Arbitration CAS 2019/A/6422 Cruzeiro E.C. v. Ramón Darío Ábila & Fédération Internationale de Football Association (FIFA), award of 24 July 2020

Panel: Mr Juan Pablo Arriagada (Chile), President; Mr Mario René Archila Cruz (Guatemala); Mr Jordi López Batet (Spain)

Football
Termination of the employment contract by mutual agreement
Starting date of accruing interest on outstanding remuneration

Article 102.2 of the Swiss Code of Obligations states that where a deadline for performance of the obligation has been set by agreement, the obligor is automatically in default on expiry of the deadline. Consistent CAS jurisprudence has established that in such cases, the interest accrues from the day following the due date.

I. PARTIES

1. Cruzeiro Esporte Clube (hereinafter the "Appellant" or "Cruzeiro") is a Brazilian professional football club with its registered office in Belo Horizonte, Brazil. It is a member of the *Confederação Brasileira de Futebol* (hereinafter, the "CBF"), which in turn is a member of the *Fédération Internationale de Football Association*.

2. Ramón Darío Ábila (hereinafter the "First Respondent") is an Argentinian professional football player, currently registered with Club Atlético Boca Juniors, affiliated to the *Asociación del Fútbol Argentino (AFA)*.

3. *Fédération Internationale de Football Association* (hereinafter "FIFA" or the "Second Respondent") is the international governing body of football.

II. FACTUAL BACKGROUND

4. This section of the Award sets out a brief summary of the most relevant facts and the background giving rise to the present dispute, as established on the basis of the Parties' written submissions and the CAS file. Additional facts may be set out, if and where relevant, in connection with the legal discussion that follows.

5. On 1 July 2016, the Appellant and the First Respondent entered into an employment contract, which was valid from 8 August 2016 until 30 June 2018.

6. On 18 July 2017, the Appellant and the First Respondent terminated in advance, by mutual agreement, the employment contract.

7. On 16 August 2017, the Appellant and the First Respondent signed off *"Instrumento de Repactuação de Débitos"* by means of which the Appellant admitted owing and agreed to pay to the First Respondent R$ 749.905,09 in the following terms:

> *"[…]*
>
> *Resolvem as partes firmar o presente "Instrumento de Repactuação de Débitos", visando o pagamento no valor líquido de R$ 749.905,09 (setecentos e quarenta e nove mil novecentos e cinco reais e nove centavos) referente débitos de rescisão do contrato de trabalho nos termos do TRCT (em anexo), no valor líquido de R$ 742.174,71 (setecentos e quarenta e dois mil cento e setenta e quarto reais e setenta e um centavos) e TRCT complementar n a importância liquida de R$ 7.730,38 (sete mil, setecentos e trinta reais e trinta e oito centavos) ante as seguintes condições:*
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> - *Forma de pagamento:*
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> - *Valor liquido R$ 749.905,09 (setecentos e quarenta e nove mil novecentos e cinco reais e nove centavos), a ser pago em 5(cinco) parcelas, assim discriminadas:*
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> *1ª, parcela no valor de R$ 149.981,09 (cento e quarenta e nove mil e novecentos e oitenta e um reais e nove centavos), com pagamento de imediato;*
>
> *2ª, parcela no valor de R$ 149.981,09 (cento e quarenta e nove mil e novecentos e oitenta e um reais e nove centavos), com pagamento em 30/08/2017;*
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> *3ª, parcela no valor de R$ 149.981,09 (cento e quarenta e nove mil e novecentos e oitenta e um reais e nove centavos), com pagamento em 30/09/2017;*
>
> *4ª, parcela no valor de R$ 149.981,09 (cento e quarenta e nove mil e novecentos e oitenta e um reais e nove centavos), com pagamento em 30/10/2017;*
>
> *5ª, parcela no valor de R$ 149.981,09 (cento e quarenta e nove mil e novecentos e oitenta e um reais e nove centavos), com pagamento em 30/11/2017".*

8. The Appellant paid the first installment arising out of the *"Instrumento de Repactuação de Débitos"* but failed to pay the others, and thus on 28th September 2018, the First Respondent sent a default notice to the Appellant through his legal representative.

III. PROCEEDINGS BEFORE THE DISPUTE RESOLUTION CHAMBER

9. On 29 October 2018, the First Respondent filed a claim before the FIFA's Dispute Resolution Chamber (hereinafter "DRC") against the Appellant, claiming the payment of outstanding remuneration in the amount of BRL 599,924, corresponding to the last four instalments stipulated in the *"Instrumento de Repactuação de Débitos"*, plus 15% interest p.a.

10. On 17 January 2019, the Appellant filed its response.

11. On 26 June 2019, the DRC rendered the following Decision:

> *1. The claim of the Claimant, Ramón Darío Abila, is partially accepted.*
>
> *2. The Respondent, Cruzeiro EC, has to pay to the Claimant outstanding remuneration in the amount of BRL 599,924 plus interest calculated as follows:*
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> - *5% interest p.a. as of 31 August 2017 over the amount of BRL 149,981 until the date of effective payment;*
> - *5% interest p.a. as of 1 October 2017 over the amount of BRL 149,981 until the date of effective payment;*
> - *5% interest p.a. as of 31 October 2017 over the amount of BRL 149,981 until the date of effective payment;*
> - *5% interest p.a. as of 1 December 2017 over the amount of BRL 149,981 until the date of effective payment.*
>
> *3. The Claimant is directed to inform the Respondent, immediately and directly, preferably to the e-mail address as indicated on the cover letter of the present decision, of the relevant bank account to which the Respondent must pay the amounts plus related interest mentioned under point 2. above.*
>
> *4. The Respondent shall provide evidence of payment of the due amounts plus related interest in accordance with point 2. to FIFA to the e-mail address psdfifa@fifa.org, duly translated, if need be, into one of the official FIFA languages (English, French, German, Spanish).*
>
> *5. In the event that the amount due plus related interest in accordance with point 2. above are not paid by the Respondent within 45 days as from the notification by the Claimant of the relevant bank details to the Respondent, the Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amounts are paid and for the maximum duration of three consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*
>
> *6. The ban mentioned in point 5. above will be lifted immediately and prior to its complete serving, once the due amounts are paid.*
>
> *7. In the event that the aforementioned sums plus interest are 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 FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *8. Any further claim of the Claimant is rejected".*

12. On 26 July 2019, FIFA notified the parties of the grounds of the Decision passed by the DRC on 26 June 2019.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 16 August 2019, the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (hereinafter the "CAS") challenging the Decision rendered by the DRC on 26 June 2019 (hereinafter the "Appealed Decision"), with the following requests for relief:

> *"On the merits:*
>
> *FIRST – To dismiss, in full, the Appealed Decision;*
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> *SECOND – To accept the present appeal;*
>
> *At any rate:*
>
> *THIRD – To order the First Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS;*
>
> *FOURTH – To order the First Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel".*

14. On 10 September 2019 the Appellant filed its Appeal Brief with the following requests for relief:

> *"FIRST – To confirm that the Appealed Decision consists with lack of procedural pre-requisites;*
>
> *SECOND – To confirm the implication of a default interest of 5% per annum on the entire outstanding value as from 26 August 2019;*
>
> *THIRD – To order the First Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS; and*
>
> *FOURTH – To order the First Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel.*
>
> *Assuming but not admitting, that in the unlike event, the above is rejected:*
>
> *FIFTH - To confirm that the Appealed Decision consists with lack of procedural pre-requisites;*
>
> *SIXTH – To confirm the implication of a default interest of 5% per annum on the entire outstanding value as from 30 November 2017;*

SEVENTH – To order the First Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS; and

EIGHTH – To order the First Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel".

15. On 25 November 2019, the First Respondent filed its Answer before the CAS, requesting the following:

"1: This Answer to the Appeal Brief is admissible and well-founded;

2: The Appellant's appeal shall be dismissed in its entirety and the FIFA DRC Decision shall be upheld in its entirety;

3. Consequently, that the Appellant has to pay to the First Respondent outstanding remuneration in the amount of BRL 599,924, plus interest calculated as follows:

a. 5% interest p.a. as of 31 August 2017 over the amount of BRL 149,981 until the date of effective payment;

b. 5% interest p.a. as of 1 October 2017 over the amount of BRL 149,981 until the date of effective payment;

c. 5% interest p.a. as of 31 October 2017 over the amount of BRL 149,981 until the date of effective payment;

d. 5% interest p.a. as of 1 December 2017 over the amount of BRL 149,981 until the date of effective payment.

4. If the Appellant does not the sums owed shall be banned from registering any new players, either nationally or internationally, up until the due amounts are paid and for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).

5. The Appellant shall pay in full the costs and expenses of the proceeding, including the First Respondents Legal costs and expenses pertaining to these appeal proceedings before CAS".

16. On 2 December 2019, the Second Respondent filed its Answer before the CAS, requesting *"to issue an award on the merits:*

(a) rejecting the reliefs sought by the Appellant;

(b) dismissing the appeal;

(c) confirming the Appealed Decision;

(d) ordering the Appellant to bear the full costs of these arbitration proceedings; and

(e) ordering the Appellant to make a contribution to FIFA's legal costs".

17. On 21 November 2019, the CAS Court Office, on behalf of the Deputy President of the Appeals Arbitration Division, informed the Parties that the Panel was constituted as follows:

President: Juan Pablo Arriagada Aljaro, attorney-at-law, Santiago, Chile

Mario René Archila Cruz, attorney-at-law, Ciudad de Guatemala, Guatemala (nominated by the Appellant)

Jordi López Batet, attorney-at-law, Barcelona, Spain (jointly nominated by the Respondents)

18. On 4 December 2019, the CAS Court Office invited the parties to inform the CAS by 9 December 2019 whether they preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the parties' written submissions.

19. On 9 December 2019, the Parties informed the CAS that they preferred the Panel to issue an award based solely on the parties' written submissions.

20. On 30 December 2019, the Panel invited the Appellant and the First Respondent to file a written submission on FIFA's standing to be sued and informed the parties that upon receipt of them, the Panel would decide whether to hold a hearing in this matter or not.

21. On 10 January 2020 the Appellant filed its answer on the FIFA's standing to be sued, mentioning that *"we agree with the contentions raised by FIFA in its Answer that it does not have standing to be sued"*. The First Respondent did not file any submission in this respect.

22. On 15 January 2020, the CAS Court Office informed the parties that, pursuant to Article R57 of the CAS Code, the Panel had decided not to hold a hearing in this case since the Panel is well-informed to decide this case based solely on the Parties' written submissions.

23. On 24 January 2020, the CAS Court Office sent the Order of Procedure to the parties, which was duly signed by them.

V. SUMMARY OF THE PARTIES' SUBMISSIONS

24. The following summary of the parties' positions is merely illustrative and does not necessarily comprise each and every contention put forward by the parties. However, for the purposes of the legal analysis that follows, the Panel has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

V.1. The Appellant

25. The Appellant and the First Respondent signed the *"Instrumento de Repactuação de Débitos"* on 16 August 2017 in order to establish the terms and conditions regarding the player's outstanding remuneration at the termination of their employment relationship due to the First Respondent permanent transfer to Club Atlético Boca Juniors.

26. This agreement established that the Appellant had to pay to the First Respondent a total remuneration of R$ 749,905 in 5 equal and successive installments of R$ 149,981.

27. The First Respondent sent a notice of default to the Appellant on 28 September 2018, claiming the payment of the outstanding remuneration agreed. As he did not obtain the payment, the First Respondent turned to FIFA DRC.

28. The DRC determined that the Appellant had to pay the second, third, fourth and fifth installment foreseen in the *"Instrumento de Repactuação de Débitos"*. With regard to the interest rate to be applied to such amount, the DRC ordered Cruzeiro to pay a default interest of 5% per annum as from the relevant due dates until the date of effective payment.

29. The Appellant recognizes that it owes the amount claimed by the First Respondent.

30. However, the Appellant contends that in the Appealed Decision, the FIFA DRC failed (i) to provide any clarification whatsoever as to the establishment of 5% interest per annum as from the relevant due dates until the date of effective payment and (ii) to indicate premises, principles or evidences that drove to the conclusion that the application of such interest shall start as from the original due dates, and requests that CAS confirms that the Appealed Decision *"consists with lack of procedural prerequisites"* and that the Appealed Decision should be modified in order to calculate the 5% interest per annum as from 30 days after the date of the notification of the Appealed Decision to the parties (26 August 2019), based on *"a well-established understanding of FIFA as well as CAS"*, and alternatively as from the date the last instalment fell due (30 November 2017), mentioning that the First Respondent, in its claim before FIFA, requested the application of an interest rate of 15% per annum as from 30 November 2017 onwards.

V.2. The First Respondent

31. Pursuant to the *"Instrumento de Repactuação de Débitos"* the Appellant had the obligation to pay the First Respondent a total outstanding remuneration of BRL 599,924 in five equal installments. In this regard, it is undisputed that the Appellant has acknowledged its failure to pay the second, third, fourth and fifth of the above-mentioned installments to the Respondent, that should have been paid on 31 August 2017, 1 October 2017, 31 October 2017 and 1 December 2017.

32. In addition, from a detailed reading of the Appeal Brief, there is no basis for having turned to FIFA, and the Appellant is only trying to delay more the fulfillment of its obligations, since it has recognized that it owes the money. The Appellant only disagrees with the default date

determined by the DRC, considering that the interest for the default should be calculated from 30 days after the notification of the decision of the DRC.

33. In addition, the First Respondent rejects the Appellant's submission according to which the interest for the default should count from 30 days after the notification of the decision of the DRC. In his view, the interest for the default must be calculated in accordance with the Swiss Code of Obligations, which the parties have agreed as supplementary application. In its Article 102.2, it is stated that where a deadline for performance of the obligation has been set by agreement, the obligor is automatically in default on expiry of the deadline.

34. Finally, since the Appellant's claim is contrary to the principle *"pacta sunt servanda"* and the principle of *"estoppel"* is applicable since the Appellant acknowledges the due dates of the installments but has not justified its delay, as a result, the Appellant's appeal shall be dismissed and the FIFA's decision shall be upheld.

V.3. The Second Respondent

35. In first place, the Second Respondent alleges that there is nothing sought against FIFA by the Appellant with respect to the Appealed Decision or its dispute with the Player. Therefore, it lacks standing to be sued in the present proceedings. It is evident that this case exclusively relates to a horizontal dispute between the Appellant and the First Respondent; none of the requests for relief of the Appellant concerns FIFA; and there is no scope of discretion for the DRC with regards to the imposition of the consequences in case of non-compliance provided for in Article 24bis RSTP.

36. Finally, FIFA submits that the Appealed Decision is correct from a legal and factual standpoint; the Appealed Decision has been taken in full compliance with the DRC's long-standing jurisprudence confirmed by CAS, with regards to the starting date for the calculation of the payment of the default interest of 5% per annum; the unsubstantiated arguments brought by the Appellant in this regard are unfounded and inapplicable to the present matter. As a result, the Appellant's appeal shall be dismissed.

VI. JURISDICTION

37. Pursuant to Art. R47 of the CAS Code *"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.* […]*".*

38. In the present case, the jurisdiction of the CAS, which is not disputed and has been confirmed by the parties by signing the Order of Procedure, follows from the content of Art. 58 of the FIFA Statutes, pursuant to which *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

VII. ADMISSIBILITY

39. Pursuant to Art. 58 para. 1 of the FIFA Statutes, in connection with Art. 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.

40. The grounds of the Appealed Decision were communicated to the Appellant on 26 July 2019, and its Statement of Appeal was filed on 16 August 2019, i.e. within the time limit required both by the FIFA Statutes and Art. R49 of the CAS Code.

41. Consequently, the Appeal filed by the Appellant is admissible.

VIII. APPLICABLE LAW

42. Article R58 of the CAS Code reads as follows:

> *"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".*

43. In addition, Art. 57, para. 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".*

44. Therefore, taking into account the abovementioned provisions, the Panel considers that the applicable law for the present dispute shall be the FIFA regulations and, subsidiarily, Swiss Law.

IX. MERITS

45. According to Art. 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 replacing the challenged decision or may annul the decision and refer the case back to the previous instance.

46. Firstly, the Panel will address the mater related with the FIFA's standing to be sued. The Panel notes that the Appellant expressly recognized in its letter of 10 January 2020 that the position held in this regard by FIFA was correct. The Appellant formally stated that *"we agree with the contentions raised by FIFA in its Answer that it does not have standing to be sued".*

47. Therefore, the Panel resolves that FIFA lacks standing to be sued in this specific case.

48. In the present procedure, the Appellant, apart from alleging the existence of *"lack of procedural prerequisites"* as explained in section V.1, is only challenging the date from which the 5% default interest shall accrue on the principal. Therefore, taking into account the parties' submissions and the limited scope of the Appellant's appeal, the issue that shall be addressed by the Panel to settle the dispute is from which date the installments of the outstanding remuneration start accruing interest.

49. In this regard, the Panel observes that the *"Instrumento de Repactuação de Débitos"* has no reference to the application of the 5% default interest per annum nor to the date according to which the interest rate should accrue.

50. The Appellant considers that the DRC's statement, which imposes Cruzeiro to pay a default interest of 5% per annum as from the relevant due dates until the date of effective payment, shall be revoked; or, at least, modified in terms of confirming the appliance of a default interest of 5% p.a. on the entire outstanding value as from 26 August 2019 or in the alternative, as from 30 November 2017.

51. Conversely, the First Respondent argues that in accordance with Article 102.2 of the Swiss Code of Obligations -which the parties have agreed as being of supplemental application -, that states that where a deadline for performance of the obligation has been set by agreement, the obligor is automatically in default on expiry of the deadline, the default interest construction established in the Appealed Decision is correct. Thus, in the First Respondent's view, the true intention of the Appellant was to delay the fulfillment of its obligations.

52. The Panel takes note that the substance of the dispute at stake refers to how the interest rate on each of the overdue instalments must be calculated. It is an undisputed fact that Cruzeiro owes the Player the amount of BRL 599,924.-.

53. This matter has been repeatedly reviewed by CAS Panels. And the consistent jurisprudence has established that in cases like the one at stake, the interest accrues from the day following the due date (CAS 2016/A/4428, CAS 2018/A/6023, CAS 2017/A/5279).

54. In the present case, the Panel does not see any reason to deviate from this well-established CAS jurisprudence according to which interest accrues from the day following the due date. Article 102 of the Swiss Code of Obligations is in any event self-explanatory in this respect and the arguments brought by the Appellant to try to contest such position have no legal basis and are in the Panel's view of no avail. In particular, the Panel shall remark that it is not correct that the First Respondent accepted in the FIFA proceedings that the calculation of interest shall count from 30 November 2017, as alleged by the Appellant.

55. In addition, the Panel does not see any *"lack of procedural prerequisites"* as alleged by the Appellant with regard to this determination of the interest in the Appealed Decision. On the contrary, the Panel finds the reference to the interest made in the Appealed Decision sufficient, and additionally notes that Cruzeiro is well aware of the system of calculation of interest in proceedings of this kind, as (i) it made reference to Swiss Code of Obligations' interest regime

in his submissions and (ii) Cruzeiro has been a party in proceedings at CAS where discussions on the interest have taken place and been resolved (ad exemplum, CAS 2018/A/6023).

56. As a result, the Panel rejects the appeal filed by the Appellant and confirms in full the Appealed Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Cruzeiro Esporte Clube against the decision issued by the Dispute Resolution Chamber of FIFA on 26 June 2019 is dismissed.

2. The decision issued by the Dispute Resolution Chamber of FIFA on 26 June 2019 is confirmed.

3. (…).

4. (…).

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