



**Arbitration CAS 2014/A/3664 Al Ittihad Club v. Club de Regatas Vasco da Gama, award of 9 January 2015**

Panel: Mr Manfred Nan (The Netherlands), President; Mr Patrick Lafranchi (Switzerland) Mr Rui Botica Santos (Portugal)

*Football*

*Transfer fee*

*Discretion of the court to reduce excessive penalties*

*Penalty of 20% of the amount overdue in order to ensure payment of the overdue amounts*

*Power of the adjudicatory body to impose a contractual penalty and to award interest*

1. **Swiss law does not prohibit the use of contractual penalties for untimely payment of debts. The parties are free to determine the amount of the contractual penalty but the court may reduce penalties that it considers excessive at its discretion. However, as the possibility to reduce liquidated damages by the judge is against the principles of contractual freedom and contractual loyalty, it should, therefore, be applied with reluctance. More particularly, there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages.**
2. **A penalty of only 20% of the amount overdue is not an unreasonable deterrent to ensure that the debtor would pay the overdue amounts in light of the value of the transaction to debtor.**
3. **In principle, no default interest can be awarded in addition to a contractual penalty. However, if the contract is clear in determining that both can be awarded complementarily, nothing prevents an adjudicatory body from awarding both.**

**I. PARTIES**

1. Al Ittihad Club (the “Appellant” or “Ittihad”) is a football club with its registered office in Jeddah, Saudi Arabia. Ittihad is registered with the Saudi Arabian Football Federation (SAFF), which in turn is affiliated to the Fédération Internationale de Football Association (FIFA).
2. Club de Regatas Vasco da Gama (the “Respondent” or “Vasco da Gama”) is a football club with its registered office in Rio de Janeiro, Brazil. Vasco da Gama is registered with the Confederação Brasileira de Futebol (CBF), which in turn is affiliated to FIFA.

## II. FACTUAL BACKGROUND

### A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeals arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
4. On 23 July 2012, Ittihad and Vasco da Gama concluded a transfer agreement (the "Transfer Agreement") regarding the transfer of D. (the "Player"), a football player of Brazilian nationality, to Ittihad.
5. The Transfer Agreement contains, *inter alia*, the following relevant terms:

#### *"3. TRANSFER FEE, PAYMENT CONDITIONS, ISSUANCE OF THE ITC AND TMS*

- 3.1. *Transfer Fee: For the definitive transfer of Player, [Ittihad] agrees to pay a total transfer fee in the net amount of 5,000,000€ (five million Euros) ("Transfer Fee") which is inclusive of any and all amounts that would be due to [Vasco da Gama] [...]. The Transfer Fee gives [Ittihad] 100% of the economic rights of the Player.*
- 3.2. *Payment Conditions: The net amount of 5,000,000€ (five million Euros) shall be paid by [Ittihad] in accordance with the following schedule:*
  - a) *1,000,000€ [...] on or before 25 July 2012 (the "First Installment");*
  - b) *1,500,000€ [...] on or before 10 August 2012 (the "Second Installment");* and
  - c) *2,500,000€ [...] on or before 15 January 2013 (the "Third Installment").*

#### *4. PENALTIES AND EVENT OF DEFAULT*

- 4.1. *Should [Ittihad] fail to pay the First Installment on or before 25 July 2012, [Vasco da Gama] will be excused from issuing the ITC until the payment of the First Installment and the Second Installment is completed.*
- 4.2. *In the event that [Ittihad] fails to comply, either totally or partially, with the timely payment of the Second Installment, the Third Installment shall be subject to early maturation and, together with the outstanding debt concerning the Second Installment; it shall become due on 20 August 2012.*
  - 4.2.1. *In the case [Ittihad] does not comply with the timely payment of the Second and Third Installments, as established under Section 4.2, the amount in debt shall be subject to a 10% (ten percent) penalty.*

- 4.3. *In addition to any penalty due in the terms of this Transfer Agreement, interest on any past due and unpaid amount shall be applicable from payment due date until the date of effective payment, at a rate of 10% (ten percent) per annum.*
- 4.4. *Should [Vasco da Gama] fail to insert the relevant data into the TMS and thus impede [Ittihad] to have the Player's ITC on time for his registration, [Vasco da Gama] shall pay an indemnity of US\$14,000,000.00 (fourteen million American Dollars), which represent the value of the transaction to [Ittihad].*
- 4.5. *Additionally, in case [Vasco da Gama] releases the Player's ITC against the swift copy and for any reason the funds are not made available to [Vasco da Gama] within 05 (five) business days, the Second Installment and the third Installment shall be subject to early maturation and, together with the outstanding debt concerning the First Installment, they shall all become due on 10 August 2012.*
  - 4.5.1. *Failure by [Ittihad] to comply with the timely payment of the First, Second and Third Installments, in the vent [sic] described under Section 4.5 above, shall subject [Ittihad] to the payment of a 20% (twenty percent) penalty fee".*
6. On 25 July 2012, Vasco da Gama, upon receipt of the swift for the first instalment, inserted the relevant data regarding the transfer into the Transfer Matching System of FIFA ("TMS") and allowed the issuance of the International Transfer Certificate (the "ITC") of the Player in favour of Ittihad.
7. On 28 August 2012, after Vasco da Gama found out that the swift was allegedly incorrect, Vasco da Gama served a formal notice of default to Ittihad.
8. It is undisputed that Ittihad never paid Vasco da Gama.

## **B. Proceedings before the Players' Status Committee of FIFA**

9. On 4 October 2012, Vasco da Gama lodged a claim with the Players' Status Committee of FIFA (the "FIFA PSC") against Ittihad requesting payment of EUR 6,000,000 (EUR 5,000,000 transfer fee and EUR 1,000,000 as a contractual penalty) from the latter, plus 10% interest *per annum* as of 10 August 2012.
10. On 10 January 2013, Ittihad submitted its defence with FIFA, acknowledging that it owed EUR 5,000,000 to Vasco da Gama, but nevertheless argued that because the Player had left after only four months "*paying the full amount of transfer (...) is really difficult, as we did not have the chance to see the player performing*".
11. On 15 January 2014, the Single Judge of the FIFA PSC (the "Single Judge") rendered its decision (the "Appealed Decision") with, *inter alia*, the following operative part:
  - "1. *The claim of [Vasco da Gama], is partially accepted.*

2. [Ittihad], *has to pay to [Vasco da Gama], within 30 days as from the date of notification of this decision, the amount of EUR 5,000,000 plus 10% interest p.a. on the said amount until the date of effective payment as from 11 August 2012.*
  3. *Furthermore, [Ittihad] has to pay to [Vasco da Gama], within 30 days as from the date of notification of this decision, the amount of EUR 1,000,000.*
  4. *Any further claims lodged by [Vasco da Gama], are rejected.*
  5. *If the aforementioned sums plus interests are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision and an interest rate of 5% per year will apply on the amount of EUR 1,000,000 mentioned in point 3. above as of the expiry of the fixed time limit".*
12. On 2 July 2014 the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:
- Entering into the substance of the matter, the Single Judge noted that *"on 23 July 2012, [Vasco da Gama] and [Ittihad] had concluded a [Transfer Agreement] which provided for [Vasco da Gama] to receive from [Ittihad] EUR 5,000,000 as transfer fee (the transfer fee) as follows: EUR 1,000,000 by no later than 25 July 2012, EUR 1,500,000 by no later than 10 August 2012 and EUR 2,500,000 by no later than 15 January 2013. Furthermore, the Single Judge remarked that art. 4.5 of the agreement contained an acceleration clause which provided for the second and third instalment to become due on 10 August 2012 together with the first instalment, in case [Vasco da Gama] failed to pay this first instalment on time. In addition, the Single Judge observed that in accordance with art. 4.5.1. of the [Transfer Agreement] (the penalty clause), in case [Ittihad] failed to comply with the relevant provision included in art. 4.5., the latter would have to pay to [Vasco da Gama] a penalty fee corresponding to 20% of the transfer fee. In the same context, the Single Judge also noticed that as per art. 4.3. of the [Transfer Agreement], an additional penalty fee of 10% was applicable on any outstanding amounts as from the respective due date. [...]"*
  - *[T]aking into account the legal principle of pacta sunt servanda, which in essence means that agreements must be respected by the parties in good faith, considering that [Ittihad] had admitted not having paid the transfer fee to [Vasco da Gama], the Single Judge resolved that [Ittihad] must fulfil its obligations established in the [Transfer Agreement] and consequently, pay to [Vasco da Gama] the outstanding amount of EUR 5,000,000".*
  - With regard to the penalty fee the Single Judge *"recalled that in accordance with art. 4.5.1. in combination with art. 4.5. of the [Transfer Agreement], provided that [Ittihad] failed to pay the transfer fee by 10 August 2012, the latter would have to pay an additional sum corresponding to 20% of the transfer fee as penalty.*
  - *Bearing in mind the aforementioned, the Single Judge deemed it appropriate to first of all recall that a penalty fee amounting to 20% of the total remuneration due in connection with the transfer or loan of a player was not to be considered abusive in accordance with both his jurisprudence and the jurisprudence of the Players' Status Committee. Hence, considering that the transfer fee had not yet been paid by [Ittihad]*

*as well as taking into account the content of the penalty clause and in accordance once again with the legal principle of pacta sunt servanda, the Single Judge concluded that the additional amount of EUR 1,000,000 has to be paid by [Ittihad] to [Vasco da Gama] as penalty for having failed to pay the transfer fee on time”.*

- With regard to the Vasco da Gama’s request related to the payment of 10% interest on the claimed amount as of 10 August 2012, the Single Judge pointed out that *“in art. 4.3. of the [Transfer Agreement], the parties had agreed on an interest rate of 10% to be applied on any outstanding amount as of the respective due, on top of any other penalty which would be due.*
- *In view of the above, considering the content of art. 4.3. of the [Transfer Agreement] as well as recalling once again the principle of pacta sunt servanda, the Single Judge decided that an interest rate of 10% should be paid by [Ittihad] to [Vasco da Gama] on the outstanding sum of EUR 5,000,000 as of 11 August 2012, i.e. as of the day after the entire sum became due in accordance with art. 4.5 of the agreement.*
- *Finally and with regard to the last part of [Vasco da Gama’s] claim, i.e. his request relative [sic] to the payment of the legal costs and expenses incurred, the Single Judge referred to art. 18 par. 4 of the Procedural Rules and stressed that no procedural compensation shall be awarded in proceedings of the Players’ Status Committee and the DRC. As a result, the Single Judge established that this last request of [Vasco da Gama] has to be rejected for lack of legal basis.*
- *In conclusion, the Single Judge decided that the claim of [Vasco da Gama] is partially accepted and [Ittihad] has to pay to [Vasco da Gama] the amount of EUR 5,000,000 plus 10% interest on the said amount as from 11 August 2012 as well as the sum of EUR 1,000,000”.*

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 22 July 2014, Ittihad filed a Statement of Appeal, in accordance with Article R47 and R48 of the CAS Code of Sports-related Arbitration (the “CAS Code”), with the Court of Arbitration for Sport (“CAS”). In its submission, Ittihad nominated Mr Patrick Lafranchi, attorney-at-law in Bern, Switzerland, as arbitrator.
14. On 29 July 2014, Vasco da Gama nominated Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal, as arbitrator.
15. On 31 July 2014, Ittihad filed its Appeal Brief, in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the challenge of the Appealed Decision, submitting the following request for relief:
  - “1. To fully accept the present appeal against the Decision, rendered by the Single Judge of FIFA Players’ Status Committee on 15 January 2014 (ref. Decision Iza 12-03110).
  2. To adopt an award annulling the said decision and issue a new one declaring that the Appellant should pay to the Respondent the amount of EUR 5,000,000 as compensation for the transfer of player D. and, additionally:

- *An amount of EUR 500,000, which is 10% of the transfer fee, as a penalty for late payment of the latter, with no interest rates applied; or alternatively<sup>1</sup>*
  - *An interest of 5% p.a. on said amount as from 11 August 2012 until the date of the effective payment with no additional penalty; or alternatively*
  - *An amount of EUR 1,000,000 as penalty agreed for late payment of the transfer fee, with no interest rates applied; or alternatively*
  - *An interest of 10% p.a. on said amount as from 11 August 2012 until the date of the effective payment with no additional penalty.*
3. *To fix a sum of 15,000 CHF to be paid by the Respondent to the Appellant to aid the Appellant in the payment of its defence fees and costs.*
4. *To condemn the Respondents [sic] to the payment of the whole CAS administration costs and the Arbitrators fees”.*
16. On 4 August 2014, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present appeal arbitration proceedings.
17. On 26 August 2014, Vasco da Gama filed its Answer, pursuant to Article R55 of the CAS Code, whereby it requested CAS to decide the following:
- I) *“To reject the Appeal lodged by the Claimant;*
- II) *To uphold the decision passed by the Single Judge of the Players’ Status Committee and confirm the enforceability of said decision, determining the Appellant to immediately pay to Vasco the total amount of 7,050,910.00€ (seven million, fifty thousand and nine hundred and ten Euros) - as of this date -, calculated as follows:*
- a) *5,000,000.00€ (five million Euros), as principal amount;*
  - b) *1,020,500.00€ (one million, twenty thousand and five hundred Euros) as interests calculated at 10% per annum as of 11 August 2012 over the principal;*
  - c) *1,000,000.00€ (one million Euros) as contractual penalty on continued default; and*
  - d) *30,410.00€ (thirty thousand, four hundred and ten Euros) as interests calculated at 5% per annum as of 15 January 2014 over the contractual penalty.*

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<sup>1</sup> During the hearing, Ittihad added another alternative request for relief referring to an amount payable corresponding to a percentage of 15% of the transfer fee, i.e. an amount of EUR 750,000.

*III) Condemn the Claimant to bear all the costs associated with the present procedure as well as to support the expenses incurred by the Respondent in connection herewith, in the amount of 10,000.00€ (ten thousand Euros)”.*

18. On 3 and 11 September 2014 respectively, further to a request from the CAS Court Office, Ittihad requested a hearing to be held and Vasco da Gama clarified that it did not deem it necessary to hold a hearing.
19. On 12 September 2014, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:
  - Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands, as President;
  - Mr Patrick Lafranchi, attorney-at-law in Bern, Switzerland, and
  - Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal, as arbitrators.
20. On 3 October 2014, both parties returned duly signed copies of the Order of Procedure.
21. On 7 October 2014, upon request of the President of the Panel, pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the present matter.
22. On 4 December 2014 a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.
23. In addition to the Panel and Mr William Sternheimer, Managing Counsel and Head of Arbitration, the following persons attended the hearing:
  - a) For the Appellant:
    - Mr Agustín Amorós Martínez
  - b) For the Respondent:
    - Mr Rafael Queiroz Botelho
    - Mr Frederico Pena
24. No witnesses and experts were heard. The parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.
25. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure and that their right to be heard had been respected.

26. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

#### IV. SUBMISSIONS OF THE PARTIES

27. The following outline of the parties' positions is illustrative only and does not necessarily encompass every contention put forward by the parties. However, the Panel 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 summaries.
28. Ittihad's submissions, in essence, may be summarized as follows:
- Ittihad does not deny its obligation to pay the pertinent transfer fee and *"never tried not to pay the amount"* even though the Player left Ittihad without just cause and is currently sued by Ittihad before FIFA.
  - However, Ittihad maintains that the Appealed Decision is disproportionate and unfair and should be mitigated.
  - Ittihad argues that the amount to be paid by Ittihad in case of failure to comply with the first instalment increased 6 fold in one month, which it finds *"totally astonishing"*. Originally, EUR 1,000,000 had to be paid on 25 July 2012, but because the failure to do so EUR 5,000,000 had to be paid by 10 August 2012 and after that date an additional penalty of EUR 1,000,000, thus EUR 6,000,000 in total, with interest at an *"unbelievably high rate of 10% p.a"*.
  - Ittihad further submits that article 163(3) of the Swiss Code of Obligations (SCO) prescribes as mandatory that excessive penalties should be reduced *"in order to warrant public order and the principle of proportionality"*.
  - With reference to jurisprudence of the Swiss Federal Tribunal, Ittihad maintains that a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity. A balance of interests is required to decide whether a penalty is abusive or not in each case. For this purpose, the creditor's interest, the seriousness of the breach of the contract and the debtor's fault, along with financial situation of parties, are determinant.
  - As such, Ittihad avers that the Single Judge failed to consider Ittihad's organization difficulties, due to the fact that it changed its President three times in the last year and a half. Ittihad also argues that it attempted to reach an amicable solution with Vasco da Gama, but that it seems that Vasco da Gama wanted to receive all excessive penalty amounts and that *"this is not what is called good faith"*.



- Ittihad refers to jurisprudence from the FIFA PSC, CAS and the Swiss Federal Tribunal to show that these bodies decided in the past that certain penalty clauses were excessive and that this jurisprudence shall be applied in the present case.

29. Vasco da Gama's submissions, in essence, may be summarized as follows:

- Vasco da Gama maintains that although it undertook all its obligations under the Transfer Agreement and tried to solve the situation amicably on numerous occasions, Ittihad failed to comply with all its obligations and remained in breach and did not provide any reason and/or justification for its continued default.
- Vasco da Gama argues that by not respecting the payment schedule established under Section 3.2, Ittihad evidently breached the Transfer Agreement and, thus, should become liable for the payment of the penalty clause provided under Section 4.5.1 of the Transfer Agreement".
- In continuation, and with reference to a legal authority, Vasco da Gama points out that penalty clauses are considered valid under Swiss law and that the clause in the Transfer Agreement is fair, legitimate and proportionate.
- As to the interest rate, Vasco da Gama submits that the parties agreed on an interest rate of 10% per annum in case of default, which rate *"was commonly set by the parties to reflect the applicable rates in Brazil"*. Vasco da Gama contends that the basic interest rate in Brazil in January 2014 was 11% per year.
- Finally, Vasco da Gama avers that the jurisprudence cited by Ittihad is not applicable or relevant and argues that it incurred several financial and sportive damages due to the fact that it sold one of its best players but never received any transfer fee in exchange. Ittihad *"acted with extreme bad faith (fraud swift, continued default, postponement/procrastination of the legal proceeding before FIFA, derisory settlement proposals, etc.)"*.

## V. ADMISSIBILITY

30. The appeal was filed within the 21 days set by article 67(1) of the FIFA Statutes (2013 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.
31. It follows that the appeal is admissible.

## VI. JURISDICTION

32. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

33. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties.
34. It follows that CAS has jurisdiction to decide on the present dispute.

## VII. APPLICABLE LAW

35. Article R58 of the CAS Code provides the following:

*“The Panel shall decide the dispute according to the applicable regulations and, subsidiarity, 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”.*

36. The Panel notes that article 66(2) of the FIFA Statutes 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”.*

37. Furthermore, article 7 of the Transfer Agreement provides as follows:

*“7. GOVERNING LAW*

*7.1 This Transfer Agreement shall be governed by and construed in accordance with FIFA Regulations, as well as the complementary rules enacted by FIFA from time to time, and the Swiss laws”.*

38. Consequently, the Panel will decide the present dispute primarily in accordance with the FIFA regulations and, subsidiarily, Swiss law should the need arise to fill a possible gap in the regulations of FIFA.

## VIII. MERITS

### A. The Main Issues

39. The Panel observes that Ittihad does not dispute the validity of the Transfer Agreement, nor that it failed to pay the amount of EUR 5,000,000 as stipulated in article 3 of the Transfer Agreement. Therefore, the Panel observes that Ittihad acknowledges owing Vasco da Gama the sum of EUR 5,000,000.
40. As such, the main issues to be resolved are:
  - a) Is Ittihad obliged to pay Vasco da Gama an additional sum corresponding to 20% of the transfer fee as a contractual penalty?
  - b) Is Ittihad obliged to pay Vasco da Gama 10% interest?

c) Is it disproportionate to impose a contractual penalty and to award interest?

**a. *Is Ittihad obliged to pay Vasco da Gama an additional sum corresponding to 20% of the transfer fee as a contractual penalty?***

41. The Panel observes that whereas Ittihad argues that the penalty clause is disproportionate and excessive, and should be reduced based on Swiss Law, Vasco da Gama argues that based on the principle of *pacta sunt servanda*, Swiss law and Ittihad's inexcusable failure to comply with the terms of the Transfer Agreement, the application of the penalty clause is fair, legitimate and proportionate.
42. The Panel observes that article 4 of the Transfer Agreement determines, *inter alia*, as follows:

***"4. PENALTIES AND EVENT OF DEFAULT***

*4.4. Should [Vasco da Gama] fail to insert the relevant data into the TMS and thus impede [Ittihad] to have the Player's ITC on time for his registration, [Vasco da Gama] shall pay an indemnity of US\$14,000,000.00 (fourteen million American Dollars), which represent the value of the transaction to [Ittihad].*

*4.5. Additionally, in case [Vasco da Gama] releases the Player's ITC against the swift copy and for any reason the funds are not made available to [Vasco da Gama] within 05 (five) business days, the Second Installment and the third Installment shall be subject to early maturation and, together with the outstanding debt concerning the First Installment, they shall all become due on 10 August 2012.*

*4.5.1. Failure by [Ittihad] to comply with the timely payment of the First, Second and Third Installments, in the vent [sic] described under Section 4.5 above, shall subject [Ittihad] to the payment of a 20% (twenty percent) penalty fee".*

43. The Panel notes that from these provisions it is clear that both parties incorporated mutual obligations to transfer the Player from Vasco da Gama to Ittihad, explicitly agreeing on reciprocal penalties in case one of the parties would fail to comply with its obligations.
44. The Panel observes that it is undisputed that article 4.5.1 of the Transfer Agreement is a penalty clause, providing a penalty of 20%, corresponding to EUR 1,000,000, only payable in case Vasco da Gama would release the Player's ITC in time against an incorrect swift for payment of the first instalment and Ittihad would fail to pay all three instalments of the transfer fee of EUR 5,000,000 in time. If Ittihad would have timely provided Vasco da Gama with a correct swift for payment or would have paid the first instalment in time, Vasco da Gama would thus not be entitled thereto.
45. The Panel observes that Swiss law does not prohibit the use of contractual penalties for untimely payment of debts. More specifically, the Panel observes that article 160(1) and (2) of the SCO provide the following:

*“Wenn für den Fall der Nichterfüllung oder der nicht richtigen Erfüllung eines Vertrages eine Konventionalstrafe versprochen ist, so ist der Gläubiger mangels anderer Abrede nur berechtigt, entweder die Erfüllung oder die Strafe zu fordern”.*

*Wurde die Strafe für Nichteinhaltung der Erfüllungszeit oder des Erfüllungsortes versprochen, so kann sie nebst der Erfüllung des Vertrages gefordert werden, solange der Gläubiger nicht ausdrücklich Verzicht leistet oder die Erfüllung vorbehaltlos annimmt”.*

Which can be translated as follows:

*“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.*

*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”.*

46. In continuation, the Panel observes that article 163 of the SCO determines the following:

1. *“Die Konventionalstrafe kann von den Parteien in beliebiger Höhe bestimmt werden.*
2. *Sie kann nicht gefordert werden, wenn sie ein widerrechtliches oder unsittliches Versprechen bekräftigen soll und, mangels anderer Abrede, wenn die Erfüllung durch einen vom Schuldner nicht zu vertretenden Umstand unmöglich geworden ist.*
3. *Übermässig hohe Konventionalstrafen hat der Richter nach seinem Ermessen herabzusetzen”.*

Which can be translated as follows:

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”.*

47. 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 Panel considers that it has the duty to reduce the 20% penalty fee set out in article 4.5.1 of the Termination Agreement if it considers this amount to be excessive.

48. In several cases, the Swiss Federal Tribunal underlined that the discretion of the judge according to article 163(3) of the SCO should be used with reluctance: The possibility to reduce liquidated damages by the judge is against the principles of contractual freedom and contractual loyalty and, therefore, should be applied with reluctance (SFT 4C.5/2003; 114 II 264; 103 II 135). According to legal commentators, there must be a manifest contradiction between justice and

fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages (GAUCH/SCHLUEP/SCHMID/EMMENEGGER, Schweizerisches Obligationenrecht, Allgemeiner Teil, 10<sup>th</sup> Ed. (2014), N 3828).

49. In CAS 2012/A/2202 the following is determined with reference to TAS 2008/A/1491, §97-101:

*“Finally, Article 163 al. 3 CO provides that “excessively high liquidated damages shall be reduced at the discretion of the judge”.*

*The Swiss Supreme Court held that this latter norm is part of public policy and that as a consequence the judge must apply it even if the debtor did not expressly request a reduction, whilst observing a degree of deference, in order to respect the contract as much as possible (ATF 133 III 201, c. 5.2).*

*As such, a reduction in the penalty clause by the judge is justified “when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place. To judge the excessive character of the contractual penalty, one must not decide abstractly, but, on the contrary, take into consideration all the circumstances of the case in hand” (ATF 133 III 201, c. 5.2).*

*The Swiss Supreme Court holds that various criteria play a determining role, such as the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties, as well as the potential interdependency between the parties (ATF 133 III 201, ibid.).*

*When proceeding to reduce the contractual penalty, the judge must make use of his discretion, but with a certain reserve, since the parties are free to fix the amount of the penalty (article 163 al. 1 CO) and the contracts must in principle be respected. The protection of the economically weak party authorises however more a reduction than if those affected are economically equal parties” (free translation)”.*

50. Considering the above legal background, the Panel finds that a contractual penalty of EUR 1,000,000 (20% of the transfer fee) is not disproportionate considering the fact that an amount of EUR 5,000,000 was outstanding at the time and article 4.4 of the Transfer Agreement provides that Vasco da Gama – if failing to meet its obligations – shall pay an indemnity of USD 14,000,000 to Ittihad, “representing the value of the transaction to Al Ittihad”. The Panel finds that a penalty of only 20% of the amount overdue is not an unreasonable deterrent to ensure that the debtor would pay the overdue amounts in light of the value of the transaction to Ittihad as explicitly mentioned in article 4.4 of the Transfer Agreement. In assessing the proportionality of the penalty clause, the Panel also took into consideration the fact that Vasco da Gama immediately transferred the Player without receiving any payments, and its credit was therefore left unsecured. Although in this specific case the deterrent of 20% of the amount overdue did not prevent Ittihad from failing to pay, a lower penalty would most likely certainly not have prevented Ittihad from failing to pay. As such, the reference of Ittihad to CAS 2010/A/2317, 2011/A/2323 in which the CAS Panel determined that the penalty clause was unreasonable, falls short, because in that case the CAS Panel acknowledged that “[t]he sum of the penalty exceeds the price of the transfer fee”.

51. The Panel also finds that a contractual penalty of 20% of the transfer fee is not disproportionate in light of the blatant violations committed by Ittihad. Not only did Ittihad fail to pay Vasco da Gama the overdue amounts by 10 August 2012 as agreed in the Transfer Agreement, it must also be taken into account that Ittihad and/or one of its sponsors apparently issued a swift for payment of the first instalment, inducing Vasco da Gama to insert the relevant data regarding the transfer into TMS and to allow the issuance of the ITC of the Player in favour of Ittihad in time, which swift turned out to be incorrect.
  
52. Moreover, the Panel observes that although Ittihad admits the obligation to pay the transfer fee of EUR 5,000,000, it only made offers to pay, but did not pay any amount whatsoever to Vasco da Gama. Even after more than 2 years and 4 months not even a part of the overdue amount is paid by Ittihad.
  
53. The Panel also considers the timeframe relevant. Ittihad agreed on 23 July 2012 to pay EUR 1,000,000 by no later than 25 July 2012, which was the date of issuing the ITC for the Player, EUR 1,500,000 by no later than 10 August 2012 and EUR 2,500,000 by no later than 15 January 2013, and that *“in case Vasco releases the Player’s ITC against the swift copy and for any reason the funds are not made available to Vasco within 05 (five) business days”* it would have to pay a 20% penalty fee to Vasco da Gama.
  
54. The Panel finds that considering this time schedule, Ittihad had the possibility to carefully assess its financial situation at the time and was able to verify if it would be able to pay – at least the First Instalment – in time. Ittihad maintains the following arguments to explain their non-fulfilment of the Transfer Agreement: *“all types of penalties, provided by the Transfer Agreement (...) were so excessive that put [Ittihad] into a difficult position (...); (...) the amount necessary to pay (...) rose 6 times in one month (...); (...) the player involved (...) left the Club and is currently sued before FIFA PSC for unjust breach of contract; (...) our club also faced problems of corruption and a few changes of Presidents in a short time; (...) Hence, it is clear that the aforementioned problems have led the club to a serious financial situation”*. The Panel finds that all these alleged facts are the full responsibility of Ittihad and that these circumstances do not justify Ittihad’s lack of payment. Moreover, even if these circumstances indeed justifiably affected Ittihad’s ability to pay – *quod non* – the Panel finds it important that Ittihad did not adduce any evidence to show that these circumstances occurred between 23 July 2012 (the date of conclusion of the Transfer Agreement) and 25 July 2012 (the due date of the First Instalment), justifying its lack of payment on such short notice.
  
55. Regarding the financial position of the parties, Vasco da Gama argued that it “transferred the Player in the Brazilian mid-season (whilst it was runner-up in the Campeonato Brasileiro, only 3 points behind leader Fluminense) only because it desperately needed the funds to pay its players’ salaries. Not only the club lost sportive performance without its best player and finished 5<sup>th</sup> place (19 points behind the champion Fluminense and missing the Copa Libertadores 2013 and the incoming funds that would be accrued have it qualified for the competition) but, also, being unable to pay its players’ salaries, Vasco had to release several players for the 2013 season – which culminated with [Vasco da Gama’s] relegation to the Brazilian second division”.
  
56. Although Ittihad argues that it was also in a difficult financial situation, the fact that Vasco da Gama issued the ITC of the Player on 25 July 2014, Ittihad acquired the full 100% economic

rights of the Player, which rights were valued at USD 14,000,000 by Ittihad in article 4.4 of the Transfer Agreement. As such, also in view of the financial positions of the parties, the Panel finds that there is no reason to mitigate the contractual penalty of EUR 1,000,000.

57. In view of the Panel's conclusion that the amount of EUR 1,000,000 is a penalty and not compensation, the Panel finds that even if Ittihad did not suffer damages – *quod non* – or could have mitigated its damages – *quod non* – there is no particular reason to take this into account as the amount of EUR 1,000,000 does not concern damages, which would have entailed a duty for Vasco da Gama to mitigate its damages and could potentially have lead to a reduction of the compensation to be awarded. The Panel feels comforted in this conclusion by article 161(1) of the SCO determining that:

*“Die Konventionalstrafe ist verfallen, auch wenn dem Gläubiger kein Schaden erwachsen ist”.*

Which can be translated as follows:

*“The penalty is payable even if the creditor has not suffered any loss or damage”.*

58. Consequently, the Panel concurs with the Single Judge and finds that Vasco da Gama is entitled to an additional sum of EUR 1,000,000 corresponding to 20% of the transfer fee as a contractual penalty.

***b. Is Ittihad obliged to pay Vasco da Gama 10% interest?***

59. As to the interest, Ittihad requests the Panel to award only a percentage of 5% interest *per annum*, whereas Vasco da Gama requests the Panel to confirm the Appealed Decision in awarding 10% interest *per annum*.
60. The Panel observes that Swiss law does not prohibit parties to agree on a specific interest rate. More specifically, the Panel observes that article 104 of the SCO provide the following:

1. *“Ist der Schuldner mit der Zahlung einer Geldschuld in Verzug, so hat er Verzugszinsen zu fünf vom Hundert für das Jahr zu bezahlen, selbst wenn die vertragsmässigen Zinse weniger betragen.*
2. *Sind durch Vertrag höhere Zinse als fünf vom Hundert, sei es direkt, sei es durch Verabredung einer periodischen Bankprovision, ausbedungen worden, so können sie auch während des Verzuges gefordert werden.*
3. *Unter Kaufleuten können für die Zeit, wo der übliche Bankdiskonto am Zahlungsorte fünf vom Hundert übersteigt, die Verzugszinsen zu diesem höheren Zinsfusse berechnet werden”.*

Which can be translated as follows:

1. *“A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract.*

2. *Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.*
  3. *In business dealings, where the normal bank discount rate at the place of payment is higher than 5%, default interest may be calculated at the higher rate”.*
61. Thus, the Panel notes that parties may freely determine the applicable interest rate, which was done by the parties in the Transfer Agreement. Further, the Panel is of the opinion that the agreed interest rate of 10% is not disproportionate given that at the hearing Ittihad argued that the basic interest rate at the moment of signing the Transfer Agreement was 7.9% in Brazil, which is the place of payment since Vasco da Gama has its registered office in Rio de Janeiro, at the moment of signing of the Transfer Agreement up until now.
62. As such, taking into account the content of article 4.3 of the Transfer Agreement, as well as recalling the principle of *pacta sunt servanda*, the Panel is of the opinion that, in principle, Ittihad is obliged to pay to Vasco da Gama an interest rate of 10% on the outstanding amount of EUR 5,000,000 as of 11 August 2012, *i.e.* as of the day after the entire amount became due in accordance with article 4.5 of the Transfer Agreement.
63. With reference to article 4.3 of the Transfer Agreement, the Panel considers that Ittihad should in principle also pay 10% interest over the amount of EUR 1,000,000 and not 5%. However, in view of the fact that the Single Judge awarded only 5% interest *p.a.* and because Vasco da Gama did not lodge an independent appeal against the Appealed Decision, the Panel finds that it is prevented from awarding a higher percentage of interest. Ruling otherwise would constitute a ruling *ultra petita*.
64. Consequently, the Panel considers that Ittihad is in principle obliged to pay Vasco da Gama 10% interest *p.a.* over the transfer fee of EUR 5,000,000, accruing as from 11 August 2012, and a penalty fee of EUR 1,000,000, with interest at 5% *p.a.* accruing as from 30 days following the day after the date of issuance of the Appealed Decision.

***c. Is it disproportionate to impose a contractual penalty and to award interest?***

65. The Panel observes that whereas Ittihad argues that the Single Judge should have excluded the “double penalty in the form of excluding interest rate” and that the Single Judge failed to “mitigate the penalty clauses existing in the Transfer agreement, which resulted in abusive and disproportional financial penalties (...)”, Vasco da Gama submits that the parties agreed on a default interest rate of 10% *per annum*, which rate “was commonly set by the parties to reflect the applicable rates in Brazil”, referring to the basic interest rate of 11% in Brazil.
66. Ittihad refers to case law and argues that “a penalty for late payment cannot be requested with default interest as both requests aim at compensating the creditor for late payment”. Vasco da Gama maintains that “the jurisprudence presented by [Ittihad] is not at all applicable to the present matter” and points out that



because of the bad faith of Ittihad “*there are absolutely no reasons to set aside the penalty clause and/or interest established in the Transfer Agreement*”.

67. The Panel observes that in a decision passed by the Single Judge of the FIFA PSC on 30 January 2012, it was held that “*according to the long standing and well-established jurisprudence of the Players’ Status Committee in similar cases, a penalty for late payment cannot be requested together with default interest as both requests aim at compensating the creditor for late payment*”.
68. The Panel observes that article 4.3 of the Transfer Agreement provides as follows:
- “In addition to any penalty due in the terms of this Transfer Agreement, interest on any past due and unpaid amount shall be applicable from payment due date until the date of effective payment, at a rate of 10% (ten percent) per annum”.*
69. The Panel notes that from this provision it is evident that both parties agreed on an interest rate of 10% **in addition to** any penalty due in the terms of the Transfer Agreement. As such, the parties have foreseen the possibility that an interest rate of 10% had to be paid as well as a penalty fee in case of late payment.
70. This position was also taken by the Single Judge of the FIFA PSC in the Appealed Decision, holding that:
- “in art. 4.3. of the [Transfer Agreement], the parties had agreed on an interest rate of 10% to be applied on any outstanding amount as of the respective due date, **on top of any other penalty which would be due**. In view of the above, considering the content of art. 4.3. of the [Transfer Agreement] as well as recalling once again the principle of pacta sunt servanda, the Single Judge decided that an interest rate of 10% should be paid by [Ittihad] to [Vasco da Gama] on the outstanding sum of EUR 5,000,000 as of 11 August 2012, i.e. as of the day after the entire sum became due in accordance with art. 4.5 of the agreement” (emphasis added).*
71. The Panel understands the decision of the FIFA PSC dated 30 January 2012 in the sense that the FIFA PSC is of the view that, in principle, no default interest can be awarded in addition to a contractual penalty. However, if the contract is clear in determining that both can be awarded complementarily, nothing prevents an adjudicatory body from awarding both.
72. In view of these considerations and taking into account all facts and circumstances in this case, the Panel concurs with the conclusion reached by the Single Judge in the Appealed Decision that awarding interest in addition to a contractual penalty is not disproportionate in the present case.
- B. Conclusion**
73. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

- a. Vasco da Gama is entitled to the transfer fee of EUR 5,000,000 and an additional sum of EUR 1,000,000 corresponding to 20% of the transfer fee as a contractual penalty.
  - b. Ittihad is obliged to pay Vasco da Gama 10% interest *p.a.* over the transfer fee of EUR 5,000,000, accruing as from 11 August 2012, and a penalty fee of EUR 1,000,000, with interest at 5% *p.a.* accruing as from 30 days following the day after the date of issuance of the Appealed Decision.
  - c. The imposition of a contractual penalty and to award interest is not disproportionate in the present case.
74. Any further claims or requests for relief are dismissed.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules:

1. The appeal filed on 22 July 2014 by Al Ittihad Club against the Decision issued on 15 January 2014 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.
2. The Decision issued on 15 January 2014 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.