Arbitration CAS 2017/A/5304 PFC Levski v. Dustley Roman Mulder, award of 9 April 2018

Panel: Mr Alexander McLin (Switzerland), Sole Arbitrator

Football
Termination agreement to an employment contract
Applicable law
Abuse of law
Reduction of a "penalty" amount

1. **Following agreement on CAS as the court of arbitration, Article R58 of the CAS Code, implicitly agreed to by the parties, takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. R58 is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. R58, the "applicable regulations" always primarily apply, regardless of the will of the parties.**

2. **Availing oneself of the right to file a claim by a set deadline, even on its last day, cannot be deemed to constitute abuse of law.**

3. **A reduction of the penalty by the judge is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place. To evaluate the excessive character of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration all the circumstances of the case at hand. Various criteria can play a determining role, such as the nature and duration of the contract, the degree of fault and of the contractual violation, the economic situation of the parties, as well as the potential subordination of the debtor.**

I. PARTIES

1. Professional Football Club Levski (the "Club", or the "Appellant"), is a Bulgarian football club affiliated with the Bulgarian Football Union (the "BFU"), itself a member of FIFA (Fédération Internationale de Football Association, the international governing body for the sport of football).

2. Mr. Dustley Roman Mulder, (the "Player" or the "Respondent") is a professional football player of Dutch nationality.

II. FACTUAL BACKGROUND

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

4. On 2 July 2010, the Player entered into an employment contract with the Club, originally valid from 5 July 2010 to 30 July 2012 (the "Contract"). The Contract was extended until 30 June 2015 by means of a document referred to as "Annex no 3" (the "Annex").

5. The Contract provided for a monthly remuneration to the Player of BGN (Bulgarian lev) 17,600. The Annex provided for additional remuneration as follows:

   - EUR 10,250 per month for the period comprised between 1 January 2013 until 30 June 2013;
   - EUR 12,500 per month *"for the 2013/2014 football season"*;
   - EUR 13,000 per month *"for the 2014/2015 season"*.

6. On 2 July 2014, the parties terminated the Contract as of 1 July 2014 (the "Termination Agreement").

7. Article 2 of the Termination Agreement provided in addition that the Club should pay the Player a total amount of EUR 43,029.39 as follows:

   - EUR 25,117.39 *"at the day of termination of the [Contract] and the [Annex] but no later than [4 July 2014] (…) by cash payment"*;
   - EUR 10,000, *"payable latest by* [5 August 2014] *by bank transfer";*
   - EUR 7,912, *"payable latest by* [30 September 2014] *by bank transfer"*.

8. Article 5 of the Termination Agreement stated as follows:

   "In the event of a delayed payment of the due amounts [the Club] *is obliged to pay* [the Player] *an amount of 39 000 (…) which is based on the three monthly payments of* [the Player's] *salary for season 2014/2015 according to* [the Annex]*"*.

9. While the Club paid the amount of EUR 25,117.39 by the deadline stipulated in the Termination Agreement, the remaining amounts totalling EUR 17,912 were paid on 21 April 2015 only, after the stated deadlines.

10. On 7 March 2016, the Player sent a default notice to the Club via his legal representative, requesting payment of the disputed amount.

11. On 18 March 2016, the Player notified the BFU of the existence of outstanding payables by the Club in his favour.

12. The Club contested the competence of the BFU to deal with the matter and argued that Article 5 of the Termination Agreement should be deemed "null and void" as the penalty represented 90.64% of the principal amount, representing "abuse of the law" under the relevant FIFA and Bulgarian state court jurisprudence.

13. On 5 August 2016, the Player lodged a claim before the FIFA Dispute Resolution Chamber (the "DRC") and requested the payment of a total amount of EUR 39,566.66, and legal and procedural costs calculated as follows:

- EUR 39,000 pursuant to Article 5 of the Termination Agreement, plus 5% interest as from 6 August 2014;

- EUR 566.66 in interest for the delay in the payment of two instalments under the Termination Agreement.

14. In the DRC proceedings, the Club claimed that a verbal agreement existed in whereby the Player agreed for payments to be postponed until April 2015 by virtue of the Club facing payroll restrictions imposed by UEFA for violation of Financial Fair Play rules. The existence of this verbal agreement was evidenced by the fact that the Player had not sought payment of the outstanding amounts before March 2016.

15. The Club also considered that Article 5 of the Termination Agreement constituted an unenforceable "penalty clause" under relevant FIFA, CAS and Swiss Federal Tribunal jurisprudence.

16. The Player considered the amount to represent a *"genuine amount constituting three monthly salaries"*, denied the existence of a verbal agreement for late payment, and that in the alternative, Article 5 could be seen as a provision for liquidated damages.

17. In its decision dated 19 January 2017 (the "DRC Decision"), which was based on the 2015 edition of the FIFA Rules Governing the Procedures of the Players' Status Committee (the "Procedural Rules") and the 2016 edition of the FIFA Regulations on the Status and Transfer of Players (the "RSTP") the DRC found in favour of the Player, given insufficient evidence of a verbal agreement and the fact that the amount due was *"both proportionate and reasonable"* even if it were to be considered a penalty clause.

18. The DRC Decision provided as follows:

"1. The claim of the Claimant, Dustley Roman Mulder, is accepted.

2. The Respondent, PFC Levski Sofia, has to pay to the Claimant ***within 30 days*** *as from the date of notification of this decision, the amount of EUR 39'000, plus 5% interest* p.a. *as from 6 August 2014 until the date of effective payment.*

3. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision. (…)".

19. The reasoned DRC Decision was notified to the parties on 10 August 2017.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 4 September 2017, the CAS Court Office confirmed receipt of Appellant's statement of appeal, filed on 30 August 2017 in keeping with Article R48 of the Code of Sports-related Arbitration (the "Code"), to the parties. It also noted the Appellant's request for a Sole Arbitrator

21. On 11 September 2017, the CAS Court Office confirmed receipt of the Appellant's appeal brief filed on 8 September 2017.

22. On 13 September 2017, the CAS Court Office informed the parties that in the absence of an answer from the Respondent concerning whether the matter should be submitted to a sole arbitrator within the five-day deadline granted in its letter of 4 September 2017, the decision would be taken by the President of the CAS Appeals Division, or her Deputy, further to Article R50 of the Code.

23. Also on 13 September 2017, the Respondent requested that the time limit to file his answer be set once the advance on costs had been paid by the Appellant further to Article R55.3 of the Code. This request was duly acknowledged to the parties and granted by the CAS Court Office the same day.

24. On 18 October 2017, the CAS Court Office acknowledged the receipt of Appellant's payment of the advance on costs and set a 20-day deadline for the submission of the Respondent's answer. It also informed the parties of the decision of the CAS Appeals Arbitration Division President to appoint Alexander McLin, attorney-at-law in Geneva, as Sole Arbitrator pursuant to Article R54 of the Code.

25. The Respondent filed his answer on 7 November 2017, which was acknowledged to the parties by the CAS Court Office the following day.

26. On 8 November 2017, the CAS Court Office invited the parties to state whether they preferred for a hearing to be held, or whether the Sole Arbitrator should decide the matter on the basis of the parties' written submissions.

27. On 14 November 2017, the Respondent indicated that it preferred for the matter to be decided without a hearing.

28. On 15 November 2017, the Appellant requested additional time to submit a final written position to the Respondent's answer, or alternatively for a hearing to be held.

29. On 15 November 2017, the CAS Court Office informed the parties that the Sole Arbitrator had considered the parties' positions and had decided to dismiss the Appellant's request for an additional submission, absent any indication of exceptional circumstances as required by Article R56 of the Code. Furthermore, the parties were also informed that the Sole Arbitrator deemed himself sufficiently informed to decide the case without holding a hearing.

30. On 27 November 2017, the CAS Court Office sent the parties the Order of Procedure for their signature.

31. On 27 November and 4 December 2017, respectively, the Appellant and the Respondent returned the signed Order of Procedure. By the signature of the Order of Procedure, the parties expressly confirmed their agreement that the Sole Arbitrator may issue an award based only on their written submissions and that their right to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

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

- Swiss civil law, and in particular the Swiss Code of Obligations ("SCO") are subsidiarily applicable to the present matter;

- There are three relevant legal issues to consider: (i) the nature of the obligation in Article 5 of the Termination Agreement, (2) whether or not such fee is "exclusive" or "cumulative" in nature, and (3) in the event it is due, the appropriateness of the amount of such fee;

- There is no reasonable doubt that the payment agreed by the parties in Article 5 of the Termination Agreement is a penalty;

- Pursuant to Article 160 para. 2 SCO, the Player is not entitled to claim the penalty in addition to performance if he has accepted performance without reservation;

- It is undisputed that the Player accepted performance (i.e. late payment), without any reservation. As a result, no penalty is due;

- In the event a penalty is found to be due, the amount of the penalty *"shall be adequate and proportionate to the amount of the late payment"*. In determining adequacy and proportionality,

due regard should be given to the fact that the Club *"executed nearly 2/3 of its obligation to the Player in a timely manner and eventually the whole obligation"*.

- In the event it is found that the payment of a penalty is justified, then in accordance with CAS case law, *"it shall be reduced as excessive to the usual amount of 5% p.a. on the delayed instalments"*.

33. The Appellant makes the following requests for relief:

"With view of the above and after a consideration of the present appeal as admissible, justified and well proven, I, on behalf of my client, would like to ask the Honorable Panel of the CAS to review the present dispute de novo and to cancel the challenged decision of the DRC entirely as unsubstantiated and to issue a new decision with which to dismiss in full the claim of the Player.

Alternatively, I, on behalf of my client, would like to ask the Honorable Panel of the CAS to amend the decision of the DRC, to reduce the amount of the penalty and to award the Player an usual interest at the rate of 5 % p.a. over the second and third instalments stipulated in the Agreement for termination of labour contract № 5 and Annex № 3 signed by the parties, as from the dates they fell due until the date of the effective payment.

In any way the Appellant request Honorable Panel of the CAS to establish that the costs of Arbitration procedure, including the attorney's fee, shall be borne by the Respondent".

B. The Respondent

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

- In the Respondent's view the three legal questions for analysis are: (1) whether Article 5 of the Termination Agreement is a "penalty clause", (2) if it is, is it valid and is the amount specified therein due under the applicable Swiss law, and (3) if the clause is valid and the amount is due, is the latter subject to reduction for being excessive?

- The Respondent considers that the DRC judges were correct in their analysis that Article 5 of the Termination Agreement was not intended to penalize the Player, but rather to give rise to an obligation that was already established in the underlying Contract, namely three monthly salaries;

- The negotiations leading to the Termination Agreement made it clear that the Player would not give up amounts the he considered were owed to him under the Contract if the agreed-upon payment schedule was not respected, which resulted in the wording of Article 5. The amount payable thereunder was a condition *sine qua non* for the execution of the Termination Agreement;

- The fact that at the time of conclusion of the Termination Agreement the Appellant had failed to pay the Respondent more than three months' worth of salary meant that the Respondent had the right to terminate the Contract with just cause and claim the entire amount owed to him at the time (totaling twelve monthly salaries or EUR 156,000).

Instead, he demonstrated good faith by agreeing to payment of three salaries or EUR 39,000 in the event of delayed payment;

- The Appellant, having negotiated the clause in Article 5 of the Termination Agreement, is estopped from claiming that the clause is void according to the principle of *venire contra factum proprium*;

- Finally, even if the clause is to be considered a penalty clause, it is still valid given its proportionate and reasonable amount under Swiss law and CAS case law;

- Article 160 para. 2 SCO requires that performance be expressly accepted without reservation. The Appellant has failed to meet its burden of proof in this respect as it has not adduced any evidence supporting its allegation that the Respondent had accepted performance;

- The amount is not subject to reduction for being excessive in light of its reasonable and proportionate nature well within the bounds of CAS case law. The relevant test being that the amount of a penalty clause needs to offend the sense of justice and equity to be deemed excessive, this is not the case here.

35. The Respondent makes the following requests for relief:

"In view of the above legal arguments and the evidence provided I would like to ask on behalf of the Respondent the Honourable Sole Arbitrator of the CAS to render a decision, by which to dismiss entirely the appeal, confirm the appealed decision of the DRC and award the procedural and legal costs of these proceedings, including the Respondent's attorney's fees, against the Appellant".

V. JURISDICTION

36. Article R47 of the Code provides as follows:

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

37. Article 58.1 of the FIFA Statutes grants the Player a right of appeal to CAS from a decision of the DRC. In addition, the Parties have both signed the Order of Procedure, expressly consenting thereby to CAS jurisdiction.

38. The CAS, therefore, has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

39. Art. 58.1 of the FIFA Statutes (2016) states:

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.

40. Art. 58.2 of the FIFA Statutes (2016) states:

Recourse may only be made to CAS after all other internal channels have been exhausted.

41. The Parties received the DRC decision from FIFA on 10 August 2017.

42. The Appellant submitted its Statement of Appeal on 30 August 2017.

43. The appeal is therefore admissible.

VII. APPLICABLE LAW

44. Article 187(1) of the Swiss Private International Law Act provides as follows:

The arbitral tribunal shall decide on the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

45. Article R58 of the Code provides more specifically 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

46. The Termination Agreement is silent as to applicable law.

47. The Contract provides as follows:

"XII. FINAL PROVISIONS

XII.1. This contract may be amended and supplemented by written consent of the parties only expressed also in writing. Any supplementary protocols and other written documents, made in relation to the performance of this contract shall be an integral part thereof.

XII.2. Any issues that are not provided herein shall be governed by the effective provisions of the BFU's regulations and the Bulgarian legislation".

48. The manner in which a combination of rules of law and regulations should be applied in the context of a given dispute has been the subject of numerous CAS cases (see *e.g.* CAS 2013/A/3401, CAS 2013/A/3383-3385, and CAS 2014/A/3742). In his analysis of these decisions, Ulrich Haas concludes that following agreement on CAS as the court of arbitration, Article R58 of the Code, implicitly agreed to by the parties, *"takes precedence over any explicit choice*

of law by the parties (for example in the contract), since the purpose of Art. 58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. 58 of the CAS Code, the "applicable regulations" always primarily apply, regardless of the will of the parties" (HAAS U., "Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law", *CAS Bulletin 2015/2*, p. 17).

49. Applying this hierarchy to the present matter, the FIFA Statutes and Regulations are applicable first and principally, and are subject to Swiss law with respect to their interpretation and application where they seek to set uniform standards internationally.

50. As the Termination Agreement is clearly a separate an independent agreement from the Contract, and the Termination Agreement does not specify a governing law and the DRC Decision which is under appeal before CAS emanates from a federation (FIFA) domiciled in Switzerland, to the extent a national law needs to be applied subsidiarily, Swiss law shall apply.

51. The applicable regulations in this matter are the RSTP, 2016 edition.

VIII. MERITS

52. The parties appear to be in general agreement as to the three questions to be addressed. These are (a) what is the nature of Article 5 of the Termination Agreement, and specifically, is it a penalty clause; (b) is this clause valid and, if so, is it "exclusive" or "cumulative" with respect to meeting the other payment obligations provided for in the Termination Agreement, and (c) to the extent the clause is deemed valid, is the amount it provides for excessive, and if so, to what extent should it be reduced?

53. The Appellant briefly questions the jurisdiction of the FIFA DRC to have heard the case presently under appeal before CAS. The Sole Arbitrator notes that any concerns as to the DRC Decision are cured by the *de novo* nature of the present proceedings. Moreover, objections to the FIFA DRC's jurisdiction should have been raised before the DRC itself, which does not appear to be the case from the text of the DRC Decision. In any case, as far as the jurisdiction of the CAS is concerned, the same was expressly confirmed by the signature of the Order of Procedure by both parties.

(a) Is Article 5 of the Termination Agreement a "penalty clause"?

54. The Appellant contends that it cannot reasonably be doubted that Article 5 of the Termination Agreement is a penalty clause. It believes that the fact that it cannot have been claimed but for the existence of delay in payment of due amounts gives it the nature of a penalty, without substantiating this argument any further. It cites a number of CAS decisions, namely CAS 2010/A/2317, CAS 2011/A/2323, CAS 2015/A/4057 and CAS 2015/A/4139 as supportive

of its interpretation, however without explaining how the rationale applied in said case law leads to its conclusion.

55. The Respondent, on the other hand, contends that the clause was (a) clearly referencing a right to salary payments that existed under the Contract, (b) as a result, constituted a condition sine qua non without which he would not have signed the Termination Agreement as he considered that he otherwise had a right to twelve salary payments if he exercised a termination for just cause, and (c) the clause was not identified as a penalty or compensation clause, making its purpose obvious.

56. The relevant provisions of the SCO are as follows:

"Article 160 CO: C. Contractual penalty – I. Rights of the creditor - 1. 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 CO: 2. 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 CO: II. 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".

57. Given the existence of valid arguments both in favour and against considering Article 5 as a penalty clause under Article 160 *et seq.* SCO, the Sole Arbitrator finds it unnecessary to make a determination on this point given his conclusions in (b) *infra*, namely that even if the clause is assumed to be a penalty clause, it should be deemed valid under applicable law.

(b) Is the clause valid, and, if so, what is the amount due given that other payment obligations under the Termination Agreement have been met?

58. For purposes of his determination, the Sole Arbitrator considers that he must determine whether Article 5 is valid assuming that it is a penalty clause under Article 160 et seq. SCO. As such, he considers the parties' arguments with respect to the case law they have both determined is applicable, while reaching different conclusions.

59. The application of Article 160.2 SCO to the language of Article 5 of the Termination Agreement leads us to conclude, still assuming arguendo that Article 5 is a penalty clause, that it was intended to function in such a way as to provide the possibility functioning cumulatively. Article 5 clearly refers to the fact that the Appellant must make payments by stated deadlines, failing which the obligation to pay the penalty is created.

60. This being established, the burden of proving that the clause was indeed intended to be cumulative falls on the Respondent (CAS 2015/A/4057 para. 88, relying on Article 8 of the Swiss Civil Code (CC), and MOSER M. in THÉVENOZ/WERRO, Commentaire romand, Bâle, 2012, ad. Article n 13, p. 1155).

61. In support of its position, the Respondent highlights that when negotiating the Termination Agreement, it was the Appellant that had proposed the language for Article 5 as a counteroffer to the Respondent's desire to have a higher amount corresponding to twelve monthly salaries. Indeed, the relevant response from the Appellant's Sports Director in his email of 27 June 2014 included the following language:

"Regarding the clause you suggest to be present in the contract, the club could only put the text of potential payment of 3 player's monthly salaries from the season 2014/2015, but not more than EUR 39 000 in case of late (more than 14 working days) payment of the next instalments due to the real financial situation of the club you are saying you both understand very well. We would like to draw your attention to more realistic way of settlement of the present situation".

62. The Respondent considers that the Appellant is estopped from challenging the validity of the clause given the fact that the Appellant itself had proposed its language and suggested its inclusion in the Termination Agreement. For the Respondent, for the Appellant to challenge the validity of the clause in light of this negotiation history constitutes *venire contra factum proprium*.

63. The Sole Arbitrator is sufficiently convinced, by the wording of the clause as well as by its negotiation history, that the intent of the parties was for the payment of the amount provided for in Article 5 to be cumulative with the other payment obligations in the Termination Agreement.

64. Article 160.2 SCO, however, contains another condition, namely that the right to the additional payment not be "expressly waived", or that performance not be "accepted without reservation".

65. For the Appellant, the fact that the Respondent accepted late payment without initially expressing a complaint about late payment constitutes such a lack of reservation. No claim for the "penalty" amount was made prior to the late payment of the amounts due under the Termination Agreement. In addition, the fact that the Respondent had an email exchange with the Appellant's representative in which he expressed understanding for the club's financial situation, for the Appellant, was sufficient assurance that the Respondent would not be seeking to exercise Article 5.

66. For the Respondent, the fact that the rights under Article 5 were not exercised earlier has no bearing on the validity of such a right, which is anchored simply in the lack of timely payment of the other obligations under the Termination Agreement. Given that that the payments were made by bank transfer, there was no relevant mechanism by which to express reservation. The Respondent had not received responses to emails for four months seeking payment of the principal amounts that were overdue. He had therefore not actively waived any rights.

67. The Sole Arbitrator, bearing in mind the lack of an active waiver and the lack of any time limitation on the contractual right in Article 5, considers that there are insufficient elements to conclude that the Respondent accepted performance without reservation in a manner that would extinguish his rights to claim the EUR 39'000 meant to be paid in the event of late payment of the instalments.

(c) If valid, is the amount appropriate or should it be reduced?

68. Having established that Article 5 constitutes a valid penalty clause if indeed it is deemed as such, the Sole Arbitrator turns to the amount (EUR 39'000) to determine whether it is excessive under the applicable rules of law.

69. The Appellant considers that it is excessive in light of the fact that the amount represents 90.64% of the principal amount due under the Termination Agreement. Moreover, the "penalty" amount represents more than twice the amount of the delayed instalment.

70. Both parties refer to CAS precedent with respect to the determination of what constitutes an excessive amount that should be reduced under Article 163.3 SCO.

71. The panel in CAS 2015/A/4057 effectively summarized the manner in which excessiveness should be assessed:

"Swiss laws and case law do not regulate specific cases where an imbalance between the parties' obligations must be considered as usurious. Some criteria have been developed, and it is for the judge to decide on a case by case basis. Disproportion must significantly exceed the limits of what appears to be normal in light of all circumstances for a practice to be considered usurious (Decision of the Swiss Federal Tribunal 6B_27/2009; dated 29 September 2009, consid. 1.2).

As such, a reduction of the penalty by the judge is justified when there is a significant disproportion ("disproportion crasse") between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place. To evaluate the excessive character

of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration all the circumstances of the case at hand. The Swiss Supreme Court holds that various criteria can play a determining role, such as the nature and duration of the contract, the degree of fault and of the contractual violation, the economic situation of the parties, as well as the potential subordination of the debtor (ATF 133 III 201, consid. 5.2; see also CAS 2010/A/2202 para. 28)".

72. From the Appellant's perspective, the "penalty" amount due is excessive when measured against the last instalment, which was the only one that was late. The language of Article 5 should be interpreted to reflect the parties' intent, which is that the amount should be payable only if all instalments were late, as opposed to only one of them. The Appellant considers it inappropriate that the same amount of penalty should be due regardless of the amount of due payment that was late. It claims that the fact that the claim was filed by the Respondent before the DRC one day before the deadline constitutes abuse of the law.

73. The last of these arguments can easily be dismissed, seeing as it is difficult to imagine how availing oneself of the right to file a claim by a set deadline, even on its last day, can be deemed to constitute abuse of law.

74. The Respondent contends that other than the plain language of Article 5, the negotiation history makes it clear that the amount of the "penalty" would be applicable in the event of lateness of any instalment, given that the first payment was made in cash upon signature of the Termination Agreement. The latter had been a condition for the Player to be willing to sign the deal. Finally, the quantum of the "penalty", representing three monthly salaries is a relatively small amount for a professional football club of the Appellant's level.

75. The Sole Arbitrator, considering the arguments raised by the parties and the factors to be considered under Swiss law, deems that this case is significantly different from the CAS precedent cited by the parties in which penalty amounts were deemed excessive and became subject to reduction. Indeed, in both CAS 2010/A/2317 & 2323 and CAS 2015/A/4057, the penalty amounts were variable in nature by virtue of being set at a specific amount per day that the payment was overdue. The later the payment, the higher the increase in the penalty. Such a system can lead to very significant amounts (including amounts exceeding the overall amount due under a given agreement) if there is sufficient delay.

76. In the present case, the amount was a fixed amount which was clearly discernible at the moment the parties entered into the agreement, given that it represented three monthly salaries as had been negotiated. There was a logic to the figure, which had to do with amount that the Player was foregoing by assenting to enter into the Termination Agreement. It was by virtue of the Player's good faith and reasonableness that he agreed to settle for less than he might have otherwise obtained by terminating the Contract with just cause and seeking payment of the entire remainder of his salary thereunder. He was conscious, however, that he was negotiating with a party that was already late in making payments that were due to him, and he felt that some measure of security was needed if this scenario were to be repeated.

77. The Sole Arbitrator finds that the amount of EUR 39'000 when measured at the time the violation took place (i.e. the moment at which the payment was late), does not rise to the level

of disproportionality envisioned by the Swiss legislator that would require a reduction. In light of what the amount represented and the nature of the negotiation that had taken place between the parties, the amount appears fully justified, were it to be considered a "penalty" clause.

78. In its decision, the DRC found that the disputed amount of EUR 39'000 did not constitute a penalty within the meaning of Article 160 SCO. The Sole Arbitrator finds that even in the event that it were to be considered such a penalty clause, it is still valid and not excessive.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Professional Football Club (PFC) Levski on 30 August 2017 against the decision issued by the FIFA Dispute Resolution Chamber on 19 January 2017 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 19 January 2017 is confirmed.

3. (…).

4. (…).

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