Arbitrations CAS 2020/A/6809 Deportivo Popular Junior FC v. Clube Atlético Mineiro & CAS 2020/A/6843 Clube Atlético Mineiro v. Deportivo Popular Junior FC, award of 28 June 2021

Panel: Mr José Juan Pinto (Spain), President; Mr Alexander McLin (Switzerland); Mr Francisco Müssnich (Brazil)

Football
Transfer with acceleration and penalty clauses
Validity of a penalty clause
Types of penalty clauses
Duty to reduce excessive penalty clauses
Unreasonableness of a penalty clause
Criteria to consider a penalty clause excessive
Amount of the penalty
Interest rate
Amout to which the interest is applicable

1. **A penalty clause contained in a contract shall be considered as valid and applicable under Swiss law if it contains all the necessary elements required for such purpose: a) the parties bound thereby are mentioned, b) the kind of penalty has been determined, c) the conditions triggering the obligation to pay it are set, and d) its measure is identified.**

2. **Under Swiss law, a penalty clause can be agreed for the event of non-performance or defective performance of a contract (Article 160 par. 1 of the Swiss Code of Obligations, CO). In such situation, the penalty clause must be considered "exclusive"; this means that the creditor must choose between compelling the performance and claiming the penalty. On the contrary, a penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160 par. 2 Swiss CO). In such situation, the penalty is "cumulative", which means that the creditor might claim the penalty in addition to performance, provided he has not expressly waived such right or accepted performance without reservation. In such case, the creditor might as well ask for the default interest. When the parties have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and meaning of the main obligation that is guaranteed. The burden of proof of the "cumulative" nature of the clause falls upon the creditor.**

3. **The Swiss legislator has enacted a limitation to the contractual freedom to determine the amount of the penalty clause by establishing in Article 163 par. 3 of the Swiss CO that the judicial body analysing the case shall reduce penalties that are considered excessive at its discretion in order to warrant the public order and the principle of proportionality as standard in Swiss law. The word "shall" undoubtedly implies the**

mandatory nature of the judicial body's duty to reduce penalties that are considered as excessive, and the inabilities of the parties to depart from its determination.

4. **A penalty is considered abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of the principles of justice and equity. This disproportion must significantly exceed the limits of what appears to be normal in light of all circumstances, i.e. it is unreasonable to an extent which cannot be justified. As the possibility of a reduction affects the contractual freedom of the parties, the reduction of a penalty clause shall only be reserved for exceptional cases. The judge shall not reduce the penalty too easily and therefore the principle of contractual liberty always has the privilege in case of doubt. In this regard, penalty fees may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor, as the penalty clauses as such, normally include a punitive aspect that implies that the penalty amount does not have to exactly meet the amount of the damage.**

5. **Several criteria define what an abusive amount is. The creditor's interest, the seriousness of the breach of the contract and the debtor's intentional failure, along with the financial situation of both parties, are determinant. The economic dependence of the debtor, the disproportion between the damage and the penalty, the debtor's professional background and not only the damage actually produced but also the risk of damage to which the creditor was exposed are also to be considered relevant when analysing the proportionality of a penalty clause. These criteria shall not be considered as a *numerus clausus* and a judicial body must not decide in an abstract manner, but on the contrary a balance of interests is required to decide whether a penalty is abusive or not in each case.**

6. **If a penalty amount is essentially preventive and not only punitive or compensatory, it must be more important than the damages which might be granted. It shall also be taken into account that the more severe the debtor's fault is, the less the penalty might be reduced.**

7. **It is the common practice, not only in sports law but generally in contractual law, to calculate interest on an annual basis. The Parties are free to negotiate a higher amount of interest as the default interest of 5% per annum contemplated for in Article 104 par.1 of the Swiss CO. However, this contractual freedom is not unlimited as the outcome would have to remain compatible with Swiss law when applicable. In this regard, interest rates under 18% are considered to be in line with the maximum level of interest applicable under Swiss law.**

8. **The interest rate is applicable solely to the outstanding amount owed but not to the penalty, as the main aim of an interest rate is to compensate the delay in the fulfilment of the contractual obligations.**

I. THE PARTIES

1. Deportivo Popular Junior FC (the "Appellant" or "Junior") is a Colombian professional football club with its registered office in Barranquilla, Colombia. Junior is affiliated to the Colombian Football Association (*Federación Colombiana de Fútbol)*, which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

2. Clube Atlético Mineiro (the "Respondent", "Mineiro", or "CAM"), is a Brazilian football club with its registered office in Belo Horizonte, Brazil. Mineiro is affiliated to the Brazilian Football Confederation (*Confederação Brasileira de Futebol)*, which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

3. A summary of the most relevant facts and the background giving rise to the present dispute will be developed based on the Parties' written submissions, the evidence filed with these submissions, and the statements made by the Parties at the hearing held in the present case. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. The Panel refers in the present Award only to the submissions and evidence it considers necessary to explain its reasoning. The Panel, however, has considered all the factual allegations, legal arguments and evidence submitted by the Parties in the present proceedings.

4. On 9 June 2018, Junior and Mineiro signed a transfer agreement (the "Transfer Agreement") providing for the terms and conditions of the transfer of the Colombian player A. (the "Player").

5. Clause 3 of the Transfer Agreement set the financial conditions of said transfer. In particular, it provided for the obligation of Mineiro to pay Junior the amount of USD 6.000.000 in five instalments:

- USD 2.000.000 on 15 June 2018;
- USD 1.000.000 on 10 July 2018;
- USD 1.000.000 on 30 October 2018;
- USD 1.000.000 on 30 January 2019; and
- USD 1.000.000 by 30 April 2019.

6. Moreover, the Parties agreed to include a sell-on clause by virtue of which if Mineiro received an offer to purchase 100% of the player's federative and economic rights and the Player was transferred to a third club, Junior would receive 30% of the agreed transfer fee. The Parties also agreed to include an acceleration, interest and penalty clause in the terms set out below. The most relevant parts of the Transfer Agreement read as follows:

"[…]

PRIMERA. - OBJETO: EL CEDENTE, como titular de los derechos federativos y económicos del JUGADOR, transferirá al CESIONARIO tales derechos a partir del día diez (10) de julio del año 2018, siempre y cuando en esa fecha JUNIOR haya recibido a su entera satisfacción las cuotas del precio reguladas en los numerales 3.1 y 3.2 de la Cláusula Tercera de este Convenio. Cumplidas esas condiciones suspensivas, el CEDENTE realizará todas las actuaciones necesarias conforme a la reglamentación vigente, para tramitar el certificado de transferencia internacional (CTI) del JUGADOR a favor del CESIONARIO por medio del ingreso de los datos correspondientes al Transfer Matching System (TMS) de la Federación Internacional de Fútbol Asociación (FIFA). Es entendido que ninguna de las partes dará inicio a éste proceso sin el cumplimiento previo de las condiciones suspensivas establecidas en este Convenio. -

[…]

TERCERA. - VALOR DE LA TRANSFERENCIA: El valor de la Transferencia Definitiva objeto de este Convenio se pacta en la suma completa, sin deducción alguna, de ***SEIS MILLONES DE DÓLARES DE LOS ESTADOS UNIDOS DE AMÉRICA (USD 6.000.000)****, suma de dinero que el CESIONARIO pagará al CEDENTE así:*

3.1 La suma completa de DOS MILLONES DE DÓLARES DE LOS ESTADOS UNIDOS DE AMÉRICA (USD 2.000.000[sic.]0), libres de cualesquiera deducciones, pagaderos mediante transferencia bancaria electrónica de dinero, así: […]. Esta cuota del precia la pagará el CESIONARIO al CEDENTE en la forma indicada, a más tardar el quince (15) de junio de 2018, siempre y cuando el JUGADOR apruebe la revisión médica

[…]

3.2 La suma completa de UN MILLÓN DE DÓLARES DE LOS ESTADOS UNIDOS DE AMÉRICA (USD 1.000.000[sic.]0) el diez (10) de julio de 2018, libres de cualesquiera deducciones, pagaderos mediante transferencia bancaria electrónica de dinero, así: […]. El pago se entenderá realizado cuando el CEDENTE informe al CESIONARIO del recibo efectivo del dinero. El incumplimiento a este pago releva de manera inmediata al CEDENTE de cualesquiera obligaciones a su cargo contenidas en el presente documento, y lo faculta para ejercer todos los derechos que tenga para procurar el cumplimiento o terminación del Convenio, y además procurar el resarcimiento de perjuicios y el cobro de penalidades.

3.3 La suma completa de UN MILLÓN DE DÓLARES DE LOS ESTADOS UNIDOS DE AMÉRICA (USD 1.000.000[sic.]0) el treinta (30) de octubre de 2018, libres de cualesquiera deducciones, pagaderos mediante transferencia bancaria electrónica de dinero, así: […]. El pago se entenderá realizado cuando el CEDENTE informe al CESIONARIO del recibo efectivo del dinero. El incumplimiento a este pago releva de manera inmediata al CEDENTE de cualesquiera obligaciones a su cargo contenidas en el presente documento, y lo faculta para ejercer todos los derechos que tenga para procurar el cumplimiento o terminación del Convenio, y además procurar el resarcimiento de perjuicios y el cobro de penalidades.

3.4 La suma completa de UN MILLÓN DE DÓLARES DE LOS ESTADOS UNIDOS DE AMÉRICA (USD 1.000.000[sic.]0) el treinta (30) de enero de 2019, libres de cualesquiera deducciones, pagaderos mediante transferencia bancaria electrónica de dinero, así: […]. El pago se entenderá realizado

cuando el CEDENTE informe al CESIONARIO del recibo efectivo del dinero. El incumplimiento a este pago releva de manera inmediata al CEDENTE de cualesquiera obligaciones a su cargo contenidas en el presente documento, y lo faculta para ejercer todos los derechos que tenga para procurar el cumplimiento o terminación del Convenio, y además procurar el resarcimiento de perjuicios y el cobro de penalidades.

3.5 La suma completa de UN MILLÓN DE DÓLARES DE LOS ESTADOS UNIDOS DE AMÉRICA (USD 1.000.000[sic.]0) el treinta (30) de abril de 2019, libres de cualesquiera deducciones, pagaderos mediante transferencia bancaria electrónica de dinero, así: […]. El pago se entenderá realizado cuando el CEDENTE informe al CESIONARIO del recibo efectivo del dinero. El incumplimiento a este pago releva de manera inmediata al CEDENTE de cualesquiera obligaciones a su cargo contenidas en el presente documento, y lo faculta para ejercer todos los derechos que tenga para procurar el cumplimiento o terminación del Convenio, y además procurar el resarcimiento de perjuicios y el cobro de penalidades. PARÁGRAFO: Un retraso superior a treinta (30) días en el pago oportuno y completo de cualquiera de las cuotas del precio sometidas a plazo, causará en favor del CEDENTE y a cargo del CESIONARIO: (i) Intereses moratorias del 15% sobre saldo insoluto; (ii) Aceleración inmediata del plazo de las restantes cuotas, que se considerarán por tanto como vencidas y en mora, dando lugar a la exigibilidad del saldo del precio; (iii) Penalidad especial equivalente al doble del valor de cada cuota del precio vencida e impagada. El presente documento presta mérito ejecutivo para el cobre de las obligaciones en él contenidas a cargo del CESIONARIO y en favor del CEDENTE, ante los mismos organismos competentes. -

CUARTA. - PARTICIPACIÓN EN FUTURAS TRANSFERENCIAS: además de la cantidad prevista en la Cláusula Tercera, el CESIONARIO, como parte del pago de la transacción contenida en este Convenio, transfiere de forma irrevocable, ilimitada e incondicional al CEDENTE una participación equivalente al treinta por ciento (30%) de todas las sumas que recibirá el CESIONARIO en relación con futuras transferencias temporales o definitivas del JUGADOR a clubes terceros.

[…]

NOVENA. - DOMICILIO Y SOLUCIÓN DE CONFLICTOS: El órgano única y exclusivamente competente para tratar cualquier disputa en relación con el presente Convenio es la Comisión del Estatuto del Jugador de la FIFA".

Free translation into English as follows:

"[…]

OBJECT: ***THE ASSIGNOR, as holder of the federative and economic rights of the PLAYER, shall transfer such rights to the ASSIGNEE as from the tenth (10th) of July 2018,*** *provided that on that date JUNIOR has received to its full satisfaction the instalments regulated in numerals 3.1 and 3.2 of Clause Three of this Agreement. Once these suspensive conditions have been fulfilled, the ASSIGNOR shall take all the necessary steps in accordance with the regulations in force to process the PLAYER's international transfer certificate (ITC) in favour of the ASSIGNEE by entering the data corresponding to the Transfer Matching System (TMS) of the International Fédération of Association Football*

(FIFA). It is understood that none of the parties will initiate this process without prior compliance with the suspensive conditions established in this Agreement.

[…]

THIRD - VALUE OF THE TRANSFER: The value of the Final Transfer, which is the object of this Agreement, is agreed in the full amount, without any deduction, of ***SIX MILLION UNITED STATES DOLLARS (USD 6,000,000),*** *which the ASSIGNEE will pay to the ASSIGNOR in the following way:*

3.1 The full amount of TWO MILLION UNITED STATES DOLLARS (USD 2,000,000 [sic]), free of any deductions, *payable by means of a bank electronic transfer as follows: […]. This instalment shall be paid by the assignee to the assignor in the manner indicated, no later than* **fifteen (15) June 2018, provided that the PLAYER approves the medical examination.**

[…]

3.2 The full amount of ONE MILLION UNITED STATES DOLLARS (USD 1,000,000 [sic]) on the tenth day of July 2018, *free of any deductions, payable by means of a bank electronic transfer, as follows: […]. The payment shall be considered done when the ASSIGNOR informs the ASSIGNEE of the actual receipt of the instalment. Failure to make this payment immediately relieves the ASSIGNOR of any obligations under this document and entitles him to exercise all rights he has to seek compliance or termination of the Agreement, and also to seek compensation for damages and the collection of penalties.*

3.3 The full amount of ONE MILLION UNITED STATES DOLLARS (USD 1,000,000[sic]) on the thirty of October 2018, *free of any deductions, payable by means of a bank electronic transfer, as follows: […]. The payment shall be considered done when the ASSIGNOR informs the ASSIGNEE of the actual receipt of the instalment. Failure to make this payment immediately relieves the ASSIGNOR of any obligations under this document and entitles him to exercise all rights he has to seek compliance or termination of the Agreement, and also to seek compensation for damages and the collection of penalties.*

3.4 The full amount of ONE MILLION UNITED STATES DOLLARS (USD 1,000,000[sic]) on the thirty of October 2019, *free of any deductions, payable by means of a bank electronic transfer, as follows: […]. The payment shall be considered done when the ASSIGNOR informs the ASSIGNEE of the actual receipt of the instalment. Failure to make this payment immediately relieves the ASSIGNOR of any obligations under this document and entitles him to exercise all rights he has to seek compliance or termination of the Agreement, and also to seek compensation for damages and the collection of penalties.*

3.5 The full amount of ONE MILLION UNITED STATES DOLLARS (USD 1,000,000[sic]) on the thirty of April 2018, *free of any deductions, payable by means of a bank electronic transfer, as follows: […]. The payment shall be considered done when the ASSIGNOR informs the ASSIGNEE of the actual receipt of the instalment. Failure to make this payment immediately relieves the ASSIGNOR of any obligations under this document and entitles him to exercise all rights he has to seek*

compliance or termination of the Agreement, and also to seek compensation for damages and the collection of penalties.

***PARAGRAPH: A delay of more than thirty (30) days** in the timely and full payment of any of the instalments abovementioned, shall cause in favour of the ASSIGNOR and at the expense of the ASSIGNEE: **(i) Delay interest of 15% on the amount unpaid; (ii) Immediate acceleration of the term of the remaining instalments, which shall therefore be considered as overdue and in arrears, giving rise to the enforceability of the price balance; (iii) Special penalty equivalent to twice the value of each price instalment due and unpaid.** The present document is enforceable for the collection of the obligations contained in it by the ASSIGNEE and in favour of the ASSIGNOR, before the competent bodies.*

FOURTH - PARTICIPATION IN FUTURE TRANSFERS: in addition to the amount provided for in Clause Three, the ASSIGNOR, as part of the payment for the transaction contained in this Agreement, irrevocably, unlimitedly and unconditionally shall transfer to the ASSIGNEE a share equivalent to thirty percent (30%) of all sums received by the ASSIGNOR in relation to any future temporary or definitive transfer of the PLAYER to any third club.

[…]

NINTH - ADDRESS AND DISPUTE RESOLUTION: The sole and exclusive body competent to deal with any dispute in relation to this Agreement is the FIFA Players' Status Committee".

7. On 15 June 2018, Mineiro paid Junior USD 2,000,000, corresponding to the first instalment agreed in the Transfer Agreement.

8. On 10 July 2018, Mineiro paid Junior USD 1,000,000, corresponding to the second instalment agreed in the Transfer Agreement.

9. On 30 October 2018, Mineiro did not comply with the payment obligation established for that date in the Transfer Agreement.

10. On 14 November 2018, Junior, in view of the non-payment of this third instalment, sent an e-mail to Mineiro requesting the payment of said instalment before the end of the agreed 30-day grace period.

11. On 15 November 2018, Mineiro answered to Junior in the following terms:

"[…] Hace un par de días nos reunimos con D. Juan Pablo Pachón y le explicamos a él nuestras dificultades de flujo de caja, así como le transmitimos nuestras sinceras disculpas por el inconveniente, Ojalá tengan Uds. recibido la información y las disculpas. […]

Ha sido una temporada de eliminaciones inesperadas y muy antes de lo que habíamos planeado, lo que nos llevó al recibimiento de montos considerablemente menores do que esperábamos y al incumplimiento de algunas obligaciones de orden financiera. […]

Tal vez sea oportuno empezar desde ya a pensar juntos acerca de una composición para toda la deuda restante (US$ 3 millones), con un número más grande de parcelas y extensión de los plazos.

Por favor nos diga que les parece la posibilidad de arreglar un nuevo plan de pagos, de manera con que podamos pagarles lo más pronto posible, pero dentro de las nuevas posibilidades económicas y financieras".

Free translation into English as follows:

"[…] A couple of days ago we met with Mr. Juan Pablo Pachón and we explained to him our cash flow difficulties, as well as we convey our sincere apologies for the inconvenience, I hope you have received the information and the apologies. […]

It has been a season of unexpected eliminations and much earlier than we had planned, which led us to recover considerably less amounts than we expected and to breach some financial obligations. […]

Perhaps it is appropriate to start thinking together about a new payment structure for the remaining debt (US $ 3 million), with a larger number of instalments and extension of the terms.

Please let us know what you think about the possibility of arranging a new payment plan, so that we can pay you as soon as possible, but within our new economic and financial possibilities".

12. On 16 November 2018, Junior answered the letter sent by Mineiro on 15 November 2018 rejecting the option of establishing an additional payment plan in the following terms:

"[…] Las condiciones de la transferencia mencionada fueron acordadas entre las partes luego de tratativas preliminares, y se acordaron en los términos que están contenidos en el documento suscrito el 9 de junio de 2018.

Lamentamos las circunstancias que exponen en su carta, pero igualmente les informamos que Junior FC S.A. programó compromisos tanto de funcionamiento como de atención a obligaciones contando con los pagos acordados por la transferencia que nos ocupa, completos y oportunos.

No recibir los pagos en la cantidad y fecha convenidas genera evidentes perjuicios a Junior FC S.A., sociedad que no está en condiciones de modificar la forma de pago ya establecida.

Por lo tanto, y sin menoscabo del ejercicio de los derechos de Junior FC, S.A. a recibir el precio en la forma y oportunidades convenidas, así como de los derechos de Junior FC, S.A. a intereses, penalidades, perjuicios y aceleración del plazo de las cuotas restantes, los invitamos a honrar el compromiso adquirido, reiterando nuestra comunicación anterior de cobro".

Free translated into English as follows:

"[…] The conditions of the aforementioned transfer were agreed between the parties after preliminary negotiations, and were agreed in the terms that are contained in the transfer agreement signed on June 9, 2018.

We regret the circumstances exposed in your letter, but we also inform you that Junior FC S.A. scheduled commitments for both operational and payment obligations, taking into account the payments agreed and that had to be received in timely manner regarding this transfer.

Failure to receive said payments in the amount and on the agreed date generates obvious damages to Junior FC S.A., a company that is not in a position to modify the already established payment plan.

Therefore, and without prejudice to the exercise of the rights of Junior FC, S.A. to receive the price as it was agreed, as well as Junior FC, S.A. rights to request the corresponding interests, penalties, damages and acceleration of the term of the remaining installments, we invite you to honor the commitment acquired, reiterating our previous communication of collection".

13. On 1 December 2018, the grace-period established in the Transfer Agreement in the event of non-payment was met without Mineiro making the corresponding payment.

14. On 7 December 2018, Junior sent a last letter to Mineiro, that remained unanswered, with the following terms:

"[…] On account of the aforementioned and since the third instalment of USD 1.000.000 remained outstanding for more than 30 days, the three aforementioned legal consequences apply in the case at hand, which means the following:

Firstly, since according to point ii. of the aforementioned cited contractual clause all remaining instalments (i.e. the third, fourth and fifth instalment of USD 1.000.000 each) will be considered immediately overdue and in arrears, the immediate outstanding balance or price is of USD 3.000.000. Secondly, over the said price balance of USD 3.000.000 default interest of 15% apply. Thirdly, a penalty must be paid equal to the double of the value of each overdue an unpaid instalment of the price, which is 2x USD 3.000.000 = USD 6.000.000.

On account of the above, I kindly ask you to proceed to the payment of

1. *the transfer price balance of USD 3.000.000 plus 15% of default interest over the said amount; plus*
2. *the penalty of USD 6.000.000,*

all until 18 December 2018 at the latest and to the following bank account: […]" (emphasis omitted).

III. PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS COMMITTEE

15. On 1 January 2019, Junior lodged a claim against Mineiro before the Player's Status Committee of FIFA (the "PSC FIFA"), requesting *inter alia* the following:

- USD 3.000.000 as outstanding transfer amount;
- USD 6.000.000 as penalty fee (cf. the penalty clause);

- 15% (alternatively 5%) per year over the outstanding transfer fee of USD 3.000.000 and over the penalty fee of USD 6.000.000 (alternatively only over the outstanding transfer compensation), as of 19 December 2018 (one day after expiration of the deadline given in the correspondence sent to CAM on 7/12/2018) until the date of effective payment.

- Procedural cost shall be borne by CAM.

16. Mineiro answered to the claim requesting its complete rejection or alternatively to partially accept the claim by ordering the payment of USD 3.000.000 corresponding to the third, fourth and fifth instalments of the transfer fee agreed plus default interest at a rate of 5% per annum applicable as from the date of the decision.

17. On 16 December 2019, the PSC FIFA issued its decision in the above dispute (the "Appealed Decision") in the following terms:

"1. *The claim of the Claimant, Deportivo Popular Junior, is partially accepted.*

2. *The Respondent, Atletico Mineiro, has to pay to the Claimant the amount of USD 3,000,000 plus 15% interest p.a. as from 19 December 2018 until the date of effective payment.*

3. *The Respondent, Atletico Mineiro, has to pay to the Claimant the amount of USD 1,980,000 as penalty.*

4. *The Claimant is directed to inform the Respondent, immediately and directly, preferably to the e-mail address as indicated on the cover letter of the present decision, of the relevant bank account to which the Respondent must pay the amounts mentioned under points 2 and 3 above.*

5. *The Respondent shall provide evidence of payment of the due amounts in accordance with points 2 and 3 above to FIFA to the e-mail address psdfifa@fifa.org, duly translated, if need be, into one of the official FIFA languages (English, French, German, Spanish).*

6. *In the event that the amounts due plus interest in accordance with points 2 and 3 above are not paid by the Respondent within 45 days as from the notification by the Claimant of the relevant bank details to the Respondent, the Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of the Players).*

7. *The ban mentioned in point 6 above will be lifted immediately and prior to its complete serving, once the due amount is paid.*

8. *In the event that the aforementioned sums plus interest are still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

9. *The final costs of the proceedings in the amount of CHF 20,000 are to be paid by both parties as follows: […]"* (emphasis omitted).

18. On 10 February 2019, the PSC FIFA notified to the Parties the grounds of the Appealed Decision, which can be summarized as follows:

a. It is undisputed that the Parties signed a transfer agreement on 9 June 2018 by virtue of which Mineiro undertook to pay the total amount of USD 6.000.000 in 5 installments. By virtue of clause 3 of the Agreement, in the event of a delay of more than 30 days in the payment of any of the contractual installments, the rest of them would become automatically due.

b. It is uncontested by the Parties that Mineiro effectively paid the first two instalments on the agreed date and that the 3 last instalments for a total amount of USD 3.000.000 remained outstanding. Therefore, the Single Judge concludes that on 7 December 2018, junior put Mineiro in default of payment of USD 3.000.000 as outstanding transfer fee plus 15 % interest rate, as well as the "special penalty" amounting to double of the outstanding amount setting 10 days' time limit in order to remedy the default as established in clause 3 of the transfer agreement signed by the Parties.

c. The principle of *pacta sunt servanda* must be respected by the Parties, which undoubtedly implies that Mineiro must pay Junior the USD 3.000.000 due as established in clause 3 of the Transfer Agreement.

d. Likewise, the 15% annual interest over the outstanding balance agreed by the Parties must be paid from 19 December 2018 until the effective date of payment, since this agreed annual interest is below the maximum interest allowed by Swiss law.

e. Regarding the penalty clause in the Transfer Agreement, on the basis of which Junior claims the payment of USD 6.000.000, (double the value of each overdue and unpaid instalment) the Single Judge concluded that even though it had been contractually agreed, it was still opened for him to analyse if said clause should be considered valid and binding.

f. The Single Judge considers that, although contractually agreed by the Parties concerned, the penalty amounting to the double of the outstanding transfer amount represents twice the outstanding amount and 100% of the total transfer amount provided in the agreement and therefore considers it to be disproportionate and excessive and should therefore be reduced.

g. In view of the above, FIFA considers that an amount of USD 1.980.000 which represents almost one third of the requested penalty (USD 6.000.000) seemed to be an appropriate and justified penalty in order to compensate Junior for the late payment by Mineiro.

h. Additionally, the FIFA PSC underlined that the annual interest of 15% requested should only apply to the outstanding transfer fee and not to the penalty.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

A. CAS 2020/A/6809 Deportivo Popular Junior FC v. Clube Atlético Mineiro

19. On 29 February 2020, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), Junior filed its Statement of Appeal before the Court of Arbitration for Sport (the "CAS") against Mineiro with respect to the Appealed Decision. Junior requested in line with Article R51 of the CAS Code that the Statement of Appeal should be considered as the Appeal Brief in the present case. In its Statement of Appeal, Junior appointed Mr. Alexander McLin as arbitrator. The Appellant also chose English as the language of the present arbitration proceedings and submitted the following requests for relief:

"1. To review the present case as to the facts and to the law, in compliance with Article R57 of the [CAS Code].

2. To issue a new decision, which sets aside the decision passed by the Single Judge of the FIFA Players' Status Committee in the meeting held on 16 December 2019, confirming that

i. CAM shall be obliged to pay to Junior FC the outstanding transfer amount of USD 3,000,000 (three million US dollars), plus 15% interest p.a. over said amount as from 19 December 2018 until the date of effective payment.

ii. CAM shall be obliged to pay to Junior FC the agreed penalty fee of USD 6,000,000 (six million US dollars).

iii. CAM shall be obliged to pay all the procedural costs relating to the first instance proceeding before FIFA.

iv. The application of Article 24bis of the FIFA Regulations on the Status and Transfer of Players of the Single Judge of the Players' Status Committee to the present case shall be confirmed.

3. *CAM shall be ordered to bear all costs and legal expenses relating to the present appeal procedure".*

20. On 6 March 2020, Mineiro requested that the time limit to file its Answer be fixed after the payment by Junior of its share of the advance of costs.

21. On 9 March 2020, the CAS Court Office confirmed that Mineiro's time limit to file the answer to the appeal brief was set aside and that a new time limit would be fixed upon Junior's payment of its share of the advance of costs.. The CAS Court Office also informed the Junior that Mineiro had also filed an appeal against the Appealed Decision.

22. On the same date, Mineiro informed the CAS Court Office that it agreed with the ongoing procedure to be conducted in English, had no interest on submitting the matter at hand to mediation and appointed Mr. Francisco Müssnich as arbitrator.

B. CAS 2020/A/6843 Clube Atlético Mineiro v. Club Deportivo Popular Junior FC

23. On 11 March 2020, pursuant to Articles R47 and R48 of the CAS Code, Mineiro filed its Statement of Appeal before CAS against Junior with respect to the Appealed Decision. In its Statement of Appeal, Mineiro appointed Mr. Francisco Müssnich as arbitrator. The Appellant also chose English as the language of the present arbitration proceedings.

24. On 12 March 2020, Junior informed the CAS Court Office that it agreed to consolidate the two appeal procedures and nominated Mr. Alexander McLin as an arbitrator in this matter.

25. On 17 March 2020, Mineiro informed the CAS Court Office that it agreed to consolidate the present case with the case CAS 2020/A/6809.

C. CAS 2020/A/6809 & CAS 2020/A/6843

26. On 20 March 2020, in view of the Parties' agreement, the President of the CAS Appeals Arbitration Division decided to consolidate both procedures in accordance with Article R52 of the CAS Code.

27. On 24 March 2020, FIFA informed the CAS Court Office that it renounced to its right to request its possible intervention in both arbitration proceedings that now were consolidated.

28. On 6 April 2020, the CAS Court Office acknowledged receipt of the Appeal Brief filed on 31 March 2020 in case 2020/A/6843 by Mineiro and granted Junior a 20-day period to submit its Answer to the Appeal. The Appeal Brief filed by Mineiro had the following request for relief:

"Procedurally:

FIRST – To order the Respondent to produce the documents indicated in the Chapter XII above, which apparently under its custody and control (cf. Art 44.3, par.1 of the CAS Code).

On the merits:

SECOND – To accept in full the present Appeal;

THIRD – To confirm that the Appellant has to pay to the Respondent the amount of USD 3,000,000 (three million dollars) plus a default interest at a rate of 5% (five percent) p.a. as from 19 December 2018 until the date of effective payment;

FOURTH – To dismiss any other penalty amount, percentage, mechanism or default interest, eventually set out in clause 3 of the Transfer Agreement and/or in the Appealed Decision;

Alternatively, and only in the event the above is rejected:

FIFTH –To confirm that the Appellant has to pay to the Respondent the amount of USD 3,000,000 (three million dollars) plus a default interest at a rate of 5% (five percent) p.a. as from 19 December 2018 until the date of the effective payment; and

SIXTH –To confirm that the Appellant has to pay to the Respondent USD 300,000 (three hundred thousand dollars) due as penalty.

At any rate:

SEVENTH – To order the Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS (if any); AND

EIGTH –To order the Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 10,000 (ten thousand Swiss Francs)" (emphasis omitted).

29. On 21 April 2020, the CAS Court Office acknowledge receipt of Junior's payment of the entire advance on costs in case 2020/A/6809 and granted Mineiro a 20-day period to file its Answer to the Appeal Brief.

30. On 27 April 2020, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to settle the present dispute would be composed of the following:

President: Mr. José Juan Pintó, Attorney-at-law in Barcelona, Spain

Arbitrators: Mr. Alexander McLin, Attorney-at-law in Geneva, Switzerland

Mr. Francisco Müssnich, Attorney-at-law in Rio de Janeiro, Brazil.

31. On 1 May 2020 Junior FC filed its answer to the Appeal in the case 2020/A/6843, in accordance with Article R55 of the CAS Code, with the following requests for relief:

"1. To reject the Appellant's appeal in its entirety.

2. To accept the requests of the Respondent made in its statement of appeal and appeal brief dated 28 February 2020 (CAS 2020/A/6809).

3. *To order the Appellant to bear all the costs incurred during the present procedure, as well as all legal costs incurred by the Respondent".*

32. On 26 May 2020, Mineiro filed its answer to the Appeal in case 2020/A/6809, in accordance with Article R55 of the CAS Code, with the following requests for relief:

"FIRST – To set aside in full the Appeal Brief;

SECOND – To order the Appellant to pay the full amount of the CAS arbitration costs relating the present dispute at the end of the ongoing arbitration; and

THIRD – To order the Appellant to also pay a contribution towards the legal costs, fees and other related expenses of the Respondent regarding the ongoing matter, in the form of CHF 20,000".

33. On 8 June 2020, the Parties were invited to inform the CAS Court Office by 15 June 2020 whether they wished a hearing to be held in this matter.

34. On 10 and 13 June 2020 respectively, both Parties informed the CAS Court Office of their preference for a hearing to be held.

35. On 30 June 2020, Mineiro was invited to complete its request for production of documents, indicating in particular which concrete documents it is requesting, and to demonstrate that such documents are likely to exist and to be relevant, as stated in Article R44.3 of the CAS Code.

36. On 2 July 2020, the Panel, pursuant to Articles R57 and R44.2 of the CAS Code, decided to hold a hearing, either in person or by video conference, depending on the overall situation arising from the COVID-19 pandemic.

37. On 6 July 2020, the CAS Court Office informed the Parties that Mr. Alberto Donado-Mazarrón, Attorney-at-law in Barcelona, Spain had been appointed as ad hoc Clerk in order to assist the Panel in these proceedings.

38. On the same date, the Panel decided to hold the hearing in Brazil, subject to the evolution of the COVID-19 situation.

39. On 13 July 2020, the CAS Court Office informed the Parties that the Panel had decided to reject Mineiro's request for the production of additional documentation as it did not supplement its request as was requested by the Panel.

40. On 30 July 2020, the CAS Court Office invited the Parties *"to provide [...] their position regarding holding the hearing in Rio de Janeiro, in Lausanne or in any other place and/or by video-conference"* and informed them that *"none of the Parties, Counsel, witnesses and arbitrators will be obliged to travel to Rio de Janeiro or to any other place if they do not feel comfortable doing it. Any attendee will be free to attend the hearing by video-conference".*

41. On 5 August 2020, the CAS Court Office informed the Parties that the Panel had decided that the hearing in the present case would take place on 30 November 2020 and that the location of the hearing would be decided at a later stage.

42. On 2 November 2020, the CAS Court Office informed the Parties that the Panel had decided that, in light of the ongoing COVID-19 situation, the hearing scheduled on 30 November 2020 would be held by video conference.

43. On 19 November 2020, the CAS Court Office forwarded to the Parties the Order of Procedure and requested them to return a signed copy thereof by 19 October 2020.

44. On the same date, the CAS Court Office acknowledged receipt of the Order of Procedure duly signed by Junior.

45. On 26 November 2020, the CAS Court Office acknowledged receipt of the Order of Procedure duly signed by Mineiro.

46. On 30 November 2020, a hearing was held by video-conference (via Cisco Webex). At the outset of the hearing both Parties confirmed that they had no objection as to the constitution of the Panel.

47. In addition to the Panel, the *Ad Hoc* Clerk and Ms. Delphine Deschenaux-Rochat, Counsel to the CAS, the following persons attended the hearing:

    a) For Junior:
        1. Ms. Melanie Schärer, legal counsel
        2. Mr. Juan Pablo Pachón Chávez, witness

    b) For Mineiro:
        1. Mr. Breno Costa Tannuri, legal counsel
        2. Mr. Vitor Neves Restivo, legal counsel
        3. Mr. Mandepanda Somaiah Jaya, legal counsel
        4. Mr. Lucas Ottoni, witness
        5. Mr. Carlos Meinberg Neto, witness

48. At the hearing, the Parties had the opportunity to present their case, to submit their arguments and to comment on the issues and questions raised by the counterparty.

49. At the closing of the hearing, the Parties expressly stated that they did not have any objections with regard to the procedure. The Parties further confirmed that they were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel and that their right to be heard had been respected.

50. On 28 January 2020, Breno Costa Ramos Tannuri, counsel until that moment of Mineiro during the present proceeding, informed the CAS court Office that it would be no longer representing Mineiro.

51. On 29 January 2020, the CAS Court Office acknowledged that Mr. Luiz Fernando Pimenta Ribeiro had been appointed as the new counsel for Mineiro.

V. SUMMARY OF THE PARTIES' POSITIONS

52. 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 Panel, however, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the Parties, even if there is no specific reference to those submissions in the following section.

A. Deportivo Popular Junior FC

53. Junior's submissions, in essence, may be summarized as follows:

54. The Single Judge of the PSC FIFA correctly analyzed clause 3 of the Transfer Agreement, according to which, after a delay of more than 30 days in the payment of any of the instalments, the remaining instalments would automatically be due. It also correctly stablished that the first two instalments were paid correctly, and that the last three instalments were not paid. Therefore, it also correctly concluded that the amount of USD 3.000.000 remains outstanding and it shall be concluded that CAM must pay said amount to Junior based on the principle of *pacta sunt servanda*.

55. Furthermore, the Single Judge also rightly concluded that the agreed interest rate of 15% *per annum* was in line with the maximum rate applicable under Swiss law. Moreover, Mineiro has accepted several times an interest rate greater than 5%, so it is not something new for them.

56. Consequently, this conclusion of the Single Judge should also be confirmed in the present appeal.

57. However, with regard to the application of the penalty clause included in the Transfer Agreement, the decision taken by the Single Judge to reduce the amount due on this basis from USD 6.000.000 to USD 1.980.000 is not justified, and evidently erroneous based on the application of the principle of freedom of contract and therefore the principle of *pacta sunt servanda*.

58. The stipulation of penalty clauses is admitted in international civil and contractual law and particularly in Swiss law. Likewise, under Swiss law, the parties are free to determine the amount of said clause for non-payment of an obligation. Swiss law also established that penalty

clauses may only be reduced when, according to the particularities of the case at stake, the amount agreed by the parties may be considered as excessive and grossly disproportionate.

59. Mineiro is untruthful about how the negotiations for the transfer of the Player were conducted and the actual intention of the Parties in including the compensatory penalty clause in the contract. The negotiations lasted about 3 months and both Parties were represented during the negotiations by experienced lawyers. Extensive discussions regarding the financial outcome of said transfer took place as Mineiro was not willing to pay the USD 12.000.000 that Junior was claiming for the transfer of the player. Mineiro was not willing to pay even half of the value requested by Junior.

60. Two meetings were held between the Parties to discuss the terms of the transfer, at which an initial agreement was reached for USD 6.000.000. Once the transfer price had been agreed, the Parties continued to negotiate on the terms of payment of the transfer, given Mineiross track record and poor reputation for payment, Junior requested the payment in one unique instalment, or in the event that a multiple instalment payment plan was agreed, that the Brazilian club provide bank guarantees to secure the credit. Mineiro objected head-on to both requests.

61. Given Mineiro's position, Junior ended up offering the possibility of effectively diversifying the payment of the USD 6.000.000 agreed upon as long as a penalty clause was included in the contract with its corresponding interest in case of breach of some of the instalments by Mineiro. Junior's intention was to obtain a guarantee that the amount agreed by the Parties would be effectively transferred. Therefore, the inclusion of the penalty clause was an essential element of the agreement between the Parties and Mineiro was always aware of the capital importance that Junior gave to such inclusion. Mineiro accepted its inclusion at all times and therefore the clause has been openly accepted by both Parties.

62. The principle of *pacta sunt servanda* is an unalterable principle that ensures the contractual stability contained in the FIFA regulations and additionally constitutes the *ratio legis* established by Article 12 bis of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") that was implemented so that football clubs would always comply with their contractual obligations.

63. The Parties in the present case freely and voluntarily agreed to establish the penalty clause included in the Transfer Agreement signed by both Parties and obliged each other to comply with the integrity of the Agreement.

64. In addition, Swiss case law states that a severe penalty clause must be considered admissible and may NOT be reduced by a court when (i) the debtor's fault is serious and would have recognised the scope of the penalty clause at the time of the termination of the contract; and (ii) it does not irrationally and flagrantly exceed the amount admissible in the sense of justice and equity, and (iii) the business experience of the debtor must be taken into account. In any case it must be underlined that the judge should not reduce a penalty too easily and that the

principle of contractual liberty, which is essential under Swiss law, has always to be privileged in case of doubt.

65. In the present case, the application of the agreed penalty equal to double the value of each overdue and unpaid instalment was Mineiro's fault alone. Mineiro is a well-established club and has extensive experience in negotiating and signing contracts related to the international players' transfers and therefore at the time of signing expressly consented to the inclusion of the penalty clause. The basis of this clause was to protect Junior in case of breach, since Mineiro did not want to agree to make a single payment for the transfer of the Player nor to provide any bank guarantee. In view of Mineiro's refusal, the inclusion of such a penalty clause was *sine qua non* for carrying out the transfer. In fact, it was Mineiro's proposal to include said penalty clause in order to prevent Junior from insisting on a one-off payment or demanding a bank guarantee. Therefore, Mineiro's failure to comply should be considered as a serious breach justifying the value of the penalty clause in its entirety.

66. The facts of the case are crystal clear: there was an unjustified failure by Mineiro to comply with the third, fourth and fifth installments established in the Transfer Agreement signed by the Parties and therefore a real and economically quantifiable damage was caused to Junior which entitles it to collect what is due, together with its applicable interest and the penalty clause for such failure as it was clearly established in the Transfer Agreement signed by the Parties.

67. Likewise, there is CAS precedent where penalty clauses that amount not only to double, but even triple the value of the transfer, have been accepted (see CAS 2017/A/5304 and CAS 2013/A/3205). Therefore, in the present case, given Mineiro's conduct, an application of a penalty clause of twice the amount due is perfectly proportionate.

68. In any case, the penalty clause was not determined by a fixed value, but on the contrary by a decreasing value depending on the amount of the hypothetical breach by Mineiro. In other words, it was agreed that the penalty would amount to the double of the overdue amount at that moment. For example, if Mineiro had agreed a penalty clause knowing from the beginning that it would not even pay the first instalment, then its fault must be considered very severe. In such a case, it would have been justified for them to pay, in addition to the transfer amount of USD 6.000.000 a penalty of the double value of the unpaid transfer fee, that is to say USD 12.000.000. In the overall, Mineiro would have had to pay for the Player the total amount of USD 18.000.000. On the other hand, if Mineiro had not been able to pay Junior the last instalment of USD 1.000.000, then it would have had to pay a penalty of USD 2.000.000 (double the value of the unpaid installment) and in the overall, it would have been obliged to pay as total transfer fee the amount of USD 8.000.000.

69. Consequently, this decreasing penalty system is completely fair and just. It can be considered severe, but not excessive. Mineiro itself had in its own hands the possibility either to pay in one payment the amount agreed by the Parties or to fix what would be the value of the penalty

in case of non-compliance if it did not agree with the proposed modality. Mineiro raised no objection to the inclusion of such clause which was negotiated and accepted by the Parties.

70. Taking into account the FIFA, CAS and SFT jurisprudence, it is far less excusable for a party with business experience like Mineiro than for a party inexperienced in business to conclude a penalty fee subject to onerous consequences. It is also less excusable for a party with business experience like Mineiro than for a party inexperienced in business to commit serious misconduct.

71. A prestigious and experienced club like Mineiro, which constantly buys players and participates at the highest level, knows and is aware of the consequences of a breach of contract and therefore was fully aware of the consequences of such breach. The penalty clause and the fact that Mineiro was not willing to pay the full amount agreed between the Parties in a single payment, was a *sine qua non* requirement for such a penalty clause to be fixed. If the penalty clause had not been included, the Transfer Agreement would not have been signed.

72. As regards Mineiro's argument that under Swiss law (i) it is the creditor who must prove that the penalty clause applies cumulatively, (ii) that the penalty had a punitive nature and (iii) that the creditor must also prove having suffered damages due to the debtor's act or omission, this party considers that such an assertion is not in accordance with the Swiss CO.

73. The second paragraph of Article 160 of the Swiss CO states the following: *"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"*. Swiss case law has interpreted this article extensively, concluding that in cases where there are specific dates on which specific payments must be made, the penalty may be claimed in addition to compliance with the obligation itself. Therefore, in the case in question and taking into account that Mineiro did not comply with its payment obligations on the established dates, it must be considered that the penalty clause may be required in addition to the contractual obligation itself.

74. Likewise, under Article 161 par. 1 of the Swiss CO, *"The penalty is payable even if the creditor has not suffered any damage"*, and therefore, Junior is not required to prove that it has suffered any damage in order to be entitled to the penalty clause. Article 161 of the Swiss CO is crystal clear and leaves no room for interpretation other than the one that follows from the literal wording of the article.

75. In any case, the fact that Junior did not have to pay a significant amount regarding the replacement of the Player and therefore decided to promote players from their academy is absolutely irrelevant as far as the determination of the damage suffered by Junior is concerned, since it is evident that with the non-payment of the three installments by Mineiro, a significant financial damage was produced to the creditor.

76. A penalty clause can only be reduced when it is clearly disproportionate, as the Panel must respect at all times what has been freely agreed by the parties, in light of complying with the *pacta sun servanda* and contractual freedom principles. The Parties in the present case freely agreed on all the clauses included in the Transfer Agreement, including therefore the penalty clause, and it is for this reason that the intention of the Parties expressed in the Agreement must be respected. The wording of the penalty clause is clear and precise and there is no doubt that it clearly represents the intention of the Parties.

77. Even in cases where the penalty clause can be considered to be a severe one, it must be considered as admissible and cannot be reduced by a judicial body when:

- There is fault attributable to the debtor and this is relevant to generate the non-payment.

- It does not unreasonably and flagrantly exceed the amount permissible under the principles of justice and equity. This should be taken into account when analysing this aspect in order to lower standards where the contracting parties have extensive business experience.

78. Regarding the penalty clause, it has been demonstrated that it is far from irrational or that it flagrantly exceeds the amount admissible under the principles of justice and equity. The CAS has accepted and imposed in other cases penalty clauses much more onerous than the current one, up to three times the amount that had been unpaid.

79. The penalty clause signed by the Parties should be considered proportional and reasonable and therefore should not be reduced in order to respect the will of the Parties and the principle of *pacta sunt servanda*.

80. Additionally, this party is forced to mention that this is not the first time that Mineiro has been involved in this type of litigation, trying to justify its failure to comply with contractual obligations under the pretext of financial difficulties, and requesting a reduction of a penalty clause. Mineiro had, or has, similar cases in 2015 with Dynamo Kyiv; 2016 with Udinese, and in 2019 with Huachipato, Wolfsburg and Boca Juniors. Its conduct is therefore a constant in a significant number of transfers made and demonstrates that it was not only fully aware of what it was doing, but that this was premeditated and fraudulent conduct on his part. This behavior would certainly not be deterred by reducing a contractually agreed penalty clause as it is pretty clear that Mineiro is a repeated offender.

81. Mineiro requests the non-application of the 15% annual interest established in the agreement and granted by the Appealed Decision based on the theory that interest cannot be applied in addition to the penalty clause itself for the same infraction since it would imply that a double penalty was agreed by the Parties. In this sense, it is also worth mentioning that Mineiro did not oppose its inclusion and additionally, the percentage in question does not violate Swiss law as it does not exceed the maximum annual interest of 18% established as onerous by Swiss Law.

82. Moreover, such is Mineiro's bad faith that in January 2020 it transferred the Player to Portland Timbers of the United States for an apparent amount of USD 5.380.000 and has not paid the sell-on fee agreed by the Parties.

83. For all the above reasons, Mineiro must pay Junior the penalty clause of USD 6.000.000, in addition to the amount owed of USD 3.000.000 plus 15% default interest.

B. Clube Atlético Mineiro

84. Mineiro's submissions, in essence, may be summarized as follows:

85. The Appealed Decision fails to clarify the findings of the decision that led the Single Judge to establish that the default interest of 15% of the overdue amount should be applied on an annual basis, even though the Transfer Agreement failed to provide any indication in that sense. FIFA therefore took a decision which does not contain the findings to an important conclusion and thus clearly violates the provisions set out in the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules").

86. Moreover, and although the Appealed Decision correctly decided that the penalty clause was excessive and disproportionate and should be reduced, it fails to clarify the context or reasons to determine the reduction imposed.

a. As to the penalty clause

87. Under Article 160 par.1 of the Swiss Code of Obligations ("Swiss CO"), penalty clauses are legal, valid and binding for the event of non-performance or for defective performance. When this situation occurs, the penalty clause must be considered as *"exclusive"* and therefore the creditor must choose between compelling the performance or claiming the penalty.

88. Regardless of the above, a penalty clause can also be set for the event of a failure to comply with the stipulated time of performance. In those cases, the penalty clause is considered as *"cumulative"* and therefore the creditor might claim the penalty in addition to the performance provided that the latter has not expressly waived such right or accepted the performance without reservation. In such cases the creditor might as well ask for default interest.

89. In the present case, the Agreement does not specify what type of penalty clause is included in the Transfer Agreement and therefore it is the creditor's obligation to prove the cumulative nature of the clause if it claims that this is the type of clause that was negotiated between the Parties.

90. According to Swiss law, a contractual penalty has to respect the following elements: *(a)* clear indication of the parties bound by the contractual party; *(b)* the sort of penalty; *(c)* conditions

triggering the obligation to pay such contractual clause; and *(d)* the measures of the contractual penalty.

91. Article 163 par. 3 of the Swiss CO enables the respective court to reduce the penalties that it considers excessive at its discretion. Swiss law does not clarify when a penalty clause shall be considered as excessive, and according to the Swiss Federal Tribunal ("SFT"), it shall be the decision body who establishes, taking into account the merits of the case at stake and the relevant circumstances, whether a penalty is excessive or not. Swiss case law considers as excessive a penalty clause when it is not reasonable and exceeds the penalty amount that would seem just and equitable. It is also fundamental, when analyzing if a penalty clause is excessive or not, to determine the real intention or objective of the parties with respect to the inclusion of said clause in the relevant agreement.

92. It is also important to point out that although the Swiss CO enshrines the principle of freedom of contract, it also sets out some exceptions thereto as it prohibits contracts which are impossible, unlawful, immoral and/or contravene public policy or personal rights.

b. In casu

93. When an interpretation of a contract is in dispute, the judge shall try to understand and analyze the true and mutually agreed intention of the parties. When this real intention cannot be sufficiently established, the contract must be interpreted according to the requirements of good faith.

94. If we analyze not only the penalty clause itself, but also the conduct of the parties during the negotiations carried out, it must be concluded, without a shadow of doubt, that the penalty clause incorporated had a clear compensatory and non-punitive component. As can be seen from Junior's communications to the present proceedings, the club's real intention was to use the entirety of the agreed fixed transfer fee to reinvest such amount in other players with similar characteristics.

95. Hence, Junior imposed on Mineiro the exact wording of the penalty clause with the intent of receiving the necessary amount to hire a new player to replace the transferred Player.

96. Taking into account the terms and conditions of the referred clause, it shall be considered as undisputed that the main objective when including such penalty clause has always been to develop a compensatory penalty clause – *in lieu* – of a punitive clause. Therefore, it should be concluded that the penalty clause had as a fundamental purpose to somehow monetize the eventual damage that could be caused to Junior by a hypothetical breach by Mineiro.

97. The penalty clause at issue was developed taking into account the damages that Junior was supposed to suffer and therefore, and in light of what is established in Article 12 par. 3 of the FIFA Procedural Rules, Article 8 of the Swiss CO and both CAS jurisprudence and Swiss

doctrine, Junior is the party that has the burden of proving that those damages effectively existed.

98. It is undisputed that Junior has failed to meet its burden of proving that these supposedly alleged damages occurred in the case at stake.

99. It shall also be taken into account that Mineiro never intended to deliberately breach the Agreement or had any intention whatsoever to breach the financial obligations assumed towards Junior. Mineiro suffered a serious financial problem that led it to unfortunately being unable to meet its contractual obligations.

100. Contrary to what has been insinuated by Junior, Mineiro in spite of undergoing a serious financial crisis, has managed to pay clear its debts owed to the members of the so-called FIFA family. Mineiro has also managed to meet all its financial obligations due after the conclusion of several cases in front of the FIFA judicial bodies.

101. It shall be emphasized that the intention of Mineiro has been at all times to comply with the contractual obligations towards Junior derived from the Transfer Agreement. The club, although it had a real difficult financial situation, did its best to pay the instalments as agreed and established in the Transfer Agreement. The most evident proof of that is that it paid half of the total transfer fee without delay. It was only when an unsustainable financial situation arose against its will that it had no other option than to try to negotiate with Junior the terms of the Transfer Agreement and find alternative manners to mitigate the losses and damages that may occur and therefore satisfy all parties involved. Mineiro tried to obtain information about the damages caused to Junior with the objective of trying to mitigate them as much as possible but Junior emphatically refused in negotiating with Mineiro.

102. The penalty clause imposed by Junior has the sole purpose of reimbursing the latter any eventual loss or damage caused by Mineiro if it failed to pay the transfer fee by the agreed dates. As from the moment Junior fails to proof the existence of such losses or damages it seems reasonable that said penalty clause is no longer acceptable.

103. The penalty clause never had a punitive function as its sole objective was to protect the Junior from any eventual loss or damage caused whether Mineiro failed to pay the agreed transfer fee by the due dates.

104. It is undisputed that the penalty amount applicable in the case at hand shall be exactly proportional to the losses and damages that Junior had and clearly demonstrated during the processes of replacing the Player. The replacements of the transferred Player were Jarlan Barrera, promoted from its youth academy, Daniel Moreno Mosquera, who was hired in July 2018 and Fabian Sambueza who was hired in July 2019. The two latter players were hired for a modest transfer fee, demonstrating that Junior did not suffer any damages whatsoever.

c. *As to the applicable reduction*

105. The Single Judge agreed that the penalty amount established in the Transfer Agreement is disproportionate and imbalanced and consequently had to be duly reduced. When establishing the reduction, the Single Judge did not provide the findings that led him to finally conclude that the penalty clause had to be reduced from USD 6.000.000 to USD 1.980.000.

106. It is important to bear in mind that, despite the abovementioned reduction, the penalty amount imposed by FIFA amounts approximately to 66,66% of the total value owed by Mineiro, and is therefore still excessive.

107. In addition, and regarding the 15 % annual interest established in the Appealed Decision, this is 3 times the minimum interest established by Swiss law.

108. Therefore, adding this 66,66% penalty and the 15% default interest, the total amount raises the penalty fee to 81,66%, which is obviously excessive and far from any premise of justice and equity.

109. All stakeholders of the football community are aware that when a penalty guarantees a financial obligation, its function is financially close to a default interest and according to Swiss law a default interest cannot exceed a 18% per year.

110. The SFT considers that a contractual penalty that represents 20% of the amount of the purchase price is abusive and considers that it is important to take into consideration when establishing the proportional amount, if the creditor has failed to prove the damages suffered.

111. Regarding CAS jurisprudence, it has already been decided that a penalty of twice the amount due shall be considered excessive.

112. Bearing in mind the aforementioned, there is no doubt that the amount due as penalty by Mineiro to Junior shall not be higher than 10% of the total outstanding amount and therefore taking into account that the total outstanding transfer fee is USD 3.000.000, Junior shall be entitled to receive from Mineiro a penalty amounting to USD 300.000.

d. *Violation of the Ne bis in idem principle*

113. Furthermore, the contested decision violates the *ne bis in idem* principle. Swiss law clarifies that in the absence of an agreement to the contrary, the default interest will be 5% per annum. In the Transfer Agreement signed by the Parties, interest of 15% was agreed upon but it was not established that the referred interest rate had to be calculated annually. However, the Appealed Decision concluded, without any justification, that the interest in question should be calculated on an annual basis, when the Parties never agreed on this in the Transfer Agreement.

114. In the present case, Mineiro would be punished twice for the same breach of contract, firstly by the 15% default interest imposed for its breach and secondly by the penalty clause itself. This double penalty would not only be unfair but also violates some of the most fundamental principles of law.

115. The Transfer Agreement was drawn up by Junior and is also in Spanish, so it must be interpreted directly against it. Therefore, the request by Junior regarding the interest and the penalty clause is openly disproportionate. The interest that should be established in this case should be 5% p.a. according to Swiss law.

116. Consequently, Mineiro requests that the Panel conclude that it has to pay the USD 3.000.000 owed with 5% annual interest and that it waive the payment of a penalty clause. In the alternative, that the penalty clause to be paid be a maximum of USD 300.000 as it is 10% of the value due, this amount being proportional.

VI. JURISDICTION

117. The jurisdiction of the CAS, which is not disputed by the Parties, derives from Article R47 of the CAS Code in connection with Articles 57 par. 1 and 58 par. 1 of the FIFA Statutes.

118. Article R47 par. 1 of the CAS Code provides as follows:

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

119. Articles R57 par. 1 of the FIFA Statutes reads as follows:

"FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents".

120. Article R58 par. 1 of the FIFA Statutes reads as follows:

"Appeals 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 notification of the decision in question".

121. The jurisdiction of the CAS is not contested by the Parties and is confirmed by the execution of the Order of Procedure. It follows, therefore, that CAS has jurisdiction in this appeal.

VII. ADMISSIBILITY

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

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

123. As quoted above, Article 58 par. 1 of the FIFA Statutes (2019 ed.) states that appeals against final decisions passed by FIFA's legal bodies shall be lodged with CAS within 21 days of notification of the decision in question.

124. The grounds of the Appealed Decision were notified to the Parties on 10 February 2020. Junior's Statement of Appeal was filed on 29 February 2020 and Mineiro's Statement of Appeal was filed on 2 March 2020. Both were therefore filed prior to the expiry of the 21-day deadline in the FIFA Statutes and the Code. Both Statements of Appeal also complied with the requirements set by Article R47, R48 and R64.1 of the CAS Code.

125. It follows that both appeals are therefore admissible.

VIII. APPLICABLE LAW

126. Article R58 of the CAS Code reads as follows:

"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".

127. Article 57 par. 2 of the FIFA Statutes states 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".

128. In accordance with these provisions, the Panel must decide the present dispute in accordance with, primarily, the FIFA Regulations, and additionally, Swiss Law.

IX. MERITS

129. The Panel underlines that it is undisputed that the Parties signed a transfer agreement providing for the terms and conditions of the transfer on a permanent basis of the Player from Junior to Mineiro. The total transfer fee agreed by the Parties amounted to USD 6.000.000 and had to be paid in 5 different instalments by a set date, with a grace period of 30 days for each of the instalments. The Parties also agreed to include in the Agreement a penalty clause by means of which, in the event Mineiro failed to pay any of the instalments within the grace period, this would trigger the immediate acceleration of the deadlines for the remaining instalments, that would also be considered overdue and in arrears. This would in turn give rise to the enforceability of the remaining outstanding transfer fee with a default interest of 15% on the outstanding balance and a special penalty equivalent to double the value of each overdue and unpaid instalment.

130. In this regard, the penalty clause included in the Transfer Agreement signed by the Parties reads as follows:

"Un retraso superior a treinta (30) días en el pago oportuno y completo de cualquiera de las cuotas del precio sometidas a plazo, causará en favor del CEDENTE y a cargo del CESIONARIO: (i) Intereses moratorias del 15% sobre saldo insoluto; (ii) Aceleración inmediata del plazo de las restantes cuotas, que se considerarán por tanto como vencidas y en mora, dando lugar a la exigibilidad del saldo del precio; (iii) Penalidad especial equivalente al doble del valor de cada cuota del precio vencida e impagada".

Translation produced by Mineiro and not contested by Junior:

"A delay of more than thirty (30) days in the timely and complete payment of any of the installments of the price subject to the term, shall cause in favour of the ASSIGNOR and the expense of the ASSIGNEE: (i) Default interest of 15% on unpaid balance; (ii) Immediate acceleration of the term of the remaining installments, which will, therefore be considered as past due in default, giving rise to the enforceability of the price balance; (iii) Special penalty equivalent to double the value of each installment of the price due and unpaid".

131. It is also uncontested that Mineiro paid the first two instalments (amounting USD 3.000.000 in total) but failed to comply with the third instalment of the Agreement. The Panel notes that Mineiro does not dispute the validity of the Transfer Agreement, nor that it failed to pay the amount of USD 3.000.000 as stipulated in clause 3 of the Agreement. Therefore, the Panel concludes that Mineiro acknowledges owing Junior the total amount of USD 3.000.000.

132. On the basis of the relief requested by the Parties in the cases at stake, the Panel considers that the object of these proceedings is the enforceability of the penalty set in clause 3 of the Transfer Agreement. The PSC Single Judge concluded that although the event that generated the execution of the penalty clause was met, the penalty amounting the double of the outstanding transfer amount, that is to say USD 6.000.000 in the existing situation, was evidently disproportionate and excessive as it amounted by itself to 100% of the transfer amount provided in the agreement, and double the outstanding amount. Therefore, and in

view of the circumstances of the present case, the Single Judge held that a penalty amounting to USD 1.980.000 which represents almost one-third of the requested penalty, seemed to be appropriate, just and equitable.

133. The decision of first instance has been appealed by both Parties in the present proceedings and although both of them consider undisputed the breach of contract fulfilled by Mineiro, they differ, firstly, regarding the application made by the FIFA PSC Single Judge of the penalty clause included in the Transfer Agreement and secondly, regarding the interest rate applicable to the overdue amounts.

134. In light of the above, the Panel considers that the issues to be resolved by the Panel are:

a) Is the penalty clause included in clause 3 of the Transfer Agreement applicable in the present dispute?

b) If the penalty clause shall be applied, should the penalty clause be reduced for being disproportionate?

c) What should be the amount of penalty imposed to Mineiro?

d) What is the interest rate that should be applied to the overdue amounts?

135. These issues will be considered in turn.

A. Is the penalty clause included in clause 3 of the Transfer Agreement applicable in the present dispute?

136. Mineiro considers, taking into account the terms and conditions of said clause and the merits of this specific case, as undisputed that the main objective of the penalty clause has always been to develop a compensatory penalty amount and not a punitive penalty. In addition, it also considers that the penalty clause has to be considered as "exclusive" and not "cumulative", implying therefore that Junior may only request either the overdue instalments regarding the transfer fee or the penalty clause, but considers that it is not entitled to request both amounts as it has not proven in the present proceedings the "cumulative" nature of the clause included in the Transfer Agreement.

137. According to the above, Mineiro also considers that Junior suffered no damage whatsoever due to the non-payment of the overdue installments as it voluntarily decided to replace the transferred player with an own academy player and two other external players for which it paid a significantly lower transfer fee amount that the one received from Mineiro. Therefore, it considers that Junior has been unable to prove that it suffered any losses or damages arising from the default on payment, implying that the penalty installment shall be set aside or in a subsidiary manner reduced to USD 300.000, that is to say 10% of the overdue amount.

138. On the other hand, Junior is of the opinion that the penalty clause had been duly agreed by the Parties, and due to the fact that Mineiro seems to be a repeat offender with respect to non-payment of contractual obligations associated to transfer fees, the introduction of this penalty clause was a *sine qua non* condition to enter into the Transfer Agreement and therefore, and according to the principle of *pacta sunt servanda*, the intention of the Parties shall be respected and the penalty clause has to be applied with no deduction whatsoever.

139. The Panel has determined that the rules and regulations of FIFA must apply primarily and Swiss law subsidiarily. It shall be taken into account that the FIFA RSTP does not foresee any provision regarding penalty clauses and consequently offers no guidance on this issue. Therefore, and in order to analyse the validity and proportionality of said clause, the Panel has to take into account the provisions regarding penalty clauses set out in Swiss law, specifically in the Swiss CO and the jurisprudence of the SFT in this regard.

140. Articles 160 et seq. of the CO read as follows:

"Article 160: Relation between penalty and contractual performance

1. *Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.*

2. *Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.*

3. *The foregoing does not apply if the debtor can prove that he has the right to withdraw from the contract by paying the penalty.*

Article 161: Relation between penalty and damage

1. *The penalty is payable even if the creditor has not suffered any loss or damage.*

2. *Where the loss or damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault.*

[…]

Article 163: Amount, nullity and reduction of the penalty

1. *The parties are free to determine the amount of the contractual penalty.*

2. *The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.*

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

141. The Panel notes that the penalty clause contained in clause 3 of the Transfer Agreement shall be considered as valid and applicable under Swiss law as it contains all the necessary elements required for such purpose: a) the parties bound thereby are mentioned, b) the kind of penalty has been determined, c) the conditions triggering the obligation to pay it are set, and d) its measure is identified (COUCHEPIN G., La clause pénale, Zurich 2008, para. 462).

142. Under Swiss law, a penalty clause can be agreed for the event of non-performance or defective performance of a contract (Article 160 par. 1 Swiss CO). In such situation, the penalty clause must be considered "exclusive"; this means that the creditor must choose between compelling the performance and claiming the penalty. On the contrary, a penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160 par. 2 Swiss CO). In such situation, the penalty is "cumulative", which means that the creditor might claim the penalty in addition to performance, provided he has not expressly waived such right or accepted performance without reservation. In such case, the creditor might as well ask for the default interest (Article 104 Swiss CO) (COUCHEPIN G., op. cit., para. 1182 et seq.). When the parties have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and meaning of the main obligation that is guaranteed. The burden of proof of the "cumulative" nature of the clause falls upon the creditor (Article 8 of the Swiss Civil Code ("Swiss CC") (MOSER M., in THÉVENOZ/WERRO (eds), Commentaire romand – Code des obligations I, Bâle 2012, ad Article 160, N 13, and CAS 2015/A/4057 and CAS 2017/A/5046).

143. Consequently, the Panel, in order to establish if the penalty clause is "exclusive" or "cumulative" and therefore if Junior is entitled to request in the present proceedings the payment of the penalty included in clause 3 of the Transfer Agreement in addition to the payment of the transfer fee already granted by the Appeal Decision (at point II of its operative part) with its corresponding interest rate, has to determine if the penalty was established for *"non-performance or defective performance"* or for *"failure to comply with the stipulated time or place of performance"*.

144. The Panel is of the opinion that the nature of the agreed penalty clause is "cumulative" as it was clearly contractually stipulated for the failure to comply with the obligation in a fixed time-period. Mineiro's payment obligations were to be performed before a defined time-period, or at maximum within the grace-period included. The Panel considers that, in the case at stake, the defined time limits are of the utmost importance given that Junior requested a single payment instalment at the beginning of the negotiations, and finally, and in order to conclude the transfer, agreed on establishing a staggered payment plan. In the Panel's view, it seems plausible that in order to replace the transferred Player, Junior could have needed the transfer fee payments with no delay. Article 160 par. 2 Swiss CO, however, contains another necessary condition to consider a penalty clause to be cumulative, namely that the right to the additional payment was not *"expressly waived"*, or that the debtor's performance was not *"accepted without reservation"*. Both conditions were not met by Junior in the case at stake and therefore, and taking into account the circumstances of the present case, the Panel considers proven that the penalty clause included by the Parties is of a "cumulative" nature.

145. In addition, the Panel also notes that clause 3 of the Transfer Agreement contains three separate concepts: (i) the applicable interest governing the overdue amounts, (ii) the immediate acceleration of the remaining instalments and (iii) the special penalty equivalent to twice the value of each due and unpaid instalment. The Panel is of the view that the three different amounts regarding different concepts are cumulative and not exclusive and therefore there is no room for a different interpretation than to consider that Junior is entitled to request the payment of the special penalty clause, together with the payment of the outstanding installments owed and the corresponding default interest applicable.

B. If the penalty clause shall be applied, should the penalty clause be reduced for being disproportionate?

146. Once it has been established that the penalty clause shall be applied to the present case, the Panel considers whether it must be applied in its entirety, or rather whether it should be reduced, as was determined in the Appealed Decision.

147. The Panel firstly notes that pursuant to the principle of contractual freedom, the Parties are free to determine the amount of the penalty clause as it has been established by Article 160 par. 1 of the Swiss CO. However, the Swiss legislator has enacted a limitation to this freedom by establishing in Article 163 par. 3 of the Swiss CO that the Panel or Judge analysing the case shall reduce penalties that are considered excessive at its discretion in order to warrant the public order and the principle of proportionality as standard in Swiss law (COUCHEPIN G., op. cit., para. 783).

148. The Panel wishes to highlight that SFT jurisprudence refers to the word "shall", undoubtedly implying the mandatory nature of the judicial body's duty to reduce penalties that are considered as excessive, and the inabilities of the parties to depart from its determination. Therefore, the Panel has to examine the amount included in the penalty clause and all the circumstances that surrounds the present case in order to conclude if the agreed amount is excessive, and if so, to what extent it shall be reduced.

149. Swiss law does not provide an exact definition of when a penalty shall be considered abusive or excessive. The judge must therefore establish, taking into account the merits of the case and all the relevant circumstances, whether the penalty is excessive or not, and if so, the extent to which it should be reduced (ATF 82 II 142 par. 3). However, according to the SFT, a penalty is considered abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of the principles of justice and equity (ATF 82 II 43 par. 3 and ATF 133 II 43 par. 3.3.1). This disproportion must significantly exceed the limits of what appears to be normal in light of all circumstances. Thus, the Panel may reduce the penalty when it is unreasonable to an extent which cannot be justified (COUCHEPIN G., op. cit, par. 840).

150. The Panel also notes that, as it has been repeatedly established both by the SFT and CAS jurisprudence, the reduction of a penalty clause shall only be reserved for exceptional cases that occur when the penalty is grossly and evidently unfair since the possibility of a reduction

affects the contractual freedom of the parties. In any case, the judge shall not reduce the penalty too easily and therefore the principle of contractual liberty always has the privilege in case of doubt (MOSER M., op. cit., ad Article 163, N 7; COUCHEPIN G., op. cit., par. 934). In this regard, the SFT has considered that penalty fees may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor as, the penalty clauses as such, normally include a punitive aspect that implies that the penalty amount does not have to exactly meet the amount of the damage produced to the creditor.

151. The criteria according to which contractual penalties shall be deemed as excessive and the extent to which a Panel may reduce them are to be found in Swiss case law. The SFT has established several criteria to define what an abusive amount is. The creditor's interest (ATF 103 II 129), the seriousness of the breach of the contract (ATF 91 II 372 par. 11) and the debtor's intentional failure, along with the financial situation of both parties, are determinant. The economic dependence of the debtor, the disproportion between the damage and the penalty (ATF 52 II 223), the debtor's professional background (ATF 102 II 420 par. 4) and not only the damage actually produced but also the risk of damage to which the creditor was exposed (ATF 133 III 43) are also to be considered relevant when analysing the proportionality of a penalty clause.

152. The abovementioned criteria shall not be considered as a *numerus clausus* and the Panel must not decide in an abstract manner, but on the contrary, it has to take into consideration all the particularities of the case at hand to decide on a case-by-case basis as a balance of interests is required to decide whether a penalty is abusive or not in each case.

153. The Panel notes that, in the case at stake, the creditor had a significant interest in the debtor's compliance with its payment obligations as it shall be taken into account that the transfer of the Player from Junior to Mineiro was one of the five most expensive transfers in Colombian football history and the most expensive transfer in the history of Junior. It was thus not a common deal for the seller.

154. In addition, taking into account that more than two years have elapsed from the moment at which Mineiro breached the Transfer Agreement and that the club has not made any effort whatsoever to settle the present dispute and effectively pay at least the uncontested amount owed to Junior, the Panel considers the breach to be of significant importance.

155. This being said, the Panel is also of the view that although Mineiro has had plenty of time to try and mitigate the breach produced by complying with the payment obligations it undertook by signing the Transfer Agreement, it is not less true that Mineiro effectively paid the first two installments as agreed. The Panel is therefore convinced that Mineiro's bad faith, to the extent it was present, did not reach the level of premeditation present at the moment it signed the Transfer Agreement. In other words, the Panel does not consider proven the intentional breach of the main obligation alleged by Junior.

156. The Panel also notes that both clubs are well-established football clubs in Brazil and Colombia and moreover were assisted by experienced lawyers during the negotiation period and the signing of the Transfer Fee. Mineiro is, and has been for many years, a successful club in Brazil that has only been demoted once to Serie B, the second level of the Brasileirao. It is a club that is used to play at a top level not only in Brazil but also in the Conmebol Libertadores Cup. Mineiro is therefore used to enter into international transfer agreements and has an extensive experience with this kind of agreement.

157. The Panel concludes that it is far less excusable for a party with an extensive experience in negotiating transfer agreements to have concluded a penalty fee subject to onerous consequences regarding the breach of a payment obligation than for an inexperienced party. It is also less excusable for a club with such an experience in international football to have committed a severe breach than for an unexperienced club.

158. Regarding the alleged extremely poor financial situation Mineiro was facing, which supposedly would make the payment obligation impossible to comply with, it shall be noted that Mineiro's representatives confirmed at the hearing that the club has continued to acquire new players in order to strengthen the team, and therefore has continued entering into other transfer agreements. This certainly constitutes an improper and reproachable conduct by the debtor.

159. On the other hand, the Panel also concludes that Junior was fully aware of the risk to which it was being exposed when entering into an important transfer with a club that had been facing financial difficulties in recent years, linked to several breaches of contracts in similar transactions. Junior was aware of the financial risks it was undertaking when entering into the Transfer Agreement, especially if the hypothetical non-fulfilment of the payment obligations could imply, as has been alleged by Junior, a serious economic damage for the club.

160. Ultimately, despite the known risks associated with contracting with Mineiro, Junior went ahead and entered into the Transfer Agreement. Unable to secure the desired bank guarantees, it accepted the option of a stringent penalty clause in the hopes that its terms would sufficiently deter Mineiro from breach for non-payment. Another option would have been not to enter into the deal at all.

161. In light of all the above and taking into account all the circumstances including the factors outlined above, the Panel considers the penalty clause included in the Transfer Agreement to be excessive. This determination takes into account that the penalty amount represents 100% of the total transfer fee agreed by the Parties and 200% of the outstanding installments owed by Mineiro. In its view, this penalty is of such a nature that it should be reduced in accordance with Article 163 Swiss CO.

C. What should be the amount of penalty imposed?

162. In order to determine a non-excessive penalty amount, the Panel shall assess all the elements which are objectively relevant and look for an adequate solution regarding the concrete

circumstances of the matter at stake (ATF 101 Ia 545 par. 1b). The Panel shall not try and substitute their own view of what the amount of the penalty should be but should only try and reduce the amount in order to consider that it is not excessive any more taken into account the particularities of the case at stake (ATF 133 II 201, par. 5.2 and 5.4).

163. The Panel deems it relevant to note that given the fact that Mineiro has in bad faith neglected to meet its financial obligations several times in the recent years, each with a significant amount, CAS has already in the past considered Mineiro as a "repeated offender", which is considered as an aggravating circumstance according to Article 12bis par. 6 of the FIFA RSTP (see CAS 2020/A/7305; CAS 2019/A/6315; CAS 2018/A/5838; CAS 2017/A/5202 & 5203 or CAS 2016/A/4718 & 4719).

164. In light of the above, and of the negotiations record posed by the Parties, the Panel considers proven that the penalty clause was an evident conditio sine qua non for Junior in order to enter into the Transfer Agreement with Mineiro and that therefore, both Parties voluntarily decided to include a severe penalty clause in order to try and restrain Mineiro of unfulfilling its payments obligations.

165. In light of the merits of the case, the Panel, in such an exercise of removal of excessiveness, considers fair and equitable to impose a penalty amounting USD 3.000.000, equivalent to the exact amount that is owed by Mineiro and representing 50% of the agreed transfer fee. Although the Panel is aware that it is a significantly high penalty amount, it wishes to highlight that Swiss jurisprudence has confirmed that if a penalty amount is essentially preventive and not only punitive or compensatory, it must be more important than the damages which might be granted (ATF 116 II 302 par. 4). It shall also be taken into account that the more severe the debtor's fault is, the less the penalty might be reduced (COUCHEPIN G., op. cit., par. 882).

166. The Panel also deems it relevant to note that the Parties extensively negotiated the Transfer Agreement in which the penalty clause was included and, moreover, both Parties are certainly used to negotiate transfer agreements and associated penalty clauses. Such penalty clauses are objectively justified in transfers like the one at stake as when the seller club is not immediately paid, it faces several disadvantages which cannot be precisely calculated and therefore promptly and easily remedied (see CAS 2013/A/3205). The economic damage is easier to compensate as the interest rate applicable to the outstanding amounts is precisely aimed at mitigating such damage. On the contrary, the lack of cash assets during a transfer period might prevent a club from being able to acquire new players or substitute the player than has been transferred. The absence of one of the best players in Junior's squad is of course hard to compensate economically and it is therefore understandable that both Parties agreed to stipulate high preventive penalties in this regard. In the present case, the Panel considers that Junior had a strong interest in receiving the transfer fee in timely manner and in order to fulfil its preventive purpose, the penalty needs to be substantial.

167. In light of the above, the Panel has to conclude that the Parties' intention when establishing such amount was inserting an important penalty clause meant to prevent Mineiro from not

complying with its financial obligations. Therefore, and also taking into account all the particularities of the present case, the Panel does not wish to substitute the will of the Parties but just reduce the penalty amount to an amount that it does not consider to be excessive.

168. In light of all the above the Panel considers the breach of contract to be unjustifiable and weighing all the relevant factors of the case at stake considers that a penalty equivalent to USD 3.000.000 is reasonable and fair in the present case. The Panel expects that this penalty shall stop Mineiro from continuing a conduct that is clearly considered unlawful pursuant to existing case law against it, and which other CAS panels have also determined to be unlawful.

D. What is the interest rate that should be applied to the overdue amounts?

169. With respect to the applicable interest rate, the controversy lies in the fact that, on the one hand, Junior requests that the 15% interest should be applied not only to the outstanding amount of USD 3.000.000, but also to the penalty amount that shall be granted by the Panel, and on the other hand, Mineiro considers that such interest is totally disproportionate and excessively burdensome since it is three times the minimum interest rate imposed by the Swiss CO and if the penalty amount is confirmed by the Panel, Mineiro would be facing a double penalty for the same infringement what would imply a violation of the *ne bis in idem* principle. Additionally, Mineiro alleges that there is no stipulation whatsoever in the Transfer Agreement that allows the Panel to conclude that the 15% interest rate shall be applied annually as the clause is not clear enough and there is no certainty that the interest rate should be calculated annually.

170. The Appealed Decision considers that the 15% annual interest, being the one agreed upon by the Parties and not being contrary to any legal system and especially burdensome, should be applied to the amount owed by the Brazilian club, but not to the penalty since the purpose of the interest rate is to compensate Junior for the delay in the fulfillment of its obligations by Mineiro. If an interest rate were applied to the penalty, it would imply an unfair enrichment of Junior.

171. Firstly, the Panel observes that, besides the special penalty included in clause 3 of the Transfer Agreement and addressed at length above, said clause also establishes the following:

"Un retraso superior a treinta (30) días en el pago oportuno y completo de cualquiera de las cuotas del precio sometidas a plazo, causará en favor del CEDENTE y a cargo del CESIONARIO: (i) Intereses moratorias del 15% sobre saldo insoluto"

Free translation into English as follows:

"A delay of more than thirty (30) days in the timely and full payment of any of the instalments abovementioned, shall cause in favour of the ASSIGNOR and at the expense of the ASSIGNEE: (i) Delay interest of 15% on the amount unpaid"

172. The Panel wishes to highlight that the Transfer Agreement, as explained above, clearly establishes that the outstanding transfer amount, the interest rate and the penalty amount can be awarded complementarily and therefore nothing prevents an adjudicatory body from awarding both the penalty and the interest rate. The Panel does not consider, as alleged by Mineiro, such interest rate to be a fine or a penalty for the hypothetical default of payment which would have constituted a second penalty in addition to the special penalty amount. It shall merely be considered as a simple interest rate to be applied on default of payment to compensate Junior for the financial losses as a result of depriving the club, due to the delayed payments, from receiving the transfer fee agreed by the Parties.

173. The Panel does not accept Mineiro's allegation on the ambiguity or lack of clarity regarding the applicability of the 15% interest rate. Although it is not expressly stated in the Transfer Agreement that said interest should be considered annual in nature, the Panel observes that it is the common practice, not only in sports law but generally in contractual law, to calculate interest on an annual basis, including under Swiss law (Article 104 par. 1 of the Swiss CO). If the intention of the Parties was to deviate from the standard practice, this should certainly have been established in the Transfer Agreement. Taking into account the absence of such a reference, the Panel concludes, following the standard practice, that the interest rate shall be calculated annually.

174. Regarding the alleged excessiveness of the same, the Panel notes that Article 104 par. 2 of the Swiss CO establishes that *"Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default"*. Therefore, it shall be concluded that the Parties are free to negotiate a higher amount of interest as the default interest of 5% per annum contemplated for in Article 104 par.1 of the Swiss CO.

175. In addition, and as stated in CAS 2010/A/2128, this contractual freedom is not unlimited as the outcome would have to remain compatible with Swiss law when applicable, as in the instant case. In this regard, the Panel notes that interest rates under 18% are considered to be in line with the maximum level of interest applicable under Swiss law. There is no regulation that establishes that an interest rate of 15% is excessive or disproportionate and therefore the Panel, complying with the principle of *pacta sunt servanda,* finds that there is no reason to reduce the interest rate of 15% per annum to a lower percentage.

176. Finally, the Panel finally considers that Appealed Decision is correct when establishing that the interest rate is applicable solely to the outstanding transfer amount owed but not to the penalty, not only because the main aim of an interest rate is to compensate the delay in the fulfilment of its contractual obligations but also because the Parties agreed in the Transfer Agreement to apply the delay interest *"on the amount unpaid"*. In any case, Junior did not request in its Appeal Brief the payment of default interest on the amount of the penalty fee, which would in any event prevent the Panel from granting such interest.

177. Consequently, the Panel finds that Atlético Mineiro is required to pay interest at a rate of 15% per annum over the outstanding transfer fee amount, that is to say over USD 3.000.000.

E. Conclusion

178. In light of the foregoing, the Panel holds that the appeal brought by Junior is to be partially upheld and the appeal brought by Mineiro is to be fully dismissed. Therefore, the Appealed Decision is to be partially modified confirming the obligation of Mineiro to pay the amount of USD 3.000.000 plus 15% interest (confirming point 2 of the Appealed Decision) and also ordering Mineiro to pay Junior an amount of USD 3.000.000 as a contractual penalty.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Deportivo Popular Junior FC against the Decision rendered by the FIFA Single Judge of the Players' Status Committee on 29 October 2020 is partially upheld.

2. The appeal filed by Clube Atlético Mineiro against the Decision rendered by the FIFA Single Judge of the Players' Status Committee on 29 October 2020 is dismissed.

3. Point III of the Decision of the Single Judge of the FIFA Players' Status Committee dated 29 October 2020 shall be set aside and replaced by the following:

   "3. Clube Atlético Mineiro has to pay to Deportivo Popular Junior FC the amount of USD 3.000.000 as penalty".

4. All the remaining points of the Decision of the Single Judge of the FIFA Players' Status Committee dated 29 October 2020 are confirmed.

5. (…).

6. (…).

7. (…).

8. All other or further motions or prayers for relief are dismissed.