Arbitration CAS 2017/A/5493 Bursaspor Kulübü Derneği v. Sebastian Frey, award of 23 July 2018

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Breach of Settlement Agreement
Payment of pecuniary debts
Interpretation of contracts
Liquidated damages clause and additional penalty
Interpretation of settlement agreement

1. **In the absence of a specific agreement between the parties, pecuniary debts must be paid at the place where the creditor is resident at the time of performance (Article 74(2) Swiss Code of Obligations (CO)). Further, in order to not place the creditor in a worse situation than if he had received a cash payment, the contractual payment obligation is only deemed fulfilled once the money is available to the creditor.**

2. **Under Swiss law (Article 18 CO) contracts have to be interpreted in accordance with the true and common intention of the parties, without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement. The aim is to identify the actual and mutual intention of the parties. If this cannot be established, then the principle of good faith should be applied to determine the meaning the parties could and should have given to their expressions of will.**

3. **The purpose of a liquidated damages clause is to compensate one party for an anticipated damage, whereas a penalty clause goes beyond that in that an additional penalty is included in order to encourage performance of the contractual obligation.**

4. **In case a settlement agreement, concluded to substitute an employment relationship, foresees a reduced amount of remuneration and further only foresees that in case of non-payment or late payment of the reduced amount within a specific deadline, the terms of the employment contract would apply, entitling the employee to the full payment under the original employment contract, the settlement agreement cannot be interpreted to contain *e.g.* a further penalty element, enabling the employee to pressure its former employer to comply with the payment terms of the settlement agreement. It follows that also no reduction under Article 163(3) CO may be requested.**

I. PARTIES

1. Bursaspor Kulübü Derneği (the "Club" or the "Appellant") is a professional football club based in Bursa, Turkey and is affiliated to the Turkish Football Federation (the "TFF"), which in turn is affiliated to Fédération Internationale de Football Association ("FIFA").

2. Mr Sebastian Frey (the "Player" or the "Respondent") is a retired professional football player with French nationality, born on 18 March 1980.

II. BACKGROUND FACTS

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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 16 July 2013, the Club and the Player signed an employment contract valid from that date until 31 May 2016 (the "Employment Contract"). Under the Employment Contract, the Club was obliged to pay the Player, *inter alia*, the following[1]:

   - For the 2015/16 season, total wages of EUR 1,500,000 (net) in ten equal monthly instalments commencing on 30 August 2015 and ending on 30 May 2016;

   - Under Article (f) of the special provisions, a guaranteed bonus of at least EUR 250,000 EUR (net) per season, payable by the end of May of the respective season in which the bonus was due.

5. On 13 July 2015, the Club and the Player signed a settlement agreement (the "Settlement Agreement") which under Art. 2b of the Settlement Agreement committed the Club to pay to the Player the amount of EUR 850,000 (net) instead of the EUR 1,500,000 (net) due under the Employment Contract for the 2015/16 season. The payment schedule (the "Schedule") in the Settlement Agreement was set out as follows:

   - EUR 85,000 on 30 September 2015;
   - EUR 85,000 on 30 October 2015;
   - EUR 85,000 on 30 November 2015;
   - EUR 85,000 on 30 December 2015;

[1] The Sole Arbitrator notes that the Club was also obliged to provide the Player with numerous other benefits including appearance bonuses, win bonuses, flight tickets etc. however they have not been listed in this Award as these benefits were not disputed between the parties and were therefore not relevant to this dispute.

- EUR 85,000 on 30 January 2016;
- EUR 85,000 on 28 February 2016;
- EUR 85,000 on 30 March 2016;
- EUR 85,000 on 30 April 2016;
- EUR 85,000 on 30 May 2016; and
- EUR 85,000 on 30 June 2016.

6. Further, the Settlement Agreement stated as follows:

> *"2.*
>
> *a. The parties mutually agree that the Club is obliged to pay the Player the amount of net EUR250.000.- (Article f of Special Provisions) unconditionally and irrevocably on 30 August 2015.*
>
> …
>
> *3. In case of non payment of one of the installments* [sic] *stated above for more than 60 days, the agreed amount stated in article 2/b will be annulled and the Parties will go back to the conditions and the amounts payable for the 2015/16 season in the Employment Agreement dated 16 July 2013 (i.e. EUR1.500.000.-) which is referred in the Article 1 of this Agreement".*

7. On 30 August 2015, the Club paid the Player the EUR 250,000 pursuant to Article 2a. of the Settlement Agreement.

8. On 30 September 2015, the Club paid the Player EUR 85,000 corresponding to the instalment due on that date pursuant to the Schedule.

9. On 31 December 2015, the Player notified the Club by letter that it had failed to comply with the Schedule in the Settlement Agreement. This correspondence stated that as more than 60 days had elapsed in relation to the payment due on 30 October 2015, the agreed amount payable under the Settlement Agreement was no longer valid and would be replaced by the original amount payable – i.e. EUR 1,500,000. The Player requested the payment of the entire amount of EUR 1,500,000 from the Club within ten days.

10. On 31 December 2015, the Club paid the Player EUR 85,000 corresponding to the instalment due on 30 October 2015 pursuant to the Schedule. The Player stated that he received this amount on 4 January 2016.

11. On 21 January 2016, further to his letter dated 31 December 2015 the Player wrote to the Club once again, stating *inter alia*, that pursuant to Article 3 of the Settlement Agreement, the Club owed the Player a total of EUR 1,500,000, not EUR 850,000. At the date of the letter, the Player stated that he was owed 5 instalments (i.e. August to December 2015) of EUR 150,000 each – totalling EUR 750,000. Accordingly, since the Club had only paid the Player a total of EUR

170,000 to date (i.e. two instalments of EUR 85,000 each), the Club still owed the Player EUR 580,000. The Player requested the payment of this outstanding amount within ten days.

12. On 29 January 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 30 December 2015 pursuant to the Schedule.

13. On 1 February 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 30 November 2015 pursuant to the Schedule.

14. On 8 February 2016, the Player lodged a claim before the Dispute Resolution Chamber of FIFA (the "FIFA DRC").

15. On 29 March 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 31 January 2016 pursuant to the Schedule.

16. On 29 April 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 28 February 2016 pursuant to the Schedule.

17. On 27 May 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 30 March 2016 pursuant to the Schedule.

18. On 23 June 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 30 April 2016 pursuant to the Schedule.

19. On 25 July 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 30 May 2016 pursuant to the Schedule.

20. On 24 August 2016, the Club paid the Player EUR 85,000 corresponding to the instalment due on 30 June 2016 pursuant to the Schedule.

21. On 21 September 2017 the FIFA DRC rendered a decision on the claim filed by the Player (the "Appealed Decision") as follows (emphasis in original):

> *"1. The claim of the* [Player] *is partially accepted.*
>
> *2. The* [Club] *has to pay to the* [Player], ***within 30 days*** *as from the date of notification of this decision, the amount of EUR 650,000, plus 5% interest p.a. as follows:*
>
> *a. 5% p.a. as from 31 October 2015 until 31 December 2015 on the amount of EUR 150,000;*
>
> *b. 5% p.a. as from 31 December 2015 until the date of effective payment on the amount of EUR 65,000;*
>
> *c. 5% p.a. as from 1 October 2015 until the date of effective payment on the amount of EUR 65,000;*
>
> *d. 5% p.a. as from 31 August 2015 until 29 January 2016 on the amount of EUR 150,000;*

e. 5% p.a. as from 29 January 2016 until the date of effective payment on the amount of EUR 65,000;

f. 5% p.a. as from 1 December 2015 until 1 February 2016 on the amount of EUR 150,000;

g. 5% p.a. as from 1 February 2016 until the date of effective payment on the amount of EUR 65,000;

h. 5% p.a. as from 31 December 2015 until 29 March 2016 on the amount of EUR 150,000;

i. 5% p.a. as from 29 March 2016 until the date of effective payment on the amount of EUR 65,000;

j. 5% p.a. as from 31 January 2016 until 29 April 2016 on the amount of EUR 150,000;

k. 5% p.a. as from 29 April 2016 until the date of effective payment on the amount of EUR 65,000;

l. 5% p.a. as from 29 February 2016 until 27 May 2016 on the amount of EUR 150,000;

m. 5% p.a. as from 27 May 2016 until the date of effective payment on the amount of EUR 65,000;

n. 5% p.a. as from 31 March 2016 until 23 June 2016 on the amount of EUR 150,000;

o. 5% p.a. as from 23 June 2016 until the date of effective payment on the amount of EUR 65,000;

p. 5% p.a. as from 1 May 2016 until 25 July 2016 on the amount of EUR 150,000;

q. 5% p.a. as from 25 July 2016 until the date of effective payment on the amount of [EUR] *65,000;*

r. 5% p.a. as from 31 May 2016 until 24 August 2016 on the amount of EUR 150,000;

s. 5% p.a. as from 24 August 2016 until the date of effective payment on the amount of [EUR] *65,000".*

22. On 4 December 2017, the grounds of the Appealed Decision were notified to the parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 22 December 2017, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the Club filed a Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (the "CAS"), requesting the following prayer for relief (emphasis in original):

> *"4. We request from the Court of Arbitration for sport the* ***annulment of decision given by FIFA****".*

24. In its Statement of Appeal, the Club requested the appointment of a sole arbitrator by the CAS.

25. On 29 December 2017, in accordance with Article R51 of the CAS Code, the Club filed its Appeal Brief, requesting the following prayers for relief:

> *"Because of the reasons stated above and the reasons taken into considerations by CAS panes* [sic]*, we hereby request from CAS:*
>
> - *to arrange date for hearing,*
> - *to accept our appeal against the decision DRC dated on 21 September 2017,*
> - *to overturn and set aside the abovementioned decision with all its consequences if this is not accepted, to accept mitigating circumstances and to make reasonable deduction from the compensation and interests.*
> - *To condemn the respondent to pay the legal fees and other expenses of the Appellant in connection with the proceedings".*

26. On 30 December 2017, the Player wrote to the CAS Court Office rejecting the appointment of a sole arbitrator and requested a panel of three arbitrators to be appointed.

27. On 8 January 2018, the Player wrote to the CAS Court Office requesting that the time limit for the filing of his Answer be fixed after the payment by the Club of the advance of costs.

28. On the same date, the CAS Court Office wrote to the parties confirming that the Player's deadline for submitting his Answer was set aside and would be fixed upon the payment of the advance of costs by the Club.

29. On 9 January 2018, the CAS Court Office wrote to the parties stating that the President of the CAS Appeals Arbitration Division had decided to submit the present procedure to a panel composed of three arbitrators. Consequently, the parties were invited to nominate an arbitrator from the list of CAS arbitrators within ten days.

30. On 12 January 2018, the Club wrote to the CAS Court Office nominating Prof. Ulrich Haas, Attorney-at-Law, Zurich, Switzerland, as an arbitrator.

31. On 17 January 2018, in accordance with Article R53 of the CAS Code, the Player nominated Mr Francesco Macri, Attorney-at-Law, Piacenza, Italy, as an arbitrator.

32. On 19 February 2018, in accordance with Article R55 of the CAS Code, the Player submitted his Answer and made the following requests for relief:

> *"1. To reject the appeal and to uphold the Challenged Decision;*
>
> *2. To condem the Appellant to the payment in favour of the Respondent of the legal expenses incurred;*
>
> *3. To establish that the costs of the arbitration procedure shall be borne by the Appellant".*

33. On 20 February 2018, the CAS Court Office wrote to the parties acknowledging receipt of the Player's Answer. Further, the CAS Court Office noted that the Settlement Agreement contained a clause providing for the appointment of a sole arbitrator. Accordingly, the parties were invited to inform the CAS Court Office whether they agreed to proceed with a three person panel or wished for the appointment of a sole arbitrator.

34. On 21 February 2018, the Player wrote to the CAS Court Office stating that he did not feel a hearing was necessary in this case, and also stated that he wished for the hearing to proceed with the appointed panel of three arbitrators.

35. On 22 February 2018, the Club wrote to the CAS Court Office stating, *inter alia*, that it requested the appointment of a sole arbitrator as the Settlement Agreement expressly provided for it. The Club also reiterated its request for a hearing to be held in this matter.

36. On 27 February 2018, the CAS Court Office advised the parties that having been made aware of the provision in the Settlement Agreement for a sole arbitrator, the President of the CAS Appeals Arbitration Division had decided to submit the case to a sole arbitrator instead of a panel. Accordingly, pursuant to Article R54 of the CAS Code, the Sole Arbitrator appointed to this case was as follows:

Sole Arbitrator: Mr Mark A. Hovell, Solicitor, Manchester, England

37. On 9 March 2018, the CAS Court Office wrote to the parties informing them that pursuant to Article R57 of the CAS Code, the Sole Arbitrator had decided to hold a hearing in this matter. On the same date, the CAS Court Office wrote to FIFA on behalf of the Sole Arbitrator requesting a copy of the complete FIFA file relating to this matter.

38. On 14 March 2018, FIFA provided a copy of the complete FIFA file to the CAS Court Office. The CAS Court Office duly provided a copy of the file to the parties.

39. On 4 April 2018, the CAS Court Office provided the parties with an Order of Procedure.

40. On 5 April 2018, the Club and the Player wrote to the CAS Court Office providing their signed copies of the Order of Procedure.

IV. THE HEARING

41. On 12 March 2018, the CAS Court Office wrote to the parties confirming that a hearing would be held in this matter on 6 April 2018.

42. A hearing was held on 6 April 2018 at the Lausanne Palace Hotel in Lausanne, Switzerland. The parties did not raise any objection as to the appointment of the Sole Arbitrator. The Sole Arbitrator was present and was assisted by Ms Delphine Deschenaux-Rochat, Counsel to the CAS. The following persons attended the hearing:

i. The Club: Ms Jale Demir and Dr. Nihat Güman, both external counsel;

ii. The Player: Mr Gianpaolo Monteneri and Ms Anna Smirnova, counsel.

43. The parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Sole Arbitrator. The hearing was then closed and the Sole Arbitrator reserved his detailed decision to this written Award.

44. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. The Sole Arbitrator 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

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

A. The Club's Submissions

In summary, the Club submitted the following in support of its Appeal:

46. The Club claimed that failure to pay the 30 October 2015 payment on time was due to the election of a new President and the appointment of a new management board at the Club. The Club was experiencing a financial crisis at the time with debts of EUR 100m. A new President would replace the previous one, but needed formally appointing. The new President and his new management board would not take office until January 2016, when the Club's General Meeting confirmed their appointments. Once the General Meeting had been called, it was no longer possible for the Club to make payments until the new management were appointed as the Club's accounts are published for the General Meeting and cannot be altered until its conclusion.

47. The Club also claimed that it prepared a protocol to deal with the late payments of 30 October 2015, 30 November 2015 and 30 December 2015 which would have provided for payments of EUR 120,000 to be paid on 30 January 2016 and a second payment of EUR 135,000 to be paid on 28 February 2016 to the Player to cover the unpaid amounts. However, the Club could not get the Player to sign this protocol.

48. The protocol was sent to Mr Toros, who the Club alleged to be the Player's Turkish agent. All their correspondence was through Mr Toros and the Player's address on the Employment Contract was c/o Mr Toros. The Club submitted that Mr Toros has indicated that the Player would sign the protocol, but when he didn't, the Club had to pay the October instalment of EUR 85,000 on 31 December 2015.

49. The Club stated that it always intended to make the required payments to the Player according to the Settlement Agreement and stated that within the Club's financial capacity it had acted in good faith. The Club did not feel that FIFA had recognised this in the Appealed Decision.

50. The Club also submitted that the Player did not act in good faith and *"misused his position"*, which were mitigating circumstances which the FIFA DRC did not take into account.

51. Further, the Club argued that the 30 October 2015 payment was made on 31 December 2015, which was at the end of the second month end. The Club's position was that the Settlement Agreement should be interpreted that payments could only trigger Article 3 if they weren't made by the last day of the month, 2 months after the due date. Further, it is the day that a payment is sent rather than when it is received that matters (the Player claims to have received the EUR 85,000 on 4 January 2016, but the Club produced the swift payment receipt from the bank showing it was made on 31 December 2015). The Club maintained that they were not in breach of the Settlement Agreement as they paid within the contractual deadline.

52. Additionally, at the hearing, the Club argued that Article 3 of the Settlement Agreement acted like a penalty clause, in that the Player still was able to leave the Club a year early and find work elsewhere, yet the Club had to pay him the entire balance of his Employment Contract. As such, the Club requested that the Sole Arbitrator use Swiss law to reduce the penalty clause and the sums awarded to the Player.

B. The Player's Submissions

In summary, the Player submitted the following in support of his argument that the Appealed Decision should be upheld in its entirety:

53. The Player argued that Article 3 of the Settlement Agreement was clear that if the Club delayed the payment of any instalments by more than 60 days, the original terms of the Employment Contract would apply. Accordingly, the 'mitigating circumstances' submitted by the Club were irrelevant and did not affect the strict application of the relevant contractual provisions. At the hearing, the Player submitted that there was no need to interpret the Settlement Agreement. Article 3 referred to a payment being "60 days" late, not 2 months late. In any event, the payment would only count when received by the Player, which in the case of the 30 October 2015 instalment, was on 4 January 2016 – contrary to the Club's assertions that this was paid on 31 December 2015. This was sent and received over 60 days from the due date. In any event, the payment was due on 30 October 2015 and at no point did the Club contact the Player to explain the delay in payment.

54. The Club have failed to provide any reasonable justification for its failure to comply with the contractual provisions and the agreed deadlines, and the internal election procedures could not amount to a valid excuse for delaying payment, nor were its financial problems the concern of the Player. He was not paid and his time with the Club effectively ended his career.

55. The Player acknowledged that the Club had paid him EUR 850,000 (which was the amount due under the Settlement Agreement) but not the remaining EUR 650,000 which was owed to him as a result of the Club's breach of the Settlement Agreement.

56. So far as the protocol was concerned, the Player stated that Mr Toros was not his agent, rather he represented the Club. He never signed or agreed to sign the protocol.

57. At the hearing, the Player provided some context to the Settlement Agreement. During the second season of the Employment Contract, he experienced numerous delays in getting paid and was forced to train alone. He had been a French international player, but he was not playing for the Club, so a settlement was the only way to try and find regular football again. However, in case the Club violated the Settlement Agreement, Article 3 was negotiated. It is not a penalty clause. The Player had already reduced his entitlement from EUR 1.5m to EUR 850k under this arrangement and granted a 60 day grace period, but if the Club violated the Settlement Agreement, then it would simply go back to owing him the monies under the Employment Contract.

VI. JURISDICTION

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

> *"An appeal against a 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 him prior to the appeal, in accordance with the Statutes or regulations of that body".*

59. Moreover, the Club relied on Article 58 of the FIFA Statutes. The jurisdiction of CAS was not disputed by either of the parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both parties.

60. It follows that the CAS has jurisdiction to hear this dispute.

VII. ADMISSIBILITY

61. The Statement of Appeal, which was filed on 22 December 2017, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

62. It follows that the Appeal is admissible.

VIII. APPLICABLE LAW

63. Article R58 of the CAS Code provides the following:

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

64. Article 57(2) of the FIFA Statutes provides 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".

65. The Sole Arbitrator also notes that Article 5 of the Settlement Agreement states as follows:

"This Agreement shall be governed by, and construed and interpreted in accordance with Swiss Law and in case of a dispute exclusively the competent FIFA committees will handle it and as appeal body CAS will have jurisdiction as expedited procedure, which will be applied by sole arbitrator, and the language of the proceedings will be English. Nevertheless the Parties agree that, in case of a dispute arising out of this Employment Agreement, the Player has an alternative choice of law and he can file the claim before TFF Dispute Resolution Chamber and TFF Arbitration Board".

66. The Club did not specify which law(s) it believed applied to this dispute. The Player submitted that the various regulations of FIFA should apply, with Swiss law applying subsidiarily.

67. In light of all of the above, the Sole Arbitrator is satisfied that the various regulations of FIFA are applicable, with Swiss law applying to fill in any gaps or *lacuna* within those regulations. However, as the regulations of FIFA do not touch upon the issues dealt with below, the Sole Arbitrator applies Swiss law.

IX. MERITS

A. The Main Issues

68. The Sole Arbitrator observes that the main issue to be resolved are:

a) Was the Settlement Agreement breached by the Club as a result of late payment?

b) If the Club breached the Settlement Agreement, is Article 3 a penalty clause and should the amount payable be reduced?

c) Are there any mitigating circumstances justifying a departure from Article 3 of the Settlement Agreement?

d) How much is owed by the Club to the Player?

The Sole Arbitrator will address these issues in turn.

a) Was the Settlement Agreement breached by the Club as a result of late payment?

69. The Club claimed that it made the October 2015 payment on time. To support this argument, the Club relied upon two factors. Firstly that a payment is made by a party when it instructs its bank to send the payment; and secondly, that the Settlement Agreement needs interpreting. The Club invited the Sole Arbitrator to look behind the words and to determine that it was the parties' intention that the grace period should be 2 months rather than 60 days.

70. Looking at these issues in turn, the Sole Arbitrator notes that in the absence of an agreement between the parties, pecuniary debts must be paid at the place where the creditor is resident at the time of performance (Article 74(2) of the Swiss Code of Obligations (the "CO")). Further, according to the Swiss Federal Tribunal, the contractual payment obligation is only deemed fulfilled once the money is available to the creditor. Indeed, the creditor *"shall not be placed in a worse situation than in if he had received a cash payment"* (Decision of the Swiss Federal Tribunal ATF 119 II 232).

71. In the case at hand, the Player stated that the money only arrived in his account as cleared funds on 4 January 2016. It is not disputed that the money was ordered to leave the Club's account on 31 December 2015.

72. However, looking at the Settlement Agreement, the Sole Arbitrator notes that the parties agreed in clause 2, that *"[a]ll payments referred in article 2 will be ordered on the date fixed, to the following account of the player"*. The Settlement Agreement then provided the bank details of the Player. As such, the parties agreed that the monies must "be ordered" on the date fixed, which, for the instalment in question was 30 October 2015. Then the parties agreed in clause 3 of the Settlement Agreement that the non-payment of such instalment *"for more than 60 days"* would trigger the reversion to EUR 1,500,000 as the settlement, rather than the EUR 850,000. The parties have agreed that the date the money is ordered is key, as opposed to when it is received.

73. That then leads to the second issue. Should the Sole Arbitrator consider that the Club's bank should be ordered to transfer the monies within 60 days of 30 October (i.e. on 29 December 2015) or within 2 calendar months (i.e. on 31 December 2015) to avoid the reversion?

74. The Sole Arbitrator notes that under Swiss law (Article 18 CO) contracts will be interpreted in accordance with the true and common intention of the parties, without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement. The aim is to identify the actual and mutual intention of the parties. If this cannot be established, then the principle of good faith should be applied to determine the meaning the parties could and should have given to their expressions of will.

75. In the case at hand, the Settlement Agreement clearly refers to 60 days, not 2 months. Further, the Sole Arbitrator notes that the Club did not produce a single piece of evidence to demonstrate that the intention of the parties was to apply months rather than days. Finally, the Player submitted that the contract was clear and relied upon the 60 days. The Sole Arbitrator sees no need to go beyond the literal wording in the Settlement Agreement. The Club would have to had made the bank transfer on 29 December 2015 to have avoided Article 3 being

triggered. As such, the Settlement Agreement was breached by the Club as a result of late payment of the October 2015 instalment.

b) Penalty clause?

76. The position of the Club is that Article 3 of the Settlement Agreement represents a penalty clause and it invited the Sole Arbitrator to utilise Article 163(3) CO to reduce the contractual penalty.

77. The Sole Arbitrator recalls that Article 3 of the Settlement Agreement read as follows:

> *"In case of non payment of one of the installments* [sic] *stated above for more than 60 days, the agreed amount stated in article 2/b will be annulled and the Parties will go back to the conditions and the amounts payable for the 2015/16 season in the Employment Agreement dated 16 July 2013 (i.e. EUR1.500.000.-) which is referred in the Article 1 of this Agreement".*

78. Contracts often contain liquidated damages clauses, penalty clauses and clauses that set out the obligations of one party or the other. The purpose of a liquidated damages clause is to compensate one party for an anticipated damage, whereas a penalty clause goes beyond that, an additional penalty is included to encourage performance of the contractual obligation.

79. In the case at hand, the contract is a settlement agreement. Under the Employment Contract, the Club would have to pay the Player EUR 1,500,000 regardless of whether it played him in matches, however, the Player was prepared to walk away from some of this money on the basis he could look to find another club that would play him more regularly. However, if a payment was not made (not only on the due date, but after an additional grace period of 60 days) then the deal changed, the Player wanted his full entitlement, not the reduced sum he'd accepted to get away. However, the Settlement Agreement did not seek to go even further and ask for a penalty element too in order to pressure the Club to comply with the payment terms of the Settlement Agreement. Looked at in a different way, if the Club didn't pay, then the Settlement Agreement could be terminated. The Employment Contract could not then come back to life (as the Player would hopefully have found another club and it is not possible for a player to have two professional contracts at one time), but if it could, then the Player would be entitled to the sums under the Employment Contract i.e. EUR 1,500,000, but nothing more. As such, rather than terminate the Settlement Agreement for the Club's breach, the parties agreed that the Club would simply have to pay what the Player would have received if he had not agreed to settle his Employment Contract, i.e. EUR 1,500,000.

80. As such, the Sole Arbitrator fails to see how Article 3 can be classed as a penalty clause and as such he cannot, even if he wanted to, apply Article 163(3) CO.

c) Any mitigating circumstances?

81. The Sole Arbitrator notes that the Club claimed that it acted in good faith (by making all the instalment payments on time), whereas the Player acted in bad faith (as he refused to sign the protocol, despite his agent indicating that he would) and that the Club was unable to make

payments, due to the process it was undertaking at the time to convene a general meeting and to elect a new President. These factors should have been taken into account by the FIFA DRC.

82. The Sole Arbitrator notes that the Club did not specify exactly how such factors could result in some form of reduction in the sum awarded by the FIFA DRC and therefore on what basis the Sole Arbitrator could take these factors into consideration.

83. In any event, the Sole Arbitrator notes that the Club did pay the remaining instalments of EUR 85,000 each month, but always at the end of the grace period, so never actually on the due date; and it ignored the Player's claims that such instalments should be EUR 150,000 each month. The Club also never attempted to provide the Player with an explanation for why the payments were late. There did not appear to be any particular good faith demonstrated here by the Club.

84. The Player denied that Mr Toros was his agent, indeed he demonstrated that he had a different agent that represented him. There was no evidence that the Player was even aware of the draft protocol, let alone that he allowed the Club to believe that he would sign it, only to renege on this. The Sole Arbitrator was left with the impression that the protocol would have been an ideal solution to the Club's financial difficulties and it may have reached out to an agent that was involved with helping the Club with foreign players to see if he could help; the agent may well have indicated that he could, hoping that this would be the case, but ultimately he failed to deliver. The Sole Arbitrator fails to see how this could constitute bad faith on the part of the Player.

85. Finally, the Sole Arbitrator could understand that the Clubs accounts may be "ruled off" at a certain date, so the members of the Club could understand and see what the financial position of the Club was when its General Meeting was convened, so it may not want to make payments after the date of those accounts, but that is not the concern of the Player, nor is it some special fact that would enable the Sole Arbitrator to somehow reduce the sums due to the Player under the Settlement Agreement. Further, the Club still managed to make a payment of EUR 85,000 during this period prior to the General Meeting, as it paid the October 2015 instalment on 31 December 2015.

86. In conclusion, the Sole Arbitrator determined that there were not any mitigating circumstances justifying a departure from Article 3 of the Settlement Agreement.

d) How much is owed by the Club to the Player?

87. In the Appealed Decision, the FIFA DRC awarded the difference between the EUR 850,000 paid by the Club and the EUR 1,500,000 due under the Settlement Agreement. It also dealt with the dates each instalment was made and the interest that should accrue on each late payment.

88. The Sole Arbitrator concurs with the Appealed Decision as regards the principle sum to be paid by the Club to the Player and notes that neither party challenged or commented upon the interest calculations made in the Appealed Decision.

89. As such the Sole Arbitrator confirms the financial award contained in the Appealed Decision.

B. Conclusion

90. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Sole Arbitrator dismisses the Appeal by the Club in its entirety and confirms the Appealed Decision.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 22 December 2017 by Bursaspor Kulübü Derneği against the decision issued on 21 September 2017 by the FIFA Dispute Resolution Chamber is dismissed.

2. The decision issued on 21 September 2017 by the FIFA Dispute Resolution Chamber is confirmed.

(…)

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