Arbitration CAS 2021/A/7727 Yeni Malatyaspor FK v. Issiar Dia, award of 8 November 2021

Panel: Mr José Juan Pintó (Spain), Sole Arbitrator

Football
Termination of the employment contract by mutual agreement
Proportionality of a penalty clause
Proportionality of an interest rate

1. **A penalty is considered abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of the principles of justice and equity. When analysing the proportionality of a penalty clause, the creditor's interest, the seriousness of the breach of the contract, the debtor's intentional failure, the financial situation of both parties, the economic dependence of the debtor, the disproportion between the damage and the penalty, the debtor's professional background, and not only the damage actually produced but also the risk of damage to which the creditor was exposed, are to be considered relevant.**

2. **Article 104.2 of the Swiss Code of Obligations (SCO) establishes that *"[w]here the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default"*. Therefore, nothing prevents the parties to negotiate and establish a higher amount of interest as the default interest of 5% p.a contemplated in article 104(1) of the SCO. This contractual freedom is not unlimited as the outcome has to remain compatible with Swiss law when applicable. In this regard, an interest rate below 18% is considered to be in line with the maximum level of interest applicable under Swiss law. There is no regulation that establishes that an interest rate of 10% is excessive or disproportionate.**

I. PARTIES

1. Yeni Malatyaspor FK (the "Appellant" or the "Club") is a professional football Club based in Malatya, Turkey. The Club is affiliated to the Turkish Football Association (the "TFA") which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

2. Issiar Dia (the "Respondent" or the "Player") is a French-Senegalese professional football player.

II. FACTUAL BACKGROUND

3. A summary of the most relevant facts and the background giving rise to the present dispute will be established based on the parties' written submissions and the evidence filed within these submissions. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. The Sole Arbitrator refers in its Award only to the submissions and evidence he considers necessary to explain its reasoning. The Sole Arbitrator, however, has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings.

4. On 27 July 2017, the Club and the Player entered into an Employment Contract (the "Employment Contract"), valid as from 27 July 2017 until 31 May 2020, according to which the Player was entitled to receive 2.350.000 EUR as remuneration for three seasons (600,000 EUR for the 2017/2018 season, 850,000 EUR for the 2018/2019 season and 900,000 EUR for the 2019/2020 season).

5. On 8 May 2020, the legal representative of the Player sent a formal notice to the Appellant in relation to the outstanding remuneration that was owed to the Player by virtue of the Employment Contract. The relevant parts of the letter sent by the Player read as follows:

"Reference is made to the last exchanges between the Player and the Club regarding the outstanding remuneration at the end of May 2020 amounting to € 371,250.00 (i.e., three hundred seventy-one thousand and two hundred fifty EUR) NET in virtue of the employment contract concluded with the Player.

The Club sent to the Player through the month of April 2020 a draft of mutual agreement in order to pay this outstanding amount in three instalments (i.e., €123.750,00 net on 30/07/2020 - € 123.750,00 net on 30/09/2020 - € 123.750,00 net on 30/11/2020).

This draft agreement is entitled "Mutual Termination and Financial Clearance" and was proposed to the Player while the Championship was suspended and the Turkish Football Federation had not yet announced whether and when the Championship would be restarted.

[…]

The Players of the Club have received written confirmation dated April 28th 2020 of the restart of the Championship and, de facto, the restart of the training in Malatya on 15th May 2020, but not Mr. Issiar DIA, without explanations.

On the contrary, the Club urged the Player to sign the draft agreement which mentions the mutual termination of the Contract at the end of May 2020.

[…]

However, in order to force the Player to sign the Mutual Termination agreement, the Club has an unacceptable behavior and puts the Player under intolerable pressure.

[…]

The Club decided yesterday (i.e., 7 May 2020) to remove all these bonuses without warning the Player and without explanations. Today, the Player has no car and no room which must be provided by the Club. The Player's couldn't sleep in his room last night and couldn't find his effects that were in his room.

Such a situation is intolerable. The Club must immediately and without delay allow the Player to benefit from the car and that room. Failing that, we will have this situation officially recognized and will lodge a claim in front of FIFA.

Furthermore, the Club still owes irrevocably the Player an amount of € 371,250.00 (i.e., three hundred seventy-one thousand and two hundred fifty EUR) NET corresponding to unpaid salaries at the end of May 2020.

[…]

By this letter, I formally request the payment to Mr. Issiar DIA the amount of € 303.750,00 without delay".

6. On 21 May 2020, the Parties signed a termination agreement (the "Termination Agreement") according to which they agreed to terminate their employment relationship.

7. Pursuant to the Termination Agreement, the Club undertook to pay to the Player 371.250,00 EUR in three instalments as follows:

   a) 123,750 EUR on 30 June 2020;

   b) 123,750 EUR on 25 July 2020;

   c) 123,750 EUR on 15 August 2020.

   d) The last paragraph of clause 2 of the Termination Agreement reads as follows: *"If the Club doesn't pay one of the instalments within the prescribed above mentioned deadlines, for some reason that it is and without prior formal notice from the Player, the Club is indebted without delay of the total sum remaining due as principal increased by an interest at 10% (ten percent) per year from the date of eligibility of the instalment until the date of effective payment and with a supplementary fix penalty amounting to € 20,000 (i.e. twenty thousand EUR)".*

   e) On 1 July 2020, the Player, given that the Club had not satisfied the first agreed instalment, sent a correspondence putting the Club in default of payment for the first time and requesting that the total amount recognized in the Termination Agreement to be paid to the Player without delay. The letter reads as follows in its most relevant parts:

      "Reference is made to the payment of the amount of €371,250 which has to be paid in several installments as follows:

      - *€123,750 net for the 30-06-2020*

      - *€123,750 net for the 25-07-2020*

- *€123,750 net for the 15-08-2020*

To date, the first installment has not been paid to the Player by the Club.

[…]

By this letter, I formally request the payment to Mr. Issiar Dia the amount of €371,250 without delay, plus interest as the supplementary fix penalty amounting 20,000".

8. On 7 July 2020, the Player, taking in account that his letter sent on 1 July 2020 remained unanswered, sent a new correspondence putting the Club in default of payment requesting again the following:

"By this letter, I formally request the payment to Mr. Issiar Dia the amount of €371,250 without delay, plus interest as the supplementary fix penalty amounting 20,000".

9. On the same date, the Club sent to the Respondent's lawyer a copy of the email that was sent on 6 July 2020 to him that stated the following:

"We received your email for Issiar Dia regarding mutual termination agreement. Our club wants to fulfil all its obligations against Issiar Dia strongly. Our club is going through economically difficult conditions. In order to overcome these problems, we signed an agreement for transferring of Thievy Bifouma to Chinese club last week. We are planning to receive first instalment on this next week. We will then pay the Issiar Dia immediately.

We do not agree with a part in the letter you sent. If a payment is not made, the meaning that all payments will be due is not included in the contract. Total amount expression means separately for each installment. Otherwise, the word of the total termination contract amount should be included. I do not think this will be a big problem between us. Other installments are due soon.

With the installment from the Chinese club, we will make your payment immediately".

10. In July 2020, Mr. Thievy Bifouma was transferred to a Chinese club (Shenzhen SC). According to the press articles submitted by the Respondent, the amount of the transfer was approximately 2,800,000 EUR.

11. On 23 July 2020, the Player sent another formal notice to the Club reminding the Appellant the correspondence sent by the Player dated July 1 and 7, 2020 and requesting for the third time the total overdue amount of 371,250 EUR.

12. On 31 July 2020, and once the date of the second installment was overdue, the Player sent a new letter to the Club putting the Appellant in default of payment regarding the first and the second installment. The letter reads as follows in its most relevant parts:

"I remind you my last correspondence dated July 1,7 and 23, 2020.

[…]

To date, the first and second installment have not been paid to the Player by the Club. The Club is clearly not fulfilling its commitments.

However, to date, the Player has still not received anything despite your commitment to make the payment through Thievy Bifoum's transfer to a Chinese Club.

[…]

By this letter, I formally request the payment to Mr. Issiar Dia the amount of €371,250 without delay, plus interest as the supplementary fix penalty amounting 20,000.

[…]

If this payment (principal amount + interest + penalty) is not made within a very short period of time, we will lodge a claim in front of FIFA".

13. On 19 August 2020, and once the third installment was overdue, the Player sent a new letter to the Club informing that the full instalments had not been paid to the Player by the Club and requesting once more the overdue amounts and stated the following:

"If this payment (principal amount + interest + penalty) is not made within 12 days of this correspondence, we will lodge a claim in front of FIFA".

14. This letter also remained unanswered by the Club.

III. PROCEEDINGS BEFORE THE DISPUTE RESOLUTION CHAMBER

15. On 15 October 2020, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber (the "**FIFA DRC**"), for outstanding remuneration and compensation for breach of contract claiming the total amount of EUR 399,195.69 and requested *inter alia*, the following:

a) "The Claim is well-founded for non-fulfilment of the Mutual Termination and Financial Clearance;

b) Malatyaspor must pay in favour of Mr. Issiar Dia an amount of € 371,250.00 as outstanding remuneration regarding the Employment contract;

c) Malatyaspor must pay to Mr. Issiar Dia an amount of € 2,.000.00 as fix penalty;

d) Malatyaspor must pay to Mr. Dia an amount of € 7.945,69 as interest at 10% since 30 June 2020, 25 July 2020 and 15 August 2020 (this amount will be necessary updated until the day of full payment to Mr. Issia Dia);

e) All amount claimed shall be considered as net".

16. In its reply, the Club argued that the Player never had a good performance while at the Club and that the latter always paid on time his financial obligations under the Employment Contract. Moreover, the Club argued that a penalty clause of EUR 20,000 and a 10% interest rate was *"disproportionate and therefore not valid"* and should be reduced.

17. On 10 December 2020, the FIFA DRC issued its decision REF 20-01468 in the above dispute (the "Appealed Decision") in the following terms:

1. *"The claim of the Claimant, Issiar Dia, is partially accepted.*

2. *The Respondent, Yeni Malatyaspor, has to pay to the Claimant the following amounts:*

   - *EUR 123,750 as outstanding remuneration plus 10% interest p.a. as from 31 June 2020 until the date of effective payment;*

   - *EUR 123,750 as outstanding remuneration plus 10% interest p.a. as from 26 July 2020 until the date of effective payment;*

   - *EUR 123,750 as outstanding remuneration plus 10% interest p.a. from 16 August 2020 until the date of effective payment.*

   - *EUR 20,000 as contractual penalty.*

3. *Any further claims of the Claimant are rejected.*

4. *The Claimant is directed to immediately and directly inform the Respondent of the relevant bank account to which the Respondent must pay the due amount.*

5. *The Respondent shall provide evidence of payment of the due amount in accordance with this decision to* ***psdfifa@fifa.org****, duly translated, if applicable, into one of the official FIFA languages (English, French, German, Spanish).*

6. *In the event that the amount due, plus interest as established above is not paid by the Respondent within 45 days, as from the notification by the Claimant of the relevant bank details to the Respondent, the following consequences shall arise:*

   1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The aforementioned ban mentioned will be lifted immediately and prior to its complete serving, once the due amount is paid. (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

   2. *In the event that the payable amount as per in this decision is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee.*

7. *The decision is rendered without costs".*

18. The main grounds of the Appealed Decision are the following:

- The FIFA DRC considered undisputed that the Club has not paid the amounts agreed in the Termination Agreement.

- Regarding the interest rate, the Chamber referred to its own jurisprudence and well-established practice and confirmed that the interest rate of 10% per annum cannot be considered as excessive or disproportionate, and decided to uphold the arguments of the Claimant in this respect.

- The penalty clause of EUR 20,000 was found proportionate and not excessive, as it represented only 5.39% of the principal amount due. Accordingly, the Chamber also referred to the jurisprudence of the DRC, which has consistently confirmed that clauses such as the one at stake shall be enforced and shall not be considered as excessive by any means.

- Regarding the circumstances raised by the Club to justify its non-compliance with the financial obligations of the Player, the Chamber considered them as non-sufficient and concluded that there was no valid reason for the non-payment of the overdue amount requested by the Claimant. The reasons brought forward by the Respondent in its defense do not exempt the Respondent from its obligation to fulfil its contractual obligations towards the Claimant. The DRC furthermore highlighted that both the interest rate and the contractual penalty were freely negotiated between the parties and are fair and proportionate.

- In light of all the above, the FIFA DRC decided that, in accordance with the general legal principle of *"pacta sunt servanda"*, the Respondent is liable to pay to the Claimant the total amount of 371,250 EUR as outstanding remuneration as well as 20,000 EUR as contractual penalty.

- In addition, taking into account the Claimant's request as well as the consistent practice of the FIFA DRC, the Chamber condemned the Club to pay to the Player an interest rate of 10% p.a. on each of the relevant payments as of the day on which the relevant payments fell due, until the date of effective payment. The FIFA DRC clarified however that in accordance with its own well-established practice, no interest shall accrue on the contractual penalty.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 23 February 2021, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "**CAS Code**"), the Club filed its Statement of Appeal before the Court of Arbitration for Sport (the "**CAS**") against the Appealed Decision. The appeal is directed against the Player and FIFA, the Appellant nominated Mr. Emin Ozkurt as Arbitrator, Managing Partner at Ozurk Law Offices in Istanbul, Turkey. The Appellant also chose English as the language of the present arbitration proceedings and submitted the following request for relief:

"6. To stay execution of the sanction imposed by FIFA DRC and

7. Annulment of FIFA DRC date on 3 February 2021 notified to the parties on 4 February 2021".

20. On 24 February 2021, the CAS Court Office acknowledged receipt of the Statement of Appeal filed by the Appellant on 23 February 2021 and, *inter alia*, stated the following:

"I note that the Appellant has applied for the stay of the challenged decision. According to CAS jurisprudence, a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal. It may not, therefore, be stayed and an application in that respect - being moot - would in principle be dismissed. In such circumstances, the Applicant might have to bear the consequential arbitration costs. In view of this CAS jurisprudence, the Appellant is invited to inform the CAS Court Office within three (3) days from receipt of this letter by email, whether it maintains or withdraws its application for a stay. In the absence of an answer from the Appellant within the prescribed deadline or in case it maintains its application, the Respondents shall be granted a deadline to file their position on the Appellant's application in accordance with Article R37 of the Code".

21. On 1 March 2021, the CAS Court Office acknowledged receipt of the Player's letter sent on 26 February 2021 in which the Player informed the CAS that it agreed with the ongoing procedure to be conducted in English, nominated Mr. François Klein as Arbitrator and noted that it did not intend to pay his share of the advance of costs.

22. On the same date, the Appellant requested to the CAS Court Office that the appeal be referred to a Sole Arbitrator.

23. On 3 March 2021, FIFA requested to be excluded as a respondent from the procedure at stake.

24. On the same date, the Player informed the CAS Court Office that it agreed with the case being submitted to a Sole Arbitrator.

25. On the same date, the Appellant withdrew its request for a stay of execution.

26. On 5 March 2021, the Appellant, pursuant to Article R51 of the CAS Code, submitted its Appeal Brief, with the following request for relief:

1. *"To stay execution of the sanction imposed by FIFA DRC and*

2. *Annulment of FIFA DRC date on 3 February 2021 notified to the parties on 4 February 2021".*

27. On the same date, the CAS Court Office acknowledged receipt of the Appeal Brief and, *inter alia*, stated the following:

"According to CAS jurisprudence, a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal. It may not, therefore, be stayed and an application in that respect - being moot - would in principle be dismissed. In view of the fact that the Appellant has informed the CAS Court Office that it had decided to withdraw its request for provisional measures, the Appellant's request for the stay of the decision as stated in the Appeal Brief will be deemed withdrawn, unless the Appellant explicitly confirms on or before 10 March 2021 that it is maintained".

28. On 10 March 2021, the CAS Court Office acknowledged receipt of the Appellant's letter of 9 March 2021, by means of which, the Appellant decided to withdraw its appeal against FIFA.

29. On the same date, the CAS Court Office advised the Parties that in view of the mutual agreement of them to submit the dispute to a Sole Arbitrator, the latter would be appointed in accordance with article R54 of the CAS Code.

30. On 20 April 2021, the CAS Court Office acknowledged receipt of the Appellant's payment of the advance of costs and informed the Parties that pursuant to Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration Division, the Sole Arbitrator appointed to decide the present case was the following:

Sole Arbitrator: Mr. José J. Pintó, Attorney-at-law in Barcelona, Spain.

31. On 11 May 2021, the Player filed his Answer to the Appeal Brief, in accordance with Article R55 of the CAS Code, submitting the following requests for relief:

a) *"Confirm FIFA's decision with Reference 20-01468 dated on 10 December 2020, notified to the Parties on 3rd February 2021, in its entirety;*

b) *Confirm that the Appellant has to pay to the Respondent the following amounts:*

- ✓ *EUR 123,750 as outstanding remuneration plus 10% interest p.a. as from 31 June 2020 until the date of effective payment;*
- ✓ *EUR 123,750 as outstanding remuneration plus 10% interest p.a. as from 26 July 2020 until the date of effective payment;*
- ✓ *EUR 123,750 as outstanding remuneration plus 10% interest p.a. as from 16 August 2020 until the date of effective payment;*
- ✓ *EUR 20,000 as contractual penalty.*

c) Order Malatyaspor to pay any legal expenses or costs faced by the Player in an amount prudently estimated in the excess of 10,000.00 € (ten thousand Euros).

d) Order Malatyaspor to bear any and all administrative and procedural costs, which have already been incurred or may eventually be incurred in connection with these or future proceedings".

32. On the same date, the CAS Court Office invited the Parties to inform the CAS Court Office whether they preferred a hearing to be held in this matter or if they preferred the Sole Arbitrator to issue an Award based solely on the Parties' written submissions.

33. On 11 May 2021, the Respondent informed of his preference for the Sole Arbitrator to issue an award based solely on the Parties' written submissions, without holding a hearing. The Appellant had already requested in its Appeal Brief a hearing to be held.

34. On 12 May 2021, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing.

35. On 14 May 2021, the CAS Court Office informed the parties that Mr. Alberto Donado-Mazarrón Cebrian, Attorney-at-law in Barcelona, Spain, had been appointed as *ad hoc* clerk in order to assist the Sole Arbitrator in these proceedings.

36. On 26 May 2021, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the Appellant and the Respondent on 27 May 2021 and 1 June 2021, respectively.

37. On 30 June 2021, a hearing was held by video-conference. At the outset of the hearing, both Parties confirmed that they had no objection as to the constitution of the Panel.

38. The following persons attended the hearing in addition to the Sole Arbitrator, Ms. Sophie Roud, CAS Counsel, and Mr. Alberto Donado-Mazarrón, *Ad hoc* Clerk:

    a) For the Appellant: Mr. Burk Çakir, Counsel.

    b) For the Respondent: Mr. Thomas Normand, Counsel.

39. Both Parties were given the full opportunity to present their cases and submit their arguments in opening and closing statements.

40. The Parties expressly renounced to examine the witnesses they requested to call in their respective Appeal Brief and Answer.

41. Before the hearing was concluded, both Parties expressly stated that they had no objection to the procedure conducted by the Sole Arbitrator and that their right to be heard had been respected.

V. PARTIES' SUBMISSIONS

42. 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, for the purposes of the legal analysis which follows, all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

A. Appellant's position

43. Despite the Player's low performance, the Club has respected its financial obligations comprised in the Employment Contract and did its best to perform its financial obligations regarding the Termination Agreement signed between the Parties. However, the Club has suffered lack of financial sources due to the fact that the Club's revenues have sharply decreased during the season 2019-2020 due to the COVID-19 pandemic.

44. On 27 April 2020, the Club sent an email to the Player stating the following;

"All our sources of incomes are suspended due to Covid-19. This situation almost paved the way for us to go bankrupt. Tv Right, sponsorship, investment, match income etc. rates dropped to zero. Under these circumstances, our club suspended its payment obligations until the pandemic ended in the outbreak".

45. Despite the above-mentioned letter, the Player insisted on requesting his entire remunerations and the Club offered him a termination agreement, that was finally signed by the Parties.

46. The Appellant contends that the basic rule of *pacta sunt servanda* must be respected when the agreement reached by the Parties was concluded in equal circumstances between the signatories. In this regard, when the Termination Agreement was signed, the Appellant was in a critical position both from a sporting and economic point of view as the COVID-19 pandemic has generated a critical financial situation and the Club's first team had to be relegated to the Turkish second division due to its poor performance during the 2019/2020 season.

47. Under these circumstances, the Player clearly abused of its position and the critical situation of the Club and requested the entire employment contract overdue amount. The Appellant had no other option than to sign the Termination Agreement with the conditions proposed by the Player including an early termination compensation and additionally in case of delay in payments, a penalty clause of 20,000 EUR and a 10% annual interest. Due to the decrease of all the Club's sources of income, the Appellant had to accept the Player's proposal despite its extremely delicate financial situation.

48. The FIFA DRC took its decision without taking into account this abovementioned situation. The Appellant is not a company and/or commercial entity, it is an association under civil law. Therefore, the Club cannot be treated as commercial entity.

49. Considering the existing circumstances, the penalty clause amounting 20,000 EUR is not valid. If the Sole Arbitrator considers the penalty valid, then it should be considered disproportionate and therefore should be reduced.

50. The Club alleges that also the 10% interest rate is disproportionate and that at most, a maximum interest of must be applied for any late payments.

51. Finally, the Club points out that the Player has not played football for 1.5 years and so it did not give a contribution to the Club. This has to be considered for the evaluation of the validity and disproportionality of the penalty clause and the interest rate.

B. Respondent's position

52. On 29 July 2017, the Parties signed an Employment Contract which ended on 31 May 2020. The Player was entitled to receive EUR 2.350.000 during the three seasons in which the Player was contracted by the Appellant.

53. On 8 May 2020, the legal representative of the Player sent a formal notice to the Appellant in relation to the outstanding remuneration that was owed to the Player in accordance with the Employment Contract.

54. By means of this letter, the Player's lawyer emphasizes that the outstanding amount owed by the Club to the Player at the end of May 2020 amounted to 371,250 EUR and also stated that the Parties were in negotiations in order to reach an agreement concerning the terms of the payment of this amount.

55. Finally, the Parties reached an agreement on the schedule of payment of the outstanding amount as follows:

- First payment on 30/06/2020 à 123,750 EUR net
- Second payement on 25/07/2020 à 123,750 EUR net
- Third (and last) payment on 15/08/2020 à 123,750 EUR net

56. The Respondent considers undisputed that the Player's lawyer sent several letters putting the Club on default of payment that remained unanswered and that the debtor did not comply with its financial obligations.

57. With regard to the Merits of the present case, the Respondent notes as a starting point that the Parties must fulfil their contractual obligations in good faith as both Parties freely and consciously signed the binding and valid Termination Agreement.

58. Reference is made to Art. 102, par. 2, Swiss CO, that establishes the following: *"Where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right of termination reserved by one party, the obligor is automatically in default on expiry of the deadline"* (emphasis added).

59. The Club has never contested the Termination Agreement and has even accepted his financial obligations towards the Player as in its letter dated 6 July 2020 it stated: *"We received your email for Issiar Dia regarding mutual termination agreement. Our club wants to fulfil all its obligations against Issiar Dia strongly. Our club is going through economically difficult conditions. In order to overcome these problems, we signed an agreement for transferring of Thievy Bifouma to Chinese club last week. We are planning to receive first instalment on this next week. We will then pay the Issiar Dia immediately".*

60. In this regard it has to be taken into account that it was the Club itself who decided to terminate with the Player's contract before the restart of the 2019/2020 season. It was not the Player who proposed to sign a Termination Agreement, to the contrary, he wanted to continue playing with the team but it was a unilateral decision from the Appellant that pushed him to agree and finally sign the Termination Agreement.

61. Once the Termination Agreement was signed, the Club automatically waived its payment obligations towards the Player despite the fact that the Player's lawyer sent up to 5 letters putting the Club on default and requesting the overdue amount. The Club just answered once

stating that it would certainly comply with its financial obligations but never did so. The rest of the letter sent by the Player remained unanswered.

62. In the FIFA proceedings, the Club never contested the Termination Agreement and gave two reasons to justify the non-compliance of its financial obligations. First of all, it alleged that *"the Player maintained unprofessional life during contract and therefore the coaches did not prefer to work with him"*, this argument has not been raised in the Appeal Brief. Moreover, nobody from the Club informed the Player that this supposed "unprofessional life" was occurring and in addition, the Appellant had not proved that this situation really occurred; in this regard it is also worth noting that this ground has no connection with the failure to fully perform the Termination Agreement signed by the Parties.

63. The second argument raised by the Club to justify its conduct is that the Club was heavily affected by the Covid-19 crisis and encountered financial difficulties. This argument cannot explain why the Club has still not paid any of the monies negotiated and agreed upon in the Termination Agreement.

64. In conclusion, there is no argument put forward by the Club that legitimates both the non-payment of the Agreement and the disproportionate interest and financial penalties associated with the non-payment of the principal sum.

65. These arguments have no connection with the failure to fully perform the Termination Agreement. Moreover, the Club never criticized the Player for his behavior during the entire contract period.

66. Neither the Club's unsatisfactory position in the 2019/2020 league table is a valid argument to consider the amount of interest and penalty clause disproportionate.

67. In light of all the above, the Respondent strictly implements the clauses of the Termination Agreement signed by the Parties and the provisions of Article 12 bis of the FIFA Regulations on the Status and Transfer of Players.

68. The Player therefore is entitled to receive the entire amount included in the Termination Agreement which are as follows:

- 371,250 EUR as outstanding remuneration regarding the Employment contract;
- 20,000 EUR as penalty;
- Interest at 10% calculated as follows:
  - 10% regarding the instalment of 123,750 that should have been paid on 30 June 2020
  - 10% regarding the instalment of 123,750 EUR that should have been paid on 25 July 2020

- 10% regarding the instalment of 123,750 EUR that should have been paid on 15 August 2020.

VI. JURISDICTION

69. The CAS jurisdiction derives from Article R47 of the CAS Code, that 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.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

70. In connection with the above-mentioned Article R47 of the CAS Code, the jurisdiction of the CAS, which has not been disputed by the parties, arises out of Articles 57 and 58 of the FIFA Statutes (2019 ed.) which in the pertinent part reads as follows:

"57: 1. FIFA recognizes 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…".

"58: 1. 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".

71. The Sole Arbitrator notes that the Appealed Decision has been issued by a FIFA legal body, that the FIFA Statutes provide for the recourse to the CAS and that all the prior legal remedies available to the Appellant have been exhausted, so the general conditions for the CAS to have jurisdiction in accordance with Article R47 of the CAS Code are met.

72. In addition, all the parties accepted that the CAS has jurisdiction to resolve this dispute and, moreover, confirmed it by signing the Order of Procedure.

73. Therefore, the Sole Arbitrator holds that the prerequisites of Article R47 of the CAS Code are met in this case and CAS is competent to rule on it.

VII. ADMISSIBILITY

74. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt

of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

75. As quoted at para.72, Article 58.1 of the FIFA Statutes (2019 ed.) states that appeals shall be lodged with CAS within 21 days of notification of the challenged decision.

76. The Sole Arbitrator notes that the admissibility of the Appeal is not contested by the Parties. The grounds of the Appealed Decision were notified to the Parties on 3 February 2021. The Appellant's Statement of Appeal was filed on 23 February 2021, i.e., within the 21-day deadline established by Article 58 of the FIFA Statutes and Article R49 of the CAS Code.

77. Consequently, the appeal filed by the Appellant is admissible.

VIII. APPLICABLE LAW

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

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

79. In addition, Article 57, paragraph 2 of the FIFA Statutes establishes the following:

> *"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

80. In accordance with these provisions, the Sole Arbitrator considers that the present dispute shall be resolved on the basis of the applicable FIFA Regulations and supplemented by Swiss law, if necessary.

IX. MERITS

81. The present proceedings arise out of the Appealed Decision issued on 10 December 2020 by the FIFA DRC, which partially accepted the Player's Claim and imposed the Club the obligation to pay the amount of 371,250 EUR plus interest as described in the Appealed Decision and the amount of 20,000 EUR as contractual penalty.

82. The FIFA DRC noted that the circumstances raised by the Club to justify its non-compliance with the financial obligations towards the Player, had to be considered as non-sufficient and concluded that there was no valid reason for the non-payment of the overdue amount claimed by the Claimant.

83. The Sole Arbitrator considers undisputed that on 21 May 2020, both Parties signed the Termination Agreement by means of which the Parties ended with its contractual relationship. Pursuant to the Termination Agreement, the club undertook to pay to the player the existing outstanding salaries as follows:

- 123,750 EUR on 30 June 2020;
- 123,750 EUR on 25 July 2020;
- 123,750 EUR on 15 August 2020;

84. It is also undisputed that the Club, despite the Player's request did not satisfy any of the three installments agreed by the Parties and that the total amount of 371,250 EUR remains outstanding up to date.

85. Once contextualized the situation of the case at stake, the Sole Arbitrator, in view of the Appealed Decision and the Parties' submissions and requests, before entering into the merits of the present case, deems it appropriate to identify and define the main issues that shall be analysed and resolved in the present case which are the following:

A. Is there any valid reason for the non-payment of the instalments established in the Termination Agreement?

B. If not, should the penalty clause be considered invalid or disproportionate?

C. Is the interest rate applied in the Appeal Decision disproportionate and should it be reduced?

86. These issues will be considered in turn.

A. Is there any valid reason for the non-payment of the instalments established in the Termination Agreement?

87. Firstly, the Sole Arbitrator notes that the Appellant has never denied nor objected to the outstanding remuneration claimed by the Player. In both the FIFA DRC and the CAS proceedings, the Club has accepted that it signed the Termination Agreement with the Player and that it has failed to pay all the outstanding amount. The Sole Arbitrator notes that said remuneration payments were included in the Termination Agreement as the core obligation of the Club. The Termination Agreement was agreed by the Parties in order to end with the contractual relationship between them and settle the outstanding salaries owed to the Player. It shall also be noted that even when the Player put in default the Club for the first time, the Appellant answered said first letter accepting owing the requested amount and confirming that its intention was to satisfy the payments towards the Club once they had transferred a certain player to a Chinese club. Even though such player seems to have been effectively transferred and despite the fact that the Club generated the legitimate expectation to the Player that it would comply with the Termination Agreement, the reality is that the Club never paid the

remuneration amount to the Player nor even contested the several formal letters that were sent by the Player requesting the payment.

88. The Appellant does not dispute having failed to comply with the Termination Agreement but tries to justify its breach based on the alleged poor financial situation that the club is going through due to the Covid-19 pandemic. In this regard, the Appellant considers that the Player somehow pushed the Club to accept the Termination Agreement that was finally signed by the Parties and that it did not take into account the extremely delicate financial situation of the Club. In this regard, the Sole Arbitrator finds difficult to follow the reasoning of the Club as it does not understand how the Player was supposed to push the Club to sign a non-beneficial agreement for the Club when the reality is that the Club was not any more interested in the professional services of the Player and still had outstanding salaries toward him.

89. In this regard, the Sole Arbitrator concludes that it has not been proven by the Club that it was somehow pushed to sign the Termination Agreement or that it was signed contrary to its will.

90. In light of all the above, the Sole Arbitrator concludes that the Player has not acted in bad faith or has forced in any possible way the Club to sign the Termination Agreement against its will, what therefore implies that the agreement is valid and has binding effects for both Parties.

91. Furthermore, the Sole Arbitrator notes that although the Appellant alleges that when it had to make the corresponding payments it was facing economic difficulties that were of such entity that impede the payment of the outstanding remuneration, the reality is that it has not filed in the present proceedings any evidence of the alleged financial distress.

92. Regarding the burden of proof, the Sole arbitrator recalls what it has been established in the CAS case CAS 2020/A/6796 that states the following:

"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue, In other words, the party which asserts facts to support its rights has the burden of establishing them (…). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence" (e.g. CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff)".

93. Despite the above, the Sole Arbitrator also notes that the economic situation derived from the Covid-19 pandemic cannot be considered in the present case, and taking into account the particularities of the same, as an exculpatory situation that justifies the non-compliance of the payment obligations of the Club towards the Player. In this regard, the Sole Arbitrator notes that the Termination Agreement was signed between the parties on 21 May 2020, that is to say, when the pandemic had already started and even after the re-start of the competitions was announced and the training sessions were starting to take place. Therefore, the Club, being fully aware of the pandemic situation and the economic consequences derived from it, decided

voluntarily to sign the valid and binding Termination Agreement and committed itself to pay the outstanding remuneration to the Player in three different installments. It shall also be noted that the Club never answered to the default letters sent by the Player requesting the outstanding amounts informing the Respondent of the alleged impossibility of complying with the outstanding remuneration owed to the Player or trying to find an amicable solution for both Parties. On the contrary, it confirmed in the letter sent on 6 July 2020 that the Club was undergoing a transfer operation and that once they received the first installment, scheduled on the following days, it would pay the Player immediately. As it has been above-mentioned, the rest of the letters sent by the Player requested the overdue amount remained unanswered.

94. In light of all the above, and taking into account that it is undisputed that the Club has not satisfied up to date the outstanding remuneration, the Sole Arbitrator concludes that the Club has to pay to the Player the amount of 371,250 EUR due to outstanding remuneration.

B. Is the penalty clause invalid or disproportionate?

95. Regarding the penalty clause amounting to 20,000 EUR that was included in the Termination Agreement and that should be applicable in the case that the Club did not pay any of the installments owed by the Player, the Appellant considers that the penalty clause lacks validity and is excessive and disproportionate and therefore not applicable to the case at stake, or, in a subsidiary way, the Club requests that the penalty clause is reduced due to its excessiveness.

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

97. Article 160 and subsequent of the CO regulates the penalty clauses under Swiss law and states in its Article 160.2 that *"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"*. It shall also be noted that article 163 of the CO enables the Parties to freely determine the amount of the contractual penalty.

98. The Sole Arbitrator notes that the penalty clause included in the Termination Agreement shall be considered as valid and applicable under Swiss law as it contains all the necessary elements required for such purpose. It shall also be taken into account that the Parties freely and voluntarily decided to include said penalty clause in the Termination Agreement and therefore the Appellant was fully aware of its inclusion when it signed the above-mentioned agreement. In addition, and pursuant to the principle of contractual freedom, it shall also be concluded that the Parties were free to determine the amount of the penalty clause.

99. Once established that the penalty clause is valid and effective in the case at stake, the Sole Arbitrator turns its analysis to the alleged excessiveness of the same. In this regard, it shall be

noted that Swiss law establishes in article 163(3) of the CO that the deciding body analysing the potential disproportion of the penalty clause shall reduce said clauses that are considered excessive at its discretion in order to warrant the principle of proportionality.

100. The Sole Arbitrator notes that Swiss law does not provide an exact definition of when a penalty shall be considered abusive or excessive. In light of what is established by the SFT, the deciding body must establish, in order to analyse the proportionality of a penalty clause, whether the penalty is excessive or not, and if so, the extent to which it should be reduced (ATF 82 II 142 consid. 3, JdT 1957 I 104). This proportionality analysis has to be done on a case-by-case basis taking into account the particularities of the case at stake.

101. Regarding the concept of excessiveness, the SFT has considered that a penalty is considered abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of the principles of justice and equity (ATF 82 II 43, consid. 3 and ATF 133 II 43, par. 3.3.1).

102. Regarding the criteria that has to be analysed by the deciding body in order to study the proportionality and excessiveness of the relevant penalty clause, the Sole Arbitrator wishes to note what has been established by the CAS jurisprudence in this regard, among others, CAS 2012/A/6809-6843:

"The criteria according to which contractual penalties shall be deemed as excessive and the extent to which a Panel may reduce them are to be found in Swiss case law. The SFT has established several criteria to define what an abusive amount is. The creditor's interest (ATF 103 II 129 = 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 intentional failure, along with the financial situation of both parties, are determinant. The economic dependence of the debtor, the disproportion between the damage and the penalty (ATF 52 II 223 JT 1926 I 442), the debtor's professional background (ATF 102 II 420, consid. 4 = JdT 1978 I 230) and not only the damage actually produced but also the risk of damage to which the creditor was exposed (ATF 133 iii 43 JT 2007 I 226) are also to be considered relevant when analysing the proportionality of a penalty clause".

103. Taking into account all the above-mentioned elements, the particularities of the case at stake and the conduct of the Club, the Sole Arbitrator considers that the penalty clause included in the Termination Agreement should not be considered excessive or disproportionate. The Sole Arbitrator notes, as it was established in the Appeal Decision by the FIFA DRC, that the penalty clause amounts to less than 6% of the total outstanding remuneration owed to the Player what therefore clearly demonstrates that it is far for being considered excessive, especially taking into account that the Club breached its financial obligations since the first moment. In this regard, the Club seems not to have made any single approach to intend to comply with its obligations towards the Player and even left unanswered 5 default letters sent by the creditor in which it requested the outstanding amounts.

104. In light of the above, the Sole Arbitrator considers the penalty clause of 20,000 EUR to be proportional and applicable to the case at stake, and confirms that it shall be paid by the Club.

C. Is the interest rate applied by the Appealed Decision disproportionate?

105. With respect to the applicable interest rate that is included in the Termination Agreement, the controversy lies in the fact that the Appellant alleges that said interest rate is disproportionate and therefore should be reduced accordingly and considers that it shall be established in a maximum of 5% p.a.

106. The Appealed Decision considers that the 10% annual interest, being the one agreed upon by the Parties in the Termination Agreement and not being contrary to any legal system and especially burdensome, should be applied to the overdue amount.

107. The Sole Arbitrator notes that Article 104.2 of the Swiss CO establishes that *"Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default"*. Therefore, it shall be concluded that nothing prevents the Parties to negotiate and establish a higher amount of interest as the default interest of 5% p.a contemplated in article 104(1) of the SCO.

108. In addition, and as stated in CAS 2010/A/2128, this contractual freedom is not unlimited as the outcome would have to remain compatible with Swiss law when applicable. In this regard, the Sole Arbitrator notes that an interest rate below 18% are considered by the SFT jurisprudence as to be in line with the maximum level of interest applicable under Swiss law. There is no regulation that establishes that an interest rate of 10% is excessive or disproportionate and therefore the Sole Arbitrator, complying with the principle of *pacta sunt servanda,* finds that there is no reason to reduce the 10% p.a. interest rate.

109. In light of all the above, the Sole Arbitrator decides to dismiss in its entirety the Club's Appeal and confirms entirely the FIFA's DRC decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Yeni Malatyaspor FK against the decision rendered on 10 December 2020 by the Single Judge of the FIFA Dispute Resolution Chamber is rejected.

2. The decision rendered on 10 December 2020 by the Single Judge of the FIFA Dispute Resolution Chamber is confirmed.

3. (…).

4. (…).

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