Arbitration CAS 2017/A/5233 Ittihad FC, Saudi Arabia v. Etoile Sportive du Sahel, award of 22 December 2017

Panel: Prof. Philippe Sands QC (United Kingdom), President; Prof. Petros Mavroidis (Greece); Prof. Luigi Fumagalli (Italy)

Football
Transfer of a player between two clubs
Validity of the late payment penalty fee

According to art. 160 of the Swiss Code of Obligations (CO), parties to a contract may agree on a penalty clause in case of non-performance or defective performance of a contract. When the contract has to be performed within a given deadline, parties may agree on penalty fees for each day during which the debtor is in default. Pursuant to the principle of contractual freedom, the parties can freely determine the amount of the contractual penalty. However, the Swiss legislator has enacted a limitation to this freedom at art. 163 al. 3 CO in order to warrant public order and the principle of proportionality as a standard in Swiss law. A penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity. However, the late payment penalty fees is not abusive in nature.

I. PARTIES

1. The Appellant is a football club domiciled in Jeddah, Saudi Arabia. It is affiliated to the Saudi Arabia Football Federation, which is in turn affiliated to the Fédération Internationale de Football Association ("FIFA"). The Appellant participates in the Saudi Premier League.

2. The Respondent is a football club domiciled in Sousse, Tunisia, affiliated to the Fédération Tunisienne de Football (the Tunisian Football Federation), which is in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

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 Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties and deemed admissible in the present proceedings, they refer in this Award only to the submissions and evidence considered necessary to explain their reasoning.

4. The facts of this matter may be summarised as follows.

5. On 27 July 2016, the Appellant concluded a transfer agreement with the Respondent in respect of the footballer Ahmed Akaichi (the "Player"), pursuant to which the Appellant undertook to pay the Respondent a transfer fee of EUR 2,000,000 (the "First Agreement"), comprised of EUR 1,000,000 *"before the issue of the player International Transfer Certificate"* and EUR 1,000,000 before 31 August 2016.

6. On 14 September 2016 the parties concluded a further agreement (the "Second Agreement"), *"considering that [the Appellant] had failed to fulfil its financial obligations towards [the Respondent]…related to the first agreement"*, which set down (in Article 2) a schedule for the payment of five instalments of EUR 400,000, payable by the Appellant on 6 September 2016[1], 21 September 2016, 6 October 2016, 21 October 2016 and 5 November 2016.

7. In respect of the Second, Third, Fourth and Fifth instalments of EUR 400,000 which remained outstanding, Article 2 of the Second Agreement provided that if payment was delayed by more than seven days (from the date specified in the payment schedule), then a late payment penalty of EUR 100,000 would be payable by the Appellant, in respect of each such instalment.

8. Under Article 3 of the Second Agreement, the Appellant was also *inter alia* obliged to pay to the Respondent EUR 50,000 *"and the total charge and accommodation of forty persons (including the flight round trip tickets Tunis-Jeddah) to organise a friendly match between the two clubs in 2017"*.

9. On 30 November 2016 the Respondent lodged a claim with FIFA against the Appellant for breach of contract, claiming the following sums:

   - EUR 1,600,000 in respect of the Second, Third, Fourth and Fifth instalments (of EUR 400,000 each);
   - EUR 400,000 in respect of late payment penalty fees (i.e. EUR 100,000 each in respect of the ongoing non-payment of the Second, Third, Fourth and Fifth instalments);
   - EUR 50,000 pursuant to Article 3 of the Second Agreement; and
   - EUR 120,000 in respect of the costs of a trip of 40 people to Saudi Arabia.

10. Accordingly, the total sum claimed by the Respondent before the PSC was EUR 2,170,000.

[1] In its claim before the PSC, the Respondent accepted that the Appellant had paid the first instalment of EUR 400,000 on 6 September 2016.

11. The Respondent also requested that unspecified sanctions be imposed on the Appellant.

12. In the proceedings before the PSC, the Appellant failed to submit any comments in response to the Respondent's claim.

III. THE PSC DECISION

13. Given its lack of engagement with the PSC process, the Single Judge concluded that the Appellant had *"renounced its right of defence and, thus, it had to be assumed that it had accepted the allegations of the [Respondent]"*.

14. The Single Judge concluded that the Appellant had breached the Second Agreement and was liable to pay the Respondent:

- EUR 1,600,000 in respect of the Second, Third, Fourth and Fifth instalments;
- EUR 400,000 in respect of late payment penalty fees; and
- EUR 50,000 pursuant to Article 3 of the Second Agreement.

15. With regard to the award of EUR 400,000 in respect of late payment penalty fees, the Single Judge held that:

- The Respondent's claim had not been challenged by the Appellant;
- The late payment penalty fees were *"clearly stipulated in the [Second] agreement"*;
- Non-payment of the First, Second, Third and Fourth instalments had triggered the four penalty fee provisions; and
- Having regard to *"well established jurisprudence"*, the *"relevant penalties were not to be considered as excessive or disproportionate"*.

16. The Single Judge rejected the Respondent's claim for EUR 120,000 in respect of the costs of a trip of 40 people to Saudi Arabia, on the basis that: (a) no sum had been stipulated in the Second Agreement; and (b) *"no evidence had been provided by the [Respondent] in support of the allegation that a trip for 40 people to Saudi Arabia for the amount of EUR 120,000 in the sense of art. 3 of the second agreement had actually taken place"*.

17. Accordingly, the Single Judge ordered the Appellant to pay the Respondent the total sum of EUR 2,050,000, payable within 30 days from notification of the PSC Decision (the "Deadline"). The Single Judge further held that if this sum was not paid by the Deadline, interest at a rate of 5% per annum would be payable *"as of expiry of the fixed time limit"*.

18. Finally, the Single Judge rejected the Respondent's request for sanctions to be imposed on the Appellant, concluding that this request *"lacked legal basis"*.

19. The grounds for the PSC Decision were notified to the parties on 14 June 2017.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. The Appellant filed its Statement of Appeal on 4 July 2017 and, on 10 July 2017, requested an extension of time until 4 August 2017 to file its Appeal Brief.

21. By a letter dated 11 July 2017 (delivered to the Respondent on 13 July 2017), the CAS Court Office:

- Initiated an appeal arbitration procedure under the case reference *CAS 2017/A/5233 Ittihad FC, Saudi Arabia v. Etoile Sportive du Sahel*;
- Invited the Respondent to express its position on the Appellant's requests for: (a) the appointment of a Sole Arbitrator; and (b) an extension of time until 4 August 2017 for the filing of its Appeal Brief;
- Suspended the time limit for the filing of the Appel Brief until further notice; and
- *Inter alia* informed the parties that, unless an objection was sent within three days from receipt of the letter by courier, their written submissions should be filed in English.

22. By a letter of 17 July 2017, the Respondent:

- Requested the submission of the case to a three-member Panel, in view of the substantial sum in dispute;
- Requested that the procedure be conducted in French, since all the written submissions before FIFA were drafted in French; and
- Objected to the Appellant's request for an extension of time for the filing of its Appeal Brief.

23. By a letter of 18 July 2017, the CAS Court Office:

- Invited the Respondent to indicate, within three days, whether it intended to pay its share of the advance of costs to be requested;
- Invited the Appellant to express, within the same time limit, its views on the conduct of the procedure in French;
- Invited both parties to indicate whether they would agree with the conduct of a bilingual (French/English) procedure; and
- Noted that in view of the Respondent's objection, the President of the CAS Appeals Arbitration Division, or her Deputy, would decide on the time extension requested by the Appellant.

24. On 19 July 2017, the Appellant:

- Disagreed with the Respondent's proposal for the procedure to be conducted in French, as well as with the suggestion for a bilingual procedure;
- Requested that the procedure be conducted in English;

- Requested a new time limit to nominate its arbitrator, if a three-member Panel was to be appointed; and
- Requested a new time limit for the filing of its Appeal Brief, once these issues had been clarified.

25. On 20 July 2017, the Respondent:
- Informed the CAS Court Office that it agreed to pay its share of the advance of costs;
- Again, mentioned its preference for the procedure to be conducted in French; and
- Stated that it would agree to the conduct of a bilingual procedure, if the Appellant maintained its objection to the procedure being conducted in French.

26. On 21 July 2017, the CAS Court Office informed the parties that in view of their disagreement on: (a) the language of the procedure; (b) the number of arbitrator(s); and (c) the time limit for filing the Appeal Brief, these issues would be decided by the President of the CAS Appeals Arbitration Division, or her Deputy.

27. On 31 July 2017, having considered the parties' representations and Articles R29 and R50 (1) of the Code of Sports-related Arbitration (the "CAS Code"), the Deputy President of the Appeals Arbitration Division ordered, *inter alia*, that:
- The language of the arbitral procedure shall be English;
- The Appellant shall file its Appeal Brief within 10 days from receipt of the Order; and
- The dispute shall be determined by a three-member Panel.

28. On 9 August 2017, the Appellant filed its Appeal Brief.

29. On 11 August 2017, the CAS Court Office:
- Acknowledged receipt of the Appeal Brief; and
- Ordered the Respondent to file its Answer to the appeal within 20 days of receipt of the letter.

30. On 4 September 2017, the Respondent filed its Answer and exhibits.

31. On 7 September 2017, the CAS Court Office:
- Acknowledged receipt of the Respondent's Answer; and
- Invited the parties to confirm whether they preferred a hearing to be held in this matter, or for the Panel to issue an award based solely on the parties' written submissions.

32. On 14 September 2017, the Appellant expressed its wish for a hearing to be held in this matter, *"in order to be able to discuss the fundamental legal aspects of this case"*.

33. On 6 October 2017, the CAS Court Office:

- Acknowledged receipt of the Appellant's payment towards the advance of costs; and
- Confirmed the constitution and membership of the three-member Panel, as well as the appointment of the ad hoc clerk.

34. On 27 October 2017, the parties were sent an Order of Procedure (the "Original Order of Procedure"), which confirmed *inter alia* that the *"Panel considers itself to be sufficiently well informed to decide this matter without the need to hold a hearing"*.

35. By a letter dated 2 November 2017, received by the CAS Court Office on 3 November 2017, the Respondent raised two queries regarding paragraphs 6 and 11 of the Original Order of Procedure.

36. On 8 November 2017, the CAS Court Office:

- Acknowledged receipt of the Appellant's signed copy of the Original Order of Procedure;
- Having regard to the Respondent's comments, sent the parties a slightly revised Order of Procedure (the "Amended Order of Procedure");
- Sent the Appellant a copy of the Respondent's 2 November 2017 letter; and
- Requested that the parties return a signed copy of the Amended Order of Procedure by 13 November 2017.

37. The Appellant returned a signed a copy of the Amended Order of Procedure on 8 November 2017.

38. The Respondent returned a signed a copy of the Amended Order of Procedure on 13 November 2017.

V. SUBMISSIONS OF THE PARTIES

39. This appeal relates solely to the aspect of the PSC Decision concerning the late payment penalty fees. No appeal is pursued by the Appellant in respect of the Single Judge's awards of:

- EUR 1,600,000 in respect of the Appellant's failure to pay Second, Third, Fourth and Fifth instalments; or
- EUR 50,000 pursuant to Article 3 of the Second Agreement.

40. The Appellant's submissions may be summarised as follows:

- The penalty fees included in Article 2 of the Second Agreement are *"absurdly high"* and raise a fundamental issue under Swiss law, and more specifically, the consistency of the late payment penalty fees with public policy (*ordre public*);
- This issue was not addressed, adequately or at all, by the Single Judge in the PSC Decision;

- The rescheduling of the transfer fee, as provided in Article 2 of the Second Agreement, required the full amount to be paid within a two month period and, therefore, the *"deferral of payments was actually quite relative, if not actually completely irrelevant"*;
- The late payment penalty fees amount to 25% of the value of each of the Second, Third, Fourth and Fifth instalments;
- The Appellant was, *"due to its financial situation, not able to make payment of the [Second, Third, Fourth and Fifth] instalments"*;
- The Single Judge of the PSC *"completely disregarded the excessive nature of the penalty payments"* and did not *"respect of the relevant case law of CAS or of the Swiss Federal Tribunal on this issue"*;
- The late payment penalty fees were *"clearly disproportionate"*;
- Under Article 163 of the SCO, there is a mandatory limitation on parties' freedom to include penalty clauses in a contract. Even where a debtor does not expressly request the reduction of a contractual penalty, the judge is obliged to apply a reduction in circumstances where the penalty is found to be excessively high;
- In the PSC Decision, the Single Judge did not make reference to Article 163 of the SCO, or *"examine the relevant criteria, as developed in case law of CAS and of the Swiss Federal Tribunal"*;
- With regard to the aforementioned criteria: (a) *"a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity"*; and (b) relevant factors include the interest of the creditor to receive his payment, the seriousness of the breach of contract, the debtor's fault, the financial situation of the parties, the parties' professional background, the nature of the agreement, the aim of the contractual penalty and a lack of reciprocity;
- The Appellant's failure to comply with the payment schedule (as stipulated in Article 2 of the Second Agreement) has not caused the Respondent any damage;
- The Swiss Federal Tribunal has declared contractual penalties corresponding to 20% of the contract value to be *"abusive"* and reduced them accordingly;
- The CAS has reduced contractual penalties in transfer agreements to amounts of 10% of the transfer fee; and
- The late payment penalty fee awarded by the Single Judge of the PSC was *"completely disproportionate"* in the circumstances of the present case;
- In the circumstances, *"at least such a reduction to a penalty fee corresponding to 10% of the transfer fee, if not lower, appears not only reasonable, but mandatory"*.

41. The Appellant's conclusion is drafted as follows:

- *"It would overall be proportionate to award <u>at maximum</u> the basic outstanding amount of EUR 1,600,000, plus a penalty fee of EUR 160,000 (10%), plus the undisputed amount of EUR 50,000, resulting in a total amount of EUR 1,810.000"*.

and its requests for relief are drafted as follows:

"Prayer1: The Appealed Decision shall be partially set aside: The Amount awarded to Etoile Sportive du Sahel in para. 2 of the Operative Part of the Appealed Decision shall be reduced at the discretion of CAS. The amount awarded to Etoile Sportive du Sahel shall not be higher than EUR 1,810,000.

Prayer 2: In any case, Etoile Sportive du Sahel shall bear the costs of the arbitration and it shall contribute to the legal fees incurred by Appellant at an amount of at least CHF 30,000".

42. The Respondent's submissions may be summarised as follows:

- The Appellant has manifestly failed to comply with its obligations under the First Agreement or the Second Agreement; indeed, the Appellant has still failed to pay the Second, Third, Fourth or Fifth instalments, notwithstanding its admission that such sums are owing;
- The Appellant's conduct has significantly prejudiced the Respondent's financial position: a printout of the Respondent's bank account shows that it was, as at 4 September 2017, significantly overdrawn;
- It was the Appellant that proposed replacing the First Agreement with the Second Agreement, to which the Respondent agreed;
- The Appellant has acted in bad faith, whereas the Respondent has acted in good faith. Furthermore, *"no party can take advantage of mitigating circumstances if it shows bad faith and/or clear attitude to ruin the other party"*;
- The Appellant freely agreed to the late payment penalty fees, and did not propose reducing them;
- The Respondent has a right under Article 160 of the SCO to enforce the agreement regarding late payment penalty fees;
- Late payment penalty fees should not automatically be classified as abusive because they exceed a certain amount or percentage; and
- The jurisprudence relied upon by the Appellant was *"not applicable in this case"*, owing to the different agreements and circumstances under consideration in those cases.

43. In summary, the Respondent invites the CAS to:

- *"Reject the appeal in its totality and to confirm the challenged decision"; and*
- *"Condemn [the Appellant] to support all arbitration costs related to this case, bearing in mind that [the Respondent] is the weaker party and didn't cause any damage to [the Appellant]".*

VI. JURISDICTION

44. The CAS has jurisdiction to decide the present dispute between the parties.

45. In fact, the jurisdiction of the CAS is not disputed by the parties, has been confirmed by the Order of Procedure, and is contemplated by Article 57 *et seq.* of the FIFA Statutes.

VII. ADMISSIBILITY

46. The PSC Decision, with grounds, was notified to the parties on 14 June 2017. The Appellant's appeal was filed within 21 days of 14 June 2017 and complied with the requirements of Article R47 of the CAS Code. The appeal brief was further filed within the time limit granted by the CAS Court Office further to the Appellant's request for an extension/suspension of such time limit. The appeal is therefore admissible.

VIII. APPLICABLE LAW

47. Article R58 of the CAS Code provides 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".

48. Article 57 of the FIFA Statutes provides as follows:

"1. 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.

2. 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".

49. In light of the above, the Panel agrees with both parties' contention that this dispute shall be decided according to any applicable FIFA Regulations and, additionally, in accordance with Swiss law.

IX. MERITS

A. The law

50. As the Appellant acknowledges, contractual late payment penalty fees are, as a matter of Swiss law, permissible in principle. Article 160 of the Swiss Code of Obligations (the "SCO") provides as follows:

"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".

51. It is not necessary for the creditor to prove damage or loss, in order to claim a late payment penalty fee (Article 161 (1) of the SCO).

52. Whilst Article 163 (1) of the SCO provides that *"The parties are free to determine the amount of the contractual penalty"*, they do not have complete autonomy or freedom in this regard. Article 163 (3) of the SCO provides that *"At its discretion, the court may reduce penalties that it considers excessive"*.

53. The central question in this appeal is whether the late payment penalty fees agreed by the parties (and recorded in Article 2 of the Second Agreement) ought to be regarded as *"excessively high"* within the meaning of Article 163 (3) of the SCO, such that the CAS ought to reduce them. If the conclusion of the Panel is that they *are* excessively high, then a secondary question arises as to *what* reduction, in the exercise of the Panel's discretion, ought to be applied.

54. The relevant legal principles were helpfully summarised in the conjoined CAS cases CAS 2010/A/2317 & CAS 2011/A/2323. In particular, at paragraphs 25 to 29 of the Award, the Panel held as follows:

"25. According to art. 160 CO, parties to a contract may agree on a penalty clause in case of nonperformance or defective performance of a contract. When the contract has to be performed within a given deadline, parties may agree on penalty fees for each day during which the debtor is in default.

26. Pursuant to the principle of contractual freedom, the parties can freely determine the amount of the contractual penalty. However, the Swiss legislator has enacted a limitation to this freedom at art. 163 al. 3 CO in order to warrant public order and the principle of proportionality as a standard in Swiss law (COUCHEPIN G., La clause pénale, Zurich 2008, N. 783).

27. The Panel note that art. 163 al. 3 CO states: "the judge shall reduce an excessive penalty". This provision is mandatory and the parties cannot contractually depart from it. Therefore, the judge (or the Panel, in this matter) shall examine this amount. The Panel notes in this matter Timisoara have challenged the penalty. The burden of proving the facts that lead to conclude that one is in presence of an abusive penalty clause lies within the debtor (ATF 133 III 43, consid.4.1 = JdT 2007 I 236). However this requirement is lighter concerning the real damage suffered by the creditor because it cannot be assumed that the debtor is aware of this damage (Federal Tribunal, judgement of 8 December 2009, 4A_141/2008, consid. 15.1.2). Thus, the Federal Tribunal considers that the creditor has to prove even succinctly his loss (ibidem).

28. The criteria according to which contractual penalties shall be deemed as excessive and the extent to which a judge may reduce them are to be found in Swiss case law. First, as the judge can only reduce the penalty when its amount is, at the time of the judgment, abusive, the Federal Tribunal has established several criteria to define what an abusive amount is. According to the Federal Tribunal, a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity (ATF 82 II 142, consid. 3 = JdT 1957 I 104). A balance of interests is required to decide whether a penalty is abusive or not in each case. For this purpose, the creditor's interest (ATF 103 II 129 = JdT 1978 I 159), the seriousness of the breach of the contract (ATF 91 II 372, consid. 11 = JdT 1966 I 322) and the debtor's fault (ibidem), along with financial situation (ibidem) of both parties, are determinant. The nature of the agreement (ATF 103 II 108 = JdT 1978 I 194), the debtor's professional background (ATF 102 II 420, consid. 4 = JdT 1978 I 230) and the aim of the penalty also have to be taken into consideration in the balance.

29. However, penalty fees may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor (Federal Tribunal, judgement of 8 December 2009, 4A_141/2008, consid. 15.1.2). Indeed, including a punishment aspect, the penalty does not have to meet exactly the amount of the damage (idem, consid. 15.1.4)".

55. The Panel also notes, and cites with approval, paragraphs 99 and 100 of the CAS Award in CAS 2015/A/4057, in which the Panel held as follows:

"99. The Swiss Supreme Court held that Article 163 CO is part of public order and that, as a consequence, the Judge must apply it even if the debtor has not expressly requested a reduction. Nevertheless, the Judge must observe a degree of deference as the parties are free to determine the amount of the contractual penalty (see Article 163 para. 1 CO) and as the principle of freedom of contract commands that the judge abides by the parties' agreement. The judge must intervene only when the stipulated amount is so high that it unreasonably and flagrantly exceeds the amount admissible with regard to the sense of justice and equity (ATF 133 III 201, consid. 5.2; see also CAS 2010/A/2202 para. 28; Decision of the Swiss Federal Tribunal 4C.5/2003, dated 11 March 2003, consid. 2.3.1; ATF 114 II 264 consid 1a).

100. The Judge must assess all the elements, which are objectively relevant and look for an adequate solution regarding the concrete circumstances of the matter before him or her (ATF 101 Ia 545 cons. 1b). He or she will primarily seek to enforce the parties' intention and make sure not to substitute his or her own views for that of the parties' (ATF 133 III 201 consid. 5.2 and 5.4). In other words, should the Judge hold that the penalty clause is excessive, he or she must refrain from doing anything else but reduce it so that it is not excessive anymore. In particular, the Judge cannot reduce the penalty to an amount that he or she deems fair (ATF 133 III 201, consid. 5.2 and 5.5 and references)".

B. The cases relied on by the Appellant

56. In paragraphs 29 to 31 of its Appeal Brief, the Appellant cites several cases in support of its submission that the late payment penalty fees in the present case ought to be regarded by the Panel as excessive, abusive, unreasonable and clearly in excess of the admissible amount in consideration of justice and equity. These are considered by the Panel below, in the order in which they appear in the Appeal Brief.

57. First, the Appellant cites the decision of the Swiss Federal Tribunal in Decision 4C_374/2006 of 15 March 2007. In that case, contractual penalties representing approximately 21% of the amount of the purchase price, in a contract for the sale of an aircraft, were deemed to be abusive. The Panel notes that the sums under consideration in that case were significantly higher than those stipulated in the Second Agreement; specifically, the purchase price for the aircraft was USD 17,595,000, and the claimed penalty fees were USD 3,733,500. Other relevant aspects of the SFT's judgment in this case (which fall to be contrasted with the facts of the present case) are that: (a) the debtor was not regarded as being at fault, because the reasons that prevented it from paying the sums due were out of its control; and (b) the creditor had been able to sell the aircraft to another purchaser, and had not suffered a loss serious enough to justify such a high penalty.

58. Secondly, the Appellant cites the CAS Award referenced in paragraph 54 above, which in turn refers (in paragraph 35 of the Award) to the SFT Decision 4A_141/2008 of 8 December 2009. That case concerned the construction of a villa, for the sum of CHF 2,325,000, which was delayed by 18 months. The SFT held that a reduction of the penalty fee from CHF 1,800,000 to CHF 800,000 was not arbitrary, considering the circumstances. The Panel notes that the modified / reduced penalty in this case amounted to nearly 35% of the agreed contract price, which is a significantly higher percentage than the late payment penalty fees under consideration in the present case, as a proportion of the transfer fee.

59. Thirdly, the Appellant cites the decision in CAS 2010/A/2317 & 2011/A/2323 to reduce a contractual penalty to EUR 105,000, which sum amounted to 10% of the transfer fee. The Appellant cites this as, in effect, a 'benchmark' against which the Panel should assess the late payment penalty fees under consideration in the present case. The Panel notes, however, the following aspects of the CAS's reasoning in that case:

- First, applying the stipulated penalty rate of EUR 1,000 per day, at the time of the Panel's deliberations, the total amount of the penalty fees would have been EUR 1,267,000. This sum exceeded the transfer fee, which was EUR 1,050,000. In the Panel's judgment (at paragraph 30 of the Award), *"this amount is clearly unreasonable as nothing justifies a doubling of the transfer price as a result of the debtor's default"*. In the present case, the late payment penalty fees under consideration do not exceed the transfer fee (or come close to doing so).
- Secondly, the creditor had failed to prove that it sustained damage as a consequence of the debtor's default; *per* paragraph 31 of the Award: *"…The Panel might have expected a creditor to produce evidence of its bank statements – if it was in overdraft as a result of the non payment, the interest it was having to pay the bank and the like…"*. This lack of evidence falls to be contrasted with the present case, having regard to the financial evidence submitted by the Respondent (mentioned in paragraph 42 above).
- Thirdly, the debtor in CAS 2010/A/2317 & 2011/A/2323 had explained its financial situation to the creditor and asked for longer deadlines, all of which were rejected by the creditor. In the Panel's judgment, *"a fairer attempt to solve the solution would have been to accept more, smaller instalments. Thus, the creditor could have tried to solve the situation better"*. Again, this falls to be contrasted with the present case: there is no evidence of the Appellant having requested a rescheduling of the (rescheduled) payment obligations, as agreed and recorded in the Second Agreement.

C. Other relevant decisions

60. In CAS 2015/A/4057, the CAS concluded that a penalty fee of EUR 10,000 per day, which would have amounted to a total penalty of EUR 4,280,000 as at the date of the hearing, was excessive. In the Panel's judgment, a daily penalty of EUR 500 was reasonable, such that *"the Appellant would be entitled to the payment of EUR 214,000; i.e. more than half of the outstanding amount of EUR 350,000"*. Such a penalty did not, in the Panel's view, constitute a *"confiscatory measure, which could be seen as an inadmissible impediment to the Respondent's financial future"*.

61. In CAS 2014/A/3664, the CAS held that a contractual penalty amounting to 20% of the transfer fee was a proportionate deterrent and not excessive. The Panel held, in paragraph 50 of the Award:

"…In assessing the proportionality of the penalty clause, the Panel also took into consideration the fact that Vasco da Gama immediately transferred the Player without receiving any payments, and its credit was therefore left unsecured. Although in this specific case the deterrent of 20% of the amount overdue did not prevent Ittihad from failing to pay, a lower penalty would most likely certainly not have prevented Ittihad from failing to pay".

62. The Panel also noted the *"blatant violations committed by Ittihad"*, finding that *"Even after more than 2 years and 4 months not even a part of the overdue amount is paid by Ittihad"*. Furthermore, the Panel found that Ittihad *"had the possibility to carefully assess its financial situation at the time and was able to verify if it would be able to pay – at least the First Instalment – in time…".*

63. In CAS 2015/A/3909, the CAS upheld a contractual penalty amounting to 10% of the principal debt, concluding that this was not excessive, and that there was no *"massive imbalance"*. In paragraph 106 of the Award, the Panel held as follows:

"…it merely seems that, as argued by Dynamo Kyiv, while Dynamo Kyiv initially wanted the transfer sum to be paid immediately in full, Atlético Mineiro applied for a more flexible and lenient payment schedule. According to Dynamo Kyiv and as confirmed by Mr Volk during his testimony, the contractual penalty was integrated in the Transfer Agreement as a compromise…".

64. The Panel also notes the judgment of the High Court of England and Wales in *Pencil Hill Limited v US Citta Di Palermo S.p.A*[2], in which the court considered the enforceability of an arbitral award, having regard to domestic principles of public policy. The facts of the case were summarised by the court as follows:

- The contractual dispute between the parties related to the sale of financial rights deriving from the registration rights of a professional football player;
- Under the parties' first contract, the agreed price was EUR 6,720,000, payable in two equal instalments;
- Clause 4 of the first contract contained a penalty clause, which stated as follows: *"In the case [Palermo] fails to pay any of the instalment agreed, then, all the remaining amounts shall become due and as penalty [Palermo] will have to pay an amount equal to the amount pending IE [Palermo] will pay the double of the pending amount at the moment of the fail on the payment"*;
- Palermo failed to pay either of the agreed instalments under the first contract, and Pencil Hill filed a claim with the CAS seeking, *inter alia*, the agreed contract prince of EUR 6,720,000 plus a penalty payment of a further EUR 6,720,000;
- The CAS found that Palermo was liable to pay the agreed contract price of EUR 6,720,000 and upheld that element of the claim[3];

[2] Case No: BA40MA109, 19 January 2016, unreported.
[3] It also upheld a claim for EUR 1,000,000 in respect of a second contract between the parties.

- With regard to the claim for a penalty payment, the CAS awarded the *reduced* additional sum of EUR 1,680,000, on the basis that the claimed penalty was excessive; and
- This decision was subsequently upheld by the Swiss Federal Tribunal.

65. The Panel notes, in particular, that the reduced penalty payment awarded by the CAS in this case (and upheld on appeal to the Swiss Federal Tribunal) amounted to 25% of the agreed contract price under the first contract.

D. The Panel's findings and conclusions

66. The Panel notes that the Appellant has not sought to argue that Article 163 (2) of the SCO, which provides that *"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"*, is engaged on the facts of this case. Whilst paragraph 9 of the Appeal Brief asserts that the Appellant was experiencing a *"difficult financial situation"* at the time when the First Agreement was entered into (on or around 27 July 2016), the Appellant has filed no evidence at all regarding its financial situation, (i) at the time when the First Agreement was entered into; (ii) when the Second Agreement was entered into; (iii) when the Second, Third, Fourth and Fifth instalments (under the Second Agreement) fell due for payment; or (iv) otherwise. For the avoidance of doubt, on the basis of the evidence before it the Panel does not accept that the Appellant has been prevented from complying with the Second Agreement.

67. With respect to the central question in this appeal, having regard to and applying the legal principles outlined above, the Panel rejects the Appellant's submission that the late payment penalty fees, stipulated in Article 2 of the Second Agreement, are *"excessively high"* within the meaning of Article 163 (3) of the SCO. The Panel does not accept that the *"stipulated amount is so high that it unreasonably and flagrantly exceeds the amount admissible with regard to the sense of justice and equity"*, or that the late payment penalty fees in this case are abusive in nature. In the Panel's judgment, the Single Judge of the PSC was right to award the Respondent EUR 400,000 in respect of late payment penalty fees.

68. In reaching this conclusion, the Panel has taken account of the following considerations in particular:

- At the time when the Second Agreement was entered into, the Appellant was already late in fulfilling its payment obligations to the Respondent;
- The Second Agreement was freely negotiated and willingly entered into by the Appellant;
- In the Second Agreement, the parties elected to agree, and clearly stipulate, what the financial consequences of a (further) failure by the Appellant to comply with its (rescheduled) payment obligations would be;
- The Appellant is a professional football club participating in the Saudi Premier League, and could not be said to be subordinate to the Respondent;

- There is no evidence that the Appellant sought to object to the inclusion of the late payment penalty provisions in the Second Agreement;
- There is no evidence that the Appellant requested a further modification or variation of the payment schedule, subsequent to the Second Agreement;
- The Respondent had a legitimate and important interest in securing prompt payment of the agreed transfer fee (in respect of the Player, whose services it had lost to the Appellant);
- The Appellant's breaches of the Second Agreement are serious. It has still failed to pay any of the Second, Third, Fourth and Fifth instalments (which, even on its case, it is legally obliged to pay to the Respondent). Of the agreed transfer fee of EUR 2,000,000, the Appellant has paid only EUR 400,000 – i.e. 80% of the agreed transfer fee remains outstanding;
- The Appellant has not adduced any evidence that it has been unable to pay the agreed transfer fee;
- Logically, at the time when the Second Agreement was entered into, the Panel proceeds on the basis that the Appellant must have considered that it was or would be in a position to pay the various instalments by the agreed dates; were it otherwise, the Appellant would have been making contractual commitments that it knew it would breach;
- As noted in paragraph 42 above, the Respondent's financial situation has been damaged by the Appellant's breaches of the Second Agreement;
- The aim of the late payment penalty provisions in Article 2 of the Second Agreement was to deter ongoing breaches of the Respondent's obligation to pay the agreed transfer fee. This was a legitimate aim;
- Each late payment penalty fee (of EUR 100,000) is significantly lower than the transfer fee instalment (of EUR 400,000) to which it relates;
- The total amount of the late payment penalty fees (EUR 400,000) amounts to 20% of the total agreed transfer fee (of EUR 2,000,000);
- This is not a case in which the late payment penalty fees could be said to be equivalent to, or to exceed, either the total transfer fee or the outstanding balance (indeed, far from it);
- Having regard to the matters discussed in section VIII(B) above, the cases relied on by the Appellant do not warrant a conclusion that the late payment penalty fees under consideration in the present case may be said to be abusive;
- Whilst each case falls to be assessed on its own merits and there is no 'bright line rule' to be applied, in sections VIII(B) and (C) above, the Panel has noted other cases in which penalty payments of 25% or more (of the agreed contract price or outstanding balance) have been deemed reasonable and lawful by the CAS and the Swiss Federal Tribunal.

69. In conclusion, the Panel rejects the Appellant's appeal against the PSC Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 4 July 2017 by Ittihad FC, Saudi Arabia against the Decision of the Single Judge of the Players' Status Committee, which was notified to the parties with grounds on 13 June 2017 (the "PSC Decision"), is dismissed.

2. The PSC Decision is confirmed.

3. (…).

4. (…).

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