Arbitrations CAS 2021/A/7673 Club Olimpia de Paraguay v. FC Dynamo Kyiv & CAS 2021/A/7699 FC Dynamo Kyiv v. Club Olimpia de Paraguay, award of 12 October 2021

Panel: Mr Patrick Grandjean (Switzerland), Sole Arbitrator

Football
Failure to comply with the terms of a transfer agreement
Force majeure
Impossibility to perform the obligations
Burden and standard of proof
Financial difficulties
Clausula rebus sic stantibus
Interpretation of a contractual clause
Penalty clause
Maximum interest rate

1. ***Force majeure*** **is used to describe a situation or event, which is beyond the control of the parties, which prevents them from fulfilling their contractual obligations and for which they believe they should not carry any liability or obligations. Under Swiss law, there is no statutory definition of *force majeure*. According to the Swiss Federal Tribunal, there is *force majeure* in the presence of an unforeseeable and extraordinary event that occurs with irresistible force. The conditions for the occurrence of *force majeure* are to be narrowly interpreted, since *force majeure* introduces an exception to the binding force of an obligation.**

2. **The legal consequences of non-performance of a contract depend on whether the impossibility to discharge obligation is temporary or permanent and whether one of the contractual parties is at fault. Should the impossibility to fulfil the obligations be only temporary, Articles 107 to 109 of the Swiss Code of Obligations (CO) apply. In accordance with Article 97 CO, the debtor's fault is presumed. Pursuant to Article 99(1&2) CO, the debtor is generally liable for any fault attributable to him. The scope of such liability is determined by the particular nature of the transaction and in particular is judged more leniently where the obligor does not stand to gain from the transaction.**

3. **In CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence. In**

general, the burden of proof is satisfied whenever the judge is convinced of the truthfulness of a factual allegation based on objective grounds. Absolute certainty is not required. It is sufficient if the judge has no serious doubt about the existence of the alleged facts or if any remaining doubt appears to be tenuous.

4. Financial difficulties or the lack of financial means of a club cannot be invoked as a justification for the non-compliance with a payment obligation.

5. According to the principle *pacta sunt servanda*, the terms of the contract must in principle be respected. However, the contract can be amended by the judge when the circumstances under which it was concluded have changed to such an extent that the continuation of the contract cannot be required. Such an intervention by the judge must remain an exception and is acceptable only if subsequent, unforeseen and inevitable circumstances result in an obvious disproportion between performance and consideration that would make one party's insistence on its claim seem abusive. This concept, also known as *clausula rebus sic stantibus*, arises from the general principles of fairness and good faith based on Article 2 of the Swiss Civil Code (CC). The *clausula rebus sic stantibus* principle comes into play, if, at least, the following two requirements are met: a) the change in the contractual relationship is caused by new, unforeseeable and inevitable circumstances; and b) the performance becomes excessively burdensome for one party; he balance between performance and consideration is so seriously disturbed that performance of the contractual obligation cannot be demanded in good faith.

6. When the interpretation of a contractual clause is in dispute, the judge should seek to discover the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article18 para. 1 CO). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith. The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case. The requirements of good faith tend to give the preference to a more objective approach.

7. A penalty can be agreed for the event of non-performance or defective performance of a contract (Article 160 para. 1 CO). In such situation, the penalty clause must be considered "exclusive"; i.e. the creditor must choose between compelling the performance and claiming the penalty. At the same time, a penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160 para. 2 CO). In such situation, the penalty is "cumulative": this means that the creditor might claim the penalty in addition to performance, provided he has not expressly waived such right or accepted performance without reservation. In such case, the creditor might as well ask for the default interest (Article 104 CO). When the parties

have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and meaning of the main obligation that is guaranteed. The burden of proof of the "cumulative" nature of the clause falls upon the creditor (Article 8 CC).

8. An interest rate as high as 18% *per annum* is acceptable. Above this limit, the interest rate is usurious and, therefore, contrary to public morals.

I. PARTIES

1. Club Olimpia de Paraguay is a football club with its registered office in Asuncion, Paraguay ("Olimpia"). It is a member of the Paraguayan Football Association (Asociación Paraguaya de Fútbol – "APF"), itself affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Football Club Dynamo Kyiv is a football club with its registered office in Kyiv, Ukraine ("Dynamo"). It is a member of the Ukrainian Association of Football, itself affiliated with FIFA.

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings, and evidence adduced in these proceedings. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis 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 deems necessary to explain his reasoning.

B. The contract signed between the Parties

4. X. is a professional football player of Paraguayan nationality, born [in] 1994 (the "Player").

5. By means of a contract dated 7 February 2020, Dynamo accepted to transfer the Player to Olimpia (the "Transfer Agreement").

6. The Transfer Agreement provides, so far as material, as follows:

"(…)

2.2. Dynamo shall have the right:

2.2.1. To receive payment of the fixed transfer compensation for the transfer of the Player in amount of 5'000'000 (five million) US dollars, net (without any deductions).

(…)

2.3. [Olimpia] shall be obliged:

(…)

2.3.2. To pay to Dynamo the fixed transfer compensation in the amount of 5'000'000 (five million) US dollars, net as follows:

a) 1'000'000 (one million) US dollars, net - by 30 March 2020;

b) 1'000'000 (one million) US dollars, net - by 30 December 2020; and

c) 1'000'000 (one million) US dollars, net - by 30 April 2021; and

d) 1'000'000 (one million) US dollars, net - by 30 December 2021; and

e) 1'000'000 (one million) US dollars, net - by 30 July 2022. (…)

3.1 Whereas, the Parties estimate the full Player's market transfer value in the amount of 10'000'000 (ten million) US dollars, the Parties have agreed that Dynamo shall have right to receive 50% (fifty per cent) of the transfer compensation for subsequent transfers of the Player (both temporary (on a loan basis) and permanent) from the Club to third clubs. (…)

4.2. In view of the fact that Dynamo agreed to split payment of the transfer compensation into installments as per the payment schedule requested by [Olimpia], the Parties agreed that in case of untimely or incomplete execution by [Olimpia] of any of the payments under the present Contract with a delay of 15(fifteen) and more days, [Olimpia] shall be obliged to additionally pay to Dynamo a fine of 10% of the outstanding amount due plus 10% p.a. interest on the outstanding amount. [Olimpia] confirms that such penalty sanction is fair and proportionate and waives any right to challenge it.

4.3. In case of any delay in the payment for 45 (forty-five) or more days or in case of incomplete execution by [Olimpia] of any of the payments under the Contract, [Olimpia] would be obliged to immediately pay to Dynamo all payments of residual transfer compensation, provided by the Contract except for the sell on fees, which shall be payable on the terms and conditions provided in the present Contract.

> ***5. ARBITRATION***
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> *5.1. Dynamo and [Olimpia] shall take all measures to settle disputes and differences which may arise out of the present Contract by means of negotiations. In case the disputes are not settled by means of negotiations, any and all disputes arising from this Contract shall be submitted to the FIFA Player's Status Committee or (as appeal body) to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. In the latter case, the dispute shall be resolved in accordance with the Code of Sports related Arbitration.*
>
> *The language of arbitration shall be English.*
>
> *5.2. This Contract and any dispute or claim arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the FIFA Regulations and the laws of Switzerland"* (emphasis in original).

7. It is undisputed that the Player was registered with Olimpia after the signature of the Transfer Agreement.

8. On 25 March 2020, the President of Olimpia wrote to Dynamo to expose that the COVID-19 pandemic ("the Pandemic") put his club under major financial pressure as a) competitions were suspended with the consequence that the broadcast rights were not paid, b) the last matches were played behind closed doors and, therefore, did not generate any income from the ticket sales and c) membership fees could not be collected. Under these circumstances, Olimpia *"respectfully [requested] Dynamo, to postpone the payment of the first installment (only that one) for the term of 180 days"*.

9. On 26 March 2020, Dynamo answered to Olimpia that it was not willing to postpone the payment of the first instalment of the Player's transfer fee as it was facing its own financial hardships due to the Pandemic. It insisted on that fact that *"Under such circumstances, any delay in payment under the contract on transfer of [the Player] will severely affect our financial situation. You should know that the Ukrainian Championship has also been suspended and therefore our club also suffers from depriving of relevant incomes. However, such situation in no way exempt us from compliance with the financial commitments towards our counterparts. Not to say that our club, in view of its affiliation with UEFA, has to comply with Financial Fair Play Regulations and so far, to confirm that it has no overdue payables"*. As a consequence, Dynamo urged Olimpia to fully comply with its contractual obligations in a timely manner.

10. On 31 March 2020, Dynamo complained about the fact that it did not receive the first instalment of the Player's transfer fee and warned Olimpia that the payment of the relevant amount after 14 April 2020 would trigger the penalty fee provided under Article 4.2 of the Transfer Agreement. Much more, it reminded Olimpia that a payment of the first instalment made 45 days beyond the due date would make the whole transfer fee fell due at once, in accordance with Article 4.3 of the Transfer Agreement. Dynamo urged Olimpia to *"execute this payment without any further delay, however not later than by 14 April 2020. Otherwise, (…) [it] will have no other choice than to submit the claim before FIFA bodies about violations of respective Regulations made by [Olimpia] (failure to*

respect the transfer contract) and to request implementation of other non-financial sanctions as regards the overdue payables in accordance with Article 12bis of FIFA RSTP Regulations".

11. On 2 April 2020, Olimpia wrote to Dynamo to seek its indulgence, considering that the Pandemic had taken a heavy toll on Paraguay's economy and public healthcare. As the county was *"in a total lockdown situation"* and the club was left without any financial resources whatsoever, Olimpia asked Dynamo to reconsider its request to *"postpone the payment of the first installment (only that one), at least for 90 days".*

12. On 3 April 2020, Dynamo acknowledged Olimpia's letter of 2 April 2020 and referred it to its letter of 26 March 2020.

13. On 13 April 2020, Olimpia sent to Dynamo a letter dated 10 April 2020 and drafted on its behalf by its legal representative. In this document, Olimpia expressed its disappointment with Dynamo's refusal to postpone the payment of the first instalment of the Player's transfer fee, in spite of the extraordinary circumstances. Olimpia claimed to be *"in a situation of 'force majeure', which force [it] to suspend, for the moment, the corresponding payments, without any kind of liability"* and asserted that, on 16 March 2020, Paraguay was declared in a state of emergency and that, on 26 March 2020, the Law 6524 was passed resulting in the closure of all the non-essential activities. Olimpia reiterated that it did not have any income and *"added to this, it is impossible to order an international transfer, or it will be particularly complicated, since there is no officials on the department of foreign operations on the Banks, duly working, who could approve the order, after revise the documentation and get the approval from the compliance department on the Bank".* Olimpia called Dynamo once again to reconsider its position and to accept *"a negotiation in good faith in order to re-schedule the first payment, one time the emergency situation declared by Law in Paraguay be lifted, and Club OLIMPIA can attend their payments as always has done. (…) If 15 April we have not got an agreement with you, related this matter from your side, we will be forced to present the corresponding claim before the FIFA Player's Statuts (sic) Department, in order be declared that the penalties fixed for the breach of the term to pay the first installment due cannot be applied, since the breach of the term fixed for the first installment was due to a force majeure".*

14. On 1 June 2020, Dynamo wrote to Olimpia to complain about the non-payment of the first instalment of the Player's transfer fee within the 15-day and 45-day deadlines provided, respectively, under Articles 4.2 and 4.3 of the Transfer Agreement. It insisted on the fact that *"as from 15th May 2020 [Olimpia] become obliged to pay to Dynamo all residual payments of the fixed transfer compensation in the amount of $4'000'000 (four million US dollars) in addition to the overdue amount of the first payment of transfer compensation in the amount of $1'000'000 (one million US dollars). Moreover, in view of the above and taking into account provisions of cl. 4.2 of the transfer contract (which provides financial sanctions for late execution of any of the payments under the transfer contract for more than 15 days), we would like to draw your attention that the penalty (10%) and default interest (10% p.a.) became also applicable to the residual payments of transfer compensation (in the amount of $4'000'000) as from 1 June 2020".* Dynamo asked Olimpia to make the relevant payments within the next 10 days.

15. Between 4 September and 6 October 2020, Olimpia transferred the following sums to Dynamo:

- USD 100,000 on 4 September 2020;

- USD 100,000 on 21 September 2020;

- USD 200,000 on 6 October 2020.

C. The Proceedings before the Single Judge of the FIFA Players' Status Committee

16. On 29 April 2020, Dynamo filed a claim with FIFA against Olimpia, requesting the following:

- payment of the first instalment of the Player's transfer fee in an amount of USD 1,000,000 with 10% interest *p.a.* as from 31 March 2020 until the date of effective payment;

- payment of a penalty fee of USD 100,000 as provided for under Article 4.2 of the Transfer Agreement;

- imposition of disciplinary sanctions on Olimpia.

17. On 1 July 2020, Dynamo filed another claim with FIFA against Olimpia, requesting the following:

- payment of USD 4,000,000 in accordance with Article 4.3 of the Transfer Agreement with 10% interest *p.a.* as from 1 June 2020 until the date of effective payment;

- payment of a penalty fee of USD 400,000 as provided for under Article 4.2 of the Transfer Agreement;

- imposition of disciplinary sanctions on Olimpia.

18. In a decision dated 29 September 2020, the Single Judge of the FIFA Players' Status Committee ("FIFA Single Judge") examined both claims of Dynamo and partially accepted them, based upon the following considerations:

- The ongoing sanitary crisis was not a reason for Olimpia to not make the contractually agreed payments. *"[A] club's financial difficulties cannot be considered a valid justification for non-compliance with its essential contractual obligations deriving from the signature of a binding agreement"*.

- Contrary to Olimpia's assertions, FIFA Circular letter n° 1714 of 7 April 2020, entitled *"COVID-19: Football Regulatory Issues"* (the "FIFA Covid-19 Guidelines"), does not establish a general situation of *force majeure* and Olimpia was therefore not exempted from its financial obligations under the Transfer Agreement.

- In application of the principle *pacta sunt servanda* and bearing in mind that Olimpia failed to pay the first instalment of the Player's transfer fee which was originally due on 30 March 2020, the rest of the transfer fee became due on 15 May 2020, in accordance with Article 4.3

of the Transfer Agreement. As a consequence, *"the Single Judge decided that [Olimpia] should pay to [Dynamo] the entire transfer fee amounting to EUR 5,000,000".*

- *"In relation to clause 4.2 of the Agreement, the Single Judge of the PSC proceeded to analyse it and took note that said clause established '...a fine of 10% p.a. interest on the outstanding amount..'. (…) Therefore, the Single Judge came to the conclusion that despite of its unclear wording, it shall be considered as an interest clause and not as a contractual penalty clause. (…) In addition, the Single Judge was keen to emphasise that the wording of the clause 4.2 of the Agreement is clear and only establishes one way to compensate the possible delay in paying amounts contractually agreed, i.e. an annual interest of 10%. (…) Therefore, the Single Judge stated that the double request of the Claimant to apply a fine of 10% and an annual interest of 10% over the outstanding amount does not correspond to the terms agreed by the parties in the clause 4.2 of the Agreement".*

19. As a result, on 29 September 2020, the FIFA Single Judge issued the following decision:

"(…)

1. *The claim of [Dynamo] is partially accepted.*

2. *[Olimpia] has to pay to [Dynamo], the following amounts:*

   - *USD 1,000,000 plus 10% interest p.a. as from 31 March 2020 until the date of effective payment;*

   - *USD 4,000,000 plus 10% interest p.a. as from 1 June 2020 until the date of effective payment.*

3. *Any further claim lodged by [Dynamo] is rejected.*

(…)

6. *In the event that the amount due, plus interest as established above is not paid by [Olimpia] within 45 days, as from the notification by [Dynamo] of the relevant bank details to [Olimpia], the following consequences shall arise:*

   1. *[Olimpia] shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The aforementioned ban mentioned will be lifted immediately and prior to its complete serving, once the due amount is paid. (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

   2. *In the event that the payable amount as per in this decision is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee.*

7. *The final costs of the proceedings in the amount of CHF 5,000 are to be paid by the Respondent to FIFA (cf. note relating to the payment of the procedural costs below)".*

20. On 22 January 2021, the Parties were notified of the grounds of the decision issued by the FIFA Single Judge (the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 4 February 2021, Olimpia lodged its Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision in accordance with Articles R47 *et seq.* of the Code of Sports-related Arbitration (2020 edition) (the "Code"). Only Dynamo was named as a Respondent and the matter was registered under *"CAS 2021/A/7673 Club Olimpia de Paraguay v. FC Dynamo Kyiv"* ("CAS 2021/A/7673").

22. On 10 February 2021, the CAS Court Office acknowledged receipt of Olimpia's Statement of Appeal and of its payment of the CAS Court Office fee. It invited Dynamo to comment by 17 February 2021 on the request of Olimpia to submit the case CAS 2021/A/7673 to a sole arbitrator.

23. On 12 February 2021, Dynamo lodged its Statement of Appeal with the CAS against the Appealed Decision in accordance with Articles R47 *et seq.* of the Code. Only Olimpia was named as a Respondent and the matter was registered under *"CAS 2021/A/7699 FC Dynamo Kyiv v. Club Olimpia de Paraguay* ("CAS 2021/A/7699").

24. On 17 February 2021, Dynamo informed the CAS Court Office that it agreed to refer the case CAS 2021/A/7637 to a sole arbitrator.

25. On 19 February 2021, Olimpia requested a 10-day extension of its deadline to file its Appeal Brief, which was eventually granted in accordance with Article R32 of the Code.

26. On 22 February 2021, the CAS Court Office acknowledged receipt of Dynamo's Statement of Appeal and of its payment of the CAS Court Office fee. It invited Olimpia to comment a) within 5 days on the request of Dynamo to submit the case CAS 2021/A/7699 to a sole arbitrator and b) within 2 days on Dynamo's application requesting the same case be expedited in accordance with Article R52 of the Code.

27. On 22 February 2021, Dynamo requested a 10-day extension of its deadline to file its Appeal Brief, which was eventually granted in accordance with Article R32 of the Code. It also requested the case CAS 2021/A/7699 be consolidated with the case CAS 2021/A/7673 as both proceedings were directed against the same Appealed Decision.

28. The same day, Olimpia informed the CAS Court Office that it a) was opposed to Dynamo's motion for an expedited procedure, b) agreed to refer the matter registered under CAS 2021/A/7699 to a sole arbitrator and c) requested the consolidation of the cases CAS 2021/A/7673 and CAS 2021/A/7699.

29. On 23 February 2021, the CAS Court Office confirmed to the Parties that, in view of Olimpia's objection, no expedited procedure was being implemented. It furthermore confirmed that the cases CAS 2021/A/7673 and CAS 2021/A/7699 were consolidated and that the President of the CAS Appeals Arbitration Division or her Deputy would appoint the sole arbitrator in charge of both procedures.

30. On 4 March 2021, Dynamo requested that its deadline to file its Appeal Brief be extended until 12 March 2021, which was eventually granted following Olimpia's consent.

31. On 4 March 2021, FIFA confirmed to the CAS Court Office that it had renounced on its right to request to intervene in the present arbitration proceedings.

32. On 4 March 2021, Olimpia filed its Appeal Brief in the case CAS 2021/A/7673 in accordance with Article R51 of the Code.

33. On 12 March 2021, Dynamo filed its Appeal Brief in the case CAS 2021/A/7699 in accordance with Article R51 of the Code.

34. On 15 March 2021, the CAS Court Office acknowledged receipt of both Appeal Briefs and invited the Parties to submit their respective Answer within the next 20 days.

35. On 16 March 2021, Olimpia asked the CAS Court Office that the time limit for the filling of its Answer be fixed after the payment by Dynamo of its share of the advance of costs.

36. On 24 March 2021, Dynamo asked the CAS Court Office that the time limit for the filling of its Answer be fixed after the payment by Olimpia of its share of the advance of costs.

37. On 29 March 2021, the CAS Court Office acknowledged receipt of each Party's payment of its share of the advance of costs in the relevant procedure and invited both, Olimpia and Dynamo, to file their respective Answer within 20 days. The Parties were also informed that the Deputy President of the CAS Appeals Arbitration Division had appointed Mr Patrick Grandjean, Attorney-at-law, Lausanne, Switzerland as Sole Arbitrator in accordance with Articles R52, R53 and R54 of the CAS Code.

38. On 16 April 2021, Olimpia filed its Answer in accordance with Article R55 of the Code.

39. On 19 April 2021, Dynamo applied for a 10-day extension of its deadline to file its Answer, which was granted in accordance to Article R32 of the Code.

40. On 29 April 2021, Dynamo applied for an extension of the deadline to file its Answer until 15 May 2021. By letter of 30 April 2021, the CAS Court Office invited Olimpia to comment on Dynamo's request by 3 May 2021, failing which its silence would be considered as acceptance. On 5 May 2021, the CAS Court Office noted the absence of reply from Olimpia within the given deadline and granted the extension of time requested by the Dynamo.

41. On 17 May 2021, Dynamo applied for an extension of the deadline to file its Answer until 22 May 2021, which was granted following Olimpia's tacit acceptance. As 22 May 2021 fell on a Saturday, the due date for Dynamo to submit its Answer was extended to Monday 24 May 2021.

42. On 25 May 2021, the CAS Court Office acknowledged receipt of the Answers filed on 16 April 2021 by Olimpia and on 24 May 2021 by Dynamo and invited the Parties to state by 1 June 2021 whether their preference was for a hearing to be held in the present matter.

43. Within the prescribed deadline, Olimpia requested a hearing to be held, whereas Dynamo confirmed that it preferred for the matter to be decided solely on the basis of the written submissions.

44. On 22 June 2021, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing, which was eventually scheduled for 12 July 2021, with the agreement of the Parties.

45. On 1 July 2021, the CAS Court office sent to the Parties the Order of Procedure which was returned duly signed by the Parties on 8 July 2021.

46. The hearing was held on 12 July 2021, via video-conference.

47. In addition to the Sole Arbitrator and Mrs Delphine Deschenaux-Rochat, Counsel to the CAS, the following persons attended the hearing:

For Olimpia:

1) Mr Rafael Benitez, in-house legal counsel

2) Mr Ariel N. Reck, external legal counsel

For Dynamo:

1) Mr Dmytro Brif, in-house legal counsel.

48. During the hearing, the Parties were questioned by the Sole Arbitrator. Relevant parts of their testimony include that:

- During the Pandemic, Olimpia kept paying its employees' salaries. However, it had to terminate some employment contracts and some of its players accepted a salary cut.

- The Player is still playing for Olimpia but he is among the employees who accepted a reduction in his wages.

- During the Pandemic, Olimpia sold one of its players and hired a new player, whose transfer fee was paid by offsetting a claim that Olimpia had against the transferor club.

- Considering that Dynamo did not make any effort to settle the situation in spite of the extraordinary circumstances caused by the Pandemic and in view of its rigid attitude, Olimpia had decided to settle its other debts before paying the Player's transfer fee.

- Olimpia's financial statement for the year 2020 was not available.

IV. SUBMISSIONS OF THE PARTIES

A. Olimpia

49. In its Appeal Brief filed in the matter CAS 2021/A/7673, Olimpia submitted the following requests for relief:

> *"As a result, [Olimpia] asks CAS to adopt an award stating:*
>
> *1.- FIFA's decision should bee (sic) annulled.*
>
> *2.- Olimpia's overdue shall be considered justified due to force majeure.*
>
> *3.- As we proposed, the transfer fee shall be mantained (sic) but the payment schedule shall be adjusted as requested in application of the Rebus Sic Stantibus doctrine, annuling (sic) the penalties and the acceleration decided by FIFA.*
>
> *4.- On a subsidairy (sic) basis, we request the CAS to apply any other alternative solution that the Sole Arbitrator deems appropiate (sic) to restore the balance in the contract.*
>
> *5.- In any case (even if the Sole Arbitrator dismisses the other defenses), clause 4.3 of the contract shall be considered innaplicable (sic) for being an excessive punishment under the circumstances of the case and also for being a hidden interest clause that raises the total rate to a percentage incompatible with public policy. In that case, the award shall order Olimpia to pay only the installments due at the time of the award, with an interest rate of 10% p.a, minus the amounts already paid.*
>
> *6.- The legal costs of the present case shall be imposed to Dynamo".*

50. In its Answer filed in the matter CAS 2021/A/7699, Olimpia submitted the following requests for relief:

> *"As a result, we request CAS to adopt an award stating that:*
>
> *1.- FIFA's decision should be annulled.*
>
> *2.- Olimpia's overdue shall be considered justified due to force majeure.*
>
> *3.- As we proposed in our appeal brief, the transfer fee shall be maintained but the payment schedule*

shall be adjusted in application of the Rebus Sic Stantibus doctrine, annulling the penalties and the acceleration decided by FIFA.

4.- Subsidiarily, we request CAS to render any other alternative solution that the Arbitrator deems fit to restore the contract´s economic balance.

5.- In any case (even if the Sole Arbitrator dismisses the other defenses), clause 4.3 of the contract shall be considered inapplicable for being an excessive punishment under the circumstances of the case and also for being a hidden interest clause that raises the total interest rate to a percentage violative of swiss public policy. Should this be the case, we request for the decision to order Olimpia to pay only the installments due at the time of the award, with an interest rate of 10% p.a, minus the amounts already paid.

6. Should the Sole Arbitrator consider the applicability of clause 4.3, the penalty of 10% foreseen in clause 4.2 shall be left unactive due to the exclusive and non- cumulative nature of the scheme set forth in the mentioned clauses.

7.- The legal costs of the present case shall be borne by Dynamo".

51. The submissions of Olimpia, in essence, may be summarized as follows:

- The Pandemic (and the resulting economic and health situation in Paraguay) is an event of *"force majeure under the terms of arts. 97.1 and 119 of the Swiss CO"* making it impossible for Olimpia to comply with its contractual obligations.

- Contrary to the findings of the FIFA Single Judge, the financial difficulties faced by Olimpia are the direct result of the Pandemic and not of the club's lack of management of its first team or of poor sporting results. Olimpia cannot be held responsible for being unable to comply with its contractual obligations. *"The dramatic speed at which the events developed and the lack of information on the virus at the time of the agreement's perfection made it impossible for Olimpia to foresee what was coming or what the impact of the sanitary crisis would have on football. The fact that the pandemic and its effects on football are totally out of Olimpia's control is in itself evident and does not deserve further debate".*

- Olimpia tried at all time to reach a new agreement with Dynamo or at least to obtain a payment delay, without success. As a sign of good will, it even made some partial payments to Dynamo, which had completely closed the door on any attempt to find a practical solution to a situation caused by a worldwide crisis. *"In light of the described facts and in the context befalling upon the contract, Dynamo's response to Olimpia' s request can be viewed as an act of bad faith".*

- On 11 June 2020, FIFA issued its Circular letter n° 1720, entitled *"COVID-19: Football Regulatory Issues (FAQs and new matters)"* ("Circular letter n° 1720"). According to this document, the Pandemic does not automatically amount to a *force majeure* situation for

every country. Whether such a *force majeure* situation (or its equivalent) exists in a specific territory must be addressed on a case-by-case basis. In his Appealed Decision, the FIFA Single Judge did not make such an analysis of the case at hand. In particular he did not take into account the specificity of the situation of Olimpia, whose finances suffered greatly from the suspension of all football activities, the absence of season tickets and match-day revenue and from the fact that it had to reimburse the fans for the advance purchase for a match that was eventually cancelled. Much more, *"the abrupt suspension of the sportive season in Paraguay had a negative impact to all football clubs. Like in many other places in the world, clubs faced cuts in sponsors payments and TV rights, as well as no income for ticketing match day revenue, merchandising, etc. Olimpia suffered a 60% reduction in its annual incomes in 2020 as the economic report shows"*.

- The requirements developed by the Swiss Federal Tribunal in relation with the *clausula rebus sic stantibus* principle, are met in the present case. As a consequence, Olimpia must be temporarily exempted from fulfilling its contractual obligations, until better times.

- *"It is even foreseeable that Dynamo was in fact awar (sic) of the potential efects (sic) of Covid and that's why the club decided to accept the transfer and to include these penalties, knowing in advance the difficulties that were coming"*.

- The new circumstances generated by the Pandemic represent a direct and significant change of scenario, which resulted in an unfair disparity between the Parties' reciprocal obligations: Olimpia acquired the Player's services but could not make use of them due to the suspension of all football activities. Moreover, it had to pay for the Player's salaries. *"For the same reasons, Dynamo would have not been able to use the player had he stay in Dynamo. So, the transfer represented (apart from the fee) a savings for [Dynamo]"*.

- Olimpia suggested that the following payment schedule be imposed to Dynamo: USD 500,000 by 30 July 2021; USD 500,000 by 30 December 2021; USD 1,000,000 by 30 July 2022; USD 1,000,000 by 30 December 2022; USD 1,000,000 by 30 July 2023; USD 600,000 by 30 December 2023.

- The interest rate applied by the FIFA Single Judge in his Appealed Decision is excessive. According to the Transfer Agreement, the Player's transfer fee was to be paid in 5 instalments, between 30 March 2020 and 30 July 2022, *i.e.* over a period of 2 years and 4 months. By applying Article 4.3 of the Transfer Agreement, the FIFA Single Judge accepted that the entire transfer fee fell due on 15 May 2020. Hence, by applying a 10% rate (as provided under Article 4.2 of the Transfer Agreement) to the "accelerated payment" of instalments n°2 to n°5, Olimpia is deemed to pay to Dynamo an added amount of USD 453,488, corresponding to approximatively 13%. Hence, this *"hidden rate"* of 13% added to the *"non hidden rate"* of 10% provided for under Article 4.2 of the Transfer Agreement amounts to a total rate of 23%, which must be considered as usurious. *"In summary, the combination of clauses 4.2 and 4.3 as admited (sic) by the single judge, has*

the effect of rainisng (sic) the interest rate to a 23%, far beyond the acceptable limit of 17% admited (sic) by swiss law and CAS jurisprudence".

- The FIFA Single Judge correctly interpreted Article 4.2 of the Transfer Agreement. The unclear wording of this provision must be interpreted as per the principle *in dubio contra proferentem* as the Transfer Agreement was drafted in its entirety by Dynamo.

- Articles 4.2 and 4.3 of the Transfer Agreement provide for non-cumulative penalties: *"[The] wording of clauses 4.2 and 4.3 construct the applicable scheme to outstanding payments assigning either the 10% penalty to payments delayed between 15 and 44 days, or the acceleration clause (4.3) to payments delayed for 45 days or more. (…)".*

B. Dynamo

52. In its Appeal Brief filed in the matter CAS 2021/A/7699, Dynamo submitted the following requests for relief:

"Based on the above, [Dynamo] respectfully PLEADS:

1. To modify the clause 2 of the findings of the contested decision as follows:

'2. [Club Olimpia] has to pay to [Dynamo], the following amounts:

- *USD 1,000,000 plus 10% interest p.a. as from 31 March 2020 until the date of effective payment;*
- *USD 4,000,000 plus 10% interest p.a. as from 1 June 2020 until the date of effective payment;*
- *USD 500,000 as the contractually agreed penalty';*

2. To grant to [Dynamo] a contribution of all the costs of arbitration, including the CAS Court Office fee amounting to CHF 1'000 and the advance of costs, which would be paid in due course;

3. To grant to [Dynamo] a contribution towards its expenses, incurred in connection with the proceedings but not less than 30.000 CHF".

53. In its Answer filed in the matter CAS 2021/A/7673, Dynamo submitted the following requests for relief:

"Based on the above, [Dynamo] respectfully PLEADS:

(1) To reject the Appeal, lodged by [Olimpia], in its entirety.

(2) To oblige [Olimpia] to bear all costs of the present proceedings;

(3) To grant to [Dynamo] a contribution towards its expenses, incurred in connection with the proceedings but not less than 15.000 CHF".

54. The submissions of Dynamo, in essence, may be summarized as follows:

- In his Appealed Decision, the FIFA Single Judge correctly found a) that Olimpia was in default of the contractually agreed payments, b) that FIFA guidelines do not establish a general situation of *force majeure* following the Pandemic outbreak, c) that the requirements of Article 4.3 of the Transfer Agreement were met.

- The FIFA Single Judge erroneously interpreted Article 4.2 of the Transfer Agreement. As is clear from the text of the Appealed Decision, the FIFA Single Judge based his reasoning on a misquotation of the said provision. The fact that the FIFA Single Judge cut five important words off Article 4.2 of the Transfer Agreement undeniably affected the legal clarity of the text and did absolutely not reflect the Parties' intention, which is unambiguously transcribed in the original wording of the provision.

- The penalties provided for under Articles 4.2 and 4.3 of the Transfer Agreement are cumulative, as expressly accepted by Olimpia in its Answer filed before the FIFA Single Judge. This is also confirmed by the clear wording of Articles 4.2 and 4.3 of the Transfer Agreement.

- The penalties provided under the Transfer Agreement in case of late payments of the transfer fee are fair and proportionate. Furthermore, similar penalties are applied in numerous transactions in the football community and are common practice in the presence of players' transfers.

- A distinction must be made between default interest, which is governed by Article 104 of the Swiss Code of Obligations ("CO") and penalties, governed by Article 160 CO. Hence, Article 4.2 of the Transfer Agreement provides for a fine as well as a default interest.

- The concept of *force majeure* is widely and internationally accepted but must only be applied in a very restricted manner. It is limited to cases where it is absolutely impossible for the debtor to execute its obligation. In the present case, it is Olimpia's case that it cannot carry out its side of the Transfer Agreement due to its financial problems linked to the Pandemic. *"[Under] no legal concepts in no country such a reason could be interpreted as a justification of force majeure".* According to a constant and well-established jurisprudence of the CAS, financial difficulties or lack of financial means cannot be invoked as a justification for the non-compliance with an obligation.

- Olimpia claims that bank transfers are *"particularly complicated"* due to the situation caused by the Pandemic. However, it does not mean that such transfers are impossible. Olimpia has not proven otherwise.

- The principle of *clausula rebus sic stantibus* allows the parties to a long-term contractual relationship to request a change of certain contractual parameters. *"According to the Swiss legal doctrine one of the mandatory elements of situation, when such clausula could be applicable is fundamental change of the circumstances. However, a* ***judicial adjustment is exceptionally possible only*** *if* ***the circumstances changed so fundamentally*** *after the conclusion of the contract* ***that a serious equivalence disruption occurs.*** *In this regard we should note that in our case this element is not met because there are no any circumstances, which were fundamentally changed as to the subject matter of the contract: the football still exists, Club Olimpia still participates in organized football, the player is eligible to play etc. All the circumstances were not changed. In fact, the only change, which [Olimpia] tries to involve, - is alleged problems of Club Olimpia with its finances. However, Under Swiss law, the performance of monetary obligations is never impossible. Therefore, the party's obligation to execute the payment within the agreed terms could not be affected due to its financial difficulties"* (emphasis added by Dynamo).

- The principle of *clausula rebus sic stantibus* is only applicable *"if there is significant disproportion between performance and consideration. In our case there are no any disproportion between performance and consideration. In the present case Dynamo by means of conclusion of the transfer contract provided Club Olimpia with the right to sign the employment contract with our former football player and accordingly to register the player for its team and to benefit from his performance. On the other hand, Club Olimpia obliged to pay Dynamo transfer compensation. Not to say that this player was engaged by Dynamo for a huge amount of more than 12 million Euros".*

- Just like Olimpia, Dynamo suffers from the whole situation created by the Pandemic. Just like all the other clubs in the world, Dynamo needs to meet its own financial obligations and there is no reason for Olimpia to benefit from a privileged treatment.

V. JURISDICTION

55. The jurisdiction of the CAS, which is not disputed, derives from Articles 57 et seq. of the applicable FIFA Statutes, Article R47 of the Code as well as Article 5 of the Transfer Agreement. It is further confirmed by the Order of Procedure duly signed by the Parties.

56. It follows that the CAS has jurisdiction to decide on the present dispute.

57. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

VI. ADMISSIBILITY

58. The appeals are admissible as Olimpia as well as Dynamo submitted them within the deadline provided by Article R49 of the Code as well as by Article 58 para. 1 of the applicable FIFA Statutes. They comply with all the other requirements set forth by Article R48 of the Code.

VII. APPLICABLE LAW

59. 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".*

60. Pursuant to Article 57 (2) of the applicable FIFA Statutes, *"[t]he 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".*

61. In Article 5 of the Transfer Agreement as well as in their respective written submissions, the Parties expressly agreed that, subject to the primacy of applicable FIFA's regulations, Swiss Law should apply to the extent warranted.

62. As a result and in light of the foregoing, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply complementarily, whenever warranted.

63. The present case was submitted to FIFA on 29 April 2020, *i.e.* after 5 June 2019 and 1 March 2020, which are the dates when the FIFA Statutes, edition June 2019 and the Regulations on the Status and Transfer of Players, edition March 2020, came into force.

64. These are the editions of the rules and regulations, which the Sole Arbitrator will rely on to adjudicate this case.

VIII. PROCEDURAL MOTIONS

A. The request filed by Olimpia in its Appeal Brief

65. Article R57 (3) of the Code provides the following:

> *"The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply".*

66. Article R44.3 (1) of the Code reads as follows:

> *"A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant".*

67. In its Appeal Brief, Olimpia requested the Sole Arbitrator *"to ask FIFA 1. The entire file that lead to [the Appealed Decision]"* as well as *"2. The TMS instructions and dates for the transfer of the player from Dynamo to Olimpia"*. It did not support its motion with any argument or document showing that the requested documents were relevant or necessary.

68. Bearing in mind that a) Olimpia was a party in the proceedings before the Single Judge of the FIFA Players' Status Committee, b) filed submissions before that instance, c) does not dispute the fact that it entered into an employment contract with the Player, the Sole Arbitrator decided to dismiss Olimpia's application for lack of apparent pertinence, in accordance with Articles R57 of the Code. He is comforted in his position by the fact that, since the filing of its Appeal Brief on 4 March 2021, Olimpia did not make any reference to its request, not even in its Answer filed on 16 April 2021 nor during the hearing held on 12 July 2021.

B. Olimpia's Witnesses

69. In its Appeal Brief, Olimpia indicated an intention to call Mrs Lilian Machuca, head of finances at Olimpia, and announced that she would make observations on *"the financial crisis generated by the covid pandemic in Olimpia"*, comment a report which she drafted and which was filed as exhibit 4 to the Appeal Brief and *"explain the calculation of the interest for advance payment of the installments originally set to mature in 2022 and 2023"*.

70. On 9 July 2021, *i.e.* three days prior the hearing before the CAS, Olimpia announced that Mrs Machuca would not be able to testify for health reasons. It required the Sole Arbitrator to *"accept in replacement the testimony of Manuel Adolfo Ferreira Brusquetti, who works as external financial auditor of Olimpia"*. No notice of any kind had previously been given with respect to Mr Brusquetti.

71. At the hearing before the CAS, Dynamo objected on the basis that the criteria of Articles R51 and R56 of the Code were not satisfied. These provisions read as follows:

- Article 51 (2) of the Code:

  "In its written submissions, the Appellant shall specify the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, it intends to call and state any other evidentiary measure which it requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise".

- Article 56 (1) of the Code:

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

72. At the hearing before the CAS, the Sole Arbitrator informed the Parties that he had decided to reject Olimpia's application as there were no exceptional circumstances within the meaning of Article R56 of the Code to justify admission of Mr Brusquetti's testimony. He held that each party was responsible for the availability of its witnesses and experts it had called and the fact that Mrs Machuca was unexpectedly unable to testify did not amount to an *"exceptional circumstance"*.

IX. MERITS

73. It is uncontroversial that a) the Player was transferred from Dynamo to Olimpia, b) the transfer fee is USD 5,000,000, c) this amount was to be paid in five instalments over a period of 2 years and 4 months, d) the first instalment equals USD 1,000,000 and fell due on 30 March 2021; *i.e.* after 11 March 2020, when the World Health Organization (WHO) has declared the COVID-19 outbreak a global pandemic, e) to date, Olimpia has paid USD 400,000, f) Olimpia is willing to pay the transfer fee but with another payment schedule as the one contractually agreed. Olimpia claims that, because the Pandemic is a *force majeure* event, it was not in a position to perform its contractual obligations in a timely manner and, therefore, is not at fault.

74. The matters in dispute to be resolved by the Sole Arbitrator are as follows:

A. Does the Pandemic qualify as a *force majeure* event rendering Olimpia's performance of its contractual obligation temporarily impossible?

B. Can the Sole Arbitrator revise the Transfer Agreement to adapt the payment schedule to the changed circumstances following the spread of the COVID-19?

C. What are the consequences from Olimpia's noncompliance with the terms of the Transfer Agreement?

A. Does the Pandemic qualify as a *force majeure* event rendering Olimpia's performance of its contractual obligation impossible?

75. Succinctly expressed, *force majeure* is used to describe a situation or event, which is beyond the control of the parties, which prevents them from fulfilling their contractual obligations and for which they believe they should not carry any liability or obligations.

76. With respect to the possible consequences of the Pandemic on the contractual relationship between the Parties, the resolution of the dispute will need a two-phase approach. At first, it is necessary to assess whether the Transfer Agreement includes specific provisions, which deal with the non-performance or delay of performance due to events like the Pandemic (e.g., a *force majeure* clause). Secondly, the situation must be reviewed in the light of the applicable law.

1. The Transfer Agreement

77. The Transfer Agreement does not contain a *force majeure* clause. In this document, the Parties did not contemplate the non-performance of the contract following the occurrence of a specified event, which is beyond the control of the Parties or which the Parties could not have anticipated.

78. The only provision of the Transfer Agreement, which deals with non-performance, is its clause 4, which merely provides for a penalty and default interest in case of late payment, regardless of the reason for the delay. In particular, nowhere in the contract is there a definition of an event that could be related to a *force majeure* situation.

2. FIFA Regulations

79. Article 27 RSTP, entitled *"Matters not provided for"* reads as follows:

> *"Any matters not provided for in these regulations and cases of force majeure shall be decided by the FIFA Council whose decisions are final".*

80. There is no definition of *force majeure* in the FIFA Regulations.

81. At FIFA level, the concept of *force majeure* related to the Pandemic was addressed in several FIFA circular letters ("CL"):

- 13 March 2020 (CL n° 1712): On account of the spread of COVID-19, it was observed that *"Many national governments have put in place restricted travel and immigration requirements, introduced quarantine periods, and banned public gatherings. Football (and public) authorities have taken similar precautions in ordering matches to be postponed or played behind closed doors, restricting access to team dressing rooms and stadiums, and suspending or cancelling competitions. FIFA itself recently postponed the Asian and South American qualifiers for the FIFA World Cup Qatar 2022".* Considering that the circumstances *"constitute a situation of force majeure"*, the Bureau of the FIFA Council took several measures with respect to the release of players to association teams. In this CL, FIFA recommended the postponement of any international matches but insisted that *"the final decision on this matter rests with the relevant competition organisers or with the relevant member associations in case of friendlies".*

- 7 April 2020 (CL n° 1714): FIFA provided its members with recommendations *"to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonised in the common interest".* On that occasion, FIFA reiterated that the Bureau of the FIFA Council recognised that the disruption to football caused by the Pandemic was a case of *force majeure* and declared *"The COVID-19 situation is, per se, a case of force majeure for FIFA and football".* In this CL, FIFA submitted *"proposed guiding principles"*, which covered three core matters; *i.e.* a) expiring employment agreements; b) employment agreements which cannot be performed as the parties originally anticipated; and c) registration periods. The proposed

guidelines do not cover the situation at stake; *i.e.* the payment of a transfer fee from one club to another. However, it transpires from this CL that the members of the football family are strongly encouraged to work together to find appropriate solutions in response to the extraordinary circumstances surrounding the worldwide Pandemic.

– 11 June 2020 (CL n° 1720): FIFA issued a document entitled *"Frequently asked questions (FAQs) COVID-19 Football Regulatory Issues"* (the "FAQ"). In a preamble, it is exposed that *"From 8 April 2020 to 7 May 2020, the FIFA administration conducted 13 workshops with representatives from its MAs and confederations, members of the WLF, and members of the ECA, which involved more than 350 participants from around the world. The FIFA administration has also actively responded to any electronic queries received regarding the regulatory and legal impact of COVID-19. This active consultation process led to the identification of frequently asked questions (FAQs) as well as several new regulatory and legal issues for consideration"*. The very first questions dealt with in this document were a) whether the Bureau of the FIFA Council declared a *force majeure* situation in any territory and b) whether this declaration can be relied upon by Member associations, clubs, or employees.

  The following answer was offered:

  > *"In this context, on 6 April 2020, the Bureau made several decisions regarding regulatory and legal issues as a result of COVID-19. In order to temporarily amend the RSTP, the Bureau relied upon article 27 as its source of power, determining that the COVID-19 outbreak was a matter not provided for and a force majeure situation for FIFA and football generally.*
  >
  > *The Bureau did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure.*
  >
  > *For clarity: clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent).*
  >
  > *Whether or not a force majeure situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement"* (emphasis added by FIFA).

82. The Pandemic was addressed in further CL and other FIFA publications, none of which makes reference to the concept of *force majeure*. This said and in relation with the dispute at stake, it is noteworthy to mention the existence of the *"Global Transfer Market Report 2020 – a review of international football transfers worldwide"*, released by FIFA on 18 January 2021. According to this document, *"Although the absolute numbers show a decline for the first time in the last ten years, the transfer activity of professional football players in 2020 was still high, demonstrating the considerable resistance and strength of football in the worldwide employment activity, with a total of 17,077 international transfers (…) representing a decrease of 5.4% compared to 2019, while still slightly higher than 2018. (…) In January 2020,*

the number of international transfers was up 9.2% compared to the same period in the previous year, and this increase would probably have been even more significant in the second transfer window. But after the pandemic started spreading across the globe, the usual peak in July did not happen, with a large number of competitions not being completed and many member associations shifting their registration periods. Instead, there was a longer and more extensive period of transfer activity, beginning in early July and reaching its peak in late September, and even continuing into October. (…) [Club-to-club transfers] represented a relatively small proportion of the activity (11.6%) of all transfers in 2020. Transfers of out-of-contract players were by far the most common activity with an impressive 62.5%. (…) [While] both of these types of transfers decreased in 2020 compared to 2019 (12.9% and 64.3% respectively in 2019), loans and returns from loans both took a more prominent role than in the previous year with shares of 16.2% (14.2% in 2019) and 9.7% (8.6% in 2019)". According to this document, Olimpia was among the *"top ten clubs from CONMEBOL by spending on transfer fees in 2020"*. According to this document and in 2020, Olimpia accumulated 18 outgoing transfers.

83. In view of the foregoing and in particular the FAQ, it appears that no automatic recourse to the notion of *force majeure* is supported by the FIFA applicable regulations and/or can be made by clubs or employees impacted by the Pandemic. According to FIFA, each situation must be assessed on a case-by-case basis, *"vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement"*; *i.e.* in the present case, Swiss law.

3. Swiss law

84. The legal concept of *force majeure* is widely and internationally accepted and, in particular, is valid and applicable under Swiss law, which is applicable to the present dispute.

85. Under Swiss law, there is no statutory definition of *force majeure*. However and according to the Swiss Tribunal federal ("SFT"), there is *force majeure* in the presence of an unforeseeable and extraordinary event that occurs with irresistible force (WERRO F., in Commentaire Romand, 2nd ed., no 46 *ad* Art. 41 CO and references).

86. In CAS 2015/A/3909 (which refers to a decision of the SFT, 2C_579/2011, consid. 1 of 21 July 2022 – which in fact quotes the finding of the lower instance), the Panel held that *"force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner"*. According to other Panels, *"force majeure implies an objective (rather than a personal) impediment, beyond the control of the "obliged party", that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible"* (CAS 2018/A/5537; CAS 2017/A/5496; CAS 2013/A/3471; CAS 2006/A/1110; CAS 2002/A/388). In CAS 2010/A/2144, the Panel found that *"force majeure is an event which leads to the non performance of a part of a contract due to causes which are outside the control of the parties and which could not be avoided by exercise of due care. The unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it. (…) Moreover, force majeure is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference"*. Consistently with the SFT (WERRO F., *ibidem*), several CAS Panels have

insisted on the fact that *"The conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation"* (CAS 2018/A/5537; CAS 2015/A/3909; CAS 2006/A/1110).

87. In the absence of a *force majeure* clause in the Transfer Agreement, Swiss statutory law applies. The legal consequences of non-performance of a contract depend on whether the impossibility to discharge obligation is temporary or permanent and whether one of the contractual parties is at fault.

88. Should the impossibility to fulfil the obligations be only temporary, Articles 107 to 109 CO apply. According to these provisions, the counterparty can, at its discretion, a) set an appropriate time limit for subsequent performance or ask the court to set such time limit (Article 107 CO), b) under certain circumstances, insist on performance without delay (Article 108 CO), c) waive performance and claim damages (Article 107(2) CO or d) terminate the agreement and demand the return of any performance already made. In addition, it may claim damages for the lapse of the contract, unless the debtor can prove that he was not at fault (Article 109 CO). In accordance with Article 97 CO, the debtor's fault is presumed. Pursuant to Article 99(1&2) CO, the debtor is generally liable for any fault attributable to him. The scope of such liability is determined by the particular nature of the transaction and in particular is judged more leniently where the obligor does not stand to gain from the transaction.

89. In the present case, it is undisputed that Olimpia accepts that its impossibility to perform its side of the contract is only limited in time. It persistently insisted on the fact that it was willing to pay the Player's transfer fee but only in accordance with a payment plan adapted to the unforeseen circumstances, which appeared after the Transfer Agreement was concluded.

90. The Sole Arbitrator is not aware of any decision of the CAS or of the SFT, where the doctrine of *force majeure* was applied in the context of a worldwide pandemic. In any case, it appears from the above considerations that Olimpia has the burden of proof that a) it was objectively impossible for it to perform its contractual obligations in a timely manner, b) because of the Pandemic, c) there is a causal link between the Pandemic and its failure to fulfil its side of the Transfer Agreement and d) it is not at fault.

91. With respect to the burden of proof, Article 8 of the Swiss Civil Code ("CC") states that *"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"*. As a result, the Sole Arbitrator reaffirms the principle established by CAS jurisprudence that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (CAS 2014/A/3546, para. 7.3 and references). In general, the burden of proof is satisfied whenever the judge is convinced of the truthfulness of a factual allegation based on objective grounds. Absolute certainty is not required. It is sufficient

if the judge has no serious doubt about the existence of the alleged facts or if any remaining doubt appears to be tenuous (ATF 130 III 321, consid. 3.3).

92. In its Appeal Brief, Olimpia criticizes the FIFA Single Judge for having failed to follow the recommendations contained in CL n° 1720. According to this document, whether or not a *force majeure* situation exists in a specific country is a matter of law and fact, which must be addressed on a case-by-case basis. Olimpia complained that *"**the single judge did not make such analisys** (sic) **in the case at hand**"* (highlighted by Olimpia).

93. On the basis of the evidence provided by Olimpia, the Sole Arbitrator does not see how the FIFA Single Judge could have been reasonably expected to scrutinize the consequences of the Pandemic in Paraguay. On file, there is not any documented information related to a) whether the legislation of Paraguay has a specific definition of *force majeure,* b) the measures taken by the Paraguayan government to limit the spread of the COVID-19, c) how these measures affected the performance of contracts in the world of Paraguayan football as well as on the domestic market in general, d) whether Paraguay was effectively in a lockdown situation, for how long and to what extent, e) the potential financial relief available, f) etc.. Olimpia has not even filed the regulations and guidelines adopted by the leaders of its country on the basis of the Pandemic. The only legal document on file was submitted by Dynamo (Paraguayan Law 6524, passed on 26 March 2020) and was not translated into English. Neither Olimpia nor Dynamo relied on specific provisions contained in this set of rules to support their respective position.

94. In any event and regarding its specific situation, Olimpia did not offer convincing evidence that it was objectively impossible for it to perform its side of the Transfer Agreement because of the Pandemic. In particular it did not satisfy its burden of proof that no fault can be attributed to it for the failure to comply with its contractual obligations. As a matter of fact, Olimpia exclusively filed the following seven documents:

(1) A copy of its letter to Dynamo sent on 2 April 2020 whereby it sought Dynamo's indulgence, due to the fact that the Pandemic had taken a heavy toll on Paraguay's economy and public healthcare and that the county was *"in a total lockdown situation"*. It claimed that *"The economy is stopped, and we do not have any type of income"*.

The Sole Arbitrator finds that this letter is of no avail to prove objectively that the Pandemic made it impossible for Olimpia to pay the first instalment of the Transfer fee. It is a mere declaration, not supported by any documentary evidence. On the contrary, Olimpia's allegations contained therein are contradicted by its own statements in the present arbitral proceedings: At the hearing before the CAS, Olimpia confirmed that it kept paying its employees' wages and continued its professional activities, which had to be adapted to the unforeseen circumstances of COVID-19. In its Appeal Brief, Olimpia declared that it suffered a 60% reduction in its annual incomes in 2020, which corroborates the fact that it was still able to generate some revenue in spite of the Pandemic. The reasons why it was impossible for Olimpia to pay the first instalment of the Player's transfer fee remain unanswered and unsubstantiated.

It is undisputed that, as soon as the competitions resumed, Olimpia kept playing. According to publicly available information, it has furthermore been established that Olimpia was quite active on the players' transfer market.

(2) A copy of CL n° 1714, by means of which FIFA informed its members that the Bureau of its Council recognised that the disruption to football caused by COVID-19 was a case of *force majeure* and declared *"The COVID-19 situation is, per se, a case of force majeure for FIFA and football"*.

The Sole Arbitrator holds that Olimpia cannot rely on CL n° 1714 to rest its case as the ambiguity that arose from that document was quickly removed by FIFA with its CL n° 1720. In the attached FAQ, it is made clear that *"clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent)"* (emphasis added by FIFA) and that each situation in each country had to be assessed separately, on a case-by-case basis.

(3) An interview transcript of *"Mr Miguel Laterza Zunini, Chief Legal Officer at Paraguayan FA"*, dated 30 June 2020, and published on an unidentified media service. Relevant parts of the interview include:

- The football season in Paraguay follows the calendar year.
- On 13 March 2020, the APF *"decided to suspend official competitions in all its forms, including matches, training and related activities"*.
- On 28 May 2020, the *"Protocol for the Safe Return of Paraguayan Football"* was approved, as well as the planning or roadmap for future activities, which were planned as follows: *"(…)*
  - *June 5th, 6th and 7th: Test taking and beginning of domiciliary quarantine of people involved.*
  - *June 10th: Start of Phase 1 - Individual training.*
  - *June 15th: National Government report on "Smart Quarantine".*
  - *June 16th: Start of reduced group training.*
  - *June 22nd: Start of Phase 2 - Group training*
  - *July 17th: Start of Phase 3 - Resumption of the "Campeonato Apertura 2020" (2020 Opening Championship)".*
- Explanations were given with respect to the consequences of the Pandemic on the rankings, award of titles and the qualifying slots for the Continental cups.

- Concerning the relationship with the broadcasters, Mr Zunini explained that *"the suspension of football competitions on account of Acts of God or force majeure could have constituted - on a case-by-case basis - a legitimate option for broadcasters to terminate their various contractual relationships with the APF and/or the member clubs.*

  However, in the specific case of the APF, good faith, contractual loyalty and the principle of pacta sunt servanda prevailed, based on the existence of a consolidated, peaceful and multi-year link between the APF and the company exploiting the TV rights of the local competition matches, which coincidentally is the main institutional sponsor of the Association.

  With regard to the rights to broadcast the matches of the national team, the APF and the foreign company exploiting these rights have renegotiated the terms of payment for the services agreed upon in the respective contract, taking into account the postponement to 2021 of the start of the matches corresponding to the qualifying phase for the Qatar 2022 World Cup".

- Mr Zunini furthermore gave his opinion on how the Pandemic would affect the football industry in the Future.

The Sole Arbitrator observes that this interview does not address the specific situation of Olimpia. It merely indicates that the official competitions in Paraguay were suspended for about three months and gives information with the adaptation made to the ranking system following the COVID-19 outbreak.

The interview of Mr Miguel Laterza Zunini actually weakens Olimpia's position as, according to his own words, a) in case of *force majeure*, contractual relationships are not automatically terminated but could be on a case-by case basis, b) AFA maintained its contractual relationship with the broadcasters as *"the principle of pacta sunt servanda prevailed"*.

(4) An undated document drafted by Mrs Lilian Machuca, Olimpia's Head of finances (the "Report"), which enumerates the financial loss suffered by the club in 2020 and caused by a) the fact that games were suspended before being played behind closed doors, b) the refunds of tickets sold before the cancellation of games or the decision to play games behind closed doors, c) the decreasing number of members, d) the refund of the rent paid in advance for stadium boxes, which could not be used while the games were played behind closed doors, e) renegotiations of sponsorship contracts, f) the decline of the players' transfer prices.

The Sole Arbitrator finds that the probative value of this document is limited for several reasons: a) it was drafted by Olimpia's own Head of finances, whose impartiality cannot be guaranteed; b) Mrs Machuca was called by Olimpia to comment her report during the hearing before the CAS but failed to appear, denying Dynamo the possibility of cross-examining her; c) the Report is not supported by any evidence, in particular the figures presented by Mrs Machuca are absolutely not substantiated; d) there is no indication of the revenues generated or the actual costs incurred by Olimpia in 2020.

In connection with the above, it must be observed that Olimpia did not file its financial statement for 2020, which is a fundamental evidence to establish whether or not it was objectively impossible for Olimpia to comply with the Transfer Agreement. Only this document could have corroborated the content of the Report and Olimpia's allegation that it lost 60% of its annual income. In its Appeal Brief, Olimpia announced that *"The financial statements of Olimpia for the year 2020 have not been released yet, with an estimate release date by the end of March and an estimate date for the external audit report by the end of April 2021. We request the court to allow Olimpia to present these statements once they are released and audited, and we gibe (sic) our consent in advance for Dynamo to comment on it once presented"*. At the hearing before the CAS, Olimpia simply declared that its financial statement for the year 2020 was not available. It did not offer to produce an *interim* report.

(5) Three bank statements establishing two payments of USD 100,000 from Olimpia to Dynamo in September 2020 and one payment of USD 200,000 in October 2020.

These documents are irrelevant insofar as the consequences of the Pandemic are concerned. The same can be said about exhibit (6) to the Appeal Brief, which is a decision issued by the Single Judge of the FIFA Player's Status Committee on 19 September 2018. According to Olimpia, this decision deals with the concept of *"hidden interests"*.

(7) A report of KPMG, dated 23 February 2021 entitled *"Football Benchmark - Player Valuation Update: the crippling effects of Covid"*.

This 5-page long document makes no reference to Paraguay or Olimpia and is essentially commenting the impact of the Pandemic on the players' market value for some European clubs.

95. It follows from the above that Olimpia relied exclusively on unsubstantiated general statements according to which a) the Pandemic is worldwide, b) it is an event of *force majeure,* c) Olimpia's financial difficulties are the direct result of the Pandemic, d) Paraguay was in a *"total lockdown situation"* and *"The economy is stopped, and we do not have any type of income"*, e) the competitions were suspended before they resumed behind closed doors, f) it was impossible for Olimpia to pay the first instalment of the Player's transfer fee.

96. Olimpia failed in its duty to objectively demonstrate the existence of what it alleges. It is not sufficient for it to simply assert a state of fact for the Sole Arbitrator to accept it as true. This is especially true since *"The conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation"* (CAS 2018/A/5537; CAS 2015/A/3909; CAS 2006/A/1110).

97. In addition, it must be observed that the Transfer Agreement was signed on 7 February 2020 and the first instalment of USD 1,000,000 was due on 30 March 2020, *i.e.* two weeks after the APF decided to suspend official competitions in Paraguay. Olimpia did not explain what

happened in those two weeks for it to be absolutely unable to execute its payment on a timely manner in full or, at least, in part.

98. As a consequence, Olimpia has not brought forward any convincing reasons allowing the Sole Arbitrator to deviate from the principle *"pacta sunt servanda"* on the basis of a *force majeure* event. Any other approach based on so little evidence would lead to the unreasonable result that, in the presence of a worldwide pandemic, the *force majeure* exception would be applied automatically, regardless of the specific circumstances of each situation. It can be accepted that the Pandemic made Olimpia's performance of its side of the contract more difficult, but certainly not impossible. In this regard and according to the well-established CAS jurisprudence, financial difficulties or the lack of financial means of a club cannot be invoked as a justification for the non-compliance with a payment obligation (CAS 2018/A/5537 and references).

B. Can the Sole Arbitrator revise the Transfer Agreement to adapt the payment schedule to the changed circumstances following the spread of the COVID-19?

99. In a second plea, Olimpia contends that the requirements of the *clausula rebus sic stantibus* principle are met in the present case. As a consequence, Olimpia is of the view that a) it should be temporarily exempted from fulfilling its contractual obligations, until better times, b) the payment schedule implemented in the Transfer Agreement should be revised in order to take into account the financial impact of the Pandemic, or c) *"On a subsidiary basis, [Olimpia requests] the CAS to apply any other alternative solution that the Sole Arbitrator deems appropiate (sic) to restore the balance in the contract"*.

100. In the event of a dispute, the judge is bound by the contract validly entered into by the parties, even if he finds the result surprising or shocking (TERCIER/PICHONNAZ, Le droit des obligations, 6th ed. N° 1011, p. 236). He will primarily seek to enforce the parties' intention and make sure not to substitute his own views for that of the parties' (ATF 133 III 201 consid. 5.2 and 5.4). According to the principle *pacta sunt servanda*, the terms of the contract must in principle be respected. However, the contract can be amended by the judge when the circumstances under which it was concluded have changed to such an extent that the continuation of the contract cannot be required. Such an intervention by the judge must remain an exception and is acceptable only if subsequent, unforeseen and inevitable circumstances result in an obvious disproportion between performance and consideration that would make one party's insistence on its claim seem abusive (ATF 101 II 17, consid. 1 b). This concept, also known *clausula rebus sic stantibus*, arises from the general principles of fairness and good faith based on Article 2 CC (WINIGER B., in Commentaire Romand 2nd ed., no 193 *ad* Art. 18 CO and references, p. 175).

101. The *clausula rebus sic stantibus* principle comes into play, if, at least, the following two requirements are met (TERCIER/PICHONNAZ, op. cit, N° 1053 *ss*, p. 246):

- the change in the contractual relationship is caused by new, unforeseeable and inevitable circumstances (ATF 135 III 1, consid 2.4; ATF 127 III 300, consid. 5 b).

– The performance becomes excessively burdensome for one party. The balance between performance and consideration is so seriously disturbed that performance of the contractual obligation cannot be demanded in good faith (WINIGER B, op. cit., no 196 and references, p. 175). Such was the case in the presence of an increase in costs from 24% to 60% in a short period of time (ATF 45 II 31), 52,33% of revenue loss arising from a war situation (ATF 48 II 249); 60% increase in costs incurred for the execution of work (ATF 50 II 158/165); 48 % of the turnover loss (ATF 60 II 205) (see TERCIER/PICHONNAZ, op. cit, N° 1056, p. 247).

102. The Sole Arbitrator has no difficulty to accept that the first requirement is met as hardly anyone will seriously argue that the Pandemic and its consequences were foreseeable or evitable. With respect to the second condition, Olimpia has absolutely not satisfied its burden of proof that the Pandemic created an obvious disproportion between the transfer of the Player and the payment of the first instalment of the transfer fee and that, given the circumstances, it would be abusive on the part of Dynamo to insist that Olimpia abides by the Transfer Agreement.

103. With respect to Olimpia's burden of proof, what has been set out hereabove in relation with the *force majeure* argument can be applied *mutatis mutandis*. In particular, considering that a) the Parties agreed that the Player's actual transfer market value was of USD 10,000,000 (see Article 3.1 of the Transfer Agreement), b) that the agreed transfer fee was only of USD 5,000,000, c) payable over a period of 2 years and 4 months, d) that Olimpia is still enjoying the Player's services, e) that it is undisputed that the Player has been fielded on a regular basis by Olimpia, the Sole Arbitrator does not consider that Dynamo's demand of payment of the first instalment is abusive or that there is any disproportion between the Parties' reciprocal commitments. This is particularly true as the first instalment became due on 30 Mars 2020, *i.e.* two weeks after the provisional suspension of competitions in Paraguay. In the absence of proof to the contrary, it is unlikely that, at that time, Olimpia did not have the resources to comply with its contractual obligations. It appears that, on the pretext on the Pandemic, Olimpia decided to allocate its resources as it deemed fit, in breach of its commitments towards Dynamo. It could not ignore that a delayed payment of the first instalment could trigger Articles 4.2 and 4.3 of the Transfer Agreement and must take the responsibility for it, as it has not demonstrated that it was not at fault.

C. What are the consequences from Olimpia's non-compliance with the terms of the Transfer Agreement?

104. In case of delayed payments of the transfer fee, the relevant provisions of the Transfer Agreement are its Articles 4.2 and 4.3.

105. Dynamo claims that the FIFA Single Judge misquoted Article 4.2 of the Transfer Agreement and, therefore, failed to correctly interpret the Parties' intention. Contrary to Dynamo's position, Olimpia is of the view that Articles 4.2 and 4.3 of the Transfer Agreement are not cumulative. Furthermore, Olimpia argues that the "acceleration clause" provided under Article

4.3 of the Transfer Agreement is actually a "hidden interest clause" which increases the interest rate to an amount, which is incompatible with Swiss public policy.

106. Hence, the issues to be addressed by the Sole Arbitrator are the following ones:

1) What do Articles 4.2 and 4.3 of the Transfer Agreement say?

2) Did the FIFA Single Judge correctly interpret Article 4.2 of the Transfer Agreement?

3) Are Articles 4.2 and 4.3 of the Transfer Agreement cumulative?

4) Is the penalty / Interest rate excessive?

1) What do Articles 4.2 and 4.3 of the Transfer Agreement say?

107. In paras. 3 and 18 of the Appealed Decision, Article 4.2 is quoted as follows:

> *"(…) the Parties agreed that in case of untimely or incomplete execution by [Olimpia] of any of the payments under the present Contract with a delay of 15 or more days, [Olimpia] shall be obliged to additionally pay to [Dynamo] a fine of 10% p.a. interest on the outstanding amount".*

108. Articles 4.2 and 4.3 of the Transfer Agreement read as follows:

> *"4.2. In view of the fact that Dynamo agreed to split payment of the transfer compensation into installments as per the payment schedule requested by [Olimpia], the Parties agreed that in case of untimely or incomplete execution by [Olimpia] of any of the payments under the present Contract with a delay of 15 (fifteen) and more days, [Olimpia] shall be obliged to additionally pay to Dynamo a fine of 10% of the outstanding amount due plus 10% p.a. interest on the outstanding amount. [Olimpia] confirms that such penalty sanction is fair and proportionate and waives any right to challenge it.*
>
> *4.3. In case of any delay in the payment for 45 (forty-five) or more days or in case of incomplete execution by [Olimpia] of any of the payments under the Contract, [Olimpia] would be obliged to immediately pay to Dynamo all payments of residual transfer compensation, provided by the Contract except for the sell on fees, which shall be payable on the terms and conditions provided in the present Contract".* (emphasis added)

109. The underlined words were those omitted by the FIFA Single Judge, when he analysed Article 4.2 of the Transfer Agreement in his Appealed Decision. The findings set out in recitals 18 to 22 of such Decision show that the FIFA Single Judge based his conclusions on the misquotation of Article 4.2, which he, for that reason, found unclear.

2) Did the FIFA Single Judge correctly interpret Article 4.2 of the Transfer Agreement?

110. On the basis of his (incorrect) transcription of Article 4.2 of the Transfer Agreement, the FIFA Single Judge held that *"despite of its unclear wording, it shall be considered as an interest clause and not as a contractual penalty clause. (…) the wording of the clause 4.2 (…) only establishes one way to compensate the possible delay in paying amounts contractually agreed, i.e. an annual interest of 10%. (…) Therefore, the Single Judge stated that the double request of [Dynamo] to apply a fine of 10% and an annual interest of 10% over the outstanding amount does not correspond to the terms agreed by the parties in the clause 4.2 of the Agreement"*.

111. The Sole Arbitrator reaches another conclusion than the FIFA Single Judge based on the actual wording of Article 4.2 of the Transfer Agreement. According to the literal interpretation of this provision and should Olimpia's obligation be carried out with a delay of 15 or more days, the Parties explicitly agreed on a penalty fee as well as on a late interest rate. As a matter of fact, this provision foresees:

- a *"10% of the outstanding amount"*
- *"plus"*
- *"10% p.a. interest on the outstanding amount"*.

112. In view of the clear wording of Article 4.2 of the Transfer Agreement, the Sole Arbitrator has no difficulty to find that should this provision come into play, in addition to the amount due, a contractual penalty of 10% of the said amount is payable with a 10% *p.a.* interest rate.

113. In view of the wording of Article 4.2 of the Transfer Agreement, the *"10% p.a"*. interest applies only to the *"outstanding amount"*. This provision makes a clear difference between the *"outstanding amount"*; *i.e.* the unpaid transfer fee (which triggers the penalty) and the penalty; *i.e. "a fine of 10% of the outstanding amount"*. In other words, Article 4.2 of the Transfer Agreement uses the words *"outstanding amount"* when it refers to the unpaid transfer fee, and it refers to *"fine"* for the penalty. Considering that the provision clearly states that *"10% p.a. interest [is applicable] on the outstanding amount"*, there is no reason to believe that the said interest rate is also applicable to the *"fine"*. The Sole Arbitrator is comforted in his position by the fact that, no interest has been claimed for by Dynamo in relation with the penalty.

3) Are Articles 4.2 and 4.3 of the Transfer Agreement cumulative?

114. In its Answer, Olimpia argued that *"[the] wording of clauses 4.2 and 4.3 construct the applicable scheme to outstanding payments assigning either the 10% penalty to payments delayed between 15 and 44 days, or the acceleration clause (4.3) to payments delayed for 45 days or more. (…)"*. At the hearing before the CAS, Olimpia exposed that Article 4.2 of the Transfer Agreement only applies to the first instalment of the transfer fee. It submitted that the remaining instalments of the transfer fee, which fell due after a 45-day delay, are exclusively governed by Article 4.3 of the contract.

115. When the interpretation of a contractual clause is in dispute, the judge should seek to discover the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article18 para. 1 CO). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664 consid 3.1; ATF 128 III 419 consid. 2.2 p. 422). The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case (ATF 133 III 61, consid. 2.2.1; ATF 131 III 606, consid. 4.1; ATF 129 III 118 consid. 2.5 p. 122; ATF 128 III 419 consid. 2.2 p. 422). The requirements of good faith tend to give the preference to a more objective approach (ATF 129 III 118 consid. 2.5 p. 122; ATF 128 III 419 consid. 2.2 p. 422).

116. In the present case and in view of the wording of the disputed provisions, it appears that Articles 4.2 and 4.3 of the Transfer Agreement deal with two distinct situations. Article 4.2 sets out a *"fine"* and the applicable default interest in the event of a 15-day delay of *"any of the payments under the present Contract"*. As clearly expressed, Article 4.2 is obviously applicable to *"any payment"* which fell due. Contrary to Olimpia's allegations, it does not make a difference between payments which matured in accordance with the payment schedule provided under Article 2.3.2 or in accordance with Article 4.3 of the Transfer Agreement.

117. Article 4.3 of the Transfer Agreement deals exclusively with the requirements, which need to be met for the remaining instalments of the transfer fee to be declared immediately payable. Nothing in Article 4.3 enters into conflict with what is provided for under Article 4.2 of the contract. In particular, the Sole Arbitrator does not see how it can be claimed that *"all payments of residual transfer compensation"* (mentioned in Article 4.3) are not included among *"<u>any</u> of the payments under the present Contract"* (foreseen under Article 4.2 – emphasis added).

118. The position expressed by Olimpia is not supported by the wording of the litigious provisions and seems unreasonable as it is very unlikely that it was in the Parties' intention to accept that, should Article 4.3 of the Transfer Agreement be triggered, the remaining instalments of the Transfer fee would be immediately payable but without interest and/or penalty. Such a conclusion would be inconsistent with the last sentence of Article 4.2 of the Transfer Agreement, whereby Olimpia expressly acknowledged the consequences of any late payment and accepted them (*"[Olimpia] confirms that such penalty sanction is fair and proportionate and waives any right to challenge it"*.)

4) Is the penalty / Interest rate excessive?

a) In general

119. 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.

Article 161 CO: 2. Relation between penalty and damage

1 The penalty is payable even if the creditor has not suffered any loss or damage.

2. Where the loss or damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault.

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".

120. The legal principles were summarised in CAS 2015/A/4057 (para. 88) in which the Panel held that *"a penalty can be agreed for the event of non-performance or defective performance of a contract (Article 160 para. 1 CO). In such situation, the penalty clause must be considered "exclusive"; i.e. the creditor must choose between compelling the performance and claiming the penalty. At the same time, a penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160 para. 2 CO). In such situation, the penalty is "cumulative": this means that the creditor might claim the penalty in addition to performance, provided he has not expressly waived such right or accepted performance without reservation. In such case, the creditor might as well ask for the default interest (Article 104 CO) (Couchepin, [La Clause Pénale], para. 1182 et seq.). When the parties have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and meaning of the main obligation that is guaranteed. The burden of proof of the "cumulative" nature of the clause falls upon the creditor (Article 8 CO* [recte: CC]*) (Michel Moser, in Thévenoz / Werro, Commentaire romand, Helbling & Lichtenhahn, Bâle, 2012, ad. Article 160, n 13, p. 1155)".*

121. In CAS 2010/A/2317 & CAS 2011/A/2323 (paras. 26 to 28), the Panel exposed the following: *"(…)*

> *26. 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 at art. 163 al. 3 CO 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).*
>
> *27. The Panel note that art. 163 al. 3 CO states: "the judge shall reduce an excessive penalty". This provision is mandatory and the parties cannot contractually depart from it. Therefore, the judge (or the Panel, in this matter) shall examine this amount. The Panel notes in this matter Timisoara have challenged the penalty. The burden of proving the facts that lead to conclude that one is in presence of an abusive penalty clause lies within the debtor (ATF 133 III 43, consid.4.1 = JdT 2007 I 236). However this requirement is lighter concerning the real damage suffered by the creditor because it cannot be assumed that the debtor is aware of this damage (Federal Tribunal, judgement of 8 December 2009, 4A_141/2008, consid. 15.1.2). Thus, the Federal Tribunal considers that the creditor has to prove even succinctly his loss (ibidem).*
>
> *28. 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). 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 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.*
>
> *29. However, penalty fees may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor (Federal Tribunal, judgement of 8 December 2009, 4A_141/2008, consid. 15.1.2). Indeed, including a punishment aspect, the penalty does not have to meet exactly the amount of the damage (idem, consid. 15.1.4)".*

b) In the case at hand

122. The penalty clause contained in Article 4.2 of the Transfer Agreement qualifies as a contractual penalty under Swiss law (Articles 160 *et. Seq.* CO). Indeed, this provision 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 a penalty are set, d) its measure is identified (COUCHEPIN G., op. cit., Zurich 2008, para. 462).

123. In its Appeal brief, Olimpia claimed that by applying Article 4.3 of the Transfer Agreement, the FIFA Single Judge accepted that the entire transfer fee fell due on 15 May 2020. Hence, by applying a 10% rate (as provided under Article 4.2 of the Transfer Agreement) to the "accelerated payment" of instalments n°2 to n°5, Olimpia is deemed to pay to Dynamo an added amount of USD 453,488, corresponding to approximatively 13%. Hence, this "hidden rate" of 13% added to the "non hidden rate" of 10% provided for under Article 4.2 of the Transfer Agreement amounts to a total rate of 23%, which must be considered as usurious.

124. Olimpia supported its position with a decision rendered by the Single Judge of the FIFA Players' Status Committee on 19 September 2018, which had to deal with a situation that had little in common with the present dispute. As a matter of fact, he found that *"the payment of a penalty fee of 1% of the relevant instalments for each day of delay of said instalments, (…) is nothing more than an interest rate, as it is an open-ended penalty, applicable until the date of effective payment. In view of the foregoing circumstances, the Single Judge deemed that said penalty clause is in fact a hidden interest rate, which in reality would correspond to an interest rate of 365% p.a"*.

125. In the present case, Article 4.2 of Transfer Agreement provides for a 10% *p.a.* interest rate as well as a 10% penalty fee. For the reasons exposed above, the penalty and the interest rate are applicable to the instalments which fell due as well as to any amount which matured under Article 4.3 of the Transfer Agreement. In light of other precedents, with similar facts, the penalty and interest rate agreed by the Parties are not excessive:

- Decision of the SFT 4A_536/2016 & 4A_540/2016 of 26 October 2016 (translation can be found in CAS Bulletin 2018, I, p. 104)

  Two football clubs entered into a contract concerning the transfer of a professional football player. The transfer fee was set at EUR 5'800'000, payable in six instalments. The parties inserted the following clause in their contract:

  > *"In case of untimely or incomplete execution by the [Transferee Club] of any of the payments under the present Agreement, the [Transferee Club] shall be obliged to additionally pay to [the Transferor Club] a penal clause of 10% of the respective unpaid amount, as well as a fine (financial penalty) of 1% of the amount due per each month (30 days) of the delay of such payment"*.

  There was no acceleration clause in this contract. After the first instalment, the Transferee Club failed to pay the remaining transfer fee. The SFT found that *"It has already been decided that a contractual penalty reaching 10% of the sales price was not excessive according to Swiss law (ATF 133 III 201 at 5.5). Furthermore, a penalty interest of 12% is certainly not contrary in itself to the opportunity afforded by Ar. 104(2) CO to the parties to agree contractually upon a rate of interest above 5% yearly. A failure to pay the contractual penalty within the time limit foreseen for this purpose leads to late payment interest of 5% per annum does not appear disputable either, as this is a consequence foreseen by the law when the debtor is in default (Art. 104(1) CO). One also does not see in what way combining these three obligations [i.e. the combined application of a contractual penalty interest of 12%*

yearly, of the contractual penalty of 10% of the capital due, and the statutory interest of 5%], as in the case at hand, would lead to the Appellant's freedom being excessively infringed upon in the light of Art. 27(2) CC7, such that it would hand it over to co-contracting party's arbitrariness, would suppress its economic freedom, or limit it to such an extent that the very basis of its economic existence would be jeopardized (ATF 123 III 337 at 5)".

- CAS 2014/A/3664, award of 9 January 2015

  Two football clubs entered into a contract concerning the transfer of a professional football player. The transfer amount was set at EUR 5'000'000 and payable in three instalments. The parties agreed on applying a penalty of 20%, corresponding to EUR 1,000,000, namely if the Transferee Club would fail to pay any of the three instalments in time. The contract contained an acceleration clause which was triggered as the Transferee Club had not paid any amount to the Transferor Club. In this case, the Panel found (para. 50) that *"A penalty of only 20% of the amount overdue is not an unreasonable deterrent to ensure that the debtor would pay the overdue amounts in light of the value of the transaction (…)".* Furthermore, the Panel held (para. 61) that *"parties may freely determine the applicable interest rate, which was done by the parties in the Transfer Agreement. Further, the Panel is of the opinion that the agreed interest rate of 10% is not disproportionate (…)".* The Panel was ready to apply the 10% interest rate to the outstanding amount as well as to the penalty. However, with respect to the penalty, it could only apply à 5% interest rate as, in the case at hand, it would otherwise breach the *ultra petita* principle.

- CAS 2015/A/3909, award of 9 October 2015

  In this case, the CAS Panel upheld a contractual penalty amounting to 10% of the principal debt, concluding that this was not excessive, and that there was no *"massive imbalance".*

- CAS 2017/A/5233, award of 22 December 2017

  In this case, the CAS Panel upheld a contractual penalty amounting to 20% of the principal debt, concluding that this was not abusive.

126. Having regard to and applying the legal principles outlined above, the Sole Arbitrator rejects Olimpia's submission that the penalty stipulated in Article 4 of the Transfer Agreement is excessively high or abusive within the meaning of Article 163 (3) CO. In reaching this conclusion, the Sole Arbitrator has taken account of the following considerations:

- The Transfer Agreement was freely negotiated and willingly entered into by Olimpia. In particular, it accepted Articles 4.2 and 4.3 of the Transfer Agreement. Olimpia cannot reasonably state that the "acceleration clause" constitutes a hidden interest clause, as it merely sets an another (contractually agreed) time table for making payments of the instalments, should specific requirements be met.

- In Article 4.2 of the Transfer Agreement, Olimpia expressly confirmed that *"such penalty sanction is fair and proportionate and waives any right to challenge it"*.

- Dynamo had a legitimate interest in securing payment of the agreed transfer fee, in respect of the Player, whose services it had lost to Olimpia. The fact that it took the appropriate measures to enforce the Transfer Agreement does not constitute an abuse of right.

- The Parties agreed that the Player's actual transfer market value was of USD 10,000,000 (see Article 3.1 of the Transfer Agreement). Dynamo accepted to transfer the Player, without receiving any payments and its credit was left insecure.

- To date, Olimpia has not paid in full or in part any of the contractually agreed instalment. It paid USD 100,000 on 4 September 2020, USD 100,000 on 21 September 2020 and USD 200,000 on 6 October 2020. At the hearing before the CAS, it affirmed that it would rather settle other debts than make any further payment to Dynamo in view of its rigid attitude shown between March and April 2020. Such a declaration confirms that the payment of the transfer fee is not impossible. Olimpia just chose to allocate its resources as it deems fit, regardless of its contractual obligations.

- The amounts paid to Dynamo represent 8% of the contractually agreed transfer fee and 40% of any instalment.

- If Olimpia had complied with the Transfer Agreement, Dynamo would have received USD 3,000,000 at the time of the hearing before CAS.

- Olimpia has not adduced any evidence that it had been unable to pay the agreed transfer fee. It tried to take advantage of the Pandemic but failed to satisfy its burden of proof that a) it was objectively impossible for it to perform its contractual obligations in a timely manner, b) because of the Pandemic, c) there is a causal link between the Pandemic and its failure to fulfil its side of the Transfer Agreement and d) it is not at fault.

- The penalty fees (USD 100,000 + USD 400,000) amount to 10% of the total agreed transfer fee (of USD 5,000,000).

127. Based on the foregoing considerations, the Sole Arbitrator finds that Dynamo is entitled to a) a penalty fee of USD 100,000 with respect to the non-payment of the first instalment and b) a penalty fee of USD 400,000 with respect to the non-payment of the remaining instalments of the transfer fee, which fell due after a 45-day delay, as provided under Article 4.3 of the Transfer Agreement.

128. Hence, Dynamo is entitled to an additional sum of EUR 500,000 corresponding to 10% of the transfer fee as a contractual penalty. The Sole Arbitrator does not see any reason to adjust this amount, which is not excessive, given the circumstances of the case.

129. With respect to the payment of default interest, the question is not governed by FIFA Regulations and must therefore be assessed according to Swiss law. The pertinent provisions are:

> *Article 73 of the Swiss Code of Obligations ("CO")*
>
> *[1] Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum.*
>
> *[2] Public law provisions governing abusive interest charges are not affected.*
>
> *Article 104 CO*
>
> *[1] A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract.*
>
> *[2] Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.*

130. It results from the above provisions that the default interest is of 5% but nothing prevents the Parties from agreeing on a higher interest rate as long as it stays within the limits of Article 73 (2) CO.

131. At the federal level, the Federal Law on Consumer Credit ("LCC") is the only Civil law that deals with the maximum interest rate (*i.e.* 15% - Article 14 LCC). However, before this law came into force, the Swiss Federal Tribunal held that an interest rate as high as 18% *per annum* was acceptable (ATF 93 II 189). It ruled that above this limit, the interest rate was usurious and, therefore, contrary to public morals (ATF 93 II 189; GRANGES M., Les intérêts moratoires en arbitrage international, Zurich 2014, p. 236).

132. Hence the 10% interest agreed in the Transfer Agreement is acceptable. No interest was claimed for by Dynamo in its written or oral submissions with respect to the penalty, which must therefore be awarded without interest.

D. Conclusion

133. For all the reasons set above, the Sole Arbitrator comes to the conclusion that Dynamo is entitled to the following amounts:

- USD 1,000,000 plus 10% interest *p.a.* as from 31 March 2020 until the date of effective payment;

- USD 4,000,000 plus 10% interest *p.a.* as from 1 June 2020 until the date of effective payment;

- USD 500,000 as the contractually agreed penalty, which must be reduced by USD 400,000, corresponding to the payments made on 4 September 2020, on 21 September 2020 and on 6 October 2020, respectively. For that reason, the appeal filed by Dynamo against the decision issued by the Single Judge of the FIFA Players' Status Committee on 29 September 2020 is partially upheld and so is Olimpia's appeal. As a matter of fact and in its requests for relief, Olimpia asked the CAS to take into account the payments already made, which the FIFA Single Judge did not do.

134. The above conclusion makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Olimpia de Paraguay in the matter CAS 2021/A/7673 against the decision issued by the Single Judge of the FIFA Players' Status Committee on 29 September 2020 is partially upheld.

2. The appeal filed by Football Club Dynamo Kyiv in the matter CAS 2021/A/7699 against the decision issued by the Single Judge of the FIFA Players' Status Committee on 29 September 2020 is partially upheld.

3. Clause 2 of the decision issued by the Single Judge of the FIFA Players' Status Committee on 29 September 2020 is amended as follows:

   - Club Olimpia de Paraguay is ordered to pay to Football Club Dynamo Kyiv USD 1,000,000 plus 10% interest *p.a.* as from 31 March 2020 until the date of effective payment;

   - Club Olimpia de Paraguay is ordered to pay to Football Club Dynamo Kyiv USD 4,000,000 plus 10% interest *p.a.* as from 1 June 2020 until the date of effective payment;

   - Club Olimpia de Paraguay is ordered to pay to Football Club Dynamo Kyiv USD 100,000.

4. The remainder of the decision issued by the Single Judge of the FIFA Players' Status Committee on 29 September 2020 is confirmed.

5. (…).

6. (…).

7. (…).

8. All other motions or prayers for relief are dismissed.