



**Arbitration CAS 2017/A/5279 Cruzeiro E.C. v. Club Tigres, award of 13 April 2018**

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

*Football*

*Failure by a club to pay part of a transfer fee*

*Duty to comply with payment obligations*

*Principle in dubio contra stipulatorem*

*Applicable interest rate*

1. The utmost obligation of a debtor is to duly transfer the amount to the bank account provided by the creditor, and, therefore it is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation in accordance with a FIFA decision.
2. The principle “*in dubio contra stipulatorem*” establishes that, in case of ambiguity or contradiction, the interpretation of unclear clauses will be interpreted to the detriment of the part that drafted them.
3. If the application of the principle “*in dubio contra stipulatorem*” has led a CAS panel to come to the conclusion that the applicable default interest on outstanding amounts provided for in a contract is at the rate of 48% per year, the next step for that panel is to analyse whether this rate is disproportionate in light of the usual commercial practice in the football market and the applicable rules and jurisprudence, and is therefore to be reduced. However, such analysis is not necessary if the creditor of the outstanding amounts has not appealed the first instance decision awarding such amounts at an interest rate of 5% per year and, moreover, has itself requested that such rate be 5% per year in its Answer before the CAS.

**I. PARTIES**

1. Cruzeiro E.C. (hereinafter referred to as the “Appellant” or “Cruzeiro”) is a professional football club based in Belo Horizonte, Brazil, member of the Brazilian Football Confederation, which, in turn is affiliated to the Federation International de Football Association (hereinafter referred to as “FIFA”).
2. Club Tigres de la UANL (hereinafter referred to as the “Respondent” or “Tigres”) is a football club based in Nuevo León, México, member of the Mexican Football Federation, which in turn is also affiliated to FIFA.

## II. FACTUAL BACKGROUND

3. The following is a summary of the relevant facts and arguments based on the Parties' written submissions. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. Although the Sole Arbitrator has considered all the facts, legal arguments and evidence submitted by the Parties in the present case, he refers in this Award only to the submissions and evidence he considers necessary to explain in his reasoning.
4. On 25 June 2016, Cruzeiro and Tigres signed an agreement (hereinafter referred to as the "Contract"), regarding the permanent transfer of the player R. (hereinafter referred to as the "Player") from the Respondent to the Appellant.
5. According to the Contract, Cruzeiro bought from Tigres, which had a valid labour contract with the Player at that time, the 100% of the federative rights of the Player.
6. The Contract was drafted in both English and Portuguese languages. Clause 11 of the Contract, the heading of which is "Language", provides as follows: "*This agreement is executed in English and Portuguese. However, the English language version shall be the only valid and binding document reflecting the Agreement between the parties and shall govern any dispute over the terms and obligations arising under this agreement*".
7. The economic terms of the transaction were contained in clause 2 of the Contract, which reads, in its relevant part, as follows:

### ***"2. Transfer Fee.***

*2.1 CRUZEIRO undertakes to pay to TIGRES the total amount of USD 4,000,000 (four million dollars) net, free of taxes, as follows:*

*(I) USD 1,000,000 nets, free of taxes, within 24h before the sending of the ITC of the PLAYER via TMS.*

*(II) USD 1,000,000 nets, free of taxes, due on 1 November 2016.*

*(III) USD 1,000,000 nets, free of taxes, due on 1 July 2017.*

*(IV) USD 1,000,000 nets, free of taxes, due on 1 November 2017.*

*2.2. This amounts will be paid in the next bank account property of Sinergia Deportiva S.A. de C.V. (Club Tigres de la UANL): Bank Account.- Santander Account Number.- 82500636859 Swift.- BMSXMXMM.*

*2.3. In the event the CRUZEIRO fails to provide the payment of fee amount agreed above within the agreed a default interests will accrue on the full amount outstanding at the rate of 4% per month rate from the due date until the date of payment" (emphasis added).*

8. The Portuguese version of Clause 2.3 of the Contract contains a discrepancy in relation to the English version, by providing as follows: "*Na hipótese de o CRUZEIRO deixar de pagar o*

*montante indenizatório estipulado acima, nos prazos determinados, aplicar-se-á juros de mora de 4% ao ano computados sobre o valor total em mora, da data devida até a data do pagamento”* (emphasis added). This can be translated to English, as follows: “*In the event the **CRUZEIRO** fails to provide the payment of fee amount agreed above within the agreed a default interests will accrue on the full amount outstanding at the rate of 4% per year rate from the due date until the date of payment”* (emphasis added).

9. The Contract also contains other general terms.
10. It remained undisputed that **CRUZEIRO** failed to pay the second instalment in the amount of USD 1,000,000.

### III. PROCEDURE BEFORE FIFA

11. In a nutshell, the following is a description of what happened in front of FIFA that lead to the decision issued by the Single Judge of the Players’ Status Committee (hereinafter referred to as the “Single Judge”).
12. On 15 December 2016, the Respondent lodged a claim in front of FIFA against Cruzeiro, requesting the payment of USD 1,000,000 and interests of 4% per month as per clause 2.3 of the Contract.
13. On 9 March 2017, the Appellant presented its reply, expressing as its main argument that it was not able to pay due to the fact that it had never received the “pertinent invoice” from Tigres in order to make the payment.
14. After analysing the arguments of the parties, the Single Judge issued his decision on 8 May 2017 (hereinafter referred to as the “Appealed Decision”), the grounds of which were notified on 13 July 2017 to the parties.
15. The operative part of the Appealed Decision provides as follows:
  - “1. *The claim of the Claimant, Tigres, is partially accepted.*
  2. *The Respondent, Cruzeiro Esporte Clube, has to pay to the Claimant, Tigres, within 30 days as from the date of notification of the present decision, the total amount of USD 1,000,000, plus 5% interest p.a. on said amount as from 2 November 2016 until the date of effective payment.*
  3. *If the aforementioned sum, plus interest as established above, is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA’s Disciplinary Committee for consideration and a formal decision.*
  4. *Any other claims lodged by the Claimant, Tigres, are rejected.*
  5. *The final costs of the proceedings in the amount of CHF 15,000 are to be paid by the Respondent, Cruzeiro Esporte Clube, within 30 days as from the date of notification of the present decision, as follows.*

- 5.1. *The amount of CHF 10,000 has to be paid to FIFA to the following bank account with reference to case nr 16-02216/lzq: [...].*
- 5.2. *The amount of CHF 5,000 has to be paid directly to the Claimant, Tigres.*
6. *The Claimant, Tigres, is directed to inform the Respondent, Cruzeiro Esporte Clube, immediately and directly of the account number to which the remittances under points 2. and 5.2. above are to be made and to notify the Player's Status Committee of every payment received".*

#### **IV. THE ARBITRAL PROCEEDINGS BEFORE THE CAS**

16. On 3 August 2017, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS"), pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the "Code"), challenging the Appealed Decision. In its statement of appeal, the Appellant proposed that a sole arbitrator be appointed to hear the appeal.
17. On 18 August 2017, the Appellant filed its appeal brief, together with supporting documents.
18. As the Respondent did not submit its position as to the composition of the Panel, the matter was referred to the President of the Appeals Arbitration Division. On 9 September 2017, the parties were informed that the President of the Appeals Arbitration Division had decided to submit the case to a sole arbitrator.
19. On 19 September 2017, the Respondent filed its answer to the appeal brief.
20. On 29 September 2017, the Appellant requested that a hearing be held in this matter. On the same date, the Respondent indicated that it preferred that a decision be rendered on the papers.
21. On 6 October 2017, the parties were informed that the Sole Arbitrator appointed to hear this dispute was Mr Gustavo Albano Abreu, professor in Buenos Aires, Argentina.
22. On 12 October 2017, the parties were informed that, having considered the parties' positions, the Sole Arbitrator deemed that he was sufficiently well-informed to decide the case based solely on the parties' written submissions, without the need to hold a hearing.
23. On 6 November 2017, the CAS Court Office acknowledged receipt of the Order of Procedure, duly signed by each party.

#### **V. SUMMARY OF THE PARTIES' POSITIONS**

24. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator, however,

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

**A. The Appellant's Position**

25. The Appellant's position and arguments can be summarized as follows:
26. The Contract was signed by the parties in two different languages. When comparing both columns of the Contract, the English and Portuguese versions, it can be noticed that when the parties established the consequences of a delay in the payment of any instalment of the transfer price, they agreed as follows: In the English version: "2.3. *In the event Cruzeiro fails to pay the amounts agreed above within the agreed dates, a default interest will accrue on the full amount outstanding "at the rate of 4% per month" from the due date until the date of payment*" while in the Portuguese version: "*at the rate of 4% per year*".
27. Although the parties have also agreed that the English version of the agreement should prevail in the event of any controversy, it is clear that the inclusion of the word "month" instead of "year" in the English version of the Contract was a mere mistake.
28. The real intention and the real agreement between the parties was that the interest of 4% per year should apply in the event of any default. The parties are important clubs in their respective countries and are more than experienced in dealing with international transfer of players. Both parties know, therefore, that an interest of 48% per year is abusive and illogical in any contractual relation between football clubs.
29. The parties never intended, indeed, to agree on so excessive interest rates. Therefore, the English version of the Contract contained a serious mistake that did not reflect the will of the parties at all, that is the reason why with respect to clause 2.3 of the Contract the Portuguese version of the agreement should prevail.
30. The Appellant also alleges that the payment was not made on time because the Respondent failed to comply with its obligation of sending Cruzeiro a proper invoice covering the payment.
31. The Appellant made the following requests for relief:

*"FIRST- To establish that no interest shall apply on the due amount since the Respondent failed to send the Appellant a proper invoice covering the payment of USD 1,000,000 on 1 November 2016.*

*SECOND- To establish that the Portuguese version of Clause 2.3 of the Transfer Agreement shall prevail and as result that the maximum rate of interest applicable to any default cannot exceed 4% per year.*

*THIRD- To establish the Respondent shall pay all the arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any advance of costs paid.*

*FOURTH- The Respondent shall be ordered to pay the appellant a contribution towards the legal and other*

*costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel”.*

## **B. The Respondent’s Position**

32. The Respondent’s position and arguments can be summarized as follows:

33. According to the Contract, Cruzeiro had to pay the equivalent amount of USD 1,000,000 on 1 November 2016, amount that Cruzeiro has acknowledged it owes.

34. In accordance with clause 11.1 of the Contract, the English version should prevail in any event of controversy, so we should only focus on the English version.

35. It is clear that the true intention of the parties was that in case that Cruzeiro does not pay in the limits established they will pay interest calculated at 4% monthly of the payable amount.

36. According to the Swiss Law (ATF 99 II 75; 100 II 153) and to the principle “*in dubio contra stipulatorem*”, in case of ambiguity, the interpretation unfavourable to the author has to be adopted.

37. In this case, if we attend to the Contract we will notice that the author of that agreement was Cruzeiro, so it is clear that any interpretation about the clause in discussion must be unfavourable for Cruzeiro.

38. The Respondent made the following requests for relief:

*“First) Acknowledgement of delivery in the due time and proper form of the answer the Statement of Claim filed by Cruzeiro.*

*Second) To establish that the English version of clause 2.3 of the Transfer Agreement shall prevail.*

*Third) Club Tigres must be absolved of any CAS arbitration costs and/ or any legal costs.*

*Fourth) To order club Cruzeiro to pay Club Tigres the total amount of USD 1,000,000 plus 5% interest p.a. on said amount as from November, 02, 2016 until the date of effective payment”.*

## **VI. JURISDICTION**

39. Article R47 of the Code reads as follows:

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.*

40. The jurisdiction of the CAS, which has not been disputed by the parties, derives from Article

R47 of the Code and from Article 58 of the FIFA Statutes.

41. The jurisdiction of the CAS is further confirmed in the Order of Procedure, which was duly signed by the parties.
42. It follows that CAS has jurisdiction to rule on this dispute.

#### **VII. ADMISSIBILITY**

43. Pursuant to Article 58, paragraph 1 of the FIFA Statutes, in connection with Article R49 of the Code, the Appellant had 21 days from the notification of the Appealed Decision to file its Statement of Appeal before the CAS.
44. The Appealed Decision was notified to the Appellant on 13 July 2017 and the statement of appeal was filed on 3 August 2017, i.e. within the above-mentioned twenty-one day deadline. No further stages of appeal against the Appealed Decision were available at the FIFA level. The appeal therefore complies with the requirements of Article R48 of the Code.
45. Accordingly, the appeal is admissible.

#### **VIII. APPLICABLE LAW**

46. According to Art. R58 of the Code:

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

47. Article 57, paragraph 2 of the FIFA Statutes establishes the following:

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

48. Moreover, Clause 7 of the Contract provides as follows:

*“The Agreement shall be governed by and construed in accordance with the various regulations of FIFA, in particular, to the Regulations on the Status and Transfer of Players (“RSTP”).*

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

**IX. THE MERITS OF THE DISPUTE**

50. According to Article R57 of the Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.
51. Taking into account the facts of the case and the parties' submissions, the Sole Arbitrator considers that the following issues shall be addressed to settle the dispute:
- A – Has the fact that the Respondent failed to send the pertinent invoice to the Appellant any bearing in the accrual of interest according to Contract?
- B – Which interest rate should be applied to the outstanding amount?
52. The Sole Arbitrator will address each of the mentioned issues in turn.
- A. Has the fact that the Respondent failed to send the pertinent invoice to the Appellant any bearing in the accrual of interest according to contract?**
53. Both parties agree that the second instalment in the amount of USD 1,000,000 has not yet been paid by the Appellant to the Respondent.
54. Cruzeiro and Tigres also concur that the second instalment had to be paid on 1 November 2016 and that this payment has not yet been made by Cruzeiro.
55. The Appellant has neither offered nor produced any evidence with respect to the alleged obligation of sending an invoice on part of the Respondent. The above mentioned obligation does not arise from the wording of the Contract and has not been otherwise adequately established.
56. In addition, the Sole Arbitrator notes that Clause 2.2 of the Contract provides the bank account information necessary for Cruzeiro to make the relevant payments and that Cruzeiro has not indicated that said account information was insufficient or incorrect.
57. Finally, the Sole Arbitrator endorses the view already expressed by other Panels in similar matters that *“the utmost obligation of the debtor is to duly transfer the amount to the bank account provided by the Creditor, and, therefore it is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation in accordance with a FIFA decision [in casu a contractual obligation]”* (See CAS 2013/A/3323, CAS 2015/A/4342 and CAS 2016/A/4718). The Sole Arbitrator considers that Cruzeiro has not established having done all relevant efforts to comply with its payment obligation.
58. As Clause 2.1 (ii) of the Contract provides for a specific fixed date for the payment of the second instalment due under the Contract (1 November 2016), said instalment became due on that date. As a result of the non-payment, interest started accruing as of the following day, pursuant to Clause 2.3 of the Contract, which provides that interest will accrue *“from the due*

*date until the date of payment”.*

**B. Which interest should be applied to the outstanding amount?**

59. To get to the final answer to this question we need to analyse the different arguments addressed by both parties in relation to this main issue.
60. On one side the Appellant argues that the inclusion of the word “month” instead of “year” in the English version of the Contract was a mere mistake. The real intention and the real agreement between the parties was that interest of 4% per year should apply in the event of any default. The parties are important clubs in their respective countries and are more than experienced in dealing with international transfer of players. Both parties know, therefore, that interest of 48% per year is abusive and illogical in any contractual relation between football clubs.
61. On the other hand, the Respondent contends that according to clause 11.1 the English language version should be *“the only valid and binding document reflecting the Agreement between the parties”* and should *“govern any dispute over the terms and obligations arising under this Agreement”*. Even more, the parties drafted the Contract according to the Official Offer letter dated June 21, 2016, where the Appellant clearly established: *“in case that Cruzeiro doesn’t pay in the limits established, Cruzeiro will have to pay interest calculated at 4% monthly of the payable amount”* (Exhibit 3).
62. In order to get to the final conclusion on this issue, it is necessary to focus on Clauses 11.1 and 2.3. of the Contract.
63. Clause 11.1 of the Contract provides as follows:
- “This agreement is executed in English and Portuguese. However, the English language version shall be the only valid and binding document reflecting the Agreement between the parties and shall govern any dispute over the terms and obligations arising under this agreement”.*
64. Clause 2.3 of the Contract provides as follows:
- “In the event the Cruzeiro fails to provide the Payment of fee amount agreed above within the agreed a default interests will accrue on the full amount outstanding at the rate of 4% month rate from the due date until the date of payment”.*
65. When examining the wording of the Contract, the situation is relatively unambiguous. The English version provides that the interest rate is 4% per month and the Contract provides that the English version prevails over the Portuguese version.
66. When examining the real intention of the parties, it is true that the fact that the Portuguese version provides for 4% per year could cast a certain doubt as to what the real intention was. However, on the other hand, the Sole Arbitrator should not overlook the fact that, when sending the Contract offer, Cruzeiro expressly stated that the applicable interest rate was 4% per month, which appears to confirm that indeed, that was the interest rate being proposed

and which was accepted in the English – prevailing – version of the Contract.

67. Assuming that the true intention of the parties could not be ascertained, the Sole Arbitrator is of the view that, on the basis of the elements on file, notably the existence of an offer from Cruzeiro providing for a 4% monthly interest rate and a clause in the prevailing version of the Contract confirming that same rate, constitute sufficient reasons to objectively consider that that was the agreement between the parties.
68. In addition, the Sole Arbitrator recalls the principle “*in dubio contra stipulatorem*” which establishes that, in case of ambiguity or contradiction, the interpretation of unclear clauses will be interpreted to the detriment of the part that drafted them. The Contract was drafted in Cruzeiro letterhead paper and it therefore appears reasonable to assume that the Contract was indeed drafted by Cruzeiro. Therefore, applying the so-called rule of ambiguous clauses, the contract must be interpreted against the draftsman.
69. In light of the above, the Sole Arbitrator would tend to consider that the parties’ agreement as to the applicable interest rate (4% per month) should in principle be enforced.
70. It would then be necessary to analyse if the agreed interest rate of 4% per month, which would correspond to 48% per year, would be disproportionate in light of the usual commercial practice in the football market and the applicable rules and jurisprudence, to such an extent that it should be reduced. However, in the present case, such an analysis is ultimately not necessary, because the Respondent has not appealed against the Appealed Decision and, indeed, requested in its Answer that the applicable interest rate be 5% per year (the same interest granted by FIFA). The interest rate applied by FIFA shall therefore stand.
71. Therefore the Appellant must pay the second instalment due under the Contract, that is USD 1,000,000, plus an interest of 5% per year to be calculated from 2 November 2016 until effective payment.

### **C. Final conclusion**

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

## ON THESE GROUNDS

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed on 3 August 2017 by Cruzeiro EC against the decision issued on 8 May 2017 by the Single Judge of the FIFA Players' Status Committee is dismissed.
2. The decision issued on 8 May 2017 by the Single Judge of the FIFA Players' Status Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.