Arbitration CAS 2018/A/5738 Cruzeiro E.C. v. Club Atlético Morelia, award of 16 November 2018

Panel: Mr Marco Balmelli (Switzerland), Sole Arbitrator

Football
Overdue instalments of a transfer fee
Penalty clauses and limitation to contractual freedom
Excessive penalty clauses

1. **According to Article 160 Swiss Code of Obligations (SCO), parties to a contract may agree on a penalty clause in case of non-performance or defective performance of a contract. In case a contract has to be performed within a given deadline, the parties may agree on penalty fees for each day during which the debtor is in default. Pursuant to the principle of contractual freedom, the parties can freely determine the amount of the contractual penalty. However, a limitation to this freedom has been enacted in Article 163 al. 3 SCO in order to warrant public order and the principle of proportionality as standards of Swiss law. According to Article 163 al. 3 SCO, the court (or Panel) *"at its discretion"*, may *"reduce penalties that it considers excessive"*. This provision is mandatory and the parties cannot contractually depart from it.**

2. **A penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity. The application of this clause should only happen in a reserved way and for gross disproportions. A balance of interests is required to decide whether a penalty is abusive or not in each case. For this purpose, the creditor's interest, the seriousness of the breach of the contract and the debtor's fault, along with the financial situation of both parties, are determinant. The nature of the agreement, the debtor's professional background and the aim of the penalty also have to be taken into consideration in the balance.**

I. PARTIES

1. Cruzeiro E.C. (the "Appellant") is a Brazilian professional football club competing in the Brazilian Serie A. The Appellant is affiliated to the Brazilian Football Confederation (the "CBF") which is affiliated to the Fédération Internationale de Football Association (the "FIFA").

2. Club Atlético Morelia (the "Respondent") is a Mexican professional football club competing in the Mexican Primera Division. The Respondent is affiliated to the Mexican Football Federation (the "FMF") which is affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the 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, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 13 January 2015, the parties concluded a transfer agreement ("Transfer Agreement") regarding the player D. (the "Player").

5. The transfer sum amounted to USD 2,200,000.00 and was due according to a detailed plan:

- USD 200,000 *"within 24 hours following the registration of the New Player Contract before CBF"*;
- USD 200,000 on 17 March 2015;
- USD 200,000 on 17 April 2015;
- USD 200,000 on 17 May 2015;
- USD 200,000 on 17 June 2015;
- USD 100,000 on 17 August 2015;
- USD 100,000 on 17 September 2015;
- USD 100,000 on 17 October 2015;
- USD 100,000 on 17 November 2015;
- USD 100,000 on 17 December 2015;
- USD 100,000 on 17 January 2016;
- USD 100,000 on 17 February 2016;
- USD 100,000 on 17 March 2016;
- USD 100,000 on 17 April 2016;
- USD 100,000 on 17 May 2016;
- USD 100,000 on 17 June 2016 and
- USD 100,000 on 17 July 2016.

6. The Appellant was according to Article 12.1 of the Transfer Agreement entitled to *"discount from the transfer fee (…) 5% due as solidarity contribution (…)"*.

7. On 5 May 2016, the parties concluded another agreement (the "Debt Recognition Agreement") after the Appellant had failed to pay an important sum of the agreed transfer amount on time. USD 1,600,000 were still outstanding and acknowledged by the Appellant which is why the following payment plan was concluded:

- USD 300,000 on 11 May 2016;
- USD 200,000 on 2 June 2016;
- USD 125,000 on 2 July2016;
- USD 125,000 on 2 August 2016;
- USD 125,000 on 2 September 2016;
- USD 125,000 on 2 October 2016;
- USD 125,000 on 2 November 2016;
- USD 125,000 on 2 December 2016;
- USD 125,000 on 2 January 2017;
- USD 125,000 on 2 February 2017 and
- USD 100,000 on 2 March 2017.

8. The Debt Recognition Agreement also contained a penalty clause on page 2:

> *"CRUZEIRO agrees with the signing of this instrument, that if CRUZEIRO fail to comply with any of the payments on the dates indicated, is obliged to pay the amount of an additional $100,000.00 (one hundred thousand dollars), given that until today has a debt with MONARCAS of more than $ 1,300,00.00 (one million three hundred thousand dollars) that has not been covered by CRUZEIRO has requested to renegotiate de debt in several times. This amount should be pay three days after the breaching of this agreement" (sic).*

A penalty fee of USD 100,000 was due by the Appellant three days after a possible breach, if they failed to comply with any of the payments on the dates indicated. Any non-payment or late payment would constitute a breach and the new method of payment would lose its legal effects.

9. After the conclusion of the Debt Recognition Agreement, Cruzeiro paid the first few instalments but ceased doing so after a while again. The Respondent listed the payments as follows: USD 190,000 on 26 February, USD 190,000 on 18 March 2015; USD 190,000 on 8 May 2015; USD 285,000 on 16 May 2016 and USD 190,000 on 14 July 2016. This was not contested by the Appellant.

B. Proceedings before the FIFA Players' Status Committee

10. On 2 March 2017, the Respondent lodged a claim against the Appellant in the amount of USD 1,145,000 corresponding to the overdue instalments and of USD 100,000 for the above cited penalty fee before FIFA's Players' Status Committee (the "FIFA PSC").

11. The Single Judge of the FIFA PSC rendered his decision on 27 September 2017 (the "Appealed Decision"), partially accepting the Respondent's claim. The Single Judge considered, in essence, the following:

- The parties concluded an agreement but the Appellant undisputedly failed to comply with its obligations. According to the legal principle of *pacta sunt servanda*, the Appellant therefore had to pay to the Respondent the amount of USD 1,045,000 plus 5% interest on this amount from 2 March 2017 on, as the parties freely concluded said Debt Recognition Agreement in which the Appellant obligated himself to pay the indicated sums.

- An interest rate of 5% was due from the day of the judgment until the payment date.

- The Appellant furthermore had to pay to the Respondent a penalty fee of USD 100,000 within 30 days as from the date of notification of the Appealed Decision. This fee was also mutually agreed on by the parties (*pacta sunt servanda*) and is not excessive in view of the amount in dispute and the well-established jurisprudence.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 9 May 2018, the Appellant filed its statement of appeal against the Appealed Decision in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2017) (the "Code").

13. In accordance with Article R51 of the Code, the Appellant filed its appeal brief on 24 May 2018, amending its prayers for relief with respect to the statement of appeal.

14. In accordance with Article R55 of the Code, the Respondent filed its answer on 18 June 2018.

15. On 25 June 2018, Dr Marco Balmelli was appointed as Sole Arbitrator.

16. On 19 July 2018, the CAS Court Office, on behalf of the Sole Arbitrator, issued an Order of Procedure, which was returned signed by the Appellant on 24 July 2018 and by the Respondent on 20 July 2018.

17. On 27 July 2018, a hearing was held in Lausanne, Switzerland. In addition to the Sole Arbitrator and Mr Daniele Boccucci, Counsel to the CAS, the following persons attended the hearing:

For the Appellant: Mr André Oliveira de Meira Ribeiro, attorney-at-law in Sao Paulo. Mr Benecy Queiroz and Mr Marcelo Kiremitdjian, called as witnesses, did not appear.

For the Respondent: Mr Lucas Ferrer and Mr Luis Torres, both attorneys-at-law in Barcelona, Spain.

18. No witnesses or experts were heard, since the announced witnesses did not appear. The parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

19. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

20. The Sole Arbitrator confirms that he carefully heard and took into account in the subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

21. The following outline 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 all the submissions made by the parties, even if no explicit reference has been made in what immediately follows. The parties' written submissions and the content of the Appealed Decision were all taken into consideration.

A. Appellant

22. In its appeal brief, the Appellant submitted the following prayers for relief:

    1. *"To cancel in full the amount due as penalty and set out in the New Agreement;*

    2. *To confirm that the any default interest shall apply as from 3 March 2017;* (sic)

    3. *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 CAS; and*

    4. *To order the Respondents to pay the Appellant any contribution towards the legal and other costs and regarding the ongoing proceedings amounting CHF 5,000".*

23. The Appellant's submissions, in essence, may be summarized as follows:

    - After having paid almost half of the fee, the Appellant faced unexpected financial difficulties. It was a difficult time for all Brazilian football clubs (FIFA banned TPO transactions) and the country of Brazil on top of that faced the strongest and longest economic crisis of recent history.

    - The penalty fee is excessive and needs to be reduced according to Article 163 of the Swiss Code of Obligations ("SCO"). Furthermore, the Respondent itself wasn't much interested in this sum as they took almost half a year before sending a first payment notice, without mentioning the penalty fee.

- The interest rate on the still payable sum can only run from 3 March 2017 and not already from 2 March 2017, as the instalment was only due on this date.

- FIFA doesn't comply with its own Statutes. The Appealed Decision was not sufficiently motivated and no jurisprudence was indicated or quoted.

B. Respondent

24. The Respondent submitted the following prayers for relief, asking CAS:

> *1. "To reject the appeal filed by Cruzeiro E.C. against the decision of the FIFA Players' Status Committee dated 27 September 2017;*
>
> *2. To confirm the FIFA PSC decision in full and, accordingly, to condemn CRUZEIRO E.C. to pay CLUB ATLETICO MORELIA the following amounts:*
>
> i. *USD 1.045.000,00 (one million and forty five thousand dollars) corresponding to the amounts of the transfer fee, plus 5% interest p.a. on said amount as from 2 March 2017 until the date of effective payment;*
>
> ii. *USD 100.000,00 (one thousand dollars)* (sic!) *corresponding to the penalty;*
>
> *3. To condemn Cruzeiro E.C. to pay the total costs of these proceedings and a contribution towards the Appellant's legal fees for a total amount of EUR 10.000".*

25. The Respondent's submissions, in essence, may be summarized as follows:

- The whole procedure is only a dilatory tactic by the Appellant in order to further delay the payment of this transfer amount.

- The Respondent was very flexible in the first place and also available to conclude a new agreement, the Debt Recognition Agreement. The penalty clause was agreed on mutually and is not excessive at all.

- The Appellant has paid no part of the rest up to now. *Pacta sunt servanda* is a key principle and needs to be applied here as well. The remaining instalments need to be paid while the other points brought forward by the Appellant (interest, procedural issues) are not founded and irrelevant.

V. JURISDICTION

26. The jurisdiction of the CAS – which is not disputed by the parties – derives from Article 58 al. 1 of the FIFA Statutes, which provides that:

"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with the CAS within 21 days of notification of the question".

27. Article R47 of the Code provides:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or 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".

28. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the parties.

29. Therefore, the Sole Arbitrator considers that CAS has jurisdiction to decide over this case.

VI. ADMISSIBILITY

30. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

31. The Appealed Decision was notified to the Appellant on 18 April 2018. The statement of appeal was filed on 9 May 2018, *i.e.* within the deadline of 21 days set by Article 58 of the FIFA Statutes and Article R49 of the Code. The appeal brief was filed within due time after a five-day extension was granted. The appeal further complied with all other requirements of Articles R48 and R51 of the Code. Therefore, the appeal is admissible.

VII. APPLICABLE LAW

32. Article R58 of the Code provides the following:

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

33. Accordingly, the Sole Arbitrator rules that FIFA Regulations (primarily the Regulations on the Status and Transfer of Players, "RSTP") would apply, with Swiss law applying to fill in any gaps or lacuna, when appropriate.

VIII. MERITS

a. Penalty fee

34. Page 2 of the Debt Recognition Agreement contains the following rule:

> *"CRUZEIRO agrees with the signing of this instrument, that if CRUZEIRO fail to comply with any of the payments on the dates indicated, is obliged to pay the amount of an additional $100,000.00 (one hundred thousand dollars), given that until today has a debt with MONARCAS of more than $ 1,300,00.00 (one million three hundred thousand dollars) that has not been covered by CRUZEIRO has requested to renegotiate de debt in several times. This amount should be pay three days after the breaching of this agreement" (sic).*

35. According to Article 160 SCO, parties to a contract may agree on a penalty clause in case of non-performance or defective performance of a contract. When the contract has to be performed within a given deadline, parties may agree on penalty fees for each day during which the debtor is in default.

36. Pursuant to the principle of contractual freedom, the parties can freely determine the amount of the contractual penalty. However, the Swiss legislator has enacted a limitation to this freedom in Article 163 al. 3 SCO in order to warrant public order and the principle of proportionality as a standard in Swiss law (COUCHEPIN G., La clause pénale, Zurich 2008, N. 783).

37. Article 163 al. 3 SCO states that, *"at its discretion, the court may reduce penalties that it considers excessive"*. This provision is mandatory and the parties cannot contractually depart from it. Therefore, the judge (or the Sole Arbitrator, in this matter) shall examine this amount. The Sole Arbitrator notes in this matter that the Appellant has challenged the penalty. A balance of interests is required to decide whether a penalty is abusive or not in each case.

38. The criteria according to which contractual penalties shall be deemed as excessive and the extent to which a judge may reduce them are to be found in Swiss case law. First, as the judge can only reduce the penalty when its amount is, at the time of the judgment, abusive, the Federal Tribunal has established several criteria to define what an abusive amount is. According to the Federal Tribunal, a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity (ATF 82 II 142, consid. 3 = JdT 1957 I 104). The application of this clause should only happen in a reserved way and for gross disproportions. A balance of interests is required to decide whether a penalty is abusive or not in each case. For this purpose, the creditor's interest (ATF 103 II 129 = JdT 1978 I 159), the seriousness of the breach of the contract (ATF 91 II 372, consid. 11 = JdT 1966 I 322) and the debtor's fault (ibidem), along with the financial situation (ibidem) of both parties, are determinant. The nature of the agreement (ATF 103 II 108 = JdT 1978 I 194), the debtor's professional background (ATF 102 II 420, consid. 4 = JdT 1978 I 230) and the aim of the penalty also have to be taken into consideration in the balance. This jurisprudence has also been recognized by CAS in former decisions (CAS 2010/A/2317 & CAS 2011/A/2323).

39. Unlike in the just cited case, the Appellant in the present case was given extensions of deadline and the Respondent was ready to extend the payment deadline, leading to the conclusion of the

Debt Recognition Agreement. Even after that, the Respondent waited again after another failure to pay, inquiring about the missing payments, and the Appellant reacted only after several demands. The flexibility and tolerance of the Respondent surely should not be used against it at this stage of the procedure. In any case, the Respondent has definitely not forfeited its right to demand the penalty fee.

40. Furthermore, a penalty fee needs to be grossly disproportionate to be deemed excessive according to the law. The penalty fee of USD 100,000 in the matter at hand is less than 10% of the outstanding transfer sum. There is no straight rule, from which percentage on it could be called excessive. It must always be looked at on a case-by-case basis while the percentage of the penalty in relation to the total sum still represents an important criterion to define excessiveness. The penalty fee here being less than 10% of the outstanding amount is rather moderate in this regard. The Respondent in addition was well aware of the consequences of this part of the agreement. The stipulated penalty fee cannot be called excessive, especially because the Respondent acted very favourably towards the Appellant and granted extended payment dates etc. The reasons put forward by the Appellant for the late payments are not sufficient in the Sole Arbitrator's opinion and were also foreseeable up to a certain point.

41. By looking at the market operations of the Appellant, one can see that it earned a lot more money with transfers in the last five years than it spent. It is even more remarkable though that in the previous season (2017/18) they spent almost 4 times more than they earned. A football club that faces severe financial difficulties does not act in this way, respectively by acting so cannot evoke a disproportionality of such a penalty clause.

42. The alleged late notice by the Respondent is not a valid argument either. The Appellant tries to draw an advantage from the Respondent's flexible and cooperative behaviour.

43. To summarize it, the Sole Arbitrator concludes that according to the principle of *pacta sunt servanda* and in view of the circumstances of the present case, the penalty fee of USD 100,000.00 is clearly due.

b. The interest

44. The Sole Arbitrator therefore turns his attention to the Appellant's claim that the starting date of the interest rate for the amount due should be 2 March 2017 instead of 3 March 2017.

45. Article 102 al. 2 SCO states:

> *"Where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right of termination reserved by one party, the obligor is automatically in default on expiry of the deadline".*
>
> (in German: "Mit Ablauf dieses Tages").

46. In cases where an exact date is defined as the date, a so-called expiry-date business (*"Verfalltagsgeschäft"*), the non-complying party is immediately in default (ATF 116 II 443). To define and calculate the interest rate, Article 104 SCO in relation with Article 77 SCO are

pertinent. According to the prevailing case-law and legal doctrine, interest is due from the day after the expiry-date.

47. The last instalment in the present case should have been paid on 2 March 2017. According to Swiss law, the Appellant therefore was in default the day after the due date which is 3 March 2017. The Appellant is therefore prevailing in this rather negligible point.

c. Procedural issues

48. The Appellant further stresses that the Appealed Decision was not motivated properly as it did not provide reasons for some findings and FIFA therefore does not comply with its own Statutes. The Appealed Decision only contained a general statement that the penalty fee was not excessive without quoting or providing any proper clarification about it.

49. In this respect, the Sole Arbitrator considers 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.

50. The Sole Arbitrator considers, after reading the Appealed Decision, that the supposed procedural non-compliance pretended by the Appellant is more an argument attacking the content of the Appealed Decision than the process itself.

51. In any event, the Sole Arbitrator considers that in this new procedure before 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.

d. Conclusion

52. In conclusion, the Sole Arbitrator notes that the parties are validly bound through the Debt Recognition Agreement where a penalty fee was mutually agreed on. The Appellant, on the other hand, failed to establish that there are reasons which would allow the Sole Arbitrator to mitigate this sum. The appeal is therefore dismissed, except for the element on the interest rate which is however only marginal in view of the amount in dispute.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Cruzeiro E.C. on 9 May 2018 against the decision issued by the Single Judge of the Players' Status Committee of FIFA rendered on 27 September 2017 is partially upheld.

2. The decision issued by the Single Judge of the Players' Status Committee of FIFA on 27 September 2017 is modified as follows:

   Cruzeiro E.C. is ordered to pay Club Atlético Morelia the amount of USD 1'045'000.00 (transfer fee) and the amount of USD 100'000.00 (penalty fee);

   Cruzeiro E.C. has to pay Club Atlético Morelia 5% interest on the amount of USD 1'045'000.00 from 3 March 2017 until the date of effective payment.

(…)

5. All other prayers for relief are dismissed.