

## **Decision of the Single Judge of the PSC**

passed on 20 November 2020

regarding a contractual dispute concerning the player Maicon Pereira Roque

### **COMPOSITION:**

**Roy Vermeer** (Netherlands), Single Judge of the PSC

### **CLAIMANT:**

**Galatasaray AS, Spain**

Represented by Mr PhD S. Petek Akyüz Arslan

### **RESPONDENT:**

**Al Nassr, Italy**

Represented by Muñoz & Arias Sports Lawyers

## I. Facts

1. On 30 July 2020, the Claimant and the Respondent concluded an agreement (hereinafter: *the transfer agreement*) on the permanent transfer of the player, Maicon Pereira Roque, from the former to the latter, against payment of EUR 1,100,000 by 14 August 2020, as per clause 4.1 of the transfer agreement.
2. Clause 4.4 of the transfer agreement reads as follows:

*"If [the Respondent] does not pay the above transfer fee on 14 August 2020 at the latest, the transfer fee will become immediately due without a need of warning and default interest of 5% per month shall apply to the transfer fee starting from the date of default. [The Claimant's] right to claim penalty in accordance with article 4.5 of this agreement is reserved even if [the Respondent] is in default".*
3. Clause 4.5 of the transfer agreement reads as follows:

*"In case [the Respondent] fails to pay any abovementioned amounts on its due dates at the latest, [the Respondent] shall pay to [the Claimant] 300,000 EUR as the penalty, for one time only, in addition to the transfer fee and interests without need of any notice, notification and/or court verdict. The parties hereby agree, declare, and undertake that this penalty is not extortionate, is set by the free will of the parties and with the signing of this transfer agreement [the Respondent] waives from the demand rights of reduction and amortization of this penalty. The parties agree that this provision is the indispensable provision (sine que non) of this transfer agreement and this transfer agreement has been signed taking into consideration this provision".*
4. Clause 9 of the transfer agreement stipulates that the content thereof is confidential. In particular, the said clause states the following:

*"The parties agree, declare and undertake to observe strict confidentiality regarding the terms of this transfer agreement. The parties shall not disclose this transfer agreement to any third parties (other than their professional advisors), unless they are required to do so by law, fiscal authorities or a Football Association/League. Any breach of this obligation will entitle the other parties to claim damages against the breaching party".*
5. By means of its correspondence dated 17 August 2020, the Claimant contacted the Respondent, requesting evidence from the latter as to having proceeded with the payment of the transfer compensation; however, to no avail.
6. Consequently, the Claimant put the Respondent in default of payment via its correspondence dated 19 August 2020. In particular, the Claimant put the Respondent in default of payment of EUR 1,100,000, corresponding to the transfer compensation, plus default interest of 5% per month, as well as of the payment of EUR 300,000, corresponding to the agreed penalty.
7. In its request for relief, the Claimant requested the Respondent be ordered to pay outstanding remuneration in the total amount of EUR 1,400,000 –corresponding to the amount of the transfer compensation, i.e. EUR 1,100,000, and the amount of the contractually agreed penalty, i.e. EUR 300,000–, plus 5% interest p.a. as from 14 August 2020, until the date of effective payment.

8. Furthermore, the Claimant requested the Respondent be ordered to pay: *"the costs of the present arbitration procedure [...] if any"*; as well as the amount of EUR 10,000 as *"legal fees"*.
9. In its claim, the Claimant argued that, despite having put the Respondent in default of payment on 19 August 2020, the latter failed to comply with its financial obligations as per the transfer agreement. Moreover, the Claimant highlighted that, pursuant to clauses 4.1 and 4.5 of the transfer agreement, the Respondent is liable to pay to the Claimant the requested amount of EUR 1,400,000 plus interests of 5% p.a. (in accordance with clause 4.4 of the transfer agreement) by virtue of the general principle of law, *pacta sunt servanda*.
10. In its reply to the claim, the Respondent explained that its default of payment responds to its loss of income arising from the losses suffered by the Respondent from ticketing and tv rights, as well as the losses suffered upon the refinancing of payment plans of the Respondent's sponsors. In this respect, the Respondent referred to art. 163 of the Swiss Code of Obligations (SCO), which concerns contractual penalties. In particular, the Respondent referred to its para. 2, which reads as follows: *"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"*. On those grounds, since the performance of the terms of the transfer agreement was beyond the control of the Respondent, the latter argued that clause 4.5 of the transfer agreement shall be deemed null and void and no penalty shall be paid to the Claimant.
11. Moreover, the Respondent maintained that, should its aforementioned request be disregarded, clause 4.5 of the transfer agreement shall still not be applied, since it is *"grossly disproportionate under Swiss Law and consequently must be set aside"*. In this regard, the Respondent held that a penalty of EUR 300,000 represents 27% of the transfer compensation of EUR 1,100,000, which is *"contrary to public policy and morality under Swiss Law, and consequently shall be set aside"*;
12. On the alternative, the Respondent requested the penalty of EUR 300,000 to be reduced, insofar it is excessive. In this context, the Respondent made reference to para. 3 of the already mentioned art. 163 SCO, which establishes that: *"At its discretion, the court may reduce penalties that it considers excessive"*.
13. Furthermore, the Respondent held that, should it be condemned to pay to the Claimant the penalty of EUR 300,000, *"no default interest can arise in this case"*. In this context, the Respondent stressed that, to grant default interest over the transfer compensation, in addition to the enforcement of the penalty arising from the late payment of the transfer compensation would contravene the legal principle of *non bis in idem*, in accordance with which the party in breach shall not be punished twice *"for the same conduct"*.
14. In this point, the Respondent referred to clause 9 of the transfer agreement and argued that the Claimant failed to respect the confidentiality clause of the agreement. In this respect, the Respondent maintained that, on 1 August 2020, one day after the transfer agreement was concluded, the Claimant published in its official website the following announcement: *"For our professional footballer Maicon Pereira Roque, an agreement has been reached with Al Nassr Saudi Club for a net transfer fee of 1,430,000 Euro"*.

## II. Considerations of the Single Judge of the PSC

1. First of all, the Single Judge of the PSC (hereinafter also referred to as *Chamber* or *DRC*) analyzed whether it was competent to deal with the case at hand. Taking into account the wording of art. 21 of the June 2020 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: *the Procedural Rules*), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.
2. Subsequently, the Single Judge of the PSC referred to art. 3 par. 1 of the Procedural Rules and emphasized that, in accordance with art. 24 par. 1 in combination with art. 22 lit. f) of the Regulations on the Status and Transfer of Players, the Single Judge of the PSC is competent to deal with disputes between clubs belonging to different associations.
3. In continuation, the Single Judge of the PSC analyzed which edition of the Regulations of the Status and Transfer of Players should be applicable to the present matter. In this respect, the Single Judge of the PSC confirmed that in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players, and considering that the claim was lodged on 3 August 2020, the June 2020 edition of the aforementioned regulations (hereinafter: *the Regulations*) is applicable to the matter at hand.
4. With the above having been established, the Single Judge of the PSC entered into the substance of the matter. In doing so, it started to acknowledge the facts of the case as well as the documents contained in the file. However, the Single Judge of the PSC emphasized that in the following considerations it will refer only to facts, arguments and documentary evidence which it considered pertinent for the assessment of the matter at hand.
5. In this respect, the Single Judge noted that, on 30 July 2020, the parties concluded an agreement for the permanent transfer of the player, Maicon Pereira Roque, from the Claimant to the Respondent, for the amount of EUR 1,100,000, payable by 14 August 2020.
6. Subsequently, the Single Judge observed that, on 3 August 2020, the Claimant lodged a claim before FIFA and requested the payment of the outstanding amount of EUR 1,400,000, corresponding to the unpaid transfer compensation, as well as to a penalty in the amount of EUR 300,000 as per clause 4.5 of the transfer agreement (cf. point I.3 *supra*); plus 5% interests p.a. as from 14 August 2020 until the date of effective payment.
7. Having analyzed the positions of both parties, the Single Judge firstly stressed that, since it remained uncontested that the Respondent failed to make the payment of the transfer compensation in the amount of EUR 1,100,000, which was due as per the transfer agreement concluded between the parties, the Respondent shall be condemned to pay to the Claimant the amount of EUR 1,100,000 in application of the legal principle of law: *pacta sunt servanda*.
8. Having clarified the above, the Single Judge noted that the conflicting point arising from the present case concerns the application of clause 4.5 of the transfer compensation, in accordance with which the Respondent shall pay to the Claimant a penalty of EUR 300,000 in case of non-payment of the transfer compensation of EUR 1,100,000 on its due date. In this respect, the Single Judge observed that, whereas the Claimant requests the payment of the penalty from the Respondent –being uncontested that the latter did not pay the transfer compensation on its due date –, the Respondent argues that the lack of payment is a consequence of the losses it has

suffered upon the situation of financial distress caused by Covid-19 and that the present situation fits a scenario of force majeure. In this point, the Single Judge further noticed that, subsidiary, the Respondent requested said penalty to be reduced ex. art. 163.3 SCO or, subsidiary, that the Claimant is not awarded default interest, since –if done so– the Respondent would be punished twice for the same conduct (*non bis in idem*).

9. In this respect, the Single Judge concluded that the wording of clause 4.5 is very clear in the sense that the activation of the clause and the subsequent payment of the penalty of EUR 300,000, should the Respondent not have paid the transfer compensation of EUR 1,100,000 by 14 August 2020, was an essential part of the transfer agreement.
10. In this respect, the Single Judge noted that clause 4.5 of the transfer agreement stipulates, *inter alia*, that: “*The parties hereby agree, declare, and undertake that this penalty is not extortionate, is set by the free will of the parties and with the signing of this transfer agreement [the Respondent] waives from the demand rights of reduction and amortization of this penalty. The parties agree that this provision is the indispensable provision (sine que non) of this transfer agreement and this transfer agreement has been signed taking into consideration this provision*”. The Single Judge wished to further note that the transfer agreement was entered into by the parties in July 2020, when the Covid-19 outbreak had already occurred and it was already considered a pandemic (the World Health Organization recognized the spread of COVID-19 as a pandemic on 11 March 2020).
11. Hence –continued the Single Judge–, the argument of the Respondent as to the application of *force majeure* in order to not comply with its contractual obligations, is to be rejected, insofar the Respondent, when signing the transfer agreement in July 2020, should have foreseen the financial impact of the pandemic and, nevertheless, agreed to pay a penalty to the Claimant in case of non-payment of the transfer agreement, which was –as agreed by the parties– an essential part thereof.
12. The above being clarified, the Single Judge addressed the argument of the Respondent regarding the penalty being disproportionate, since it “*represents 27% of the transfer compensation*”. In this respect, the Single Judge recalled the jurisprudence of the Players’ Status Committee, in accordance with which penalties will be considered disproportionate when they constitute an amount that represents more than 50% of the principal outstanding amount. In this regard, the contractually agreed penalty representing 27% of the principal outstanding amount, the Single Judge deemed that the penalty is to be considered reasonable and proportionate.
13. As to the default interest, the Single Judge noted that clause 4.4 of the transfer agreement states that a default interest of 5% per month shall be paid by the Respondent should it fail to timely pay the transfer compensation to the Claimant. In this respect, the Single Judge further noticed that interests of 5% per month would result in interests of 60% per year and that, according to Swiss Law, the limit regarding the rate of default interest is 18% per year. Thus, –continued the Single Judge– the default interest agreed between the parties shall be reduced to 18% per annum and be awarded to the Claimant, but only on the amount of EUR 1,100,000, insofar no interest shall be applied on penalties, in accordance with the well-established jurisprudence of the Players’ Status Committee.
14. As to the allegation of the Respondent concerning the commission of a *non bis in idem* infringement, should the Claimant be awarded default interest as well as the penalty contemplated in clause 4.5 of the transfer agreement, the Single Judge highlighted that, in

accordance with the usual practice of the Players' Status Committee, default interest can always be granted to the creditor in accordance with Swiss Law, should the latter request said default interest; and that, to simultaneously award default interests and a penalty is not to be considered an infringement of the legal principle of *non bis in idem*, since the nature of the penalty is punitive and its basis is the contract, whereas the nature of the default interest is compensatory and its basis is normative.

15. As to the disclosure in its official website of the amount of the transfer compensation agreed between the parties, the Single Judge stressed that said conduct did constitute a breach of clause 9 of the contract. Nevertheless –pointed the Single Judge– the Claimant has not proven any damage arising from such breach.
16. Hence –concluded the Single Judge–, in application of the legal principal of law, *pacta sunt servanda*, the Claimant shall be awarded outstanding remuneration in the amount of EUR 1,100,000, plus 18% interest *p.a.* as from its due date, *i.e.* 15 August 2020, until the date of effective payment, as well as a penalty in the amount of EUR 300,000.
17. In continuation, the Single Judge of the PSC referred to art. 25 par. 2 of the Regulations in combination with art. 18 par. 1 of the Procedural Rules, according to which in the proceedings before the Dispute Resolution Chamber relating to disputes regarding solidarity mechanism costs in the maximum amount of CHF 25,000 are levied. The costs are to be borne in consideration of the parties' degree of success in the proceedings.
18. In this respect, the Single Judge of the PSC referred to the Covid-19 Football Regulatory Issues – FAQ, published on 11 June 2020 which establish that, for any claim lodged between 10 June 2020 and 31 December 2020 (both inclusive), there will be no requirement to pay an advance of costs and no procedural costs shall be ordered.
19. Furthermore, taking into account the previous considerations, the Single Judge of the PSC referred to par. 1 and 2 of art. 24bis of the Regulations, which stipulate that, with its decision, the pertinent FIFA deciding body shall also rule on the consequences deriving from the failure of the concerned party to pay the relevant amounts of outstanding remuneration and/or compensation in due time.
20. In this regard, the Single Judge of the PSC pointed out that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of a ban from registering any new players, either nationally or internationally, up until the due amounts are paid and for the maximum duration of three entire and consecutive registration periods.
21. Therefore, bearing in mind the above, the Single Judge of the PSC decided that, in the event that the Respondent does not pay the interest due to the Claimant within 45 days as from the moment in which the Claimant, following the notification of the present decision, communicates the relevant bank details to the Respondent, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become effective on the Respondent in accordance with art. 24bis par. 2 and 4 of the Regulations.
22. In this respect, the Single Judge of the PSC recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amount, in accordance with art. 24bis par. 3 of the Regulations.

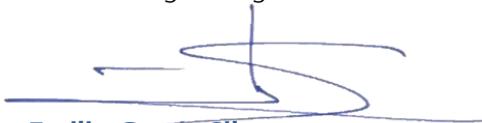
23. Finally, the Single Judge of the PSC finished his deliberations by stating that any further claim lodged by the Claimant is rejected, in particular the application of 5% interest *p.a.* on both the transfer compensation and the penalty, the procedural costs' –which are none– and the legal fees' reimbursement request, and by determining that the claim of the Claimant is, therefore, partially accepted.

### III. Decision of the Single Judge of the PSC

1. The claim of the Claimant, Galatasaray AS, is partially accepted.
2. The Respondent, Al Nassr, has to pay to the Claimant the amount of EUR 1,100,000, plus 18% interest *p.a.* as from 15 August 2020 until the date of effective payment.
3. The Respondent has to pay to the Claimant a penalty in the amount of EUR 300,000.
4. Any further claims of the Claimant are rejected.
5. The Claimant is directed to immediately and directly inform the Respondent of the relevant bank account to which the Respondent must pay the due amounts.
6. The Respondent shall provide evidence of payment of the due amounts in accordance with this decision to [psdfifa@fifa.org](mailto:psdfifa@fifa.org), duly translated, if applicable, into one of the official FIFA languages (English, French, German, Spanish).

7. In the event that the amounts due, plus the applicable interest, are 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.
8. This decision is rendered without costs.

For the Single Judge of the PSC:



**Emilio Garcia Silvero**  
Chief Legal & Compliance Officer

## NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 58 par. 1 of the [FIFA Statutes](#), this decision may be appealed against before the [Court of Arbitration for Sport \(CAS\)](#) within 21 days of receipt of the notification of this decision.

## NOTE RELATED TO THE PUBLICATION:

FIFA may [publish](#) this decision. For reasons of confidentiality, FIFA may decide, at the request of a party within five days of the notification of the motivated decision, to publish an anonymised or a redacted version (cf. article 20 of the Procedural Rules).

## CONTACT INFORMATION:

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