Arbitration CAS 2020/A/7007 Al Nassr FC v. Fenerbahçe Futbol AS, award of 8 December 2020

Panel: Mr Bernhard Welten (Switzerland), Sole Arbitrator

Football
Transfer
Breach of procedural rules and CAS de novo review
Effects of the absence of a written default notice on the possibility to file a claim for amounts due
Excessive penalty amount
Rate of the default interest

1. **The FIFA Player's Status Committee (PSC) is not considered to be a court or an arbitration panel in the legal sense. It is an organ of FIFA, an association under Swiss law, and as such the principles of impartiality and independence applicable to state courts or arbitral tribunals do not apply *mutatis mutandis*. Similarly, the Single Judge of the PSC cannot be considered a judge in the sense of Article 6 of the European Convention on Human Rights (ECHR). In any case, the appeal to the CAS has a healing effect for different forms of irregularities which (may have) happened in the first instance, such as an alleged unfairness, the lack of independence of the first-instance tribunal, the non-participation in the proceedings or a risk of conflict of interest.**

2. **Article 12bis para. 3 of the FIFA Regulations on the Status and Transfer of Players (RSTP), requesting a written default notice with a 10 days deadline to fulfill the outstanding financial obligations, only specifies the condition for an application of the general rule of Article 12bis para. 2 RSTP, according to which any club found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis *may be sanctioned in accordance with Article 12bis para. 4 RSTP*. The lack of a 10-day deadline in a warning letter does not mean that the debt is inexistent, nor insubstantial. Consequently, even if a creditor club does not completely comply with the rules of Article 12bis RSTP, this will not hinder the creditor club to file a claim for amounts due in front of the competent FIFA authority: the creditor club would *only* be prevented from seeking sanctions pursuant to Article 12bis para. 4 RSTP against the debtor club. In fact, for assessing whether a payment is overdue or not, the underlying contractual regulations are of essence.**

3. **In general the parties are free to agree on a penalty amount and only if such penalty amount is excessively high and to be considered as being against justice and fairness, it is possible, based on Article 163 para. 3 of the Swiss Code of Obligations (CO), to reduce it. A reduction of a penalty shall only be decided on a case-by-case basis and take into consideration all the circumstances of the case, e.g.: (i) the ratio between the agreed penalty and the creditor's interest in the fulfilment of the secured claim; (ii) the**

seriousness of the fault of the parties involved; (iii) the importance of the fulfilment of the principal claim for the other party; (iv) the debtor's interest and profit in non-performance or defective performance; (v) the seriousness of the breach of the primary obligation guaranteed; (vi) the economic situation of the parties; (vii) the maximum presumed damage suffered by the creditor; however, the damage actually suffered is not decisive; and (viii) the risk of damage to which the creditor was exposed in the specific case.

4. **The legislator did already take into consideration that the due default interest is possibly higher than the market interest during the period of default and, by doing so, the legislator showed the penalty effect of the default interest. As a consequence, the setting of the default interest at a rate of 5% in Article 104 CO cannot be lowered by any proofs and neither by a judge.**

I. PARTIES

1. Al Nassr Football Club (the "Appellant") is a football club with its registered office in Riad, Saudi Arabia. The club plays in the Saudi Arabian Premier League, the top league in football in Saudi Arabia. It is a member of the Saudi Arabian Football Federation ("SAFF") which in turn is affiliated to the West Asian Football Federation ("WAFF") and the Fédération Internationale de Football Association ("FIFA").

2. Fenerbahçe Futbol AS (the "Respondent") is a football club with its registered office in Instanbul, Turkey. The club plays in the Turkish Super League, the top league in football in Turkey. It is a member of the Turkish Football Federation ("TFF") which in turn is affiliated to the Union of European Football Association ("UEFA") and FIFA.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established by the Sole Arbitrator on the basis of the Parties' written and oral submissions and the exhibits produced during these proceedings and statements made during the hearing. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered carefully all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning.

A. Facts

4. On 19 August 2018, the Parties entered into a transfer agreement (the "Transfer Agreement") of the football player G. (the "Player") from the Respondent to the Appellant.

5. Article 2.2 lit. a)-c) of the Transfer Agreement stated the transfer fee of EUR 10,500,000, to be paid as follows:

   - EUR 5,000,000 on or before 6 September 2018;
   - EUR 3,500,000 on or before 28 February 2019;
   - EUR 2,000,000 on or before 1 October 2019.

6. Article 2.2 lit. d) of the Transfer Agreement further provided:

   "In the event that AL NASSR fails to pay any of the installments mentioned above after twenty days from the above-mentioned dates, and a notice sent by FENERBAHÇE to AL NASSR, AL NASSR shall pay the additional amount of 350,000 Euro (three hundred and fifty thousand euros) as an overdue penalty each time AL NASSR fails to make the payment for each installment".

7. In accordance to Article 2.3 of the Transfer Agreement the Respondent was entitled to additional payments beside the transfer fee as follows:

   - EUR 250,000 in case the Appellant finishes in the top three places in the Saudi League whilst the Player is registered with the Appellant (lit. a);
   - EUR 250,000 in case the Player scores and/or assists more than 15 goals in the official matches of the Appellant in one football season (lit. b).

8. On 13 March 2019, the Respondent sent a letter to the Appellant, requesting the Appellant to pay an amount of EUR 3,750,000, corresponding to the second installment of the transfer fee as well as the bonus contained in Article 2.3 of the Transfer Agreement. No reference was made to the penalty clause, stated in Article 2.2 lit. d) of the Transfer Agreement.

B. Proceedings before the FIFA Player's Status Committee ("PSC")

9. On 2 April 2019, the Respondent lodged a claim with the PSC, asking for a total amount of EUR 4,100,000 from the Appellant, composed of the second installment (EUR 3,500,000) plus default interest, penalty fee (EUR 350,000) and the additional amount for the Player to score more than 15 goals (EUR 250,000).

10. On 12 June 2019, the Appellant filed an answer to the Respondent's claim of 2 April 2019.

11. On 12 September 2019, the Respondent sent a statement (reply) to the Appellant's allegations of 12 June 2019.

12. On 10 December 2019, the Appellant filed its answer (rejoinder) to the Respondent's reply of 12 September 2019.

13. On 20 January 2020, the PSC informed the Parties that the investigation phase of the present matter was closed and a formal decision will be taken shortly.

14. On 11 February 2020, the Single Judge of the PSC rendered the Appealed Decision, which was

later notified to the Parties on 20 February 2020 by email, by which the Respondent's claim was partially accepted, as follows:

"1. The claim of the Claimant, Fenerbahçe SK, is admissible.

2. The claim of the Claimant is partially accepted.

3. The Respondent, Al Nassr, has to pay to the Claimant the amount of EUR 3,500,000 plus 5% interest p.a. from 1 March 2019 until the date of effective payment.

4. The Respondent has to pay to the Claimant the amount of EUR 600,000.

5. Any further claim lodged by the Claimant is rejected.

6. The Claimant is directed to inform the Respondent, immediately and directly, preferably to the e-mail address as indicated on the cover letter of the present decision, of the relevant bank account to which the Respondent must pay the amount mentioned under points III./3. and III./4. above.

7. The Respondent shall provide evidence of payment of the due amount in accordance with points III./3. and III./4. above to FIFA to the e-mail address psdfifa@fifa.org, duly translated, if need be, into one of the official FIFA languages (English, French, German, Spanish).

8. In the event that the amount due, plus interest in accordance with points III./3. and III./4. above, is not paid by the Respondent within 45 days as from the notification by the Claimant of the relevant bank details to the Respondent, the Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).

9. The ban mentioned in point III./8. above will be lifted immediately and prior to its complete serving, once the due amount is paid.

10. In the event that the aforementioned sum, plus interest, is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

11. The final amount of costs of the proceedings in the amount of CHF 20,000 is to be paid by the Respondent as from the notification of the present decision, as follows:

a. The amount of CHF 5,000 has to be paid to the Claimant;
b. The amount of CHF 15,000 has to be paid to FIFA to the following bank account with reference to case nr. lza/19-00804: […].

12. In the event that the aforementioned amount of costs is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision".

15. On 31 March 2020, the PSC sent the reasoning of the decision taken on 11 February 2020 (the "Appealed Decision") by email to the Parties.

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

16. On 21 April 2020, the Appellant filed its Statement of Appeal against the Respondent regarding the Appealed Decision, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

17. On 8 May 2020, the CAS Court Office informed the Parties that the Respondent agreed to submit this case to a Sole Arbitrator.

18. On 11 May 2020, FIFA informed the CAS Court Office that it renounces to its right to intervene in the present arbitration proceedings and sent a clean copy of the Appealed Decision.

19. On 9 June 2020, the Appellant filed its Appeal Brief pursuant to Article R51 of the Code.

20. On 10 June 2020, the CAS Court Office confirmed having received the Appeal Brief and set the Respondent a deadline of 20 days to file its Answer pursuant to Article R55 of the Code.

21. On 23 June 2020, the CAS Court Office informed the Parties that Mr. Bernhard Welten, Attorney-at-law in Berne, Switzerland, was appointed as Sole Arbitrator to decide this case.

22. On 30 June 2020, the Respondent filed its Answer pursuant to Article R55 of the Code.

23. On 3 respectively 8 July 2020, the Respondent informed the CAS Court Office that the Sole Arbitrator shall decide the case based on the written submissions, while the Appellant requested for a hearing to be held in this case.

24. On 13 July 2020, FIFA sent the complete file of this case to the CAS Court Office.

25. On 16 July 2020, the CAS Court Office informed the Parties about the Sole Arbitrator's decision to hold a hearing by video-conference in this case.

26. On 20 July 2020, the CAS Court Office informed the Parties about the video-conference hearing to be held on 14 August 2020 at 9.30am Swiss time.

27. On 30 July and 5 August 2020, the Parties signed the Order of Procedure.

28. On 14 August 2020, the hearing was held by video-conference. For the Appellant attended the legal representatives Mr. Sven Demeulemeester and Mr. Gauthier Bouchat, Attorneys-at-Law. For the Respondent attended the inhouse Counsels Mr. Yigit Cem Coşkun and Mr. Ozge Tokarli. At the outset of the hearing, both Parties confirmed not having any objection regarding Mr. Bernhard Welten being the Sole Arbitrator to decide this case. At the end of the hearing, the Parties further confirmed having been treated equally and their right to be heard to be fully

respected.

IV. SUBMISSIONS OF THE PARTIES

29. In the following summaries, the Sole Arbitrator will not include every argument put forward to support the Parties' prayers for relief. Nevertheless, the Sole Arbitrator has carefully considered and taken into account all of the evidence and arguments submitted by the Parties, but limits his explicit references to those arguments that are necessary in order to justify his decision.

A. Appellant's Submissions and Requests for Relief

30. The Appellant's submissions, in essence, may be summarized as follows:

- The Appellant timely and correctly paid the first and biggest installment of EUR 5,000,000 on 6 September 2018. However, cashflow issues blocked the Appellant to proceed with the timely payment of the second installment of Euro 3,500,000 and the bonus payment of EUR 250,000, due on 28 February 2019. The Appellant, however, specifies that these two amounts are not contested.

- The Single Judge of the PSC was Mr. José Luis Andrade, who is further working as General Counsel of the European Club Association (the "ECA"). The President of the Respondent, Mr. Ali Koç, is a member of the Executive Board of the ECA. Therefore, the Single Judge of the PSC dealing with the case at FIFA level was not impartial.

- FIFA forced the Appellant to pay the procedural costs in order to receive the grounds of the Appealed Decision. Based on the applicable FIFA rules, entered into force on 1 January 2018, the Appellant should not have been obliged to pay the procedural costs in order to receive the grounds of the PSC decision. Consequently, forcing the Appellant to pay the procedural costs as a condition to receive the grounds of the Appealed Decision, resulted in an attempt to hinder the Appellant to bring its case in front of a judge in the sense of Article 6 ECHR, since the Single Judge of the PSC cannot be considered as such.

- The Respondent sent a notice of default to the Appellant on 13 March 2019; however, it granted only a deadline of nine days, i.e. until 22 March 2019, to proceed with the payment. Therefore, the Respondent failed to respect the formal requirements of Article 12bis RSTP and its claim should be rejected, even if the Appellant does not contest that the principal amount of EUR 3,500,000, as a second installment of the transfer fee, is effectively due. Regarding the alleged default notice of 11 April 2019, the Respondent did not bring any proof in support of its sending.

- The Respondent did further not respect the formal requirements of Article 12bis RSTP for the additional claimed payment of EUR 250,000. Therefore, such claim shall be rejected as well.

- The Respondent did not wait 20 days – as provided for by the Transfer Agreement – after the due date of the second installment, but sent its reminder for payment already on 13 March 2019. Therefore, this request cannot trigger the penalty clause foreseen in Article 2.2 lit. d of the Transfer Agreement.

- Subsidiarily, the penalty of EUR 350,000 shall be considered as excessive and, therefore, based on Article 163 para. 1 Swiss Code of Obligations (CO) be reduced. When considering the balance of interests necessary for a reduction of a penalty clause to be admitted, it shall be considered that: (i) the Respondent was not very collaborative in finding a solution; (ii) the first installment was timely paid by the Appellant;(iii) that the Appellant has severe financial difficulties since the end of the season 2018/19; and that (iv) the Respondent is entitled to receive default interests at a rate of 5%, as provided for by Swiss Law, which represents an interest rate much higher than the current bank interests. Further, the Appellant argued that the situation caused by COVID-19 does slightly favor the Respondent which will resume the football games in June 2020, whereas the Saudi Professional League will not resume before August 2020.

31. In its prayers for relief, the Appellant requests as follows:

"1. Declare this Appeal admissible:

2. Annul the Decision under Appeal rendered by FIFA Players' Status Committee on 11 February 2020 in its entirety;

3. Send back the present case to the FIFA Players' Status Committee for this body to take a new decision whilst respecting the principles of due process and impartiality of judge;

Or, in the alternative to point 3, to:

4. Declare that the Respondent's claim for payment and penalty is premature;

5. Dismiss the Respondent's claim for payment and penalty;

Or, in the alternative to point 2, 4 and 5, to:

6. Partially set aside the Decision under Appeal;

7. Award the Respondent the principal amount of EUR 3,750,000;

8. Reject the claim for the penalty in the amount of EUR 350,000;

Or, in the alternative to point 8, to:

9. Reduce the penalty to a reasonable amount;

10. Reject the claim for interest on the penalty;

And in any event, to order the Respondent to:

11. Bear the costs of the proceedings before the FIFA Players' Status Committee and reimburse the payments made by Al Nassr to FIFA and the Respondent in this respect;

12. Bear the costs of the proceedings before the Court of Arbitration for Sport including the CHF 1,000 paid by Al Nassr as CAS Court Office Fee;

13. Award a contribution to be established at its discretion to cover the legal fees and expenses of the Appellant".

B. Respondent's Submissions and Requests for Relief

32. The Respondent's submissions, in essence, may be summarized as follows:

- Today, all installments of the transfer price as well as the conditional payments are due and remained unpaid, except for the first installment. The Respondent filed a total of three petitions before the competent FIFA authority. The first one, corresponding to these proceedings, regarding the unpaid second installment and the conditional payment stipulated in Article 2.3 lit. b of the Transfer Agreement. The second one, pending before CAS (*CAS 2020/A/7132*) regarding the conditional payment stipulated in Article 2.3 lit. a of the Transfer Agreement and the third one, still pending before the PSC regarding the third installment of the transfer fee.

- The Respondent filed the first notice of default to the Appellant on 13 March 2019. The second notice followed by email on 2 April 2019, the same day it filed its petition to the competent FIFA authority. The final notice of default was then sent to the Appellant on 11 April 2019, granting an additional 10 days to pay the outstanding amounts. The correspondence to the Appellant was sent to its official email address as well as the address stated in the Transfer Agreement. All correspondences were sent to the PSC on 10 May 2019 and are part of the first instance file.

- The Appellant filed its Appeal only to gain time and postpone the payment. No excuses are brought forward by the Appellant for the non-payment of the amounts defined in the Transfer Agreement.

- Based on Article 2.2 lit. d of the Transfer Agreement, the Respondent does not have to send another notice in order to claim the penalty fee.

- The Appellant purchased a successful player, scoring more than 15 goals and with this helping the Appellant to become champion in the 2018/19 season. The damage caused by the non-payment by the Appellant is bigger than the agreed contractual penalty; therefore, no reduction of this penalty amount is justified.

- The comments made by the Appellant regarding the Single Judge of the PSC who decided this case in the first instance and who is the General Counsel of the ECA, are inappropriate and baseless.

33. In its prayers for relief, the Respondent requests as follows:

"1- Uphold the decision of the FIFA PSC passed on 11 February 2020 with its reference Player G. (Club Fenerbahce SK, Turkey/Club Al Nassr, Saudi Arabia) (case ref. 19-00804),

2- Reject the Appellant's request for relief,

3- Order Respondent to bear the costs of proceedings before the Court of Arbitration for Sport,

4- Award a contribution to be established in its discretion to cover the legal fees and expenses of the Respondent".

V. JURISDICTION

34. Art. R47 of the Code states:

"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 or 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".

35. The jurisdiction of the CAS, which is not disputed, derives from Art. 58 FIFA Statutes as well as Art. 6.2 of the Transfer Agreement. Art. 58 para. 1 of the FIFA Statutes provides that appeals against final decisions passed by FIFA's legal bodies shall be lodged with CAS within 21 days of receipt of the decision in question.

36. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

VI. ADMISSIBILITY

38. The Appealed Decision was communicated to the Parties by email on 31 March 2020.

39. The Appellant filed its Statement of Appeal on 21 April 2020 and, therefore, within 21 days from the communication of the Appealed Decision. The Appeal complied with all other requirements of Article R47 et seq. of the Code, including of the payment of the CAS Court Office fee.

40. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

41. Article R58 of the 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".

42. Article 6.1 of the Transfer Agreement states: *"This agreement shall be governed by and construed in accordance with FIFA Regulations and/or Swiss law".*

43. The Parties concur and the Sole Arbitrator agrees that based on the before cited Article 6.1 of the Transfer Agreement first of all the FIFA Regulations and, subsidiarily, Swiss law shall be applicable.

VIII. MERITS

A. Has there been a breach of procedural rules in front of the PSC?

44. Firstly, the Appellant alleges several breaches of procedural rules in front of the PSC, amongst which the Single Judge of the PSC not to be impartial due to his work as General Counsel of the ECA and the Respondent's President being a member of the ECA board.

45. In this respect, first of all, the Sole Arbitrator points out to the fact that the PSC is not considered to be a court or an arbitration panel in the legal sense: It is an organ of FIFA, an association under Swiss law, and as such the principles of impartiality and independence applicable to state courts or arbitral tribunals do not apply *mutatis mutandis*. The Appellant itself correctly observed that the Single Judge of the PSC cannot be considered a judge in the sense of Article 6 ECHR; such role of the Single Judge of the PSC was never alleged, neither by the Respondent nor by FIFA.

46. Further, the Sole Arbitrator points out to Article R57 of the Code which states:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. […]".

47. Based on the CAS jurisprudence, the appeal to the CAS has a healing effect for different forms of irregularities which (may have) happened in the first instance: *"*[…] *such irregularities may take the form of an alleged unfairness, the lack of independence of the first-instance tribunal, the non-participation in the proceedings or a risk of conflict of interest"* (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, R57 N29).

48. In looking at the CAS jurisprudence and the legal authorities cited before, the Appellant's argument regarding the alleged lack of impartiality of the Single Judge of the PSC, therefore, is to be considered as healed with the proceedings before the Sole Arbitrator. In this respect, the

Sole Arbitrator highlights that, at the beginning of the hearing, both Parties confirmed that they do not have any objection to Mr. Bernhard Welten being the Sole Arbitrator to decide this case. At the end of the hearing, they further confirmed that their right to be heard has been fully granted and they were treated equally.

49. The Appellant argued that, based on the applicable FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "Procedural Rules") being in force since 1 January 2018, it was not obliged to pay the procedural costs of the PSC. The Sole Arbitrator notes that in the Appealed Decision, the Single Judge of the PSC stated in II.1.: *"[…] In this respect, he took note that the present matter was submitted to FIFA on 2 April 2019. Taking into account the wording of art. 21 of the 2019 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: the Procedural Rules), the aforementioned edition of the Procedural Rules is applicable to the matter at hand"*. However, Article 21 of the 2019 edition does only state that it enters into force on 1 November 2019, while there is no specific regulation for ongoing procedures which started during the year 2019.

50. The Sole Arbitrator has compared the 2018 and 2019 editions of the Procedural Rules and notes that both versions of Article 18 para. 1 have the same wording and read *"Costs are to be borne in consideration of the parties' degree of success in the proceedings"*. Therefore, the Single Judge of the PSC decided that it was for the Appellant to bear all the costs of the FIFA proceedings. In this regard, the Sole Arbitrator notes that it is uncontested that the Appellant was the losing party and, as such, had to pay the costs for the FIFA proceedings. Even if the 2018 edition of the Procedural Rules would be applicable, the Appellant, as losing party, would have had to pay the FIFA procedural costs anyway.

51. Furthermore, the Sole Arbitrator also notes that, in fact, Article 15 para. 4 (which reads: *"Whenever procedural costs are due, the grounds of decision will only be notified to the party requesting the grounds and upon payment of the relevant procedural costs")* was only introduced with the 2019 edition of the Procedural Rules, while the 2018 edition did not provide any specific rule regarding the payment of the relevant procedural costs as condition to receive the grounds of a decision. This notwithstanding, the Sole Arbitrator is of the opinion that this issue is of no relevance for the outcome of the present matter since, as mentioned above, the Appellant would have had to pay the costs in any event. In addition, and most importantly, the Appellant was, in the end, not prevented to bring its case before the CAS, as it eventually did. Consequently, by virtue of the healing effect of CAS appeals, the Sole Arbitrator considers that any possible procedural mistake occurred before the previous instance in relation to the applicable edition of the Procedural Rules and the request to pay the procedural costs in order to receive the grounds of the Appealed Decision, has been cured by the mere fact that the Appellant filed its Appeal with the CAS. Accordingly, the Appellant's arguments in this regard are dismissed.

B. Are the outstanding payments due?

52. The Sole Arbitrator further acknowledges that it remained uncontested that the Appellant owes the Respondent the second installment of EUR 3,500,000 and that such amount is overdue since 1 March 2019, as well the additional payment of EUR 250,000 based on Article 2.3 lit. b of the Transfer Agreement, which is overdue as the Player scored or assisted more than 15 goals

in one football season. In this regard, the Sole Arbitrator notes that Article 2.3 lit. c of the Transfer Agreement states: *"The amounts mentioned in Article 2.3 above shall be paid by AL NASSR to FENERBAHÇE within 15 (fifteen) days after conditions for the payment are met"*.

53. The Respondent, in its default notice of 13 March 2019, requested the payment of the amount based on Article 2.3 lit. b of the Transfer Agreement. In this regard, the Sole Arbitrator notes that the Appellant did not contest that the Player scored at least 17 goals in the period prior the sending of the default notice of 13 March 2019. Therefore, pursuant to Article 2.3 lit. b and c of the Transfer Agreement, the Sole Arbitrator is of the opinion that the amount of EUR 250,000 became overdue on the fifteenth day after the sending of the default notice of 13 March 2019, i.e. on 28 March 2019. However, as no interest for the delayed payment was granted by the PSC on this additional amount of EUR 250,000 and the Respondent did not appeal against this point, the Sole Arbitrator has not to look into further details since when possibly an interest on the additional amount for delayed payment of 5% p.a. would be due by the Appellant.

54. The Appellant's arguments according to which the Respondent did not respect the formal requirements of Article 12bis RSTP were rejected by the Single Judge of the PSC. Nevertheless, the Appellant tries again to reject the Respondent's claim with this reasoning. The Sole Arbitrator is of the opinion that the formal requirements based on Article 12bis para. 3 RSTP – i.e. a written default notice with a 10 days deadline to fulfill the outstanding financial obligations – is *only* a precondition for a debtor club to be considered to have overdue payables, as such, to be sanctioned according to Article 12bis para. 4 RSTP. More precisely, Article 12bis para. 3 RSTP specifies the condition for an application of the general rule of Article 12bis para. 2 RSTP, according to which *"[a]ny club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned in accordance with* [Article 12bis para. 4 RSTP]*"*. As observed in CAS 2016/A/4874, *"the 10-day deadline in Article 12bis para. 3 RSTP applies to a determination as to whether a Club is in arrears of its payment obligations for purposes of seeking sanctions against it"*.

55. Furthermore, CAS 2016/A/4874 states that *"[t]he lack of a 10-day deadline in a warning letter does not mean the debt is inexistent, nor insubstantial"*. Consequently, even if a creditor club does not completely comply with the rules of Article 12bis RSTP, this will not hinder the creditor club to file a claim for amounts due in front of the competent FIFA authority: the creditor club would *only* be prevented from seeking sanctions pursuant to Article 12bis para. 4 RSTP against the debtor club. In fact, for assessing whether a payment is overdue or not, the underlying contractual regulations are of essence. In the case at hand, this means that mainly Articles 2.2 and 2.3 of the Transfer Agreement are important. As stated before, it remained uncontested by the Appellant that the second installment of the transfer fee in the amount of EUR 3,500,000 as well as the additional payment for the Player scoring more than 15 goals in one football season in the amount of EUR 250,000 were overdue on 1 March respectively on 13 March 2019. The Sole Arbitrator acknowledges that these are uncontested facts. Therefore, it is obvious for the Sole Arbitrator that the Respondent was allowed to file its claim before the competent FIFA authorities for the payment of these two amounts on 2 April 2019. With this, the Appellant's allegations are rejected.

56. The Appellant in its submissions further alleged that the Respondent is prevented from asking for the penalty amount foreseen in Article 2.2. lit. d of the Transfer Agreement as the

Respondent did not wait the requested 20 days but sent its reminder on 13 March 2019 instead.

57. First of all, the Sole Arbitrator acknowledges that in the Respondent's default notice of 13 March 2019, the Respondent did not ask for the penalty amount based on Article 2.2 lit. d of the Transfer Agreement. Only in the claim filed on 2 April 2019, the Respondent requested the payment, in addition to the two uncontested amounts, of the penalty amount of EUR 350,000.

58. The Sole Arbitrator further notes that in the FIFA file there is a letter of the Respondent dated 9 August 2019 in which reference is made to another request sent by the Respondent to FIFA on 10 May 2019; this second request is based on Article 12bis RSTP. However, for unknown reasons, FIFA did not include this additional request in the case file sent to the CAS Court Office. Nevertheless, the Respondent provided in its Answer the final notice of default sent to the Appellant by email on 11 April 2019. In this letter, the Respondent asked for the additional payment of the penalty amount of EUR 350,000 and set the Appellant a deadline of 22 April 2019 to pay the total due amount of EUR 4,100,000.

59. The Single Judge of the PSC did not state any details how and when the penalty amount of EUR 350,000 was requested by the Respondent. He mainly rejected the Appellant's argumentation and confirmed that the penalty amount cannot be considered as unfair or disproportionate.

60. Looking at the wording of Article 2.2 lit. d of the Transfer Agreement and the Respondent's final notice of default of 11 April 2019, the Sole Arbitrator is satisfied with the Respondent's compliance with the conditions set in Article 2.2 lit. d of the Transfer Agreement. The Appellant's argumentation that the Respondent did not wait 20 days after the due date of the second installment, but sent its reminder for payment already on 13 March 2019 and, therefore, the Respondent's request for the penalty amount cannot be considered, is rejected. For whatever reasons, the Appellant did not refer in its argumentation to the final notice sent by the Respondent on 11 April 2019. During the hearing, the Appellant only referred to the fact that its secretary-general in charge during the season 2018/19 did leave the Appellant by the end of the season and did not inform the new secretary-general of the Appellant about all facts and correspondence. In the Sole Arbitrator's view, this is no excuse as it is the duty of the Appellant alone to be organized in a sense that all important information is kept within the club and accessible to the persons in charge. Even if the UPS document provided by the Respondent for sending this final notice on 11 April 2019 does not give any proof that such letter was received by the Appellant, the copy of the email sent on 11 April 2019 clearly shows that it was sent to the email address of the secretary-general of the Appellant. Therefore, it is obvious for the Sole Arbitrator that at least such email was received by the Appellant and as a consequence the Respondent fulfilled the conditions set in Article 2.2 lit. d of the Transfer Agreement and the penalty amount of EUR 350,000 became due.

61. The Appealed Decision does grant the Respondent the total amount of EUR 4,100,000 which included the penalty amount of EUR 350,000. The Appealed Decision, however, did not grant any interests on the amount of EUR 600,000 (additional payment of EUR 250'000 and the penalty amount of EUR 350'000). As stated before, the Sole Arbitrator is of the opinion that also the penalty amount of EUR 350'000 became due, but as the Respondent did not appeal

himself against the Appealed Decision, the Sole Arbitrator has not to take any decision regarding a possible interest due by the Appellant on the penalty amount.

C. Is the penalty to be considered excessive and therefore should it be reduced?

62. To the Appellant's allegation that a penalty amount of EUR 350,000 pursuant to Article 2.2 lit. d of the Transfer Agreement has to be considered as excessive, the Sole Arbitrator notes the following.

63. The Sole Arbitrator first considers that the validity of the penalty clause of the Transfer Agreement has to be assessed according to Swiss law, pursuant to Article 6.1 of the Transfer Agreement and Article R58 of the Code. The applicable Article 163 Swiss Code of Obligations (CO) 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".*

64. The Sole Arbitrator, based on the subsidiarily applicable Swiss law, holds that in general the parties are free to agree on a penalty amount and only if such penalty amount is excessively high and to be considered as being against justice and fairness, it is possible, based on Article 163 para. 3 CO, to reduce it. There is a long-standing CAS jurisprudence existing to the question if a penalty has to be considered as excessive and accordingly be reduced. Reference is made to *CAS 2018/A/5857*, *CAS 2017/A/5242*, *CAS 2015/A/4057*, *CAS 2012/A/2202* and further references made in these awards.

65. There are further several decisions of the Swiss Federal Tribunal ("SFT") mainly stating that a reduction of a penalty shall only be decided if the disproportionality between the agreed penalty amount and the interest of the creditor to maintain his entire claim is obvious. The judge shall decide on a case-by-case basis and take into consideration all the circumstances of the case, e.g.:

- the ratio between the agreed penalty and the creditor's interest in the fulfilment of the secured claim *("das Verhältnis zwischen der vereinbarten Konventionalstrafe und dem Interesse des Gläubigers an der Erfüllung der gesicherten Forderung"*; SFT of 25.08.2011, 4A.107/2011, E. 3.1; SFT 82 II 142, 146);

- the seriousness of the fault of the parties involved (*"die Schwere des Verschuldens der Beteiligten"*; SFT of 01.05.2013, 4A.656/2012, E. 2.3; 21.12.2012, 4A.595/2012, E. 5.1; 19.01.2005, 4C.360/2004; 14.10.2003, 4C.143/2003; SFT 105 II 200, 203f. E. b, c; 103 II 135; 91 II 383);

- the importance of the fulfilment of the principal claim for the other party (*"die Wichtigkeit der Erfüllung der Hauptforderung für die anderen Partei"*);

- the debtor's interest and profit in non-performance or defective performance (*"das Interesse und der Gewinn des Schuldners an der Nicht- oder Schlechterfüllung"*);

- the seriousness of the breach of the primary obligation guaranteed (*"die Schwere der Verletzung der gesicherten Hauptverpflichtung"*; SFT of 01.05.2013, 4A.656/2012, E. 2.3; 25.08.2011, 4A.107/2011, E. 3.1; 14.10.2003, 4C_143/2003; SFT 103 II 129, 135);

- the economic situation of the parties (SFT of 01.05.2013, 4A.656/2012, E. 2.3; 21.12.2012, 4A.595/2012, E. 5.1; 25.08.2011, 4A.107/2011, E. 3.1; 06.07.2009, 4A_233/2009, E. 4; 14.10.2003, 4C_143/2003; SFT 103 II 129, 135; 95 II 532, 539 f.), mainly the debtor. The more strained the financial situation of the debtor is, the more likely the contractual penalty must be regarded as excessive (*"die wirtschaftliche Lage der Beteiligten, namentlich des Verpflichteten. Je angespannter die finanzielle Lage des Pflichtigen ist, umso eher muss die Konventionalstrafe als überhöht angesehen werden"*; SFT of 20.02.2004, 4C.276/2003);

- the maximum presumed damage suffered by the creditor; however, the damage actually suffered is not decisive (*"der mutmassliche Schaden, den der Gläubiger höchstens erlitten hat; der effektiv eingetretene Schaden ist hingegen nicht massgebend"*; SFT of 25.08.2011, 4A.107/2011, E. 3.1).

- the risk of damage to which the creditor was exposed in the specific case (*"das Schadensrisiko, dem der Gläubiger im konkreten Fall ausgesetzt war"*; SFT of 17.10.2012, 4A.160/2012, E. 1.2; 08.12.2009, 4A.141/2008, E. 14 f.; SFT 133 III 43, 54 f.).

66. In its submissions, the Appellant pointed out several factors that, in its opinion, would justify a reduction of the penalty. In particular, the Appellant considered that the balance of interests, the fact that the Respondent was not very collaborative in finding a solution, the fact that the first installment was timely and fully paid in accordance with the Transfer Agreement and the Appellant had – and still has – severe financial difficulties since the end of the season 2018/19. Further, the Appellant also stressed out that, following the COVID-19 pandemic, the Respondent will resume the football games in June 2020, while the Saudi Professional League will not resume before August 2020. Consequently, the Appellant argued that this element shall also be taken into account in the assessment of the penalty clause. In addition, the Appellant argues that a reduction of the penalty should also be granted since the Respondent was already awarded with the payment of default interests at a rate of 5%, which is clearly higher than the interest rate applied by any bank in the actual market situation.

67. The Respondent mainly replied that the damage caused by the non-payment is far bigger than the agreed penalty amount. During the hearing, the Respondent further pointed out that the transfer of the Player is the single biggest transfer done by the Respondent in many years and the transfer fee corresponds to roughly 12.5% of its annual budget. Due to the non-payment, the Respondent was financially struggling and it was lucky to finally get a license for the season 2020/21. Therefore, the Respondent is of the opinion that the contractual penalty amount is not excessive.

68. First of all, the Sole Arbitrator compares the penalty amount to the transfer fee of the Player as

agreed between the Parties. The penalty amount of EUR 350,000 is merely 3.33% of the total transfer fee (i.e. EUR 10,500,000). As the penalty is due each time the Appellant fails to make the payment for each installment, the penalty amount is further compared to the two outstanding installments: compared to the second installment of EUR 3,500,000 it corresponds to 10% and compared to the third installment of EUR 2,000,000 it corresponds to 17.5%. The Sole Arbitrator is, therefore, of the opinion that based on the ratio alone, the penalty amount cannot be considered as disproportionate.

69. Further, the Sole Arbitrator considers that the Appellant failed to substantiate its allegation regarding its financial difficulties by the end of the season 2018/19, since no evidence nor statement have been provided in this regard by the Appellant.

70. In any event, the Sole Arbitrator considers that the alleged financial difficulties do not constitute a valid reason to consider the penalty amount as being disproportionate. In fact, the first installment was apparently paid by 6 September 2018 in accordance with the Transfer Agreement. The second installment became overdue on 1 March 2019 and, therefore, still during the season 2018/19. There are no proofs that the Appellant was in financial difficulties in this moment.

71. Further, the COVID-19 pandemic does not favor any Party, since it is foreseen that also the Appellant will finish the games of the season 2019/20 in late August/early September 2020. The Sole Arbitrator also takes into consideration that the second installment is due since a year and a half, and, therefore, well before the pandemic effects could have an influence on the relations between the Parties.

72. Further, the Appellant did not bring forward any other reasoning to convince the Sole Arbitrator to consider the penalty fee as being excessive and to reduce it. The Respondent did not have any duty to negotiate a reduction of the transfer fee with the Appellant; it is the Appellant's main duty to pay the transfer fee as agreed in the Transfer Agreement based on the principle *"pacta sunt servanda"*.

73. Regarding the default interest rate of 5% granted by the Appealed Decision and the Appellant's argument according to which such interest rate is higher than any interest rate applied by banks, the Sole Arbitrator points out to Article 104 CO, which states:

> *"[1] 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.*
>
> *[2] Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.*
>
> *[3] In business dealings, where the normal bank discount rate at the place of payment is higher than 5%, default interest may be calculated at the higher rate".*

74. Further, the Swiss Federal Tribunal in SFT 130 III 312 and WEBER in the Bernese Commentary (*"Berner Kommentar"*) state that the legislator did already take into consideration that the due

default interest is possibly higher than the market interest during the period of default and, by doing so, the legislator showed the penalty effect of the default interest. However, the setting of the default interest at a rate of 5% in Article 104 CO cannot be lowered by any proofs and neither by a judge. As a consequence, the Sole Arbitrator is of the opinion that the penalty amount of EUR 350,000 cannot be reduced based on the default interest of 5% granted on the overdue second installment of EUR 3,500,000. Therefore, the Sole Arbitrator rejects the Appellant's request for a reduction of the penalty amount.

75. As a last point, the Sole Arbitrator holds that the Appellant did not oppose to the ban from registering any new players, either nationally or internationally, up until the due amount is paid, based on Article 24bis RSTP. As the Appellant already paid the first installment to the Respondent, it has all bank details of the Respondent to pay the overdue second installment plus interests, the additional payment of EUR 250,000 based on Article 2.3 lit. b respectively the penalty amount of EUR 350,000 based on Article 2.2 lit. d of the Transfer Agreement.

76. Based on the above, the Sole Arbitrator dismisses the Appeal and confirms the Appealed Decision in full.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Al Nassr Football Club against the decision issued on 11 February 2020 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is fully dismissed.

2. The decision issued on 11 February 2020 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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