Arbitration CAS 2018/A/5950 Valencia Club de Fútbol, S.A.D. v. Fenerbahçe Spor Kulübü, award of 14 August 2019

Panel: Mr Hendrik Willem Kesler (The Netherlands), President; Mr Hans Nater (Switzerland); Mr Lars Hilliger (Denmark)

Football
Solidarity contribution
Club to pay the solidarity contribution
Alternatives to close a contractual lacuna
Interpretation of contractual clauses

1. **Although it is the new club that shall distribute solidarity contribution, the financial burden of paying this solidarity contribution in principle lies with the releasing club. Only if the releasing club is able to establish that a different arrangement was made can a deviation therefrom be accepted.**

2. **According to Swiss law, there are two alternatives to close a so-called *"Vertragslücke"* (contractual *lacuna*): the first one is the so-called "subjective amending", i.e. amending the agreement by relying on the hypothetical intention of the parties, the second alternative would be to close the gap by referring to any legal disposition or regulation.**

3. **Under Article 18 of the Swiss Code of Obligations, the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention. This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them. The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation. By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith, based on its wording, the context and the concrete circumstances in which it was expressed. Unclear declarations or wordings in a contract will be interpreted against the party that drafted the contract: it is of the responsibility of the author of the contract to choose its formulation with adequate precision (*in dubio contra stipulatorem*). Moreover, the interpretation must – as far as possible – stick to the legal solutions under Swiss law, under which the accrued protection of the weakest party.**

I. PARTIES

1. Valencia Club de Fútbol, S.A.D. (the "Appellant" or "Valencia") is a professional football club with its registered office in Valencia, Spain. Valencia is registered with the Royal Spanish Football Federation (the "RFEF"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Fenerbahçe Spor Kulübü (the "Respondent" or "Fenerbahce") is a multi-sports club with its registered office in Istanbul, Turkey. Fenerbahce is registered with the Turkish Football Federation (the "TFF"), which in turn is also affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

3. On 7 July 2015, L. (the "Player") and Fenerbahce concluded an employment contract (the "Employment Contract") for three sporting seasons, i.e. as from the moment of signing until 31 May 2018. Clause 7(A) of the Employment Contract determines as follows:

"The parties mutually agree and expressly accept in advance that, if at the end of the TFF football season 2015-2016 (i.e. 30 June 2016 at the latest), the Club should receive a written offer from another club interested to register the Player for an amount of EUR 8,500,000.00/- (Eight Million Five Hundred Thousand Euro Only), then the Club shall be obliged to immediately notify in written the Player and permit him as well as his intermediaries/representatives, if any, to enter into negotiations with such other club, should the Player wish to do so. In the event that the Player should then agree with the aforesaid other club for his transfer to the same club, the Club shall be obliged to do all the necessary actions to complete the Player's transfer accordingly at the first available date thereafter and it will be entitled to receive only the amount of 8,500,000.00/- (Eight Million Five Hundred Thousand Euro Only)".

4. On 21 and 22 June 2016, representatives of Valencia and Fenerbahce held negotiations in Istanbul, Turkey, with regard to Valencia's intention to execute the buy-out clause in the Employment Contract.

5. On 27 June 2016, Valencia's President informed Fenerbahce as follows:

"We hereby NOTIFY you, following our meetings hold in Istambul on the 21 and 22 of June with Mr. Usiman, Mr. Mamut Uslu, Mr. Sekip Mosturoglu and Mr. Hasan Cetinkaya about the formal purpose of [Valencia] to execute the buyout clause of the [Player], and to obtain the permanent acquisition of the federative and economic rights [of] the [Player], currently football player of [Fenerbahce].

The terms and conditions of this acquisition offer would be according to the wording of the buyout clause settled in the labour agreement between [Fenerbahce] and the [Player]:

[Fenerbahce] should received a written offer from another club interested to register the [Player] for an amount of EIGHT MILLION FIVE HUNDRED THOUSAND EURO (8.500.000,00€) to acquire definitely

the federative and economic rights relating to the Player, free of any taxes, encumbrances, claims, charges, liens and rights of any third parties.

By virtue of this letter, [Valencia] kindly requests to [Fenerbahce] (i) the authorization to enter into discussion with the [Player] (ii) to arrange a medical test between [Valencia] and the [Player] and (iii) to initiate all the process and to do all necessary actions to complete the [Player's] transfer at the first date available.

The present offer is subject to i) the consent and acceptance of [the Player] to the transfer of his definitive federative rights from [Fenerbahce] to [Valencia] and ii) the satisfactory completion of the player's medical test conducted by [Valencia's] medical staff.

In any case, this offer is subject to the signing of the relevant agreements by all the parties.

We look forward to your favourable response to our offer and to working with you towards a completion of the transaction as expeditiously as possible".

6. On 28 June 2016, Fenerbahce's Finance Director informed the Player that he was granted permission to enter into discussions with Valencia.

7. On 28 June 2016, Fenerbahce's Finance Director informed Valencia as follows:

"We have received your offer letter about executing the buyout clause and obtaining acquisition of the federative and economic rights of our [Player].

We have immediately notified our [Player] about your kind offer and authorized the [Player] in order to enter discussions with your club.

We hereby give authorization to you (i) to enter into discussion with the abovementioned Player, (ii) to arrange a medical test between you and the [Player] and (iii) to initiate all the process and to do all necessary actions to complete [Player's] transfer at the first date available.

As you are well aware of that the buyout clause of the [Player] can be executed only if you agree with the [Player] in terms of conditions to conclude a contract and the payment is made in one single instalment to the bank account given below: […]

Thank you in advance for your co-operation".

8. On 4 July 2016, Valencia's President informed Fenerbahce that Valencia had reached an economic agreement with the Player.

9. On 5 July 2016, Valencia transferred a sum of EUR 8,500,000 to Fenerbahce and provided the latter with proof of payment.

10. On 11 July 2016, Real Sport Clube, a former club of the Player, requested Valencia to be paid solidarity contribution in an amount of EUR 119,127.05.

11. On 12 July 2016, Valencia requested Fenerbahce to provide it with an invoice and to enter the relevant information into FIFA's Transfer Matching System ("FIFA TMS").

12. Also on 12 July 2016, Fenerbahce provided Valencia with an invoice, indicating as follows: *"1. TRANSFER FEE"*.

13. On 21 July 2016, following additional correspondence between the parties regarding certain formalities that are not relevant for the matter at hand, Mr Özge Tokarli of Fenerbahce's Legal Department informed Mr Jesus Paniagua, representative of Valencia, as follows by email:

"I put the details on system. But there's a mismatch information. 8.500.000 Euro paid as release buy-out fee. I think you have to change it on TMS".

14. The mismatch in FIFA TMS was caused by the fact that Valencia indicated that the amount of EUR 8,500,000 represented a "transfer fee", whereas Fenerbahce indicated that this amount represented a "buy-out fee".

15. Also on 21 July 2016, Mr Paniagua responded as follows:

"We have introduced the order extracting the information from your invoice (please check it) where expressly indicates that the payment consists in a transfer fee payment. Please modify it and also the sell on fee concept (by mistake you have introduced the name of your club) which is not applicable".

16. Also on 21 July 2016, Mr Tokarli responded as follows:

"We will modify the invoice then send you immediately. […]".

17. Shortly after such email, Fenerbahce provided Valencia with an amended invoice referring to *"buy-out clause article 7"* instead of *"transfer fee"*.

18. Also on 21 July 2016, Valencia ultimately changed the entry *"transfer fee"* to *"buy-out fee"*, thereby resolving the mismatch.

19. Also on 21 July 2016, an external counsel for Valencia informed Mr Tokarli as follows:

"I am contacting you on behalf of my client [Valencia], regarding the transfer of the [Player] and I would like to point out as follows:

a) You have contacted the club in order to change the modification of the concept of transfer in the FIFA TMS as well as the very invoice sent by Fenerbahce.

b) As it has been told by [Valencia], we can't accept the modification of the initial invoice (for the reasons explained in our previous emails).

c) For the sake of having the transfer done and the TMS matches, we do accept to modify the concept to be introduced into the FIFA TMS System so you could get the ITC urgently.

d) However, this modification does not change the contract with the player and its wording, as well as it does not change the invoice too.

e) For the sake of clarity please be informed that [Valencia] reserves all its legal rights to take any possible further legal action in connection with this matter in order to defend our interests".

20. On 26 July 2016, the Player was registered with Valencia.

21. On 27 October 2016, Sporting Clube de Portugal, a former club of the Player, requested Valencia to be paid solidarity contribution in an amount of EUR 155,890.

22. On 7 November 2016, Mr Paniagua requested Fenerbahce to either pay solidarity contribution to all the clubs that participated in the training of the Player directly, or alternatively, to disburse the same amount to Valencia so that the latter could pay these clubs.

23. On 29 November 2016, Mr Tokarli of Fenerbahce informed Valencia as follows:

"First of all we would like to state that again; according to FIFA RSTP, the club who transfers the player is obliged to distribute the solidarity contribution to any and all clubs which have participated in the trainings and education of the Player.

It can be understood from the related regulation that, a professional football club which concludes transfers of professionals should absolutely know about its responsibility for solidarity contribution. [Fenerbahce] was acting in good faith since the first day of the related transfer negotiations with Valencia hence Fenerbahce fulfilled all of its obligations within the scope of this transfer.

The 8.5 million Euro set forth in the Player's agreement constitutes a "certain amount" in order to exercise the buy-out clause. As a matter of fact, in the case that [Fenerbahce] was paid the deducted amount by Valencia, then it would be impossible to exercise the aforementioned buy-out clause.

In the light of the explanations above, [Fenerbahce] is not in a position to distribute the amount in question as a former club. It is clear that [Valencia] exercise [sic] the "buy-out clause" in Player's agreement for this transfer and therefore paid the related amount unconditionally. Valencia omitted to place any kind of legal reservation which may cause [Fenerbahce's] liability to any further club regarding the solidarity contribution of [the Player]. In addition to that, Valencia did not stipulate any other conditions regarding the liability of Fenerbahce. [Fenerbahce], as a professional Football club, is well aware of the relevant regulations and jurisprudence on solidarity contribution and therefore cannot be held liable for the Valencia's act which is contrary to the understanding between parties.

The understanding between [Fenerbahce] and [Valencia] regarding the transfer of the Player and the related amount is incontrovertibly explicit and again it is Valencia's duty to distribute solidarity contribution as a club which transferred the Player".

24. On 30 and 31 March 2017, Valencia paid solidarity contribution to three former clubs of the Player, i.e. Real Sporte Clube, Sporting Clube de Portugal and Manchester United FC, in the total amount of EUR 402,010.52.

25. A legal dispute ensued between the parties as to whether the payment of EUR 8,500,000 was net of solidarity contribution, i.e. that Valencia had to pay solidarity contribution on top of the payment of EUR 8,500,000 to Fenerbahce, or whether the payment of EUR 8,500,000 included solidarity contribution, i.e. that Fenerbahce had to reimburse Valencia with the amount of solidarity contribution paid by Valencia to the three clubs mentioned in the above paragraph.

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

26. On 12 May 2017, Valencia filed a claim against Fenerbahce before the Single Judge of FIFA's Players' Status Committee (the "FIFA PSC Single Judge"), requesting the reimbursement of solidarity contribution in the amount of EUR 402,010.52, plus interest, and that Fenerbahce should cover the costs of the proceedings as well as legal fees in the amount of EUR 10,000.

27. Fenerbahce objected against the jurisdiction of the FIFA PSC Single Judge and disputed Valencia's claim.

28. On 5 June 2018, the FIFA PSC Single Judge rendered his decision (the "Appealed Decision"), with the following operative part:

> *"1. The claim of [Valencia] is admissible.*
>
> *2. The claim of [Valencia] is rejected.*
>
> *3. The final amount of costs of the proceedings in the amount of CHF 20,000 are to be paid by [Valencia] to FIFA. Given that the latter has already paid the amount of CHF 5,000 as advance of costs at the start of the present proceedings, the amount of CHF 15,000 has to be paid by [Valencia],* ***within 30 days*** *of notification of the present decision, to FIFA to the following bank account […]".*

29. On 20 September 2018, the grounds of the Appealed Decision were communicated to the parties, determining, inter alia, as follows:

- *"[…] Having established the above, the Single Judge acknowledged that, on 7 July 2015, the [Player] and [Fenerbahce] concluded an employment contract for the period between 7 July 2015 and 31 May 2018, which contained a buy-out clause in the amount of EUR 8,500,000. Equally, the Single Judge noted that [Valencia] made use of said buy-out clause in order to acquire the [Player's] services, as a result of which the [Player] was transferred to and registered with [Valencia] on 26 July 2016.*

- *In this context, the Single Judge noted that [Valencia] asserted that it omitted to deduct the solidarity contribution in relation with the transfer of the [Player] when it paid the amount of EUR 8,500,000 to [Fenerbahce].*

- *In continuation, the Single Judge observed that [Valencia] provided evidence of having distributed the total amount of EUR 402,010.52 to Real Sport Clube, Sporting Clube de Portugal and Manchester United FC as solidarity contribution in relation with the transfer of the [Player] and according to art. 21 and Annexe 5 of the Regulations and that it asked that [Fenerbahce] be ordered to reimburse said amount.*

- *Similarly, the Single Judge noted that, for its part, [Fenerbahce] alleged that clause 7 par. 1 of the [Employment Contract] being a buy-out clause, the amount of EUR 8,500,000 contained therein is a net amount, as only the payment of EUR 8,500,000 would trigger the transfer of the [Player] from [Fenerbahce] to [Valencia].*

- *In this regard, the Single Judge referred to art. 21 of the Regulations in combination with art. 1 of Annexe 5 of the Regulations which stipulate that, if a professional moves during the course of a contract, 5% of any compensation, not including training compensation paid to his former club, shall be deducted from the total amount of this compensation and be distributed by the new club as a solidarity contribution to the club(s) involved in the training and education of the [Player] in proportion of the number of years the [Player] has been registered with the relevant club(s) between the seasons of his 12th and 23rd birthday.*

- *Moreover, the Single Judge referred to the jurisprudence of the Dispute Resolution Chamber in accordance with which the solidarity mechanism as provided for in art. 21 and Annexe 5 of the Regulations is applicable to compensation paid by the new club on the basis of a buy-out clause contained in the employment contract of a player with his former club, as in the matter at hand.*

- *Furthermore, the Single Judge highlighted that it remained undisputed that [Valencia] had paid 100% of the amount of the buy-out clause to [Fenerbahce], i.e. EUR 8,500,000.*

- *At this stage, the Single Judge turned his attention to the wording of clause 7 par. 1 of the [Employment Contract], which reads as follows: […]. In this respect, the Single Judge underscored that [Fenerbahce] and the [Player] agreed upon the early termination of the [Player's] employment relationship in the event that another club offers [Fenerbahce] the amount of EUR 8,500,000 for the services of the [Player] and the [Player] reaches an agreement with the relevant other club.*

- *Likewise, the Single Judge referred to jurisprudence of the Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) submitted by the parties, pursuant to which the wording of the Regulations does not prohibit that the amount specified in a transfer agreement represents only 95% of the gross transfer value, as long as the solidarity contribution in the end is still deducted from the gross transfer value and distributed in conformity with the wording of art. 1 of Annexe 5 of the Regulations. The Single Judge considered that the same applies, by analogy, to the amount specified in a buy-out clause.*

- *Having said that, the Single Judge agreed with the argumentation put forward by [Fenerbahce] in that only the payment of EUR 8,500,000 would trigger the buy-out of the [Player], i.e. the payment of EUR 8,500,000 minus the 5% of solidarity contribution would not result in the early termination of the [Employment Contract].*

- *On account of the above, the Single Judge concluded that the amount of EUR 8,500,000 is indeed to be considered a net amount, which thus represents the 95% of the total compensation paid by [Valencia] in connection with the transfer of the [Player] from [Fenerbahce] to [Valencia]. In light of the foregoing, the Single Judge decided that the aforementioned consideration could lead to no other conclusion than that, in line with art. 21 of the Regulations in combination with art. 1 of Annexe 5 of the Regulations, [Valencia] shall bear the financial obligations pertaining to the solidarity contribution.*

- *In view of all the above, the Single Judge decided to reject [Valencia's] claim for the reimbursement of the solidarity contribution in connection with the transfer of the [Player] from [Fenerbahce] to [Valencia].*

- *Moreover, the Single Judge decided to reject [Valencia's] claim pertaining to legal costs in accordance with art. 18 par. 4 of the Procedural Rules and the PSC's respective longstanding jurisprudence in this regard".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

30. On 8 October 2018, in accordance with Article R48 of the Code of Sports-related Arbitration (edition 2017) (the "CAS Code"), Valencia filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), challenging the Appealed Decision. Valencia nominated Dr Hans Nater, Attorney-at-Law in Zurich, Switzerland, as arbitrator.

31. On 12 October 2018, upon being invited by the CAS Court Office to express its position in this regard, FIFA renounced its right to request its possible intervention in the present arbitration proceedings.

32. On 25 October 2018, Fenerbahce nominated Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark, as arbitrator.

33. On 5 November 2018, in accordance with Article R51 CAS Code, Valencia filed its Appeal Brief.

34. On 16 November 2018, pursuant to Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the parties were informed that the arbitral tribunal appointed to decide the present matter was constituted by:

    - Mr Hendrik Willem Kesler, Attorney-at-Law in Enschede, the Netherlands, as President;

    - Dr Hans Nater, Attorney-at-Law in Zurich, Switzerland;

    - Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark.

35. On 26 November 2018, the CAS Court Office informed the parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, had been appointed as Ad hoc Clerk.

36. On 7 December 2018, in accordance with Article R55 CAS Code, Fenerbahce filed its Answer.

37. On 19 December 2018, upon being invited by the CAS Court Office to indicate their positions in this respect, both parties requested a hearing to be held.

38. On 7 March 2019, both parties returned duly signed copies of the Order of Procedure to the CAS Court Office.

39. On 20 March 2019, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.

40. In addition to the Panel, Daniele Boccucci, Counsel to the CAS, and the Ad hoc Clerk, the following persons attended the hearing:

For Valencia:

1) Mr Alfonso León, Counsel

For Fenerbahce:

1) Ms Özge Tokarh Gündüz, in-house lawyer;

2) Mr Christian Keidel, Counsel;

3) Mr Paul Fischer, Counsel.

41. The Panel heard evidence from the following persons, in order of appearance:

1) Mr Javier Solís, representative of Valencia during the negotiations with Fenerbahce, witness called by Valencia (by video-conference);

2) Mr Jesus Paniagua, representative of Valencia during the negotiations with Fenerbahce, witness called by Valencia (by video-conference).

42. All witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. Both parties and the Panel had the opportunity to examine and cross-examine the witnesses. The parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

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

44. On 23 April 2019, upon being granted a deadline to try and reach an amicable solution to their dispute, both parties informed the CAS Court Office that they had not been able to do so.

45. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the parties during the hearing, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

46. Valencia's submissions, in essence, may be summarised as follows:

- The appeal proceedings at hand are exclusively related to whether the payment made by Valencia to Fenerbahce in the amount of EUR 8,500,000 should be considered as a net amount or not.

- With reference to CAS jurisprudence, Valencia submits that the burden of proof is always on the former club to prove that an express and explicit internal arrangement existed between the parties to shift the financial burden of the solidarity contribution from what is stipulated in the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), i.e. that the solidarity contribution must not be deducted from the transfer agreed to be received by the former club, but should be added on top of it.

- Fenerbahce has not proven that any eventual internal arrangement was agreed by and between the parties to shift the financial burden of the solidarity contribution from Fenerbahce to Valencia. As a result thereof, it must be concluded that no deviation occurred from the standard practice when it comes to the implementation of solidarity mechanism, i.e. the new club distributes it, but the former club is the one effectively burdening it as the solidarity contribution levy must be deducted from the transfer fee to be received by the former club.

- The inconsistency of the Appealed Decision appears from the fact that if any such internal agreement would have existed, quod non, this would mean that EUR 8,500,000 would represent 95% of the transfer fee agreed between the parties and not 100%. Consequently, the basis to calculate the portion of solidarity contribution that Real Sport Clube, Sporting Clube de Portugal and Manchester United FC should then have been EUR 8,947,365 and not EUR 8,500,000. Neither Fenerbahce, FIFA nor any of the three clubs mentioned above have ever claimed this.

- Only the Appealed Decision opted for such interpretation following a most unsubstantiated approach.

- If the Appealed Decision were upheld, one of the pillars sustaining solidarity contribution, which is not left to the discretion of the parties to a transfer agreement in light of the well-established jurisprudence of CAS, would be contravened, i.e. that the entire solidarity contribution should always be 5% of the overall transfer fee.

- Fenerbahce also acted in bad faith. It cooperated with Valencia at all times, even before being presented with a written offer of EUR 8,500,000. Also, the first invoice issued by Fenerbahce refers to a "transfer fee" which is illustrative of the fact that it was well-aware of the implications of considering a move of a player from itself to a third club being considered as a "transfer". Further, the invoice issued by Fenerbahce was clear in that

EUR 8,500,000 represented the overall transfer fee. Fenerbahce's failure to specify therein that it was to be considered as a net transfer fee, i.e. not inclusive of solidarity contribution, thereby trying to mislead Valencia, must be construed to the detriment of Fenerbahce. Fenerbahce also drafted the Employment Contract, the invoice issued to Valencia as well as other communications to the Player. At no stage was it determined that the amount of EUR 8,500,000 was net of solidarity contribution.

- The bad faith of Fenerbahce is obvious when noting that only after receiving the payment from Valencia on 5 July 2016, having let Valencia enter into a binding employment contract with the Player on 14 July 2016, and after Fenerbahce entered into a mutual termination agreement with the Player on 14 July 2016 which cleared Fenerbahce of all liabilities towards the Player, Fenerbahce issued a statement on 21 July 2016 determining that it i) supposedly "had not agreed" to the move of the Player to Valencia; ii) this exclusively in order to pretend that no transfer had taken place; iii) with the sole aim of deceitfully preparing its position in order to subsequently refuse to reimburse Valencia the solidarity contribution; and iv) attempt thereby to somehow create its upcoming case before the FIFA judicial bodies.

- All factual and legal considerations of the case should lead this honourable panel to rule that the entire solidarity contribution arising out of the transfer of the Player to Valencia shall be burdened entirely by Fenerbahce.

47. Valencia submits the following requests for relief:

"1. To accept this appeal against the Decision;

2. To annul the Decision;

3. To order the Respondent the reimbursement to the Appellant of the solidarity contribution portions already anticipated by the latter in connection with the transfer of the Player from the Respondent to the Appellant, in the amount of EUR 402,010.52/-, plus

3.1. 5% interest p.a. on the amount of EUR 155,847.50/- as from the 30th of March 2017;

3.2. 5% interest p.a. on the amount of EUR 127,035.52/- as from the 30th of March 2017; and

3.3 5% interest p.a. on the amount of EUR 119,127.50/- as from the 31st of March 2017.

4. To order the Respondent to cover the legal fees already incurred by the Appellant in the amount of EUR 15,000.00/-;

5. Awarding any such other relief as the Panel may deem necessary or appropriate;

6. To condemn the Respondent to the payment of the whole CAS administration costs and arbitrators fees".

B. The Respondent

48. Fenerbahce's submissions, in essence, may be summarised as follows:

- Valencia is not entitled to the claimed reimbursement of the solidarity contribution in the amount of EUR 402,010.52 due to the following reasons:

- First, the transfer of the Player was only based on Clause 7(A) of the Employment Contract, which implies that the payment of EUR 8,500,000 was required without deduction of the solidarity contribution, i.e. that Valencia should bear the financial burden of the solidarity contribution. Any payment less than EUR 8,500,000 would not have triggered the buy-out clause, which interpretation was explicitly confirmed by the parties' conduct throughout the entire transaction. The wording "receive" is unambiguous. Fenerbahce also relies on the arbitral award issued in CAS 2015/A/4188 and, with reference to Spanish law, submits that the amount paid by Valencia was the net amount to be received by Fenerbahce, without any deduction. This is also confirmed by the parties' behaviour, because i) Fenerbahce qualified the payment in FIFA TMS as a "buy-out fee"; ii) as soon as a mismatch appeared in FIFA TMS between "buy-out fee" and "transfer fee", Fenerbahce requested Valencia to modify its entry to "buy-out fee"; iii) Valencia agreed to modify its qualification to "buy-out fee".

- Second, even if there was an underlying transfer agreement (*quod non*), the parties agreed on the shift of the financial burden regarding the solidarity contribution to Valencia. With reference to CAS jurisprudence, Fenerbahce submits that Article 1 of Annex 5 to the FIFA RSTP does not preclude an agreement under which the new club of a player agrees not to deduct the solidarity contribution from the agreed transfer fee but, instead, bears such payments in addition to such fee. Valencia also explicitly emphasised that the amount of EUR 8,500,000 is *"free of any taxes, encumbrances, claims, charges, liens and rights of any third parties"*. Accordingly, Valencia did not leave room for any interpretation different than its intention to pay the full amount as stipulated in Clause 7(A) of the Employment Contract without any deduction. This interpretation is further corroborated by the fact that Valencia indeed paid the full amount of EUR 8,500,000 to Fenerbahce, without making the deduction of 5% as foreseen by the mechanism under Article 1 of Annex 5 to the FIFA RSTP. This is only more true because the receipt of an amount of EUR 8,075,000 simply would not have triggered the buy-out clause.

- Third, even if the financial burden regarding the solidarity contribution was not shifted to Valencia (*quod non*), Valencia is prevented from asking for any reimbursement because it did not even allege that it paid such amount in the erroneous belief that the debt was owed. With reference to Article 63 of the Swiss Code of Obligations (the "SCO"), it is submitted that Valencia does not comply with the criteria for reimbursement because it failed to prove that it had been under the erroneous belief that it owed the full amount to Fenerbahce. It remains unanswered why Valencia paid the full amount of EUR 8,500,000. One can only conclude that it agreed to a net amount of such sum, or it tried to deceive Fenerbahce with the intention to reclaim the owed solidarity contribution at a later stage. In the latter case, Article 63(1) SCO excludes such repayment for good reason.

The reference in the Commentary on the FIFA RSTP (the "FIFA Commentary") to the possibility to claim back the 5% solidarity contribution in case the entire transfer compensation is paid, is not applicable because the FIFA Commentary has no legally binding effect. The FIFA Commentary was drafted 15 years ago when clubs were still unfamiliar with the FIFA RSTP and mistakes happened. An experienced football club as Valencia can now no longer claim that it does not know how the solidarity contribution system works. In fact, Valencia was aware that a buy-out requires the payment of the full amount to trigger its effect under Spanish law.

- Finally, even if the CAS would find that a reimbursement obligations exists despite the above (*quod non*), Valencia would be estopped from invoking it based on the principle of *venire contra factum proprium*.

49. Fenerbahce submits the following requests for relief:

"I. Dismiss all prayers for relief submitted by Valencia;

II. Order Valencia to pay the entire costs of the present proceedings; and

III. Order Valencia to pay the legal fees and expenses of Fenerbahçe, to be determined at a later stage of the proceedings".

V. JURISDICTION

50. The jurisdiction of the CAS, which is not disputed, derives from Article 58(1) of the FIFA Statutes (2018 edition), providing that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question"* and Article R47 CAS Code.

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

VI. ADMISSIBILITY

52. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

53. It follows that the appeal is admissible.

VII. APPLICABLE LAW

54. Valencia submits that CAS shall exclusively apply the various rules and regulations of FIFA and, subsidiarily, Swiss law.

55. Fenerbahce submits that it agrees with Valencia that the rules and regulations of FIFA and, subsidiarily, Swiss law shall apply.

56. 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".

57. Article 57(2) of the FIFA Statutes determines the following:

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

58. The Panel is satisfied that the various regulations of FIFA are primarily applicable, in particular the FIFA RSTP (2016 edition), and subsidiarily Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

A. The Main Issues

59. The main issues to be resolved by the Panel are:

i. Was there a clear agreement between the parties on the consequences for solidarity contribution when exercising Clause 7(A) of the Employment Contract?

ii. If not, what was the true and common intention of the parties when transferring the Player from Fenerbahce to Valencia based on the basis of a good faith interpretation?

i. Was there a clear agreement between the parties on the consequences for solidarity contribution when exercising Clause 7(A) of the Employment Contract?

60. The Panel first of all observes that the concept of solidarity contribution is governed by Article 21 and Annexe 5 FIFA RSTP.

61. Article 21 FIFA RSTP provides as follows:

"If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). The provisions concerning solidarity contribution are set out in Annexe 5 of these regulations".

62. Annexe 5 FIFA RSTP provides the following, as relevant:

Article 1 Solidarity contribution

"If a professional moves during the course of a contract, 5% of any compensation, not including training compensation paid to his former club, shall be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years. […].

Article 2 Payment procedure

"1. […]

2. It is the responsibility of the new club to calculate the amount of the solidarity contribution and to distribute it in accordance with the player's career history as provided in the player passport. The player shall, if necessary, assist the new club in discharging this obligation.

3. […]".

63. The Panel notes that there is a consistent line of CAS jurisprudence determining that, although it is the new club that shall distribute solidarity contribution, the financial burden of paying this solidarity contribution in principle lies with the releasing club. Only if the releasing club is able to establish that a different arrangement was made can a deviation therefrom be accepted.

64. For instance, in CAS 2009/A/1773 & 1774, the following is determined:

"It follows that, as regards the internal relationship between new and former club and in the absence of any agreement to the contrary, Article 21 of the FIFA Regulations imposes the financial burden of solidarity contribution on the former club. Therefore, Borussia being the former club of the Player, it bears the procedural onus of proving that an agreement shifting the said burden to América was concluded in the present case. It is only under this construction that the Appellant could validly argue that the amount of USD 4,600,000 was agreed to be paid net of any charges related to solidarity contribution and that the Appellant is not to reimburse the Respondent for the solidarity contribution paid by the latter" (CAS 2009/A/1773 & 1774, para. 18 of the abstract published on the CAS website).

65. The main question to be addressed by the Panel is therefore whether it can be established that Fenerbahce succeeded in convincing the Panel, on a balance of probability, that Fenerbahce and Valencia agreed to deviate from such default rule.

66. It is to be noted that the present case does not concern a typical transfer of a football player from one club to another that is negotiated by the three parties concerned (the football player, the releasing club and the engaging club) and executed by means of paying a transfer fee. The Panel agrees with the parties that, as opposed to such tripartite agreement, the matter at hand concerns the transfer of a football player from one club to another that is executed by means of paying a buy-out fee, i.e. a predetermined sum set out in the employment contract between the football player and the releasing club for which the releasing club commits itself to releasing the football player in case such fee is paid to it.

67. Clause 7(A) of the Employment Contract contains such "buy-out clause":

"The parties mutually agree and expressly accept in advance that, if at the end of the TFF football season 2015-2016 (i.e. 30 June 2016 at the latest), the Club should receive a written offer from another club interested to register the Player for an amount of EUR 8,500,000.00/- (Eight Million Five Hundred Thousand Euro Only), then the Club shall be obliged to immediately notify in written the Player and permit him as well as his intermediaries/representatives, if any, to enter into negotiations with such other club, should the Player wish to do so. In the event that the Player should then agree with the aforesaid other club for his transfer to the same club, the Club shall be obliged to do all the necessary actions to complete the Player's transfer accordingly at the first available date thereafter and it will be entitled to receive only the amount of 8,500,000.00/- (Eight Million Five Hundred Thousand Euro Only)".

68. The litigious clause was therefore not negotiated between Fenerbahce and Valencia, but between Fenerbahce and the Player. Valencia had no influence on the wording chosen. This notwithstanding, Valencia freely agreed to lift the option set out in Clause 7(A) of the Employment Contract and thereby conformed itself to the applicability thereof when it paid Fenerbahce the amount of EUR 8,500,000 on 5 July 2016.

69. More specifically, the arrangement between Fenerbahce and Valencia is governed by Article 112 SCO, which provides as follows:

> *"1. If a party acting in his own name and in favour of a third person, he shall be entitled to ask that a performance be effected in favour of such third person.*
>
> *2. The third person or his successor is entitled in his own right to require performance in his favour if this was the intention of the two contracting parties, or if this is customary.*
>
> *3. In such case, the original obligee can no longer release the obligor from the time such third person has declared to the latter that he claims his right".*

70. Indeed, Clause 7(A) of the Employment Contract provides the right to any club to acquire the services of the Player by paying an amount of EUR 8,500,000 to Fenerbahce. Valencia exercised such right. In turn, Fenerbahce complied with its side of the bargain by releasing the Player and completed the transfer with Valencia. Accordingly, Article 112(2) SCO has been complied with.

71. Even though no specific agreement or contract was entered into between Fenerbahce and Valencia, representatives of the latter travelled to Istanbul to negotiate the terms of executing the buy-out clause. The Panel observes that it appears from the evidence on record that – regardless of how strange this may seem – the issue of solidarity contribution was not specifically discussed during those meetings, nor was the issue specifically addressed in the correspondence between representatives of the two clubs before the payment was executed.

72. The Panel finds that, from a mere literal interpretation of Clause 7(A), it is not clear whether the amount of EUR 8,500,000 was payable including or excluding solidarity contribution, because the concept of solidarity contribution is not specifically addressed therein. The situation in the matter at hand is either that EUR 8,500,000 represents the net amount of the transfer, with EUR 8,947,368.42 as the gross amount, or that EUR 8,500,000 represents the gross amount, with EUR 8,075,000 as the net amount.

73. Accordingly, the Panel finds that there is a so-called *"Vertragslücke"* (contractual *lacuna*) (SFT 4A_380/2011, Wiegand, zit. OP. para. 61 to Article 18 SCO). According to Swiss law, there are two alternatives to close the *lacuna*: the first one is the so-called "subjective amending", i.e. amending the agreement by relying on the hypothetical intention of the parties, the second alternative would be to close the gap by referring to any legal disposition or regulation.

74. Consequently, the Panel finds that it cannot be established with certainty that there was a clear agreement between the parties on the consequences for solidarity contribution when Valencia transferred the amount of EUR 8,500,000 to Fenerbahce on 5 July 2016 with the intention of exercising Clause 7(A) of the Employment Contract, with the consequence that a good faith interpretation on the basis of Article 18 SCO should follow.

ii. If not, what was the true and common intention of the parties when transferring the Player from Fenerbahce to Valencia based on the basis of a good faith interpretation?

75. Article 18 SCO stipulates as follows:

> *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement".*

76. The Panel observes that there is consistent CAS jurisprudence on how to interpret contractual clauses, which it fully endorses:

> *"According to the interpretation given to this article by CAS jurisprudence, "(u)nder this provision, the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention (Winiger, Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO). This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them (Winiger, op. cit., n. 26 ad art. 18 CO; Wiegand, Obligationenrecht I, Basel 2003, n. 19 ad art. 18 CO). The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation (Winiger, op. cit., n. 33, 37 and 134 ad art. 18 CO; Wiegand, op. cit., n. 29 and 30 ad art. 18 CO)"* (CAS 2005/A/871, pg. 19, para. 4.29).

> *"By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must – according to the jurisprudence of the Swiss Federal Court – be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith ('Treu und Glauben': WIEGAND W., op. cit., n. 35 ad art. 18 CO), based on its wording, the context and the concrete circumstances in which it was expressed (ATF 124 III 165, 168, consid. 3a; 119 II 449, 451, consid. 3a). Unclear declarations or wordings in a contract will be interpreted against the party that drafted the contract (ATF 124III 155, 158, consid. 1b): It is of the responsibility of the author of the contract to choose its formulation with adequate precision (*In dubio contra stipulatorem – *WINIGER B., op. cit., n. 50 ad 18 CO). Moreover, the interpretation must – as far as possible – stick to the legal solutions under Swiss law (ATF 126 III 388, 391, consid. 9d), under which the accrued protection of the weakest party" (CAS*

2005/A/871, pg. 19, para. 4.30)" (CAS 2008/A/1518, para. 46-47 of the abstract published on the CAS website).

77. Engaging in such good faith interpretation, the Panel notes that Valencia, by letter dated 27 June 2016, indicated to Fenerbahce that it intended to lift the buy-out clause in the Player's Employment Contract by paying a sum of EUR 8,500,000 *"to acquire definitely the federative and economic rights relating to the Player, free of any taxes, encumbrances, claims, charges, liens and rights of any third parties"*.

78. The Panel observes that counsel for Valencia argued during the hearing that the reference to *"rights of any third parties"* was added so as to ensure that Valencia would acquire the full federative and economic rights of the Player, free of any third party ownership construction. Be it as it may, the Panel finds that in case Valencia intended to pay EUR 8,500,000 to Fenerbahce and subsequently claim back the amount to be paid to third parties as solidarity contribution, it should have made this clear to Fenerbahce. By failing to do so, the Panel finds that it could not be expected from Fenerbahce that it should have understood Valencia's intentions.

79. To the contrary, although this letter does not explicitly refer to the concept of solidarity contribution, the Panel finds that Fenerbahce could in good faith understand from this expression that the amount of EUR 8,500,000 was net in all respects, and therefore also net of solidarity contribution.

80. The Panel also finds that Fenerbahce's response to Valencia dated 28 June 2016 is telling in this regard. The Panel finds that it may be inferred from Fenerbahce's statement indicating that *"the buyout clause of the player can be executed only if you agree with the player in terms of conditions to conclude a contract and the payment is made in one single instalment to the bank account given below […]"*, Fenerbahce made it clear – and Valencia should in good faith have understood – that Fenerbahce would not consider the buy-out clause properly executed in case a lower amount than EUR 8,500,000 would be transferred to it.

81. Besides these statements from the parties, the Panel finds that also the post-passage behaviour of the parties points in the direction of concluding that Fenerbahce could in good faith understand that Valencia transferred the amount of EUR 8,500,000 net of solidarity contribution.

82. First, it strikes the Panel as odd that a respected professional football club like Valencia mistakenly paid an amount of EUR 8,500,000 to Fenerbahce while it should only have paid EUR 8,075,000 if its reasoning in respect of the payment were to be followed. Indeed, the Panel finds it telling that neither of the two witnesses called by Valencia were able to explain how it could be that Valencia "mistakenly" paid EUR 8,500,000 to Fenerbahce, instead of only EUR 8,075,000. To the contrary, neither of the witnesses was prepared to admit that a mistake was made. They rather stated that they supposed that Fenerbahce would reimburse the amount of solidarity contribution to Valencia. The Panel however finds that neither of the witnesses could satisfactorily explain the logic underlying such reasoning, even though counsel for Fenerbahce and the Panel repeatedly asked the witness and counsel for Valencia to do so.

83. Furthermore, both witnesses testified that Valencia normally deducted 5% of a transfer fee when acquiring a new player, but refused to answer counsel for Fenerbahce when he asked them whether Valencia did the same when acquiring players on the basis of a buy-out clause governed by Spanish law.

84. The Panel finds it more likely than not that Valencia either genuinely paid a net amount of EUR 8,500,000 to Fenerbahce because it was – at the relevant moment in time – of the understanding that this was indeed what was required to execute the buy-out option, or, alternatively, that Valencia, in order to leave no doubt about the proper triggering of the buy-out clause so as to ensure that the Player would be registered with it, did so with the intention of afterwards exploring the possibilities of being reimbursed with the amount of solidarity contribution.

85. All in all, the Panel agrees with the reasoning of the FIFA PSC Single Judge in the Appealed Decision that it is unlikely that Fenerbahce would have released the Player in case Valencia would have made it clear to Fenerbahce from the beginning that it would only transfer an amount of EUR 8,075,000 instead of EUR 8,500,000. The Panel finds that Valencia, after paying the amount of EUR 8,500,000 to Fenerbahce, could not in good faith change its course of action by claiming that it should be reimbursed with 5% of this amount, while admitting not having brought up the issue of solidarity contribution in the negotiations with Fenerbahce.

86. For the avoidance of doubt, this entails that the gross value of the transfer was not EUR 8,500,000, but EUR 8,947,368.42, with a total amount of solidarity contribution (i.e. 5% of such total amount) comprising EUR 447,368.42.

87. For the reasons set out above and on the basis of a good faith interpretation in accordance with Article 18 SCO, the Panel finds that the true and common intention of the parties when transferring the Player from Fenerbahce to Valencia was that the amount mentioned in Clause 7(A) of the Employment Contract was to be paid to Fenerbahce net of solidarity contribution.

88. The Panel, on a balance of probability and by relying on the principle of good faith, the hypothetical will of the parties as well as their post-passage behaviour, reached the conclusion that the transfer would not have taken place had Valencia made clear to Fenerbahce that the latter had to bear the financial burden of the solidarity contribution.

89. Consequently, the Panel finds that Valencia is responsible to pay and finance the solidarity contribution distributed to Real Sporte Clube, Sporting Clube de Portugal and Manchester United FC.

B. Conclusion

90. Based on the foregoing, the Panel holds that:

i. It cannot be established with certainty that there was a clear agreement between the parties on the consequences for solidarity contribution when exercising Clause 7(A) of the Employment Contract, with the consequence that a good faith interpretation on the basis of Article 18 SCO should follow.

ii. Following a good faith interpretation in accordance with Article 18 SCO, the true and common intention of the parties when transferring the Player from Fenerbahce to Valencia was that the amount mentioned in Clause 7(A) of the Employment Contract was to be paid to Fenerbahce net of solidarity contribution.

91. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 8 October 2018 by Valencia Club de Fútbol, S.A.D. against the decision issued on 5 June 2018 by the Single Judge of the Players' Status Committee of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 5 June 2018 by the Single Judge of the Players' Status Committee of the *Fédération Internationale de Football Association* is confirmed.

3. (…).

4. (…).

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