



Arbitration CAS 2017/A/4994 Cruzeiro E.C. v. C.A. Atenas, award of 11 July 2017

Panel: Mr Ricardo de Buen Rodríguez (Mexico), Sole Arbitrator

Football

Transfer

Obligation of the debtor to undertake all efforts to discharge its obligation to pay

Reallocation of the FIFA costs

1. **In a transfer, the main obligations of the parties are, in the case of the transferor club, to transfer the federative and economic rights of the player to the transferee club, and, in the case of the latter, to pay a specific amount of money to the former. A provision in the transfer contract establishing that the payments shall be deposited into the bank account “to be informed” by the transferor club, is only an accessory clause. Therefore, in case the transferor club has performed its obligation to transfer the player and is entitled to get the payment, the obligation to pay is only a responsibility of the transferee club, which has the obligation to try, by all means, to comply with it. The words “to be informed” regarding the bank account information mean that the transferor club will give the information of the account, as is common in the modern business world, but applying the principle of good faith, the one obliged to pay and to ask for this information is the transferee club.**

2. **A request for the procedural costs imposed by FIFA to be reduced, must be rejected. CAS Panels have already confirmed in the past that it is not for the CAS to reallocate the costs of the proceedings before previous instances.**

I. PARTIES

1. Cruzeiro E.C. (hereinafter referred to as the “Appellant” or “Cruzeiro”) is a professional football club based in Belo Horizonte, Brazil, member of the Brazilian Football Federation, which, in turn is affiliated to the Federation International de Football Association (hereinafter referred to as “FIFA”).

2. C.A. Atenas (hereinafter referred to as the “Respondent” or “Atenas”) is a football club based in San Carlos, Uruguay, member of the Uruguayan Football Association, which in turn is also affiliated to FIFA.

II. FACTUAL BACKGROUND

3. The following is a summary of the relevant facts and arguments based on the Parties' written submissions. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. Although the Sole Arbitrator has considered all the facts, legal arguments and evidence submitted by the Parties in the present case, he refers in this Award only to the submissions and evidence he considers necessary to explain in his reasoning.
4. On 15 July 2015, Cruzeiro and Atenas signed an agreement (hereinafter referred to as the "Contract"), regarding the permanent transfer of the player G. (hereinafter referred to as the "Player") from the Respondent to the Appellant.
5. According to the Contract, Cruzeiro bought from Atenas, which had a valid labour contract with the Player at that time, the 100% of the federative rights and the 50% of the economic rights of the Player.
6. The economic terms of the transaction were contained in clause 2 of the Contract, which reads, in its relevant part, as follows:

*"2.1. By the assignment of all federative rights and 50% of the economic rights of the **CONSENTING ATHLETE**, as set forth in clauses 1.1 and 1.2 hereof, **CRUZEIRO** undertakes to pay **ATENAS** for the total net amount of three million and for hundred thousand US Dollars (US\$3,400,000.00), in 5 annual and consecutive instalments, as follows:*

I- 1 installment (sic) in the amount of US\$600,000.00, to be due on 12/31/15,

II- 4 installments (sic) in the amount of US\$700,000.00, to be due on 12/31/16, 12/31/17, 12/31/18 and 12/31/19.

*2.2. The amounts set forth in clause 2.1. shall be deposited into the bank account to be informed by **ATENAS**.*

*2.3. **ATENAS** shall enter the information relating to the **CONSENTING ATHLETE**'s transfer into FIFA's Transfer Matching System-TMS, authorizing thus the Uruguayan Soccer Association to issue **CRUZEIRO**'s Transfer Certificate of the **CONSENTING ATHLETE**.*

*2.4. In event of late payment of any of the instalments by **CRUZEIRO**, as set forth in clause 2.1, a penalty at five percent (5%) shall be added to the amounts of the instalment(s) upon the amount of each unpaid installment (sic).*

*2.5. In event of delay longer than 5 months in the payment of any of the installments, all upcoming instalments may be considered as automatically due, at sole discretion of **ATENAS**, and, consequently, **ATENAS** shall be authorized to promptly charge for the entire remaining debit".*

7. The Contract also contains general terms.
8. It is undisputed that no instalment has yet been paid by Cruzeiro to Atenas. The reason for

the lack of payment is the main issue to be solved in this arbitration, and will be further analysed in the present award.

III. PROCEDURE BEFORE FIFA

9. In a nutshell, the following is a description of what happened in front of FIFA that led to the decision issued by the Single Judge of the Players' Status Committee (hereinafter referred to as the "Single Judge").
10. On 9 August 2016, the Respondent lodged a claim in front of FIFA against Cruzeiro, requesting the payment of USD 3,400,000 and interests of 5% per year and a penalty of 5%, based on the Contract.
11. On 29 September 2016, the Appellant presented its reply, expressing as its main argument that it was not able to pay due to the fact that it had never received the account information from Atenas in order to make the payment.
12. After analysing the arguments of the parties, the Single Judge issued his decision on 22 November 2016 (hereinafter referred to as the "Appealed Decision"), the grounds of which were notified on 23 January 2017 to the parties.
13. The operative part of the Appealed Decision provides as follows:

"1. The claim of the Claimant, Atlético Atenas, is partially accepted.

2. The Respondent, Cruzeiro, has to pay to the Claimant, Atlético Atenas, within 30 days, as from the date of notification of the present decision, the amount of USD 3,400,000, plus 5% interest p.a. on the said amount from 1 January 2016 until the date of the effective payment.

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

4. Any other claims lodged by the Claimant, Atlético Atenas, are rejected.

5. The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Cruzeiro, within 30 days as from the date of notification of this decision, as follows:

5.1. The amount of CHF 15,000 has to be paid to FIFA to the following bank account with reference to case nr 16-01420/lde: [...]

5.2. The amount of CHF 5,000 has to be paid directly to the Claimant, Atlético Atenas.

6. The Claimant, Atlético Atenas, is directed to inform the Respondent, Cruzeiro, immediately and directly of the account number to which the remittances under points 2. and 5.2. above are to be made and to notify the Player's Status Committee of every payment received".

IV. THE ARBITRAL PROCEEDINGS BEFORE THE CAS

14. On 13 February 2017, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”), pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the “Code”), challenging the Appealed Decision. In its statement of appeal, the Appellant proposed that a sole arbitrator be appointed to hear the appeal.
15. On 1 March 2017, the Appellant filed its appeal brief, together with supporting documents.
16. On 2 March 2017, the Respondent agreed to refer the appeal to a sole arbitrator.
17. On 17 March 2017, the Respondent filed its answer to the appeal brief. In its answer, the Respondent indicated its preference to have the sole arbitrator render an Award based on the parties’ written submissions and without the need for a hearing.
18. On 29 March 2017, the Appellant indicated that it was also its preference that an Award be rendered solely based on the papers.
19. On 5 April 2017, the parties were informed that the Sole Arbitrator appointed to hear this dispute was Mr Ricardo de Buen Rodríguez, attorney-at-law in México City, México.
20. On 12 April 2017, the parties were informed that, having considered the parties’ positions, the Sole Arbitrator deemed that he was sufficiently well-informed to decide the case based solely on the parties’ written submissions, without the need to hold a hearing.
21. On 5 May 2017, the CAS Court Office acknowledge receipt of the Order of Procedure, duly signed by each party.

V. SUMMARY OF THE PARTIES’ POSITIONS

22. 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 Sole Arbitrator, however, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

A. The Appellant’s Position

23. The Appellant’s position and arguments can be summarized as follows:
24. The Contract does not leave any doubt in relation of the intention and conditions agreed by the parties. The payment of instalments has to occur only after the Respondent provides the Appellant, in writing, with the information of the bank account to which the amounts due had to be transferred.

25. The obligation to provide the information of the bank account is a *sine qua non* condition that the parties had agreed in order to make the payment of the relevant instalments, and this is the reason why the notification of the details of the bank account has to be done in writing and has to occur before the payment of each of the instalments.
26. The receipt of the banking information was of “*imperative*” importance to permit Cruzeiro to comply with its obligations.
27. There is no evidence that the Respondent provided the Appellant with the bank account information before the relevant due dates. By having failed to notify Cruzeiro in writing of the bank information, Atenas failed to comply with its obligations.
28. The Appealed Decision did not establish clear reasons for the findings, and did not comply with the applicable procedural requirements. In particular, the Appealed Decision ignored the existence of the above-mentioned imperative condition which needed to be fulfilled in order for payments to be made.
29. In case that it is considered that the Appellant did not comply with the payment of the transfer fee, the Single Judge has no legal basis to make Cruzeiro pay the total of the procedural costs, as it is incorrect to consider that Atenas’ claim was only partially accepted, but then impose the entire amounts of costs on Cruzeiro.
30. The Appellant made the following requests for relief:

‘FIRST- To set aside the Appealed Decision in full;

SECOND- To confirm that the Respondent failed to comply with its obligations by not forwarding in writing to the Appellant the bank account details as set out in the Transfer Agreement;

THIRD- To uphold, in the scenario above, that the Appellant was entitled to withhold the payment due as transfer fee, as well as there is no legal basis for the imposition of any default interest whatsoever (cf. Art. 82 of the Swiss CO);

FOURTH- 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 CAS;

FIFTH – 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.

Alternatively and only in the event the above is rejected:

SIXTH- To uphold, assuming but not admitting, that the Respondent complied with the terms and conditions set out in the Transfer Agreement and somehow provided the Appellant the bank account details, the imposition of the entire cost of CHF 20,000 violates the principle of proportionality and Art. 18 par 1 of the FIFA Procedural Rules;

SEVENTH- 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 CAS; AND

EIGHT- 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’s Position

31. The Respondent’s position and arguments can be summarized as follows:
32. Upon the delay in complying with the payment of the first instalment, that had to be paid on 31 December 2015 at the latest, Atenas sent Cruzeiro formal requests, on 7 January, 18 January and 20 June 2016 (in is answer the Respondent indicated 2015, however said documents are from 2016).
33. It was 7 months after the maturity date of the first instalment that Atenas decided to take the case before FIFA.
34. All the agreed instalments are currently overdue.
35. The defence presented by Cruzeiro, arguing that they did not perform the payment because the Respondent had not informed the details of a bank account, goes against common sense and disrespects the principle of good faith that should govern all contractual relationships.
36. If Cruzeiro had the will to comply with its obligations to pay, the demands presented by Atenas should have been enough for the Appellant to request clarification of the details of the bank account.
37. Contracts should be executed in good faith, which is a general principal of law normally found in private law and especially in contractual matters.
38. According to the said principle, a debtor cannot fail to pay a creditor by arguing that it does not know the information of the bank account to perform the payment, because the obligation could have been complied by just asking for that info.
39. In conclusion, this is a clear example of incomppliance of the contract from Cruzeiro.
40. The Respondent made the following requests for relief:

“1o) that the answer to the appeal presented by Cruzeiro E.C. be considered submitted in due time and manner.

2o) that in compliance with the stipulations of Article R54 of the Code, a single Judge be appointed for him to rule regarding the appeal.

3o) finally, that the appeal against the judgement issued by FIFA Player’s Status Committee dated 22 November 2016 be rejected, and thus, said judgement be confirmed in all respects.

40) that the appellant be ordered to pay all the costs of the proceedings as per the stipulations of Art. R64.5”.

V. JURISDICTION

41. Article R47 of the Code reads as follows:

“An appeal against the 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 it prior to the appeal, in accordance with the statutes or regulations of that body”.

42. The jurisdiction of the CAS, which has not been disputed by the parties, derives from Article R47 of the Code and from Article 58 of the FIFA Statutes.

43. The jurisdiction of the CAS is further confirmed in the Order of Procedure, which was duly signed by the parties.

44. It follows that CAS has jurisdiction to rule on this dispute.

VI. ADMISSIBILITY

45. Pursuant to Article 58, paragraph 1 of the FIFA Statutes, in connection with Article R49 of the Code, the Appellant had 21 days from the notification of the Appealed Decision to file its Statement of Appeal before the CAS.

46. The Appealed Decision was notified to the Appellant on 23 January 2017 and the statement of appeal was filed on 13 February 2017, within the above-mentioned twenty-one day deadline. No further stages of appeal against the Appealed Decision were available at the FIFA level. The appeal therefore complies with the requirements of Article R48 of the Code.

47. Accordingly, the appeal is admissible.

VII. APPLICABLE LAW

48. According to Art. R58 of the Code:

“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”.

49. Article 57, paragraph 2 of the FIFA Statutes establishes 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”.

50. Moreover, clause 5.2 of the Contract provides as follows:

“The Regulations of the Fédération Internationale Football Federation (FIFA) will be applicable to this contract”.

51. Taking into account the aforementioned provisions, the Sole Arbitrator concludes that the applicable law to the present dispute is the FIFA rules and regulations primarily, and Swiss law subsidiarily.

VIII. THE MERITS OF THE DISPUTE

52. According to Article R57 of the Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

53. Taking into account the facts of the case and the parties’ submissions, the Sole Arbitrator considers that the following issues shall be addressed to settle the dispute:

A - Did the Single Judge comply with his procedural obligations?

B - Was the obligation of Atenas to notify Cruzeiro of the bank information to pay the agreed instalments a condition which non-fulfilment would have prevented the Appellant from paying the amounts due?

C - Does the Appellant have to pay the total amount of procedural expenses fixed by the Single Judge?

54. The Sole Arbitrator will address each of the mentioned issues in turn.

A. Did the Single Judge comply with his procedural obligations?

55. The Appellant in its appeal brief states that *“the Appealed Decision failed for several times failed (sic) to comply with its procedural obligations, notably, establishing clear and predictable reasons for the findings of several baseless conclusions”.*

56. Cruzeiro also explains which procedural rules, from its point of view, are applicable and were not respected by the Single Judge, especially the obligation to give reasons to his findings.

57. In this respect, the Sole Arbitrator considers that taking into consideration that according to Article R57 of the Code, he has the power to act *de novo* and review all the facts and the law, as he has done in the present case, any procedural defect which could have existed in the context of the FIFA proceedings has been cured through this arbitration procedure.

58. Despina Mavromati and Matthieu Reeb in their book *The Code of the Court of Arbitration for Sport* (Kluwer Law International BV, 2015, page 511), state that *“The fact that CAS Panels enjoy a full power of review of the appealed decision also means that, in principle, procedural defects occurred in the previous instance can be cured through the appeal to CAS”*.
59. In the case at stake in this arbitration the Appellant mainly argues, in respect of the procedural behaviour of the Single Judge, that he did not give enough reasons.
60. The Sole Arbitrator considers, after reading the Appealed Decision, that the supposed procedural non-compliance pretended by Cruzeiro is more an argument attacking the content of the Appealed Decision than the process itself.
61. In any event, the Sole Arbitrator considers that in this new procedure in front of the CAS, all the arguments of the parties have been taken into account and have been analysed in the present award, thus, as expressed before, any possible procedural misconduct has been cured.

B. Was the obligation of Atenas to notify Cruzeiro of the bank information to pay the agreed instalments a condition which non-fulfilment would have prevented the Appellant from paying the amounts due?

62. This is the main and most important issue to be solved in the present arbitration procedure. To get to the final answer to that question we need to analyse the different arguments addressed by both parties in relation to this main issue.

1. General arguments

63. On one side the Appellant argues that it will not have any obligation to pay until the Respondent sends, in writing, the information of the bank account in order to make the transfer of the money owed by Cruzeiro, so there has not been any violation of the Contract or any default regarding the fixed payments, due to the fact that the mentioned information has not been provided.
64. On the other hand, the Respondent contends that if Cruzeiro had acted in good faith, the demands presented by Atenas should have been enough for the Appellant to request clarification of the details of the bank account.
65. In order to solve the case we will begin with what is undisputed.

2. The undisputed

66. Both parties agree that the Contract exists. They also concur with the existence of the economic clause and that in the mentioned clause they agreed to pay the total amount of USD 3.400.000, in 5 different instalments.

67. Cruzeiro and Atenas also concur that the first instalment had to be performed on 31 December 2015 and that this payment has not yet been made by Cruzeiro.
68. There is also no controversy regarding the existence of a provision established in the Contract, by which, at the sole discretion of Atenas, in the event of a delay of longer than 5 months in the payment of any of the instalments, all upcoming instalments could be considered as automatically due, and the Respondent shall be authorized to promptly charge the entire remaining sum.

3. *The proven facts*

69. Regarding the different requests made by Atenas to Cruzeiro, the Respondent has presented evidence, not objected by the Appellant, that they were done on 7 and 18 January 2016 in relation with the first instalment due on 31 December 2015, and that an additional request was made on 20 June 2016. The requests for the payment do not provide the information concerning the relevant bank account.

4. *Preliminary conclusions*

70. In a nutshell, before going forward with the final conclusions, the Sole Arbitrator has found on one side that we can conclude from the facts that firstly there is no doubt about the existence of the debt, secondly that one instalment, the one agreed to be paid on 31 December 2015, is due (at this time the one established to be paid on 31 December 2016 is also due) and finally that more than 5 months passed between the date the first instalment becoming due and the date in which the claim was presented in front of FIFA.
71. On the other side, there is no evidence that, even though the Respondent sent some formal requirements to the Appellant, Atenas had sent the bank account information, either verbally or in writing.
72. Taking all the previously expressed facts, arguments and analysis into account, what is left to solve is if the Appellant does not have the obligation to pay because it has not received the bank information in writing or does have that obligation regardless of whether it received it or not.

5. *Conclusions*

73. In order to get to the final conclusion in this case, we have to focus on clause 2.2. of the Contract.
74. The free translation to English of said clause is as follows:

“The amounts set forth in clause 2.1 shall be deposited into the bank account to be informed by ATENAS”.

75. It is clear that for practical reasons, before the payment, the information of the bank account must be provided. Contrary to the arguments expressed by the Appellant, the Sole Arbitrator does not find the obligation for Atenas to provide the bank information in writing. The question is if Cruzeiro, being the debtor, is the one obliged to ask for it in order to comply with its debt, or it is an obligation for Atenas to provide it unilaterally and if it does not do it, Cruzeiro does not have the obligation to pay.
76. To solve this, and being Swiss Law subsidiarily applicable, we have to analyse this specific obligation in the light of the Swiss Code of Obligations (hereinafter referred to as the “CO”) and in the light of the entire Contract.
77. After carefully analysing the Contract, the Sole Arbitrator has found that the main obligations of the parties are, in the case of Atenas, to transfer the federative and the economic rights of the Player to the Respondent, and, in the case of Cruzeiro, to pay a specific amount of money in different instalments.
78. The obligation of Cruzeiro to pay in the future, was born at the moment that the Contract was executed and the Player transferred. Thus, the provision establishing that the payments shall be deposited into the bank account “*to be informed*” by ATENAS, is only an accessory clause.
79. It is true, as cited by the Appellant, that Article 82 of the CO provides that “*A party who wishes to demand performance of a bilateral contract by the other party must either have already performed himself...*”. In the case at stake Atenas has performed its obligation to transfer the Player and with that conduct is entitled to get the payment.
80. The obligation to pay is only a responsibility of Cruzeiro, which has the obligation to try, by all means, to comply with it. Even more so, when it has received several warnings from Atenas requesting the payment of the due instalment.
81. The words “*to be informed*” regarding the bank account information mean that Atenas will give the information of the account, as is common in the modern business world, but applying the principle of good faith, the one obliged to pay and to ask for this information is the debtor, in this case Cruzeiro. There is no evidence that Cruzeiro has made any effort to comply with the payment by asking for the bank information. The behaviour of the Respondent after the first instalment was due, during the procedure in front of FIFA and now, knowing its obligation and not paying, does not show good faith.
82. The Sole Arbitrator concludes that the Appellant was in default from the moment it did not comply on time with the payment of the first instalment, this is from 1 January 2016.

6. Consequences

83. Having concluded that the Appellant was in default after not paying the first instalment on time, it is clear that said first instalment is owed to the Respondent.

84. Now it is important to determine if the total amount of USD \$3.400.000 is due or not.
85. Clause 2.5 of the Contract, which was reproduced before in this Award, provides that, in case the Appellant was late for more than 5 months in the payment of any of the instalments, Atenas had the right, at its sole discretion, to consider all future instalments as immediately due and payable and to, consequently, claim for the payment of all amounts.
86. In this case, when Atenas presented its claim in front of FIFA, more than 7 months had passed from the date the first instalment had become due, thus the claim of Atenas to receive the total amount is justified.
87. In relation to the interest of 5% per year, to be calculated from 1 January 2016 until the payment is done, the Sole Arbitrator considers that they are applicable to the case at stake and must be paid by the Appellant. This percentage is established in clause 2.4 of the Contract. In relation to the dates and the basis for the calculation of the interest, the Appellant has not objected to the ones established in the Appealed Decision, thus they are confirmed.

C. Does the Appellant has to pay the total amount of procedural expenses fixed by the Single Judge?

88. The Appellant argues that the Single Judge has no factual or legal basis to order the latter to pay the procedural costs in full.
89. In a nutshell, the argument of the Respondent is that in the procedure in front of the Single Judge, Atenas' claim was only partially accepted and that FIFA's regulations, specifically the procedural rules, establish that the costs have to be borne in consideration of the parties' degree of success in the proceedings.
90. First of all, CAS Panels have already confirmed in the past that *"it is not for the CAS to reallocate the costs of the proceedings before previous instances, and that therefore the appeal shall be dismissed in this respect"* (see, for example, CAS 2013/A/3054, paragraph 89; CAS 2016/A/4387, paragraph 181).
91. In any event, comparing what was claimed by the Respondent in front of FIFA and what the Single Judge ordered Cruzeiro to pay, the Sole Arbitrator found that the only concept that was not condemned in the Appealed Decision was an extra 5% fine that Atenas was asking for, which from the Sole Arbitrator's point of view is just an accessory claim.
92. Based on the foregoing, the Sole Arbitrator concludes that the Appellant's request for the procedural costs imposed by FIFA to be reduced, must be rejected.

D. Final conclusion

93. Taking into account that the general conclusions of the Sole Arbitrator in relation to the case at stake, are the same that those determined by the Single Judge, the Sole Arbitrator has decided to confirm the Appealed Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Cruzeiro EC against the decision issued on 22 November 2016 by the Single Judge of the FIFA Players' Status Committee is dismissed.
2. The decision issued on 22 November 2016 by the Single Judge of the FIFA Players' Status Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.