



**Arbitration CAS 2019/A/6568 Bursaspor Kulübü Derneği v. Estoril Praia Futebol SAD, award of 30 March 2020**

Panel: Mr Frans de Weger (The Netherlands), Sole Arbitrator

*Football*

*Loan agreement*

*Enforcement of a penalty clause*

*Reduction of excessive penalty clauses*

*Conditions for a penalty clause to be deemed excessive*

*Awarding of interest on the principal amount in addition to a penalty fee*

1. Swiss law does not prohibit the use of contractual penalties for untimely payment of debts. In order to fulfill its purpose, the penalty clause must contain the following necessary elements: (a) the parties bound thereby are mentioned, (b) the kind of penalty has been determined, (c) the conditions triggering the obligation to pay it are set; and (d) its measure is identified. It does not follow from the FIFA Regulations, Swiss law or CAS jurisprudence that a written notice is a requirement for a party in order to enforce a penalty clause.
2. Contractual penalties should be reduced in case they are excessive, which follows from Article 163.3 of the Swiss Code of Obligations. The law, however, does not state clearly what an excessive penalty is, so that it is for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty is excessive and, if so, to what extent it should be reduced. In any case, the judge should not reduce a penalty too easily. The principle of contractual liberty, which is essential under Swiss law, has always to be privileged in case of doubt.
3. According to Swiss case law and legal doctrine, a penalty is deemed to be excessive when it is not reasonable and exceeds patently the amount that would seem just and equitable. Thus, the judge may reduce it when it is unreasonable to an extent which cannot be justified. The burden of the proof of the penalty's excessiveness falls upon the debtor (Article 8 of the Swiss Civil Code).
4. Nothing prevents an adjudicatory body from awarding both interest and a penalty fee. There is indeed a conceptual difference between a penalty and interest. Interest, on the one hand, only compensates the creditor for the debtor's late payment and the financial (interest) losses of the creditor as a result of depriving it from payments it is entitled to. Penalty clauses, on the other hand, are contractual provisions which parties can use to impose penalties on each other in the event that one of them breaches a contractual obligation. In fact, a penalty aims at putting pressure on the debtor in order to foster *in terrorem* compliance under threat of having to pay a penalty.

## **I. INTRODUCTION**

1. This appeal is brought by Bursaspor Kulübü Derneği (“Bursaspor” or the “Appellant”) against the decision rendered by the Single Judge of the Players’ Status Committee (the “PSC”) of the Fédération Internationale de Football Association (“FIFA”) on 15 October 2019 (the “Appealed Decision”), regarding a contractual dispute between Bursaspor and Estoril Praia Futebol SAD (“Estoril” or the “Respondent”).

## **II. PARTIES**

2. The Appellant is a professional football club, based in Bursa, Turkey. Bursaspor is affiliated to the Turkish Football Federation (“TFF”) which in turn is affiliated with FIFA.
3. The Respondent is a professional football club based in Estoril, Portugal. Estoril is affiliated to the Portuguese Football Federation (“FPF”) which in turn is affiliated with FIFA.

## **III. FACTUAL BACKGROUND**

### **A. Background facts**

4. Below is a summary of the main relevant facts and allegations based on the parties’ written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations found in the parties’ submissions may be set out, where relevant, in connection with the further 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, the award only refers to the submissions and evidence it considers necessary to explain its reasoning.
5. On 27 July 2018, Bursaspor and Estoril entered into an agreement for the temporarily transfer of the professional football player A. from Estoril to Bursaspor (the “Loan Agreement”).
6. According to Article 3 of the Loan Agreement, Bursaspor is obliged to pay to Estoril a total loan fee of net EUR 350’000.- (in words: three hundred and fifty thousand Euros). The parties agreed to that Bursaspor would pay this amount in three instalments to Estoril: the first instalment, of EUR 100’000.- (in words: one hundred thousand Euros) on or before 30 August 2018; the second of EUR 100’000.- (in words: one hundred thousand Euros) on or before 30 November 2018; and the third of EUR 150’000.- (in words: one hundred and fifty thousand Euros) on or before 30 April 2019.
7. Article 17 of the Loan Agreement provides for a penalty fee and read as follows:

*“It is agreed that should Bursaspor fail to proceed with the timely payment of a part or the full amount of the Loan Fee or the Transfer Fee, a penalty of 10% (ten per cent) shall apply to the total outstanding amount”.*

8. On 4 January 2019, Estoril sent a formal notice of default to Bursaspor requesting the payment of the first two instalments of the Loan Agreement of in total EUR 200'000.- (in words: two hundred thousand Euros), “*without incidence of the penalty fee*”, whilst granting a final deadline of 10 (ten) days.
9. On 5 June 2019, Estoril sent a second notice of default, requesting the payment of the total amount of EUR 385,000.- corresponding to the three instalments of the Loan Agreement as well as the penalty fee, whilst granting a final deadline of 10 (ten) days.

**B. Proceedings before the FIFA Players’ Status Committee**

10. On 24 June 2019, Estoril filed a claim against Bursaspor in front of FIFA, asking that Bursaspor:

*“be ordered to pay to it overdue payables in the amount of EUR 392,600, as follows:*

- i) EUR 350,000, as “principal”;*
- ii) EUR 35,000, as “penalty on default”;*
- iii) EUR 7,600, as “accrued interests on default rate of 5% p.a. until 15 June 2019”, as follows:*
  - i. EUR 4,000, as “interest on default – 1<sup>st</sup> Installment (4%)”;*
  - ii. EUR 2,700, as “interest on default – 2<sup>nd</sup> Installment (2.7%)”;*
  - iii. EUR 900, as “interest on default – 3<sup>rd</sup> Installment (0.6%)”.*

11. On 15 October 2019, the Single Judge of the FIFA Players’ Status Committee (the “Single Judge”) rendered a decision with regard to Estoril’s claim (the “Appealed Decision”). The operative part of the Appealed Decision reads as follows:

*“1. The claim of the Claimant, Estoril Praia Futebol, is partially accepted.*

*2. The Respondent, Bursaspor Derneği, has to pay to the Claimant overdue payables in the amount of EUR 350,000 plus 5% interest p.a. as follows:*

- a. on the amount of EUR 100,000, as from 31 August 2018 until the date of effective payment;*
- b. on the amount of EUR 100,000, as from 1 December 2018 until the date of effective payment;*
- c. on the amount of EUR 150,000, as from 1 May 2019 until the date of effective payment.*

*3. The Respondent has to pay to the Claimant the penalty amount of EUR 35,000.*

*4. Any further claim lodged by the Claimant is rejected.*

*5. A warning is imposed on the Respondent.*

*6. (...).”*

12. On 22 October 2019, the grounds of the Appealed Decision were notified to the parties which can be summarized as follows:

- The Single Judge concluded that “[Estoril] *had duly proceeded in accordance with art. 12bis par. 3 of the Regulations, which stipulates that the creditor (player or club) must have put the debtor club in default in writing and have granted a deadline of at least ten days for the debtor club to comply with its financial obligations*”.
- In this regard, the Single Judge “*took into account that, for its part, [Bursaspor] failed to present its response to the claim of [Estoril], despite having been invited to do so. In this way, so the Single Judge deemed, [Bursaspor] renounced its right to defence and, thus, accepted the allegations of [Estoril]*”.
- The Single Judge “*established that [Bursaspor] failed to remit the amount of EUR 350,000 to [Estoril], corresponding to the loan fee*” and that “[Bursaspor] *had delayed a due payment for more than 30 days without a prima facie contractual basis*”.
- The Single Judge decided that “*in accordance with the general principle of pacta sunt servanda, [Bursaspor] is liable to pay to [Estoril] overdue payables in the amount of EUR 350,000*”.
- With regard to the penalty fee, the Single Judge deemed that “*the penalty fee of 10% of the outstanding instalment is both proportionate and reasonable*” and therefore decided that “[Bursaspor] *has to pay to [Estoril] the penalty fee amounting to EUR 35,000*”.
- As to the remaining request for interest on the penalty fee as of its due date, the Single Judge concluded that “*the penalty fee did not provide for any interest to be due in case of its late payment, regardless of the fact that no due date for payment of the penalty amount was included in the transfer agreement*”.
- The Single Judge referred to the jurisprudence of the PSC according to which “*no interest is due over a late payment of a penalty fee*”. Therefore, the Single Judge was of the opinion that “*this request could not be granted, and consequently rejected [Estoril]’s request for interest on the penalty fee*”.

#### IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 11 November 2019, Bursaspor filed a Statement of Appeal before the Court of Arbitration for Sport (the “CAS”) in accordance with Article 58 of the FIFA Statutes and Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”). Furthermore, Bursaspor requested that the appeal be decided by a Sole Arbitrator.
14. On 12 November 2019, Estoril accepted English as the official language and agreed with the appointment of a Sole Arbitrator.

15. On 22 November 2019, Bursaspor filed its Appeal Brief pursuant to Article R51 of the CAS Code. Bursaspor challenged the Appealed Decision, submitting the following requests for relief:
  - a. to set aside the challenged Single Judge of the FIFA Players' Status Committee in its entirety,*
  - b. in subsidiary order, to order that no interest shall be due,*
  - c. to condemn the Respondent to pay the Appellant the legal fees and other expenses in connection with the proceedings”.*
16. On 3 December 2019, Estoril requested that the time limit for the filing of the Answer be fixed after the payment by Bursaspor of its share of the advance costs.
17. On 4 December 2019, the CAS Court Office informed the parties that pursuant to Article R55 para. 3 of the CAS Code, the time limit for the filing of the Answer was set aside and that a new time limit would be fixed upon the Appellant's payment of its share of the advance costs. Accordingly, a new deadline was fixed on 6 December 2019.
18. On 6 December 2019, the CAS Court Office informed the parties that pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the Panel appointed to hear the appeal was constituted as follows:
  - Sole Arbitrator: Mr Frans M. de Weger, Attorney-at-Law, Haarlem, the Netherlands
19. On 20 December 2019, Estoril filed its Answer in accordance with Article R55 of the CAS Code. Estoril submitted the following requests:
  - a) Fully dismiss the Appeal Brief and reject all requests for relief put forward by the Appellant;*
  - b) Uphold the Decision of FIFA in its entirety; and*
  - c) Condemn the Appellant to bear all costs and expenses associated with the present procedure and contribute with CHF10,000 (ten thousand Swiss Francs) towards the Respondent's legal costs in this proceeding”.*
20. On 23 December 2019, the CAS Court Office invited the parties to inform the CAS Court Office, by 6 January 2020, whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on their written submissions.
21. On 24 and 26 December 2019 respectively, the parties informed the CAS Court Office that they did not consider it necessary for a hearing to be held.
22. On 9 January 2020, on behalf of the Sole Arbitrator, who had considered the parties' positions with respect to a hearing and pursuant to Article R57 of the CAS Code, the parties were advised that the Sole Arbitrator deemed himself well-informed to decide the case based solely on the parties' written submissions, without the need to hold a hearing.

23. On 20 January 2020 and 21 January 2020 respectively, Estoril and Bursaspor returned duly signed copies of the Order of Procedure to the CAS Court Office.
24. In the present arbitral award, the Sole Arbitrator confirms that he considered himself to be sufficiently informed without the need of an oral hearing and that he carefully took into account all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the award.

## V. SUBMISSIONS OF THE PARTIES

25. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

### A. Position of the Appellant

26. In its Statement of Appeal, Bursaspor submitted the following requests for relief:
  - a. *to set aside the challenged Single Judge of the FIFA Players' Status Committee in its entirety,*
  - b. *in subsidiary order, to order that no interest shall be due,*
  - c. *to condemn the Respondent to pay the Appellant the legal fees and other expenses in connection with the proceedings*".
27. The submissions of Bursaspor, in support of its prayers, may, in essence, be summarized as follows:
  - Bursaspor submits that *"the Parties agreed on a contractual penal clause, to be applied if Bursaspor fails to proceed with the timely payment of an instalment"*.
  - Bursaspor, however, argued that *"it must be admitted that such a penalty clause cannot be enforced since it articulates such a high percentage of the principal debt without foreseeing a remedy for the late payment"*.
  - Further to this, Bursaspor submits that *"at least a written notice should be inserted as a prerequisite for requesting the penalty amount in the relevant article"*.
  - In addition, it is Bursaspor's understanding that the *"contractual penalty covers the damages of the Respondent and compensates it for the late payment fully and therefore, interest shall not be due on the principal amount once the penalty clause is triggered"*.

- In this regard, Bursaspor refers to well-established jurisprudence of FIFA and CAS (CAS 2014/A/3664) arguing that only interest and a penalty are both applicable when the contractual clause explicitly provides so.
- In conclusion, Bursaspor argues that *“since there is no such clause which clearly determines the payment of both the penalty and the interest in the agreement between the Parties, interest cannot be requested and awarded”*.

## **B. Position of the Respondent**

28. In its Answer, Estoril submitted the following prayers for relief:

- “a) Fully dismiss the Appeal Brief and reject all requests for relief put forward by the Appellant;*
- b) Uphold the Decision of FIFA in its entirety; and*
- c) Condemn the Appellant to bear all costs and expenses associated with the present procedure and contribute with CHF10,000 (ten thousand Swiss Francs) towards the Respondent’s legal costs in this proceeding”*.

29. Estoril submitted, in essence, that Bursaspor’s appeal should be dismissed because:

- There are no legal grounds to support the requests for relief presented in the Appeal Brief. In this regard, Estoril submits *“that the wording of the [Appealed] Decision is clear and fully supported by the established jurisprudence of FIFA and the CAS”*.
- As to the height of the penalty fee, Estoril submits that 10% (ten percent) is fair and proportionate for a continued default.
- Estoril argued, referring to CAS 2014/A/3664, that *“there is a conceptual difference between the penalty and the interest on default”*. Whilst the penalty aims at compensating the creditor for the late payment by the debtor and punishing the debtor for its unjustified default, the interest aims solely at maintaining the *“purchase power”* of the amount in default.
- Estoril finds that if the CAS understands that the penalty clause cannot be cumulative with interests on default, *“it would encourage the debtor to postpone ad aeternum its payment obligations once a penalty clause was triggered”*.
- Estoril submits that Bursaspor evidently breached the Loan Agreement and, thus, should be responsible for the payment of the penalties under Article 17 of the Loan Agreement. Also, in accordance with Swiss law and the established jurisprudence of FIFA and the CAS, Bursaspor is also subject to payment of interests on default of 5% per year, as from each date of default.

- As to the arbitration costs and legal fees, Estoril submits that “*all costs and expenses associated with this proceeding to be borne exclusively by the Appellant, regardless of any decision passed by the Sole Arbitrator*”.
- In conclusion, Estoril submits “*that the Sole Arbitrator has no alternative but to fully dismiss the Appeal Brief and to uphold in full the [Appealed Decision], determining [Bursaspor] to pay the amount of 350,000€ increased by the penalty fee and the interests on default, at the rate of 5% per annum, from the date in which each installment became due and unpaid by [Bursaspor]*”.

## VI. JURISDICTION

30. Article R47 of the CAS Code provides as follows:

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

31. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) of the FIFA Statutes which reads:

*“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 receipt of the decision in question”.*

32. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

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

## VII. ADMISSIBILITY

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

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

35. The Sole Arbitrator notes that pursuant to Article 58(1) of the FIFA Statutes, the time limit to file an appeal is 21 days of receipt of the Appealed Decision.

36. The Sole Arbitrator observes that the grounds of the Appealed Decision were notified to Bursaspor on 22 October 2019.
37. As the Statement of Appeal was filed by Bursaspor on 11 November 2019, which is within the 21 days deadline, the appeal was timely submitted. It complies with all the other requirements set forth by Article R48 of the CAS Code and is therefore admissible.

### **VIII. APPLICABLE LAW**

38. Article R58 of the CAS Code provides more specifically the following:

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

39. Article 57 para. 2 of the FIFA Statutes reads as follows:

*“The arbitral tribunal shall decide 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 dispute has the closest connection”.*

40. The Sole Arbitrator notes that the Loan Agreement provides for a choice-of-law clause, referring to the FIFA Regulations and Swiss Law.
41. In its Appeal Brief, Bursaspor submits that the case is primarily governed by the FIFA Regulations and, subsidiary, Swiss law applies pursuant to Article 57 para. 2 of the FIFA Statutes and the jurisprudence of the CAS.
42. Estoril did not object thereto and did not make any specific submissions on the law to be applied.
43. In light of the above, the Sole Arbitrator is satisfied that the FIFA Regulations are applicable, with Swiss law applying to fill in any gaps or *lacuna* within those regulations.

### **IX. MERITS**

#### **A. The Main Issues**

44. The Sole Arbitrator observes that it is undisputed between the parties that the parties concluded a Loan Agreement, which is valid and binding, and that Bursaspor failed to remit the amount of EUR 350'000.- to Estoril, corresponding to the loan fee.
45. Further, the Sole Arbitrator notes that it is not disputed between the parties that the parties agreed on a contractual penalty clause under Article 17 of the Loan Agreement should Bursaspor fail to proceed with the timely payment of the loan fee to Estoril.

46. Although the Appellant requests the cancellation of the Appealed Decision in its entirety, it did not address the issue of the amount of the overdue payables in its submissions. The Appellant thus did not put forward any arguments which would prompt the Sole Arbitrator to reconsider whether the loan fee is due and whether the Appellant has indeed defaulted on such payment. Accordingly, the Sole Arbitrator has no reason not to confirm the Appealed Decision insofar as it orders the Appellant to pay to the Respondent overdue payables in the amount of EUR 350,000. What is disputed in this case is only whether the penalty clause under Article 17 of the Loan Agreement can be enforced and whether both interest and the penalty are applicable.
47. In view of the positions of the parties as summarized above, the Sole Arbitrator observes that in order to decide the present case, the following shall therefore be established:
- i) whether the penalty can be enforced; and
  - ii) whether interest and the penalty can be awarded cumulatively.

## **B. Enforcement of the penalty clause**

48. In order to address the first issue, whether Article 17 of the Loan Agreement can be enforced, the Sole Arbitrator observes that Bursaspor is of the opinion that the penalty clause under this provision cannot be enforced *“since it articulates such a high percentage of the principal debt without foreseeing a remedy for the late payment”*.
49. As a starting point, the Sole Arbitrator wishes to underline that Swiss law does not prohibit the use of contractual penalties for untimely payment of debts. The Sole Arbitrator takes judicial note that the penalty clause contained in Article 17 of the Loan Agreement qualifies as contractual penalty (“clause pénale” or “Konventionalstrafe”) under Swiss law, following Article 160 of the Swiss Code of Obligations (“CO”), i.e. under the law applicable to the merits of the dispute in this arbitration.
50. The Sole Arbitrator finds that the penalty clause contains all the necessary elements required for such purpose: (a) the parties bound thereby are mentioned, (b) the kind of penalty has been determined, (c) the conditions triggering the obligation to pay it are set; and (d) its measure is identified (COUCHEPIN G., *La clause pénale*, Zürich, 2008, § 462). In addition, the Sole Arbitrator also remarks that, in principle, under Swiss law, the parties are free to determine the amount of the contractual penalty (Article 163.1 CO). It also clearly follows from CAS jurisprudence that contractual penalties can be valid (see, *inter alia*, CAS 2017/A/5233, CAS 2010/A/2317 and CAS 2011/A/2323).
51. The Sole Arbitrator observes that it is Bursaspor’s position that at least a written notice was a prerequisite in order to validly request the penalty under Article 17 of the Loan Agreement. The Sole Arbitrator does, however, not agree. Firstly, it does not follow from the text of Article 17 that a written notice was a condition for requesting the penalty clause. In other words, the Parties did not make the penalty clause under Article 17 subject to a written notice. Secondly, the Sole Arbitrator wishes to stress that it does not follow from the FIFA

Regulations, Swiss law or CAS jurisprudence that a written notice is a requirement for a party in order to enforce a penalty clause. Thirdly, and more importantly, the Sole Arbitrator observes that Estoril in its default letters of 4 January 2019 and 5 June 2019 respectively did make reference to the penalty under Article 17. Therefore, Bursaspor's position does not stand as a written notice was sent by Estoril.

52. At any event, the Sole Arbitrator wishes to emphasise that a party signing a document of legal significance, as a general rule, does so on its own responsibility and is liable to bear the possible legal consequences arising from the execution of the document. Put differently, it is Bursaspor's responsibility to bear the legal consequences of Article 17.
53. Regarding the argument of Bursaspor in relation to the height of the percentage, the Sole Arbitrator generally notes that contractual penalties should be reduced in case they are excessive, which follows from Article 163.3 CO. The law, however, does not state clearly what an excessive penalty is, so that it is for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty is excessive and, if so, to what extent it should be reduced (ATF 82 II 142 consid. 3, JdT 1957 I 104). In any case, it must be underlined that the judge should not reduce a penalty too easily and that the principle of contractual liberty, which is essential under Swiss law, has always to be privileged in case of doubt (MOOSER M., *Commentaire Romand du Code des obligations*, 2<sup>nd</sup> ed., Basel, 2012, n. 7 ad art. 163; COUCHEPIN, *op. cit.*, § 934).
54. To put it in a different way, the Sole Arbitrator must act with reluctance with regard to any reduction of the awarded penalty clause of 10% of the total outstanding debt.
55. In this regard, the Sole Arbitrator notes that, according to the Swiss case law and legal doctrine, a penalty is deemed to be excessive when it is not reasonable and exceeds patently the amount that would seem just and equitable (ATF 82 II 142 consid. 3, JdT 1957 I 104). Thus, the judge may reduce when it is unreasonable to an extent which cannot be justified (COUCHEPIN, *op. cit.*, § 840 ff.). The Sole Arbitrator emphasises that the burden of the proof of the penalty's excessiveness falls upon the debtor (Article 8 of the CC) (see also COUCHEPIN, *op. cit.*, § 851; ATF 114 II 264, JdT 1989 I 74).
56. In light of the above, and weighing all the relevant factors, the Sole Arbitrator finds that a penalty clause of 10% of the total outstanding debt, as awarded by the Single Judge in the Appealed Decision, is not unreasonable regarding the breach imputed by Bursaspor and the interest of Estoril in order to secure performance of the breached obligation.
57. In the present case, therefore, the Sole Arbitrator finds that a contractual penalty of 10% of the total outstanding debt, as is awarded by the Single Judge in the Appealed Decision, is not excessive here, also considering the amount in dispute of EUR 350'000 and the fact that Bursaspor did not demonstrate, at all, that the penalty fee is excessive.
58. Therefore, under the specific circumstances of the present case, the Sole Arbitrator concurs with the decision of the Single Judge to award the penalty of EUR 35'000.-.

### C. Penalty fee and interest

59. The Single Judge decided in the Appealed Decision that Bursaspor has to pay to Estoril the amount of EUR 350'000.- as well as 5% interest on the amounts of EUR 100'000.-as from 31 August 2018, EUR 100'000.- as from 1 December 218; and EUR 150'000.- as from 1 May 2019, all until the date of effective payment. Moreover, the Single Judge decided that Bursaspor has to pay the penalty fee in the amount of EUR 35'000.-.
60. It is Bursaspor's position that "*interest shall not be due on the principal amount once the penalty clause is triggered*", as opposed to what the Single Judge decided in the Appealed Decision. Bursaspor challenges this part of the Appealed Decision because the penalty clause already covers the damages of Bursaspor and must be seen as a compensation for the late payment. In this regard, interest as well as a penalty fee can only be claimed cumulatively if the contractual clause explicitly provides for this.
61. The Sole Arbitrator wishes to emphasise that he concurs with the decision of the Single Judge of the PSC not to award interest on the penalty as of its due date, as was initially claimed by Estoril in the FIFA proceedings. In fact, the penalty clause under Article 17 of the Loan Agreement did not provide for any interest to be due in case of its late payment. Only if the Parties had explicitly provided in the Transfer Agreement that interest would be due on the penalty fee, which the parties failed to do, interest on the penalty fee could have been awarded. This is also fully in line with the jurisprudence of FIFA as well as the CAS, where both parties referred to (see CAS 2014/A/3664).
62. However, in the present appeal case it is not a question whether interest is due on the penalty (as was initially requested by Estoril in the FIFA proceedings and as such rejected by the Single Judge), but if interest can be awarded on the initial amount of EUR 350'000.-, in addition to the penalty fee of EUR 35'000.-, as was decided by the Single Judge in the Appealed Decision. This is now disputed by Bursaspor in the present appeal as it claims that "*interest shall not be due on the principal amount once the penalty clause is triggered*". The Sole Arbitrator does, however, not agree with Bursaspor.
63. The Sole Arbitrator wishes to stress that nothing prevents an adjudicatory body from awarding both interest and a penalty fee, as is also clearly established in the CAS jurisprudence (see, *inter alia*, CAS 2014/A/3664). In this regard, the Sole Arbitrator agrees with Estoril that there is indeed a conceptual difference between a penalty and interest. Interest, on the one hand, only compensates the creditor for the debtor's late payment and the financial (interest) losses of the creditor as a result of depriving it from payments it is entitled to (CAS 2015/A/3909). Penalty clauses, on the other hand, are contractual provisions which parties can use to impose **penalties** on each other in the event that one of them breaches a contractual obligation. In fact, a penalty aims at putting pressure on the debtor in order to foster *in terrorem* compliance under threat of having to pay a penalty (cf. MOOSER, op. cit., n. 2 ad art. 160 ("*effet répressif*" and "*effet préventif*" role of penalty).

64. In addition, the Sole Arbitrator also agrees with Estoril that if no interest would be applicable and cannot be awarded if a penalty is already due, and so not cumulatively, this would not incentivize the breaching party to make the payment of the initial amount.
65. Therefore, the Sole Arbitrator agrees with the Single Judge to award Estoril in the Appealed Decision, in addition to the penalty amount of EUR 35'000.-, with the amount of EUR 350'000.- as well as 5% interest on the separate amounts of EUR 100'000.- as from 31 August 2018, EUR 100'000.- as from 1 December 2018; and EUR 150'000.- as from 1 May 2019, all until the date of effective payment, taking into consideration that, in accordance with Articles 102 and 104 CO, interest shall accrue starting the day after the aforementioned dates until which the payment could be made without delay.

#### **D. Conclusion**

66. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made by the parties, the Sole Arbitrator finds that:
- i. The penalty fee under Article 17 of the Loan Agreement can be enforced by Bursaspor resulting in the payment of the penalty fee of EUR 35'000.-; and
  - ii. An interest rate of 5% *per annum* on the initial amount as well as the penalty fee as agreed under Article 17 of the Loan Agreement can be awarded cumulatively.
67. As a final conclusion and in light of the reasoning set out above, the Sole Arbitrator concurs with the Single Judge of the PSC in the Appealed Decision to award Estoril, next to the penalty amount of EUR 35'000.-, with the amount of EUR 350'000.- as well as 5% interest on the separate amounts of EUR 100'000.- as from 31 August 2018, the amount of EUR 100'000.- as from 1 December 2018; and the amount of EUR 150'000.- as from 1 May 2019, all until the date of effective payment by Bursaspor to Estoril.

### **ON THESE GROUNDS**

#### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by Bursaspor Kulübü Derneği against Estoril Praia Futbol SAD on 11 November 2019 with respect to the decision rendered by the Single Judge of the Players' Status Committee on 15 October 2019 is rejected.

2. The decision rendered by the Single Judge of the Players' Status Committee on 15 October 2019 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.