Arbitration CAS 2019/A/6508 Cruzeiro E.C. v. Independiente del Valle & Fédération Internationale de Football Association (FIFA), award of 6 July 2020

Panel: Mr Juan Pablo Arriagada (Chile), Sole Arbitrator

Football
Unpaid installment of a transfer contract
Liquidated damages clause and penalty clause
Proof of the damage
Application of Art. 12bis RSTP
Starting date of interest

1. **The concept of a liquidated damages clause is similar to that of a penalty clause in Swiss law.**

2. **Article 161 of the Swiss Code of Obligations (SCO) rules the contractual penalty, the rights of the creditor and the relation between penalty and damage, and states that the penalty is payable even if the creditor has not suffered any damage. The obligation of paying the penalty therefore arises regardless of whether or not the creditor demonstrates the damages suffered by the default of the debtor.**

3. **There is a clear difference between disciplinary-sporting sanctions and legal effects derived from non-compliance of a financial obligation. Article 12bis of the FIFA Regulations on the Status and Transfer of Players (RSTP) foresees various sanctions that FIFA might apply to the debtor when the conditions established therein are met. Therefore, said rule does not contain the consequences derived from a breach of contract. It is not applicable to activate the effects of a penalty clause, but only to impose disciplinary sanctions.**

4. **Interest accrues from the day following the due date. Article 102 SCO is self-explanatory in this respect.**

I. PARTIES

1. Cruzeiro Esporte Clube (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. Club Independiente del Valle (the "First Respondent" or "Independiente del Valle") is an Ecuadorian professional football club with its registered office in Sangolquí, Ecuador. It is a member of the *Federación Ecuatoriana de Fútbol* ("FEF"), which in turn is a member of the *Fédération Internationale de Football Association*.

3. *Fédération Internationale de Football Association* (hereinafter, the "Second Respondent" or "FIFA") 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 17 October 2016, the Appellant and the First Respondent entered into a transfer agreement in relation to the permanent transfer of the player Mr Luis Alberto Caicedo Medina (hereinafter, the "Transfer Agreement").

6. In exchange of the permanent transfer of the player Caicedo, the Appellant agreed to pay to the First Respondent the amount of USD 1,800,000 as a transfer fee in three equal installments as follows:

   - USD 600,000 on 25 January 2017
   - USD 600,000 on 25 January 2018
   - USD 600,000 on 25 July 2018

7. Pursuant to clause 3.3 of the Transfer Agreement (hereinafter, "Clause 3.3"), in the event of non-payment, the Appellant would have to pay additionally to the First Respondent 5% of the overdue debt as penalty, plus 6% interests per year.

8. The Appellant failed to pay the third installment that was due on 25 July 2018.

III. PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS COMMITTEE

9. On 6 September 2018, the First Respondent filed a claim with the FIFA Players' Status Committee (the "PSC") against the Appellant, claiming payment of USD 600,000 for the third installment stipulated in the Transfer Agreement, plus 5% of the amount claimed as penalty, plus 6% of interests per year and USD 1,200,000 as penalty for having breached clause 1.2.1 of the Transfer Agreement.

10. On 13 December 2018, the Appellant filed his response rejecting the First Respondent's claim in its entirely.

11. On 31 January 2019, the PSC rendered the following Decision:

1. *"The claim of the Claimant, Independiente del Valle, is partially accepted.*

2. *The Respondent, Cruzeiro Esporte Club, has to pay to the Claimant, Independiente del Valle, the amount of USD 600,000 plus 6% interest p.a from 26 July 2018 until the date of effective payment.*

3. *The Respondent, Cruzeiro Esporte Club, has to pay to the Claimant, Independiente del Valle, the amount of USD 30,000.*

4. *Any further claim lodged by the Claimant is rejected.*

5. *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 mentioned under points 2. and 3. above.*

6. *The Respondent shall provide evidence of payment of the due amounts in accordance with points 2. and 3. above 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).*

7. *In the event that the amounts due, plus interest in accordance with points 2. and 3. 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 entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

8. *The ban mentioned in point 7. above will be lifted immediately and prior to its complete serving, once the due amounts are paid.*

9. *In the event that the aforementioned sums plus interest are still not paid by the end of the ban of three entire and consecutive registrations periods, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

10. *The final costs of the proceedings in the amount of CHF 25,000 are to be paid by both parties, within 45 days as from the date of notification of the present decision as follows:*

    10.1. The amount of CHF 5,000 has to be paid by the Claimant, Independiente del Valle. Considering that the latter already paid an advance of costs in the amount of CHF 5,000 at the start of the present proceedings, the Claimant is exempted from paying the aforementioned costs of the proceedings.

    10.2. The amount of CHF 20,000 has to be paid by the Respondent, Cruzeiro Esporte Club, to FIFA to the following bank account with reference to case nr. 18-02104/Iza: […].

11. *In the event that the aforementioned amount of costs is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision".*

12. On 17 September 2019, FIFA notified the parties of the grounds of the Decision passed by the PSC on 31 January 2019.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 8 October 2019, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Respondents, challenging the Decision rendered by the Players' Status Committee on 31 January 2019 (the "Appealed Decision"), with the following requests for relief:

> *"On the merits:*
>
> *FIRST – To dismiss, in full, the Appealed Decision;*
>
> *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 28 October 2019 the Appellant filed his Appeal Brief with the following requests for relief:

> *"FIRST – To dismiss in full the Appealed Decision and revert it back to the FIFA Players' Status Committee in order to permit said judicial body to provide a decision based upon the applicable version of the FIFA RSTP.*
>
> *SECOND – To order the Second 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 cost paid to the CAS; AND*
>
> *THIRD – To order the Second Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 10,000 (ten thousand Swiss Francs).*
>
> *Alternatively and only in the event the above is rejected:*
>
> *FOURTH – To dismiss in full the Appealed Decision and revert it back to the FIFA Players' Status Committee in order to permit said judicial body to provide a decision based upon the RSTP 2016 edition;*

FIFTH - To confirm the imposition to transfer ban on the Appellant shall only be for a maximum duration of two registration periods;

SIXTH – To order the Second 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

SEVENTH – To order the Second Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 10,000 (ten thousand Swiss Francs).

Alternatively and only in the event the above is rejected:

EIGHTH – To uphold the Appeal herein lodged by the Appellant;

*NINTH – To confirm that no penalty shall be applied (whatsoever) over the due amounts, considering the absence of notice of default (see paragraphs – **99** et. seq. **above**);*

TENTH – To confirm that any default interest eventually applied over the due instalments (sic) shall be 6% per annum as from the date of the notification of decision of the Single Judge of the FIFA PSC, i.e. 17 September 2019;

ELEVENTH – 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 (if applicable) paid to the CAS; and

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

15. On 4 November 2019, further to the Parties' disagreement on the issue of the number of arbitrators, the CAS Court Office informed them that, pursuant to Article R50 of the CAS Code, the President of the CAS Appeals Arbitration Division had decided to submit the present case to a Sole Arbitrator.

16. On 4 December 2019, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the case was constituted as follows: Mr. Juan Pablo Arriagada Aljaro, Attorney-at-law, in Santiago, Chile (Sole Arbitrator).

17. On 23 December 2019, the First Respondent filed his Answer with CAS, requesting the following:

"The First Respondent request (sic) the Sole arbitrator in this case to dismiss the appeal filed by Cruzeiro (The Appellant) and confirm the appealed decision.

If the Sole Arbitrator decides that an annulment is in order, even thou (sic) we are opposed to this annulment, based on what the Appellant has exposed in their appeal, the First Respondent request (sic)

that the only part of the appealed decision that should be annulled is the ban from registering new players, imposed by the Single Judge,

The First Respondent request (sic) that the Appellant must be sentenced to pay for the legal fees of the First Respondent since this appeal was filed only to further delay the payments".

18. On 23 December 2019, the Second Respondent filed his Answer before the CAS, with the following requests for relief:

"Based on the foregoing, FIFA respectfully requests CAS to issue an award on the merits:

(a) rejecting the reliefs sought by the Appellant;

(b) dismissing the appeal;

(c) confirming the Appealed Decision; and

(d) ordering the Appellant to bear the full costs of these arbitration proceedings".

19. On 6 January 2020, the CAS Court Office invited the Parties to inform the CAS by 13 January 2020 whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions. All Parties communicated their preference for an award based solely on the Parties' written submissions.

20. On 16 January 2020, the CAS Court Office informed the Parties that pursuant to Article R57 of the CAS Code, the Sole Arbitrator had decided not to hold a hearing.

21. On 20 January 2020, the CAS issued the Order of Procedure, which was duly signed by the Parties, confirming the jurisdiction of CAS and that their right to be heard had been respected.

22. On 28 April 2020, the CAS Court Office invited the Appellant and the First Respondent to file a written submission on FIFA's standing to be sued by 8 May 2020.

23. On 8 May 2020, the Appellant filed its written submission on FIFA´s standing to be sued.

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 Sole Arbitrator 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. Firstly, the Appellant asserts that FIFA has a standing to be sued in the present case because, according to CAS Jurisprudence, an appeal against a sporting sanction inflicted by a FIFA decision-making body must be directed against FIFA.

26. The Appellant argues that FIFA made a procedural mistake by applying wrongly the provisions of the Regulations on the Status and Transfer of Players, Edition June 2018 (hereinafter, "RSTP 2018"), in circumstances that it should have applied the Regulations on the Status and Transfer of Players, Edition June 2016 (hereinafter, "RSTP 2016"). Furthermore, according to CAS jurisprudence, an appeal against a sports sanction inflicted by FIFA decision-making body must be directed against it.

27. With regard to the applicable law, the Appealed Decision must be considered null and void because the Single Judge did not apply the correct regulation, since he applied the RSTP 2018, which implies a violation of mandatory principle of laws and due process.

28. In that sense, Article 26 of RSTP 2018 provides that:

> *"**1.***
> *Any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations.*
>
> ***2.***
> *As a general rule, all other cases shall be assessed according to these regulations with the exception of the following:*
>
> *a) disputes regarding training compensation;*
>
> *b) disputes regarding the solidarity mechanism;*
>
> *c) labour disputes relating to contracts signed before 1 September 2001.*
>
> *Any cases not subject to this general rule shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose.*
>
> ***3.***
> *Member associations shall amend their regulations in accordance with article 1 to ensure that they comply with these regulations and shall submit them to FIFA for approval. Notwithstanding the foregoing, each member association shall implement article 1 paragraph 3 a)".*

29. The Parties entered into the Transfer Agreement, the object of the controversy, on 17 October 2016, i.e. before the issuance of the RSTP 2018, which came into force on 1 June 2018, and as such, the 2016 edition of the RSTP must be applied to the present dispute in accordance with the principle of *tempus regit in actum*.

30. Furthermore, the RSTP 2016 should be applied to the case at hand instead of the RSTP 2018, since it provides a more favorable scenario for the Appellant according to the *lex mitior* principle. The grounds of the Appealed Decision contain that the Single Judge has based his decision for imposing a sanction on the Appellant pursuant Article 24bis of the RSTP 2018, which states that:

> ***"1.***
> *When instructing a party (a club or a player) to pay another party (a club or a player) a sum of money (outstanding amounts or compensation), the Players' Status Committee, the DRC, the Single Judge or the DRC judge (as the case may be) shall also decide on the consequences of the failure to pay the relevant amounts in due time.*
>
> ***2.***
> *Such consequences shall be included in the findings of the decision and will be the following:*
>
> *Against a club, a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall maximum duration of the registration ban, including possible sporting sanctions, shall be of three entire and consecutive registration periods;*
>
> *Against a player, a restriction on playing in official matches up until the due amounts are paid. The overall maximum duration of the restriction, including possible sporting sanctions, shall be of six months on playing in official matches.*
>
> ***3.***
> *The ban or the restriction will be lifted prior to its complete serving, once the due amounts are paid.*
>
> ***4.***
> *The ban or the restriction shall be applicable if the due amounts are not paid within a period of 45 days as of the creditor having provided the debtor with the required bank details for the payment while the relevant decision having become final and binding".*

31. The RSTP 2016, however, do not contain Article 24bis and the sanction for breach of payment obligations is provided in Article 12bis, which states that:

> ***"1.***
> *Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements.*
>
> ***2.***
> *Any club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned in accordance with paragraph 4 below.*
>
> ***3.***
> *In order for a club to be considered to have overdue payables in the sense of the present article, the creditor (player or club) must have put the debtor club in default in writing and have granted a deadline of at least ten days for the debtor club to comply with its financial obligation(s).*

4.
Within the scope of their respective jurisdiction (cf. article 22 in conjunction with articles 23 and 24), the Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge may impose the following sanctions: a) a warning; b) a reprimand; c) a fine; d) a ban from registering any new players, either nationally or internationally, for one or two entire and consecutive registration periods.

5.
The sanctions provided for in paragraph 4 above may be applied cumulatively.

6.
A repeated offence will be considered as an aggravating circumstance and lead to a more severe penalty.

7.
The execution of the registration ban in accordance with paragraph 4 d) above may be suspended. By suspending the execution of a registration ban, the deciding body subjects the sanctioned club to a probationary period ranging from six months to two years.

8.
If the club benefiting from a suspended registration ban commits another infringement during the probationary period, the suspension is automatically revoked and the registration ban executed; it is added to the sanction pronounced for the new infringement.

9.
The terms of the present article are without prejudice to the application of further measures in accordance with article 17 in the event of unilateral termination of the contractual relationship".

32. Comparing the aforementioned articles, there is no room for doubts or misunderstanding that the terms and conditions set out in the RSTP 2018 are much stricter that those of the RSTP 2016. Even though both versions establish the imposition of transfer ban for failing to comply contractual payment obligations, the RSTP 2016 only provides a possible transfer ban for two registration periods, while RSTP 2018 establishes a possible transfer ban for three registrations periods.

33. In the light of the above, RSTP 2016 should prevail over RSTP 2018 and, as such, it should apply to the present matter.

34. With respect to the merits of the case and in the event that the Sole Arbitrator does not annul the Appealed Decision, the Appellant argues that the Clause 3.3 has been misinterpreted.

35. Said clause is a liquidated damages clause, which establishes a sanction to the Appellant in the event that the payments involved in the Transfer Agreement are not completed. In order to interpret it, says the Appellant, it is necessary to take into account Articles 18 and 160 (2) of the Swiss Code of Obligation (the "SCO"). The first one states that:

> *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement".*

36. Article 160 (2) provides that:

> *"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".*

37. The liquidated damages clause does not have a punitive function, but is an early compensation for damages. In any case, the creditor must demonstrate the existence of real damages if he wants to activate the mentioned clause.

38. It is undisputable that, when the Appellant and the First Respondent agreed to insert Clause 3.3 their main objective was to trigger such clause in the event the Appellant did not comply and the Frist Respondent showed that he had suffered damages due to such non-compliance.

39. Therefore, in accordance with Articles 18 and 162 of the SCO, Clause 3.3 can be interpreted as a liquidated damages clause, and not as a punitive clause, that could only be activated once the First Respondent has demonstrated his damages due to the Appellant's failure to pay the transfer fee.

40. Additionally, the Appellant argues that the First Respondent did not notify any default or delay in payment of the installment. Neither did he mention the implications of Article 12bis of the RSTP, nor did he grant 10 days for the Appellant to complete the payment. Therefore, he did not fully meet the procedural prerequisites for filing a claim with FIFA.

41. Moreover, the Appellant cannot be held responsible for the payment of the penalty clause, given that the First Respondent expressly waived his right to claim the penalties established in Clause 3.3 by failing to notify the noncompliance and not mentioning Article 12bis and its implication of granting 10 days as a grace period.

42. Finally, in relation to accrued interest, taking into account that Clause 3.3 does not mention when the imposition of interest of 6% per year will take place, it is necessary to determine from which date an imposition of interest must take place. For this, Article 102 (1) of the SCO states that:

> *"Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee".*

43. In light with the above, as there was not a formal reminder, the decision of the Single Judge to apply 6% interest per year over the due amount from the actual contractual expiration date is incorrect, because the delivery of a reminder in order to apply default interest is inevitable and the First Respondent did not do it. In this sense, the implication of default interest should accrue from the date in which the Independiente del Valle filed his claim with FIFA, this is, on 6 September 2018.

V.2. The First Respondent

44. Regarding the edition of the applicable RSTP, is clear that the general principle is that the applicable regulation is the one in force at the time the claim is filed and the only three exceptions are those mentioned in the second paragraph of Article 26 of the RSTP 2018, neither of which applies to the present case, as it is not a claim for training rights, a solidarity mechanism or a dispute based on a contract signed before 2001.

45. According to Article 29 of the RSTP 2018, said regulation was effective since 1 June 2018 and the claim was filed on 6 September 2018, when that edition was already in force, so that is the one that the Single Judge had to apply.

46. In addition to the above, the amount not paid by the Appellant had to be paid on 25 July 2018, that is, when the RSTP 2018 was already in force. Therefore, there is no reason to declare the nullity of the Appealed Decision.

47. Regarding the penalty of 5% on the amount owed, this was duly accepted by the Appellant, who did not object at the time of signing the Transfer Agreement.

48. Article 163 of the SCO states that:

> *"The parties are free to determine the amount of the contractual penalty"*

49. Therefore, Cruzeiro and Independiente del Valle freely established and accepted the 5% penalty in the Transfer Agreement.

50. Article 161 of the SCO provides as follow: *"The penalty is payable even if the creditor has not suffered any damage"*. Thus, the First Respondent had no obligation to prove the damages suffered by the breach of the obligation to pay.

51. Concerning the lack of notice of default alleged by the Appellant, Article 102 (2) of the SCO states that:

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

52. In addition, Article 103 of the SCO establishes as follow:

> *"An obligor in default is liable in damages for late performance and even for accidental damage"*.

53. These articles clearly exempt the First Respondent from the obligation to notify the Appellant of his own and overdue debt.

54. In light of the foregoing, is has been shown that the First Respondent was under no obligation to notify the default or to remind the Appellant of the amount owed. Despite this, the First

Respondent attempted to collect the payment through his intermediary, who was unable to obtain a proposal from the Appellant on how he wanted to pay the amounts owed.

55. The First Respondent sent an email on 18 August 2018, giving the Appellant 10-day notice to pay, this communication remained unanswered and the First Respondent had to file a claim with FIFA.

56. The Appellant still owes the first installment from January 2017 and the second one from January 2018. This is why the First Respondent had filed a claim with FIFA and this demonstrate the Appellant's unwillingness to pay. Therefore, the notice of default was not necessary. Therefore, the penalty clause of 5% shall apply.

V.3. The Second Respondent

57. The Second Respondent alleges that there is nothing sought against FIFA by the Appellant with respect to the Appealed Decision. Therefore, it lacks standing to be sued in these proceedings. It is evident that this case exclusively relates to a horizontal dispute between the Cruzeiro and the Independiente del Valle. Also, none of the Appellant's requests for relief is directed against FIFA.

58. The Second Respondent considers that the general rule is that any case that has been submitted to the PSC before the most recent version of the RSTP comes into force will be assessed in accordance with the previous regulations. In other words, in order to establish which edition of the RSTP applies to a case, the date on which the case is submitted to FIFA must first be determined and is generally the deciding factor regarding the applicable edition.

59. Pursuant Article 29 RSTP 2018, this regulation came into force on 1 June 2018.

60. Article 26 of the RSTP 2018 establishes three exceptions to the general rule explained above and, in this case, none of them is applicable because it does not refer to a dispute related to the payment of a training compensation, nor to a dispute related to the solidarity contribution. The case has been submitted to FIFA after 1 June 2018, specifically on 6 September 2018. Therefore, it is the 2018 edition that applies.

61. Regarding the penalty clause, FIFA argues that Clause 3.3. does not mention any obligation for the creditor to give notice of default for the penalty being applicable. Furthermore, pursuant to Article 102 of the SCO, where a deadline for performance of the obligation has been agreed, the debtor is automatically in default if such deadline expires.

62. The Transfer Agreement foresees a specific deadline for the Appellant to execute the payment of the third installment to the First Respondent, *i.e.* on 25 July 2018. Therefore, a default notice was not necessary, as the Appellant was in default at the expiration of such deadline.

63. Regarding Article 12bis of the RSTP, it was not applicable because the Appealed Decision did not enter into the analysis of any sports sanctions.

64. With respect to the calculation of the default interest payment, the consistent practice of the PSC, in accordance with Swiss law, the interest accrues from the day following the due date. Thus, the annual interest of 6% over the third installment accrued as of 26 July 2018.

65. The Appealed Decision is not the only decision passed by the PSC involving the same Transfer Agreement and parties. The Appellant also failed to comply with the first two installments of the contract and the First Respondent filed a claim with the PSC which ordered the Appellant to pay the first two overdue installments. That PSC decision was appealed to CAS by the Appellant submitting forward exactly the same arguments that have been presented in this case and which have already been reviewed and dismissed by CAS in the very recent award CAS 2019/A/6310. Finally, FIFA considers that the Appealed Decision is correct, fully justified and should therefore be entirely upheld by the CAS.

VI. JURISDICTION

66. 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.* […]*".*

67. 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, derives from 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

68. 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 with the CAS.

69. The grounds of the Appealed Decision were communicated to the Appellant on 17 September 2019, and its Statement of Appeal was filed on 8 October 2019, *i.e.* within the time limit required both by the FIFA Statutes and Art. R49 of the CAS Code. Consequently, the Appeal is admissible.

VIII. APPLICABLE LAW

70. 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".

71. 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".

72. The Sole Arbitrator must determine which edition of the RSTP is applicable to the case. The Appellant considers that the RSTP 2016 is applicable because the Transfer Agreement was signed on 17 October 2016, i.e. before the RSTP 2018 came into force; and also, because the RSTP 2016 foresees a more favorable disciplinary scenario for Cruzeiro. Conversely, both Respondents argue that the RSTP 2018 applies to this dispute because the date when the claim is filed determines which edition governs the matter.

73. The Sole Arbitrator notes that Independiente del Valle filed his claim with FIFA on 6 September 2018.

74. Furthermore, Article 29 of the RSTP 2018 establishes that said regulation entered into force on 1 June 2018 and Article 26 provides that *"any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulation"*. In the present case, as the claim with PSC was filed on 6 September 2018, that is, after the RSTP 2018 came into effect, the RSTP 2018 edition applies to this dispute.

75. Moreover, this dispute does not fall on any of the exceptions provided in Article 26 to apply the previous regulation as it is not a dispute regarding training compensation, solidarity mechanism or a labor dispute related to a contract signed before 1 September 2001. As a result, the Sole Arbitrator considers that RSTP 2018 applies to this dispute.

76. In light of the above, the applicable law for this dispute is FIFA regulations, specifically the RSTP 2018 edition and, subsidiarily, Swiss Law.

IX. MERITS

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

78. Firstly, the Sole Arbitrator will address the issue related to FIFA´s standing to be sued.

79. The Appellant considers that FIFA has standing to be sued on the grounds of the sporting sanctions imposed on the former.

80. The Sole Arbitrator notes the general legal principle of the burden of proof, according to which any party claiming a right on the basis of an alleged fact must discharge the burden of proof, to prove that the alleged fact is as claimed.

81. This principle is in line with Article 8 of the Swiss Civil Code ("Swiss CC"), which stipulates as follows:

> *"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".*

82. Based on the above, the Sole Arbitrator considers that the burden of convincing him that FIFA has standing to be sued, because it applied a sporting sanction on the Appellant, lies with the latter.

83. Having reviewed the evidence submitted by the Appellant and according to the operative part of the Appealed Decision, the Sole Arbitrator considers that Cruzeiro failed to prove that FIFA has standing to be sued in this specific matter. Therefore, the Sole considers that FIFA has no standing to be sued.

84. Furthermore, the Sole Arbitrator notes that the Appellant challenged the regulations applied by the Single Judge, the application of the 5% as penalty and the date from which the 6% of default interest accrues on the principal.

85. Concerning the application of 5% as penalty, the Appellant submits that in accordance with Articles 18 and 160 (2) of the SCO, the First Respondent should have demonstrated the damages suffered due to the non-performance of the Appellant. In contrast, both Respondents argue that under Swiss law the penalty is payable even if there is no damage, therefore it is not necessary to prove the damage suffered.

86. To solve this issue, the Sole Arbitrator considers it necessary to determine the nature of Clause 3.3 of the Transfer Agreement. Pursuant to this clause, in the event of non-payment of the relevant installments within the term agreed, the Appellant had to pay to the First Respondent 5% of the outstanding amount as penalty. Accordingly, Clause 3.3 is a liquidated damages clause since it provides for a specific form of punishment for not fulfilling the contractual obligations.

87. The Sole Arbitrator further observes that, according to CAS jurisprudence, the concept of a liquidated damages clause is similar to the concept of a penalty clause in Swiss law (CAS 2014/A/3555, para. 57).

88. Taking into consideration that Swiss law is subsidiarily applicable to this dispute, Clause 3.3 must be analyzed in light of the SCO. In that sense, Article 161 of this Code rules the contractual penalty, the rights of the creditor and the relation between penalty and damage, and states: *"The penalty is payable even if the creditor has not suffered any damage".*

89. Thus, the Sole Arbitrator concludes that the obligation of paying the penalty arises regardless of whether or not the creditor demonstrates the damages suffered by the default of the debtor. Consequently, the First Respondent was no required to prove its damages to request the payment of the penalty of 5% on the amount owed.

90. Moreover, it is necessary to clarify whether First Respondent had the obligation to put the Appellant in default in order to be able to request the penalty together with the payment of the

due amount, that is, USD 600,000 plus 5% on such amount. The Appellant claims that the First Respondent never gave him notice of default, according to Article 12bis of the RSTP, so the latter waived his right to claim the penalty.

91. The Respondents argue that Clause 3.3 does not mention any obligation for Independiente del Valle to notify the default in order to be able to request the payment of the penalty fee. Besides, according to Article 102 of the CO, when the parties agree a term for the fulfillment of an obligation, the debtor is automatically in default after such term expires. Therefore, a notice of default would not be necessary in this case.

92. Article 102 of the CO expressly establishes:

"B. Default of obligor

I. Requirement

1 Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee.

2 Where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right of termination reserved by one party, the obligor is automatically in default on expiry of the deadline".

93. Additionally, the Sole Arbitrator notes that the Transfer Agreement foresees a specific date on which the Appellant had to pay the third installment, that is, on 25 July 2018. Therefore, the second paragraph of Article 102 applies to this case. The Appellant was automatically in default upon expiration of the deadline, without need to be notified in this regard.

94. Moreover, the Transfer Agreement does no mention any obligation to give notice of default to be entitled to request the payment of the penalty. Therefore, neither Swiss law nor the Transfer Agreement establishes the obligation to put the debtor in default. The fact that the First Respondent failed to notify the Appellant does not imply that he had waived its right to claim the penalty, as he was not required to do so.

95. Regarding Article 12bis of the RSTP referred by the Appellant, the Sole Arbitrator takes note that there is a clear difference between disciplinary-sporting sanctions and legal effects derived from non-compliance of a financial obligation. That article foresees various sanctions that FIFA might apply to the debtor when the conditions established therein are met. Therefore, said rule does not contain the consequences derived from a breach of contract, they are only disciplinary sanctions. Thus, Article 12 bis of the RSTP is not applicable to activate the effects of the penalty clause, but only to impose disciplinary sanctions, so it was not necessary for Independiente del Valle to put the Appellant in default.

96. Finally, the Sole Arbitrator has to determine when did the default interest start to accrue. The Appellant argues that the default interest of 6% per year shall be accrued as from the date in which the First Respondent lodged his claim with FIFA, *i.e.* 6 September 2018, because that would be the date on which the First Respondent gave the formal notice of default, in accordance with Article 102 of the SCO that states: *"Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee"*.

97. Conversely, the Respondents argue that in accordance with Article 102 (2) of the SCO, when a deadline for performance of the obligation has been set by agreement, the obligor is automatically in default after such deadline expires. Therefore, the Appealed Decision is correct. The Respondents consider that the calculation of the interest payment of 6% per annum must be made from the day following the due date of the third installment *i.e.* 26 July 2018. Thus, in the Respondents' view, the true intention of the Appellant was to delay the fulfillment of its obligations.

98. The Sole Arbitrator indicates that this point refers to how the interest rate should be calculated in the third installment due. It is an undisputed fact that Cruzeiro owes the Player the amount of USD 600,000.

99. This matter has been repeatedly reviewed by CAS Panels. Consistent jurisprudence has established that interest accrues from the day following the due date (CAS 2016/A/4428, CAS 2018/A/6023, CAS 2017/A/5279).

100. The Sole Arbitrator 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 SCO 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 Sole Arbitrator's view of no avail.

101. As a result, the Sole Arbitrator 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 Single Judge of the Players' Status Committee of FIFA on 31 January 2019 is dismissed.

2. The decision issued by the Single Judge of the Players' Status Committee of FIFA on 31 January 2019 is confirmed.

3. (…).

4. (…).

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