Arbitration CAS 2021/A/8340 Yeni Malatyaspor FK v. Club Atletico Talleres de Cordoba, award of 16 September 2022

Panel: Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Football
Failure to pay the amounts of a termination agreement to the loan of a player
Penalty clause and determination of its amount
Reduction of excessive contractual penalties

1. **Contractual penalties can be stipulated in sporting contracts. Under Swiss law, the parties are free to determine the amount of the penalty clause (Art. 163(1) of the Swiss Code of Obligations, CO).**

2. **According to Article 163 para. 3 CO, the court must reduce penalties that it considers excessive. However, the law does not contain a clear definition of an excessive contractual penalty, so it is up to the judge, to take into account the facts of the case and all relevant circumstances, to decide whether the penalty is excessive and, if so, to what extent it must be reduced. The judge's discretionary power relates both to the excessive nature of the penalty and to the question of the extent of the reduction. If the court recognises that the penalty is excessive, it must in principle reduce it only to the extent necessary to ensure that it is no longer excessive. A reduction of the penalty is justified in particular where there is a gross disproportion between the amount agreed and the creditor's interest in maintaining his claim in full, measured in concrete terms at the time when the contractual breach occurred. The damage to which the creditor is exposed in the specific case is indicative of the creditor's interest in performance and as such is one of the circumstances to be taken into account. Other assessment criteria may be taken into account, such as the nature and duration of the contract, the seriousness of the fault and of the breach of contract, the economic situation of the parties, especially the debtor. It is also important not to lose sight of any dependency resulting from the contract and the business experience of the parties. However, the judge must not reduce a penalty too lightly and respect the principle of freedom of contract, which is of central importance in Swiss law and which must always prevail in cases of doubt.**

I. PARTIES

1. Yeni Malatyaspor FK ("the Appellant" or "YENI") is a professional football club based in Malatya, Turkey. It is affiliated to the Turkish Football Federation (the "TFF"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Club Atletico Talleres de Cordoba (hereinafter "the Respondent" or "CAT", together with the Appellant "the Parties") is professional football club based in Cordoba, Argentina. It is affiliated to the Argentine Football Association (the "AFA"), which in turn is affiliated with FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the decision rendered by the Single Judge of the FIFA Players' Status Committee ("the PSC") on 10 August 2021 ("the Appealed Decision"), on the Parties' written submissions and pleadings as well as on the evidence adduced. Additional facts 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, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 24 August 2020, the Parties concluded an agreement (the "Loan Agreement") over the loan transfer of the player, A. (the "Player"), from the Respondent to the Appellant, against payment of a fixed transfer fee of USD 530,000. The amount was to be paid in three installments: USD 200,000 within two working days after the signature of the contract, USD 200,000 on 30 October 2020 and USD 130,000 on 20 December 2020. This contract also provided for a penalty clause of USD 100,000 which was due for each installment if it was not paid within five days after the contractual due date.

5. On 15 November 2020, the Respondent sent a default letter to the Appellant requesting the payment of the second installment for the loan of the Player in the amount of USD 200,000 plus penalty of USD 100,000 due to late payment.

6. On 8 December 2020, the Appellant informed the Respondent that the Player wanted to terminate the Loan Agreement. The Appellant indicated that it had already paid an amount of USD 200,000 and offered to pay an additional amount of USD 65,000. This amount would correspond to half of the agreed loan for a season (USD 530,000), as the Player would have only remained with Respondent for half a season.

7. On 12 December 2020, the Respondent sent a letter to the Appellant in which it stated: *"Having in consideration that the default in the installment of October 30, 2020 occurred, the total amount owed by your institution in relation to the loan agreement is 430.000 USD plus the interest rate (7%). Our proposal for an a [sic] mutual and amicable agreement of termination is the total net sum of ONE*

HUNDRED FIFTY THOUSAND 150.000 USD. In case the amount set out above (net sum of ONE HUNDRED FIFTY THOUSAND 150.000 USD) have not been paid in our bank account within two (2) days, we must start the claim in FIFA for all the sums owed, the fine, the interest and the petition for a disciplinary sanction"..

8. On 19 December 2020, the Parties concluded a Financial Clearance and Termination of Loan Agreement (the "Termination Agreement") regarding the loan of the Player with the Appellant. In the Termination Agreement, the Parties held that the Appellant had paid USD 200,000. The remaining amount of USD 330'000 was declared as pending. The Parties agreed that insofar the contract of the Player with the Appellant would be terminated early, the pending amount of USD 330'000 would be reduced to USD 110'000, payable in two installments: USD 55'000 on 20 January 2021 and USD 55'000 on 20 February 2021.

9. Under clause 2 of the Termination Agreement, the Parties stipulated the following:

"Tallares and Yeni Malatyaspor freely by mutual agreement and in full exercise of the autonomy of the will expressly provide that the non-payment in time of any of the agreed installments for the price of the FINANCIAL CLEARANCE and TERMINATION OF LOAN AGREEMENT, irrevocably cause the following consequences:

1) In the event of default of the [sic] *any of the agreed payments by MALATYA, TALLERES shall give MALATYA notice in writing in relation to the overdue payable granting 10 (ten) natural days as of the notice receipt to MALATYA deliver the payment of such installment to TALLERES. After this will place Yeni Malatyaspor in automatic default and will generate in favour of TALLERES a penalty of the sum of Twenty Five Thousand US Dollars (USD 25,000.00) for each breach of the installments. The total amount in case of breach of both installments will be Fifty Thousand US Dollars (USD 50,000.00)".*

10. On 21 January 2021, the Respondent put the Appellant in default of payment in the amount of USD 55,000, corresponding to the first installment provided for by the Termination Agreement, granted the Appellant 10 days to remedy the default and warned the latter that, should it fail to remit the said payment within the granted 10-day time-limit, a penalty of USD 25,000 would also become due.

B. Proceedings before the FIFA Player's Status Committee

11. On 15 December 2020, CAT lodged a claim against YENI with FIFA in which it requested the payment of USD 430'000 plus interest of 7% per year since 30 October 2020.

12. On 6 June 2021, YENI filed its position and, referring to the Termination Agreement, requested FIFA: *"The refusal of the amount which is the basis of the case".*

13. On 16 June 2021, CAT filed its answer to YENI's position. It acknowledged the Termination Agreement but emphasized that it had been concluded after the submission of its claim . It thus amended its requests for relief as follows:

- USD 55'000 for the first installment provided for by the Termination Agreement;
- USD 55'000 for the second installment provided for by the Termination Agreement;
- USD 50'000 corresponding to two penalties of USD 25'000.00 each, based on clause 2.1 of the Termination Agreement.

14. On 16 July 2021, YENI filed its answer to CAT's amended claims and requested: *"The refusal of the penalty clause amount or alternatively, to reduce the amount of the penalty which is in the agreement"*.

15. On 10 August 2021, the Single Judge of the FIFA Players' Status Committee ("the PSC") passed the following decision ("the Appealed Decision"):

"1. The claim of the Claimant, CA Talleres de Cordoba, is partially accepted.

2. The Respondent, Yeni MalatyaSpor [sic]*, has to pay to the Claimant USD 135,000, corresponding to the following amounts:*

- *USD 55,000 as outstanding remuneration, plus 5% interest p.a. as from 21 January 2021 until the date of effective payment;*
- *USD 55,000 as outstanding remuneration, plus 5% interest p.a. as from 21 February 2021 until the date of effective payment;*
- *USD 25,000 as contractual penalty.*

3. Any further claims of the Claimant are rejected.

4. The Claimant is directed to immediately and directly inform the Respondent of the relevant bank account to which the Respondent must pay the due amount.

5. The Respondent shall provide evidence of payment of the due amount in accordance with this decision to ***psdfifa@fifa.org****, duly translated, if applicable, into one of the official FIFA languages (English, French, German, Spanish).*

6. In the event that the amount due, plus interest as established above is not paid by the Respondent ***within 45 days****, as from the notification by the Claimant of the relevant bank details to the Respondent, the following consequences shall arise:*

1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The aforementioned ban mentioned will be lifted immediately and prior to its complete serving, once the due amount is paid.
(cf. art. 24bis of the Regulations on the Status and Transfer of Players).

2. In the event that the payable amount as per in this decision is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon

request, to the FIFA Disciplinary Committee.

7. This decision is rendered without costs".

16. On 3 September 2021, the grounds of the Appealed Decision were communicated to the Parties.

17. The PSC held that it remained undisputed that the Parties concluded a Termination Agreement whereby the Appellant undertook to pay to the Respondent USD 110'000 as compensation for the early termination of the loan period of the player and that it remained undisputed that the Respondent failed to pay the said amount.

18. In application of the legal principle, *pacta sunt servanda*, the Respondent was awarded USD 110'000 as principal outstanding remuneration.

19. Concerning the penalty of USD 50'000 requested by CAT, the PSC referred to clause 2.1 of the Termination Agreement, which provides that, in order for the payment of the penalty of USD 25'000 to be triggered, CAT must put YENI in default of payment concerning each of the outstanding installments. Since CAT had only provided one default notice sent to YENI on 21 January 2021, but failed to send to submit a second default notice regarding the second installment, the FIFA PSC decided that the penalty regarding the second installment had not been triggered. Consequently, the PSC decided that only a penalty of USD 25'000, concerning the first installment of the Termination Agreement, was triggered and had become due.

20. As to YENI's argument that the amount of the penalty was disproportionate, the PSC held that penalties, which do not exceed 50% of the principal outstanding amount, are proportionate. In sum, the PSC awarded USD 135'000 to CAT.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 23 September 2021, the Appellant filed its Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport ("CAS"). In its Statement of Appeal, the Appellant requested that a sole arbitrator be appointed by the CAS.

22. On 1 October 2021, the Appellant filed its Appeal Brief.

23. On 4 October 2021, the CAS Court Office initiated the procedure and granted the Respondent a deadline to inform it whether it agreed to the appointment of a Sole Arbitrator and to submit its Answer.

24. On 20 October, the Respondent requested that the time-limit for the filing of its Answer be fixed once the advance of costs had been paid by the Appellant.

25. On 22 October 2021, the CAS granted such request in accordance with Article R55 para. 3 of the Code of Sports-related Arbitration (the "CAS Code") and further informed the Parties that the Respondent failed to comment on the Appellant's request to nominate a Sole

Arbitrator and that it would thus be for the President of the CAS Appeals Arbitration Division to decide this issue .

26. On 2 November 2021, the Parties were informed that the President of the CAS Appeals Arbitration Division had decided, pursuant to Article R50 of the CAS Code, to submit the present dispute to a sole arbitrator.

27. On 9 December 2021, the CAS acknowledged receipt of the Appellant's payment of its share of the advance of costs and invited the Respondent to submit an Answer on or before 29 December 2021. Moreover, the CAS informed the Parties that, pursuant to Article R54 of the CAS Code, the President of the CAS Appeals Arbitration Division had appointed Mr. Patrick Lafranchi, Lawyer in Bern, Switzerland, as Sole Arbitrator.

28. On 5 January 2022, the CAS acknowledged that it had not received the Respondent's Answer, or any communication from the Respondent in this regard.

29. On 12 January 2022, the Respondent requested a hearing to be held. Such request was accepted on 19 January 2022 pursuant to Article R57 of the CAS Code.

30. On 24 January 2022 and further to a request from the Sole Arbitrator, made pursuant to Article R57 of the CAS Code, FIFA submitted a copy of its file in the current matter.

31. On 27 January 2022 and after having consultation with the Parties, the hearing was fixed on 18 February 2022. The Parties were further provided with a copy of the FIFA file.

32. On 9 February 2022 and on behalf of the Sole Arbitrator, the CAS Court Office issued an Order of Procedure, which was returned duly signed by both Parties on 18 February 2022

33. On 18 February 2022, the CAS held a hearing with the Parties via video conference. The following persons were present:

For the CAS: - Mr. Patrick Lafranchi, Sole Arbitrator

- Ms. Pauline Pellaux, Counsel to the CAS

For Appellant: - Mr. Nihat Güman, Counsel for the Appellant

For Respondent: - Mr. Martin Francia Coscia

34. The Parties were given the opportunity to present their case, to make pleadings and arguments, and to answer questions posed by the Sole Arbitrator. Upon closing of the hearing, the Parties expressly stated that they had no objections in relation to their right to be heard. After receiving guidance from the Sole Arbitrator at the hearing, the Parties agreed to attempt to amicably settle their dispute within a period of two weeks.

35. On 10 March 2022, the CAS Court Office inquired on the status of the Parties' negotiations and requested an update by 15 March 2022. In the absence of any answer, it confirmed on 22 March 2022 that the Sole Arbitrator would proceed.

IV. THE POSITION OF THE PARTIES

36. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator, indeed, has carefully considered all the written and oral submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

A. The Position of the Appellant

37. In its rather short submissions, the Appellant does not dispute that the Parties have signed the Termination Agreement and that it had to pay USD 110'000 to Respondent. The Appellant argues, however, that the Appealed Decision was unjustified and did not consider the principle of proportionality with regards to the contractual penalty in the amount of USD 25'000. Subsequently, the contractual penalty had to be either removed or reduced.

38. In its Appeal Brief, the Appellant submitted the following request for relief: *"We kindly request from CAS PANEL that as we have explained in detail above annulment of FIFA DRC decision dated on 10 August 2021 notified to the parties on 03 September 2021".*

39. During the Hearing, the Appellant referred to its written submissions. It however admitted that it had to pay USD 110'000 to the Respondent but requested the decrease of the penalty to USD 10'000 as it was excessive and not proportional and specified that its appeal was thus exclusively directed against the penalty clause.

B. The Position of the Respondent

40. The Respondent failed to submit an Answer to the Appeal Brief.

41. During the Hearing it referred to its submissions before FIFA and argued that the penalty had been mutually agreed in the Termination Agreement and was unequivocally due. The Respondent had already made substantial concessions and had lost all trust in Appellant.

42. Although before FIFA the Respondent's claim was only partially granted (it did not obtain the penalty of USD 25'000 in relation with the second instalment), the Respondent requests the confirmation of the Appealed Decision. As it did not appeal this decision before CAS, it could in any event not request more than the amount it was awarded by FIFA. Indeed, even in its answer brief, a respondent cannot request more than the confirmation of the appealed decision since, according to CAS constant jurisprudence, counterclaims and cross-appeals are no longer admissible following the 2010 amendments of the CAS Code (see, for instance, CAS 2020/A/6753, para. 100 et seq.).

V. JURISDICTION

43. Given that CAS has its seat in Switzerland and that when the purported arbitration agreement was executed neither the Appellant nor the Respondent had their respective seat in this country, this is an international arbitration procedure governed by Chapter 12 of the Swiss Private International Law Act ("PILA"), whose provisions are thus applicable. Article 186 (1) of the PILA states that the arbitral tribunal shall itself decide on its jurisdiction. This general principle of Kompetenz-Kompetenz is a mandatory provision of the *lex arbitri* and has been recognized by CAS for a long time (see *e.g.* CAS 2004/A/748).

44. Article R47 of the CAS 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 him prior to the appeal, in accordance with the statutes or regulations of that body. An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

45. Article 57 (1) of the FIFA Statutes (May 2021 edition) provides 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".

46. The Sole Arbitrator is satisfied that according to Article 58 (1) of the FIFA Statutes (May 2021 edition) and Article 24 (2) FIFA RSTP (January 2021 edition), CAS has jurisdiction to hear this case and decide on the matter.

47. It is further undisputed between the Parties that CAS has jurisdiction to adjudicate the matter at hand, which they confirmed by signature of the Order of Procedure.

VI. ADMISSIBILITY

48. 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, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

49. According to Article 58 (1) of the FIFA Statutes, appeals *"shall be lodged with CAS within 21 days of notification of the decision in question".*

50. According to Article R51 of the CAS Code, the appeal brief shall be filed *"within ten days following the expiry of the time limit for the appeal".*

51. The grounds of the Appealed Decision were notified to the Parties on 3 September 2021, the

Statement of Appeal was filed on 23 September 2021 and the Appeal Brief on 1 October 2021.

52. The Sole Arbitrator notes that all requirements mentioned in the provision set out above are fulfilled. In particular, and as set out by the CAS Court Office already, both the Statement of Appeal and the Appeal Brief were filed in a timely manner. The Appeal is therefore admissible.

VII. APPLICABLE LAW

53. Article R58 of the CAS Code reads 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

54. According to Article 56 (2) of the FIFA Statutes, the provisions of the CAS Code shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and additionally, Swiss law.

55. The Sole Arbitrator therefore rules that the present dispute is to be solved according to the corresponding FIFA regulations, in particular the FIFA RSTP (given that the Player filed its claim on 15 December 2020, in its October 2020 edition), and that Swiss law shall be applied subsidiarily.

VIII. MERITS

56. The Sole Arbitrator reminds here that the Appellant recognized that it shall pay the two outstanding instalments of USD 55'000 to the Respondent. As specified at the hearing, it exclusively requests the reduction of the penalty clause from USD 25'000 to USD 15'000, while the Respondent requests the confirmation of the Appealed Decision (see supra para. 42). Accordingly, the only issue to be addressed is the proportionality of the penalty clause of USD 25'000 for the late payment of the first instalment.

57. The Appellant sustains that the contractual penalty of USD 25'000 is disproportionate in relation to the amount of the first installment of USD 55'000 and thus needs to be reduced.

58. However, the Appellant has not explained in detail how the amount is disproportionate, let alone submitted any evidence or case law in this regard.

59. The Sole Arbitrator emphasises that Swiss law does not prohibit the application of such penalties for the untimely payment of debts. The penalty clause in Article 2 para. 1 of the Termination Agreement is also known as a "Konventionalstrafe" under Swiss law and is regulated under Article 160 of the Swiss Code of Obligations ("CO"), which is applicable here. In addition, under Swiss law, the parties are free to determine the amount of the penalty clause (Art. 163(1) CO). Furthermore, it is also clear from the case law of the CAS that contractual

penalties can be stipulated in sporting contracts (see *inter alia* CAS 2020/A/7290; CAS 2017/A/5233; CAS 2010/A/2317; CAS 2011/A/2323).

60. Contractual penalties should generally be reduced when they are excessive, which follows from Article 163 para. 3 CO. However, the law does not contain a clear definition of an excessive contractual penalty, so it is up to the judge, to take into account the facts of the case and all relevant circumstances, to decide whether the penalty is excessive and, if so, to what extent it must be reduced (SFT 4A_653/2016 of 20 October 2017, para. 5.1).

61. According to Article 163 para. 3 CO, the court must reduce penalties that it considers excessive. The judge's discretionary power (Art. 4 Swiss Civil Code; "CC") relates both to the excessive nature of the penalty and to the question of the extent of the reduction. If the court recognises that the sentence is excessive, it must in principle reduce it only to the extent necessary to ensure that it is no longer excessive (SFT 133 III 201, para. 5.2, p. 210).

62. The reduction of a contractual penalty is a case of application of the general principle of the prohibition of abuse of rights (SFT 143 I 1, para. 4.1, p. 2; 138 III 746, para. 6.1.1). The judge's intervention in the contract is justified only if the amount of the penalty fixed is so high that it exceeds any reasonable measure and can be reduced only to the extent that it is no longer incompatible with law and equity. In assessing whether the contractual penalty is excessive, one should not reason in the abstract, but rather take into account all the concrete circumstances of the case. A reduction of the penalty is justified in particular where there is a gross disproportion between the amount agreed and the creditor's interest in maintaining his claim in full, measured in concrete terms at the time when the contractual breach occurred (SFT 133 III 201 para. 5.2 p. 209). Even if the existence of damage is not necessary and a penalty is not excessive simply because it exceeds any damages for non-performance (Art. 161 para. 1 CO), the fact remains that the damage to which the creditor is exposed in the specific case is indicative of the creditor's interest in performance and as such is one of the circumstances to be taken into account (cf. SFT 114 II 264, para. 1b, p. 265; 133 III 43, para. 4.3, p. 55). Other assessment criteria may be taken into account, such as the nature and duration of the contract, the seriousness of the fault and of the breach of contract, the economic situation of the parties, especially the debtor. It is also important not to lose sight of any dependency resulting from the contract and the business experience of the parties (SFT 133 III 201, para. 5.2, pp. 209 ff).

63. However, the Swiss Federal Supreme Court exercises restraint when reviewing the amounts of contractual penalties (SFT 4A_653/2016 of 20 October 2021, para. 5.1). The judge must not reduce a penalty too lightly and respect the principle of freedom of contract, which is of central importance in Swiss law and which must always prevail in cases of doubt (CAS 2020/A/7290; cf. MOOSER M., Commentaire Romand du Code des obligations, Basel, 2003, n. 7 ad. Art. 163; COUCHEPIN G., La clause pénale, Zurich 2008, para. 934).

64. Additionally, the burden to prove that the contractual penalty is excessive, lies with the debtor (CAS 2020/A/7290; Art. 8 CO / COUCHEPIN G., op. cit., para. 851; SFT 114 II 264, JdT 1989 I 74).

65. In the present case, the Respondent originally had a claim against the Appellant of a total amount of USD 530'000 under the Loan Agreement. The Appellant had previously paid USD 200'000 to the Respondent. The Termination Agreement was already an amicable settlement and reduction from an outstanding amount of USD 330'000 to a settlement sum of USD 110'000 payable in two installments. The Respondent already showed financial curtesy towards the Appellant by reducing its original claim, as it knew that the Appellant had financial difficulties. Furthermore, the Respondent agreed to two installments and it is understandable that the Respondent wanted to have some securities in form of contractual penalties.

66. In the present case, and based on the above principles and considerations, the Sole Arbitrator deems that the contractual penalty is not excessive. Also, considering the fact that the Appellant did not establish any circumstances that would demonstrate that such clause would be excessive and in application of the principle of contractual autonomy under Swiss law, the Sole Arbitrator fully concurs with the decision of the PSC to award the Respondent the amount of USD 135'000 plus interest at the rate of 5% per annum on the two instalments as further specified under cipher 2 of the operative part of the Appealed Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Yeni Malatyaspor FK on 23 September 2021 against Club Atletico Tallares de Cordoba is dismissed.

2. The decision of the Single Judge of the FIFA Players' Status Committee of 10 August 2021 is confirmed.

3. (…).

4. (…).

5. All other or further requests or motions for relief are dismissed.