Arbitration CAS 2018/A/5697 Cruzeiro E.C. v. C.A. Independiente, award of 20 February 2019

Panel: Prof. Gustavo Albano Abreu (Argentina), Sole Arbitrator

Football
Failure to pay instalments of a transfer fee
Execution of a bilateral agreement
Cure of procedural defects
Contractual penalty clause
Criteria for the reduction of an excessive fine

1. **A party to a bilateral contract may not demand performance until it has discharged or offered to discharge its own obligation, unless the terms or nature of the contract allow it to do so at a later date. With respect to a transfer agreement between two football clubs, the club that fulfilled its obligation to transfer a player is entitled to receive the agreed payment(s). The debtor club must try, by all means, to comply with its obligation to pay, even more so when it received warnings requesting the payment(s).**

2. **The fact that CAS' panels have a full power of review of an appealed decision also means that, in principle, procedural defects occurred in the previous instance can be cured through the appeal to CAS.**

3. **A contractual clause imposing the payment of a fine in case of breach of execution of a party's contractual obligations qualifies as a contractual penalty under Swiss law if the parties bound thereby are mentioned, the kind of penalty has been determined, the conditions triggering the obligation to pay it are set, and its measure is defined.**

4. **CAS panels' power to reduce the amount of a fine they deem excessive has to be used with reluctance as it goes against the principles of contractual freedom and contractual loyalty. There must be a massive imbalance or a manifest contradiction between justice and fairness compared to the penalty at stake to modify the parties' agreed assessment.**

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 Confederation, which, in turn is affiliated to the Federation International de Football Association (hereinafter referred to as "FIFA").

2. C.A. Independiente (hereinafter referred to as the "Respondent" or "Independiente") is a football club based in Avellaneda, Argentina, member of the Argentinian 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 11 January 2016, Cruzeiro and Independiente signed an agreement (hereinafter referred to as the "Contract"), regarding the permanent transfer of the player A. (hereinafter referred to as the "Player") from the Respondent to the Appellant.

5. According to the Contract, Cruzeiro bought from Independiente, which had a valid labour contract with the Player at that time, the 100% of the federative 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. Transfer Fee.***
>
> *2.1 (…) **CRUZEIRO** shall pay to **INDEPENDIENTE** the total amount of USD 1,050,000 (one million and fifty thousand US dollars), as follows:*
>
> *(…)*
>
> *2.3 (…)*
>
> *(I) USD 550.000 (five hundred and fifty thousand US dollars) no later than 31 January 2016.*
>
> *(II) USD 250,000 (two hundred and fifty thousand US dollars) no later than 30 March 2016.*
>
> *(III) USD 250,000 (two hundred and fifty thousand US dollars) no later than 30 June 2016.*
>
> *2.4 **INDEPENDIENTE** shall send **CRUZEIRO** a proper invoice covering each of the payments with its respective bank account details and any other complementary information.*
>
> *2.4.1 In the event **CRUZEIRO** fails to make the payments in the due dates herein agreed a fine of ten per cent (10%) will apply".*

7. The Contract also contains general terms.

8. It is undisputed that Cruzeiro failed to pay the second and the third instalment in the amount of USD 500,000 and together with the application of a 10% fine (ten percent) are the main problems that must be resolved in this arbitration, and will be further analyzed 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 lead to the decision issued by the Single Judge of the Players' Status Committee (hereinafter referred to as the "Single Judge").

10. On 30 September 2016, the Respondent lodged a claim in front of FIFA against Cruzeiro, requesting the payment of the following amounts:

- USD 250,000 and a penalty of 10% plus a 5% annual interest as from the due date (30/03/2016).

- USD 250,000 and a penalty of 10% plus a 5% annual interest as from the due date (30/06/2016).

11. In reply to the claim, the Appellant alleged that the claimed default interest was not clear since the claimant did not specify if the referenced percentage should accrue daily, monthly or on a year basis, arguing that *"a penalty of 10% calculated over any eventual outstanding amount, together with any interest whatsoever the rate claimed is unfair and clear disproportionate in accordance to the well-established jurisprudence issued by the decision making bodies of the FIFA"*.

12. After analysing the arguments of the Parties, the Single Judge issued his decision on 23 January 2018 (hereinafter referred to as the "Appealed Decision"), the grounds of which were notified on 21 March 2018 to the Parties.

13. The operative part of the Appealed Decision provides as follows:

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

2. The Respondent, Cruzeiro Esporte Clube, has to pay to the Claimant, Atlético Independiente within 30 days as from the date of notification of this decision, the amount of USD 500,000 as outstanding transfer fee.

3. The Respondent, Cruzeiro Esporte Clube, has to pay to the Claimant Atlético Independiente, within 30 days as from the date of notification of this decision, the amount of USD 50,000 as penalty fee.

4. If the aforementioned amounts are not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of the expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

5. Any further claims lodged by the Claimant, Atlético Independiente, are rejected.

6. The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Cruzeiro Esporte Clube, 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 the Claimant, Atlético Independiente.

6.2 The amount of CH 15,000 has to be paid by the Respondent, directly to FIFA to the following bank account with reference to case nr 16-01784/mdo: […].

7. The Claimant, Atlético Independiente, is directed to inform the Respondent, Cruzeiro Esporte Clube, 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 Players' Status Committee of every payment received".

IV. THE ARBITRAL PROCEEDINGS BEFORE THE CAS

14. On 11 April 2018, 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 3 May 2018, the Appellant filed its Appeal Brief, together with supporting documents.

16. On 5 June 2018, the Parties were informed that the Sole Arbitrator appointed to hear this dispute was Prof. Gustavo Albano Abreu, Professor in Buenos Aires, Argentina.

17. On 28 June 2018, the Respondent filed its Answer to the Appeal Brief.

18. On 3 July 2018, 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.

19. On 10 July 2018, the Appellant informed it prefers a hearing to be held in this matter.

20. On 5 September 2018, the Parties provided their witness lists to the hearing scheduled for 29 October 2018. The Appellant provided its list, including only two of its representatives but no witnesses, contrary to what was previously announced in its Appeal Brief.

21. On 20 September 2018, in view of the fact that the Parties have eventually not called any witnesses to testify at the hearing, the Sole Arbitrator considered that such hearing was no longer necessary and annulled it. In order to give the Parties a last opportunity to present their arguments, the Sole Arbitrator decided to grant a second exchange of submissions to the Parties.

22. On 8 October 2018, on behalf of the Sole Arbitrator, the CAS Court Office issued an Order of Procedure, which was duly signed by the Appellant on 15 October 2018.

22. On 23 October 2018, the Appellant filed its Second written submission.

23. On 8 November 2018, the Respondent filed its Reply.

V. SUMMARY OF THE PARTIES' POSITIONS

25. 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

26. The Appellant's position and arguments can be summarized as follows:

27. The Single Judge failed to provide reasons of his decision, which established as not disproportionate nor excessive a penalty of 10% over any outstanding amount and as such, clearly disrespected the right of Cruzeiro to a motivated decision (Art. 5, par. 8 of the FIFA Procedural Rules).

28. It is undisputed that the Respondent made use of its contractual autonomy with view to draft and establish the terms and conditions of the Transfer Agreement and clause 2.4 established clearly that the Respondent had to address a proper invoice covering each of the instalments due as transfer fee for the permanent transfer of the player.

29. The Appellant also alleges that the Respondent had to address such invoice within one of the meanings set out in clause 5 of the Transfer Agreement, *i.e.* personally delivery, via courier or email.

30. The Respondent failed to forward to Appellant the invoices regarding the last two instalments due as transfer fee, which the former contractually undertook to do it in order to provide the latter with the necessary bank account details to permit the pertinent payments.

31. Consequently, the Respondent never had the necessary legal basis to request the Appellant the payments of the referenced remaining 2 (two) instalments due as transfer fee nor any default interest or penalty, whether it *in casu* failed to comply with its contractual obligations *i.e.* to address the referenced invoices with the bank account details.

32. The Appellant made the following requests for relief:

> *"FIRST- To dismiss in full the Appealed Decision;*
>
> *SECOND- To confirm that the Appellant is not obliged to pay the last 2 (two) instalments due as transfer fee for the permanent transfer of the Player until the Respondent forwards to the former the invoices with entitled bank account details as set out in the Transfer Agreement;*
>
> *THIRD- To order the Respondent to pay all the 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;*

FOURTH- To order the Respondent to pay to the appellant 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 set aside the imposition of a 10% penalty over the outstanding instalments as established in the Appealed Decision;

SIXTH- To confirm as the only compensation imposed on the Appellant a default interest at 5% per annum, which shall apply as from the issuance of the Appealed Decision;

SEVENTH- 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

EIGHTH- To order the Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings amounting CHF 5,000".

B. The Respondent's position

33. The Respondent's position and arguments can be summarized as follows:

34. As to the lack of grounds in the FIFA decision, the Respondent emphasizes that the same dilatory tactics have been used by the Appellant in the past with another creditor: CAS 2017/A/4994 (award of 11 July 2017).

35. The decision was correctly grounded given that the basis of the claim is an agreement that is valid and binding and the judge started its allegation referring to the principle of *"pacta sunt servanda"*. Furthermore, the Single Judge highlighted that the penalty was contractually agreed and a penalty of 10% was neither excessive nor disproportionate.

36. It also alleged that according to the applicable Swiss Law (Art. 163.1) a penalty shall only be reduced if the Judge considers it unreasonably and flagrantly exceeds the amount admissible with respect to the sense of justice and equity quoting several cases that admitted penalties way beyond 10% of the amount due: CAS 2015/A/4144, a Decision of the Swiss Federal Tribunal 4A_634/2014 confirming a CAS award that accepted a penalty amounting 25% of the amounts due, CAS 2015/A/4057 (E$1.530.000 representing the loss of chance of a transfer fee + 10%, CAS 2014/A/3646 (a penalty of E$ 1.500.000 for an unconsented loan, representing 4 times the value of the loan fee between the parties at stake), CAS 2015/A/3909 a penalty of 10% of the amounts due alongside interest at 12% annual rate.

37. As to the alleged absence of invoices, the Respondent states that the defence of the Appellant is untenable. First of all, the clause did not state that the invoice should be sent before the payment. Second, regarding the reason for the invoice, it was just to allow the Appellant to know where to transfer the money, that is why it should contain *"the respective bank details and any*

other complimentary information".

38. The Respondent also alleges that in the present case, Independiente's bank details were already uploaded to the TMS (it is a mandatory requirement as provided for in the RSTP Annex 3, art. 4.3) and Cruzeiro managed to make the payment of the first instalment, hence, the lack of an invoice is not a valid excuse for the non-compliance.

39. Third, clause 2.4 contains no consequence for the lack of issuance of the invoice. On the contrary, clause 2.4.1 provides for the consequence in case of lack of payment. The agreement was drafted by Cruzeiro (is in English and Portuguese) and therefore the appellant cannot argue that it did not understand the provision. If the Appellant wanted to make the previous issuance of an invoice a condition for the payment, then it should have written such clause explicitly in the agreement, as with the 10% penalty or with the condition precedent (clause 14 of the transfer agreement).

40. The Appellant paid the first instalment in the Independiente's account and without any reference to the invoice and without any other objection or observation. Moreover, in all the emails exchanged between the both clubs the alleged absence of invoice was never alleged by the Appellant and the only argument for late payments was the financial situation of Cruzeiro. Even more, not even at FIFA level the Appellant invoked the invoice issue. Trying to allege at this stage the absence of an invoice is clearly against good faith.

41. Finally, the Respondent points out that Independiente performed its main obligation, the transfer of the Player and the main obligation of Cruzeiro (the Appellant) was to make the agreed payments and any additional obligation of Independiente would be in any event secondary and not a valid excuse for the non-performance of Cruzeiro's main obligation.

42. The Respondent made the following requests for relief:

> *"1.-) To reject the appeal against FIFA's decision, confirming the Players' Status Committee ruling in its entirety.*
>
> *2.-) To order Cruzeiro to pay all costs and expenses relating to the FIFA and the CAS arbitration proceedings*
>
> *3.-) To order the appellant to pay a contribution towards the legal fees and other expenses incurred by this party, estimated in CHF 15.000.-".*

V. JURISDICTION

43. 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".*

44. The jurisdiction of the CAS, which has not been disputed by the Parties, derives from Article R47 of the Code and from Articles 23.4 of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") and 58 of the FIFA Statutes.

45. The jurisdiction of CAS further derives from clause 8.2 of the Contract which stipulates:

> *"Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by the FIFA Players' Status Committee (cf. Art. 23, par. 3 of the FIFA RSTP) applying FIFA rules and regulations. Any appeal to a ruling of the FIFA Players' Status Committee shall be heard by the Court of Arbitration for Sport based in Lausanne, Switzerland (cf. Art. 23, par. 3 of the FIFA RSTP, in combination with Art. 63, par. 1 of the FIFA Statues)".*

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

VI. ADMISSIBILITY

47. 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.

48. The Appealed Decision was notified to the Appellant on 21 March 2018 and the Statement of Appeal was filed on 11 April 2018, 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.

49. Accordingly, the appeal is admissible.

VII. APPLICABLE LAW

50. 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".

51. 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".*

52. 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".*

53. 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

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

55. 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 - Was the obligation of Independiente to send Cruzeiro *"a proper invoice covering each of the payments with its respective bank account details and any other complementary information"* to pay the agreed instalments a condition which non-fulfilment would have prevented the Appellant from paying the amounts due?

B - Did the Single Judge of the FIFA Players' Status Committee comply with his procedural obligations?

C - How is the penalty clause to be applied?

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

A. Was the obligation of Independiente to send Cruzeiro *"a proper invoice covering each of the payments with its respective bank account details and any other complementary information"* to pay the agreed instalments a condition which non-fulfilment would have prevented the Appellant from paying the amounts due?

57. 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.

i. General arguments

58. On one side the Appellant argues that it will not have any obligation to pay until the Respondent sends the invoice with the necessary bank account details 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.

59. On the other hand, the Respondent submits that if Cruzeiro had acted in good faith, in all emails exchanged between the two clubs, it should have required the submission of the invoice. Nothing in the conduct of the Parties can lead to the conclusion that an invoice was needed before any payment and proof of this is that Cruzeiro paid the first instalment without requiring the invoice.

60. In order to solve the case we will begin with what is undisputed.

ii. The undisputed

61. 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 1,050,000 (one million and fifty thousand US dollars), as follows:

    (I) USD 550.000 (five hundred and fifty thousand US dollars) no later than 31 January 2016.6

    (II) USD 250,000 (two hundred and fifty thousand US dollars) no later than 30 March 2016.

    (III) USD 250,000 (two hundred and fifty thousand US dollars) no later than 30 June 2016.

62. Cruzeiro and Independiente also concur that Cruzeiro paid only the first instalment in accordance with the contract and the second and third instalment had to be performed on 30 March 2016 and on 30 June 2016 and that this payments have not yet been made by Cruzeiro.

63. Preliminary conclusions

64. 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 and secondly that two instalments, are due.

65. On the other hand, there is no evidence that the Appellant required the Respondent to issue the corresponding invoices, verbally or in writing.

66. 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 invoice with the bank information in writing or does have that obligation regardless of whether it received it or not.

iii. Conclusions

67. In order to get to the final conclusion in this case, we have to focus on clause 2.4 of the Contract:

68. *"2.4 INDEPENDIENTE shall send CRUZEIRO a proper invoice covering each of the payments with its respective bank account details and any other complementary information".*

69. It is clear that for practical reasons, before the payment, the information of the bank account must be provided. 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 Independiente to provide it unilaterally and if it does not do it, Cruzeiro does not have the obligation to pay.

70. 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.

71. After carefully analysing the Contract, the Sole Arbitrator has found that the main obligations of the Parties are, in the case of Independiente, 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.

72. Cruzeiro's obligation to pay in the future was born at the time the Contract was executed and the Player was transferred. Therefore, the provision that establishes that Independiente will send an invoice *"with its respective bank account details and any other complementary information"*, is only an accessory clause.

73. It is true, as cited by the Appellant, that Article 82 of the CO establishes that *"A party wishing to demand the execution of a bilateral contract by the other party must have acted on its own"*. In the case at stake, Independiente has fulfilled its obligation to transfer the Player and with that conduct has the right to receive payment.

74. 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 Independiente requesting the payment of the due instalment.

75. Although the banking data of Independiente was charged to the Transfer Matching System and Cruzeiro managed to make the payment of the first instalment without an invoice, anyway,

applying the principle of good faith, which is required to pay and request this information it is the debtor, in this case Cruzeiro. There is no evidence that Cruzeiro has made any effort to comply with the payment requesting the bank's information. The behaviour of the Respondent after the expiration of the first instalment, during the procedure before FIFA and now, knowing its obligation and not paying, does not show good faith.

76. In the present case, the Appellant based its whole argumentation exclusively on the literal interpretation of Article 2.4., of the Transfer Agreement. In particular, it did not give any explanation as to a) the purpose of the said invoices, b) why it needed an invoice per instalment, or c) why there is a link between the non-payment of the last instalments and the issuance of a specific invoice.

77. The Sole Arbitrator concludes that the Appellant was in default from the moment it did not comply on time with the payment of the second and third instalment, this is from 30 March 2016 and on 30 June 2016.

B. Did the Single Judge of the FIFA Players' Status Committee comply with his procedural obligations?

78. The Appellant in its Appeal Brief states that *"It is undisputed that the Single Judge of the FIFA PSC failed to provide reasons of his decision, which established as not disproportionate nor excessive a penalty of 10% over any outstanding amount and as such, clearly disrespected the procedural rules emphasized above"*.

79. 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.

80. 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 it the present case, any procedural defect which could have existed in the context of the FIFA proceedings has been cured through this arbitration procedure.

81. 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"*.

82. 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.

83. 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.

84. 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.

C. How is the penalty clause to be applied?

85 It is undeniable that the Appellant did not pay the last instalments on March 30, 2016 and June 30, 2016. Therefore, the matter to be determined is whether the payment of the amount stipulated in Article 2.4.1 of the Transfer Contract is excessive or disproportionate:

> *"2.4.1 In the event CRUZEIRO fails to make the payments in the due dates herein agreed a fine of ten per cent (10%) will apply".*

86. The Single Judge decided as follows:

> *"8. In continuation, the Single Judge acknowledged that the Claimant (Independiente) requested a penalty amounting to 10% over the outstanding amount based on clause 2.4.1 of the contract and in addition a 5% annual interest as from the relevant due dates.*
>
> *9. In this respect, the Single Judge was keen to emphasize that according to the long standing and well-established jurisprudence of the Players' Status Committee 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.*
>
> *10. In this context, the Single Judge focused his attention on the penalty requested by the Claimant and remarked that said penalty was contractually agreed by the parties, i.e. clause 2.4.1 of the contract.*
>
> *11. In addition, the single Judge underlined that a 10% penalty over the outstanding transfer fee seems to be a reasonable amount to compensate late payments. Indeed, contrary to the position of the Respondent, the Single Judge was of the opinion that a 10% penalty is neither excessive nor disproportionate".*

87. Cruzeiro refers that the Single Judge made a regrettable mistake when it decides to impose on the Appellant, without having provided any reason nor clarification whatsoever, the most unfavourable option between the aforementioned quoted compensations.

88. Independiente argues that the penalty was freely established in the Contract and any reduction shall be made only up to an admissible amount not to the most favourable amount for the debtor.

89. The Sole Arbitrator notes - and it is not disputed by the Parties - that the penalty clause contained in the said provision qualifies as a contractual penalty under Swiss law (Articles 160 *et seq.* CO). Indeed, Clause 2.4.1 of the Transfer Agreement contains all the necessary elements required for such purpose: a) the Parties bound thereby are mentioned, b) the kind of penalty has been determined, c) the conditions triggering the obligation to pay it are set, and d) its measure is identified (COUCHEPIN G., La clause pénale, Zürich, 2008, para. 462).

90. Under Swiss law, the relevant provisions are the following:

> *Article 160 CO: Contractual penalty – I. Rights of the creditor - 1. Relation between penalty and contractual performance.*

1. Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.

2. Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.

3. The foregoing does not apply if the debtor can prove that he has the right to withdraw from the contract by paying the penalty.

91. The Sole Arbitrator notes that Cruzeiro freely accepted to commit itself to such contractual obligation and observes that according to Article 163 of the CO – Swiss law being the law subsidiarily applicable to the matter at hand – determines the following:

"Article 163 CO: II. Amount, nullity and reduction of the penalty.

1. The parties are free to determine the amount of the contractual penalty.

2. The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.

3. At its discretion, the court may reduce penalties that it considers excessive".

92. Thus, whereas Article 163(1) of the CO provides that parties may freely determine the amount of a contractual penalty, on the basis of Article 163(3) of the CO, the Sole Arbitrator considers that it has the duty to reduce the amount of the penalty if it considers this amount to be excessive.

93. In several cases, the Swiss Federal Tribunal underlined that the discretion of the judge according to Article 163(3) of the CO should be used with reluctance: The possibility to reduce liquidated damages by the judge is against the principles of contractual freedom and contractual loyalty and, therefore, should be applied with reluctance (SFT 4C.5/2003; 114 II 264; 103 II 135). According to legal commentators, there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages (GAUCH/SCHLUEP/SCHMID/REY, Sweizerisches Obligationenrecht, Allgemeiner Teil, 8th Ed. (2003), N 4049).

94. In view of the above legal framework, the Sole Arbitrator however does not consider a penalty of 10% of the principal debt to be excessive or that there is a massive imbalance.

95. Consequently, the Sole Arbitrator finds that Cruzeiro is required to pay a contractual penalty of 10% over the principal debt to Independiente.

D. Final conclusion

96. 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 23 January 2018 by the Single Judge of the FIFA Players' Status Committee is dismissed.

2. The decision issued on 23 January 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.