CAS 2013/A/3205 Marítimo da Madeira Futebol SAD v. AEP Paphos

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Luigi **Fumagalli**, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Mr Olivier **Carrard**, Attorney-at-Law, Geneva, Switzerland
Mr Herbert **Hübel**, Attorney-at-Law, Salzburg, Austria

between

MARITIMO DA MADEIRA FUTEBOL SAD, Funchal, Portugal
Represented by Mr Gonçalo Almeida of Almeida, Dias, Megale & Associados, Attorney-at-Law in Lisboa, Portugal

Appellant

and

AEP PAPHOS, Paphos, Cyprus
Represented by Mr Kyriakos A. Makrides, of Kikis A. Makrides & Co. LLC, Attorney-at-Law, Nicosia, Cyprus

Respondent

* * * * *

1. BACKGROUND

1.1 The Parties

1. Marítimo da Madeira Futebol SAD (hereinafter referred to as "Marítimo" or the "Appellant") is a football club, with seat in Funchal, Portugal. Marítimo is affiliated to the Federação Portuguesa de Futebol, which is a member of the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. AEP Paphos (hereinafter referred to as "Paphos" or the "Respondent") is a football club, with seat in Paphos, Cyprus. Paphos is affiliated to the Cyprus Football Association, which is also a member of FIFA.

1.2 The Dispute between the Parties

3. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

4. On 28 August 2012, the parties signed a "*Football Player Loan Agreement*" (hereinafter also referred to as the "Contract") for the loan from Marítimo to Paphos of the player Fábio Vieira Amaro (hereinafter referred to as the "Player") for a period ending on 30 June 2013.

5. The Contract provided *inter alia* for the following:

> "*3. The value of temporary transfer of the player … is 15,000.00 € (fifteen thousand euros) that must be paid by AEP to Marítimo SAD.*
>
> *4. The total transfer amount of 15,000.00 € (fifteen thousand euros) shall be paid by AEP, upon the signing of this agreement, no later than 29th August 2012. …*
>
> *12. In case of default of this contract, AEP is obliged to pay to Marítimo SAD, by way of penalty, the sum of € 500,000.00 (five hundred thousand Euros). …*
>
> *15. AEP has the option to obtain the federative rights of the permanent transfer of the Player from Marítimo SAD by informing Marítimo SAD no later than 31.12.2012 for the total net amount of € 500,000.00 (five hundred thousand Euros), as a transfer fee. …*
>
> *17. The Parties agree and acknowledge that in the event of a dispute arising, relating to this agreement, the parties shall accept the jurisdiction of FIFA, and by signing this Agreement, the parties agree to be bound by any decision made by FIFA*".

6. On 17 September 2012, Marítimo sent to Paphos the invoice No. 1213004 dated 6

September 2012 for the amount of EUR 15,000, described to correspond to the amount due for the "*temporary transfer of player Fabio Vieira Amaro (Balu) as per contract dated 28.08.2012*".

7. In a letter of 13 November 2012, Marítimo requested Paphos "*to urgently settle our invoice number 1213004*".

8. On 26 December 2012, Marítimo lodged a claim with FIFA, indicating that Paphos had not complied with the payment obligation contemplated by Article 4 of the Contract, and requesting that Paphos be ordered to pay to Marítimo the total amount of EUR 515,000, i.e. EUR 15,000 as consideration for the loan under Article 4 of the Contract, and EUR 500,000 as penalty pursuant to Article 12 of the Contract, plus interest accruing since 29 August 2012.

9. On 19 March 2013, the Single Judge of the FIFA Players' Status Committee (hereinafter referred to as the "Single Judge") issued a decision (hereinafter referred to as the "Decision") holding that:

"*1. The claim of the Claimant, CS Maritimo, is partially accepted.*

2. The Respondent, AEP Paphos, has to pay to the Claimant, within 30 days as from the date of notification of this decision, the amount of EUR 15,000 plus 5% interest p.a. on said amount as of 30 August 2012 until the date of effective payment.

3. If the aforementioned sum plus interest is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee, for consideration and a formal decision.

4. Any further claim of the Claimant is rejected. ...".

10. More specifically, the Single Judge preliminarily noted in the Decision that the 2012 edition of the Regulations on the Status and Transfer of Players (hereinafter referred to as the "RSTP") was applicable to the substance of the matter. Then:

"*8. ... the Single Judge noted that the Respondent, in spite of having been invited to do so, did not provide FIFA with its comments pertaining to the present matter. Therefore, the Single Judged deemed that, by doing so, the Respondent renounced to its right to defence.*

9. As a consequence, the Single Judge ... pointed out that in the present matter a decision shall be taken upon the basis of the documentation on file, in other words upon the documents and arguments provided by the Claimant.

10. Bearing in mind the aforementioned, the Single Judge went on to establish

whether there was any payment due by the Respondent to the Claimant, based on the transfer agreement in question.

11. In this respect, the Single Judge recalled the contents of the agreement, i.e. the obligation of the Respondent to pay a loan fee in the amount of EUR 15,000 by no later than 29 August 2012. Equally, the Single Judge recalled that the Claimant stated that the Respondent had not made any payments to the Claimant.

12. Taking into account the above-mentioned, the Single Judge concluded that in accordance with art. 4 of the agreement the Respondent had to pay to the Claimant the outstanding amount of EUR 15,000.

13. In this respect, the Single Judge established that no interest had contractually been agreed between the parties in relation to the loan fee. Consequently, the Single Judge decided to award, in accordance with the general practise of the Players' Status Committee, default interest at a rate of 5% p.a. on the outstanding amount as of 30 August 2012.

14. As regards the Claimant's request for a penalty fee of EUR 500,000, the Single Judge, after a careful examination of the contents of the agreement, especially art. 12 of the agreement, concluded that a penalty clause amounting to EUR 500,000 for late payment in relation to a total loan compensation of EUR 15,000 is to be considered as manifestly disproportionate and exorbitant, and as such, cannot be enforced.

15. Therefore, the Single Judge decided that the Claimant's claim for the payment of EUR 500,000 as a penalty for the default of the Respondent regarding the payment of the loan fee, had to be rejected.

16. In conclusion, the Single Judge decided to partially accept the Claimant's claim, and established that the Respondent had to pay to the Claimant the total amount of EUR 15,000 plus 5% interest p.a. as of 30 August 2012 until the date of effective payment and that any further claims of the Claimant are rejected".

11. The Decision with its supporting grounds was notified to the parties on 22 May 2013.

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

12. On 12 June 2013, Marítimo filed with the Court of Arbitration for Sport (hereinafter referred to as the "CAS") a statement of appeal, together with 7 exhibits, to challenge the Decision. Pursuant to Article R48 of the Code of Sports-related Arbitration (2013

Edition) (hereinafter referred to as the "Code"), the Appellant designated Mr Olivier Carrard as an arbitrator.

13. On 18 May 2013, Marítimo's statement of appeal was transmitted by the CAS Court Office to the Respondent, by fax and DHL to the address provided by the Appellant, and forwarded to FIFA. In the letter to FIFA, the CAS Court Office noted that "*the appeal is not directed at FIFA*" and that "*if FIFA intends to participate as a party in the arbitration … it shall file with the CAS an application to this effect*".

14. In a letter of 18 June 2013, the Appellant informed the CAS Court Office that the statement of appeal was to be considered as its appeal brief in accordance with Article R51 of the Code.

15. In a letter of 27 June 2013, FIFA advised the CAS Court Office that it renounced "*its right to request its possible intervention in the present arbitration proceeding*".

16. On 6 July 2013, the CAS Court Office informed the Appellant that "*DHL is currently facing difficulties to contact the Respondent in order to deliver*" the Appellant's statement of appeal and its exhibits. As a result, on 17 June 2013, the CAS Court Office requested the Appellant to provide another address for the Respondent. Such alternative address was provided by the Appellant in a letter of the same 17 July 2013.

17. On 18 July 2013, however, the CAS Court Office informed the Appellant that the statement of appeal and its exhibits could not be delivered also at the alternative address, and therefore that a new address had to be provided.

18. On 25 July 2013, the Appellant informed the CAS Court Office that the addresses previously provided corresponded "*to the ones taken from the internet and, above all, from UEFA's 2013 booklet*", and therefore requested that the Respondent be notified by fax only or through the Cyprus Football Association.

19. On 26 July 2013, the CAS Court Office transmitted to the Cyprus Football Association copy of the Appellant's statement of appeal, together with its exhibits, requesting the Cyprus Football Association "*to notify all these documents to the Respondent*" and to inform the CAS "*of the exact date of receipt of these documents by the Respondent*".

20. On 30 July 2013, the Cyprus Football Association confirmed that the Appellant's statement of appeal, together with its exhibits, had been transmitted on that day to the Respondent.

21. On 30 July 2013, the CAS Court Office, by communication sent to the fax number confirmed by the Cyprus Football Association, invited the Respondent, *inter alia*, to appoint an arbitrator and to submit its answer to the appeal, in accordance with the relevant provisions of the Code.

22. On 9 August 2013, the Respondent filed with the CAS Court Office a letter containing its "*Defence*", in reply to the appeal of Marítimo.

23. In a letter of 12 August 2013, the CAS Court Office noted that the Respondent had failed to appoint its arbitrator, and that therefore an arbitrator would be appointed by the

President of the CAS Appeals Arbitration Division *in lieu* of the Respondent, pursuant to Article R53 of the Code.

24. In letters dated 19 August 2013, both parties informed the CAS Court Office that they did not deem a hearing before the CAS to be necessary, and therefore that an award based solely on the parties' written submissions could be issued.

25. By communication dated 24 September 2013, the CAS Court Office notified the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Olivier Carrard and Mr Herbert Hübel, arbitrators.

26. With notification issued on 22 October 2013, the CAS Court Office advised the parties that the Panel had considered itself sufficiently well informed and had decided, pursuant to Article R57, second paragraph of the Code, and in accordance the parties' letters of 19 August 2013, to issue an award on the basis of the parties' written submissions only.

27. On 13 November 2013, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure, which was accepted and countersigned by the parties.

2.2 The Position of the Parties

28. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered for the purposes of its decisions all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

a. The Position of the Appellant

29. The Appellant's prayers for relief, indicated in its statement of appeal, are the following:

> "*1. Confirm that the Respondent has unlawfully breached the Agreement;*
>
> *2. Condemn the Respondent to pay to the Appellant the loan fee established in the Agreement in the amount of € 15.000,00 (fifteen thousand Euros), plus the penalty fee foreseen for its contractual breach, in the amount of € 500.000,00 (five hundred thousand Euros), totalizing € 515.000,00 (five hundred and fifteen thousand Euros);*
>
> *3. Subsidiary, in case the Panel reached the conclusion that the parties have established that faced with a contractual breach, the total amount due to the Appellant was the one established in the penalty clause, then condemn the Respondent to pay to the Appellant such penalty fee in the amount of € 500.000,00 (five hundred thousand Euros);*

4. Subsidiary, in case the Panel rejects any of the 2 (two) previous requests (Par. 2 & 3 above), concluding that the penalty clause is considered disproportionate and therefore excessive, to have such penalty fee reduced in accordance, including the outstanding loan fee;

5. Condemn the Respondent to pay to the Appellant default interest over the due amount at the rate of 5% p.a. as of 29 August 2012 until the date of its effective payment;

6. Condemn the Respondent to pay a financial contribution towards the legal costs and other expenses (e.g. communications, travel expenses and accommodation) incurred by the Appellant, in a minimum amount of CHF 10.000,00 (ten thousand Swiss Francs);

7. Condemn the Respondent, as the sole responsible for the present procedure, to bear the entire procedural costs".

30. The Appellant, in other words, claims to be entitled to receive the payment from the Respondent of EUR 15,000 as remuneration for the loan of the Player under Article 4 of the Contract, and/or of EUR 500,000 as penalty under Article 12 of the Contract for the contractual breach committed by the Respondent, or the lower amount which the Panel might determine following the reduction of the stipulated penalty, if found to be excessive. The Decision, which granted only the request for payment of EUR 15,000 and denied the claim relating to the penalty, has to be set aside, since, in the Appellant's opinion, it does not have any legal basis.

31. In fact, the Appellant maintains that all the conditions for the payment of the amount claimed as penalty have been satisfied:

i. the Respondent failed to make the payment for the loan of the Player, due on 29 August 2012, notwithstanding the invoice transmitted on 17 September 2012 and the reminder sent on 13 November 2013, therefore breaching the Contract;

ii. the Contract provided at its Article 12 a penalty for the event of breach of the obligations thereunder;

iii. such clause was freely negotiated and agreed by the parties and was intended "*to compensate the complying party for the other's eventual breach and not for damages*";

iv. the Appellant and the Respondent agreed in the Contract that the Player's value was of EUR 500,000, as they indicated that amount to be the consideration to be

paid in the event of transfer of the Player on a final basis;

v. during the loan period, the Appellant was prevented from negotiating with any other club the transfer of the Player;

vi. the validity of penalty clauses is recognised by Swiss law, and namely by Article 160 of the Swiss Code of Obligations (hereinafter referred to as the "CO"), which the Single Judge "*completely disregarded*", under which, "*in the worst case scenario for the Appellant*", the penalty could be reduced, if deemed excessive.

32. In conclusion, the Appellant submits that it "*deems that the reasons exposed in the appealed decision towards the validity and enforcement of the penalty clause fee are legally non-sustained, as it considers the Agreement to be valid and binding in all its clauses and dispositions, including the disputed one, which should be enforced*".

b. The Position of the Respondent

33. The Respondent, in its "*Defence*", requested that:

"*the Appellant's claim with regard to the amount of € 500.000 … be dismissed*".

34. More specifically, in support of its request to have the Appellant's claims dismissed, the Respondent "*denies the content of the Club's Maritimo da Madeira appeal*" and submits the following:

"*1. The Club alleges that the decision by the FIFA DRC is correct and lawful.*

The penalty amounting to Euro 500,000 for late payment in relation to a total loan compensation of Euro 15,000 is disproportionate and exorbitant.

2. Therefore the Single Judge correctly decided that the Appellant's claim for the payment of € 500,000 as a penalty for the default of the Respondent regarding the payment of the loan fee, had to be rejected and indeed rejected the said payment".

3. LEGAL ANALYSIS

3.1 Admissibility of the Appeal

35. The admissibility of the appeal is not challenged by the Respondent. The statement of appeal was filed within the deadline set in Article 67.1 of the FIFA Statutes. No further internal recourse against the Decision is available to the Appellant within the structure of FIFA. Accordingly, the appeal is admissible.

3.2 Jurisdiction

36. CAS has jurisdiction to decide the present dispute between the parties. In fact, the jurisdiction of CAS is not disputed by the parties and has been confirmed by the Order of Procedure.

37. In any case, the CAS jurisdiction is contemplated by the Statutes of FIFA (edition 2012) as follows:

Article 66

1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

2. 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.

Article 67

1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. […].

3.3 Appeal Proceedings

38. As these proceedings involve an appeal against a decision rendered by an international federation (FIFA) in a matter relating to a contractual dispute, brought on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a non disciplinary case, in the meaning and for the purposes of the Code.

3.4 Scope of the Panel's Review

39. According to Article R57 of the Code,

"*the Panel shall have 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…*".

3.5 Applicable Law

40. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

41. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

"*… according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*".

42. In the present case the "*applicable regulations*" for the purposes of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA's rules and regulations.

43. What is questionable is whether the parties – in addition to the regulations of FIFA – made a choice with regard to the applicable law.

44. The Panel notes in this respect that in the Contract the parties accepted the jurisdiction of FIFA (Article 17). On such basis, the parties also accepted the jurisdiction of CAS to hear appeals against decisions of the legal bodies of FIFA (§ 37 above).

45. In this latter respect, the Panel remarks that the FIFA Statutes provide for a choice-of-law rule if an appeal against a final decision passed by FIFA's legal bodies is filed with the CAS. As already mentioned, in fact, pursuant to Article 66.2 of the FIFA Statutes:

"*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*".

46. In addition, the Panel notes that the Appellant, in its appeal, refers to Swiss law to criticise the Decision, and invokes specific provisions of the CO, which it submits should be applied by the Panel. The Respondent, in its answer, does not challenge the

point.

47. The Panel concludes, therefore, that, in addition to the FIFA rules and regulations, Swiss law applies to the merits of the dispute object of this arbitration.

48. The provisions set in Swiss law which are relevant in this arbitration include the following:

Article 160 CO ["*Contractual penalty – I. Rights of the creditor*"]

1. Relation between penalty and contractual performance

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 CO

2. Relation between penalty and damage

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 CO ["*Contractual penalty – II. Amount, nullity and reduction of the penalty*"]

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.*

3.6 The Dispute

49. On the basis of the relief requested by the parties, the object of these proceedings is the Player's request for the payment by the Club of an amount (EUR 500,000) corresponding to the penalty set in the Contract "*in case of default*" (Article 12). The Single Judge held such amount to be excessive and disproportionate, and therefore denied the request. The Appellant criticises the Decision and insists in this arbitration in its claim, asking that the Respondent be ordered to pay such penalty, in addition to (or comprehensive of) the amount due under the Contract for the loan of the Player (Article 4), which had remained unpaid.

50. The issue to be determined in this arbitration, therefore, is whether a claim can be brought by the Appellant against the Respondent for the payment of the amount stipulated at Article 12 of the Contract. It is in fact undisputed that the Respondent breached the obligation to pay, according to the terms of the Contract, the amount therein stipulated as remuneration to the Appellant for the loan of the Player.

51. The Panel notes that the penalty clause contained at Article 12 of the Contract qualifies as a contractual penalty ("*clause pénale*" or "*Konventionalstrafe*") under Swiss law (Article 160 CO), e.g. under the law applicable to the merits of the dispute in this arbitration. In fact, it contains all the necessary elements required for such purpose: (i) the parties bound thereby are mentioned, (ii) the kind of penalty has been determined, (iii) the conditions triggering the obligation to pay it are set, (iv) its measure is identified (COUCHEPIN, *La clause pénale*, Zürich, 2008, § 462).

52. This conclusion was implied in the Decision, which qualified it to be "*a penalty clause … for late payment in relation to a loan compensation …*" (para 14 of the Decision). The same indication is shared by the Appellant, which explicitly makes reference to the Swiss law provisions on contractual penalties, and is not disputed as such by the Respondent.

53. The Panel agrees with such indication (that the penalty clause in the Contract was stipulated "*for late payment*"), on the basis of the principles enshrined in Swiss law.

54. Under Swiss law, in fact, a penalty can be agreed for the event of non-performance or defective performance of a contract (Article 160.1 CO). In such situation, the penalty clause must be considered "exclusive": this means that the creditor must choose between compelling the performance or claiming the penalty. At the same time, a

penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160.2 CO). In such situation, the penalty is "cumulative": this means that the creditor might claim the penalty in addition to performance, provided he has not expressly waived such right or accepted performance without reservation. In such case, the creditor might as well ask for the default interest (Article 104 CO) (COUCHEPIN, *op. cit.*, § 1182 ff.). When the parties have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and meaning of the main obligation that is guaranteed. The burden of proof of the "cumulative" nature of the clause falls upon the creditor (Article 8 of the CO) (COUCHEPIN, *op. cit.*, § 601).

55. As a result, in order to establish if the penalty clause stipulated at Article 12 of the Contract is "cumulative" or "exclusive", and therefore whether the Appellant can seek in this arbitration the payment of the penalty in addition to the payment of the loan transfer fee already granted by the Decision (at point 2 of its operative part), it has to be determined if it was promised for "*non-performance or defective performance*" or for "*failure to comply with the stipulated time or place of performance*".

56. In that regard, the Panel preliminarily notes that such penalty clause lacks clarity. For instance, it does not state for which of the Respondent's obligations under the Contract it was stipulated. In the absence of any precision or limitation, the clause must be interpreted as covering all of these, namely:

i. the obligation to pay the temporary transfer fee (Articles 3 and 4 of the Contract);

ii. the obligation to pay the permanent transfer fee should this happen (Article 15 of the Contract);

iii. the obligation to pay the player's salary (Articles 8 and 9 of the Contract);

iv. the obligation to subscribe an insurance policy (Article 10 of the Contract);

v. the obligation to notify Marítimo in case of injury or need for a medical/chirurgical intervention (Article 13 of the Contract);

vi. the obligation to return the player and its International Transfer Certificate at the end of the temporary loan period should no permanent transfer occur (Article 16 of the Contract).

57. All these obligations were to be performed at a defined time, or before a defined deadline. The defined time limits were actually of the utmost importance within the Contract. In fact, default on paying the transfer fee (either temporary or permanent) could have resulted in the impossibility for Marítimo to acquire a replacement player

during the transfer period (as it might have lacked cash liquidities); default on notifying Marítimo about possible injuries or physical complications could have complicated the player treatment, thus possibly hinder its recovery and permanently reduced its "market value"; default on returning the player or its International Transfer Certificate during the transfer period could have resulted in the impossibility for Marítimo to have him officially qualified for the season.

58. It follows that it might reasonably be considered that the penalty clause in the Contract was stipulated for "*failure to comply with the stipulated time or place of performance*" and that it was therefore "cumulative": as noted (§ 52 above), this conclusion is expressed also in the Decision and is not disputed by the parties. As a result, its payment can be requested by the Appellant in this arbitration, in addition to the payment of the loan transfer fee already granted by the Decision (at point 2 of its operative part).

59. Disputed between the parties, on the other hand, is the measure of the penalty, agreed in the Contract in the amount of EUR 500,000, which (as mentioned) the Decision and the Respondent find to be unreasonable and therefore unenforceable. In the Decision, in fact, "*a penalty clause amounting to EUR 500,000 for late payment in relation to a total loan compensation of EUR 15,000 is … considered as manifestly disproportionate and exorbitant*". Therefore, no amount was granted to the Appellant under Article 12 of the Contract. Contrary to that conclusion, the Appellant maintains that the amount freely agreed by the parties is justified, taking into account the value of the Player (defined in the Contract to correspond to EUR 500,000: Article 15) as well as the damage it sustained because of the breach committed by the Respondent (since during the loan period the Appellant was prevented from negotiating with other clubs the transfer of the Player).

60. The Panel remarks that, in principle, under Swiss law, the parties are free to determine the amount of the contractual penalty (Article 163.1 CO). However, the court may reduce penalties that it considers excessive at its discretion (Article 163.3 CO). The law, on the other hand, does not state clearly what an excessive penalty is, so that it is for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty is excessive and, if so, to what extent it should be reduced (ATF 82 II 142 consid. 3, *JdT* 1957 I 104). In any case, it must be underlined that the judge should not reduce a penalty too easily and that the principle of contractual liberty, which is essential under Swiss law, has always to be privileged in case of doubt (MOOSER, *Commentaire Romand du Code des obligations*, Basel, 2003, n. 7 ad art. 163; COUCHEPIN, *op. cit*., § 934).

61. The Panel notes that, according to the Swiss case law and legal doctrine, a penalty is deemed to be excessive when it is not reasonable and exceeds patently the amount that would seem just and equitable (ATF 82 II 142 consid. 3, *JdT* 1957 I 104). Thus, the judge may reduce the penalty when it is unreasonable to an extent which cannot be justified (COUCHEPIN, *op. cit*., § 840 ff.). The following criteria to assess the reasonableness of the penalty can be taken into account (COUCHEPIN, *op. cit*., § 844):

    i. the creditor's interest in the performance of the main obligation and in the sanctioning of default,

ii. the gravity of the debtor's fault, from an objective and subjective standpoint,

iii. the parties' financial situation, with the indication that the judge shall generally weigh up the different interests at stake with regard to the amount of the penalty (ATF 114 II 264 consid. 1a, *JdT* 1989 I 7).

62. In addition, it has been underlined that the creditor's interest in the performance of the main contractual obligation must be interpreted broadly: parameters might be taken into account (such as subjective interests) which are usually not covered by damages relief under Swiss law (COUCHEPIN, *op. cit*., § 864 ff.). The penalty is not excessive only because it exceeds the amount of damages which might be sought by the creditor (COUCHEPIN, *op. cit*., § 864; ATF 133 III 43 consid. 4.1, *JdT* 2007 I 236). In particular, if the purpose of the penalty is essentially preventive and not only punitive or compensatory, the penalty amount must be more important than the damages which might be (judicially) granted (ATF 116 II 302 consid. 4, *JdT* 1991 I 173). However, the more the debtor's fault is severe, the less the penalty might be reduced (COUCHEPIN, *op. cit*., § 882). In any case, the penalty cannot be reduced to an amount which is lower than the measure of the damages that might be sought (*idem*, § 936).

63. In addition, the following can be noted:

i. when the penalty guarantees a financial obligation, its function is financially close to that of default interests (Article 104 CO). Under Swiss law, such interests cannot exceed 18% per year (Art. 73 al. 2 CO and 20 CO; ATF 93 II 189 consid. 5b). This limit, however, shall not be applied with respect to penalties, in which case they would not have any proper function at all: especially where the penalty follows a preventive purpose, it might exceed said limit (COUCHEPIN, *op. cit.*, § 1178). The mentioned measure might, however, constitute a relevant indication;

ii. with respect to labour contracts, the Federal Tribunal considered that the penalty could not exceed 8 monthly salaries (that is to say, 66,66% of the yearly remuneration) or 3 months income of the former employee's new unlawful activity (i.e., of the activity whose performance triggers the obligation to pay the penalty: ATF 4A_107/2011). However, in case of especially severe breaches, a penalty equivalent to 77% of the last annual salary (ATF 4A_466/2012 consid. 6.2) was considered reasonable;

iii. with respect to contracts for professional services (*in casu*, concerning architects), the limit was fixed at 15% of the remuneration paid or at 10% of the future possible income (ATF 4C.318/1988, *SJ* 1989 521; ATF 109 II 462 consid. 4; ATF 110 II 380 consid. 3);

iv. the Federal Tribunal reduced the penalty due in case of a dentist practice's sale at 25% of the whole price (approx. CHF 680,000), in a situation in which the seller had severely breached its contractual obligations (ATF 4A_160/2012).

64. Finally, it is to be emphasized that the burden of the proof of the penalty's excessiveness falls upon the debtor (Article 8 of the CO) (COUCHEPIN, *op. cit.*, § 851; ATF 114 II 264, *JdT* 1989 I 74).

65. Against that background, defined by Swiss law, the following elements must be taken into account in the case at hand:

i. both parties are certainly used to penalty clauses, as they are common in players' transfer agreements;

ii. such penalties are objectively justified. Indeed, when the lending club is not immediately paid, it faces disadvantages which cannot be precisely calculated and therefore promptly and easily remedied. For instance, the only financial damage directly resulting from a payment default is the impossibility for the creditor to obtain interests on the amount (or the financial investment thereof). This damage can be easily compensated. However, the lack of cash assets during the limited transfer period might prevent the lender from hiring or buying another player and therefore force it to compete with an incomplete team during a whole season. The same applies with regard to permanent transfers, or when the borrower fails to return the player or its International Transfer Certificate at the end of the loan. The absence of one (or more, if the loan was particularly important) player in the team (or on the field) is of course very hard to compensate economically and it is therefore understandable that football club commonly stipulate high preventive penalties;

iii. the amount of EUR 500,000, corresponding to the value of the Player on the market, would have been acceptable if Paphos had, for instance, breached its obligation to insure the Player and injuries severely affecting the Player's value had occurred; on the other hand, it is hardly acceptable with respect to the breach of obligations not directly related to the protection of the Player's value;

iv. if Paphos had defaulted on the permanent transfer fee, the stipulated amount might have seemed reasonable as well. In this case, the price of the Player would only have been doubled, which would have been an acceptable compensation for the impossibility for Marítimo to acquire a replacing player during the limited transfer period;

v. football clubs also have a strong interest in encouraging their contractor to pay

transfer fees immediately and respect contractual deadlines given the difficulty that there might be in recovering debts in an international context;

vi. in order to fulfil its preventive purpose, the penalty needs to be substantial;

vii. the case at hand is different than those judged by the Federal Tribunal, in which the contract breached by the debtor was terminated at a very early stage, so that the creditor could ask for the penalty without being obliged to perform its own obligations. In other words, the debtor had to "pay for nothing" and it appeared necessary that the amount of the penalty be limited to a minimum. In the current case, Marítimo fulfilled its obligation to transfer the Player, so that Paphos was able to integrate him in its team during the 2012/2013 season;

viii. the payment default by Paphos was unexplained, intentional and not justifiable.

66. In light of the above, and weighing all the relevant factors, the Panel finds that the measure of the penalty stipulated in the Contract is excessive with respect to the breach imputed to the Respondent, and the interest of the creditor to secure performance of the breached obligation. Indeed, there is a patent disproportion between the penalty (EUR 500,000) and the debt which had remained unpaid (EUR 15,000), which is far too extreme to be justified by the circumstances of the case.

67. As a result, the measure of the penalty must be reduced in accordance with Article 163.3 CO. Contrary to the conclusions reached in the Decision, in fact, Swiss law only allows the judge to reduce the penalty, and not to exclude it. Thus, a penalty under the Contract is indisputably due and it was wrong for the Single Judge to state that it could not be enforced at all.

68. The Panel holds a penalty equivalent to EUR 50,000 to be reasonable, and therefore decides to reduce the penalty to such measure, in the exercise of the discretion granted by Article 163.3 CO. The Panel sets the penalty in such measure, corresponding to 10% of the penalty which was agreed in the Contract (EUR 500,000), taking into account:

i. on one hand, that:

- the breach of the Contract by Paphos was intentional and unjustified;
- Marítimo performed its obligations to transfer the Player on loan, so that the Player could play in the Respondent's team during the loan period;
- the amount at hand cannot not endanger the Respondent's financial

situation; and

- the parties were both used to these kind of clause,

with the consequence that a further reduction, to a lower amount, would seem hardly justifiable, since the penalty, however excessive, was freely agreed between two professional parties, as the principle of contractual liberty should be preserved. In addition, given the figures at stake, an inferior amount would have no preventative effect at all, and thus would strongly limit the effect of the clause; and

ii. on the other hand that:

- the value of the Player, which the parties defined to correspond to EUR 500,000, was not affected by the breach of the Contract which the Appellant invokes to obtain the penalty;

- there is no indication that at the end of the loan period the Appellant could not freely dispose of the Player, by fielding him or transfer him, with his consent, to another club; and

- at the end of the loan the situation of the Appellant, in its relations with the Player, was the same as if the Respondent had complied with its obligations to pay the loan transfer fee under the Contract,

with the consequence that a milder reduction, to a higher amount, would be hardly justifiable, and, in the Panel's opinion, would leave the penalty to an excessive level.

69. In accordance with Article 104 CO interest on the amount so determined accrue from the date it became due, i.e. starting on 29 August 2012, the date by which the obligation (payment of the loan transfer fee) breached had to be complied with.

3.7 Conclusion

70. In light of the foregoing, the Panel holds that the appeal brought by the Player against the Decision is to be partially upheld. The Decision is to be modified and replaced by a new decision not only confirming the obligation of the Respondent to pay the amount indicated at point 2 of the Decision, but also ordering the Respondent to pay the Appellant an amount of EUR 50,000 as contractual penalty, plus interest at 5% *per annum* starting on 29 August 2012.

4. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Marítimo da Madeira Futebol SAD on 12 June 2013 against the decision taken by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 19 March 2013 is partially granted.

2. The decision taken by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 19 March 2013 is partially modified.

3. AEP Paphos is ordered to pay Marítimo da Madeira Futebol SAD, in addition to the amount already indicated in the decision taken by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 19 March 2013, also the amount of EUR 50,000 (fifty thousand), plus interest at 5% (five percent) *per annum* from 29 August 2012 to the date of final payment.

4. (…).

5. (…).

6. All other prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 20 December 2013

THE COURT OF ARBITRATION FOR SPORT

Luigi **Fumagalli**
President of the Panel

Olivier **Carrard**
Arbitrator

Herbert **Hübel**
Arbitrator