary basis if there is a lacuna in the FIFA Regulations.

108. But even if Swiss law was to be applied, the Sole Arbitrator deems that the claim made for late payment penalties 30 days after the payment of the Transfer monies would not be deemed too late to be a reservation on the facts of this matter.

109. The Sole Arbitrator notes the advancement of the legal principle of *venire contra factum proprium*. As a rough translation, *"no one may set himself in contradiction to his own previous actions"*. The Sole Arbitrator notes the previous actions of the Respondent. Under the Loan Agreement, the Appellant was late in paying the first instalment due on 31 August 2012. It took the Respondent even longer to claim the penalty on that sum, it waited until 18 October 2012. Further, the second instalment under the Loan Agreement was also late and the Respondent (somewhat quicker this time – within a week) claimed the penalties. While the Appellant disputed these, it was only when the Respondent included them (in fact it appears to have included 3 late payment penalties, although this has not been appealed) in clause 2.2 of the Transfer Agreement, that the Appellant finally agrees to pay those penalties. The payment was made (late) on 12 August 2013, nearly a year after the first penalty was triggered. In the opinion of the Sole Arbitrator, this shows that the Respondent's previous actions were to pursue these penalties for as long as it took. As such, the Appellant should not have been *"taken by surprise"* when the Respondent claimed the penalties under the Transfer Agreement.

110. Finally, the Appellant cited previous CAS jurisprudence, indicating that a proper reservation would have been to reject the payment of the Transfer Agreement monies and send them back. Then to claim those monies again, but with the EUR 1m penalties on top. The Sole Arbitrator notes that most clubs would take the monies and then seek to rely on the Transfer Agreement for the penalties, as the Respondent did here, as opposed to face a long period of time without any monies at all.

111. In summary, the Sole Arbitrator is content that a delay of 30 days before claiming the penalties under the Transfer Agreement does not estop or otherwise affect the Respondent's *prima facie* claim to the contractual penalties.

b) Was the Appellant prevented from complying with its obligations due to an event of force majeure?

112. The Sole Arbitrator notes the Appellant again refers to the application of Swiss law. In this case that Article 163.2 SCO is applicable i.e. that there were *"circumstances beyond the debtors* [the Appellant's] *control"*. In particular, the Appellant blames the Respondent for leaving it until the last minute to acknowledge that the option in the Loan Agreement had been properly exercised and that it must transfer the Player to the Appellant, but only on extremely harsh terms, so far as the Appellant was concerned. The payment date for the Transfer monies was 12 August

2013, so very soon after the transfer, and the Respondent refused to accept the monies by instalments. Further, harsh penalties were included in case of late payment. In addition, the Appellant did instruct the NCB to make the payments on 8 August 2013, so within time, but it took until September 2013 to make the payments. This was out of the Appellant's hands.

113. The Sole Arbitrator agrees that 163.2 SCO is applicable and therefore has to determine whether there were *"circumstances beyond the debtors* [the Appellant's] *control"*. The Sole Arbitrator notes that the Appellant was hampered by an insolvency process, which involved any ultimate decisions being taken by the Insolvency Judge.

114. However, was the payment date of 12 August 2013 beyond the Appellant's control? The Sole Arbitrator notes that the Loan Agreement where the Transfer Option was established was freely negotiated by the parties on an arm's length basis. Clause 3 is extremely brief. The Respondent could have sought to agree when any transfer would take place, whether payment would be on completion and whether instalments payments could be made. The Appellant has provided the Sole Arbitrator with no details of any attempts to control the payments and payment date of any transfer. It has not demonstrated that it tried to negotiate in this way. Instead, it blames the Respondent for driving a hard bargain at the last minute. The Sole Arbitrator notes that the Respondent might have insisted on all the money when the actual transfer took place i.e. well before 12 August 2013, on 20 July 2013. Moreover, the Sole Arbitrator notes that the Respondent was still pursuing the Appellant for unpaid late payment fees from the Loan Agreement, so is perhaps not surprised that the Respondent demanded late penalty fees in the Transfer Agreement too.

115. Further, the Sole Arbitrator notes that the Appellant exercised the Transfer Option, not so it could utilise the services of the Player, but so that it could immediately transfer the Player on to Internacional under the Internacional Transfer. This immediate sell on practically doubled the monies the Appellant paid, so perhaps one can understand why the Appellant was prepared not to negotiate too hard with the Respondent. However, it appears not to have negotiated too hard with Internacional under the Internacional Transfer either. Internacional had 48 hours after the transfer of the Player to them by the Appellant to make their payment. As such, the Appellant should have been in possession of the monies it needed to pay to the Respondent on 28 July 2013, but it actually only received the monies on 6 August 2013. The Appellant has produced no evidence to the Sole Arbitrator that it sought to speed Internacional up nor that it had sought to include mirror penalties in the Internacional Transfer, for example. These were matters under its control.

116. At the other end, the Appellant complains that the NCB were responsible for the delay, as the instructions were given on 8 August 2013. The Sole Arbitrator again notes the lack of explanation as to why the NCB took so long to process the payment request, other than it was a large amount. The Sole Arbitrator had already raised the question with the Appellant as to how it managed to send the last 3 Loan Agreement instalments on time through the same establishment.

117. Finally, the Sole Arbitrator wonders why the Appellant did not (or if it did, why it did not produce any evidence of this to the CAS file) put the NCB on notice that an urgent payment would need to be made on 12 August 2013. The Appellant, by 22 July 2013, had concluded its contracts with both Internacional and the Respondent and had the blessing of the Insolvency Judge. If it wanted to be more cautious before putting the NCB on notice, it could have waited until 26 July 2013, when it had the ITC and the Internacional Transfer was no longer conditional.

118. In summary, the Sole Arbitrator determines that the Appellant could have done more to pay the Respondent later and/or to have forced Internacional to put it in funds earlier and/or to have made better arrangements with the NCB to make the payment to the Respondent earlier. While the Appellant may not be able to control the balance of payments in its country, it can hardly claim that everything was beyond its control.

c) If penalties are applicable, should they be reduced for being excessive or for any other reason?

119. Again the Appellant cites Swiss law, in this case Article 163 SCO and again the Sole Arbitrator determines that it is applicable. As such, the Sole Arbitrator may reduce the amount of the penalties if he considers these excessive.

120. The Sole Arbitrator notes that the Respondent claimed both the EUR 200,000 penalty at clause 2.5 of the Transfer Agreement, as the payment date of 12 August 2013 was missed, and it claimed 4 further penalties of EUR 200,000 each, as 4 successive 7 day periods elapsed before the payment was made by the Appellant, all pursuant to clause 2.6 of the Transfer Agreement. EUR 1m were claimed in total.

121. The Sole Arbitrator notes that the FIFA PSC, in the Appealed Decision, exercised the same discretion that the Sole Arbitrator has and determined that EUR 200,000 should be paid by the Appellant.

122. The Respondent has not appealed the Appealed Decision, so the question for the Sole Arbitrator is whether he feels the FIFA PSC did not go far enough and whether the circumstances of this case warrant a further reduction.

123. The Appellant notes that the payments weren't that late – only around 1 month. There was no warning either. The Appellant seeks to draw an analogy with FIFA's Art 12bis RSTP where 30 days needs to elapse and then a 10 day warning by a creditor, before FIFA would consider sanctioning the debtor. Further, that the Respondent had already received a substantial loan fee of EUR 600,000, along with a transfer fee of EUR 1.8m, for a player it didn't want and was prepared to loan out. The Appellant repeated its claims that the Respondent took advantage of the timing of the transfer and forced these terms on the Appellant.

124. In weighing these points up, the Sole Arbitrator notes that argument as to whether the Respondent received a loan and transfer fee are largely irrelevant and he has already commented on the terms of the Transfer Agreement. The Sole Arbitrator has the impression that the Appellant was desperate to conclude it on any terms, as it wanted to transfer the Player on immediately to Internacional to double its money. The Appellant repeatedly stated that it was 'forced' into the harsh conditions of the Transfer Agreement, but it appears this was only because of their own desire to make a financial windfall from the immediate sell on of the Player, rather than due to any unconscionable actions of the Respondent. The Appellant was free to reject the payment terms offered by the Respondent and/or choose not to enter into the Transfer Agreement if it truly believed it was overly onerous. But it chose to sign the Transfer Agreement. That said, the Sole Arbitrator notes on the one hand that the breach was not particularly serious as the Respondent received its money one month late, yet on the other hand, notes that the Respondent had received 2 loan instalments late and had waited almost a year to receive the penalties for those far lesser sums. The Sole Arbitrator can understand why the Respondent had sought to insert both clause 2.5 and clause 2.6 in the Transfer Agreement, but notes that the FIFA PSC had determined that both sanctions together were excessive and, using Article 163 SCO, eliminated clause 2.6, awarding only the sum of EUR 200,000 as the fair penalty in this case. The Sole Arbitrator believes that the FIFA PSC acted correctly and sees no reason to further reduce the penalty below the EUR 200,000 awarded in the Appealed Decision.

B. Conclusion

125. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Sole Arbitrator finds that the Appellant's Appeal should be dismissed entirely and the Appealed Decision should be upheld.

126. All further claims or requests for relief are dismissed, including both parties claims for a reimbursement of the FIFA PSC costs. The Appellant's claim has been dismissed along with all its prayers for relief. The Respondent's claim represents a counterclaim that is inadmissible pursuant to Article R55 of the CAS Code. The Respondent would have needed to have appealed against the Appealed Decision, which it chose not to do.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Newell's Old Boys 13 July 2015 is dismissed.

2. The Decision of the Single Judge of the FIFA Players' Status Committee of 20 November 2014 is upheld.

3. (…).

4. (…).

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