



Arbitration CAS 2018/A/5737 Cruzeiro E.C. v. Defensor Sporting Club, award of 9 April 2019

Panel: Mr Mark Hovell (United Kingdom), President; Mrs Margarita Echeverria (Costa Rica); Mr Manfred Nan (The Netherlands)

Football

Transfer of player

Inadmissibility of new legal submissions advanced during the hearing under Article R56 CAS Code

Proportionality of the penalty awarded

1. **According to Article R56, para. 1, of the CAS Code, unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submissions of the appeal brief and of the answer. Where no agreement exists between the parties in such respect and no exceptional circumstances may justify the new arguments introduced by the appellant, the new submissions are inadmissible.**
2. **A 5% penalty provided for in a Transfer Agreement over the amount of each defaulted instalment should be considered proportionate and valid.**

I. PARTIES

1. Cruzeiro Esporte Clube (“Cruzeiro” or the “Appellant”) is a football club with its registered office in Belo Horizonte, Brazil. Cruzeiro is currently competing in the Campeonato Brasileiro Série A, the highest division of professional football in Brazil. It is a member of the Brazilian Football Confederation (Confederação Brasileira de Futebol or “CBF”), which in turn is affiliated to the Fédération Internationale de Football Association (“FIFA”).
2. Defensor Sporting Club (“Defensor” or the “Respondent”) is a football club with its registered office in Montevideo, Uruguay. Defensor is currently competing in the Uruguayan Primera División, the highest division of professional football in Uruguay. It is a member of the Uruguayan Football Association (“UFA”), which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations

may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background facts

4. On 17 January 2015, Cruzeiro and Defensor concluded a transfer agreement relating to the transfer of the player G. (the “Player”) from Defensor to Cruzeiro (the “Transfer Agreement”).

5. The Transfer Agreement contained the following material clauses:

“(II) [Cruzeiro] is interested in hiring the services of the [Player] and therefore is interested in acquiring the federative and economic rights of the [Player], and for this reason, has agreed with [Defensor] the definitive acquisition of 100% of the federative rights and 50% of the economic rights of the [Player].

...

1.2 The parties also agree with the granting of 50% of the economic rights from the [Player] belonging to [Defensor]. In this way, [Defensor] and [Cruzeiro] put into effect a partnership for the economic rights of the [Player], so that, in the case of a future transfer of the sporting bond of the [Player] by [Cruzeiro] to any other entity, Brazilian or foreign, the financial result of such transaction shall be distributed as follows:

I – [Defensor]: 50% (fifty per cent);

II – [Cruzeiro]: 50% (fifty per cent).

...

2.1 For granting the totality of the federative rights and 50% of the economic rights of the [Player], as stipulated in clauses 1.1. and 1.2. of the present contractual instrument, [Cruzeiro] agrees to pay to [Defensor] the total net amount of EUR 4.030.000,00 (four million and thirty thousand Euros), in the following amounts and conditions:

I – first instalment, totalling EUR 2.000.000,00 (two million Euros), which shall be paid until 20 January 2015;

II – 29 (twenty-nine) monthly and consecutive installments [sic] of EUR 70.000,00 (seventy thousand Euros), the first due in 18 February 2015 and the last in 18 July 2017.

...

2.4 In the case [Cruzeiro] delays the payment of any of the installments [sic], as established in clause 2.1., it shall be added to the amount(s) of the overdue instalment(s) a fine of 5% (five per cent) over the amount of each defaulted instalment.

2.5 In the case of a delay of over 3 (three) months in the payment of any instalment [sic] or the delay in the payment of 3 installments [sic], all future installments [sic] can be considered automatically

enforceable, at the exclusive discretion of [Defensor], and, consequently, [Defensor] shall be entitled to immediately collect all remaining debt”.

6. On 5 November 2015, Defensor wrote to Cruzeiro putting the latter in default of payment of four instalments amounting to EUR 280,000. As at that stage 5 separate payments of instalments of EUR 70,000 each had been made out of the 9 that had fallen due.

B. Proceedings before FIFA

7. On 19 November 2015, Defensor lodged a claim before the FIFA Players’ Status Committee (the “FIFA PSC”) against Cruzeiro, requesting the following amounts:
- EUR 1,750,000 plus a default interest at a rate of 5% p.a. as from the date of said claim; and
 - EUR 17,500 as penalty of 5% over the amount of EUR 350,000.
8. Between 27 November 2015 and 29 March 2016, Cruzeiro paid Defensor the sum of EUR 630,000, in 4 payments, the first 3 in the sum of EUR 70,000 and the final payment in the sum of EUR 420,000.
9. On 20 July 2016, Cruzeiro submitted its answer to Defensor’s claim.
10. On 4 August 2016, Defensor submitted its reply to Cruzeiro’s answer. In this reply, Defensor requested the following amounts:
- EUR 63,000 as a 5% fine over the amount of EUR 1,260,000 (corresponding to 18 months’ instalments from February 2015 to July 2016); and
 - EUR 280,000 plus interest of 5%, corresponding to the late instalments for April – July 2016; and
 - EUR 840,000 plus 5% interest, corresponding to the remaining debt from August 2016 to July 2017;
 - Reimbursement of the advance of costs and payment of all procedural costs.
11. On 11 July 2017, Defensor submitted a further letter (the “Letter”) to the FIFA PSC amending its claim to request the following:
- To order Cruzeiro to pay EUR 1,050,000 as an outstanding transfer fee;
 - To order Cruzeiro to pay EUR 101,500 as a fine of 5% over the 29 instalments (EUR 2,030,000); and
 - To order Cruzeiro to pay a default interest of 5% p.a. as from the due dates of the referenced instalments until the date of effective payment.

12. On 29 August 2017, the Single Judge of the FIFA PSC (“Single Judge”) rendered a decision as follows (the “Appealed Decision”):

- “1. The claim of [Defensor], is partially accepted.
2. [Cruzeiro] has to pay to [Defensor] **within 30 days** as from the date of notification of this decision, the amount of EUR 1,050,000 as transfer compensation.
3. [Cruzeiro] has to pay to [Defensor], **within 30 days** as from the date of notification of this decision, the amount of EUR 101,500 as fine.
4. If the aforementioned amounts 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.
5. Any further claims lodged by [Defensor] are rejected.
6. The final costs of the proceedings in the amount of CHF 15,000 are to be paid by [Cruzeiro], within 30 days as from the date of notification of the present decision, as follows:
 - 6.1 The amount of CHF 5,000 has to be paid to [Defensor].
 - 6.2 The amount of CHF 10,000 has to be paid by [Cruzeiro], directly to FIFA to the following bank account...
7. [Defensor] is directed to inform [Cruzeiro] directly and immediately of the account number to which the remittances under points 2.,3. and 6.1 above are to be made and to notify the [FIFA PSC] of every payment received”.

13. In addition, in his reasoning the Single Judge concluded the following:

- “13. In continuation, the Single Judge acknowledged that [Defensor] requested a penalty amounting to 5% over the outstanding amount based on clause 2.4 of the contract and in addition a 5% annual interest over each of the outstanding instalments as from the relevant due date.
14. With regard to the claim for penalty the Single Judge took note that [Defensor] requested the amount of EUR 101,500, i.e. 5% of EUR 2,030,000.
15. The Single Judge was keen to emphasise that according to the long standing and well-established jurisprudence of the [FIFA PSC] in similar cases, a compensation or penalty for late payment cannot be requested together with default interest as both requests are punitive in nature and aim at compensating the creditor for late payment.
16. In this context, the Single Judge underlined that a 5% penalty over the amounts of EUR 2,030,000 seems to be a reasonable amount to compensate late payments.
17. In view of the foregoing, the Single Judge was of the opinion that a 5% penalty is neither excessive nor disproportionate.
18. Therefore, the Single Judge recalled, once again, the legal principle of *pacta sunt servanda* according to which [Cruzeiro] must honoured the obligations voluntarily assumed in the contract towards [Defensor].

19. *In view of all the above-mentioned considerations, the Single Judge decided that the claim of [Defensor] is partially accepted and that [Cruzeiro] has to pay to [Defensor] the amount of EUR 1,050,000 as outstanding transfer compensation as well as a penalty amounting to EUR 101,500”.*

14. On 19 April 2018, the parties were notified of the grounds of the Appealed Decision by the FIFA PSC.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 10 May 2018, in accordance with Article R47 of the Code of Sports-related Arbitration (the “CAS Code”), Cruzeiro filed a Statement of Appeal with the CAS challenging the Appealed Decision and requesting the following prayers for relief:

“On the merits

FIRST – To dismiss in full the Appealed Decision;

SECOND – To accept the present appeal;

At any rate:

THIRD – To order [Defensor] to pay all arbitration costs and be ordered to reimburse [Cruzeiro] the minimum CAS Court Office fee of CHF 1,000 and any other advance of costs paid to the CAS;

FOURTH - To order [Defensor] to pay to [Cruzeiro] any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel”.

16. In its Statement of Appeal, Cruzeiro requested the appointment of a sole arbitrator to deal with this matter. In this regard, Cruzeiro suggested Mr Juan Pablo Arriagada Aljaro, Attorney-at-Law, Santiago, Chile, as sole arbitrator.

17. On 22 May 2018, Defensor wrote to the CAS Court Office stating that it disagreed with Cruzeiro’s request for a sole arbitrator to be appointed. Pursuant to Article R50 of the CAS Code, Defensor requested that a panel of three arbitrators be appointed. In accordance with Article R53 of the CAS Code Defensor nominated Mr Manfred P. Nan, Attorney-at-Law, Arnhem, The Netherlands, as arbitrator. Defensor also confirmed that it would not be paying its share of the advance of costs, and requested that its time limit to file its Answer be fixed after the payment of its share of the advance of costs by Cruzeiro.

18. On 25 May 2018, in accordance with Article R51 of the CAS Code, Cruzeiro filed its Appeal Brief with the CAS, requesting the following prayers for relief:

“FIRST – To confirm that the penalty imposed by the Appealed Decision on [Cruzeiro] is disproportionate and abusive;

SECOND – To reduce such penalty to an amount never higher than EUR 52,500;

THIRD – To order [Defensor] to pay all arbitration costs and be ordered to reimburse [Cruzeiro] the minimum CAS Court Office fee of CHF 1,000 and any other advance of costs paid to the CAS; and

FOURTH - To order [Defensor] to pay to [Cruzeiro] any contribution towards the legal and other costs incurred and regarding the ongoing proceedings amounting CHF 5,000.

Alternatively and only in the event the above is rejected,

FIFTH - To confirm that the penalty imposed by the Appealed Decision on [Cruzeiro] is disproportionate and abusive;

SIXTH – To reduce such penalty, to an amount never higher than EUR 63,000 in accordance to the replica filed by [Defensor] before FIFA;

SEVENTH - To order [Defensor] to pay all arbitration costs and be ordered to reimburse [Cruzeiro] the minimum CAS Court Office fee of CHF 1,000 and any other advance of costs paid to the CAS; and

EIGHTH - To order [Defensor] to pay to [Cruzeiro] any contribution towards the legal and other costs incurred and regarding the ongoing proceedings amounting CHF 5,000.

Alternatively and only in the event the above is rejected,

NINTH - To confirm that the penalty imposed by the Appealed Decision on [Cruzeiro] is disproportionate and abusive;

TENTH – To reduce such penalty, to an amount never higher than EUR 84,000 in accordance to the replica filed by [Defensor] before FIFA;

ELEVENTH - To order [Defensor] to pay all arbitration costs and be ordered to reimburse [Cruzeiro] the minimum CAS Court Office fee of CHF 1,000 and any other advance of costs paid to the CAS; and

TWELFTH - To order [Defensor] to pay to [Cruzeiro] any contribution towards the legal and other costs incurred and regarding the ongoing proceedings amounting CHF 5,000”.

19. On 6 June 2018, the CAS Court Office wrote to the parties confirming that pursuant to Article R50 of the CAS Code, the CAS Appeals Arbitration Division has decided to submit the present procedure to a panel composed of three arbitrators. Accordingly, Cruzeiro was invited to nominate an arbitrator of its choice.

20. On 18 June 2018, Cruzeiro wrote to the CAS Court Office appointing Ms Margarita Echeverria Bermúdez, Attorney-at-Law, San José, Costa Rica as arbitrator.

21. On 25 July 2018, the CAS Court Office, in accordance with 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 this case was constituted as follows:

President: Mr Mark A. Hovell, Solicitor, Manchester, United Kingdom

Arbitrators: Ms Margarita Echeverria Bermúdez, Attorney-at-Law, San José, Costa Rica

Mr Manfred P. Nan, Attorney-at-Law, Arnhem, The Netherlands.

22. On 16 August 2018, in accordance with Article R55 of the CAS Code, Defensor filed its Answer to Cruzeiro's Appeal. In its Answer, Defensor made the following requests for relief:
- "a) *Fully dismiss the Appeal filed by [Cruzeiro] against the [Appealed Decision];*
 - b) *Condemn [Cruzeiro] to pay CHF 15,000 for the legal expenses of [Defensor], as well as all the expenses incurred by him during these procedures, and finally, paying the totality of the advance of costs and FIFA's costs.*
 - c) *Proceed in an expedited manner in accordance with article 44.4 of the CAS Code, once this case does not require an extensive investigation".*
23. On 24 October 2018, the CAS Court Office sent the parties the Order of Procedure, which was returned duly signed on 31 October 2018 by both Cruzeiro and Defensor.
24. A hearing was held on 13 November 2018 at the Lausanne Palace Hotel in Lausanne, Switzerland. The parties did not raise any objection as to the composition of the Panel. The Panel were all present and was assisted by Mr William Sternheimer, Counsel to the CAS. The following persons attended the hearing:
- i. Cruzeiro: Mr Andre Oliveria de Meira Ribeiro, external counsel and Mr Benecy Queiros, Technical Director;
 - ii. Defensor: Mr Eduardo Carlezzo, external counsel.
25. The Panel heard from Mr Queiros, who was invited by the President of the Panel to tell the truth subject to the sanctions of perjury. The parties and the Panel had the opportunity to examine and cross-examine the witness. The parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. The hearing was then closed and the Panel reserved its detailed decision to this written Award.
26. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. The Panel has carefully taken into account in its subsequent deliberation 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.

IV. THE PARTIES' SUBMISSIONS

27. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. Cruzeiro's Submissions

28. In summary, Cruzeiro submitted the following in support of its Appeal and its request for the Appealed Decision to be set aside:
- The imposition of the penalty in the Appealed Decision was without any factual or legal grounds, and was also the result of a procedural violation at FIFA (i.e. the acceptance of an unsolicited submission by Defensor);
 - The penalty imposed is excessive considering the facts of this dispute and the claims made by Defensor at FIFA; and
 - The penalty applicable should be limited to EUR 52,500, or alternatively EUR 63,000 or, in the further alternative, EUR 84,000.

29. In particular, Cruzeiro submitted the following:

I. Procedural issues

a) Lack of reasoning for the findings

30. Cruzeiro submitted that as FIFA was a Swiss association registered in the Commercial Register of the Canton of Zurich according to Article 60 *et seq.* of the Swiss Civil Code ("CC"), it has a legal obligation to comply with its own statutes.
31. Cruzeiro cited Articles 2(c) and 8 of the FIFA Statutes and submitted that it "*is undisputed that the purpose of the FIFA legislator was to limit the regulatory and decisional freedom from the members of its decision-making bodies in order to protect the members of FIFA as [sic] whole*". Consequently, the members of a decision-making body are not entitled to render decisions, which eventually disrespect the regulations drafted by FIFA.
32. In this regard, Cruzeiro noted that CAS jurisprudence (*CAS 2007/A/1298 & 1299 & 1300*) has stated as follows:
- "Several mandatory principles of Swiss law limit the regulatory and decisional freedom of an association in order to protect its members. One such principle is that an association must correctly apply its own regulations, another being that its regulations must be applied and its decision made in a predictable and cognisable manner, notably to ensure equality of treatment and due process"*.
33. Cruzeiro cited Articles 14(4)(f) and 5(8) of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("FIFA Procedural Rules") which provides that parties are entitled to a motivated decision outlining FIFA's reasons for a decision.
34. In this case, the Single Judge "*without providing any clarification whatsoever*" decided in the Appealed Decision that "*a 5% penalty over the amount of EUR 2,030,000 seems to be a reasonable amount to compensate late payments*". Cruzeiro submitted that the Single Judge "*failed to indicate the premises,*

principles or evidences that drove the latter” to reach such a conclusion and as such, he “failed to fulfil the terms and conditions set out in Art. 14(4)(f) of the FIFA Procedural Rules”.

35. Accordingly, Cruzeiro submitted that the Single Judge failed to comply with the minimal procedural pre-requisites set out in the Procedural Rules, *“which resulted into an incontestable violation of the statutory obligation that all bodies of FIFA shall observe and respect during their activities”.*

b) *Late submission*

36. Cruzeiro submitted that during the proceedings before the FIFA PSC, Defensor provided its final written comments on 4 August 2016. However, on 11 July 2017 Defensor submitted an *“unsolicited letter”* to the FIFA PSC (“the Letter”), amending its prayers for relief and in particular, requesting the imposition of a new penalty of 5% over the 29 instalments due as a transfer fee – amounting to EUR 101,500.

37. Cruzeiro noted that pursuant to Article 9(4) of the Procedural Rules:

“The parties shall not be authorised to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after the notification of the closure of the investigation. The FIFA administration may, however, at any time request additional statements and/or documents”.

38. Cruzeiro submitted that despite the above, the FIFA PSC not only took into account the Letter, but also failed to give it a chance to respond or rebut Defensor’s allegations and claims. This amounted to *“an unacceptable violation of imperative procedural principles of law”* including Cruzeiro’s right to be heard and the principle of adversarial process (*principe du contradictoire*). Accordingly, the fine imposed in the Appealed Decision of EUR 101,500 *“rests on unfair, improper and intolerable premises of law”.*

39. As such, Cruzeiro requested that the Panel set aside in full the penalty claimed by Defensor in the Letter as it was legally baseless.

II. Excessiveness of the penalty

40. Cruzeiro submitted that in any event, the Appealed Decision did not have any valid factual or legal grounds. Cruzeiro noted that the principle of party autonomy was a pillar of Swiss law, which was implemented by concepts such as the principle of freedom of contract, which has the following aspects:

- The freedom to enter or not into a contractual agreement;
- The freedom of choice of the contractual partner;
- The freedom to establish the content of the contractual provisions; and
- The freedom to choose the form of the contract.

41. FIFA thus always granted its members the necessary contractual autonomy to negotiate contracts of any sort *“as long as they obviously were not impossible, unlawful, immoral and/ or contravened public policy or personal rights”*.
42. Cruzeiro stated that Defensor *“always performed with outraged bad-faith”* by stating that it had never paid the referenced instalments in the correct manner.
43. Cruzeiro stated that there was no dispute between the parties that it had paid the instalments for March 2015, May 2015, June 2015, August 2015 and March 2016. Defensor did not challenge this in its submission to FIFA on 19 November 2015. It was only in the Letter did it claim otherwise.
44. Cruzeiro stated that Article 86, par. 1 of the Swiss Code of Obligations (“CO”) provides that:
“A debtor which several debts to the same creditor is entitled to state at the time of payment which debt he means to redeem”.
45. In light of the above, Cruzeiro requested that the Panel rejects any claims by Defensor in the Letter regarding the incorrect payment of instalments.
46. Cruzeiro also noted that Article 163, par. 3 of the CO states that *“[a]t its discretion, the court may reduce penalties that it considers excessive”*. In line with the above, the Swiss Federal Tribunal stated in ATF 82 II 142 that:
“[a] penalty may be defined as excessive when its amount is, at the time of the judgement, abusive. According to the Tribunal Federal, a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount considering justice and equity”.
47. Cruzeiro submitted that CAS jurisprudence (*CAS 2010/A/2317* and *CAS 2011/A/2323*) provided that:
“A balance of interest 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 debtor’s fault, along with financial situation of both parties, are determinant. The nature of the agreement, the debtor’s professional background and the aim of the penalty also have to take into consideration in the balance”.
48. Cruzeiro argued that when taking a “balance of interest” approach, the facts of this dispute conclude that a penalty of 5% over all 29 instalments is an inadmissible approach. Cruzeiro argued that it is undisputed that the creditor never demonstrated any proper intention nor interest to claim the aforementioned penalty – until the Letter which was only filed 11 months after Defensor’s submission to FIFA. Cruzeiro argued that this confirmed *“beyond any doubt that lack of interest from [Defensor] to claim such legally groundless penalty and the necessary basis to the Panel, in any case, reduce it within a fair and reasonable amount”*.
49. Cruzeiro argued that it tried as much as possible to pay Defensor the amount agreed and noted that it had already paid more than three quarters of the total amount due. Further, on

11 July 2017, Cruzeiro proposed “*a very reasonable*” payment plan to pay the outstanding amount which Defensor rejected.

50. Cruzeiro submitted that its failure to pay the referenced amounts was due to the “*deep economic crisis faced by Brazilian clubs*” and a combination of other factors, such as FIFA’s abrupt prohibition on third party ownership – which had a “*horrendous outcome to every single club in South America*”. Cruzeiro submitted that these exceptional circumstances should act as mitigating factors when considering the penalty that should be imposed on it.

III. Breakdown of the penalty calculation

51. Cruzeiro submitted that when calculating the relevant penalty amount, only the outstanding amounts between April 2016 and June 2017 – totally EUR 1,050,000 – should be considered. Therefore, the penalty should not exceed EUR 52,000 (EUR 1,050,000 x 5%).
52. Alternatively, in the event the Panel disagrees with the above, the penalty amount should be the amount claimed by Defensor in its initial submission at FIFA, i.e. EUR 63,000.
53. In the further alternative, Cruzeiro argued that the Panel should take into account the payment of instalments which were made on time. The monthly penalty amounted to EUR 3,500 (EUR 70,000 x 5%). As 5 instalments were paid on time, the penalty should therefore be limited to EUR 84,000 (3,500 x 24 months).

B. Defensor’s Submissions

54. In summary, Defensor submitted, that the Appealed Decision should be upheld. Cruzeiro did not pay a single instalment on the due date and it still owes EUR 1,050,000 to Defensor. The penalty awarded by the FIFA PSC was not excessive at all, the Letter was sent before the FIFA PSC closed its investigation phase and Cruzeiro’s rights were respected by the FIFA PSC.

I. The dates of payment

55. Defensor submitted that the payments occurred as follows:

INSTALMENT	AMOUNT	DUE DATE	DATE OF PAYMENT
1/29	EUR 70,000	18 February 2015	23 March 2015
2/29	EUR 70,000	18 March 2015	13 May 2015
3/29	EUR 70,000	18 April 2015	19 June 2015
4/29	EUR 70,000	18 May 2015	4 August 2015
5/29	EUR 70,000	18 June 2015	20 August 2015
6/29	EUR 70,000	18 July 2015	27 November 2015

7/29	EUR 70,000	18 August 2015	5 February 2016
8/29	EUR 70,000	18 September 2015	3 March 2016
9/29 10/29 11/29 12/29 13/29 14/29	EUR 420,000	18 October 2015 18 November 2015 18 December 2015 18 January 2016 18 February 2016 18 March 2016	29 March 2016

56. Due to payments being made by Cruzeiro during the course of proceedings at FIFA, Defensor simply updated FIFA periodically about these payments and reduced the amounts being requested. Defensor noted that the Letter was sent on 11 July 2017, which was before the investigation phase was closed. The investigation phase was only closed on 11 August 2017 (i.e. one month later).

57. In summary, only the first instalment of EUR 2,000,000 due on 2 January 2015 was paid on time. Out of the remaining 29 instalments, only 14 were paid and all of them were after the due date.

II. The penalty is not excessive

58. Defensor noted that Cruzeiro did not request the Panel to reduce the penalty rate of 5%, nor did it request the Panel to set aside the penalty. Instead, Cruzeiro were claiming that the Panel should calculate the amount of interest using different parameters, which Defensor rejected as “irrelevant” and requested the Panel to reject without further consideration.

59. Defensor notes that clause 2.4 of the Transfer Agreement stated (emphasis added):

“In the case CRUZEIRO delays the payment of any of the instalments, as established in clause 2.1, it shall be added to the amount(s) of the overdue instalment(s) a fine of 5% (five per cent) over the amount of each defaulted instalment”.

60. Defensor noted that it was clear that Cruzeiro failed to pay any of the 29 instalments on time, which was enough to determine that the 5% penalty was applicable to all the instalments, totalling EUR 101,500 (5% of EUR 2,030,000). Moreover, Defensor noted that the Appealed Decision clearly stated that this was not excessive or disproportionate.

61. Defensor rejected Cruzeiro’s argument that nothing prevented the latter from paying the instalments within a different date than the 18th day of each month, so long as it occurred monthly and between 18 February 2015 and 18 July 2017. Defensor argued that clause 2.1 of the Transfer Agreement made it clear that the instalments were all due on the 18th day of each month.

62. In the event the Panel considers that clause 2.1 of the Transfer Agreement is not clear and needs interpretation, Defensor submitted that Article 18 of the CO stated (emphasis added):

*“When assessing the form and terms of a contract, **the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations** they may have used either in error or by way of disguising the true nature of the agreement”.*

63. Defensor noted that *“by setting the first instalment to 18 February 2015 and the others due on a monthly and consecutive basis, the parties clearly intended to set all the subsequent instalments to the 18th day of each month, which is also corroborate by setting the last instalment to 18 July 2017. The words “monthly and consecutive” clearly give the meaning of a recurrent periodicity, which, in case, meant that the remaining instalments would be due on the 18th day of each subsequent month”.*
64. Furthermore, the Transfer Agreement was originally drafted in Portuguese by Cruzeiro, meaning that in case of any doubt, it should be interpreted against Cruzeiro and in favour of Defensor pursuant to the principle of *in dubio contra stipulatorem* (CAS 2007/A/1219, CAS 2016/A/4556).
65. With respect to the CO, Defensor noted that Article 87 par. 1 stated:
- “Where no valid debt redemption statement has been made and the receipt does not indicate how the payment has been allocated, it is allocated to whichever debt is due or, if several are due, to the debt that first gave rise to enforcement proceedings against the debtor or, in the absence of such proceedings, to the debt that fell due first”.*
66. Considering that Cruzeiro never indicated at the time of payment which instalment it was paying, Defensor was entitled to allocate the payments to the most outstanding amounts.
67. Defensor submitted that if anything, the penalty amount was low, but in any event it was *“freely established by the parties”*, in accordance with Article 163(1) of the CO, which states that parties *“are free to determine the amount of the contractual penalty”*. Moreover, pursuant to the principle of *pacta sunt servanda*, the reduction of the penalty shall be reserved for very exceptional cases (CAS 2015/A/4139), which was not the case here.
68. Further, Defensor noted that if FIFA had properly granted interest (instead of rejecting it as it did), the amount of interest granted on the amounts overdue for almost 3 years would amount to much more than the 5% penalty.

III. The alleged procedural violations at FIFA

69. The Letter merely updated the FIFA PSC on the amounts due to and penalty claimed by Defensor. There were no new legal arguments made. Further, FIFA waited another month before closing the investigation phase, so Cruzeiro had time enough to respond. The Letter acknowledged that 14 of the 29 instalments had been made and therefor Defensor was reducing its claim when writing to FIFA.
70. In addition, the Panel, pursuant to Article R57 of the CAS Code deals with these issues on a *de novo* basis, which would cure any violations at first instance.

IV. The burden of proof

71. Defensor noted that pursuant to Article 8 of the CC, *“the burden of proving the existence of an alleged fact shall rest upon the person who derives rights from that fact”*.
72. It submitted that it have provided clear evidence of when instalments were paid, whereas Cruzeiro’s submissions were not supported by any real evidence.

V. JURISDICTION OF THE CAS

73. Article R47 of the CAS Code provides as follows:

“An appeal against a decision of a federation, association or sports related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or regulations of that body”.

74. The jurisdiction of the CAS, which was not disputed, derives from Article 67.1 of the FIFA Statutes as it determines that:

“Appeals 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”.

75. The jurisdiction of CAS was not disputed by either of the parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both parties.
76. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

77. 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”.

78. According to Article 67, para. 1 of the FIFA Statutes, appeals *“shall be lodged with CAS within 21 days of notification of the decision in question”*.
79. The Statement of Appeal, which was filed on 10 May 2018, within the time limit stipulated by Article R48 of the CAS Code, complied with the requirements of Articles R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee. The Appeal Brief was filed on 25 May 2018 and, thus, within the time limit stipulated by Article R51 of the CAS Code.

80. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

81. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

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

82. Article 57(2) of the FIFA Statutes states:

“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”.

83. Accordingly, the Panel rules that the FIFA Statutes and the various FIFA regulations apply, with Swiss law applying to fill in any gaps or lacuna, when appropriate.

VIII. MERITS OF THE APPEAL

A. The Main Issues

84. The Panel notes the parties do not dispute that the sum of EUR 1,050,000 remains due to Defensor from Cruzeiro and seem to accept that the Appealed Decision is correct in awarding that sum to be paid by Cruzeiro to Defensor, despite its initial prayer for relief in its Statement of Appeal, when it requested that the Panel *“dismiss in full the appealed Decision”*. The prayers for relief in Cruzeiro’s Appeal Brief supersede that request and to the extent they were not intended to, the Panel determines not to dismiss the Appealed Decision in full.

85. Focusing on the prayers for relief of Cruzeiro in its Appeal Brief, the Panel notes that they are directed against the penalty awarded by the FIFA PSC in the Appealed Decision and are framed in the alternative. The first set of prayers look to challenge the penalty in the Appealed Decision as being *“disproportionate and abusive”* and suggests that the amount of such penalty should be *“never higher than EUR 52,500”*. The first alternative set of prayers repeat the general challenge but then suggest that the amount of such penalty should be *“never higher than EUR 63,000”*, with the final alternative again repeating the general challenge but then suggest that the amount of such penalty should be *“never higher than EUR 84,000”*. The Panel will therefore consider whether the penalty was disproportionate and abusive or not, and in any event, what is the correct amount of the penalty, if any.

86. The Panel noted that during the hearing, counsel for Cruzeiro sought to advance new legal submissions relating to (a) an alleged failure by Defensor to notify Cruzeiro (it only notified FIFA with the Letter, which was itself apparently unsolicited) that it was triggering clause 2.5

of the Transfer Agreement; and (b) that Defensor had waived its rights to exercise such clause, having already accepted 5 late instalments.

87. The Panel notes that Article R56, par. 1, of the CAS Code reads as follows:

“Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submissions of the appeal brief and of the answer”.

88. The Panel notes that there was no agreement between the parties in such respect and that there are no exceptional circumstances which may justify the new arguments introduced by the Appellant. In addition to the above, the Panel further notes that it is unable to accept late submissions, also on the basis of Article R44.2 of CAS Code:

“The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant”.

89. In any event, it seems to the Panel that the Letter was not unsolicited, as FIFA closed the investigatory proceedings the month after that correspondence; further, nowhere in clause 2.5 of the Transfer Agreement does it establish a requirement to notify Cruzeiro (however, the Panel will examine below when Defensor exercised its discretion, as required by that clause); and finally, there was no evidence brought before the Panel that Defensor had waived its contractual rights to a penalty that automatically attached to all late payments of any instalment.

a) Was the penalty disproportionate and abusive or not?

90. The Panel notes that Cruzeiro based its position on 3 different aspects:

- a) That the Appealed Decision lacked the necessary reasoning for the findings of the FIFA PSC;
- b) That the Letter was unsolicited and did not represent notice to Cruzeiro that the entire balance of instalments were being claimed by Defensor; and
- c) That the penalty clause was excessive and should be reduced pursuant to Article 163.3 of the CO.

91. Taking each of these in turn, the Panel ultimately determines that the penalty was not disproportionate or abusive and therefore is valid.

92. Firstly, the lack of reasoning in the Appealed Decision. The Panel determined that whilst the FIFA PSC could have added more reasoning, it was clear that it had determined that every instalment had been paid late, so they awarded 5% on all 29 of them. Whether that decision was right or wrong is reviewed below, but anyone looking at the Transfer Agreement could see where the 5% came from and where the 29 instalments came from.

93. Secondly, with regards to the Letter, the Panel would not class this as “unsolicited”. As every month went on, the position changed. As such, the Panel (as FIFA did too), treated the Letter as updating the FIFA PSC on the most up to date information regarding the sums due to it.
94. Defensor’s claims before FIFA were somewhat inconsistent with each other. The first claim was made on 19 November 2015. Defensor claimed all the unpaid instalments with interest, but it appeared to acknowledge that 5 instalments were late at that stage, as it requested the penalty over EUR 350,000 of arrears. The second updated claim was made on 20 July 2016, after Cruzeiro had made a number of payments. This time Defensor claimed the penalty over 18 instalments, but seemed to separately acknowledge that 4 instalments were in arrears and 14 were still due. Finally, on 11 July 2016, by the Letter, Defensor claimed that all the remaining EUR 1,050,000 was due to it and separately claimed the penalty over all 29 instalments.
95. It was at this juncture that Defensor stopped distinguishing between arrears of instalments and future instalments. The Panel therefore takes this moment in time as when Defensor exercised its discretion, as required by clause 2.5 of the Transfer Agreement to claim all outstanding instalments from Cruzeiro.
96. Thirdly, the Panel does not find that the 5% penalty in clause 2.4 of the Transfer Agreement is excessive. Indeed the Panel notes that it is less than Defensor’s claim for 5% interest (which was denied by the FIFA PSC in the Appealed Decision and as the same was not appealed by Defensor, that part of the decision is final and binding) as interest is calculated on an annual basis, whereas the penalty is a one off fine.
97. In summary, the Panel did not accept any of Cruzeiro’s arguments against the proportionality of the penalty, nor did it find it abusive.

b) *In any event, what is the correct amount of the penalty, if any?*

98. The Panel must first address when the due date for the payment of each instalment was. The Transfer Agreement did not actual expressly spell out that each instalment must be made on a certain day each month. However, the Panel did note that clause 2.1 II of the Transfer Agreement did specify the date that the first and last instalments would be due, whilst not stating any date at all for the other, save that they were to be made monthly. That date was the 18th of the month for those two instalments. The Panel, applying the CO to interpret the Transfer Agreement determine that the due date for all instalments was intended to be the 18th of each month.
99. The Panel reminds itself of the wording of clause 2.4 of the Transfer Agreement:

“2.4 In the case [Cruzeiro] delays the payment of any of the installments [sic], as established in clause 2.1., it shall be added to the amount(s) of the overdue instalment(s) a fine of 5% (five per cent) over the amount of each defaulted instalment”.

100. The Panel has taken note of the evidence put forward by the parties and determines that as at the 11 July 2016, all of the instalments that had fallen due to be paid by Cruzeiro had either been paid late or were still outstanding. Further, as no further payments were made from that date, by the time the FIFA PSC considered the matter, as Defensor had by then exercised its discretion under clause 2.5 of the Transfer Agreement, any remaining instalments had then become due too and had not been paid.
101. The upshot being that all 29 instalments were either paid late or remained unpaid, which meant that all 29 instalments were within the scope of clause 2.4 of the Transfer Agreement and attracted the 5% penalty.
102. As such, the Panel agrees with the calculations of the FIFA DRC.

B. Conclusion

103. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel dismisses the Appeal by Cruzeiro in its entirety and upholds the Appealed Decision.
104. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Cruzeiro Esporte Clube on 10 May 2018 against the Decision of the Single Judge of the FIFA Players' Status Committee of 29 August 2017 is dismissed.
2. The Decision of the Single Judge of the FIFA Players' Status Committee of 29 August 2017 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.