



Arbitration CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven, award of 10 December 2010

Panel: Mr Rui Botica Santos (Portugal), President; Mr Pedro Tomás Marques (Spain); Mr Manfred Nan (the Netherlands)

Football

Transfer of player

Submission of new evidence

Nature of the deadline to pay the advance of costs

Failure to obtain a bank guarantee as a force majeure

Obligation of the buying club to fulfil its obligation notwithstanding the lack of consent of the player in respect of the transfer

Compensation for breach

1. In view of art. R56 of the Code of Sports-related Arbitration, a party is allowed to adduce further evidence or supplement its submissions provided that the time limit for filing its Appeal Brief or its Answer has not expired.
2. The issue of the advance of costs is an administrative issue which is dealt with by the CAS Court Office. The deadline fixed by the CAS is only an indicative delay and not a mandatory time limit. The non-payment of the advance of costs within the deadline prescribed cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible. The deadlines which are fixed only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with art. R64.2 of the CAS Code.
3. *Force majeure* is an event which leads to the non performance of a part of a contract due to causes which are outside the control of the parties and which could not be avoided by exercise of due care. The unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it. Moreover, *force majeure* is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference. If a party has exercised the option provided in a loan agreement to buy the federative rights of a player but has neither made express statements reserving, subjecting or conditioning the completion of the transaction to the procurement of a bank guarantee nor manifested its inability to obtain such bank guarantee due to unforeseen facts and events beyond its control and taking place after the date when the option was exercised, the principle of *pacta sunt servanda* must be enforced and the party cannot invoke that it failed to obtain the bank guarantee as a *force majeure* to avoid fulfilling its contractual obligation.

4. **A player's consent is a key element for any successful transfer. However, the player's refusal to sign an employment contract cannot detach a club having exercised the option provided in a loan agreement to complete the transfer of the player from its contractual obligation towards the player's former club. It is standard practice in the world of football that a buying club should somehow protect itself from the risk of missing a player's consent to the transfer. Normally, this risk is prevented by inserting a clause stipulating that the player's consent is a precondition for the fulfillment of the transfer contract.**

5. **Swiss law clearly provides that a party which is found to have breached a contract without any just cause is liable to compensate the other. Pursuant to the general fundamentals of contractual law, damages due following a breach of contract are calculated in accordance with the principle of restitution. In other words, a party who has been the victim of an unjustified breach of contract is entitled to be compensated with an amount which would reinstate it in the position it would have been had the contract been performed to its end. However, the Swiss Code of Obligation also requires a deciding body to consider other facts and circumstances when assessing the amount of damages. These facts and circumstances include, among others, the degree of fault, the circumstances of the case and the special nature of the transaction.**

Real Betis Balompié SAD (the "Appellant" or "Betis") is a Spanish professional football club affiliated to the Spanish Football Federation, *i.e.* *Real Federación Española de Fútbol* (the "Spanish Federation"). The latter is a member of the Fédération Internationale de Football Association (FIFA).

PSV Eindhoven (the "Respondent" or "PSV") is a Dutch professional football club affiliated to the Dutch Football Federation, *i.e.* *Koninklijke Nederlandse Voetbalbond* (the "Dutch Federation"). The latter is also a member of FIFA.

This appeal was filed by Betis against the decision rendered by the Single Judge of the FIFA Players' Status Committee (the "FIFA PSC") passed on 30 July 2009 and notified to the Parties on 2 June 2010 (the "FIFA PSC Decision").

The circumstances stated below are a summary of the relevant facts as established on the basis of the submissions of the Parties and the evidence produced by them. The FIFA file was also taken into consideration.

On 31 January 2005, the Brazilian player R. (the "Player") and PSV signed an employment contract valid from 31 January 2005 until 30 June 2008 (the "PSV – Player Employment Contract").

On 22 December 2005, PSV and Betis signed an agreement (the “Loan Agreement”) under which PSV agreed to loan the Player to Betis from 1 January 2006 until 30 June 2007 for the net amount of EUR 1,000,000.

Under the Loan Agreement the following was also agreed:

- a) PSV granted Betis an option (the “Option”) to buy the Player’s full “*federative rights*” as per 1 July 2007 for the net amount of EUR 3,250,000 to be paid in instalments as follows:
 - EUR 1,000,000 on 15 July 2007;
 - EUR 562,500 on 15 October 2007;
 - EUR 562,500 on 15 February 2008;
 - EUR 562,500 on 15 June 2008;
 - EUR 562,500 on 15 August 2008.
- b) in case Betis were interested in exercising the Option, it was necessary to send PSV a written notice to this effect before 30 April 2007. On its part, PSV agreed to send an invoice in this regard to Betis (cf. clause 3 of the Loan Agreement).
- c) in case Betis exercised the Option, it was required to provide PSV with an appropriate and duly signed bank guarantee confirming its ability to pay the net amount of EUR 3,250,000.
- d) subject to the fulfilment of clause 3 of the Loan Agreement, Betis was to instruct the Spanish Federation to issue the Dutch Federation with a copy of the Player’s International Transfer Certificate (ITC) not later than 30 June 2007.
- e) PSV retained all the rights related to the Player until the fulfilment of clause 3.
- f) Betis would not hold PSV liable for any harm or loss sustained in relation to the implementation of the Loan Agreement.
- g) Should Betis be unwilling to exercise the Option, it was to unconditionally cause the Player to return to PSV not later than on 1 July 2007 under clause 9. In addition to all the aforementioned, under clause 10, the Parties subjected the Loan Agreement to the FIFA Regulations on the Status and Transfer of Players (the FIFA Regulations).

The relevant parts of the Loan Agreement already summarised above read as follows:

“PSV (...) is prepared to grant (...) Betis (...) the right to use the player R. (...) for a limited period of time, effective as from January 1st 2006 until June 30th, 2007 (...) subject to the following conditions:

(...)

3. PSV will grant Real Betis the option to buy the full federative rights on R. as per July 1st, 2007, against a net payment of €3.250.000. This amount will be paid in 4 instalments, i.e.:

- €1.000.000 to be paid on 15 July 2007;*
- €562.500 to be paid on 15 October 2007;*
- €562.500 to be paid on 15 February 2008;*

- €562.500 to be paid on 15 June 2008;

- €562.500 to be paid on 15 August 2008,

PSV will send as proper invoice to Real Betis, Real Betis will inform PSV in writing before 30 April 2007 whether they wish to exercise this option;

4. For the amounts mentioned under 1 and 3, Real Betis and/or its President Mr. Manuel Ruiz de Lopera y Avela will provide PSV with appropriate bank guarantees duly signed 'por aval', provided that the amounts due will be paid on Rabobank account of PSV;

5. Subject to the fulfilment of clause 3, Real Betis will instruct the Spanish Football Association to issue the International Transfer Certificate to the Royal Dutch Football Federation (KNVB) on June 30th, 2007, at the latest. Furthermore, Real Betis will ensure that a copy of the International Transfer Certificate is sent to PSV by fax;

(...)

7. Subject to the fulfilment of clause 3, any and all rights on R. of whatsoever character (including the right on transfer) will unconditionally continue to be vested with PSV;

8. Real Betis will reimburse and hold PSV harmless for any and all liabilities and consequences resulting from the implementation of this agreement;

9. In the event the option referred to in clause 3 has not been lifted, Real Betis will unconditionally cause R. to return to PSV, at the latest July 1st, 2007;

(...)

11. This agreement is subject to the FIFA Regulations governing the Transfer and Status of Football Players. Any and all disputes will be handled by a competent FIFA Committee".

On 23 December 2005, Betis signed an employment contract with the Player (the "Betis – Player Employment Contract"), under which they agreed the following:

- a) Validity: 2 seasons from 22 December 2005 until 30 June 2007;
- b) Monthly salary: EUR 2,200;
- c) Bonus: EUR 84,000 for the season 2005/2006 and EUR 194,000 for the season 2006/2007.

Furthermore, the Betis – Player Employment Contract contained "ADDITIONAL CLAUSES". In particular, clause 4 provides that "(...) in the event that REAL BETIS (...), exercised the option for a final transfer of the federative rights of the Player, in accordance with the contract signed with the club PSV (...) dated 22/12/2005, with 250,000 Euro the following retribution for salaries (...): season 2007-2008: 250,000 Euro; season 2008-2009; season 2009-2010, 250,000 Euro; season 2010-2011, 250,000 Euro, with the rest of the clauses of the present contract remaining untouched (...)".

On 4 April 2007¹, Betis sent a letter to PSV according to which:

“In December 2005, both entities agreed to the transfer contract with the option to buy the federative rights of the Player R. The option to buy all the federative rights of the Player, R., for an amount of three million two-hundred thousand euro, EUR3,250,000 was located in the third section of said contract.

In light of this, Real Betis Balompié S.A.D. exercises said option to buy.

(...)”².

On 14 April 2007, PSV wrote to Betis requesting it to send the required bank guarantee to cover the instalments.

On 1 June 2007, PSV sent an invoice to Betis granting it until 15 July 2007 to pay the first instalment amount of EUR 1,000,000. PSV then sent another letter on 8 June 2007 requesting Betis to send the irrevocable bank guarantee.

On 22 June 2007, Betis’ Spanish bank La Caixa (the “Bank”) informed Betis that it would not be authorising the requested bank guarantee of EUR 3,250,000 as such amount exceeded the amount normally accepted by the Bank. The said letter read as follows:

“(...)”

Dear Sirs,

With reference to your application to contract with this entity the concession of a process of guarantees for the total amount of 3,250,000,00 euros derived from the acquisition of the football player R., we regret to inform you that having Risks Department of the Southern Territorial Management of our entity evaluated such request, in accordance with the criterium, requisites and internal rules, authorization of the same has been esteemed as not appropriated.

(...)”

On 16 July 2007, Betis prepared a draft employment contract in favour of the Player (the “Proposed Employment Contract”), proposing, among other conditions, the following:

- a) Term of the contract: 4 seasons (valid until 30 June 2011);
- b) Annual salary: 16 x EUR 2,200 for the seasons 07/08, 08/09, 09/10 and 10/11 (14 monthly payments plus 2 additional monthly payments);
- c) Bonus: EUR 219,200 for each season of 07/08, 08/09, 09/10, 10/11 to be paid in the end of the relevant season by promissory notes; and
- d) Penalty clause: EUR 3,000,000 in the event of breach of contract.

¹ During the hearing, the Parties clarified that the reference to the year “2006” was a clerical mistake. The letter was in fact sent in “2007”, as it was proved during the hearing by the original received by PSV by fax – exhibit 11 of the Appeal Brief.

² The original was sent in Spanish and the quoted translation was adduced by the Appellant.

In addition, Betis also proposed to the Player to enter into an image rights contract with the Spanish company TEGASA – *Técnica y Garantía del Deporte S.A.* (the “Image Rights Contract”). This company proposed to pay the Player an annual amount of EUR 400,000 for his image rights during his tenure at Betis.

On 16 July 2007, Betis met the Player with a view to finalising and signing both the Proposed Employment Contract and the Image Rights Contract. However, according to Betis, the Player declined to sign the contracts on grounds that the proposed salary was inadequate. During the said meeting were present Betis’ President as well as its external lawyer, Mr. Arredondo, who adduced a statement attesting the Player’s refusal to sign for Betis.

On 17 July 2007, and pursuant to the Bank’s notice, Betis informed the Player that it had not exercised the Option. It consequently sought the termination of the proposed agreement with him.

On 1 August 2007, the Spanish Federation returned the Player’s ITC to the Dutch Federation.

On 3 August 2007, the Dutch Federation sought clarification from the Spanish Federation as to why it had returned the Player’s ITC.

Following the end of the negotiations with Betis, the Player signed for the Saudi Arabian Club Al Ittihad (“Al Ittihad”) as a free player. This was after the Single Judge of the FIFA PSC had rendered a preliminary decision on 11 September 2007 (the “FIFA ITC Decision”)³ allowing the Player to provisionally register with Al Ittihad in accordance with annex 3, art. 2.5 of the FIFA Regulations for the Status and Transfer of Players, edition 2005 (“FIFA Regulations 2005”).

On 27 July 2007, PSV filed a claim with the FIFA PSC against Betis for the alleged breach of the Loan Agreement.

On 30 July 2009, the Single Judge of the FIFA PSC issued his decision, partially granting PSV’s prayers.

The Single Judge based his findings on the following aspects:

- a) it was clear that Betis had exercised the Option on a definite basis. The letter dated 4 April 2007 was not a declaration of intention but rather the exercising of the Option;
- b) the Option was exercised 26 days before the expiry deadline granted to Betis. The Appellant had ample time to verify whether it would obtain the relevant bank guarantee;
- c) in accordance with the principle of *“pacta sunt servanda”*, Betis could not evade its contractual duty to buy the Player merely on grounds that it was unable to obtain the bank guarantee;

³ The FIFA ITC Decision was passed following an application by the Saudi Arabian Football Association for the provisional registration of the Player after the Dutch Federation had declined to issue the Saudi Arabian Football Association the Player’s ITC on grounds that a contractual dispute between Betis and PSV was pending before the FIFA PSC.

- d) the Player's loan to Betis had expired and his transfer to Betis had become definite with effect from 1 July 2007;
- e) in accordance with clause 3 of the Loan Agreement, Betis was liable to pay PSV all the amounts plus 5% annual interest from the due date of each instalment;
- f) there was no legal basis for imposing sporting sanctions on Betis and such request was dismissed; and
- g) Betis was condemned to bear the costs of the FIFA PSC proceedings, amounting to CHF 11,000.

On 21 June 2010, the Appellant filed its Statement of Appeal against the FIFA PSC Decision at the Court of Arbitration for Sport (CAS).

On 5 July 2010, the Appellant filed its "Appeal Brief". On 6 July 2010, FIFA informed the CAS Court Office that it renounced its right to intervene in the present appeal proceedings.

On 13 July 2010, the Respondent requested the CAS to extend the deadline to file its Answer.

On 14 July 2010, the CAS granted the Respondent a deadline of 2 August 2010 within which to file its Answer.

On 31 July 2010, the Respondent filed its Answer.

During the hearing all the Parties presented their respective cases and arguments before the Panel and raised no objection on the composition of the Panel. The Parties placed specific emphasis on the issue of compensation, and following the discussions, the Panel requested the Respondent to produce a copy of PSV's contract with the Mexican club Atlas Guadalajara ("Atlas") for the Player's transfer from Atlas to PSV (the "Atlas – PSV Contract"). The Parties were also allowed by the Panel to file additional submissions related to any possible influence this transfer may have in relation to the calculation of compensation. The Parties confirmed that a further hearing on this issue was not necessary.

Betis concludes requesting the CAS

"(...)

1. *To accept this appeal against the decision of the Single Judge of the FIFA Players' Status Committee (...)*
2. *To adopt an award annulling the said decision and adopt a new one declaring the Appellant is not liable to compensate the Respondent with EUR3,250,000 (...).*
3. *Further and in the alternative, to adopt an award annulling the said decision and adopt a new award declaring that the Appellant is not liable to compensate the Respondent (...) because the amount is disproportionately high and or incorrectly determined and that the loss and damages have not been proved.*

4. *To fix a sum of 30,000 CHF to be paid by the Respondent to the Appellant, to help the payment of its legal fees and costs.*
5. *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees”.*

The Respondent makes the following prayers and requests:

“(…)

- a) *(…) that CAS does not enter into the present appeal for formal reasons, and in alternative, reject it as to the substance and confirm the Decision in its entirety.*
- b) *To decide that Appellant has to pay the cost of arbitration to be fixed by your Chamber, including the advance of costs already paid by Respondent (CHF 25.000)*

(…)

- a) *(…)*
- b) *To decide that Appellant has to pay to Respondent the amount of € 3.250.000 together with 5% interest per annum as from the respective due dates;*
- c) *To decide that Appellant has to pay the cost of arbitration to be fixed by your Chamber;*
- d) *To decide to impose disciplinary measures in the event the decision of the CAS is not observed by the [Appellant]”.*

LAW

Jurisdiction of the CAS

1. The jurisdiction of the CAS, which is not disputed, derives from art. 62 and 63 of the FIFA Statutes 2009 and art. R47 of the CAS Code.
2. Moreover, the Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure.
3. It follows that the CAS has jurisdiction to decide this dispute.

Appeal Proceedings

4. As these proceedings involve appeals against a decision in a dispute relating to a contract, issued by an international federation (FIFA), and with respect to rules that provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a non-

disciplinary case of an international nature, in the meaning and for the purposes of the CAS Code

Admissibility

5. The Appellant states that the appeal is admissible because:
 - a) the time limit within which to appeal starts running from the date when the grounds of the FIFA Decision were notified to the Parties and not the date when the decision is passed;
 - b) the FIFA PSC Decision passed on 30 July 2009 states that the appeal should be filed within 21 days following its notification, pursuant to the FIFA Statutes, edition 2009, applicable in the present proceedings; and
 - c) the advance of costs were paid on time.
6. The Respondent contends that the appeal is inadmissible because (i) the advance of costs were not paid on time by the Appellant, (ii) the appeal was filed out of time and (iii) prayer 3 of the Appeal Brief is a supplementation to the Statement of Appeal and is therefore, inadmissible. These grounds have been highlighted at section IV above.

A. Timeliness of the appeal

7. The Panel refers to the case CAS 2000/A/274, at par. 207 *et seq* and finds that the procedural aspects facing the appeal shall be governed by the applicable regulations which were in force at the time the motivations of the FIFA PSC Decision were notified *i.e* on 2 June 2010.
8. The FIFA Statutes 2009 edition came into force on 2 August 2009. They shall therefore be referred to in assessing the procedural aspects of the dispute as well as the FIFA Procedural Rules 2008, which came into force on 1 July 2008.
9. According to art. 63.1 of the FIFA Statutes 2009, “[a]ppeals against final decision passed by FIFA’s legal bodies (...) shall be lodged with CAS within 21 days of notification of the decision in question”.
10. In fact, art.15.2 of the FIFA Procedural Rules 2008 states that “[i]f a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision”.
11. The motivations of the FIFA PSC Decision were notified on 2 June 2010 and the decision clearly states in the “note relating to the motivated decision” that “[t]he statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision (...)”.
12. The Statement of Appeal was filed on 21 June 2010, within the 21 days required under the FIFA Statutes 2009. It is therefore admissible.

B. *Admissibility of prayer 3 of the Appeal Brief*

13. The Respondent argues that prayer 3 of the Appeal Brief is inadmissible because it was not included in the Appellant's Statement of Appeal.
14. According to art. R56 of the CAS Code, "[u]nless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer".
15. In view of this provision, the Panel notes that a party is allowed to adduce further evidence or supplement its submissions provided that the time limit for filing its Appeal Brief or its Answer has not expired.
16. Prayer 3 of the Appeal Brief is therefore considered to be admissible.

C. *Advance of costs*

17. On 2 July 2010, the CAS Secretary General wrote to the parties requesting the payment of the advance of costs (CHF 25,000 per party) by 20 July 2010.
18. On 19 July 2010, the CAS received in its bank account the Respondent's share of the advance of costs.
19. On its side, the Appellant confirmed to the CAS Court Office that the advance of costs had been paid through two different bank transfers from two different bank offices on 20 July 2010 for an amount of CHF 22,000 and 21 July 2010 for an amount of CHF 3,000.
20. The Panel wishes to emphasize that the issue of the advance of costs is an administrative issue which is dealt with by the CAS Court Office. The deadline fixed by the CAS Secretary General is only an indicative delay and not a mandatory time limit. The non-payment of the advance of costs within the deadline prescribed by the Secretary General cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible. The deadlines which are fixed only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with art. R64.2 of the CAS Code.
21. In the present matter, it appears that the CAS Court Office has received the total amount of the advance of costs from the Appellant in a timely manner, even though through two different wire transfers, and has considered that the Panel could be constituted and that the proceedings could continue.

D. Conclusion

22. For all the foregoing, it follows that the Appeal is admissible.

Scope of the Panel's review

23. According to art. R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

Applicable law

24. Art. R58 of the CAS Code provides the following:

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

25. Art. 62.2 of the FIFA Statutes 2009 states:

"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".

26. The Panel notes that the case at stake was submitted before the FIFA PSC on 27 July 2007, during which period the FIFA Regulations 2005 were in force. These regulations shall therefore be applied in relation to the substance of the dispute, and Swiss law shall apply as a subsidiary.

Merits

27. The appeal lodged by Betis against the FIFA PSC Decision raises several issues which the Panel has to consider. As a result of the Parties' submissions and petitions, the Panel has to examine the following main issues:
- A. Whether the letter dated 4 April 2007 from Betis exercised the Option and bound Betis to buy the Player, taking into consideration the following circumstances:
 - a) the non delivery of the bank guarantee required under the Loan Agreement; and
 - b) the Player's refusal to sign the Proposed Employment Contract.
 - B. In the affirmative, whether PSV is entitled to any compensation, and if so, the amount of compensation to be paid by Betis to PSV following the former's breach of the Loan Agreement.

28. Each of the above questions shall be separately considered by the Panel.
- A. Whether the letter dated 4 April 2007 from Betis exercised the Option and bound Betis to buy the Player*
29. It is not in dispute that Betis wanted to exercise the Option in its letter dated 4 April 2007. This is a fact acknowledged by Betis itself, which asserts that the fulfilment of this Option and the completion of the Player's transfer were however subject to the delivery of the required bank guarantee and to the Player's consent.
30. It is the Panel's understanding that the letter dated 4 April 2007 clearly and unequivocally expressed Betis' intention to exercise the Option. This is supported by the wording of the said letter, wherein Betis states that "(...) *el REAL BETIS BALOMPIÉ, S.A.D ejerce dicha opción de compra. En el momento de obrar en nuestro poder la factura correspondiente, remitiremos los instrumentos de pago*". An English translation of this letter reads "(...) *REAL BETIS BALOMPIÉ S.A.D exercises said option to buy. At the time of acting in our possession an invoice, we will forward payment instruments*".
31. The Panel concurs with the Single Judge of the FIFA PSC that the letter dated 4 April 2007 cannot be interpreted as a mere "declaration of intention" but rather an exercise of the Option. Betis' arguments that the letter dated 4 April 2007 was sent by its manager is irrelevant and bears no legal consequences towards PSV or any third party in as far as the validity of the Option is concerned. The Option was exercised in good faith.
32. The Panel shall hence assess the legal relevance of the arguments raised by Betis in the performance of the Option to determine whether it was bound to buy the Player.
- a) Was the bank guarantee a condition *sine qua non* for Betis to perform the Option?
33. Betis states that the bank guarantee was one of the conditions required for the Option to be exercised and that the letter dated 4 April 2007 could not *per se* complete the Option.
34. PSV avers that a bank guarantee was not a condition *sine qua non* for exercising the Option. It states that there was no contractual provision to this effect and that the bank guarantee was a mere security for the payment of the transfer fee.
35. The Panel notes the Parties' agreement under:
- clause 3 of the Loan Agreement according to which "(...) *PSV will send a proper invoice to Real Betis, Real Betis will inform PSV in writing before 30 April 2007 whether they wish to exercise this option*"; and

- clause 4 of the Loan Agreement according to which “[f]or the amounts mentioned under 1 and 3, Real Betis and/or its President Mr. Manuel Ruiz de Lopera y Avela will provide PSV with appropriate bank guarantees duly signed (...)”.
36. The Panel considers that the delivery of the bank guarantee established under clause 4 above is not a condition *sine qua non* for the performance of the already exercised Option. The bank guarantee is considered by the Panel as a secondary and subsequent obligation to secure the payment of the transfer fee and it does not make part of the requirements to exercise the Option. In accordance with clause 3 of the Loan Agreement, Betis would only have to inform PSV in writing before 30 April 2007, at the latest, of its decision to exercise the Option and receive the relevant invoice from PSV, as it has in fact occurred.
 37. This is further corroborated by Betis’ own conduct, where it omitted to insert any reservations or conditions in its letter exercising the Option.
 38. Relevance is also made to Betis’ subsequent conduct once it exercised the Option by negotiating and offering the Player the Proposed Employment Contract and the Image Rights Contract.
 39. The Panel now turns its attention to whether or not the *force majeure* event claimed by Betis can be invoked as a ground for not complying with its contractual obligations. In fact, Betis pleads *force majeure* stating that failure to secure the bank guarantee meant that it was impossible for it to fulfil its contractual obligations towards PSV.
 40. The Panel highlights that *force majeure* is an event which leads to the non performance of a part of a contract due to causes which are outside the control of the parties and which could not be avoided by exercise of due care. The unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it.
 41. Moreover, *force majeure* is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference.
 42. Relating the above considerations with the facts of the case, the Panel notes that when exercising the Option, Betis made no express statements reserving, subjecting or conditioning the completion of the transaction to the procurement of the bank guarantee.
 43. As a matter of fact, Betis never manifested its inability to obtain the bank guarantee or disclosed any relevant information in relation to its delicate financial situation with a view to drawing PSV’s attention to the fact that this circumstance could be a hindrance in securing the bank guarantee.

44. The Panel rejects Betis' arguments on the following grounds:
- The precise reasons as to why the Bank declined to provide the guarantee have not been stated and Betis only states that the Bank declined to issue this guarantee because "(...) *the credit was over the acceptable one*".
 - Betis has not presented any evidences to satisfactorily prove its inability to obtain the bank guarantee. Even if Betis had done this, it has not established that such inability was caused by unforeseen facts and events beyond its control, and that these events took place after the date when the Option was exercised, in the way to prove the existence of a *force majeure* event;
 - In the Panel's view, the letter issued by the Bank is not enough to conclude that its inability to issue the bank guarantee was entirely caused by events which took place immediately after the Option has been exercised as it does not mention the precise reasons why the bank guarantee was refused;
 - Betis requested a bank guarantee of EUR 3,250,000, but by the time the Bank sent its letter, the first instalment of EUR 1,000,000 was already due. If indeed Betis possessed some financial stability prior to the date when the Option was exercised, one would reasonably have expected it to "at least" be prepared to pay the first instalment by cash on 15 July 2007 and only ask the Bank to provide it with a guarantee of the remaining amount (EUR 2,250,000); and
 - Betis owed a duty of care to confirm its ability to obtain the bank guarantee with the Bank or any other bank before the exercising of the Option. There is no evidence that Betis undertook these preliminary inquiries. It accepted the risk that a bank guarantee would not be provided, and it is therefore precluded by the principle of estoppel from pleading *force majeure* to evade its contractual obligations. Greater diligence also ought to have been displayed by the internal management and administration of Betis, to ensure that it had enough funds to complete the Player's transfer at the time of signing the Loan Agreement.
45. In this respect, the Panel emphasises the principle of *pacta sunt servanda* and the fact that Betis cannot avoid fulfilling its contractual obligation by arguing that it had not obtained the necessary finance. If Betis was really interested in buying the Player and prepared to pay the first EUR 1,000,000 on 15 July 2007, it could have drawn PSV's attention to its financial difficulties and proposed to renegotiate alternative means for securing the remaining instalments of the transfer fee. Betis neither undertook, nor has it proved, such diligence.
46. According to art. 2 of the Swiss Civil Code (the "Swiss CC"), "[e]very person is bound to exercise his rights and fulfil his obligations according to the principle of good faith".
47. Therefore, the failure to obtain the bank guarantee does not exonerate Betis from its contractual obligations to complete the Player's transfer, and cannot be invoked as a *force majeure*.

- b) Whether the Player's refusal to sign the Proposed Employment Contract relieves Betis from its contractual obligation to complete his transfer
48. The Panel now proceeds to address the issue whether the Player's refusal to sign an employment contract as alleged by Betis relieves it from its contractual obligations towards PSV.
49. Betis avers that it was unable to fulfil its contractual obligation towards PSV by completing the payment for the Player's transfer because the Player himself declined to sign the Proposed Employment Contract.
50. The Panel concurs with Betis that a player's consent is a key element for any successful transfer. On this point, the Panel notes that Betis and the Player had not only already agreed personal employment terms in case of an exercise by Betis of the Option, but had also agreed the duration of Betis' second employment contract with the Player under the Option.
51. This results from clause 4 of the section titled "ADDITIONAL CLAUSES" of the Betis – Player Contract which states that "(...) *in the event that REAL BETIS (...), exercised the option for a final transfer of the federative rights of the Player, in accordance with the contract signed with the club PSV (...) dated 22/12/2005, with 250,000 Euro the following retribution for salaries (...): season 2007-2008: 250,000 Euro; season 2008-2009; season 2009-2010, 250,000 Euro; season 2010-2011, 250,000 Euro, with the rest of the clauses of the present contract remaining untouched (...)*".
52. This clause is a clear manifestation of the consent given in advance by the Player, and his refusal to sign the Proposed Employment Contract cannot detach Betis from its contractual obligation towards PSV under the Loan Agreement.
53. If indeed the Player declined to sign for Betis, this possible breach of the Betis – Player Contract only concerns Betis and the Player to the exclusion of PSV.
54. It is standard practice in the world of football that a buying club should somehow protect itself from the risk of missing a player's consent to the transfer. Normally, this risk is prevented by inserting a clause stipulating that the player's consent is a precondition for the fulfillment of the transfer contract.
55. If Betis were keen on securing the Player on a permanent basis through exercising the Option, it was bound to safeguard itself against the risk of the Player refusing to sign with it. This is a duty which the Panel remarks cannot override Betis' obligations towards PSV under the Loan Agreement.
56. The Panel stresses that the Player's refusal to sign the Proposed Employment Contract does not relieve Betis from its contractual obligations towards PSV.

B. *Is PSV entitled to compensation?*

57. Swiss law clearly provides that a party which is found to have breached a contract without any just cause is liable to compensate the other. This is stipulated under art. 97 of the Swiss CO according to which “[i]f the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him”.
58. Having established the inexistence of any fact or legal argument that could prevent Betis from performing its obligations or negate any fault on the Appellant’s part, it follows that art. 97 of the Swiss CO shall apply and PSV is therefore entitled to compensation.
59. The Panel highlights that no specific FIFA regulation contains provisions in relation to the assessment of damages for cases of a specific nature as the one at stake.
60. Therefore, and pursuant to the general fundamentals of contractual law, damages due following a breach of contract are calculated in accordance with the principle of restitution. In other words, a party who has been the victim of an unjustified breach of contract is entitled to be compensated with an amount which would reinstate it in the position it would have been had the contract been performed to its end.
61. In the case at hand, there is no doubt that PSV would have received EUR 3,250,000 from Betis had the latter fulfilled its obligations under the Loan Agreement to the end, plus the accrued interest.
62. However, the Swiss CO also requires a deciding body to consider other facts and circumstances when assessing the amount of damages. These facts and circumstances include, among others, the degree of fault, the circumstances of the case and the special nature of the transaction.
63. These have specifically been stipulated under the following Swiss CO provisions:
- Art. 43.1: “[t]he judge shall determine the nature and amount of compensation for the damage sustained, taking into account the circumstances as well as the degree of fault”;
 - Art. 44.1: “[t]he judge may reduce or completely deny any liability for damages if the damaged party consented to the act of causing the damage, or if circumstances for which he is responsible have caused or aggravated the damage, or have otherwise adversely affected the position of the person liable”; and
 - Art. 99.2: “[t]he extent of (...) liability shall be governed by the special nature of the transaction (...)”.
64. With the aforementioned provisions in mind, the Panel notes that upon realising that it would be unable to keep the Player, Betis made efforts to return the Player to PSV with a view to minimising any possible damage.
65. This is evident in the Spanish Federation’s action of returning the Player’s ITC to the Dutch Federation on 1 August 2007.

66. The Panel emphasises that under clause 9 of the Loan Agreement, in case Betis failed to exercise the Option, it was obliged to cause the Player's return to PSV before 1 July 2007.
67. It however appears that PSV made no substantial efforts to receive or accept the Player back, despite having been aware of clause 7 of the Loan Agreement which provided that “[s]ubject to the fulfilment of clause 3, any and all rights on R. of whatsoever character (including the right on transfer) will unconditionally continue to be vested with PSV”.
68. Although the Spanish Federation returned the ITC on 1 August 2007, much later after the time agreed under clause 5 of the Loan Agreement had expired, PSV had the opportunity of regaining control over the Player's registration rights. This is because it still had 1 more year with the Player under its contract, which remained valid in light of clause 7 of the Loan Agreement. In addition to this, PSV had the possibility of extending its contract with the Player for an additional year.
69. However, PSV still insisted on the bank guarantee and as highlighted by the FIFA PSC, it seems that PSV was rather “(...) focused on a potential breach of the loan agreement and in particular seeking for the application of financial provisions related to the exertion of the option (...)” and no longer interested in the Player.
70. The Panel considers PSV's conduct as having some degree of fault in aggravating its own damage by not accepting the Player back and consequently by failing to mitigate its own damage.
71. It is a fact that Betis only tried to cause the Player to return to PSV on 1 August 2007, *i.e.* one month after the deadline stipulated at clause 9 of the Loan Agreement (1 July 2007) had expired. However, PSV could contribute to the non aggravation of its damage by accepting the Player back and making use of its rights over him.
72. The Panel is of the view that the 30 days remaining under the 90 days period of the summer 2007 transfer window was too short to enable PSV to either (i) negotiate the Player's transfer with a third club; or (ii) reintegrate him as a player with an active role in its team given the fact it was not expecting his return for the forthcoming season.
73. In view of the foregoing, and considering the nature of the transaction and particularities of the Loan Agreement, the Panel is of the view that PSV's compensation *vis-à-vis* the damage caused by Betis for failing to fulfil its contractual obligations should be limited to a reasonable extent.
74. Therefore, and in light of art. 44.1 of the Swiss CO, the total amount that PSV expected to receive from the transfer fee (EUR 3,250,000) shall not be considered in full in the calculation of compensation to be granted to PSV.

75. The amount of compensation should be limited to a period of time within which PSV could reasonably have negotiated the Player's transfer with another club.
76. The Panel remarks that by the time Betis tried to return the Player, PSV would only have made use of the remaining 30 days period of transfer window to negotiate a possible transfer for the Player. This period is of course considered short for any reasonable negotiations to be held. A fair compensation shall therefore be calculated taking into consideration a more realistic period of time which would have enabled PSV to conduct such negotiations.
77. With the aforementioned in consideration, the Panel underlines that the remaining period under the August 2007 transfer window together with the subsequent period, including the entire January 2008 transfer window, would have been sufficient to enable PSV to hold negotiations with another club for the Player's transfer.
78. The Panel notes that the agreed transfer fee was comprised of several instalments, with the first two covering the proportional price of the transfer fee until the end of 15 February 2008 *i.e.* the January 2008 transfer window. Therefore, the Panel is of the view that the amount of compensation shall consider the first two instalments due from the transfer fee *i.e.* EUR 1,000,000 and EUR 562,500.
79. PSV's failure to accept the Player back contributed to the aggravation of its own damage and, this is basically the reason why the Panel does not deem it fair and just to grant PSV the remaining three final instalments of the transfer fee in the amount of EUR 1,687,500. This view is adopted in light of the special nature of the transaction, and the particular facts and circumstances of the case.
80. The Panel considers the Atlas – PSV Contract irrelevant in assessing the amount of damages. In fact, the amortisation of the amount paid by PSV to Atlas under this contract had already been considered in the Player's transfer fee under the Loan Agreement. A consideration of the Atlas – PSV Contract in calculating the amount of compensation would therefore amount to duplication.
81. Interest shall accrue from the amount of EUR 1,562,500 granted with effect from the date it became due. Since the breach occurred on or about 1 August 2007 when Betis tried to send the Player back to PSV, this manifested its inability to fulfil its contractual obligations. Compensation therefore ought to have been paid with effect from this date, and the Panel finds that interest shall accrue at an annual rate of 5% starting from 1 August 2007.

Conclusion

82. The Panel holds that the appeal filed by Betis has to be partially upheld. The FIFA PSC Decision has to be modified and Betis ordered to pay PSV compensation in the amount of EUR 1,562,500, plus interest accruing from the said amount at an annual rate of 5% starting from 1 August 2007. All other requests for relief submitted by the Parties are dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed by Real Betis Balompié SAD against the decision dated 30 July 2009 rendered by the Single Judge of the FIFA Players' Status Committee is partially upheld.
2. The decision dated 30 July 2009 rendered by the Single Judge of the FIFA Players' Status Committee is modified and Real Betis Balompié SAD shall pay PSV Eindhoven a total amount of EUR 1,562,500 (one million, five hundred and sixty two thousand and five hundred Euros) as compensation together with an annual interest rate of 5% (five percent) from this amount calculated with effect from 1 August 2007.

(...)