

**Arbitration CAS 2018/A/5805 Cruzeiro EC v. FC Zarya Luhansk, award of 22 August 2019**

Panel: Mr Diego Ferrari (Argentina), Sole Arbitrator

Football

Transfer

Res judicata

An arbitral tribunal violates procedural public policy if it disregards the *res judicata* effect of a previous decision or if the final award departs from the opinion expressed in an interlocutory award disposing of a material preliminary issue. The traditional approach to the principle of *res judicata* which limits its effects only to the negative aspect, the *ne bis in idem*, by the strict verification of the “triple identity” test (same subject matter or relief, same legal grounds and same parties) may not be the most compatible with other fundamental and widely recognized procedural principles such as the principle of certainty and the principle of economy. This line of jurisprudence was adopted by CAS which concluded that the procedural concept of *res judicata* has two elements: 1) the so-called “Sperrwirkung” (prohibition to deal with the matter = *ne bis in idem*), the consequence of this effect being that if a matter (with *res judicata*) is brought again before the judge, the latter is not even allowed to look at it, but must dismiss the matter (insofar) as inadmissible; and 2) the so-called “Bindungswirkung” (binding effect of the decision), according to which the judge in a second procedure is bound to the outcome of the matter decided in *res judicata*.

I. PARTIES

1. Cruzeiro EC (“Cruzeiro” or the “Appellant”) is a Brazilian professional football club with its principal place of business at Belo Horizonte, Brazil. It is a member of the Confederação Brasileira de Futebol (“CBF”), which in turn is affiliated to the Fédération Internationale de Football Association (“FIFA”).
2. FC Zarya Luhansk (“FC Zarya” or the “Respondent”) is a Ukrainian professional football club with principal place of business at Luhansk, Ukraine. It is a member of the Football Federation of Ukraine (“FFU”), which in turn is affiliated to the FIFA.

II. FACTUAL BACKGROUND

3. This appeal is brought by Cruzeiro, against a decision of the Single Judge of the Players’ Statute Committee of the FIFA (the “Appealed Decision”) handed down on 17 April 2018, imposing

on the Appellant the payment of EUR 975,000, plus interest, to FC Zarya in the context of a sell-on fee related to the transfer of the player X. (the “Player”).

4. Below is a summary of the main relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced. 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, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.
5. Since 22 June 2012, FC Metalist was the registered owner of the federative and economic rights for the Player.
6. On 15 July 2013, FC Metalist agreed –on a loan basis– to transfer the Player to Cruzeiro for the period between 15 July 2013 and 14 July 2014. In addition, Cruzeiro was granted an option to convert the transfer in a permanent engagement if the amount of EUR 4,000,000 was paid to FC Metalist no later than 14 July 2014 (the “Loan Agreement”). This option was, however, not executed by Cruzeiro.
7. On 17 July 2014, FC Metalist and the Player mutually agreed to conclude their relationship and signed an additional agreement to their employment contract (the “Termination Agreement”). And, on the following day, 18 July 2014, the Player and Zarya entered into a two-year employment agreement.
8. On 24 July 2014, Zarya and Cruzeiro signed an agreement (the “Transfer Agreement”) for the permanent transfer of the Player.
9. Pursuant to Article 3 of the Transfer Agreement, Cruzeiro undertook to pay Zarya the total amount of EUR 3,500,000 payable in six instalments (alternatively “Instalment” or “Instalments” if referred collectively to more than one) to be paid every six months, starting on 25 September 2014 while the last receivable was to be paid on 25 March 2017 according to the following calendar:
 - 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 on 25 September 2016
 - EUR 500,000 due on 25 March 2017
10. Article 4 of the Transfer Agreement stated that: “[i]n 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 FC Zarya”.

11. Furthermore, it was agreed in Article 11 of the Transfer Agreement that: *“Cruzeiro’ 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 (por rata) 2,5% from each of the instalments set out in clause 3 above”*.
12. Appellant paid –with delays– the first three Instalments (due on 25 September 2014, 25 March 2015, and 25 September 2015 respectively) but failed to pay the fourth Instalment which was due on 25 March 2016.
13. On 24 November 2014, Zarya lodged a claim with FIFA demanding from Cruzeiro the payment of the accrued default interests for late payment of the three first Instalments. The filing was amended by Zarya, on 29 April 2016, to include in the proceedings –and cumulate to the original demand– the monies corresponding to Instalment four which was then outstanding (“FIFA Case #15-00231”).
14. On 28 February 2017, the Single Judge sitting on the FIFA Case #15-00213 handed down a decision upholding partially the Respondent’s demands and ordering Cruzeiro to pay the default interests accrued on the delay payment of the three first Instalments and the monies corresponding to the fourth Instalment (“FIFA’s First Decision”).
15. On 8 June 2017, Cruzeiro applied to CAS for the reversal of FIFA’s First Decision and filed the statement of appeal which initiated the proceedings for the case #5195 (“CAS 2017/A/5195”).
16. On 16 June 2017, Mr. Aleksander Boystan, acting as Sports Director of the FC Metalist, signed a letter (“FC Metalist’s Letter”) in which it is informed to the intended recipient that the management of said club *“(…) did not transfer the economic and federal (sic) rights for football player [the Player] to any other Club. (...) In 2014 after the expiration of [the Loan Agreement] FC Metalist’ did not sign any other agreements about the sale, loan or transfer of rights [for the Player] (...) We kindly ask you to give the explanation and position of FC ‘Cruzeiro’ on this situation (...) Perhaps, FC ‘Cruzeiro’ became a victim of a fraud”*. The letter was addressed to unknown recipients.
17. On 14 August 2018, the Sole Arbitrator appointed in CAS 2017/A/5195 rendered the award in which it was determined that: (a) the Termination Agreement and the employment agreement that linked the Player to Zarya were both valid; (b) the Respondent detained full federative and economic rights for the Player at the time of the execution of the Transfer Agreement; (c) the Termination Agreement, the employment contract with Zarya and the Transfer Agreement were duly registered with the leading institutions in the football community (namely, FFU, CBF and FIFA’s Transfer Matching System); (d) the FC Metalist’s Letter is irrelevant and unreliable evidence; (e) Zarya was the rightful owner of the federative and economic rights for the Player and validly transferred such rights on a permanent basis to Cruzeiro by means of the Transfer Agreement; and (f) whilst Zarya satisfied its obligations under the Transfer Agreement, Cruzeiro did not and is in breach for the delay payment of Instalments one to three and the non-payment of Instalment four.

18. In addition to the foregoing, the motion by Cruzeiro to obtain a refund of the monies already paid to Zarya and corresponding to first three Instalments was rejected as inadmissible on the grounds that said motion was not included in the first instance that is at FIFA.
19. As result the appeal filed by Cruzeiro was dismissed by CAS and the FIFA's First Decision confirmed.

III. THE PROCEEDINGS BEFORE FIFA

20. In the meantime, on 26 April 2017, Zarya lodged a claim with FIFA demanding the fulfilment of the contract and the consequent payment of Instalments five (EUR 500,000) and six (EUR 500,000), outstanding at the time of the filing, as well as the payment of default interests.
21. On 3 July 2017, the Appellant in its reply pleaded for a full dismissal on the grounds that the Zarya had no legal basis to claim any amount as a transfer fee since, in its view, the Respondent never had any rights over the Player. In addition, Cruzeiro countered with a motion for the reimbursement of the monies already paid to Zarya for the first three Instalments of the Transfer Agreement.
22. The main argument of defence circled around the premise that Zarya had never detained the federative and economic rights which constituted the object of the Transfer Agreement. In Cruzeiro's view the FC Metalist's Letter provides enough support to conclude that Zarya has never entered into an employment contract with the Player nor registered the latter with the FFU. As such Zarya had no rights whatsoever over the Player, consequently, could not validly transfer said rights to Cruzeiro or to any other club.
23. Alternatively, Cruzeiro pleaded for a reduction on the default interests fixed in the Transfer Agreement from the disproportionate 72% *p.a.* set forth in Article 11 to a new interest rate that should never exceed 5% *p.a.* As an ancillary relief the Appellant also requested the confirmation that it is entitled to set off up-to 2,5% due as solidarity contribution from all Instalments, including those already paid (Instalments one to three) and three still outstanding (Instalments four to six).
24. On 17 April 2018, the Single Judge issued the Appealed Decision, partially accepting the claim, which in § 2 from the operative part ordered Cruzeiro to pay to Zarya "... *the amount of EUR 975,000 as outstanding transfer fee, plus interests as follows: - 5% p.a. over the amount of ERU 487,500 as from 8 October 2016 until the date of effective payment; - 5% p.a. over the amount of ERU 487,500 as from 7 April until the date of effective payment*".
25. The Single Judge sustained the Appealed Decision on the grounds that he had already passed a decision in the FIFA Case #15-00213 in which Cruzeiro was ordered to pay default interest accrued due to the late payment of the first three Instalments and the monies corresponding to Instalment four. He also rejected the new allegations of fraud which he considered were solely supported by the statements included in the FC Metalist's Letter when, on the other hand, the registrations in the FIFA's Transfer Matching System and the International Transfer

Certificate issued by the FFU provided considerable weight to conclude that Player was indeed a former player of Zarya and validly transferred to Cruzeiro.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 27 June 2018, pursuant to Article R47 and Article R48 of the Code of Sports-related Arbitration (the “Code”), Cruzeiro filed an appeal against Zarya challenging the Appealed Decision. The Appellant requested to submit this matter to a Sole Arbitrator.
27. On 5 July 2018, the Respondent agreed to submit the case to a sole arbitrator.
28. On 12 July 2018, in accordance to Article R51 of the Code, the Appellant filed the appeal brief in which it was specified the name of the witness it intended to call who would “(...) *provide the [Sole Arbitrator] with further information regarding the financial situation of the Appellant (...)*” reserving its right to call “(...) *any eventual further witnesses and/or experts (...)*”.
29. On 2 August 2018, the CAS Court Office informed them the appointment of Diego Ferrari as sole arbitrator. Also, the Respondent was granted with twenty days to submit the answer; all in accordance to Articles R54 and R55 of the Code.
30. On 9 August 2018, the Respondent sent a letter to the CAS Court Office in which indicated that the present proceedings shared identical set of facts and similar pieces of evidence – namely the witnesses called by the Appellant– with those of CAS 2017/A/5195. In addition to the foregoing, the Respondent stated that the deposition testimony made by Mr Kirmidjan in the hearing held in said arbitration proceedings constituted a piece of evidence of material relevance for the decision of the present proceedings and requested, therefore, a copy of the recordings as well as the suspension of the deadline for filing the reply until the receipt of the evidence requested.
31. The Appellant did not object to either requests made by the Respondent and the hearing’s recordings were sent to the parties on 16 August 2018 reinitiating as from that day the 20-day term for the Respondent to file its answer.
32. On 10 September 2018, FC Zarya filed its answer in accordance with Article R55 of the Code.
33. On 19 September 2018, the Respondent wrote to the CAS Court Office waiving its right to a hearing and requested the issuance of the award based solely on the parties’ written submissions sustained, *inter alia*, on the following grounds: (i) the present matter shares identical facts with CAS 2017/A/5195 recently decided on 14 August 2018; (ii) a hearing was held on the aforementioned matter where both parties had an opportunity to thoroughly present their case and render evidence; and (iii) the witnesses named by the Appellant are the same in both cases.
34. By letter dated 21 September 2018, the Appellant expressed its preference for a hearing to be held in this matter which was eventually scheduled by the CAS Court Office for 4 December 2018 in São Paulo, Brazil.

35. On 5 and 6 November 2018, the Respondent and the Appellant, respectively, filed the Order of Procedure, duly signed.
36. On 5 November the Appellant addressed a letter to the Court Office informing that Messrs Marcelo Kiremitdjian and Benecy Quiros will attend to the hearing to be heard as witnesses.

V. THE HEARING

37. A hearing was held on 4 December 2018 in São Paulo, Brazil. The Sole Arbitrator was assisted at the hearing by Mr. Antonio de Quesada, Head of Arbitration.
38. The following persons attended the hearing:
 - i. For the Appellant: Ms Apoorvi Jha, Counsel
 - ii. For the Respondent: Ms. Juliana Avezum, Counsel
Mr. Bichara Neto, Counsel
Mr. Stefano Malvestio, Counsel
39. Although the attendance of Messrs Marcelo Kiremitdjian and Benecy Quiros was expected, and arrangements were made by the Sole Arbitrator and CAS to hear them, at the commencement of the hearing the Appellant informed to the Sole Arbitrator and the Respondent that the witnesses were not to be called to the hearing.
40. The parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Sole Arbitrator. Neither party had any objection regarding the way the proceedings were conducted. Both parties explicitly confirmed that their right to be heard had been duly respected.

VI. SUBMISSIONS OF THE PARTIES

A. Appellant

41. The Appellant's position in this arbitration proceedings may be summarized as follows:
 - a. Cruzeiro was a victim of a fraud planned by the Respondent; the Respondent and FC Metalist; or the Respondent and third parties.
 - b. The fraud consisted in an illegitimate transfer of the federative and economic rights for the Player from the Respondent to Cruzeiro rather instead than a transfer from FC Metalist to Cruzeiro, as originally provided in the Loan Agreement.
 - c. However, the Respondent was not in a position to legally transfer the federative and economic rights for the Player since Zarya was not the legitimate owner of such rights

nor the Player was ever registered in its team and not even played a single match for said club.

- d. Indeed, Cruzeiro entered into the Transfer Agreement with Zarya in good faith for it was not aware of the background circumstances of the Termination Agreement that preceded the transfer of the Player.
- e. Those circumstances were unveiled with FC Metalist's Letter which clearly stated that FC Metalist did not sell, loaned or transferred the federative and economic rights for the Player to any other club.
- f. FC Metalist's Letter proves that Zarya has never detained any rights for the Player thus, it is not only barred to receive any kind of payment due as transfer fee but also to request said payments since Zarya is not in a position to transfer any rights at all, transfer which constitutes the obligation Zarya undertook in the Transfer Agreement.
- g. Furthermore, any obligation that Cruzeiro may have undertaken in the Transfer Agreement to make payments to Zarya must immediately be extinguished.

42. The Appellant request by way of relief that:

"FIRST – To dismiss in full the appealed decision;

SECOND – To accept the present appeal and confirm that Respondent has no legal basis to claim any amount due as transfer fee from the Appellant since it never had any right over the Player;

THIRD – to confirm that the amounts so far paid by the Appellant in connection to the transfer be immediately refunded by the Respondent;

FOURTH – To order the Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS Court Office fee of CHF 1,000 and any other advance of costs (if applicable) paid to the CAS; and

FIFTH – To order the Respondent to pay to the Appellant 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".

B. Respondent

43. The Respondent's main submissions on the other hand can be summarized as follows:

- a. Although the current proceedings were originated in a claim lodged before FIFA in respect to the default in the payment of Instalments five and six of the Transfer Agreement, the underlying dispute however remains the same –with identical set of facts– as to the one decided in CAS 2017/A/5195 in which it was settled that the

Transfer Agreement was valid and binding and that Zarya had complied with its contractual obligations.

- b. Furthermore, Respondent observed that Cruzeiro benefited from the execution of the Transfer Agreement because not only the Player was indeed registered as a member of its squad but also because it will pay EUR 500,000 less than the amount fixed in the Loan Agreement for the same transaction.
- c. In addition to the foregoing, Zarya underlined that although during the hearing held in CAS 2017/A/5195 Cruzeiro expressly acknowledged the existence of an outstanding debt in connection with the transfer fee for the Player, the Appellant contested that the Respondent was its rightful creditor.
- d. Cruzeiro's cause of action relied upon the accuracy of the statements expressed in FC Metalist's Letter, *inter alia*, that the latter did not transfer the federative and economic rights for the Player to Zarya and, consequently, any financial claim derived from a subsequent transfer of said rights to another club (i.e. to the Appellant), may be the result of a fraud. Yet, in CAS 2017/A/5017 it was determined – after an extensive review – that this piece of evidence – and the grounds derived therefrom – was irrelevant and did not carry any weight.
- e. Zarya finds outstanding, as peculiar in the course of events that triggered this dispute, the fact that FC Metalist's Letter was only issued on 16 June 2017, three years after the Player has left that club.
- f. The chain of registrations of the federative and economic rights for the Player with the relevant institutions of the international football community –including the final registration of said rights made by CBF on behalf of Cruzeiro– requires the issuance, review and of the legality of a myriad of documents including the Termination Agreement; the pertaining employment contracts (with Zarya and eventually with Cruzeiro); the Transfer Agreement; the International Transfer Certificate through FIFA's TMS.
- g. The relevant institutions involved in the transfer of the Player (FFU, CBF and FIFA) have not raised any objection in the consecutive registrations of the federative and economic rights for the Player;
- h. The Player's passport reflecting the chain of consecutive registrations proves that the Appellant was not a victim of fraud for it received the rights for the Player from the rightful proprietor, Zarya.
- i. The unfair accusations brought up by Cruzeiro are groundless and may only be attributed a scheme put in place in order to avoid due payments that may aggravate its dire financial situation.

- j. The request for the reimbursement of the monies already paid in connection to the first three Installments should be declared inadmissible for the following reasons: (i) Cruzeiro has not filed this request for relief in due course, namely at FIFA level in the previous instance; (ii) this prayer for relief is covered by the authority of *res judicata* since the award rendered in CAS 2017/A/5195 condemned the Appellant to pay the default interests for late payment of the first three Instalments and also to pay Instalment four; and (iii) the relief sought is time-barred pursuant to Article 25 par. 5 of FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP”) since more than 2-year elapsed from the event giving rise to the claim considering that the Appeal Brief has been filed on 12 July 2018.

44. The Respondent makes the following request for relief:

“a) Reject the Appeal filed by the Appellant;

b) Confirm the Appealed Decision;

c) Oblige the Appellant to bear all costs associated with this Appeal Proceedings;

d) Oblige the Appellant to pay the Respondent the amount of compensation regarding the 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 Sole Arbitrator but at least equal at CHF 20,000 for the reasons explained above;

e) Order the Appellant to bear any and all FIFA and CAS administrative and procedural costs, which have already been incurred or may eventually be incurred by the Respondent”.

VII. JURISDICTION

45. 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”.

46. In its Statement of Appeal, Cruzeiro relied on Article 58.1 of the FIFA Statutes and Article 23.4 of the FIFA RSTP, which grant a right to appeal to the CAS.

47. The jurisdiction of the CAS was not contested by the Respondent and the Order of Procedure was signed by both parties without objections.

48. Accordingly, the CAS has jurisdiction to decide on the present dispute.

VIII. ADMISSIBILITY

49. The appeal was filed within the deadline provided by Article 58.1 of the FIFA Statutes, namely within 21 days after the notification of the Appealed Decision. It further complies with the requirements of Article R48 of the CAS Code.
50. It follows that the Appeal is admissible.

IX. APPLICABLE LAW

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

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

52. The matter at hand relates to an appeal against a decision rendered by a FIFA judicatory organ, hence, a reference must be made to Article 57.2 of the FIFA Statutes which stipulates the following:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

53. Further, in Article 13 of the Transfer Agreement, the parties agreed to the application of FIFA regulations in the following terms *“(…) In the matters not regulated herein, FIFA regulations shall apply”.*
54. Since the case before FIFA was filed on 26 April 2017, FIFA’s RSTP edition 2016 shall primarily govern the substance of the appeal whilst Swiss law shall apply subsidiarily. Finally, it can be observed that, in their respective submissions, the Parties adopted the same approach.

X. MERITS

55. The Sole Arbitrator finds that the present dispute can be divided in two parts. The first part concerns to the determination of whether the Transfer Agreement was a legal, valid and binding means to transfer the rights for the Player amongst the parties and, the second part concerns the source of the obligation to pay the transfer fee fixed therein.
56. It flows that only after coming with a determination on this first query the Sole Arbitrator will be enabled to enter into the second part of this dispute and make a decide upon which of the two available –and mutually excluded– contentions is correct: (i) the Respondent has the right to receive payment for Instalments five and six, or (ii) the Appellant should be reimbursed with the monies already paid under the Transfer Agreement.

57. The Sole Arbitrator observes that the main issues to be resolved are therefore the following:
- a. Were the federative and economic rights for the Player legal and validly transferred from Zarya to Cruzeiro by means of the Transfer Agreement?
 - b. Is Cruzeiro bound to pay the monies fixed in Instalments five and six, plus default interests?
 - c. Should Zarya reimburse Cruzeiro the monies received so far as payment for the transfer fee fixed in the Transfer Agreement?

A. Does the Respondent have a legal basis to claim from the Appellant the payment of the transfer fee fixed in the Transfer Agreement?

58. The Sole Arbitrator has been made aware of the fact that the present case is remarkably similar to CAS 2017/A/5195. Certainly, the case at hand concerns the same parties, the same player and a claim for the right to receive certain amounts of money which arise from the same contract, the Transfer Agreement.
59. Whilst in CAS 2017/A/5195 the dispute circled around the payment of Instalment four and default interests accrued due to the late payment of the first three Instalments, in this arbitration proceedings the dispute arose from the lack of payment of Instalments five and six.
60. However, after having examined all the evidence on file, the Sole Arbitrator has no doubt that the arguments wielded by the Appellant to justify the non-payment of Instalments five and six are identical to those raised in CAS 2017/A/5195 to decline payment of the fourth Instalment and the default interests accrued due to the late payment of the first three Instalments.
61. In both cases, Cruzeiro has used the FC Metalist's Letter to ground its intent to discharge itself from honoring the duties undertaken in the Transfer Agreement by firstly challenging Zarya's original rights over the Player for then, later, dispute the subsequent transfer of said rights to Cruzeiro which, in the Appellant's view, impeded Zarya's right to lodge a claim for the payment of the monies fixed as transfer fee.
62. In this respect, the Sole Arbitrator in CAS 2017/A/5195 concluded the following, at para. 109 – 111:

“With regard to the substance of the letter, it is no longer disputed by the Parties that [FC] Metalist “did not transfer the economic and federal rights for the football player X. to any other Club” (...) it is not disputed that [FC] 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 if his choice, without need for the new club to sign any kind of agreement with the old club.”

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 Respondent.

As the Respondent rightfully claimed in its Answer (...) the FFU confirmed that the Player had been registered with the Respondent's club (...) and that the Player's international transfer certificate had been issued in favour of the CBF (...) Likewise, the CBF recognized the validity of the Player's employment contract with the Respondent by registering the Transfer Agreement (...).

63. Moreover, the Sole Arbitrator in CAS 2017/A/5195, para. 114 further determines 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 (...) Based on the foregoing, the Sole Arbitrator finds that [FC] Metalist's letter does not introduce any new or relevant information for the resolution of the present dispute”.
64. In this respect the Sole Arbitrator notes that no objections have been raised by the Appellant to the validity of the registrations of the Player with the FFU and the CBF in neither the case at hand nor in CAS 2017/A/5195.
65. Lastly, it was also decided by the Sole Arbitrator sitting in CAS 2017/A/5195 that:

“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” (para. 136).
66. At this point the Sole Arbitrator can confirm, to its comfortable satisfaction, that the Appellant has proffered in the present proceedings an identical set of facts of those used in CAS 2017/A/5195 for the same purpose, which is not other than the disqualification of the Transfer Agreement as a legal, valid and binding source of its obligation to pay the monies fixed to compensate the transfer of the federative and economic rights for the Player.
67. The Sole Arbitrator agrees with the Respondent that, in respect to the factual grounds related to this specific merit, we are indeed in the presence of the same cause of action which was already subjected to a decision in CAS 2017/A/5195.
68. In light of the foregoing, the Sole Arbitrator decides that he is precluded from adjudicating again in this matter considering that the fraud-related claims against the legal and valid transfer of the Player were exhaustibly determined in a preceding and final award rendered by CAS that cannot be re-litigated again for it has fell within the effect of *res judicata*.
69. The fact that the Respondent has not included in its Answer a specific plea of *res judicata* – but only referred to it – does not prevent the Sole Arbitrator from raising this issue *ex officio* (cf. TF 4A_374/2014) when, like in this case, is faced with the certain possibility of being put in a position to deal with a matter that has already been decided in its merits by CAS.

70. The Sole Arbitrator notes and cites paragraph 66 of the CAS Award CAS 2015/A/4350 in which the Sole Arbitrator held as follows:

“66. (...) The Sole Arbitrator has to observe former decisions, which have res judicata status in respect of the issues submitted before him. As a matter of fact, the Sole Arbitrator would violate procedural public policy if he disregards the res judicata principle and issues an award on a claim that has already been validly and finally adjudicated upon (ATF 140 III 278, consid. 3.1)”.

71. In this regard, the Sole Arbitrator observes that there is well established CAS jurisprudence which clearly highlights the involvement of superior and fundamental principles of Swiss procedural public policy in the principle of *res judicata*. CAS addresses this topic in matters such as CAS 2013/A/3061 para. 179, CAS 2006/A/1029 para. 14, CAS 2010/A/2091, and specifically – and very helpfully summarized – in paragraph 80 of CAS 2016/A/4408:

“80. In a decision dated 27 May 2014, the Swiss Federal Tribunal (SFT) held that public policy within the meaning of Article 190(2)(e) PILA is violated when some fundamental and generally recognized principles are contravened, leading to an insufferable contradiction with the sense of justice, such that the decisions appear incompatible with the values upheld in a state of law (ATF 140 III 278 at 3.1; ATF 132 III 389 at 2.2.1). An arbitral tribunal violates procedural public policy if it disregards the res judicata effect of a previous decision or if the final award departs from the opinion expressed in an interlocutory award disposing of a material preliminary issue (ATF 136 III 345 at 2.1, p. 348; 128 III 191 at 4a, p. 194)”.

72. Of course, it can well be argued that the arbitral award rendered in CAS 2017/A/5195 refers to a different claim (payment of Instalment four and the default interests due to late payment of the first three Instalments), failing meet with the threshold of the traditional “triple identity” test, and therefore it could be disqualified as *res judicata* in respect to the discussion regarding the payment of Instalments five and six.

73. However, the Sole Arbitrator notes that the traditional approach to the principle of *res judicata* which limits its effects only to the negative aspect, the *ne bis in idem*, by the strict verification of the “triple identity” test (same subject matter or relief, same legal grounds and same parties) may not be the most compatible with other fundamental and widely recognized procedural principles such as the principle of certainty and the principle of economy also applicable in this matter.

74. This line of jurisprudence was adopted by CAS in CAS 2013/A/3256, and more recently in CAS 2018/A/5500, para. 37 in which the Panel concluded the following:

“37. The procedural concept of res iudicata on the other hand has two elements: 1) the so-called “Sperrwirkung” (prohibition to deal with the matter = ne bis in idem), the consequence of this effect being that if a matter (with res iudicata) is brought again before the judge, the latter is not even allowed to look at it, but must dismiss the matter (insofar) as inadmissible; and 2) the so-called “Bindungswirkung” (binding effect of the decision), according to which the judge in a second procedure is bound to the outcome of the matter decided in res iudicata (cf. CAS 2013/A/3256)”.

75. It is mainly the second element which is pertinent in this case.

76. Moreover, when the award rendered in CAS 2017/A/5195 has been referred to, in due course, by the Respondent who has submitted that decision into evidence in this arbitration proceedings and has expressly relied upon it in several occasion (cf. CAS 2016/A/4501, para. 103 and 106, *a contrario sensu*).
77. Applying the above legal framework to the matter at hand, the Sole Arbitrator finds that he is bound by the decision rendered in CAS 2017/A/5195 and, accordingly, decides that the motion “[to] confirm that Respondent has no legal basis to claim any amount due as transfer fee from the Appellant since it never had any right over the Player” is not admissible and must be rejected.

B. Is Cruzeiro bound to pay the monies fixed in Instalments five and six, plus default interests?

78. The Sole Arbitrator has already resolved the first part of this dispute by establishing that he is bound, due to the principle of *res judicata*, by earlier findings made in CAS 2017/A/5195 with respect of the existence of a legal basis to claim the amounts fixed in the Transfer Agreement as sale-on fee of 100% of the federative and economic rights for the Player that were effectively transferred by Zarya to Cruzeiro.
79. However, because a final and binding judgment was not issued on the question whether Instalments five and six are still pending of payment to the Respondent, the authority of *res judicata* does not preclude the review of the Appealed Decision in this respect and therefore, the Sole Arbitrator is enabled to adjudicate the second part of the dispute and determine whether Cruzeiro is bound to pay the monies fixed in Instalments five and six, plus default in the rests for the delay.
80. In light of the earlier CAS findings in this matter with respect of the legality and validity of the Transfer Agreement as the legal source of the obligation to pay the amounts due as transfer fee, it is pursuant to the rules governing the burden of proof, to verify if the Appellant has demonstrated any possible existing fact preventing or excluding its obligation to discharge payments of Instalments five and six, plus the corresponding default interest due to late payment.
81. In this regard, the Sole Arbitrator reminds that consistent with the well-established CAS jurisprudence as very well summarized in CAS 2016/A/4580, para. 91:

“According to the general rules and principles of law, facts pleaded have to be proven by those who plead them, i.e. the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proven by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. This principle is also stated in the Swiss Civil Code. In accordance with Article 8 of the Swiss Civil Code: Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.”

It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites include the concept of 'burden of proof' are (i) the 'burden of persuasion' and (ii) the 'burden of production of the proof'. In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequences envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party (CAS 2015/A/309; CAS 2007/A/1380, with further references to CAS 2005/A/968 and CAS 2004/A/730)".

82. After an overall appreciation of the file, the Sole Arbitrator has verified that Cruzeiro has not only failed to introduce any new fact or ground for the revision of the Appealed Decision, but instead continues to proffer the same excuses and evidence used in CAS 2017/A/5195 but now applied for the non-payment of Instalments five and six.
83. In this respect, the Sole Arbitrator wishes to refer to the Appellant's request to the CAS Court Office on 6 July 2018 for a five-day extension to submit the appeal brief on the grounds that "(...) *the translation of few documents, which certainly were going to play an imperative role in [the] Appeal Brief are not ready yet (...)*".
84. Well, not only the documents "*which certainly were going to play an imperative role*" were never submitted to this proceedings nor the Sole Arbitrator ever heard any further references of them, but also the witnesses proposed by Cruzeiro – and whose attendance to the hearing was confirmed just ten days before it – did not appear to the hearing with no additional explanation from the Appellant.
85. At this point, the Sole Arbitrator can only conclude that there is no justification nor reason to excuse the payment of Instalments five and six. The present appeal is completely groundless and the Appellant's belligerence towards the Transfer Agreement, and the financial consequences arising therefrom, can only be explained by an obvious intention to knowingly avoid its very well-established payment obligations in an unacceptable contradiction with the basic legal principle of *pacta sunt servanda*.
86. As a result, the Sole Arbitrator can only confirm the Appealed Decision with respect to the amounts owed by the Appellant to the Respondent in regards Instalments five and six, plus the pertaining default interests, as fixed in the Transfer Agreement.

C. Should Zarya reimburse Cruzeiro the monies received so far as payment for the transfer fee fixed in the Transfer Agreement?

87. Based on the inexistence of a legal basis to its obligation to fulfil any payment fixed in the Transfer Agreement to compensate the transfer of the Player, the Appellant demands as relief, the immediate reimbursement of all monies already paid to Zarya under said contract.
88. The Respondent requests instead that this prayer of relief should be declared inadmissible for various reasons, being the first that Cruzeiro has not filed such demand in due course, namely

at FIFA level and, alternatively that this prayer of relief is covered by the authority of *res judicata* and eventually, that the relief sought is time-barred pursuant Article 25 para. 5 of FIFA RSTP.

89. The Sole Arbitrator notes that although Cruzeiro indeed made a timely filing of this prayer of relief at FIFA level (unlike in CAS 2017/A/5195), in light of the determinations made in A and B above, for obvious reasons there is no need to address this question which it has become to a large extent moot.
90. Based on the foregoing, the Sole Arbitrator finds that the appeal shall be entirely dismissed and therefore, the Appealed Decision shall be confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Cruzeiro EC against the decision rendered on 17 April 2018 by the Single Judge of the FIFA Players' Status Committee is dismissed.
2. The decision rendered on 17 April 2018 by the Single Judge of the FIFA Players' Status Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.