TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2024/A/10598 Bojan Saranov v. PAE PAS Lamia 1964

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Ms. Maite Nadal Charco, Attorney-at-Law, Madrid, Spain.

in the arbitration between

Mr. Bojan Saranov, Serbia

Represented by Mr Tomislav Kasalo and Mr Hrvoje Raić, Attorneys-at-Law, Split, Croatia

Appellant

PAE PAS Lamia 1964, Greece

Represented by Mrs Chrissa Sevastopoulou, Attorney-at-Law, Athens, Greece

Respondent

*****

I. PARTIES

1. Mr. Bojan Saranov (the "Appellant" or "the Player") is a Sebian professional football player.

2. PAE PAS Lamia 1964 (the "Respondent" or "the Club") is a Greek professional football club, affiliated member of the Hellenic Football Federation, which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA"). It currently competes in the first division of the Greek professional Football championship of Superleague 1.

II. FACTUAL BACKGROUND

A. Background Facts

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

4. On 13 July 2022, the Club and the Player concluded an employment contract valid as from the date of signature until 30 June 2024.

5. On 31 March 2023, the Club and the Player concluded the "Payment Agreement – Settlement of Debt" by way of which the Club undertook to pay to the Player the amount of EUR 26,426.90 in different instalments.

6. On 5 April 2023, the Parties concluded the "Termination of Contract and Settlement of Debt" (hereinafter, the "Termination Agreement"), according to which *"Today, with the present agreement, the contractual parties (the PLAYER and the CLUB) agree to terminate prematurely the aforesaid contract of the PLAYER with mutual consent and generally to terminate their employment relationship, subject to the terms and conditions of this agreement"*.

7. Pursuant to Clause 3 of the Termination Agreement, the Club undertook to pay the following sums to the Player:

   a) *net 11,000 € (eleven thousand euro) as outstanding remuneration for the period up to 28 February 2023, which is also mentioned in the payment agreement dated 31.3.2023 and which is payable in 2 instalments as follows:*

      - Net 5.500,00 € on 30/04/2023,

      - Net 5.500,00 € on 31/05/2023.

   b) *compensation for premature termination of the employment contract of net*

108.000,00 € (one hundred and eight thousand euro) payable in 24 equal monthly instalments of net 4,500.00 euros each, payable (each instalment) on the last day of each subsequent month stating with the first payment due on 30/04/2023, and

c) *additional compensation of net 60,000.00 € (sixty thousand euro), payable if the PLAYER does not sign a new contract and will not be registered in another club in Greece or abroad by the end of the upcoming summer transfer season, i.e. if the Player is not registered with another football club until 30/09/2023, all in 12 instalments as follows:*

- net 5,000.00 € by no later than 30/09/2023, and

- net 5,000.00 € by no later than 30/10/2023, and

- net 5,000.00 € by no later than 30/11/2023, and

- net 5,000.00 € by no later than 30/12/2023, and

- net 5,000.00 € by no later than 30/1/2024, and

- net 5,000.00 € by no later than 28/2/2024, and

- net 5,000.00 € by no later than 30/04/2024, and

- net 5,000.00 € by no later than 30/06/2024, and

- net 5,000.00 € by no later than 30/08/2024, and

- net 5,000.00 € by no later than 30/10/2024, and

- net 5,000.00 € by no later than 30/11/2024, and

- net 5,000.00 € by no later than 30/12/2024, and

d) *all applicable taxes and surcharges on top and above the sums stipulated in this article of the agreement and all applicable taxes and surcharges related to all sums arising from the employment of the PLAYER with the CLUB, if still due".*

8. Clause 6 of the Termination Agreement stipulated the following:

"In case of delay of payment of any three monthly instalments as defined in article 3 above due to any reason, then the CLUB shall also pay to the PLAYER, on top of the amounts mentioned therein, a penalty of net 30,000.00 €, which the parties consider fair and reasonable. In such case, the PLAYER shall be obliged to send to the CLUB a written notice granting it 7 days to comply with its obligation and to pay the three instalments which are due, as a condition for the payment of said penalty".

9. On 26 January 2024, the Player acknowledged having received by the Respondent EUR 33,500 under the Termination Agreement and, at the same time, issued a default notice notifying the Club of its failure to settle the sum of EUR 38,000 net due under the Termination Agreement. This notice stipulated a seven-day deadline for the Club to comply with their financial obligations.

10. Based on evidence provided by the Appellant, the Player has not joined any new club

prior to 16 February 2024, date since when he is registered with FK Brodarac Belgrad.

B. Proceedings before FIFA Football Tribunal

11. On 12 February 2024, the Player filed a claim against the Club before the Dispute Resolution Chamber of the FIFA Football Tribunal (the "FIFA DRC").

12. According to the Player, the Club was in default of the amount of EUR 38,000 net, corresponding to several instalments of the Termination Agreement.

13. The Player further argued that on 26 January 2024, he sent a default notice to the Respondent with a seven-day deadline, to no avail. Consequently, the Player asserted that the contractual penalty agreed in Clause 6 of the Termination Agreement in the amount of EUR 30,000 net was triggered.

14. Before the FIFA DRC, the Player requested the following relief:

I. To condemn the Respondent to pay in favour of the Claimant outstanding remuneration and penalty of total net EUR 77,500.00, which matured as follows:

- EUR 9,500 net on 30/09/2023

- EUR 5,000 net on 30/10/2023

- EUR 4,500 net on 31/10/2023

- EUR 9,500 net on 30/11/2023

- EUR 5,000 net on 30/12/2023

- EUR 4,500 net on 31/12/2023

- EUR 5,000 net on 30/01/2024

- EUR 4,500 net on 31/01/2024

- EUR 30,000 net on 3/02/2024

Within 45 days as from the date of notification of the decision in the matter of the reference to the Respondent; and

II. To condemn the Respondent to pay all relevant taxes, state contributions and surcharges, on top of the above-mentioned net amounts, within 45 days as from the date of notification of the decision in the matter of the reference to the Respondent.

or alternatively

To condemn the Respondent to provide the Claimant with the corresponding tax certificates concerning the payment of all the above specified net amounts alongside all the net amounts already paid to the Claimant during the term of the

Employment contract, within 45 days as from the date of notification of the decision in the matter of reference to the Respondent; and

III. To condemn the Respondent to pay in favour of the Claimant default interest of 5% per year on the aforementioned amounts starting from the respective date of maturity until the effective date of payment, within 45 days as from the date of notification of the decision in the matter of the reference to the Respondent.

15. In response, the Club asserted that the amounts claimed by the Player were inaccurately calculated, given that on 27 February 2024 (*i.e.*, subsequent to the Player's claim being filed) it had already disbursed the sum of EUR 22,500 net to the Player. At a later stage in the FIFA DRC proceedings (18 March 2024), the Player confirmed that he had received this payment.

16. In light of the aforementioned, the Club acknowledged that it owed the Player the amount of EUR 25,000 net.

17. Regarding the contractual penalty claimed by the Player, the Club argued that it was *"undoubtedly excessive and thus illegal, abusive, and contrary to the principle of proportionality, since the remaining due as remuneration out of the total claimed amount is of EUR 25,000 net"* and that *"the Claimant's claim regarding the penalty of EUR 30,000 shall be dismissed as abusive, disproportional and immoral"*.

18. Finally, and in a subsidiary manner, the Club alleged that the contractual penalty should be reduced *"down to the appropriate level (i.e. half of the amount at maximum)"*.

19. The Club requested the following relief:

i. To rule that the amount payable by the Respondent to the Claimant as outstanding remuneration is of 25,000 euros net.

ii. To reject the Claimant's claim for the penalty of 30,000 euros net as groundless and in any case as abusive and illegal.

iii. To reject any other claim and assertion of the Claimant.

iv. Subsidiarily, to rule that the penalty claimed is disproportionate and to bring it down to the appropriate level.

v. To rule that the Claimant shall bear any and all costs of the proceedings.

20. After analysing the arguments of the Parties, the FIFA DRC issued its decision REF FPSD-13672 in the above dispute (the "Appealed Decision") on 18 April 2024, the grounds of which were notified to the Parties on 30 April 2024.

21. The operative part of the Appealed Decision provides as follows:

1. The claim of the Claimant, Bojan Saranov, is partially accepted.

2. The Respondent, PAS Lamia 1964 FC, must pay to the Claimant the following amount(s):

***EUR 25,000 net as outstanding amount** plus interest p.a. as follows:*

- *5% interest p.a. over the amount EUR 6,000 of (sic) as from 1 December 2023 until the date of effective payment;*
- *5% interest p.a. over the amount EUR 5,000 of (sic) as from 31 December 2023 until the date of effective payment;*
- *5% interest p.a. over the amount EUR 4,500 of (sic) as from 1 January 2024 until the date of effective payment;*
- *5% interest p.a. over the amount EUR 5,000 of (sic) as from 31 January 2024 until the date of effective payment; and*
- *5% interest p.a. over the amount EUR 4,500 of (sic) as from 1 February 2024 until the date of effective payment.*

EUR 6,368.72 net as contractual penalty.

3. Any further claims of the Claimant are rejected.

(…).

7. This decision is rendered without costs.

22. In its reasoning, the FIFA DRC among other noted as follows:

"… the common intention of the Parties was that the contractual penalty would trigger every time (i) the Respondent failed to pay "any three monthly instalments" and (ii) the Claimant granted a deadline of 7 days to the Respondent to comply with its obligations".

[…].

"Additionally, from the above calculation it also follows that, in the hypothetic case that the Respondent had not paid any amounts and failed to pay all the remaining instalments (i.e., EUR 141,000), the amount to be paid as penalty (provided that the Claimant indeed triggered the penalty clause), would be of EUR 23,631.28 which, if added to the granted penalty clause of EUR 6,368.72, would result in the total amount of EUR 30,000, i.e., the contractual penalty agreed in the Termination Agreement".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 20 May 2024, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS"), pursuant to the Code of

Sports-related Arbitration (hereinafter referred to as the "Code"), challenging the Appealed Decision. In its Statement of Appeal, the Appellant proposed that a sole arbitrator be appointed to hear the appeal.

24. On 24 May 2024, the CAS Court Office notified the Statement of Appeal to the Parties, noted that the Appellant had requested an extension until 15 July 2024 to file its Appeal Brief and invited the Respondent to state whether it consented to such extension, no later than 29 May 2024. The Parties were informed that the Respondent's silence in this regard would be deemed acceptance of the Appellant's request and that in the event of a disagreement, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue in accordance with Article R32 of the Code.

25. On 27 May 2024, the Respondent informed the CAS Court Office that it agreed to the extension requested and also agreed to the appointment of a sole arbitrator.

26. On 28 May 2024, the CAS Court Office confirmed the extension until 15 July 2024 of the time-limit to file the Appeal Brief.

27. On 2 June 2024, FIFA informed the CAS that according to Articles R52 para. 2 and R41.3 of the Code, it renounced its right to request their possible intervention in the arbitration proceedings.

28. Following further extensions of the respective time-limit, on 24 August 2024, the Appellant filed his Appeal Brief, together with supporting documents.

29. On 18 October 2024, the Respondent filed its Answer.

30. On 28 October 2024, the Appellant indicated that *"given the nature of this case, he deems that it is not necessary to hold a hearing in this matter"*.

31. On 29 October 2024, the Respondent informed the CAS Court Office that it preferred a hearing to be held in this matter.

32. On 23 December 2024, the CAS Court Office informed the Parties that, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division, the arbitral tribunal appointed to decide the present case was constituted as follows:

Sole Arbitrator: Ms Maite Nadal Charco, Attorney-at-law in Madrid, Spain.

33. On 31 December 2024, the Parties were advised that the Sole Arbitrator deemed herself sufficiently well-informed to decide this case based solely on the Parties' written submissions, without the need to hold a hearing.

34. On 9 January 2025, on behalf of the Sole Arbitrator, the CAS Court Office issued an Order of Procedure, which was duly signed by the Appellant on 15 January 2025 and by the Respondent on 16 January 2025.

IV. SUBMISSIONS OF THE PARTIES

35. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the Parties, even if there is no specific reference to those submissions in the summary.

A. Appellant's position

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

37. According to the Appellant, it is evident from the Appealed Decision that *"FIFA FT rightfully established that the agreed Penalty was triggered, but wrongly concluded that the Penalty arising from clause 6 of the Termination Agreement was excessive and disproportionate"*.

38. It is also alleged that, as a general rule, the parties to a contract are bound by their agreement, and the principle of freedom of contract is such that the tribunal must comply with the terms to which the parties have agreed. The possibility of a reduction has been shown to affect the contractual freedom of the parties; as a result, it may only be applied with reservation, for exceptional cases only, when the penalty is considered as grossly unfair.

39. After careful analysis of Clause 6 of the Termination Agreement and while bearing in mind the creditor's interest, it is evident, in his opinion, that the Appellant and the Respondent agreed that the penalty of net EUR 30,000 shall be paid only once when the following cumulative conditions are fulfilled: i) the Club fails to pay any three monthly instalments, and, ii) the Player beforehand granted a deadline of 7 days for the Respondent to comply with its obligations; and not every time as the FIFA DRC concluded in para. 35 of the Appealed Decision. Put differently, the Parties did not agree on multiple penalties of EUR 30,000 in case the pertinent conditions were triggered, but on one off penalty and thus the conclusion of the FIFA DRC on the nature of this penalty is completely wrong.

40. The FIFA DRC also failed to take into consideration the creditor's interest when analysing Clause 6 of the Termination Agreement. The creditor's interest was to sanction the Club in case of delay of payment of any 3 monthly instalments. Furthermore, the penalty was agreed upon taking into account the total amount that the Club was obliged to pay the Player in accordance with the Termination Agreement, which amounted to EUR 179,000. This indicates that the penalty clause of EUR 30,000 cannot be regarded as excessive or disproportionate according to the jurisprudence of CAS (CAS 2014/A/3664 Al Ittihad Club v. Club de Regatas Vasco da Gama; CAS 2014/A/3555 FC Vojvodina v. Almami Samori Da Silva Moreira, award of 18 December 2014, CAS 2022/A/9129 Al Ittihad v. Sharjah Football Club Company, award of 30 March 2023), given that it represented merely 16.76% of the total amount due by the Club. Contrary to the well-established FIFA DRC and CAS jurisprudence, the majority of the FIFA DRC did not assess the penalty in comparison with the full

outstanding amount from the Termination Agreement, but only with the amount which was eventually unpaid by the Respondent.

41. The Appellant made the following requests for relief:

I. to uphold the present appeal.

II. in doing so, to issue a new decision (award) replacing (modifying) exclusively the last paragraph of the point 2. of the findings of the FIFA DRC decision, ref. nr. FPSD-13672, in a way that the Respondent, PAS Lamia 1964 FC, is condemned to pay to the Appellant, Bojan Saranov, in addition and on top of the sum of net EUR 6,368.72 as contractual penalty which was already awarded in the FIFA DRC decision, ref. nr. FPSD-13672, also the sum of net EUR 23,631.28 as contractual penalty i.e. to condemn the Respondent, PAS Lamia 1964 FC, to pay to the Appellant, Bojan Saranov, the sum of net EUR 30,000.00 as full amount of contractual penalty; and

III. to order the Respondent to bear all the procedural costs of the present procedure; and

IV. to order the Respondent to reimburse the Appellant with all legal and other costs incurred in connection with this arbitration, with an amount to be determined at the discretion of the CAS Sole Arbitrator/Panel of at least CHF 7,000.00.

B. Respondent's position

42. The Respondent's position and arguments can be summarized as follows:

43. It is clear that the meaning of the phrase *"any three monthly instalments"* in the Termination Agreement is that the penalty clause would be indeed triggered every time the Respondent would owe the Appellant the amount of three agreed instalments.

44. It is clear and undisputed that the claimed penalty amount of EUR 30,000 is indeed excessive and thus unlawful, abusive, and contrary to the principle of proportionality, considering that the remaining amount that was due to the Appellant in the proceedings in front of the FIFA DRC was of EUR 25,000 net.

45. In light of the above, the penalty was correctly and lawfully reduced by the Appealed Decision, because, *"what really matters"*, is not the proportion of the penalty in relation to the total and initially agreed payable amount, as the Appellant alleges, but the proportion of the penalty in relation to the amount due at the time when there is actually an outstanding debt.

46. It is also alleged that according to CAS jurisprudence, the reduction of the penalty by the judge is justified when there is a significant disproportion between the agreed penalty amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place (CAS 2015/A/4057

& CAS 2017/A/5304 PFC Levski v. Dustley Roman Mulder).

47. According to the Respondent, under Swiss law, the parties are free to determine the amount of the contractual penalty. However, the court may reduce, at its discretion, penalties that it considers excessive. As the law does not clearly state what constitutes an excessive penalty, it is for the judge to determine whether the penalty is excessive, having regard to the merits of the case and all the relevant circumstances.

48. A penalty is considered excessive if it is not reasonable and manifestly exceeds the amount that would be considered just and equitable. Some criteria for assessing the reasonableness of the penalty are i) the creditor's interest in the performance of the main obligation; ii) the gravity of the debtor's fault and iii) the financial situation of the parties.

49. This proportionality analysis must be carried out on a case-by-case basis, taking into account the particularities of the case at hand.

50. Applying the above to the present case, the Respondent understands that is quite clear that a penalty of EUR 30,000, which exceeds the amount due (during the proceedings in front of the FIFA DRC) of EUR 25,000, and even corresponds to 79% of the amount due when triggered by the Appellant, is disproportionate and unfair, especially considering that the termination of the Appellant' s employment contract was by mutual consent, not with just cause by the Appellant, and without the Appellant suffering any damage.

51. The Respondent made the following requests for relief:

1. *To reject that the (sic) Appellant's Appeal in its entirety;*

2. *to establish that the costs of the present arbitration procedure shall be borne by the Appellant;*

3. *to rule that the Appellant has to pay the Respondent a contribution towards its legal fees and expenses.*

V. JURISDICTION

52. Article R47 of the Code provides as follows:

> *An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*

53. In connection with the above-mentioned Article R47 of the Code, the jurisdiction of the CAS, which has not been disputed by the Parties, arises out of Articles 56 and 57 of the

FIFA Statutes (2022 *ed.*) which in the pertinent part reads as follows:

> *"56: 1. FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, football agents and match agents".*
>
> *"57: 1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

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

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

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

VI. ADMISSIBILITY

57. Article R49 of the Code provides as follows:

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

58. As quoted at para. 52 above, Article 57.1 of the FIFA Statutes states that appeals shall be lodged with CAS within 21 days of receipt of the challenged decision.

59. The Sole Arbitrator notes that the admissibility of the Appeal is not contested by the Parties. The grounds of the Appealed Decision were notified to the Parties on 30 April 2024. The Appellant's Statement of Appeal was filed on 20 May 2024, *i.e.*, within the 21-day deadline established by Article 57.1 of the FIFA Statutes and Article R49 of the Code.

VII. APPLICABLE LAW

60. Article R58 of the Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a*

choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

61. In addition, Article 56, para. 2 of the FIFA Statutes establishes the following:

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

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

63. It is clear from the written submissions that both Parties agree with the above.

VIII. MERITS

64. The present proceedings arise out of the Appealed Decision issued on 18 April 2024 by the FIFA DRC, which partially accepted the Player's Claim and imposed the Club the obligation to pay the amount of EUR 25,000 net as outstanding amounts plus interest as described therein, and the amount of EUR 6,368.72 net as contractual penalty.

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

66. It is an undisputed fact that the Respondent did not comply with the terms of the employment contract, and that it was, therefore, in debt to the Player in the amount of EUR 47,500 net. This amount, considering the payment of EUR 22,500 made by the Club on 27 February 2024 (payment which the creditor confirmed having received), was reduced to the amount of EUR 25,000 net.

67. Consequently, the existence of a debt amounting to EUR 25,000 net, along with 5% interest on the amount calculated as outlined in the Appealed Decision, is not subject of the present dispute.

68. Pursuant to Clause 6 of the Termination Agreement, the Parties agreed that a contractual penalty of EUR 30,000 net would apply if the following two cumulative events occurred:

(i) Default by the Respondent in *"any three-monthly instalments"* as defined in Clause 3 of the Termination Agreement; and,

(ii) the Player had to give the Club notice of default and a period of 7 days to comply with its obligations.

69. Both of the above events took place. The fact that the penalty clause was triggered is not disputed by the Parties.

70. The core dispute, therefore, concerns the validity of the penalty clause stipulated in Clause 6 of the Termination Agreement (EUR 30,000 net), which the Appellant contends is valid. Conversely, the Respondent asserts that the clause is disproportionate and excessive and should be reduced accordingly.

71. As outlined above, the Sole Arbitrator has determined that the rules and regulations of FIFA must be applied primarily, and Swiss law must be applied subsidiarily. It is important to note that the "FIFA rules and regulations" do not foresee any provision regarding penalty clauses and consequently offer no guidance on this issue. Therefore, the provisions of Swiss law on penalty clauses, in particular the Swiss Code of Obligations ("SCO") and the relevant jurisprudence of the Swiss Federal Tribunal ("SFT"), must be considered in order to analyse the validity and proportionality of the said clause.

72. The Sole Arbitrator observes that Swiss law does not prohibit the use of contractual penalties for untimely payment of debts.

73. Under Swiss law, the relevant provisions are 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 163 CO: 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".

74. Thus, whereas Article 163(1) of the SCO provides that parties may freely determine the amount of a contractual penalty, on the basis of Article 163(3) of the SCO, the Sole Arbitrator considers that it has the duty to reduce the amount of the penalty if it considers this amount to be excessive.

75. The Sole Arbitrator notes - and it is not disputed by the Parties - that the penalty clause contained in the Termination Agreement qualifies as a contractual penalty under Articles 160 *et seq.* SCO. Indeed, Clause 6 of the Termination Agreement contains all the necessary elements required for such purpose and therefore, it is considered to be entirely valid: a) the Parties bound thereby are mentioned, b) the kind of penalty that has been determined, c) the conditions triggering the obligation to pay it are set, and d) its measure is identified (COUCHEPIN G., La clause pénale, Zürich, 2008, para. 462).

76. The Sole Arbitrator believes that a preliminary analysis of Clause 6 of the Termination Agreement is necessary. This is due to the absence of consensus between the Parties regarding the interpretation of the agreed penalty (EUR 30,000). Specifically, this concerns the question of whether the penalty is triggered only once when the stipulated criteria are met, as asserted by the appellant, or if it is triggered each time these criteria are met, as stated in the Appealed Decision.

77. Clause 6 of the Termination Agreement states the following:

"In case of delay of payment of any three monthly instalments as defined in article 3 above due to any reason, then the CLUB shall also pay to the PLAYER, on top of the amounts mentioned therein, a penalty of net 30,000.00 €, which the parties consider fair and reasonable. In such case, the PLAYER shall be obliged to send to the CLUB a written notice granting it 7 days to comply with its obligation and to pay the three instalments which are due, as a condition for the payment of said penalty".

78. The Sole Arbitrator acknowledges that it will be necessary to refer to the rules of interpretation set out in Article 18 para. 1 of the SCO which stipulate as follows (free translation):

"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained 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".

79. As such, Article 18 para. 1 of the SCO rules that the content of the agreement must be construed according to the true intentions of the parties. Thus, the parties' subjective will has priority over any contrary declaration in the text of the contract. In case a common subjective will of the parties cannot be ascertained, the content of the contract must be determined by application of the principle of mutual trust (CAS 2017/A/5172, para. 73).

80. In SFT 127 III 444 para. b), the Swiss Federal Tribunal indicated as follows (free translation):

> *"To determine if there has been an agreement between the parties one must first seek their true and common intention (art. 18 para.1 SCO). The judge must therefore first establish the true will of the parties, empirically as the case may be, based on clues. If he cannot establish the true will or he finds that one of the parties did not understand the true will expressed by the other party, the judge will seek the meaning that the parties could and should have given to their respective declarations in accordance with the rules of good faith (application of the principle of trust)".*

81. In the same sense and with regard to the determination of the common intention of the parties, CAS 2016/A/4379 Al Ain FC v. Sunderland AFC (para. 90):

> *"(…) If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention (WINIGER, Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO). This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them (WINIGER, op. cit., n. 26 ad art. 18 CO; WIEGAND, Obligationenrecht I, Basel 2003, n. 19 ad art. 18 CO). The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation (WINIGER, op. cit., n. 33, 37 and 134 ad art. 18 CO; WIEGAND, op. cit., n. 29 and 30 ad art. 18 CO). By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must – according to the jurisprudence of the Swiss Federal Court – be interpreted.*

82. It is imperative to note that the wording of Clause 6 has the potential to engender misinterpretation. Therefore, the responsibility falls upon the Sole Arbitrator to discern the genuine meaning intended by the Parties when appraising this clause.

83. In this respect, the Appellant - who would be the most interested in granting the interpretation of the clause made in the Appealed Decision - understands it differently than the FIFA DRC. His procedural behaviour makes this clear: when the penalty clause was triggered, there were six instalments that remained unpaid. This means that, hypothetically, the Appellant could have requested the clause on two occasions and yet did not do so.

84. In its Answer, the Respondent merely refers to the literal interpretation of Clause 6 of the Termination Agreement, which is the interpretation accepted in the Appealed Decision. However, as has already been stated, the Sole Arbitrator considers that this interpretation is not sufficient to determine the common intention of the Parties.

85. In consideration of the aforementioned, and also guided by considerations of procedural efficiency, the Sole Arbitrator is convinced that the common intention of the Parties was that the contractual penalty could only be triggered once, in the event of three

instalments, whether consecutive or not, becoming overdue and the Club ignoring a written notice granting a period of seven days to make the payment.

86. Once established that all the requirements of a penalty clause are fulfilled in the case at stake, and that the common intention of the Parties was for the penalty clause to be triggered only once, provided that the two specified criteria were met, the Sole Arbitrator turns its analysis to the alleged excessiveness of the same.

87. In this respect, the Sole Arbitrator, upon analysis of the possible disproportionality of the penalty clause, shall reduce, at its discretion, clauses considered excessive in order to ensure the principle of proportionality, in accordance with Article 163 of the SCO, as transcribed above.

88. The Sole Arbitrator notes that Swiss law does not provide an exact definition of when a penalty shall be considered abusive or excessive. In light of what is established by the jurisprudence of the SFT, the deciding body must establish, in order to analyse the proportionality of a penalty clause, whether the penalty is excessive or not, and if so, the extent to which it should be reduced (ATF 82 II 142 consid. 3, page 146, JdT 1957 I 104). This proportionality analysis has to be carried out on a case-by-case basis, taking into account the specificities of the case at hand.

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

90. In CAS 2017/A/5046 the following is determined:

> *"Under Swiss law, the interpretation of Article 163 para. 3 SCO is that the judge (or the arbitrator) will use his discretion to reduce a contractual penalty if the relationship between the amount of the penalty agreed upon, on the one hand, and the interest of the creditor worthy of protection, on the other hand, is grossly disproportionate (ATF 114 II 264 et seq.).*
>
> *In other words, an excessive penalty under Swiss law is a penalty that, at the time of the judgment, is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity, or, more simply put, is "abusive" (ATF 82 II 142). Moreover, according to the Swiss jurisprudence, the specific circumstances of the case, such as the nature and the duration of the contract, the seriousness of the contractual breach, the degree of fault, the behaviour of the creditor, the financial conditions of the parties, a special interest of the creditor that the debtor behaves in conformity with the contract, the experience in business matters of the parties and the damage incurred by the creditor shall be considered (ATF 114 II 264, 265; TF 4A_141/2008 at 14.1)".*

91. Furthermore, the panel in the case CAS 2015/A/4057 indicated the following:

"The Swiss Supreme Court held that Article 163 CO is part of public order and that, as a consequence, the Judge must apply it even if the debtor has not expressly requested a reduction. Nevertheless, the Judge must observe a degree of deference as the parties are free to determine the amount of the contractual penalty (see Article 163 para. 1 CO) and as the principle of freedom of contract commands that the judge abides by the parties' agreement. The judge must intervene only when the stipulated amount is so high that it unreasonably and flagrantly exceeds the amount admissible with regard to the sense of justice and equity (ATF 133 III 201, consid. 5.2; see also CAS 2010/A/2202 para. 28; Decision of the Swiss Federal Tribunal 4C.5/2003, dated 11 March 2003, consid. 2.3.1; ATF 114 II 264 consid 1a).

The Judge must assess all the elements which are objectively relevant and look for an adequate solution regarding the concrete circumstances of the matter before him or her (ATF 101 Ia 545 cons. 1b). He or she will primarily seek to enforce the parties' intention and make sure not to substitute his or her own views for that of the parties' (ATF 133 III 201 consid. 5.2 and 5.4). In other words, should the Judge hold that the penalty clause is excessive, he or she must refrain from doing anything else but reduce it so that it is not excessive anymore. In particular, the Judge cannot reduce the penalty to an amount that he or she deems fair (ATF 133 III 201, consid. 5.2 and 5.5 and references)".

92. It is disputed between the Parties whether the penalty clause should be regarded as excessive in relation to the overall amount stipulated in the Termination Agreement (EUR 179,000) as asserted by the Appellant, or in relation to the outstanding amount when the penalty was triggered (EUR 38,000) as held by the Appealed Decision. The Sole Arbitrator concurs, in the context of the FIFA DRC proceedings, with the latter option, because it was the debt outstanding at the time the violation took place *i.e.* the moment at which the payments that activated the penalty clause were late (in this regard CAS 2017/A/5304 & CAS 2022/A/9129).

93. In the context of the FIFA DRC proceedings, it was therefore this amount of EUR 38,000 which the FIFA DRC took into consideration in order to determine whether the clause is unfair. The fact that the amount initially claimed before FIFA was subsequently increased by the non-payment of two further instalments (EUR 5,000 net on 30 January 2024; EUR 4,500 net on 31 January 2024), or that the amount of EUR 22,500 was paid after the claim was lodged and the amount claimed was finally fixed at EUR 25,000 is, in the opinion of the Sole Arbitrator, irrelevant for the purpose of determining whether the penalty clause is excessive or not..

94. In accordance with the aforementioned points, the penalty represents 79% of the outstanding amount when the penalty was triggered (EUR 38.000).

95. In this context, the Sole Arbitrator further acknowledges that in the context of CAS Appeal Arbitration proceedings, under Article R57 of the Code, the *de novo* principle – according to which CAS Panels have the power to has the power to review the facts and the law *de novo*, without being limited by the legal arguments submitted before the previous instance (CAS 2019/A/6665, paras. 75 f.).

96. In light of the above, and in view of the circumstances of the case and the findings of the Sole Arbitrator:

a. the finding of the Sole Arbitrator that the contractual penalty only could be activated once.

b. the fact that the Parties themselves, in Clause 6 of the Termination Agreement, specifically recognise that this contractual penalty is *"fair and reasonable"*.

c. The fact that – following at least partial non-abidance by the Respondent of two earlier agreements (the employment contract and the "Payment Agreement – Settlement of Debt"), it was included as a deterrent to ensure that the Club would pay the agreed amounts.

d. The fact that at the time of signing the Termination Agreement an amount of EUR 11.000 net, was outstanding under the "Payment Agreement – Settlement of Debt", indicating that the Club had violated its payment obligations already beforehand.

and considering also that the principle of freedom of contract commands that the Sole Arbitrator abides by the parties' agreement and that the discretion foreseen at Article 163(3) of the SCO should be used with reluctance (SFT 4C.5/2003; 114 II 264; 103 II 135), the Sole Arbitrator is of the opinion that the contractual penalty agreed by the Parties (*i.e.* EUR 30,000), cannot be considered disproportionate or excessive and therefore cannot be reduced.

97. The aforementioned point is entirely congruent with the prevailing interpretation given by CAS to these types of clauses when they are deemed to be potentially excessive. In this respect, CAS 2017/A/5304, CAS 2018/A/5697.

98. In view of all the above, the Sole Arbitrator decides to uphold in its entirety the Player's Appeal and to annul partially the Appealed Decision (*i.e.* the FIFA DRC's finding related to the reduced amount (EUR 6,368.72) of penalty).

IX. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Bojan Saranov against the decision ref. nr. FPSD-13672, issued on 18 April 2024 by the FIFA Dispute Resolution Chamber, is upheld.

2. The decision ref. nr. FPSD-13672, issued on 18 April 2024 by the FIFA Dispute Resolution Chamber, is confirmed, with the exception of item 2, which is amended as follows:

   2. The Respondent, PAE PAS Lamia 1964, must pay to the Claimant the following amount(s):

   ***EUR 25,000 net as outstanding amount** plus interest p.a. as follows:*

   - 5% interest p.a. over the amount EUR 6,000 of (sic) as from 1 December 2023 until the date of effective payment;

   - 5% interest p.a. over the amount EUR 5,000 of (sic) as from 31 December 2023 until the date of effective payment;

   - 5% interest p.a. over the amount EUR 4,500 of (sic) as from 1 January 2024 until the date of effective payment;

   - 5% interest p.a. over the amount EUR 5,000 of (sic) as from 31 January 2024 until the date of effective payment; and

   - 5% interest p.a. over the amount EUR 4,500 of (sic) as from 1 February 2024 until the date of effective payment.

   EUR 30,000 net as contractual penalty.

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland

Date: 29 April 2025

THE COURT OF ARBITRATION FOR SPORT

Maite Nadal

Sole Arbitrator