



**Arbitration CAS 2018/A/5857 Sociedade Esportiva Palmeiras v. Al Shaab Football Club Co. LLC, award of 18 July 2019**

Panel: Mr Mark Hovell (United Kingdom), President; Mr Rui Botica Santos (Portugal); Mr Manfred Nan (The Netherlands)

*Football*

*Termination of a loan transfer agreement*

*Time limit to file the hard copies of the written submissions*

*Power to reduce excessive contractual penalties*

*Factors to consider when deciding whether to reduce a penalty clause*

1. Even though written submissions are electronically filed before the 21 day deadline expires, the party has until the first business day after the 21 day deadline expires to submit the hard copies by courier. The wording *“the first subsequent business day of the relevant time limit”* under Article R31 of the CAS Code cannot be interpreted as meaning that if a party files written submissions by email on Day 1 of the 21-day time limit it has to submit the hard copies by Day 2, or face having the appeal deemed inadmissible even though there is still 19 days left in the time limit to file an appeal.
2. In principle, under Swiss law, parties are free to determine the amount of a penalty clause. However, the judge or the arbitral panel shall reduce penalties that it considers excessive at its discretion. Swiss law does not state clearly what an excessive penalty is, so it is for the panel 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.
3. The reduction of a penalty is reserved only for exceptional cases when the penalty is grossly unfair. Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation. The factors to consider when deciding whether a reduction of a penalty clause is applicable, are as follows: (i) the creditor’s interest in the other party’s compliance with the undertaking; (ii) the severity of the default or breach; (iii) the intentional failure to breach the main obligation; (iv) the business experience of the parties; and (v) the financial situation of the debtor.

## **I. PARTIES**

1. Sociedade Esportiva Palmeiras (“Palmeiras” or the “Appellant”) is a football club with its registered office in São Paulo, Brazil. Palmeiras is currently competing in the Campeonato Brasileiro Série A, which is the highest division in Brazil. It is a member of the Confederação Brasileira de Futebol (the “CBF”), which in turn is affiliated to Fédération Internationale de Football Association (“FIFA”).
2. Al Shaab Football Club Co. LLC (“Al Shaab” or the “Respondent”) is a football club with its registered office in Sharjah, United Arab Emirates (the “UAE”). Al Shaab is currently competing in the UAE Arabian Gulf League, which is the highest division in the UAE. It is a member of the UAE Football Association (the “UAE FA”), which in turn is affiliated to FIFA.

## **II. FACTUAL BACKGROUND**

3. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

### **A. The Loan and Employment Agreements**

4. On 17 September 2015, Al Shaab made an offer to Palmeiras for a loan transfer of the Brazilian footballer Vinícius Santos Silva (the “Player”).
5. On 18 September 2015, Palmeiras made the necessary arrangements in order to conclude the loan transfer of the Player to Al Shaab, including terminating an existing loan of the Player to the Brazilian club Sporting Club Ceará (“Ceará”).
6. On 19 September 2015, Palmeiras sent a draft version of a loan agreement to Al Shaab.
7. On 20 September 2015, Palmeiras, Al Shaab and the Player signed a loan transfer agreement based on which the Player was to be loaned from Palmeiras to Al Shaab for the period between 21 September 2015 and 30 June 2016 without any fee (the “Loan Agreement”). The Loan Agreement contained the following material provisions:

*“4.1 During the term of this Agreement, [Al Shaab] shall be fully responsible to pay the wages, bonus and/or any other remuneration agreed in respect of the New Player Contract (hereinafter the “Salary”).*

...

4.3 *If [the Player] obtains an order at law or arbitral to terminate the New Player Contract due to a wrongful act or omission or the misconduct of [Al Shaab], [Al Shaab] shall pay to [Palmeiras] net compensation of € 2,000,000.00 (two million euros), to compensate [Palmeiras] for the loss of the economic and federative rights in respect of [the Player] that derive from the termination of the New Player Contract.*

...

5.2 *Neither [Al Shaab] nor [the Player] may terminate this Agreement or the New Player Contract without formal and express consent of [Palmeiras] except in case of the event described in Clause 5.8.*

...

5.5 *It is hereby agreed that [Al Shaab] will have the option to acquire permanently 100% (one hundred per cent) of [the Player's] federative rights from [Palmeiras] (hereinafter the "Option to Buy") by paying to [Palmeiras] the total amount of € 2,000,000.00 (two million euros).*

...

5.6 *It is hereby agreed between the Parties that in any case of infringement of the Agreement by any Party, the Party who infringe the agreement shall be obliged to pay to the other, the amount of € 1,000,000.00 (one million euros) as an agreed compensation without the need to prove any damages.*

5.7 *[Al Shaab] and/or [the Player] cannot terminate this instrument or the New Player Contract without the formal written consent of [Palmeiras], otherwise [Al Shaab] will have to pay to [Palmeiras], gross wages of [the Player] stipulated in the Employment Agreement signed between [the Player] and [Palmeiras], in the period between the termination date and the date of 30.06.2015, and also pay the fine stipulated in clause 5.6.*

...

7.1 *Notices between the parties relating to this Agreement must be in writing and must be delivered personally or sent by prepaid first-class post, prepaid air mail post or facsimile transmission to the address set out opposite the parties above or to the fax number as set out below, unless alternative details have been notified by a party for the purposes of this clause".*

8. On 21 September 2015, the Player and Al Shaab entered into an employment agreement for the period 21 September 2015 until 30 June 2016 (the "Employment Agreement").

## **B. The termination of the Loan and Employment Agreements**

9. On 21 September 2015, the Player received his flight tickets from São Paulo to Dubai. The Player received these tickets from his agent, who had been provided the tickets by Al Shaab. The flight was an Emirates flight departing Sao Paulo at 21:05 Brazilian time on 21 September

2015. The Panel notes that the arrival time in Dubai of the flight was 21:50 Dubai time on 22 September 2015.

10. On 21 September 2015, Al Shaab sent an email to Palmeiras stating as follows<sup>1</sup>:

*“Dear Sirs,*

*We would like to inform you that we canceled the TMS procedure because the [Player] did not arrive to UAE at 21/09/2015 which was mentioned in the [Loan Agreement] so we could not have time to finish our internal procedures with [UAE FA]”.*

11. Shortly thereafter on the same day, Palmeiras wrote to Al Shaab stating as follows:

*“First of all, the contract never mentioned that if the player did not arrive to UAE until 21.09.2015 the agreement would be terminated. Please find attached (again) the contract signed by Palmeiras, [Al Shaab] and [the Player].*

*Furthermore, [the Player’s] arrival in UAE it’s not reasonable and legal excuse to terminate the agreement. Still, if it was, it is of public acknowledgement that [Al Shaab] should have taken all necessary measures to assure [the Player’s] flight to UAE. In spite of that, we have been informed that [Al Shaab] has not provided the [Player] with flight tickets and has cancelled the his working visa to make sure that he does not arrive in UAE!*

*Therefore, Palmeiras will give you a deadline of 24 hours to take the necessary measures to register the [Player]. Should [Al Shaab] fail to comply with its obligations, Palmeiras will have no alternative but to charge the penalty of USD [sic- EUR] 1,000,000.00 under clause 5.6 of the Transfer Agreement and file a claim before FIFA seeking compensation as well as the imposition of disciplinary penalties to [Al Shaab]”.*

12. Shortly thereafter on the same day, Al Shaab wrote to Palmeiras stating as follows:

*“[Al Shaab] did not cancel the players ticket because the person who made the reservation was the agent of the [Player] and he is resposable for the arrival of the [Player] to UAE and the [Player] did not ask us for an tickets because he wanted to book from his side or by agent side and our club did not cancel the players visa till now and it is still valid and we will send you official letter from our club to explain the situation”.*

13. On 22 September 2015, Al Shaab sent a letter to Palmeiras, stating as follows:

***“Subject: Report about major Irregularities in contract terms***

*Please note that the [Player] did not join [Al Shaab] till this moment, (22/09/2015) which make a great violation for the triple loan agreement signed by the parties.*

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<sup>1</sup> The Panel notes that the emails and letters summarised in this section contained numerous spelling or grammatical errors from both Palmeiras and the Club. Instead of repeatedly stating [sic] throughout, the various letters and emails have been quoted verbatim.

*According to the [Loan Agreement] the [Player] necessarily should join the [Club] in 21/09/2015, and the [Player] pledged to join Al Shaab in 20/09/2015, Al Shaab got a visa for the player to enter the UAE in date 20/09/2015 (a copy of visa is attached).*

*We repeatedly emphasized that the last date to register the players in UAE Football Federation is in 21/09/2015 and the federation offices officially close at 05:00 o'clock.*

*Knowing that entering the [Player] to UAE is an obligatory term to register in [UAE FA], and it was impossible to complete the registration for reasons heard by the player and his club [Palmeiras], where [Al Shaab] has no responsibility for this violation.*

*Through his agent, the player pledged to enter UAE on Sunday afternoon, and the appointment was delayed several times for reasons that were not understood, last one was losing the [Player] for his passport, which reflects unserious will about coming to UAE for unclear reasons.*

*And According to the great violation which was made by you and the [Player], that caused the [Club] to lose his opportunity to register an essential and very important foreign player in his coming competitions.*

*Please note that:*

1. *our [Loan Agreement] is terminated because of the essential violation by the [Player] for not coming in the agreed date for registration which was agreed in [the Loan Agreement].*
  2. *[Al Shaab] keeps his legal right to claim the [Player] and [Palmeiras] for a compensation for all moral and material damages they caused by not coming on the agreed date”.*
14. On 24 September 2015, the Player sent a letter to Al Shaab clarifying that no violation of the Employment Agreement had occurred, he was ready to fulfil his obligations towards Al Shaab and gave Al Shaab 48 hours to take the necessary steps to fulfil the Employment Agreement.
  15. On 28 September 2015, Al Shaab sent an email to the Player requesting an additional 48 hours to present its final position regarding the matter. However, Al Shaab never wrote to the Player again.
  16. On 1 October 2015, Palmeiras wrote to Al Shaab stating, *inter alia*, that due to Al Shaab's silence, Palmeiras deemed the Loan Agreement had been unilaterally terminated by Al Shaab. As such, Palmeiras requested the payment of EUR 1,120,000 within 24 hours pursuant to clauses 5.6 and 5.7 of the Loan Agreement. Al Shaab did not respond to this correspondence.
  17. On 5 November 2015, in light of Al Shaab's failure to respond to its previous notice, Palmeiras wrote to Al Shaab again requesting the payment of EUR 1,120,000 pursuant to clauses 5.6 and 5.7 of the Loan Agreement. Al Shaab did not respond to this correspondence either.

### C. Proceedings before FIFA

18. On 15 October 2015, Al Shaab filed a claim at the FIFA Dispute Resolution Chamber (the “FIFA DRC”) against the Player and Palmeiras, requesting, *inter alia*, that the Player and Palmeiras be held liable for damages totalling USD 2,705,000 for (i) compensation for breach of contract; (ii) the violation of the breach of confidentiality and privacy; and (iii) for fees and expenses.
19. On 14 December 2015, Palmeiras filed a claim against Al Shaab before the FIFA Players’ Status Committee (the “FIFA PSC”), requesting the payment of the following amounts:
- EUR 1M, based on Article 5.6 of the Loan Agreement plus 5% interest p.a. as of 21 September 2015; and
  - EUR 105,235, as mandatory employment benefits, salaries and leave bonus that Palmeiras had to pay to the Player during the months he would be on loan at Al Shaab plus 5% interest p.a. as of 21 September 2015.
20. On 8 March 2018, the FIFA PSC rendered its decision as follows (the “Appealed Decision”):
- “1. *The claim of [Palmeiras] is partially accepted.*
  2. *[Al Shaab] has to pay to [Palmeiras], **within 30 days** as from the date of notification of this decision, the amount of Brazilian Reals (BRL) 372,000, plus 5% interest p.a. on said amount as from 14 December 2015 until the date of effective payment.*
  3. *In the event that the amount due to [Palmeiras] in accordance with the above-mentioned number 2. is not paid by [Al Shaab] within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
  4. *Any further claim lodged by [Palmeiras] is rejected ...”.*
21. The grounds of the Appealed Decision were notified to the Parties on 13 July 2018.

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

22. On 2 August 2018, in accordance with Article R47 of the Code of Sports-related Arbitration (the “CAS Code”), Palmeiras filed a Statement of Appeal with the CAS challenging the Appealed Decision. In its Statement of Appeal, Palmeiras requested the appointment of Mr Rui Botica Santos, Attorney-at-law, Lisbon, Portugal as arbitrator. Further, Palmeiras also stated as follows:
- “23. *[Palmeiras] informs that there were two proceedings before FIFA regarding the same facts, i.e. the termination of the Employment Agreement and the Loan Agreement, involving the [Player], [Al Shaab] and [Palmeiras].*

19. *Given the fact that [the Player] has also appealed to CAS against the decision rendered by FIFA on case ref. 15-01762/pam, the [Palmeiras] would not object to the consolidation of the proceedings.*
20. *Should the CAS understand that such consolidation is not possible, [Palmeiras] informs that it would also not object to the appointment of the same Panel to adjudicate on both appeals”.*
23. On 23 August 2018, in accordance with Article R51 of the CAS Code, Palmeiras filed its Appeal Brief with the CAS.
24. On 23 August 2018, the CAS Court Office wrote to the Parties confirming that given the absence of any objection by Al Shaab, the same Panel would be appointed to the present proceedings and the separate CAS proceedings *CAS 2018/A/5861 Vinicius Santos Silva v. Al Shaab Football Club Co. LLC*, unless there was an objection from the President of the CAS Appeals Arbitration Division, or her Deputy.
25. On 29 August 2018, Al Shaab wrote to the CAS Court Office nominating Mr Manfred P. Nan, Attorney-at-Law, Arnhem, Netherlands, as arbitrator.
26. On 22 October 2018, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:
  - President: Mr Mark A. Hovell, Solicitor, Manchester, United Kingdom
  - Arbitrators: Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal  
Mr Manfred P. Nan, Attorney-at-Law, Arnhem, Netherlands
27. On 12 November 2018, in accordance with Article R55 of the CAS Code, Al Shaab filed its Answer with the CAS Court Office. In its Answer, Al Shaab requested, *inter alia*, that Palmeiras’ Appeal be dismissed as inadmissible.
28. On 16 November 2018, Palmeiras wrote to the CAS Court Office confirming its preference for a hearing to be held in this matter, and requested that if a hearing is held, that it be held on the same day as the hearing for CAS 2018/A/5861.
29. On 19 November 2018, Al Shaab wrote to the CAS Court Office confirming its preference for a hearing to be held in this matter.
30. On 4 December 2018, the CAS Court Office wrote to the Parties confirming that Mr Tiran Gunawardena, Solicitor, London, United Kingdom was appointed as an *ad-hoc* clerk in this matter. Further, the CAS Court Office confirmed to the Parties that a hearing would be held in this matter on 13 February 2019.
31. On 7 December 2018, the CAS Court Office wrote to the Parties confirming that the Panel had decided that the Appeal shall be deemed admissible, and that its reasons would be included in the present Award.
32. On 28 February 2019, Palmeiras submitted a signed copy of the Order of Procedure.

33. On 5 March 2019, Al Shaab submitted a signed copy of the Order of Procedure.

#### **IV. HEARING**

34. A hearing was held on 13 February 2019 in Lausanne, Switzerland. The Parties did not raise any objection as to the composition of the Panel. The Panel were all present and was assisted by Mrs Andrea Sherpa-Zimmermann, Legal Counsel at the CAS, and Mr Gunawardena, *ad-hoc* clerk. Furthermore, the following persons attended the hearing:

- i. Palmeiras: Mr Leonardo Matsuno Holanda, in-house counsel; Mr André Carvalho Sica and Mr Américo Ribeiro Espallargas, external counsel; and
- ii. Al Shaab: Mr Luca Smacchia, external counsel.

35. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. The hearing was then closed and the Panel reserved its detailed decision to this written Award.

36. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their respective rights to be heard and to be treated equally in these arbitration proceedings. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

#### **V. THE PARTIES' SUBMISSIONS**

37. 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 Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

##### **A. Palmeiras' submissions**

38. In its Statement of Appeal, Palmeiras requested the following prayers for relief:

- (i) To enforce CAS' jurisdiction as competent to rule on the matter;*
- (ii) To amend the [Appealed Decision];*
- (iii) To rule that Al Shaab shall pay [Palmeiras] one million Euros (€1.000.000,00), as compensation for unilateral termination of the Loan Agreement without just cause;*
- (iv) To rule that Al Shaab to pay an additional 5% (five per cent) annual interest on the amount due to [Palmeiras] from the date of default, namely from 21 September 2015;*
- (v) To rule the [Al Shaab] responsible for covering all costs of the proceedings;*



(vi) *To order the [Al Shaab] to pay a contribution towards [Palmeiras] legal fees and other expenses incurred in connection with the proceedings in an amount deemed fit by the Hon. Panel”.*

39. In its Appeal Brief, Palmeiras requested the following prayers for relief:

“(i) *To enforce CAS’ jurisdiction as competent to rule on the matter;*

(ii) *To amend the [Appealed Decision];*

(iii) *To confirm that [Al Shaab] has unilaterally terminated the [Loan Agreement] without just cause;*

(iv) *To rule that the [Al Shaab] shall pay additional compensation to [Palmeiras] of EUR 1,000,000.00 (one million euros) due to the early termination of the [Loan Agreement] without just cause on top of the BRL 372,000 awarded by the [Appealed Decision];*

(v) *To rule that [Al Shaab] shall pay an additional 5% (five per cent) annual interest on the total amount due to [Palmeiras] from the date of default, namely from 21 September 2015;*

(vi) *To rule [Al Shaab] responsible for covering all costs of the proceedings;*

(vii) *To order [Al Shaab] to pay a contribution towards [Palmeiras] legal fees and other expenses incurred in connection with the proceedings in an amount deemed fit by the Hon. Panel”.*

40. In summary, Palmeiras submitted the following arguments in support of its Appeal:

***i. The inconsistency in the Appealed Decision***

41. Palmeiras argued that the outcome of the Appealed Decision was “clearly inconsistent” with the considerations made by the FIFA PSC in the Appealed Decision. Palmeiras believed that the FIFA PSC erred in awarding compensation solely under clause 5.7 of the Loan Agreement and ignoring clause 5.6.

42. Palmeiras noted that the Loan Agreement clearly stated that in case of infringement of the contract, the infringing party would be obliged to pay the other party EUR 1M. Clauses 5.6 and 5.7 of the Loan Agreement stated:

“5.6 *It is hereby agreed between the Parties that in any case of infringement of the Agreement by any Party, the Party who infringe the agreement shall be obliged to pay to the other, the amount of € 1,000,000.00 (one million euros) as an agreed compensation without the need to prove any damages.*

5.7 *[Al Shaab] and/or [the Player] cannot terminate this instrument or the New Player Contract without the formal written consent of [Palmeiras], otherwise [Al Shaab] will have to pay to [Palmeiras], gross wages of [the Player] stipulated in the Employment Agreement signed between [the Player] and [Palmeiras], in the period between the termination date and the date of 30.06.2015, and also pay the fine stipulated in clause 5.6”.*

43. Palmeiras therefore argued that:

*“The amount of compensation awarded in the [Appealed Decision] ignored all damages sustained by [Palmeiras], such as, inter alia, sporting damages, the loss of market value of the [Player] and the loss of an opportunity to receive compensation in exchange for the transfer of the [Player] to third clubs. The [Appealed Decision] considered solely the salaries Palmeiras had to pay the [Player]. With due respect, this is a sheer contradiction”.*

44. Palmeiras disagreed that the penalty clause was “manifestly disproportionate and exorbitant” and submitted that it was “fair, equitable and was freely negotiated between the Parties at an arms-length. To this extent, it reflects liquidated damages agreed by the Parties especially in light of the fact that there was an Option to Buy in favour of [Al Shaab]”.
45. Given that the Appealed Decision ruled that Al Shaab was in breach of the Loan Agreement, Palmeiras submitted that it was necessary that the terms agreed between the Parties be applied in full.

***ii. The unilateral termination of the Loan Agreement without just cause***

46. Palmeiras submitted that it was undisputed that Al Shaab terminated the Loan Agreement without just cause, in violation of the FIFA Regulations on the Status and Transfer of Players (the “RSTP”). Contrary to Al Shaab’s submissions, there was no provision in the Loan Agreement which required the Player to be present in the UAE on 21 September 2015 so there were no grounds for Al Shaab to terminate the contract. As such, Al Shaab must compensate Palmeiras.

***iii. Compensation to be awarded to Palmeiras under the Loan Agreement***

47. Palmeiras made the following submissions regarding the amount of compensation owed to it by Al Shaab.

***a. The application of the principles of pacta sunt servanda and in claris non fit interpretatio***

48. Palmeiras noted that the principle of *pacta sunt servanda* applies in the sphere of international agreements and must be taken into account in breaches of contract committed by clubs or players.

49. Palmeiras noted that the CAS panel in *CAS 2008/A/1644* stated:

*“Indeed, the Regulations confirm only the binding force of employment contracts, according to the principle “pacta sunt servanda”, well known in all domestic legal systems, and set the substantive and procedural rules determining the consequences of the breach of such contracts in a manner consistent with domestic law. The obligation to pay compensation, in other words, is the counterpart of the binding force of the contract, and does not imply an unlawful restriction of competition. The circumstance, then, that substantial acquisition costs imply the payment of large compensations in the event of breach by the players is, in this context, only the result of the application of general rules, allowing for compensation of wasted expenditure: the larger the damage, the greater the compensation”.*

50. Further, the CAS panel in the *Webster* case (CAS 2007/A/1298, 1299, 1300) stated:

“4. *Article 17 of the FIFA Status Regulations is not a provision that allows a club or a player unilaterally to terminate an employment contract without cause. On the contrary, any such termination is clearly deemed a breach of contract. This is a logical consequence of article 13 which underlines the principle pacta sunt servanda. Thus, unilateral termination must be viewed as a breach of contract even outside the Protected Period*”.

51. Palmeiras argued that this principle meant that once contracts were completed, the provisions agreed are mandatory to the Parties. In that regard, clause 5.2 and 5.7 of the Loan Agreement expressly forbade the early termination of the contract by Al Shaab without Palmeiras’ consent. Both clauses were breached by Al Shaab when it terminated the Loan Agreement. As a consequence, Al Shaab cannot be exempt from payment of the compensation it was required to pay under the Loan Agreement, which was freely negotiated between the Parties.

52. Palmeiras also noted that penalty clauses were permissible in contracts under Article 163 of the Swiss Civil Code (the “SCC”), which states:

“1. *The parties are free to determine the amount of the contractual penalty*”.

53. Palmeiras noted that penalty clauses were a common legal remedy for protection of the interests of a creditor in case a debtor fails to comply with its contractual obligations. The logic behind penalty clauses is to encourage compliance with contractual obligations. Therefore, the penalty clauses are enforceable under Swiss law. Palmeiras submitted that clause 5.6 was a penalty clause which legally constituted a liquidated damages clause.

54. Further, COUCHEPIN (COUCHEPIN G., *La clause pénale*, Zurich 2008, § 395 ff, § 410 ff and § 417 ff) stated the following in relation to Swiss law:

*“The following characteristics have been attributed to penalty clauses under Swiss law:*

- *They are conditional, as the obligation to pay the penalty fee only exists in case of non-performance or defective performance;*
- *They are autonomous (given that they generate a separate obligation in the contract in which they are included), but accessory (as they arise from the non-fulfilment of an obligation which they aim at reinforcing). This means that the nullity of the main obligation will render the penalty void”.*

55. Palmeiras argued that the above requirements were fully met in the present case, since (a) clauses 5.2 and 5.7 of the Loan Agreement forbade the early termination of the contract by the Parties, (b) clause 5.6 of the Loan Agreement established a penalty clause of EUR 1m for the party which breached the contract unlawfully, and (c) clause 5.7 reiterated the need of the party in breach to pay the fine under clause 5.6. Palmeiras also noted that the penalty clause was bilateral, as it applied to both Parties.

56. Palmeiras also noted that clause 5.6 did not leave room for interpretation as its wording is clear and unambiguous. Pursuant to the principle of *in claris non fit interpretatio*, the language of

the provision should govern its interpretation (CAS 2008/A/1545). Given that the wording of the clauses are clear and unambiguous, Palmeiras argued that the Panel does not need to look into alternate interpretations of clauses 5.6 and 5.7.

*b. Amount of compensation due – salaries paid, liquidated damages and proportionality*

57. Palmeiras noted that the Parties entered into the Loan Agreement on their own free will and agreed to the mandatory obligations and duties therein. Palmeiras also noted that it lost the opportunity to transfer the Player and obtain a financial gain due to the unilateral termination of the Loan Agreement without just cause by Al Shaab. Palmeiras also noted that it had to honour the employment contract which it had with the Player for the last 3 months of the 2015 Brazilian season, even though it could not play him as he was not registered, and could not be registered.
58. Those three months were detrimental to not only the Player's career, but also Palmeiras' prospects of selling the Player. Indeed, after these events, the Player eventually left Palmeiras as a free agent, meaning that the club "*never profited from its young and promising talent*". Palmeiras argued that it must be compensated for this loss of opportunity.
59. Palmeiras submitted that the penalty clause of EUR 1M was included for the exact reason that it was to substitute the calculation of losses of the Parties in case of non-compliance of the Loan Agreement. This was in addition to the damages that could be calculated, i.e. the salaries paid to the Player.
60. Palmeiras argued that although the loan of the Player to Al Shaab was free of charge, there were "*additional conditions with high economic value in the business of the transfer*". To this extent, clause 5.5 of the Loan Agreement gave Al Shaab the option to permanently acquire the Player's registration by paying EUR 2M. Palmeiras lost the opportunity to receive that money due to Al Shaab's termination of the Loan Agreement. Al Shaab also had the right of first refusal should a third club wish to hire the Player.
61. Palmeiras claimed that the insertion of the penalty clause was not by chance, it was to protect both Parties in case of a breach of contract, and the consequences of such a breach were agreed and defined in the penalty clause. Moreover, the clause was bilateral, so also protected Al Shaab, not just Palmeiras.
62. Accordingly, Palmeiras argued that the penalty clause was "*manifestly proportional and equitable*" and requested the Panel to rule that Al Shaab must pay it EUR 1M in addition to the BRL 372,000 awarded in the Appealed Decision.

**B. Al Shaab's submissions**

63. In its Answer, Al Shaab requested the following prayers for relief:

‘I. To acknowledge that the appeal filed by [the Player] is inadmissible confirming the [Appealed Decision].

- II. *In case the appeal filed by [the Player] is deemed admissible, to dismiss it in the merit.*
- III. *In any case, to condemn [the Player] to pay all the arbitration costs as well as to pay a contribution towards [Al Shaab] equal to CHF 10.000,00 or to the sum deemed opportune by the Panel, for the expenses and legal costs borne in relation to the present procedure”.*

64. In summary, Al Shaab submitted the following arguments in support of its Answer to the Player’s Appeal:

***i. The non-enforceability of clause 5.6 of the Loan Agreement***

65. Al Shaab agreed that there were two clauses which set out the financial consequences of a breach of contract, which were clauses 5.6 and 5.7 of the Loan Agreement.

66. Al Shaab argued that whereas clause 5.7 “*can be considered logic and reasonable, as it is suitable with the context of the whole agreement*”, clause 5.6 was “*totally untied from the rest of the contract and its application results in unbalanced and unjustified consequences that are completely abusive and cannot be permitted by CAS*”. Al Shaab argued that given the loan of the Player was for free, there is “*not even one possible situation of contractual infringement that may justify the payment of the sum provided by clause 5.6*”.

67. Al Shaab also submitted that applying the literal wording of clause 5.6 to the entire Loan Agreement would lead to “*completely illogical consequences*”. For example, if the Player failed to notify Palmeiras immediately in the event Al Shaab failed to pay his salary (clause 4.4), he would be obliged to pay Palmeiras EUR 1M. A similar situation would arise if he failed to return to Palmeiras within 72 hours of the loan expiring (clause 5.1).

68. Al Shaab submitted that the “*immoral and abusive nature*” of the penalty clause meant that it should be null and void under Articles 19 and 20 of the Swiss Code of Obligations (“SCO”) as well as its non-enforceability under Articles 2 and 27 of the SCC.

69. Al Shaab claimed that it was not clear whether the clause would even be considered a penalty clause under Swiss law. Al Shaab argued that a penalty clause is an accessory provision whereby a debtor promises an agreed penalty to the creditor in case the debtor does not perform or improperly performs a defined obligation that usually is the main one of the deal. The function of the penalty clause is to strengthen the primary obligation of the contract in order to ensure its accomplishment. In brief, the penalty clause shall be accessory to the principal obligation that shall be clearly identifiable. In the present case, Al Shaab argued that clause 5.6 is worded very generically and does not limit the operation of the clause to the execution of a specific obligation. Al Shaab claimed that penalty clauses usually refer to a specific obligation (e.g. payment within a fixed term), and not a generic infringement of any provision.

70. This is exactly the element that makes clause 5.6 abusive and unenforceable in light of Article 2 of the SCC, also considering the sum thereby provided as compensation.

71. Al Shaab referred to Article 160 of the SCO, which states:

- “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”.*

72. Further, according to Swiss doctrine (COUCHEPIN G., *La clause pénale*, Zurich 2008, § 462), a provision can be considered a penalty clause if it contains all the necessary elements required for such purpose as follows:

- a) *the parties bound thereby are mentioned;*
- b) *the kind of penalty has been determined;*
- c) *the conditions triggering the obligations to pay it are set;*
- d) *its measure is identified”.*

73. Al Shaab noted that clause 5.6 could apply to even non-severe breaches which would be even more disproportionate and abusive. Al Shaab argued that the correct execution of the obligations under the contract are “*guaranteed in a proportional and rational manner*” by clause 5.7 of the Loan Agreement, thereby making clause 5.6 even more abusive and excessive.

74. Al Shaab also submitted that even if the Panel were to consider clause 5.6 as a valid penalty clause, it would still not be applicable under Swiss law.

75. Whilst Parties are free to agree on penalty clauses in a contract under Swiss law, this freedom is limited by Article 163 of the SCO, which states:

- “1. *The parties are free to determine the amount of the contractual penalty.*
2. *The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor’s control.*
3. *At its discretion, the court may reduce penalties that it considers excessive”.*

76. As such, excessive penalty clauses could be reduced. This reduction takes place where there is a significant disproportion between the amount agreed and the interest of the creditor to maintain its entire claim, to be measured at the moment the contractual violation took place. According to the Swiss Federal Tribunal (the “SFT”), the reduction can take:

*“If the relationship between the amount of the penalty agreed upon on the one hand and the interest of the creditor worthy of protection on the other hand is grossly disproportionate (ATF 1114 II 264 seq.)”.*

77. Furthermore, the SFT pointed out that 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) and to this scope a balance of interest of various elements shall take place. In particular, the SFT established the following criteria that can be taken into account:
- “a) the nature and the duration of the contract;*
  - b) the degree of fault of the contractual violation;*
  - c) the evident disproportion between the effective damage and the amount of the penalty”.*
78. Moreover, according to the SFT, the burden of proving the facts that lead to conclude that one is in presence of an abusive penalty lies within the debtor (ATF 133 III 43, consid. 4.1.). However, in relation to the actual damages suffered by the creditor this requirement is lighter as it cannot be assumed that the debtor is aware of this damage. Thus, the SFT considers that the creditor has to prove its loss (SFT 4A\_141/2008).
79. Applying the above SFT criteria, Al Shaab submitted that it was undisputable that no compensation should be due to Palmeiras under clause 5.6.
80. Al Shaab noted that the Loan Agreement was valid for 9 months with no transfer fee. Further, it claimed that the Appealed Decision set out that there *“was no intentionality in the conduct of Al Shaab”*.
81. Al Shaab also argued that at the time of concluding the Loan Agreement, it was clear that the Player was not a part of the sporting project of Palmeiras as he was out on loan at Ceara. Moreover, after the breach of contract by Al Shaab, the Player remained at Palmeiras and was then loaned out to Coritiba. As such, the damage suffered by Palmeiras merely corresponds to the salary paid to the Player from October to December 2015. No other damage was suffered or demonstrated by Palmeiras. Given the Appealed Decision and clause 5.7, Al Shaab submitted that Palmeiras had already been compensated with three times the amount of damages it had suffered.
82. Al Shaab also submitted that it never requested the option to permanently acquire the Player’s registration. It merely sought a loan for the Player, but during the short negotiations Palmeiras insisted – indeed *“imposed”* – the option in the agreement. Given the short timeframe in which to finalise the deal, Al Shaab ultimately accepted the inclusion of the option as it never intended to exercise the option in any event. However, Al Shaab submitted that the value of the option (i.e. EUR 2M) should not be taken as an indication of the market value of the Player.
83. Al Shaab also rejected Palmeiras’ argument that it lost the chance to transfer the Player, as it never lost the Player’s registration and never terminated the Player’s contract. So Palmeiras always kept the opportunity to transfer the Player. Al Shaab argued that if Palmeiras failed to

transfer the Player for a sum after the events in question, *“maybe it did not do so as the Player was not that good”*.

84. Al Shaab rejected Palmeiras’ argument that the three month period in which the Player could not play any matches was *“considerably detrimental”* to the Player, and noted that Palmeiras failed to demonstrate how this was the case. Al Shaab noted that the Player only missed 11 matches of the Brazilian Serie A from October to December 2015.
85. Al Shaab also noted that Palmeiras were attempting to link their eventual release of the Player for no transfer fee to the events in this dispute, however there was no evidence that Al Shaab’s breach of contract caused this. Al Shaab suggested that this could have instead been due to the Player’s own poor performances. Al Shaab noted that in 2015-16, the allegedly young and talented Player only played 2 entire matches (with other matches where he was used as a substitute).
86. Al Shaab submitted that the penalty clause is clearly excessive and must be reduced. Al Shaab cited CAS 2015/A/4057 in which a penalty clause representing 1.5 times the transfer compensation provided for was considered excessive, and also SFT 4C\_374/2006 in which a penalty representing 20% of the purchasing price was deemed abusive as (i) the selling party did not suffer a loss serious enough to justify such a penalty and (ii) the reasons for not paying were out of the debtor’s control.
87. In the present circumstances, Al Shaab submitted that clause 5.6 should therefore be reduced to zero, and claimed that any other amount awarded in addition to damages under clause 5.7 would result in the unjustified abuse of the rights of Al Shaab.

## **VI. JURISDICTION OF THE CAS**

88. 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.*

*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”.*

89. Moreover, Palmeiras relied on Articles 57 and 58 of the FIFA Statutes. The jurisdiction of CAS was not disputed by the Parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both Parties.
90. It follows that the CAS has jurisdiction to hear this dispute.



## VII. ADMISSIBILITY

91. The grounds of the Appealed Decision were notified to the Parties on 13 July 2018. The Statement of Appeal was filed on 2 August 2018. However, Al Shaab argued that the Statement of Appeal should have been deemed inadmissible for being filed late.
92. The Panel notes that Article R31 of the CAS Code states, *inter alia*, (emphasis added):
- “The request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. **If they are transmitted in advance by facsimile or by electronic mail at the official CAS email address (procedures@tas-cas.org), the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit, as mentioned above”.***
93. Al Shaab noted that Palmeiras filed its Statement of Appeal by email on 2 August 2018 but only filed the hard copy submission by courier on 6 August 2018 - 4 days later. As such, Al Shaab requested Palmeiras’ Appeal be dismissed for being inadmissible.
94. However, the Panel did not agree with Al Shaab’s reasoning. As the grounds for the Appealed Decision were notified to the Parties on 13 July 2018, the 21-day deadline to file an appeal with the CAS (pursuant to Article 58 of the FIFA Statutes) was 3 August 2018. So even though Palmeiras’ Statement of Appeal was filed by email on 2 August 2018, the deadline for filing the Appeal was actually 3 August 2018, i.e. a day later. As 3 August 2018 was a Friday, the Panel considered that *“the first subsequent business day of the relevant time limit”* (under Article R31 of the CAS Code) should be the first business day *after* Friday, 3 August 2018 - i.e. Monday, 6 August 2018<sup>2</sup>.
95. The Panel notes that if an appellant was to file a statement of appeal by email on Day 1 of the 21-day time limit under Article 58 of the FIFA Statutes / Article R47 of the CAS Code, it would not be reasonable – and indeed, it would be nonsensical – for the appellant to have to submit the hard copy of the document by Day 2, or face having the appeal deemed inadmissible even though there would still be 19 days left in the time limit to file an appeal.
96. As such, in the present matter, even though the Statement of Appeal was electronically filed by Palmeiras one day before the 21 day deadline expired, the Panel considered that Palmeiras had until the first business day after the 21 day deadline expired to submit the hard copy by courier. As outlined above, the first business day after the time limit to appeal expired was 6 August 2018. The Parties were in agreement that the hard copy of the Statement of Appeal was filed with the CAS Court Office on 6 August 2018. Therefore, the Panel concluded that the Statement of Appeal complied with the requirements of Articles R31.

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<sup>2</sup> The Panel notes that Palmeiras and its counsels are both based in Brazil where the weekend days are Saturday and Sunday.

97. The Statement of Appeal also complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee. Palmeiras also filed its Appeal Brief within the time limit stipulated by Article R51 of the CAS Code.
98. It follows that the Appeal is admissible.

### **VIII. APPLICABLE LAW**

99. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

*“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”.*

100. Both Parties in this dispute agreed that the various rules and regulations of FIFA and Swiss law were applicable in accordance with Article R58 of the CAS Code. The Panel observes that Article 57(2) of the FIFA Statutes (2016 edition) stipulates 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”.*

101. As such, the Panel is satisfied to primarily apply the various regulations of FIFA and, subsidiarily, Swiss law should the need arise to fill a possible gap or *lacuna* in the various regulations of FIFA.

### **IX. MERITS OF THE APPEAL**

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

102. The Panel notes at the outset that the Appealed Decision determined that Al Shaab breached the Loan Agreement. As Al Shaab did not appeal against the Appealed Decision, the Panel cannot enter into the merits of the culpability of the Parties in respect of the termination of the Loan Agreement. The only relevant question for the Panel to consider was the amount of compensation that Palmeiras was owed as a result of Al Shaab’s breach.
103. In that regard, the Panel notes that the two applicable clauses in the Loan Agreement which set out the potential damages owed to Palmeiras are as follows:

*“5.6 It is hereby agreed between the Parties that in any case of infringement of the Agreement by any Party, the Party who infringe the agreement shall be obliged to pay to the other, the amount of € 1,000,000.00 (one million euros) as an agreed compensation without the need to prove any damages.*

5.7 [Al Shaab] and/or [the Player] cannot terminate this instrument or the New Player Contract without the formal written consent of [Palmeiras], otherwise [Al Shaab] will have to pay to [Palmeiras], gross wages of [the Player] stipulated in the Employment Agreement signed between [the Player] and [Palmeiras], in the period between the termination date and the date of 30.06.2015, and also pay the fine stipulated in clause 5.6”.

104. In the Appealed Decision, the FIFA PSC ruled that clause 5.7 above was applicable, whilst clause 5.6 was deemed “manifestly disproportionate and exorbitant” and therefore inapplicable. As such, the FIFA PSC awarded BRL 372,000 pursuant to clause 5.7 of the Loan Agreement.

105. Palmeiras have appealed the Appealed Decision and requested clause 5.6 be applied, and requested an award of EUR 1M in addition to the BRL 372,000 awarded in the Appealed Decision. As noted above, Al Shaab have not appealed against the Appealed Decision.

106. Accordingly, the Panel observes that the only issues to be resolved are:

- a) Is the penalty clause (clause 5.6 of the Loan Agreement) applicable in the present dispute?
- b) If it is applicable, should the penalty clause be reduced for being disproportionate?
- c) What amount of compensation is due to Palmeiras?

These issues will be considered in turn.

**a) *Is the penalty clause (clause 5.6 of the Loan Agreement) applicable in the present dispute?***

107. Al Shaab argued that clause 5.6 of the Loan Agreement was disproportionate and abusive, and should therefore be null and void and unenforceable pursuant to Articles 19 and 20 of the SCO and Articles 2 and 27 of the SCC. Al Shaab also argued that it was not clear whether clause 5.6 would even be considered a penalty clause under Swiss law. Al Shaab argued that according to Swiss doctrine (COUCHEPIN G., La clause pénale, Zurich 2008, § 462), a provision can be considered a penalty clause if it contains all the necessary elements required for such purpose as follows:

- a) *the parties bound thereby are mentioned;*
- b) *the kind of penalty has been determined;*
- c) *the conditions triggering the obligations to pay it are set;*
- d) *its measure is identified”.*

108. However, the Panel does not see why clause 5.6 of the Loan Agreement would not be considered a penalty clause. Applying the four factors listed above, it is clear that the clause

identifies the Parties bound by it, and a financial penalty of EUR 1M was due if the Loan Agreement was infringed.

109. Further, the Panel notes that the FIFA RSTP is silent on the issue of penalty clauses. The Panel therefore looks to Swiss law for guidance and under Swiss law, the provisions regarding penalty clauses are set out in Articles 160 et seq. of the SCO.

110. Articles 160, 161 and 163 of the SCO state as follows:

*“Article 160*

1 *Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.*

2 *Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.*

3 *The foregoing does not apply if the debtor can prove that he has the right to withdraw from the contract by paying the penalty.*

*Article 161*

1 *The penalty is payable even if the creditor has not suffered any loss or damage.*

2 *Where the loss or damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault.*

...

*Article 163*

1 *The parties are free to determine the amount of the contractual penalty.*

2 *The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.*

3 *At its discretion, the court may reduce penalties that it considers excessive”.*

111. Based on all of the above, the Panel is satisfied that clause 5.6 of the Loan Agreement is a valid penalty clause. As much as Al Shaab gave examples of very minor possible breaches of the Loan Agreement, to make the point that the penalty of EUR 1M was then totally disproportionate, that in itself should not defeat the clause, rather open the door for any judging authority to consider reducing the amount awarded. The question of whether the

penalty clause should be reduced for being disproportionate is a separate question to whether the penalty clause is enforceable at all, and that question is considered by the Panel below.

112. Accordingly, subject to the below, the Panel concludes that clause 5.6 is applicable in the present dispute.

**b) *If it is applicable, should the penalty clause be reduced for being disproportionate?***

113. With regard to the actual amount of the contractual penalty that is payable by Al Shaab, as is evident from above, in principle, under Swiss law Parties are free to determine the amount of a penalty clause (Article 163 para. 1 SCO). However, the Panel shall reduce penalties that it considers excessive at its discretion (Article 163 para. 3 SCO). Swiss law does not state clearly what an excessive penalty is, so it is for the Panel 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).

114. The Panel notes that the issue of whether a penalty clause should be reduced for being disproportionate under Article 163 para. 3 SCO has been considered by numerous CAS panels in the past. The CAS panel in CAS 2012/A/2202 stated the following with reference to TAS 2008/A/1491 (emphasis added):

“97. Finally, Article 163 al. 3 CO provides that « excessively high liquidated damages shall be reduced at the discretion of the judge ».

98. The Swiss Supreme Court held that this latter norm **is part of public policy and that as a consequence the judge must apply it even if the debtor did not expressly request a reduction**, whilst observing a degree of deference, in order to respect the contract as much as possible (ATF 133 III 201, c. 5.2).

99. As such, a reduction in the penalty clause by the judge is **justified « when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place**. To judge the excessive character of the contractual penalty, one must not decide abstractly, but, on the contrary, take into consideration all the circumstances of the case in hand » (ATF 133 III 201, c. 5.2).

100. The Swiss Supreme Court holds that various criteria play a determining role, such as the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties, as well as the potential interdependency between the parties (ATF 133 III 201, *ibid.*).

101. When proceeding to reduce the contractual penalty, the judge must make use of his discretion, but with a certain reserve, since the parties are free to fix the amount of the penalty (article 163 al. 1 CO) and the contracts must in principle be respected. The protection of the economically weak party authorises however more a reduction than if those affected are economically equal parties” (free translation).

115. Further, as noted by the sole arbitrator in CAS 2017/A/5046:

- “143. Under Swiss law, the interpretation of Article 163 para. 3 SCO is that the judge (or the arbitrator) will use his discretion to reduce a contractual penalty if the relationship between the amount of the penalty agreed upon, on the one hand, and the interest of the creditor worthy of protection, on the other hand, is grossly disproportionate (ATF 114 II 264 et seq.).
144. In other words, an excessive penalty under Swiss law is a penalty that, at the time of the judgment, is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity, or, more simply put, is “abusive” (ATF 82 II 142).
145. Moreover, according to the Swiss jurisprudence, the specific circumstances of the case, such as the nature and the duration of the contract, the seriousness of the contractual breach, the degree of fault, the behaviour of the creditor, the financial conditions of the parties, a special interest of the creditor that the debtor behaves in conformity with the contract, the experience in business matters of the parties and the damage incurred by the creditor shall be considered (ATF 114 II 264, 265; TF 4A\_141/2008 at 14.1)”.
116. The Panel also notes that it is established in CAS and SFT jurisprudence that the reduction of a penalty is reserved only for exceptional cases when the penalty is grossly unfair (see for example CAS 2017/A/5046 and CAS 2015/A/4139). Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation (Decision of the SFT, 11.03.2003, 4C.5/2003).
117. The CAS panel in CAS 2015/A/4139 noted that the SFT (Decision of the SFT, 16.01.2002, 4C.249/2001) has set out a list of factors to consider when deciding whether a reduction of a penalty clause is applicable, which are as follows:
- i. The creditor’s interest in the other party’s compliance with the undertaking;
  - ii. The severity of the default or breach;
  - iii. The intentional failure to breach the main obligation;
  - iv. The business experience of the parties; and
  - v. The financial situation of the debtor.
118. The Panel will consider the above factors in turn in order to determine whether the penalty fee in clause 5.6 of the Loan Agreement shall be reduced, or not, in accordance with the above mentioned provisions of the SCO.
- i. The creditor’s interest in the other party’s compliance with the undertaking*
119. In relation to this factor, the CAS panel in CAS 2015/A/4139 noted:
- “The creditor’s interest is the main criterion to be taken into consideration to evaluate the quantum of the penalty (“la quotité de la peine”), as the latter is the expression of the creditor’s will to strengthen the main*

*obligation. The creditor's interest shall be widely construed. It is determined in the light of any legitimate inconvenience which the creditor would suffer in case of breach of the main obligation. The agreed penalty fee protects the creditor's interest: the greater the creditor's interest in the performance of the main obligation, the greater a heavy punishment is justified (function of preventive pressure of the penalty clause). When the penalty fee is related to a single breach, and therefore a single payment, the reasons which lead the creditor to insert a penalty clause in the contract is the main criterion to assess the creditor's interest".*

120. In the case at hand, Palmeiras submitted that the penalty clause was included for the exact reason that it was to substitute the calculation of losses of the Parties in case of non-compliance of the Loan Agreement. The Panel therefore considered what "losses" Palmeiras suffered. Firstly, the loan of the Player was free of charge, so Al Shaab's termination of the Loan Agreement did not cause Palmeiras any loss in payments due under the agreement. Secondly, Palmeiras undoubtedly suffered losses in relation to the Player's wages (which it had to cover due to the failed loan move) for the 3 month period in which he could not play for Palmeiras as he could not be registered. However, those losses were already covered under clause 5.7 of the Loan Agreement – and were awarded to Palmeiras as damages by FIFA in the Appealed Decision. As such, the "losses" envisaged in the penalty clause (clause 5.6) essentially related to the loss of potential transfer fees from a future sale of the Player.
121. In that regard, Palmeiras submitted that the Player ultimately left the club as a free agent, meaning that it "*never profited from its young and promising talent*" and that the relevant 3 month period was detrimental to not only the Player's career, but also Palmeiras' prospects of selling the Player. However, the Panel was not convinced by this argument. Whilst the 3 month period in which the Player could only train and not play was detrimental to the Player's career in some capacity, the Panel was not convinced that it directly caused Palmeiras to fail to recoup a transfer fee for the Player.
122. The Panel noted that just before the Loan Agreement was entered into, the Player was out on loan at Ceara, so was already not a part of Palmeiras' first team in the immediate future. Moreover, after the 3 month period of being unable to play, the Player was loaned out to Coritiba. Further, the Loan Agreement was free of charge, which the Panel considered to be a reflection of both the Player's value and the Parties' intentions. The Panel considered that Palmeiras were happy to send the Player out on loan to the UAE and put himself in the shop window. Had he performed well in the UAE, Palmeiras would have looked to sell the Player on for a fee. The Panel acknowledged that the Loan Agreement contained an option to permanently acquire the Player's registration for EU 2M, but there was no obligation on Al Shaab to exercise this option and it was Al Shaab's submissions that it did not want this option, but allowed it into the Loan Agreement as it would never exercise it, so this should not be seen as its agreement to this figure being the market value of the Player.
123. The protected interest of Palmeiras therefore, was the potential increase in the Player's transfer value as a result of his performances out on loan at Al Shaab. The Player ultimately did not go to the UAE, but he was available to Palmeiras to loan or sell on elsewhere. Accordingly, the Panel considered that the penalty clause of EUR 1M should be reduced based on this criterion.

*ii. The severity of the default or breach*

124. In relation to this factor, the CAS panel in CAS 2015/A/4139 noted:

*“In itself, the penalty is triggered regardless of the importance of the breach of the contract (Article 160 (1) CO). However, the severity of the violation should be taken into consideration. It has to be appreciated to what extent the debtor breached the protected interest or interests in breaching the contract. If the violation of the primary obligation is objectively serious, the penalty fee will rarely be viewed as excessive”.*

125. In the case at hand, the protected interest was the potential increase in the Player’s transfer value as a result of his performances out on loan at Al Shaab. In that context, for all the reasons set out in factor (i) above, the Panel did not objectively consider the termination of the Loan Agreement by Al Shaab to be severe.

*iii. The intentional failure to breach the main obligation*

126. The Panel also did not consider Al Shaab to have intentionally terminated the Loan Agreement. The Panel was satisfied that Al Shaab did want the Player on loan, but as it was unable to register the Player with the UAE FA in time, it ultimately terminated the Loan Agreement. The Panel suspects that whilst Al Shaab was ultimately responsible for communicating to the Player that he needed to be in the UAE on a certain date, it did not intend for the Player to miss that date. Once he had, it took the decisions to end his employment contract and the Loan Agreement, as it could not use his services for the following 3 months.

127. In this particular context, the Panel did not consider the default by Al Shaab to be intentional.

*iv. The business experience of the Parties*

128. In relation to this factor, the CAS panel in CAS 2015/A/4139 noted:

*“The business experience of the parties plays a dual role in assessing the conduct of any party breaching the contract: (a) it is far less excusable for a party with experience of business to have concluded a penalty fee subject to onerous consequences than for a party inexperienced in business, and (b) it is far less excusable for a party with experience of business to have committed serious misconduct than for a party inexperienced in business”.*

129. In the present case, the Parties were both well-established football clubs in Brazil and the UAE respectively, so the Panel considers the Parties to be experienced in international transfers and in the negotiation and drafting of transfer and loan agreements. Therefore, the Panel does not see any reason to reduce the penalty clause with regard to this particular criterion.

*v. The financial situation of the debtor*

130. In relation to this factor, the panel in CAS 2015/A/4139 noted:



*“In principle, assessment of the penalty fee is independent of the economic position of the debtor; although exceptionally, in case of extreme disproportion between the penalty and the financial position of the debtor, a judge can apply the principle of equity in the exercise of his discretion when determining its validity”.*

131. In the case at hand, the Panel had no reason to consider that Al Shaab was in a perilous financial situation which could be jeopardised if the penalty clause was not reduced. In any event, even if Al Shaab were in financial difficulty, as noted by the CAS panel in CAS 2015/A/4139:

*“Furthermore, should the Appellant have satisfied the burden of proof that it was in fact in a difficult financial situation, a reduction of the penalty fee would still not be applicable as the doctrine states that taking into account the financial situation of the debtor principally addresses the need to prevent a case of usury (“usure”) and that the financial situation of the debtor should not relegate the creditor’s interest to a secondary level (COUCHEPIN, para. D.3.1. p. 181). The Panel is therefore of the opinion that the Appellant should not benefit from a reduction of the penalty fee on the basis of its alleged difficult financial situation”.*

132. Accordingly, given the circumstances in the present matter the Panel does not consider that Al Shaab should benefit from a reduction of the penalty fee based on its financial situation.

*The Panel’s decision on reduction for proportionality*

133. Taking into account all the circumstances in this case including the factors outlined above, the Panel considers the penalty clause of EUR 1M in clause 5.6 of the Loan Agreement to be excessive. Pursuant to Article 163(3) of the SCO, the Panel determined to reduce the penalty clause to EUR 100,000. The Panel notes that taking into account the very exceptional circumstances of this matter, it finds that a penalty amount at all would ordinarily not be fair or justified, but only because the Panel respects the contractual freedom of the Parties it grants EUR 100,000. The Panel considers that granting any more than that would be excessive.
134. With regards to how the Panel determined that amount, the Panel was not convinced that even had the Player been able to play in the UAE and therefore be in the “shop window”, that Palmeiras would have transferred the Player for value. The Panel assessed this as a 1 in 10 chance, looking at the fact that he was still able to train over the 3 months he was not registered and this gap was more akin to an injury, but also noting that Palmeiras had him out on loan before and after this time, finding no place for him in their own team. As such, the Panel has reduced the penalty to 10% of that in the Loan Agreement.

**c) *What amount of compensation is due to Palmeiras?***

135. In summary, the Panel concluded that in addition to the amount awarded in the Appealed Decision, Palmeiras was entitled to damages of EUR 100,000 pursuant to clause 5.6 of the Loan Agreement.

136. The Panel then turned to the question of interest. Palmeiras requested interest of 5% p.a. on “the total amount due” from the date of default by Al Shaab, i.e. 21 September 2015. This was not disputed by Al Shaab. The Panel notes that pursuant to Article 104(1) of the SCO:

*“A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract”.*

137. Therefore, the Panel was satisfied to award interest of 5% p.a. on the amount awarded to Palmeiras. The Panel was satisfied that interest should accrue from the date on which Al Shaab terminated the Loan Agreement.

## **B. Conclusion**

138. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel partially upholds the Appeal by Palmeiras and determines that in addition to the amounts awarded to Palmeiras in the Appealed Decision, Al Shaab must also pay to Palmeiras the sum of EUR 100,000, plus interest of 5% p.a. from 21 September 2015 until the date of effective payment.

139. Any further claims or requests for relief are dismissed.

## **ON THESE GROUNDS**

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

1. The appeal filed on 2 August 2018 by Sociedade Esportiva Palmeiras against the decision rendered by the FIFA Players’ Status Committee on 8 March 2018 is partially upheld.
2. The decision rendered by the FIFA Players’ Status Committee on 8 March 2018 is confirmed, save for para. 2 which shall read as follows:

Al Shaab Football Club Co. LLC shall pay Sociedade Esportiva Palmeiras **within 30 days** from the date of notification of the present Award the sum of:

- BRL 372,000 (three hundred and seventy two thousand Brazilian Reals); plus
- EUR 100,000 (one hundred thousand Euros);

plus 5% interest p.a. on the aforementioned amounts, from 21 September 2015 until the effective date of payment.

3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.