Arbitration CAS 2017/A/5195 Cruzeiro EC v. FC Zorya Luhansk, award of 14 August 2018

Panel: Mr Ivaylo Dermendjiev (Bulgaria), Sole Arbitrator

Football
Transfer
Modification of the request for relief between the statement of appeal and the appeal brief
Scope of the CAS power of review
Reliability of expert evidence
Value of a registration

1. **To the extent that there may be a modification of the relief sought in the appeal brief, there is no specific provision in the CAS Code that forbids an appeal brief to go beyond the request for relief as formulated in the statement of appeal. Article R56 of the CAS Code clearly refers to the procedural phase after the appeal brief. Article R51 of the CAS Code, addressing the appeal briefs, does not specifically prohibit an amendment to the statement of appeal.**

2. **The modification of the relief sought should be confined within certain boundaries. As a general rule, the CAS power of review is limited by the object of the dispute such as delimited in the previous instance. Although, pursuant to Article R57 of the CAS Code, a CAS panel has full power to review the facts and the law and to issue a decision *de novo*, when acting following an appeal against a decision of a federation, association or sports-related body, the power of review of such panel is also determined by the relevant statutory legal basis and, therefore, is limited with regard to the appeal against and the review of the appealed decision, both from an objective and a subjective point of view. Therefore, if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the panel does not have the power to decide on it and the motion must be rejected.**

3. **An expert report only relying on bad quality copies provided to the expert by a private person, and not on original documents cannot vouch for a level of certainty sufficient to establish such report as strongly reliable evidence.**

4. **It is widely accepted in the football community that registration with the leading institutions in the field establishes a rebuttable presumption that the chain of transactions, preceding the registered transfer, complies with the industry's legality requirements.**

I. PARTIES

1. Cruzeiro EC ("Cruzeiro" or the "Appellant") is a Brazilian professional football club having its seat in Belo Horizonte, Brazil. The Appellant is affiliated with Confederação Brasileira de Futebol ("CBF"). The CBF is a member of the Fédération Internationale de Football Association ("FIFA").

2. FC Zorya Luhansk ("Zorya" or the "Respondent") is a Ukrainian professional football club having its seat in Lugansk, Ukraine. The Respondent is affiliated with the Football Federation of Ukraine ("FFU"). The FFU is a member of both the FIFA and the Union of European Football Associations ("UEFA").

3. The Appellant and the Respondent will be jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

4. This appeal was filed by Cruzeiro against the Decision of the Single Judge of the FIFA Players' Status Committee passed on 28 February 2017 (the "Appealed Decision") and notified to the Parties on 18 May 2017.

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

6. The present contractual dispute is related to the right of the Respondent to receive payment of an amount equal to the default interest allegedly due for late payments of the first three instalments, and the amount corresponding to the sum of the fourth instalment, plus interest, of the transfer fee due by the Appellant to the Respondent as a consideration for the transfer of the player X. (the "Player").

7. On 24 July 2014, Zorya and Cruzeiro concluded a transfer agreement for the permanent transfer of the Player from the Respondent to the Appellant (the "Transfer Agreement").

8. The Transfer Agreement was preceded by an agreement regarding the loan from FC Metalist ("Metalist") to the Appellant of the Player for the period between 15 July 2013 and 14 July 2014 (the "Loan Agreement"), upon payment of a loan fee in the amount of EUR 1,000,000. By the same agreement, Metalist granted an option to the Appellant to permanently transfer the Player if the latter paid EUR 4,000,000 to the former by no later than 14 July 2014.

9. Around the end of the Loan Agreement, the Player informed the Appellant of the end of his relationship with Metalist as well as of his newly entered into employment contract with the Respondent. The Player further notified the Appellant that, if interested in a permanent

transfer, it had to contact the Respondent in order to negotiate the terms and conditions of such agreement.

10. On 17 July 2014, Metalist and the Player terminated their employment relationship by signing an Additional Agreement N°1 to the Contract between professional football club and professional football player dated 22 June 2012 (the "Termination Agreement").

11. On 18 July 2014, the Player signed an employment contract as a professional player with the Respondent.

12. As previously mentioned, on 24 July 2014, the Respondent and the Appellant signed the Transfer Agreement, according to which the Respondent would permanently transfer the Player to the Appellant, upon payment of a transfer fee in the amount of EUR 3,500,000, payable in six instalments as follows:

- EUR 500,000 due on 25 September 2014;

- EUR 1,000,000 due on 25 March 2015;

- EUR 500,000 due on 25 September 2015;

- EUR 500,000 due on 25 March 2016;

- EUR 500,000 due 25 September 2016;

- EUR 500,000 due on 25 March 2017.

13. Article 4 of the Transfer Agreement stated inter alia that, *"[i]n case of delay of the 'Cruzeiro'* [i.e. the Appellant] *in the payment of any amount due under clause 3 of this Contract* [i.e. Article 3 of the Transfer Agreement] *for a period of over 10 (working) days from each of the due dates above, such amount shall be subject to interests on late payment at a rate of 0.2% (in words: zero point two percent) per day from and including the date such payment is due through and including the date upon which the 'Cruzeiro' has made bank wire transfer into the account designated by the FC Zarya* [i.e. the Respondent]*"*.

14. In accordance with Article 11 of the Transfer Agreement, *"'[C]ruzeiro'* [i.e. the Appellant] *will be responsible for the payment of half of the solidarity contribution in relation to this transfer in accordance with FIFA Regulations to other clubs. 'Cruzeiro' is, therefore, allowed to retain (*pro rata*) 2,5% from each one of the instalments set out in clause 3 above* [i.e. Article 3 of the Transfer Agreement]*"*.

15. The Appellant paid to the Respondent the first three instalments of the transfer fee with a delay respectively of 159 days regarding the first instalment of EUR 500,000 due by 25 September 2014 and paid on 3 March 2015, a delay of 7 days regarding the second instalment of EUR 1,000,000 due on 25 March 2015 and paid on 1 April 2015 and a delay of 60 days regarding the third instalment of EUR 500,000 due on 25 September 2015 and paid on 24 November 2015. The Appellant failed to pay the fourth instalment.

16. By means of two letters dated 14 October 2014 and 6 October 2015 as well as an invoice dated 11 March 2015, the Respondent reminded the Appellant of the allegedly residual outstanding default interest.

III. THE FIFA PROCEEDINGS

17. On 24 November 2014 with amendments on 29 April 2016, Zorya lodged a claim against Cruzeiro with the FIFA, alleging that the latter had breached the Transfer Agreement and did not comply with its contractual duties.

18. Consequently, Zorya claimed from Cruzeiro payment in the amount of EUR 233,000 corresponding to the default interest allegedly due for late payments related to the first instalment (EUR 159,000), the second instalment (EUR 14,000) and the third instalment (EUR 60,000), and the amount of EUR 500,000 corresponding to the sum of the fourth instalment, plus interest at a rate of 0,2% per day on said amount from the relevant due date until the date of effective payment according to Article 4 of the Transfer Agreement, as well as the advance of costs and proceeding costs to be borne by the Respondent.

19. In its reply to the claim, Cruzeiro essentially acknowledged the existence of such agreement as well as its payment of the first three instalments of the transfer fee but contested the rate of the default interest for late payment and claimed its entitlement to 2.5% discount from the fourth instalment as solidarity contribution according to Article 11 of the Transfer Agreement, thus a total of EUR 62,500.

20. On 28 February 2017, the Single Judge issued the Appealed Decision, partially upholding Zorya's claim and ordered as follows:

"2. The Respondent, Cruzeiro Esporte Clube, has to pay to the Claimant, FC Zorya Luhansk, within 30 days as from the date of notification of this decision, interest at a rate of 5% per year as follows:

- over the amount of EUR 487,500 as from 9 October 2014 until 3 March 2015;

- over the amount of EUR 487,500 as from 9 October 2015 until 24 November 2015.

3. The Respondent, Cruzeiro Esporte Clube, has to pay to the Claimant, FC Zorya Luhansk, within 30 days as from the date of notification of this decision, the total amount of EUR 487,500 as well interest at a rate of 5% per year on the said amount as from 8 April 2016 until the date of effective payment.

4. If the aforementioned sums, plus interest, are not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

5. Any further claims lodged by the Claimant, FC Zorya Luhansk, are rejected.

6. The final costs of the proceedings in the amount of CHF 17,000 are to be paid within 30 days as from the date of notification of the present decision, as follows:

6.1 The amount of CHF 7,000 by the Claimant, FC Zorya Luhansk, to FIFA. Given that the Claimant, FC Zorya Luhansk, has already paid the amount of CHF 5,000 as advance of costs at the start of the present proceedings, the Claimant, FC Zorya Luhansk, shall pay an additional amount of CHF 2,000 as costs of proceedings.

6.2 The amount of CHF 10,000 by the Respondent, Cruzeiro Esporte Clube, to FIFA […]*".*

21. In support of the Appealed Decision as to the substance of the dispute, the Single Judge made the following considerations:

"9. Having duly examined the argumentation and documentation put forward by both parties and turning his attention to the Claimant's request amounting to EUR 500,000 corresponding to the fourth instalment in accordance with the agreement, the Single Judge emphasised that, it was undisputed that such amount had not been paid by the Respondent. Equally, the Single Judge recalled the provision as set forth in article 11 of the agreement, which provided that the Claimant was entitled to retain 2.5% from each instalment of the transfer fee.

10. Bearing in mind the aforementioned and the basic legal principle of pacta sunt servanda*, which in essence means that agreements must be respected by the parties in good faith as well as bearing in mind the content of the above-mentioned provisions and the fact that the conditions for the payment of the fourth instalment of the transfer fee and the deduction of half of the solidarity contribution had* in casu *both been met, the Single Judge decided that the Respondent had breached its contractual obligations towards the Claimant and should, as a consequence, be liable to pay the outstanding amount of EUR 487,500.*

11. In continuation and with regard to the Claimant's request for interest at a rate of 0.2% per calendar day, corresponding to interest at a rate of 72% per year, the Single Judge highlighted that such contractual interest is to be considered as manifestly disproportionate and excessive, and as such, cannot be enforced. In view of the foregoing, the Single Judge held that the contractual rate of article 4 of the agreement should be disregarded and that, as an alternative, taking into account the longstanding practice of the Players' Status Committee, the Single Judge concluded that the Respondent has to pay 5% default interest p.a. *on the respective said amount and instalments as of the relevant due dates until the date of effective payment.*

12. With these considerations in mind, the Single Judge focussed his attention to the Claimant's request for interest at a rate of 0.2% per calendar day for the delayed payments corresponding to the three first instalments in accordance with the agreement. Accordingly, the Single Judge referred to the content of article 4 of such agreement which expressly provided for an interest rate in case of any delayed payment after a grace period of ten days. Recalling the considerations regarding excessive interest rate as outlined above, the Single Judge granted interest at a rate of 5% per year on the delayed payments taking into account a grace period of 10 days".

22. The Appealed Decision with its supporting grounds was notified to the Parties on 18 May 2017.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 8 June 2017, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") challenging the Appealed Decision. Pursuant to Article R50 of the Code

of Sports-related Arbitration (the "CAS Code"), the Appellant applied that the appeal should be submitted to a sole arbitrator considering the low level of legal complexity of the case.

24. In accordance with Article R51 of the CAS Code, on 27 June 2017, the Appellant filed its Appeal Brief together with a request for production of documents.

25. On 1 September 2017, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division and in accordance with Article R54 of the CAS Code, informed the Parties that the Panel appointed to decide the case was constituted as follows:

Sole Arbitrator: Mr. Ivaylo Dermendjiev, Attorney-at-Law in Sofia, Bulgaria.

26. In accordance with Article R55 of the CAS Code, on 19 September 2017, the Respondent filed its Answer.

27. On 22 September 2017, the CAS Court Office invited the Parties to inform the CAS whether they prefer a hearing to be held or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

28. By letter dated 25 September 2017, the Respondent affirmed that no hearing is necessary and agreed for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

29. By letter dated 28 September 2017, the Appellant expressed the opposite opinion and requested that a hearing be held in this matter.

30. On 29 September 2017, the CAS Court Office invited the Appellant to advise on whether it maintained its request for production of documents in light of the documents produced by the Respondent with its Answer.

31. By letter dated 5 October 2017, the Appellant expressed its satisfaction with the produced documents but requested to be given the opportunity to file comments and provide further evidence regarding the Player's signature on said documents.

32. On 6 October 2017, the CAS Court Office, on behalf of the Sole Arbitrator, invited the Appellant to submit its comments on the issue of authenticity of the signature of the Player on the documents produced by the Respondent with its Answer.

33. By letter dated 13 October 2017, the Appellant produced an expert report regarding the Player's signature (the "Expert Report").

34. On 23 October 2018, the CAS Court Office invited the Respondent to file any comments that it may have on the Appellant's letter of 13 October 2018 and the Expert Report.

35. By letters dated 25 October and 3 November 2017, the Respondent requested extensions of deadline to prepare its observations to the Expert Report.

36. On 6 November 2017, the CAS Court Office granted the so requested extension and invited the Respondent to file its comments by 10 November 2017.

37. During the period between 10 November 2017 and 12 February 2018, the Parties continuously communicated to the CAS their desire to reach an amicable solution to the present procedure, requesting the suspension of the proceedings. The suspension of the procedure was confirmed by the CAS Court Office on 13 November 2017 and extended several times.

38. On 7 February 2018, the CAS Court Office set a final deadline until 12 February 2018 for the Parties to provide updates as to the status of their negotiation before the procedure resumed automatically.

39. On 15 February 2018, the CAS Court Office confirmed that the suspension of the proceedings was lifted and invited the Respondent to file its comments on the Expert Report by 20 February 2018.

40. By letter dated 20 February 2018, the Respondent again requested the suspension of the proceedings until 7 March 2018, which was subsequently confirmed by the CAS Court Office on behalf of the Sole Arbitrator.

41. By letter dated 7 March 2018, the Respondent informed the CAS Court Office that the Parties had been unable to reach an amicable settlement and requested to be granted a time limit until 19 March 2018 in order to present its observations to the Expert Report.

42. On 8 March 2018, the CAS Court Office noted that the Parties were unable to reach an amicable settlement and granted the Respondent the previously requested time limit to submit its observations to the Expert Report. The deadline was subsequently extended to 20 March 2018.

43. On 20 March 2018, the Respondent submitted its observations to the Expert Report.

44. On 23 March 2018, the CAS Court Office requested that the Parties confirm whether or not they prefer there to be a hearing in these proceedings as time had elapsed and further written submissions had been exchanged since they last contemplated the possibility of a hearing.

45. By letter dated 28 March 2018, the Respondent expressed its preference that a hearing be held. The Appellant did not provide its position within the time limit granted.

46. On 1 May 2018, the CAS Court Office informed the parties that the hearing would be held in Lausanne on 6 June 2018.

47. On 18 May 2018 and on 24 May 2018, respectively, the Respondent and the Appellant signed the signed Order of Procedure.

48. In accordance with Article R57 of the CAS Code, a hearing was convened and held on 6 June 2018 in Lausanne, Switzerland. The Sole Arbitrator was assisted at the hearing by Ms Delphine Deschenaux-Rochat, Counsel to the CAS. The following persons attended the hearing:

a. For the Appellant: Mr Breno Costa Ramos Tannuri, Counsel

Mr Ciro Tavares, Interpreter

b. For the Respondent: Mr Stefano Malvestio, Counsel

Ms Juliana Avezum, Counsel

Mr Christian Jaccard, Counsel

49. The Sole Arbitator heard Mr Marcelo Kiremitdjian as witness and Mr Reginaldo Tirotti as expert via telephone. Both of them were examined and cross-examined by the Parties, as well as questioned by the Sole Arbitrator.

50. The Parties were given the opportunity to present their respective cases, to make pleadings and arguments, to examine the witnesses and to answer questions posed by the Sole Arbitrator. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their right to be heard and that they had been treated equally in these arbitration proceedings. The Sole Arbitrator had carefully taken into account all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

51. By letter dated 19 June 2018, the Appellant provided, as invited by the Sole Arbitrator during the hearing, evidence in order to dismiss any doubt relating to the amount paid by the Appellant to Metalist for the loan of the Player.

V. SUBMISSIONS OF THE PARTIES

A. The Appellant

52. As to the facts, the Appellant's submissions, in essence, may be summarized as follows:

- On 15 July 2013, the Appellant and Metalist entered into the Loan Agreement for the loan of the Player for the period between 15 July 2013 and 14 July 2014 upon payment of a loan fee amounting to EUR 1,000,000. The agreement also contained a permanent transfer option upon payment of EUR 4,000,000 by the Appellant to Metalist by no later than 14 July 2014.

- Few days before the aforementioned deadline, the Player communicated to the Appellant the end of his employment relationship with Metalist and informed it of his new employment contract with the Respondent. The Player also advised that in case of interest in the above-mentioned permanent transfer, the Appellant had to contact the Respondent in order to negotiate such agreement.

- On 24 July 2014, the Appellant and the Respondent entered into the Transfer Agreement.

- Although the Parties had agreed to the payment modalities and the *s* retention of the solidarity contribution, the Appellant mistakenly paid to the Respondent the first three instalments without having retained a percentage due as solidarity contribution as per Article 11 of the Transfer Agreement.

- On 24 November 2014 with amendments on 29 April 2016, the Respondent filed a statement of claim before FIFA against the Appellant claiming that the latter had delayed the payment of the first three instalments and had failed to pay the fourth instalment.

- The Respondent, however, failed to inform FIFA that the Appellant had paid the first three instalments without discounting the percentage due as solidarity contribution.

- On 16 June 2017, after the Appellant had initiated the present appeal proceedings before CAS, it received a correspondence from Metalist affirming that the Appellant was victim of fraud planned by the Respondent and, possibly, the Player, as Metalist allegedly never transferred the Player after the expiration of the loan, and the Respondent had, therefore, no right to re-transfer the Player.

53. With regard to the merits, the Appellant examines the notion of transfer, which, in its view, implies a transferring of a player's registration from one club to another. In this regard, it cites to legal scholars acknowledging that a transfer involves not only the termination of a player's employment contract with one club, but also the de-registration of that player with his former club and his re-registration with the new club.

54. The Appellant further submits that such a transfer requires the signature of a transfer agreement which is drafted and implemented taking in consideration the principles of party autonomy, *pacta sunt servanda*, the prohibition of abuse of rights and the requirement to act in good faith.

55. With regard to the relevant material law, the Appellant stresses that the FIFA Regulations on the Status and Transfer of Players ("RSTP") does not provide any mandatory rule regarding the terms and conditions of such transfer agreements. Consequently, the Appellant supports that any dispute involving such agreement shall be resolved in accordance with provisions of Swiss law, applicable in the absence of specific indications by the FIFA regulations.

56. Therefore, the Appellant cites to Articles 19 and 20 of the Swiss Code of Obligations ("SCO") regarding contract terms and contract validity. Under Swiss law, a contract is invalid if it is impossible to be executed *ab initio* when, at the moment the parties entered into an agreement, one of the underlying promises can objectively not be fulfilled. The Appellant further distinguishes the situation of a supervening impossibility, exempting the parties from performance of their obligations from the moment the impossiblility arises.

57. The Appellant also cites to Article 119 of the SCO deeming an obligation extinguished where its performance is rendered impossible by circumstances not attributed to the obligor but said obligor is liable for the consideration already received in order to avoid unjust enrichment.

58. In the present case, the Appellant submits that the Respondent had no right to transfer the Player to the Appellant since the latter was not registered with the Respondent and had no employment relationship with it. According to the Appellant, such a transfer agreement would be impossible and the transfer fee received upon such transaction would qualify as unjust enrichment within the meaning of Article 62 of the SCO.

59. The Appellant further submits, based on an Expert's Report, that the Player's signature on the Termination Agreement was forged.

60. Consequently, the Appellant affirms that it had no obligation to pay the transfer fee and that the amounts paid to date shall be reimbursed.

61. In the Appeal Brief, the Appellant requested the following relief:

"On the merits:

FIRST – The appeal is upheld.

SECOND – The Appealed Decision dismissed in full.

THIRD – To order the Respondent to refund the amount so far received as transfer fee from the Appellant, that is to say, EUR 2,000,000 [this particular request was missing in the Statement of Appeal and was introduced only with the Appeal Brief].

At any rate:

THIRD – The Respondent shall bear all the arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any advance of costs paid to the Court of Arbitration for Sport.

FOURTH – The Respondent shall be ordered to pay the Appellant a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel".

B. The Respondent

62. As to the facts, the Respondent's submissions, in essence, may be summarized as follows:

- Although, in July 2014, the Player had already been playing in the Appellant's club for a year under the terms of the Loan Agreement, the Appellant did not demonstrate any interest in permanently acquiring the Player. The latter was therefore obliged to return to Ukraine and seek new job opportunities.

- On 18 July 2014, the Respondent concluded an employment contract with the Player, duly registered with the Association of professional football clubs of Ukraine "Premier League".

- While signing that contract, the Player provided the Respondent with the Termination Agreement, which has also been duly registered with the Association of professional football clubs of Ukraine "Premier League".

- Shortly after the Player signed its new employment contract with the Respondent, the former was transferred to the Appellant's club.

- The Transfer Agreement, signed on 24 July 2014, has been registered in the FIFA Transfer Matching System ("TMS") and certified by the FFU.

- Even though the Appellant was provided with comfortable payment conditions, with regard to both the amount and the modalities, for the payment of the transfer fee, it systematically delayed the so scheduled payments and omitted deducting the amount of solidarity contribution when making payments.

- After the Appealed Decision was rendered, the Appellant continued breaching the Transfer Agreement, which led to a second amended claim by the Respondent addressed to FIFA.

- As a result of the Transfer Agreement, the Appellant received a highly qualified player, while the Respondent not only lost its player but also did not receive the full amount of the transfer fee as per the contract.

63. With regard to the merits of the case, the Respondent confirms that it signed the Transfer Agreement in accordance with the valid FIFA and FFU regulations, and in all legitimacy.

64. It also states that Metalist's statement, suggesting that while contracting with the Respondent, the Player was in a valid and uninterrupted contractual relationship with Metalist, is not truly representing the facts as there is documentary proof of termination of the contract between Metalist and the Player. In this regard, the Respondent contends that by challenging the authenticity of the Player's signature on the Termination Agreement, the Appellant is in bad faith, merely seeking a way not to comply with the Appealed Decision and to obtain reimbursement of the amounts already paid to the Respondent.

65. Additionally, the Respondent challenges the credibility of Metalist's correspondence. The Respondent emphasizes that the underlying facts have only been mentioned in 2017, while the non-performance by the Appellant has begun in 2016. The Respondent further states that the Appellant has provided no evidence whatsoever relating to Metalist's position on the matter between 2014 and 2017. *In fine*, it questions the authority of the author of said letter to sign official documents on behalf of Metalist while the club is in liquidation.

66. With regard to the above, the Respondent rejects the Appellant's assertions that the former has no rights to the Player.

67. On a general note, the Respondent submits that the power of review of the CAS is limited by the object of the dispute in the first instance proceedings. In the present matter, during the FIFA proceedings, the focus was placed on the interest rate and the solidarity mechanism

deductions while the Appellant is now changing the entire object of the dispute. During the FIFA proceedings, the Appellant never questioned the signatures under the Transfer Agreement, which constitutes a breach of the principle *venire contra factum proprium*.

68. In its Answer, the Respondent requested the following relief:

"1. The Appeal is rejected;

2. The Appealed Decision is upheld;

3. To oblige the Appellant to bear all costs associated with this Appeal both already taken place, and those arising in the future.

4. To oblige the Appellant to pay to the Respondent the amount of compensation in respect of legal expenses and other expenses incurred in connection with this Appeal, which the Respondent incurred, in the amount to be determined at the discretion of the Panel of Arbitrators".

VI. JURISDICTION

69. 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 the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

70. The Appellant relies on Article 58.1 of the FIFA Statutes as conferring jurisdiction on the CAS.

71. The jurisdiction of the CAS is not contested by the Respondent and has been confirmed by the Parties in signing the Order of Procedure.

72. It follows that the CAS has jurisdiction to decide this dispute.

VII. ADMISSIBILITY

73. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

74. The grounds of the Appealed Decision were notified to the Parties on 18 May 2017 and the Statement of Appeal filed on 8 June 2017, within the required twenty-one days set in Article R49 of the CAS Code and in Article 58 of the FIFA Statutes.

75. Furthermore, no objection in that respect has been raised by the Respondent.

76. It follows that the appeal is admissible safe for particular parts of it as explained below.

77. The Appeal Brief contains one new motion, that is *"[t]o order the Respondent to refund the amount so far received as transfer fee from the Appellant, that is to say, EUR 2,000,000"*. As reasoned by the Appellant, this motion was added further to the relief sought formulated in the Statement of Appeal due to the receipt by the Appellant of additional evidence (the letter of Metalist dated 16 June 2017, received only after the Statement of Appeal had already been filed) allegedly entitling the Appellant to claim reimbursement of any amount paid to the Respondent on the grounds of the Transfer Agreement.

78. The Sole Arbitrator observes that to the extent that there may be a modification of the relief sought in the Appeal Brief, as established in CAS jurisprudence, there is no specific provision in the CAS Code that forbids an appeal brief to go beyond the request for relief as formulated in the statement of appeal. Article R56 of the CAS Code clearly refers to the procedural phase after the appeal brief. Article R51 of the CAS Code, addressing the appeal briefs, does not specifically prohibit an amendment to the statement of appeal.

79. However, the modification of the relief sought should be confined within certain boundaries. As held in CAS 2014/A/3523 (with reference to other cases), *"[w]hile the* de novo *nature of the CAS Appeal Procedure allows a CAS Panel to take new facts into account, it does not free the Panel from the inherent constraint of any appeal procedure, which must remain within the scope of the first instance decision (cf., e.g., CAS 2007/A/1433, para. 36; CAS 2006/A/1206, para. 25). By deciding upon a decision which was not the subject matter of the first instance, the CAS Panel itself might be deemed to effectively decide as a first instance, thus exceeding its mandate"*.

80. As a general rule, the CAS traditionally considers that its power of review is limited by the object of the dispute such as delimited in the previous instance. Similarly, the Panel in CAS 2007/A/1426 stated as follows: *"Although, pursuant to art. R57 of the CAS Code, a CAS panel has full power to review the facts and the law and to issue a decision* de novo*, when acting following an appeal against a decision of a federation, association or sports-related body, the power of review of such panel is also determined by the relevant statutory legal basis and, therefore, is limited with regard to the appeal against and the review of the appealed decision, both from an objective and a subjective point of view. Therefore, if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the panel does not have the power to decide on it and the motion must be rejected"*.

81. Therefore, the added motion formulated in the Appeal Brief, that is *"[t]o order the Respondent to refund the amount so far received as transfer fee from the Appellant, that is to say, EUR 2,000,000"*, is not admissible and must be rejected. For the Sole Arbitrator to have the power to rule upon such claim, it should have been initially addressed to FIFA as a first instance.

VIII. APPLICABLE LAW

82. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

83. The matter at stake relates to an appeal against a FIFA decision, and reference must hence be made to Article 57.2 of the FIFA Statutes which states that:

"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".

84. Article 13 of the Transfer Agreement entered into between the Appellant and the Respondent provides as follows:

"In the matter not regulated herein FIFA regulations shall apply".

85. In light of the above, the Sole Arbitrator is of the view that the law applicable to the present appeal shall be primarily the FIFA regulations and Swiss law as subsidiary.

86. In relation to which FIFA regulations should be applicable to the present case, the Sole Arbitrator confirms that in accordance with Article 26.1 and 26.2 of the RSTP, and considering that the matter before FIFA was filed on 24 November 2014 with amendments on 29 April 2016, the FIFA RSTP 2014 edition is applicable to the matter at hand as to the substance.

IX. MERITS

87. The core principle that CAS applies when rendering an award is the *de novo* principle resulting from Article R57 of the CAS Code. According to Article R57, the Sole Arbitrator has full power to review the facts and the law of the case. Furthermore, the Sole Arbitrator may issue a new decision which replaces the challenged decision or may alternatively annul the decision and refer the case back to the previous instance.

88. Based on the Parties' submissions and oral argument, and despite the fact that the Sole Arbitrator has already found that the appeal is partially inadmissible, the issues for determination are the following:

a. Did the Player sign the Termination Agreement as well as a new employment contract with the Respondent?

b. Depending on the answer to (a) above, did the Player legally move from Metalist to the Respondent?

c. Depending on the answers to (a) and (b) above, did the Respondent validly transfer the Player to the Appellant, and is the latter liable for the payment of the transfer fee and the contractual default interest, in accordance with the Transfer Agreement?

A. Did the Player sign the Termination Agreement as well as a new employment contract with the Respondent?

89. The Sole Arbitrator considers that resolving the issue of authenticity of the Player's signature on the Termination Agreement and on his new employment contract with the Respondent is paramount to establishing whether the transfer transaction between the Respondent and the Appellant, underlying this dispute, is valid and, consequently, whether the Respondent is entitled to recovery under the Transfer Agreement.

90. The Appellant stated in its Appeal Brief, that *"[f]ew day before* [14 July 2014]*, the Player communicated the Appellant the end of his employment relationship with F.C. Metalist. In addition, the Player communicated the Appellant that had entered into a new employment contract with an also Ukrainian professional club* in casu *the Respondent"*.

91. However, the Appellant asserted that no evidence pointed out to any employment relationship between the Respondent and the Player and requested from the Respondent documents certifying the existence of such relationship and its registration with the FFU.

92. In making the aforementioned assertions, the Appellant relied on, and produced together with its Appeal Brief, a letter from Metalist dated 16 June 2017 alleging that from the end of the loan period, Metalist has been the only club holding 100% of the federative and economic rights of the Player. Metalist therefore implied that neither its contract with the Player has been validly terminated, nor has the Player been able to conclude a new one with the Respondent.

93. In its Answer, the Respondent confirmed that, on 18 July 2014, it concluded with the Player a "personal contract", duly registered with the Association of professional football clubs of Ukraine "Premier League". Also, the Respondent claimed that, at the time of conclusion of the personal contract, the Player had already terminated his employment relationship with Metalist and presented the Respondent with evidence of such termination.

94. To that effect, the Respondent produced, together with its Answer, the Termination Agreement dated 22 June 2012, ending the Contract between Metalist and the Player, as well as the Contract between Zorya and the Player, concluded on 18 July 2014.

95. Additionally, the Respondent highlighted in its Answer inconsistencies throughout the Appellant's submissions with regard to its position on the existence of an employment relationship between Metalist and the Player.

96. The Appellant contested the authenticity of the Player's signature on the above-mentioned agreements, stating that the signatures were allegedly not made by the writing hand of the Player, and submitted an Expert Report dated 13 October 2017 on that matter. After

examination of the Player's signatures on multiple documents, the expert, Mr. Reginaldo Tirotti, concluded that *"the challenged signatures WERE NOT made by the writing hand of X."* with a level of certainty of *"reasonable possibility"* ranging from 51 to 99 %.

97. Mr. Tirotti was examined at the hearing as an expert. At cross-examination, Mr. Tirotti explained that he received the documents bearing the Player's signature by Mr. Tannuri. He further stated that because the documents were communicated to him by a private person and are not originals, he based his belief that said documents are authentic solely on good faith.

98. When asked about his methodology, Mr. Tirotti disclosed that, while both similarities and divergences exist, he had decided to only focus his analysis on the latter. When he was asked to give a more precise estimate within the range of 51 to 99%, he also revealed that his opinion was based on a *"reasonable possibility"* of around 70%, because of the inadequate quality of the examined material.

99. At the hearing, the Respondent suggested that several factors discredit the Expert's credibility and that the report has been orientated. The Respondent pointed out to the short time of production of the report (1 day), as well as to the methodology, followed by the Expert and suggested to him by the Appellant, discarding all potential similarities between the signatures.

100. In addition, the Respondent stressed, in its Reply to the Appellant's letter dated 13 October 2017, that the validity of said agreements was recognized by the FFU and the CBF, and acknowledged by FIFA as evident in the FIFA TMS.

101. As a preliminary observation, the Sole Arbitrator notes the fact that counter-intuitively the Player has not been consulted or called as witness on this issue by the Appellant. As a result, the Sole Arbitrator finds that because the Expert is only relying on bad quality copies provided to him by a private person, he could not vouch to a level of certainty sufficient to establish such report as strongly reliable evidence with regard to the authenticity of the Player's signature. Further, the Sole Arbitrator finds not credible that the Player would not have signed the contested documents since, as admitted by the Appellant, the Player himself notified the Appellant of the termination of his relationship with Metalist and of entering into a new employment contract with the Respondent.

102. Also, the recognition by inscription and registration of the Player's sales, loans and transfers, by reputable football institutions, such as the FFU, the CBF and the FIFA TMS, points to the validity of the Player's signature to the disputed agreements.

103. The Sole Arbitrator will therefore consider, for the purposes of the following discussion, that neither the evidence presented, nor the Parties' submissions on that matter, put the Player's signatures to both agreements into question. Consequently, the Sole Arbitrator will regard said agreements as valid and decide the following items accordingly.

B. Depending on the answer to (a) above, did the Player legally move from Metalist's to the Respondent's club?

104. In view of the abovementioned finding that the Player's signatures on the Termination Agreement and on his new employment contract with the Respondent were authentic, nothing should have prevented the Player from legally moving from Metalist's to the Respondent's club.

105. However, as mentioned in paragraph 90 above, the Appellant filed with its Appeal Brief a letter from Metalist dated 16 June 2017 rejecting any and all such allegations and asserting that after 14 July 2014, Metalist retained, and never up until that date transferred, sold or loaned, 100% of the economic and federative rights of the Player. The letter expressly suggested that the Appellant might therefore have been the victim of a fraud: *"**Perhaps**, FC 'Cruzeiro' became a victim of fraud"* (emphasis added). It implies that the Appellant could not have legally acquired the rights of the Player if the latter never left Metalist.

106. In its Appeal Brief, the Appellant interpreted Metalist's letter, merely suggesting such scenario, as unequivocal evidence to a fraud *"planned by the Respondent and, possibly, the Player"*.

107. In response to such allegations, the Respondent questioned the value of said correspondence for the following reasons: i) Metalist's letter dated 16 June 2017 cannot explain why the Appellant delayed payments starting from 25 March 2016; ii) no evidence was provided demonstrating that Metalist had any interest in the Player after 2014 or has been constructing any legal defence of its allegedly violated rights, iii) the letter was signed on 16 June 2017 by Mr. Boytsan, the club's alleged "Sport director", whose power to represent the club is questionable as, since 9 June 2017, Metalist was officially represented by its insolvency manager. In that context, the Respondent claimed that the letter was signed by a person lacking the authority to represent the club in official correspondence.

108. At the hearing, the Appellant reiterated its position that it allegedly remained unclear how the Player moved from Metalist to the Respondent and brought up Metalist's letter in support of such statement.

109. With regard to the substance of the letter, it is no longer disputed by the Parties that Metalist *"did not transfer the economic and federal rights for football player X. to any other Club"* (Metalist's letter dated 16 June 2017). In other words, it is not disputed that Metalist did not sell the Player. This however does not mean that the Player has not left the club; indeed, in case an employment agreement is terminated – as was the case here – the Player is free to join the club of his choice, without the need for the new club to sign any kind of agreement with the old club.

110. The Sole Arbitrator notes that, in line with the good industry practices, registration with the leading football authorities is sufficient proof that the rights of a player have passed to a new club. The Respondent provided with its Answer the Termination Agreement, as well as the Player's then newly signed contract with the Respondent.

111. As the Respondent rightfully claimed in its Answer as well as in its letter dated 20 March 2018, both agreements bear the stamp of the FFU, establishing that said agreements have been duly registered by the federation. Additionally, in a letter dated 19 March 2018, the FFU confirmed that the Player had been registered with the Respondent's club from 18 July 2014 until 24 July 2014 and that the Player's international transfer certificate had been issued in favour of the CBF on 1 August 2014. Likewise, the CBF recognized the validity of the Player's employment contract with the Respondent by registering the Transfer Agreement and publishing it in its Daily Registration Bulletin dated 1 August 2014.

112. The Respondent also provided, together with its letter dated 20 March 2018, the Player's passport, bearing inscriptions of the Player's transfer history in the period 2012-2014.

113. Moreover, the Respondent rightfully pointed out to the Transfer Agreement between the Parties, which has been registered in the FIFA TMS after verification of the legitimate nature of the transaction, including verification of all preceding transactions involving the Player.

114. The Sole Arbitrator notes that it is widely accepted in the football community that registration with the leading institutions in the field establishes a rebuttable presumption that the chain of transactions, preceding the registered transfer, complies with the industry's legality requirements. No objection to the validity of such registrations has been brought to the Sole Arbitrator's attention. Based on the foregoing, the Sole Arbitrator finds that Metalist's letter does not introduce any new or relevant information for the resolution of the present dispute.

115. Regarding the formalities of the letter, the Sole Arbitrator has been presented with sufficient evidence in respect of Metalist's liquidation status. The Sole Arbitrator agrees with the Respondent that Metalist's letter has been authored by a person lacking the authority to officially represent the club.

116. Thereupon, after having examined its form and substance, the Sole Arbitrator discards Metalist's letter as irrelevant and unreliable evidence.

117. For the above reasons, the Sole Arbitrator deems unnecessary any evidence regarding the Player's move from Metalist's to the Respondent's club, other than the duly registered agreements terminating the Player's relationship with Metalist and establishing a new one with the Respondent. Said agreements establish with a reasonable degree of certainty that prior to signing the Transfer Agreement, the Respondent detained full economic and federative rights of the Player.

C. Depending on the answers to (a) and (b) above, did the Respondent validly transfer the Player to the Appellant, and is the latter liable for the payment of the transfer fee and the contractual default interest, in accordance with the Transfer Agreement?

i. Did the Respondent validly transfer the Player to the Appellant via the Transfer Agreement?

118. In its written and oral submissions, the Appellant questioned the validity of the Transfer Agreement by casting doubt on i) the Player's signature on the Termination Agreement as well as on his new employment agreement with the Respondent, and ii) the Respondent's ownership of 100% of the economic and federative rights of the Player when transferring him to the Appellant.

119. The Sole Arbitrator has established that the evidence the Appellant introduced to substantiate such claims is irrelevant and unreliable.

120. In light of the exhibits introduced by the Respondent with its Answer and Letter dated 20 March 2018 and referred to in (b) above, it appears that i) the Player was registered with Metalist on 22 June 2012, ii) he was loaned for a period of one year until 14 July 2014 to the Appellant who did not act upon the permanent transfer option contained in the Loan Agreement, iii) the Player returned to Metalist and terminated his relationship with the latter on 17 July 2014, iv) the Player signed a new employment contract with the Respondent on 18 July 2014, and v) the Respondent transferred the Player to the Appellant on 24 July 2014.

121. It follows therefrom that the Respondent detained 100% of the economic and federative rights of the Player and validly transferred such rights to the Appellant via the Transfer Agreement.

ii. Is the Appellant liable for the payment of the fourth instalment of the transfer fee and the default interest as per the terms of the Transfer Agreement?

122. It is undisputed that on 24 July 2014 the Appellant and the Respondent entered into the Transfer Agreement and that the Appellant partially executed said agreement by paying the first three instalments of the transfer fee with a delay.

123. In the Appealed Decision, the Single Judge of the FIFA's Players' Status Committee held that, in light of *"the basic legal principle of* pacta sunt servanda*, which in essence means that agreements must be respected by the parties in good faith as well as bearing in mind the fact that the conditions for the payment of the fourth instalment of the transfer fee and the deduction of half of the solidarity contribution had* in casu *both been met, the Single Judge decided that the Respondent had breached its contractual obligations towards the Claimant and should, as a consequence, be liable to pay the outstanding amount …".*

124. In its Appeal Brief, the Appellant referred to Articles 19 and 20 of the SCO. According to Article 20 of the SCO, *"[a] contract is void if its terms are impossible, unlawful or immoral"*. The Appellant also invoked Articles 119 and 62 of the SCO providing that i) an obligation is deemed extinguished when its performance is impossible by circumstances not attributed to the obligor, ii) under the principle of unjust enrichment, such obligor is liable for the

consideration already received, and iii) the proper remedy in cases of unjust enrichment is restitution.

125. The Appellant claimed that by not having any employment relationship with the Player, the Respondent had no right to either transfer him or request the payment of a transfer fee. This allegedly rendered the Transfer Agreement impossible. Such impossibility allegedly relieved the Appellant of any obligation to pay the fourth instalment and gave it a right to request reimbursement of the first three instalments already paid.

126. The Appellant confirmed at the hearing that Metalist's letter, calling into question the legitimacy of the Respondent's employment relationship with the Player, was the reason it decided not to pay the fourth instalment of the transfer fee. It, however, does not specifically address how said letter referred to its delayed payments of the first three instalments of the transfer fee.

127. In (b) above, the Sole Arbitrator excluded Metalist's letter as both irrelevant and unreliable evidence.

128. That being said, as rightfully pointed out by the Respondent in its Reply of 20 March 2018 to the Appellant's letter dated 13 October 2017, even assuming the content of Metalist's letter were true, this would not justify the Appellant's delayed payment of the first three instalments and the non-payment of the fourth instalment of the transfer fee due well before (between 2014-2016) such letter was received on 16 June 2017.

129. With regard to the above and based on the evidence on file, the Sole Arbitrator is satisfied that i) the Transfer Agreement was validly concluded between the Appellant and the Respondent, and ii) the Appellant has no viable defenses to contract enforcement.

130. Based on the Parties' written and oral arguments, the only remaining issue for determination is whether and to what extent the Respondent is entitled to recovery of the default interest and the fourth instalment of the transfer fee, under the Transfer Agreement.

131. The relevant provisions devoted to the Respondent's entitlement to receive the so requested relief are Articles 2, 3, 4 and 11 of the Transfer Agreement.

132. According to Article 2 of the Transfer Agreement:

"The totality (100%) of the economic and federative rights to the football Player, connected with the status of professional football player, is transferred to 'Cruzeiro' on a permanent basis".

133. Article 3 of the Transfer Agreement regarding the Appellant's payment obligations reads as follows:

"For the transfer of the Football Player, 'Cruzeiro' obliges to pay to the current bank account of FC 'Zarya' the transfer fee in amount of €3,500,000 (three million five hundred thousand Euro). Subject to the discounts set out in clause 11 below [Article 11 on solidarity contribution]*, FC 'Zarya' will receive the full amount described above as follows:*

€500,000 (five hundred thousand Euro) due on 25 September 2014;

€1,000,000 (one million Euro) due on 25 March 2015;

€500,000 (five hundred thousand Euro) due on 25 September 2015;

€500,000 (five hundred thousand Euro) due on 25 March 2016;

€500,000 (five hundred thousand Euro) due on 25 September 2016;

€500,000 (five hundred thousand Euro) due on 27 March 2017".

134. Under Article 4 of the Transfer Agreement on default interest:

"In case of delay of the 'Cruzeiro' in the payment of any amount due under clause 3 of this Contract for a period of over 10 (working) days from each of the due dates above, such amount shall be subject to interests on late payment at a rate of 0.2% (in words: zero point two percent) per day from and including the date such payment is due through and including the date upon which the 'Cruzeiro' has made bank wire transfer into the account designated by the FC 'Zarya'".

135. The Sole Arbitrator reiterates the importance of the *pacta sunt servanda* principle in the context of contract enforcement.

136. It has been established that the Respondent validly transferred to the Appellant 100% of the economic and federative rights of the Player on a permanent basis, thereby satisfying on its obligations under said agreement.

137. It is undisputed that the Appellant paid the first three of six instalments of the transfer fee but delayed some of the payments, thereby breaching the agreement.

138. Moreover, after a thorough examination, the Appellant's non-payment of the fourth instalment cannot be excused and therefore also amounts to a breach of the Transfer Agreement.

139. In light of the foregoing, the Respondent is entitled to receive compensation for the Appellant's breaches of the Transfer Agreement subject to the deduction of 2.5% as solidarity contribution as per the Appealed Decision.

140. The Sole Arbitrator therefore upholds the Appealed Decision and dismisses the present appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Cruzeiro EC on 8 June 2017 is dismissed.

2. The decision rendered by the Single Judge of the FIFA Players' Status Committee on 27 February 2017 is confirmed.

3. The motion advanced in the Appeal Brief filed by Cruzeiro EC on 27 June 2017 for refund of amounts received by FC Zorya Luhansk is rejected as inadmissible.

4. (…).

5. (…).

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