CAS 2024/A/10248 Granada Club de Futbol S.A.D. v. Alanyaspor Kulubu

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: **Ms. Yasna Stavreva**, Attorney-at-law, Sofia, Bulgaria

in the arbitration between

Granada Club de Futbol S.A.D., Spain
Represented by Mr. Daniel Muñoz Sirera, Mr. Rodrigo Silva Batista and Mr. Siddharth Gosain, Muñoz & Arias, Sports Lawyers, Valencia, Spain

- Appellant -

and

Alanyaspor Kulubu, Turkey
Represented by Mr. Sami Dinc, Istanbul, Turkey

- Respondent -

I. PARTIES

1. Granada Club de Futbol S.A.D. (the "Appellant" or "Granada") is a Spanish professional football club with its seat in Granada, Spain. It is affiliated to the Royal Spanish Football Federation (the "RSFF"), which in turn is an affiliated member of the Fédération Internationale de Football Association (the "FIFA").

2. Alanyaspor Kulubu (the "Respondent" or "Alanyaspor") is a Turkish professional football club with its seat in Istanbul, Turkey. It is affiliated to the Turkish Football Federation (the "TFF"), which in turn is an affiliated member of FIFA; The Appellant and the Respondent are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the remote hearing held on 15 May 2024. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, she refers in her Award only to the submissions and evidence she considers necessary to explain her reasoning.

4. On 19 January 2023, the Parties concluded a Temporary Loan Transfer Agreement (the "Transfer agreement") for the temporary transfer of the professional football player Famara Diedhiou (the "Player").

5. The validity of the Transfer agreement was subject to four cumulatively conditions: successfully passed medical examinations by the Player; signing of a Protocol between the Player and Alanyaspor determining the conditions of the loan period; existence of an agreement between the Player and Granada on the future employment relationship; issuance of the International transfer card (the "ITC") by the TFF and the effective receipt of it by the RSFF not later than 20h00 on 31 January 2023.

6. According to clause 7.1 of the Transfer agreement if Granada achieved promotion to the First Division of *LaLiga* at the end of the Spanish football season of 2022/2023, the temporary transfer of the Player would automatically be converted into a permanent one.

7. Pursuant to clause 7.3 of the Transfer agreement in case of a permanent transfer, Granada should pay to Alanyaspor upon receipt of an invoice a total amount of EUR 500,000 (fife hundred thousand) net (the "Tranfer fee") in two equal instalments, namely EUR 250,000 (two hundred and fifty thousand) by 31 August 2023 and EUR 250,000 (two hundred and fifty thousand) by 31 January 2024.

8. In accordance with clauses 5.1, 7.3, 7.9, 7.11 of the Transfer agreement all payments due to Alanyaspor were net of bank expenses, taxes, levies and the like, and the FIFA Solidarity Contribution payment should be made by Granada in addition to the

compensation fees determined in the Transfer agreement, without any deduction on the Transfer fee, except for the portion due to Alanyaspor.

9. In case Granada failed to pay any amounts in full and/or in part of their due dates at the latest, as agreed under 7.5 of the Transfer agreement, Granada should be liable to pay to Alanyaspor a penalty of 15% of the due and unpaid amounts for each breach.

10. The Respondent achieved promotion to the First Division of *LaLiga* at the end of the Spanish football season 2022/2023.

11. On 26 June 2023, Alanyaspor sent a letter to Granada via e-mail informing them of the condition met and the obligation to pay the Transfer fee.

12. On 31 August 2023, Alanyaspor sent a letter to Granada informing them that the due date of the first instalment of the Transfer fee was 31 August 2023.

13. On the same day, Granada replied to Alanyaspor and stated that *"the payment has been correctly charged to this bank month's bank remittances"*.

14. On 7 September 2023, Alanyaspor sent a first default notice to Granada in which it requested the payment of the first instalment of the Transfer fee, a penalty of 15% of the overdue amount, in the total amount of EUR 287,500 net, in addition to default interests at the rate of 5% p.a., within seven days from the receipt of the said correspondence.

15. On 11 September 2023, a partial payment in the amount of EUR 249,973 was made by Granada to Alanyaspor.

16. On 12 September 2023, Alanyaspor sent a second default notice to Granada in which it requested the payment of the penalty of 15% of the overdue amount, in the total amount of EUR 37,500 within seven days from the receipt of the said correspondence.

17. On 24 October 2023, Alanyaspor lodged a claim before the FIFA PSC against Granada requested the payment of an overdue amount, in the total amount of EUR 37,960.22 plus interests of of 5% p.a. as from 11 September 2023 until the date of effective payment.

III. PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS CHAMBER

18. On 24 October 2023, Alanyaspor lodged a claim before the FIFA PSC against Granada requested the payment of an overdue amount, in the total amount of EUR 37,960.22 plus interests of of 5% p.a. as from 11 September 2023 until the date of effective payment.

19. On 7 December 2023, the FIFA PSC rendered the Appealed Decision, in the following terms:

> *"1. The claim of the Claimant, Alanyaspor, is partially accepted.*

2. The Respondent, Granada CF, must pay to the Claimant the following amount(s):

a. EUR 27.00 net plus interest of 5% p.a. as from 1 September 2023 until the date of effective payment.

b. Interest of 5% p.a. on the amount of EUR 249,973 as from 1 September 2023 until 11 September 2023.

c. EUR 37,500 net as contractual penalty.

3. Any further claims of the Claimant are rejected.

*4. Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.*

*5. Pursuant to art.24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made **within 45 days** of notification of this decision, the following **consequences** shall apply:*

1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire consecutive registration periods.

2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.

*6. The consequences **shall only be enforced at the request of the Claimant** in accordance with art. 24 par.7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*

7. The final costs of the proceedings in the amount of USD 5,000 are to be paid by the Respondent to FIFA. FIFA will reimburse to the Claimant the advance of costs paid at the start of the present proceedings (cf. note relating to the payment of the procedural costs below)."

20. In substance, the FIFA PSC held as follows:

"(…) 28. To this effect, the Single Judge confirmed that the Claimant has presented clear evidence that is paid EUR 249,973, which has also been confirmed by the Respondent in its submissions. Therefore, the Single Judge determined that EUR 27.00 is still outstanding to date, which already leads him to conclude that the Respondent failed to honour its contractual obligations.

29. In contrast to the above, the evidence filed by the Respondent is, in the Single Judge's view, unclear in what it consists of (a) a bank declaration stating that due to an "incident" (which is not specified) the payment order requested by the Respondent was not processed, and (b) bank statements seemingly from the Respondent's account which do not indicate the beneficiary and/or what any of the transfers listed therein refer to.

30. Accordingly, and while the burden of proof lied with the Respondent to demonstrate that it had complied with the contractual obligations, the Single Judge found that the Respondent did not meet such burden. On this note, he recalled that after being placed

in default, if the Respondent knew that the payment had not been properly made, it was the Respondent's duty to ensure that the monies were transferred to the Claimant within the additional grace period of 7 days granted by the latter.

31. In fact, it was the Single Judge's view that it was necessary for the Respondent to be more diligent, and thus has requested payment well in advance to allow sufficient time for it to be processed and forwarded to the Claimant, while it in fact made the payment after the deadline agreed upon in the transfer agreement had already expired. By making a payment order on the last day of its contractual deadline, the Single Judge found that the Respondent ran the risk of being in default if the payment was not correctly processed, as it was the case.

32. Along these lines, the Single Judge underscored that it is common in the industry of football, and in the banking industry in general, that payments between two countries take a few business days to be processed, on account of documentation check and bureaucratic steps which are normal or even expected in light of the necessity of the banking system to verify the validity and legality of the concerned money transfer. However, these steps are usually undertaken in a swift fashion, which is not at all comparable to the unusual additional time required to process the relevant payments in the matter at hand, which reportedly took place due to an unclear and unproved "incident". That being the case, the Single Judge highlighted that it was for the Respondent to have, quite simply, factored the processing time of an international payment in its financial planning to comply with the transfer agreement. Having failed to do so, the Single Judge found that the Respondent cannot now argue its own tort, let alone benefit from it.

33. In light of the fact that the Respondent failed to diligently performed its obligation under the transfer agreement, namely, to timely pay the entirety of the first instalment of the Transfer Fee without any deduction of any kind, the Single Judge concluded that the Respondent has breached the transfer agreement and therefore the consequences set therein must be triggered in line with the principle pacta sunt servanda."

21. On 20 December 2023, the grounds of the Appealed Decision were notified to the Parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 5 January 2024, the Appellant lodged a Statement of Appeal with the Court of Arbitration for Sports ('CAS") against the Respondent with respect to the Appealed Decision, pursuant to Articles R47 and R48 of the CAS Code of Sports-related Arbitration, (edition 2023), (the "CAS Code"). The Appellant requested to submit this matter to a Sole Arbitrator and the Respondent agreed to such request.

23. On 29 January 2024, the CAS Court Office, on behalf of the Division President, informed the Parties that, pursuant to Article R54 of the CAS Code, the Panel had been constituted as follows:

Sole Arbitrator: Ms Yasna Stavreva, Attorney-at-law in Sofia, Bulgaria.

24. On 16 February 2024, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

25. On 15 March 2024, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

26. On 5 April 2024, the Sole Arbitrator, after having consulted the Parties, decided to hold a hearing, by video-conference, pursuant to Article R57 of the Code.

27. On 8 April 2024, the CAS Court Office, on behalf of the Sole Arbitrator, issued the Order of Procedure, which was duly signed by the Parties.

28. On 15 May 2024, a hearing was held by video-conference. Besides the Sole Arbitrator and Mr. Antonio de Quesada, Head of Arbitration, the following persons remotely attended the hearing:

For the Appellant:

- Mr. Siddharth Gosain – attorney-at-law
- Mr. Divy Kadakia – legal intern
- Mrs. Ana Carballo – Finance director
- Mr. Lucas Gomez Ballesteros - interpreter

For the Respondent:

- Mr. Sami Dinc – legal counsel
- Mr. Emirhan Ceviker – legal counsel
- Mr. Alfonso Leon Lleo – legal counsel
- Mr. Gytis Rackauskas - attorney-at-law

29. At the hearing the Parties confirmed that they had no objections as to the constitution of the Panel. The Parties thereafter were given a full opportunity to present their case, submit their arguments and submissions and answer the questions posed by the Sole Arbitrator.

30. The Sole Arbitrator heard the testimony of Mrs. Ana Carballo, Finance director of the Appellant, who provided explanations regarding the payment of the first instalment of the Transfer fee.

31. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and confirmed that their right to be heard has been fully respected.

V. SUBMISSIONS OF THE PARTIES

A. The Appellant's Position

32. In its Statement of Appeal and Appeal Brief, the Appellant submitted the following requests for relief :

"The Appellant hereby respectfully requests this honorable Court to:

"1.Accept the present appeal against the decision passed by Players' Status Chamber on 7 December 2023, the grounds of which were notified on 20 December 2023, in the dispute between Granada CF and Alanyaspor Kulubu registered in FIFA with reference number FPSD-12380.
2. Sets aside the Appealed Decision in full.
3. Decide that Granada CF has complied with its obligation under the Transfer Agreement and therefore is not liable to pay any penalty to Alanyaspor Kulubu.

As an alternative to point 3 above:

4. Decide that Granada CF is not liable to pay any penalty to Alanyaspor Kulubu in accordance with Article 163.3 of the SCO.

As an alternative to point 4 above:

5. Decide the amount of penalty must be reduced in accordance with Article 163.3 of the SCO.
In any case:

6. Decide that Granada CF is not neither liable to pay EUR 27,00 (twenty-seven Euros) nor any interest on the said amount to Alanyaspor Kulubu.
7. Decide that Granada CF is not liable to pay any default interest on the payment of EUR 249,973 to Alanyaspor Kulubu.
8. Fix a minimum fee of sum of CHF 20,000 (twenty thousand Swiss Francs) to be paid by Alanyaspor Kulubu as a contribution to the legal fees and costs of Granada CF.
9. To order Alanyaspor Kulubu to pay all the procedural costs."

33. In support of its Appeal, the Appellant's position, in essence, may be summarised as follows:

- The Appellant submits that it fully complied with the payment of the first instalment of the Transfer fee. The payment was made on time, on 31 August 2023, before the expiry of the deadline, but the delay in processing the payment was due to the banking institution, which was outside the Appellant's control. It refers to Art.102 (2) of the Swiss Code of Obligations (the "SCO") which states that:

  "Where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right of termination reserved by one party, the obligor is automatically in default on expiry of the deadline."

As the Appellant initiated and processed the payment before the expiry of the deadline it was not put in default which was supported by the CAS jurisprudence (CAS award 2021/A/8139).

- The Appellant further submits that it acted diligently and did not breach its contractual obligations under the Transfer agreement. It took all the steps to ensure that the payment of the first instalment of the Transfer fee was properly remitted to the Respondent which was corroborated by the Bank statements. The payment was delayed only due to a technical issue of the bank institution, beyond the Appellant's control, therefore the Appellant should not be held liable. Once the technical issue was resolved, the payment was finally executed on 11 September 2023 which was confirmed by a bank certificate, stating the following:

  "Mrs. Maria Victoria Rodriguez Bedon, with NIF 24.225.362-Z, as Deputy Director of Caja Rural de Granada in the Urbana 3 collection branch,

  CERTIFIES:

  That our client "GRANADA CLUB DE FUTBOL S.A.D." with C.I.F. A18013003, dated August 31 2023, processed to register the transfer of order 10170311229, for an amount of 250,000 Euros, beneficiary "ALANYASPOR KULUBU DERNEGI", and beneficiary entity "SEKERBANK T.A.S.", from Turkey.

  The aforementioned operation was affected by a technical accident that occurred in our banking entity with several operations, which implied that despite the registration of the payment order of August 31, 2023 in the electronic banking platform of Caja Rural de Granada on the part of our client "GRANADA CLUB DE FUTBOL S.A.D." the order was nor executed, nor were the further attempts on 05, 06 and 08 September 2023.

  Once the technical issues were resolved, the payment was finally processed on September 11, 2023.

  And for the record and for its effects where appropriate, I issue the following certificate of Granada, 23 January 2024.

  Signed: Maria Victoria Rodriguez Bedon

  Deputy Director, Urbana 3 collection branch"

- In support of its stance, the Appellant also refers to the national law – the Royal Decree – Law 19/2018, of November 23, on payment services and other urgent measures in financial matters, which it considered applicable under clause 9.5 of the Transfer agreement. This document defined the responsibility of the payer's service provider for the proper execution of the transaction, stating the following:

  "Art. 60: Liability of the payment service provider in case of non-execution or defective or delayed execution of payment order.

  1. In the case pf payment orders initiated directly by the payer, and without prejudice to Articles 43, 59 and 64, the payer's payment service provider shall be liable to the payer for

the proper execution of the payment transaction, unless the payer's payment service provider can prove to the payer and, where applicable, to the payee's payment service provider that the payee's payment service provider received the amount of the payment transaction in accordance with Article 55. In such a case, the payment service provider of the payee shall be liable to the payee for the correct execution of the payment transaction…"

- Furthermore, the Appellant deems that it should not be liable and bear any penalty because the remittance of the first instalment of the Transfer fee was delayed due to circumstances completely out of its control (the technical issue of the banking institution) which prevented the Appellant from performing its obligations on time. In this regard the Appellant invokes Art. 163.2 of the Swiss Code of Obligations (the "SCO") which states:

  "The penalty cannot 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."

- Additionally, the Appellant contests the penalty as manifestly excessive and disproportionate. It argues that is should be substantially reduced in accordance with Art. 163.3 of the SCO, which allows for the reduction of excessively high penalties at the court's discretion. When analysing the proportionality of the penalty the Appellant underlines several factors, which it considers important and relevant: (i) the circumstances of the case; (ii) the Respondent's interest in the Appellant's compliance with its obligations; (iii) the severity of the breach; (iv) the intentional failure to breach the obligation for payment; (v) the Parties' business experience; (vi) the damage suffered by the Respondent; (vii) the Parties' financial situation. In support of its stance the Appellant points numerous CAS and Swiss Federal Tribunal jurisprudence which it deems applicable to the merits of the case at hand (for example: awards ATF 103 II 129, ATF 91 II 372, ATF 52 II 223, ATF 102 II 420, ATF 133 III 43, CAS 2020/A/6809, CAS 2018/A/5807, CAS 2018/A/5857, CAS 2015/A/4139, CAS 2012/A/2847).

- The Appellant stresses on the peculiarities of the case and that the payment was effectively made on the Appellant's 5th attempt *"due to a technical issue with the Bank"*. The technical problem affected several transfers, including the Appellant's one, which was expressly confirmed by the banking institution, a fact that should be taken into account.

- According to the Appellant the main interest of the Respondent as a creditor was the Appellant to comply with its obligations for payment of the first instalment of the Transfer fee. As the Appellant made the payment within the deadline and it was received by the Respondent, despite of the few days delay due to circumstances out of the Appellant's control, the Respondent's interest was not affected, therefore, the penalty should be reduced.

- The Appellant underlines that it did not intentionally or negligently breach its obligations for payment of the first instalment of the Transfer fee. It stayed constantly in touch with the banking institution to ascertain the problem and made

five attempts until the payment went through which proves the Appellant's *"diligence and willingness to comply with its obligations in a timely manner"*. The 11- days delay for the Respondent to receive the money transfer, due to external factors, beyond the Appellant's control did not constitute a severe violation of the Transfer agreement that would justify the imposition of such excessive penalty.

- Furthermore, the Appellant submits that the Respondent did not suffer any damage neither was it exposed to any risk of damage. Considering the financial situation of the Respondent, the penalty is unreasonable and clearly exceeds the admissible amount. Before the end of the summer transfer window in Turkey, the Respondent signed contracts and registered several football players with a market value much higher than the amount of the first installment, as well received a transfer fee for the transfer of one of its players in the amount of approximately EUR 2,300,000. Thus, the penalty should be reduced to zero due to its disproportionality.

- Finally, the Appellant considers that the Appealed Decision contradicts the principal of *non ultra petita,* deriving from Article 58 par.1 of the Swiss Procedural Code (the "SPC") which provides that a party cannot be awarded more than or different from what it has requested. In the proceedings before the FIFA PSC the Respondent requested a penalty to be paid in the amount of EUR 37,960.22 and a default interest of 5% p.a. as from 11 September 2023 until the date of effective payment. The FIFA PSC correctly rejected the claim for awarding a default interest over the penalty but wrongfully awarded to the Respondent: "*EUR 27.00 net plus interest of 5% p.a. as from 1 September 2023 until the date of effective payment and interest of 5% p.a. on the amount of EUR 249,973 as from 1 September 2023 until 11 September 2023".*

B. The Respondent's Position

34. In its Answer to the Statement of Appeal and the Appeal Brief, the Respondent submitted the following prayers for relief, requesting the CAS:

> *"1. To dismiss the claims of the Appellant.*
>
> *2. To dismiss other claims of the Appellant in regards to the legal fees and costs of the Appellant and the procedural costs.*
>
> *3. To fix a sum of CHF 20.000 to be paid by the Appellant to the Respondent, to help the payment of its legal fees and costs.*
>
> *4. To condemn the Appellant to the payment of whole CAS administration costs and the Arbitrators fee."*

35. In support of its defense, the Respondent, in essence, submits the following:

- The Respondent first argues that the Appellant failed to fulfil the contractual obligations in the Transfer agreement to the effect that the Appellant was supposed to pay EUR 500,000 upon conversion of the temporary transfer of the player to a

permanent one (i.e. if the Appellant achieved promotion to the First Division of LaLiga at the end of the football season of 2022/2023).

- The Respondent further submits that the Appellant delayed the payment of the first instalment of the Transfer fee, thus breaching the payment schedule in clause 7.3 of the Transfer agreement. It objects the delay to be *"due to a technical issue with the Bank"* and finds quite unrealistic, relying on the banks' practise, the 11 days duration the payment to be completed (from 31 August 2023 when the payment was alleged to be done by the Appellant till 11 September 2023 when it was remitted). According to the Respondent the evidences provided by the Appellant in this regard (bank letters dated 14.11.2023 and 23.01.2024) did not contain any details about the mentioned "incident" and "technical issues" and did not clearly indicate that the problem was caused by the bank and not by the Appellant.

- The Respondent stresses that the Appellant never mentioned in its correspondence with the Respondent its "alleged 4 failed attempts" and the technical error of the bank as a reason for its delay to transfer the first instalment of the Transfer fee within the deadline. On the contrary, it was the Respondent that sent to the Appellant an e-mail, requesting the swift document of the banking transaction on 4 September 2023 and a default notice on 7 September 2023. Thus, the Appellant acted in bad faith and cannot justify its behaviour on circumstances beyond its control.

- The Respondent underlines that according to the meaning of clause 7.3 of the Transfer agreement the first instalment of EUR 250,000 should have been transferred into the Respondent's bank account on 31 August 2023 and not the payment order to be recorded on that day. Even it was accepted that the Appellant ordered the money on 31 August 2023, should have been able to prove it by a SWIFT document, which it never provided, despite of the Respondent's request.

- Additionally, the Respondent finds the Appellant's request not to be held liable to pay a penalty amount under Art. 163.2 of the SCO unfounded because its performance was not prevented by circumstances beyond its control. The Appellant was firstly notified by the Respondent for the payment of the first instalment of the Transfer fee on 26.06 2023, sixty-seven days before the due date, and it had enough time to avoid any risk of error or delay in payment though a bank. If the Appellant wanted to fulfil correctly its contractual obligations under the Transfer agreement it should have found other options in case of bank failure.

- The Respondent also contests the Appellant's request for reduction of the penalty amount under Art. 163.3 of the SCO alleging that it contradicts clause 7.5 of the Transfer agreement and the principle of *pacta sunt servanda*. Taking into consideration the provision of clause 7.5 of the Transfer agreement, the Parties mutually agreed that the penalty amount was not extortionate and the Appellant irrevocably waived from its demand rights of amortization and / or reduction of the penalty amount.

- Lastly, the Respondent makes reference to CAS award CAS 2018/A/5588 where the concept of responsibility for the non – fulfilment of the relevant deadline due to a bank failure was confirmed.

VI. JURISDICTION

36. Article R47 par.1 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related bodies maybe 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."

37. Article 58 (1) of the FIFA Statutes states as follows:

"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."

38. The Sole Arbitrator also takes note of the fact that neither of the Parties objected to the jurisdiction of the CAS and that the Order of Procedure was duly signed by them without reservation.

39. It follows from all of the above that the CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

40. Article R49 of the CAS Code reads as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. […]"

41. In accordance with Article 58 par.1 of the FIFA Statutes:

"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."

42. The grounds of the Appealed Decision were notified to the Parties on 20 December 2023 whilst the Statement of Appeal was filed on 5 January 2024, therefore within the deadline set forth in Article 58 (1) of the FIFA Statutes. The Statement of Appeal also complied with the requirements of Article R48 of the CAS Code. Consequently, the appeal is admissible.

VIII. APPLICABLE LAW

43. Article 187 para.1 of the Swiss Private International Law Act ("PILA") provides:

"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such choice, according to the rules of the law which in the case has the closest connection."

44. Article R58 of the CAS 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

45. Article 56(2) of the FIFA Statutes (edition 2022) stipulates the following:

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

46. In addition, clause 15.1 of the Transfer agreement provides as follows:

"This agreement shall be governed by and construed in accordance with the FIFA Regulations and Swiss law on a subsidiary basis."

47. In consideration of the above and pursuant to Article R58 of the CAS Code, the Sole Arbitrator holds that the present dispute shall be resolved primarily according to the rules and regulations of FIFA, in particular the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"), (edition May 2023) and, subsidiarily, Swiss law.

IX. MERITS

48. By addressing the merits of the present dispute, the Sole Arbitrator first observes that it is undisputed between the Parties that: i) they have concluded a valid Transfer agreement; ii) the payment obligation arose as the Appellant was promoted to the First Division of *LaLiga* at the end of the Spanish football season of 2022/2023; and iii) the transfer of the player Famara Diedhiou was converted from temporary to permanent.

49. The questions which are disputed and need to be answered by the Sole Arbitrator in this appeal are the following:

a. Did the Appellant timely comply with its payment obligation under the Transfer agreement?

b. In case the previous question is not answered in the affirmative, what are the consequences thereof?

c. Did the Appealed Decision contradict the principal of non ultra petita?

A. *Did the Appellant timely comply with its payment obligation under the Transfer agreement?*

50. In essence, in the Appealed Decision the FIFA PSC held that the Appellant failed to diligently perform its obligation under the Transfer agreement, namely, to timely pay the entirety of the first instalment of the Transfer fee without any deduction. Thus, the Appellant breached the Transfer agreement and should bear the consequences thereof.

51. It is reminded that, according to the Appellant, it fully complied with its contractual obligation to pay the first instalment of the Transfer fee. The payment was made on time, before the expiry of the deadline, but its processing was delayed due to *"a technical issue with the Bank"*, beyond the Appellant's control.

52. The Respondent, in turn, argues that the Appellant did not fulfil its contractual obligations. The Appellant's delay to timely execute of the first instalment of the Transfer fee was not caused by *"a technical issue with the Bank"* but due to Granada's negligence.

53. In light of the above, the starting point of the Sole Arbitrator's analysis are Article 12bis (1) of the FIFA RSTP and clauses 7.1 and 7.3 of the Transfer agreement.

54. Article 12bis(1) of the FIFA RSTP provides as follows:

"Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements…"

55. Clauses 7.1 and 7.3 of the Transfer agreement state as follows:

"7.1 ALANYASPOR and the PLAYER grant to GRANADA an obligation to buy the PLAYER's registration on a permanent basis in exchange of a transfer compensation amounting of 500.00,00 Euro (Five Hundred Thousand Euros) net of solidarity contributions, bank expenses and all kind of Spanish taxes, levies, etc. ("Permanent Transfer Obligation") provided that GRANADA achieves promotion to the First Division of LaLiga at the end of the season 2022/2023 ("Permanent Transfer Condition").

(…)

7.3 In case the aforementioned Permanent Transfer Condition is met, in consideration of the permanent transfer of the PLAYER's registration to GRANADA, GRANADA agrees to pay to ALANYASPOR the sum of FIVE HUNDRED THOUSAND EUROS (500.000.00) net of solidarity contributions, bank expenses and all kind of Spanish taxes, levies, etc.(hereinafter, the "Transfer Fee") according to the following payment schedule:

- PAYMENT 1: GRANADA shall pay ALANYASPOR the amount of TWO HUNDRED AND FIFTY THOUSAND (250.000) EUROS by 31 August 2023 upon receipt of the relevant invoice.

- PAYMENT 2: GRANADA shall pay ALANYASPOR the amount of TWO HUNDRED AND FIFTY THOUSAND (250.000) EUROS by 31 January 2024 upon receipt of the corresponding invoice."

56. The aim of Art. 12bis of the FIFA RSTP is to ensure that clubs that are entitled to contractual amounts receive them as swiftly as possible, without unnecessary or unjustified delay. The burden of proof lies with the debtor club, i.e. in the present case with the Appellant to demonstrate that it had timely and fully complied with the contractual obligations.

57. The Sole Arbitration notes from the documentation in the file that on 11 September 2023, the Respondent received a partial payment of the first instalment of the Transfer fee amounting to EUR 249,973 and that there were still EUR 27 outstanding which was not rejected by the Appellant neither in its submissions nor during the hearing. It is evident that the payment was made eleven days after the expiry of the deadline pointed in clause 7.3 of the Transfer agreement.

58. The Sole Arbitration further notes that the Appellant argues that it actually complied with the deadline upon with Alanyaspor as it duly ordered the payment on 31 August 2023; nonetheless, it lately became aware of the fact that the payment was unsuccessful due to *"a technical issue with the Bank",* beyond its control; when it was aware of the failure, it made four attempts to execute the payment and finally the money were transferred to the Respondent's bank account. Therefore, the Appellant assumes that it cannot be considered liable for this further delay and, that in any event, it cannot be considered responsible for any overdue payables.

59. Analyzing the evidences, the Sole Arbitrator is not persuaded by the Appellant's arguments.

60. The Sole Arbitrator considers that the date of the execution of the payment by the Appellant is unclear.

61. The Sole Arbitrator considers that the Appellant has the burden to prove that the payment was made on or before 31 July 2024. However, the Sole Arbitrator considers that with the evidence on file, the Appellant failed to prove that such payment was timely made. The bank statements provided by the Appellant do not prove when the payment was made. The status of all transactions, amounting to EUR 250,000 is marked as "Expired" but do not prove when the payment was made.

62. The Sole Arbitrator's stand is confirmed by the testimony of Mrs. Ana Carballo, Finance director of Granada who explained during the hearing that the payment order amounting to EUR 250,000 was recorded in the electronic banking platform Ruralvia on 31 August 2023 but, as she did not follow the payment, she could not confirm whether it was remitted. She was aware about the failure of the payment several days after the Appellant was notified by the Respondent's correspondence.

63. With reference to the bank certificates, issued on 14 November 2023 and 23 January 2024, the Sole Arbitrator observes, that these documents indicate in common the existence of an "incident" or a "technical issue" but none of them specifies what exactly was the problem and how it affected the payment to be processed by the Appellant on 31 August 2023.

64. The Sole Arbitrator further notes, that the Appellant invoked for the first time allegations about the banking incident in the proceedings before the FIFA PSC. It has never mentioned before in the correspondence with the Respondent to justify the delay in the payment. After exchanging several e-mails on 31 August 2023, the Appellant remained silent and did not answer to the Respondent's request on 4 September 2023 for the swift document and to the second default notice, dated 7 September 2023. Being placed in default, if the Appellant knew that the payment had not been properly made, it was its duty to ensure that the first instalment of the Transfer fee was paid to the Respondent within the additional grace period of 7 days granted by the latter.

65. The Sole Arbitrator notes that the Appellant, by making a payment order on the last day of the contractual deadline, ran the risk of being in default if the payment was not correctly processed, which is the case. This conclusion fully corresponds with the existing CAS jurisprudence (award CAS 2019/A/6334), which states:

"The risk of error or delay in payment through a bank is borne by the debtor of the monetary obligation."

66. In light of the reasoning above, the Sole Arbitrator concludes that the Appellant did not comply with its obligation to timely pay the entirety of the first instalment of the Transfer fee under the Transfer agreement. The Appellant failed to demonstrate in a convincing way that it was prevented from complying with the deadline for reasons, beyond the sphere of its control. Therefore, the Appellant breached the Transfer agreement and should bear the responsibility and pay a contractual penalty to the Respondent.

B. In case the previous question is not answered in the affirmative, what are the consequences thereof?

67. The Sole Arbitrator observes that clause 7.5 of the Transfer agreement determines, *inter alia*, as follows:

"In case GRANADA fails to pay any amounts in full and / or in partial on their due dates at the latest, GRANADA shall be liable to pay to ALANYASPOR penalty at the ratio of 15% (fifteen percent) of the due and unpaid amounts for each breach separately in addition to the due and unpaid amounts and their interests (in addition to the performance) without the need of any notice, notification and / or court verdict. The Parties agree that this penalty amount is not extortionate. GRANADA irrevocably waives from its demand rights to amortization and / or reduction of the said penalty amount."

68. It is undisputed that clause 7.5 of the Transfer agreement is a valid penalty clause for untimely payment, providing penalty of 15% of the due amounts. In the matter at hand it should be calculated on the full amount of the first instalment of the Transfer fee (EUR 250,000) and corresponds to EUR 37,500.

69. Furthermore, the penalty clause does not contradict the Swiss law which allows the use of contractual penalties for untimely payment of debts. According to Art. 160 of the SCO, parties to a contract may agree on a penalty clause in case of non – performance

or defective performance of the contract. When the contract has to be performed within a given deadline, parties may agree on penalty fees for each day during which the debtor is in default. Pursuant to the principal of contractual freedom, the parties can freely determine the amount of the contractual penalty.

70. The Sole Arbitrator further notes, that the penalty clause is in line with the existing CAS jurisprudence (awards CAS 2017/A/8523, CAS 2014/A/3664).

71. In its submissions, the Appellant argues that it should not be held liable to pay a penalty in accordance with Art. 163.2 of the SCO. As an alternative, if a penalty is imposed, it should be reduced as excessive and disproportionate under Art. 163.3 of the SCO and in view of the following factors: i) circumstances and peculiarities of the case; ii) the creditor's interest in the other parties compliance with its obligations; iii) the non-existence of any severe breach; iv) the non – intentional failure to breach the main obligation; v) the parties' business experience; vi) lack of any damages suffered by the Respondent; vii) the financial situation of the parties; viii) the good faith of the Appellant.

72. Analyzing the facts of the case the Sole Arbitrator does not concur with the Appellant's allegations on the interpretation of Art. 163.2 and Art. 163.3 of the SCO.

73. Art. 163.2 of the SCO states the following:

"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."

74. Bearing in mind the above – mentioned findings that the Appellant's performance was not prevented from circumstances beyond its control the Sole Arbitrator considers the provision of Art. 163.2 of the SCO not to be applicable to the present case.

75. In Sole Arbitrator's view, the issue whether a penalty clause should be reduced as excessive and disproportionate under Art. 163.3 of the SCO should be assessed taking into account the CAS jurisprudence which states the following principles:

- *"the reduction of a penalty clause shall only be reserves for exceptional cases that occur when the penalty is grossly and evidently unfair since the possibility of a reduction affects the contractual freedom of the parties" (awards CAS 2020/A/6809&6843, CAS 2018/A/5857);*

- *"a reduction of the penalty by the judge is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain the entire claim, measured concretely at the moment the contractual violation took place. To evaluate the excessive character of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration all the circumstances at hand" (awards CAS 2017/A/5304, CAS 2019/A/6626);*

- *"the factors to consider when deciding whether a reduction of a penalty clause is applicable, are as follows: (i) the creditors interest in the other parties compliance with the undertaking; (ii) the severity of the default or breach; (iii) the intentional failure to breach the main*

obligation; (iv) the business experience of the parties; (v) the financial situation of the debtor" (CAS 2018/A/5857);

76. Considering the above legal background and the function of the penalty clause to ensure contractual stability, the Sole Arbitrator finds that a contractual penalty of EUR 37,500 (15% of the first installment of the Transfer fee) is not disproportionate having in mind that an amount of EUR 250,000 was delayed and clause 7.5 of the Transfer agreement provides that Granada - if failing to pay any amounts due on their due dates - shall pay an indemnity amounting to 15% of the principal. The Sole Arbitrator deems that a penalty of 15% of the amount due is not an unreasonable deterrent to ensure that the debtor would pay within the deadline in light of the value of the transaction.

77. Furthermore, the Sole Arbitrator finds that when signing the Transfer agreement the Appellant voluntarily agreed in clause 7.5 that the penalty amount was not extortionate and irrevocably waived from its demand rights of amortization and / or reduction of the penalty. This means, that the Appellant had the possibility to carefully asses its financial situation at the time and to verify if it would be able to pay in time.

78. With regards to the other criteria above mentioned, the Sole Arbitrator considers the Appellant's delay to comply with its payment obligations, which was not prevented from circumstances beyond its control, is a contractual breach that affected the Respondent's interest, especially when it has already performed its obligations regarding the transfer of the professional player Famara Diedhiou.

79. The business experience of the Parties and the financial situation of the Appellant as debtor cannot be considered relevant in the present case because both Parties professionally operate in the field of football and the Appellant did not provide any evidence of its financial situation and of the consequences that the payment of a penalty of EUR 37,500 would entail.

80. Taking into account all specific circumstances of the case, the Sole Arbitrator concludes that the penalty clause is not disproportionate, as it does not exceed the admissible amount in consideration of justice. Therefore, it should not be reduced.

C. Did the Appealed Decision contradict the principal of non ultra petita?

81. In its Appeal brief the Appellant contests the following amounts, awarded to the Respondent in the Appealed Decision: a) EUR 27 net plus interest of 5% p.a. as from 1 September 2023 until the date of effective payment; 2) Interest of 5% p.a. on the amount of EUR 249,973 as from 1 September 2023 until 11 September 2023. It submits that the Respondent never requested these amounts in the proceedings before the FIFA PSC, therefore the principle of *non ultra petita* was not respected.

82. The Sole Arbitrator notes that in its Statement of claim before the FIFA PSC the Alanyaspor made the following request for relief:

"The Claimant [Alanyaspor] firstly would like to request you to make a decision that the Respondent [Granada] has to pay the overdue and unpaid amount of 37,960.22 Euro (Thirty

seven thousand nine hundred sixty Euros Twenty two cents) with its 5% p.a. interest starting from 11.09.2023 until the date of effective payment.

In consideration of the fact that the Respondent [Granada] caused the Claimant [Alanyaspor] to file the case herein, we would like to request your honorable chamber to make decision that the judicial costs and the attorneyship fees that the Claimant [Alanyaspor] is faced with shall be paid by the Respondent [Granada]."

83. It follows from the above that the Respondent actually did not claim the disputed amounts before the first instance and that the FIFA PSC has granted to Alanyaspor more than it was requesting. Indeed, what was requested by Alanyaspor was the payment of an overdue amount, in the total amount of EUR 37,960.22 which partially corresponds to the contractual penalty, plus interests of of 5% p.a. as from 11 September 2023 until the date of effective payment.

84. In this context, the Sole Arbitrator reminds that she is nonetheless bound to the limits of the parties' motions, since the arbitral nature of the proceedings obliges the Sole Arbitrator to decide all claims submitted by the Parties and, at the same time, prevents the Sole Arbitrator from granting more than the parties are asking by submitting their requests for relief to the CAS, according to the principle of *ne ultra petita* deriving from Article 58 of the Swiss Code of Civil Procedure.

85. Despite of the evidence that on 11 September 2023 the Respondent received a partial payment amounting to EUR 249,973 and there were still overdue payables, the amount of EUR 27.00 and the interest of 5% p.a. on it and on the amount of EUR 249,973 as from 1 September 2023 until the date of effective payment cannot be awarded because they were not requested by the Respondent.

86. Consequently, the Appealed Decision needs to be amended in the sense that the Appellant should only be liable to pay the Respondent a contractual penalty amounting to EUR 37,500.

X. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Granada Club de Futbol S.A.D. against the decision rendered on 7 December 2023 by the FIFA Players' Status Chamber is partially upheld.

2. The decision issued on 7 December 2023 by the FIFA Players' Status Chamber is confirmed, saved item 2 of the operative part which is amended as follows:

   "The Respondent, Granada CF, must pay to the Claimant the following amount(s): EUR 37,500 net as contractual penalty."

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 14 January 2025

THE COURT OF ARBITRATION FOR SPORT

Yasna Stavreva
Sole Arbitrator