



**Arbitration CAS 2005/O/985 Feyenoord Rotterdam N.V. v. Cruzeiro Esporte Club, award of 19 December 2006**

Panel: Mr François Carrard (Switzerland), President; Mr Peter Leaver (United Kingdom); Mr Paulo Roberto Murray (Brazil)

*Football*

*Transfer fee*

*Compensation for transfer*

*Interpretation of a contractual clause*

*Deductions from the amount of the transfer fee*

*Compensation for damages*

1. Under Swiss law, when the meaning of a contractual clause is disputed, the judge seeks to determine the actual common intentions of the parties, without regard to incorrect statements or expressions used by the parties, whether by mistake or in order to conceal the true nature of the contract (Art. 18 para. 1 CO). When the actual common intentions of the parties cannot be established, the contract must be interpreted according to the requirements of good faith. The judge has to determine how a statement or an external manifestation by a party could have been reasonably understood by the other party, based on the particular circumstances of the case. The requirements of good faith tend to give preference to an objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable person would have understood that party's statements.
2. When a contractual clause states that a club shall be entitled to a certain percentage of the full transfer sum due, neither the solidarity contribution nor any amount paid to purchase a share of the player's remaining economic rights in order to be able to transfer the full rights nor any amount due to the player's agent can be deducted from the transfer fee. Indeed, none of these deductions is justified as none of them diminishes the full economic value of the player.
3. Under Swiss law, a party that suffered damages as a result of a breach of contract by another party may claim monetary compensation corresponding to the damages suffered, provided certain conditions are met. In particular, the Claimant must prove the existence and amount of damages (Art. 97 CO). If the Claimant does not state how the damages are calculated, nor to what they correspond and does not produce any evidence relating to the claim, no compensation for damages can be allowed.

The Dutch football club Feyenoord Rotterdam N.V. (“the Claimant”) held the transfer rights of a Brazilian football player, Fr derico Chavez Guedes (“Fred”), who had been trained and educated by the Brazilian football club Am rica Futebol Clube (“Am rica”). The Claimant held these transfer rights in furtherance of a cooperation agreement it had with Am rica.

On 18/19 July 2004, the Claimant and the Brazilian football club Cruzeiro Esporte Club (“the Respondent”) entered into a transfer agreement (the “Transfer Agreement”), whereby the Claimant agreed to ensure that the registration of the player Fred, at the time under contract with Am rica, would be transferred permanently to the Respondent, provided the latter reached full agreement with Fred on the terms of a player’s contract. The Transfer Agreement also provides that the Respondent would transfer the player Gerson Alencar de Lima Junior (“Magrao”) to the Claimant.

Clause 5 of the Transfer Agreement provides as follows:

*“Feyenoord remains the owner of 10% of the economic rights of Fred. This means that in the event that the player Fred is transferred in the future from Cruzeiro to another professional football club Feyenoord shall remain entitled to a percentage of 10% of the full transfer sum / compensation due or in other words Feyenoord will be entitled to 10% of all revenue with respect to this transfer”.*

Concerning payment of the amounts due, Clause 6 provides the following:

*“The amounts due to either party on the basis of the article 4 and 5 shall be paid within 30 days after the transferring party has received the first or only instalment of the transfer sum / compensation or revenue from the other professional club. [...]”.*

On 26 August 2005, the Respondent and the player Fred entered into an agreement (“the Sale Agreement”), which notably mentions the following (Clause 1):

*“[Cruzeiro Esporte Club] shall be the exclusive holder of 75% (seventy-five percent) of the economic sports rights of [Fred]. The latter shall have the free and unencumbered disposal of 15% (fifteen percent), which shall be his rights. The remaining 10% (ten percent) belong to FEYENOORD ROTTERDAM, from the Netherlands”.*

On 29 August 2005, the Respondent and l’Olympique Lyonnais SASP (“Olympique Lyonnais”) entered into a transfer agreement (the “OL Transfer Agreement”), whereby the Respondent transferred the player Fred to Olympique Lyonnais. Clause 1 of the OL Transfer Agreement provides that the transfer amount is EUR 15,000,000.

Concerning payment of the transfer sum, clause 3 of the OL Transfer Agreement provides that EUR 7,000,000 shall be paid upon signature of the agreement and EUR 8,000,000 shall be paid on 29 August 2006.

The OL Transfer Agreement further provides that the 5% solidarity contribution under Clause 1 of Annex 5 of the FIFA Regulations for the Status and Transfer of Players (“the Solidarity Contribution”), i.e., EUR 750,000, shall be borne by the Respondent.

The Sale Agreement further provides that Fred sells and transfers to the Respondent his full 15% share of his economic sports rights, for an amount in Brazilian reals corresponding to EUR 3,000,000. This amount was to be paid as follows: (1) an amount in reals corresponding to EUR 2,100,000 to be paid to Fred by 5 September 2005 at the latest and (2) an amount in reals corresponding to EUR 900,000 to be paid to Fred's agent. In addition, the Respondent agreed to pay the Brazilian Tax on Interest on these amounts.

The Sale Agreement also provides that payment of the price was dependent upon receipt by the Respondent of the amount of EUR 7,000,000 due by Olympique Lyonnais under the OL Transfer Agreement.

Clause 6 of the Sale Agreement sets out that as a result of such agreement, the Respondent shall become the exclusive and legal owner and holder of 90% of the sports rights of Fred, the remaining 10% belonging to the Claimant.

On 10 October 2005, the Claimant sent an invoice to the Respondent in the amount of EUR 1,500,000 and requested payment within 5 days.

On 24 October 2005, the Respondent's counsel replied to Feynoord. He presented a summary of the facts surrounding the transaction, as well as the Respondent's position on the Claimant's claim. The Respondent's position can be summarized as follows:

- Any amount due to the Claimant should be calculated proportionally to the amounts actually paid by Olympique Lyonnais.
- An amount of EUR 1,400,000 paid by the Respondent to Olympique Lyonnais' agent who was involved in Fred's transfer should be deducted from the transfer amount for the calculation of the Claimant's 10% share.
- The amount of EUR 3,000,000 paid by the Respondent to Fred and his agent should be deducted from the transfer amount for the calculation of the Claimant's 10% share.
- The amount of EUR 510,913 (BRL 1,367,254.41), corresponding to the Brazilian taxes paid by the Respondent on the amounts paid to Fred and his agent, should be deducted from the transfer amount for the calculation of the Claimant's 10% share.
- The 5% Solidarity Contribution paid by the Respondent in relation with Fred's transfer should be deducted from the transfer amount for the calculation of the Claimant's 10% share.

As a consequence, the Respondent's counsel indicated that the Respondent agreed to pay 10% "*calculated over the total amount effectively destined to Cruzeiro due to the transfer of Fred*", i.e., EUR 933,908.70, to be paid in the two following instalments: EUR 243,908.70 to be paid immediately and EUR 690,000 to be paid within 30 days counted as of 29 August 2006, date at which Olympique Lyonnais was supposed to pay the second instalment of the transfer fee.

The Respondent did not pay any amounts to the Claimant.

On 14 November 2005, the Claimant filed a request for arbitration with the Court of Arbitration for Sport (CAS) in order to obtain payment of the amounts due, plus costs and interests.

On 9 June 2006, the CAS, on behalf of the Chairman of the Panel, issued an order of procedure, setting out procedural aspects related to the dispute and confirming amongst other that CAS had jurisdiction to rule on this matter, and that the applicable law would be determined in accordance with Art. R45 of the Code of Sports-related Arbitration (the “Code”).

The Panel held a hearing on 5 September 2006 at the CAS premises in Lausanne.

## LAW

### CAS Jurisdiction

1. Clause 9 of the Transfer Agreement reads as follows:  
*“[...] Disputes arising out of this agreement shall be submitted directly for settlement to the Court of Arbitration for Sports (“CAS”) in Lausanne, Switzerland, in accordance with the arbitration rules of CAS. The court of arbitration shall consist of three members and the language of the proceedings shall be English. The decision of the arbitration court is binding and not open to appeal”.*
2. The parties confirmed the jurisdiction of the CAS by signing the order of procedure of 9 June 2006.
3. It follows that the CAS has jurisdiction to decide on the present dispute.

### Applicable law

4. According to Article R45 of the Code:  
*“The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono”.*
5. Clause 9 of the Transfer Agreement reads as follows:  
*“This agreement shall be construed in accordance with the FIFA Regulations for Transfer and Status of players. [...]”.*
6. Therefore, the Panel shall apply the FIFA Regulations for Transfer and Status of players and, additionally, Swiss law. The parties have not authorized the Panel to decide *ex aequo et bono*.

## Merits

7. The parties agree that the Respondent must pay to the Claimant an amount corresponding to 10% of the transfer fee related to the transfer of the player Fred from the Respondent to Olympique Lyonnais. However, they disagree on the following issues:
  - What is the amount of the transfer fee?
  - Is the Respondent entitled to make deductions from the amount of the transfer fee?
  - Can the Claimant claim interest for late payment and, if so, at what rate and from which date?
  - Does the Respondent have to pay to the Claimant an amount for the Claimant's extra-judicial costs?
- A. *Amount of the transfer fee*
8. The parties agree that the amount of the transfer fee as set out in the OL Transfer Agreement is EUR 15,000,000. However, the Claimant submits that this figure may be incorrect and that the actual transfer fee is likely to be EUR 20,000,000. In support of its allegation, the Claimant mentioned the two following elements:
  - First, the Sale Agreement provides that Fred shall receive an amount of EUR 3,000,000 for 15% of his economic rights. According to the Claimant, if 15% of the economic rights are worth EUR 3,000,000, this means that 100% of such economic rights amount to EUR 20,000,000.
  - Second, the Claimant contends that during a meeting held on 22 September 2005 in Brazil, the Respondent admitted having signed a side letter with Olympique Lyonnais, but refused to disclose the contents of such letter.
9. During the proceedings, the Respondent confirmed that the transfer fee agreed between the Respondent and Olympique Lyonnais amounted to EUR 15,000,000. It explained that Fred was paid more than 15% of EUR 15,000,000 for his 15% share only because he asked for more and had a strong bargaining position.
10. The issue of the document that was allegedly referred to during the meeting on 22 September 2005 was not further addressed by the parties in the course of the proceedings.
11. Clause 1 of the OL Transfer Agreement, clearly states that the "*definitive transfer amount*" is EUR 15,000,000. In the Panel's opinion, the mere fact that Fred was paid an amount of EUR 3,000,000 for 15% of his economic rights is not sufficient evidence that the actual transfer fee was different than what expressly set out in the OL Transfer Agreement. This agreement and the Sale Agreement are two different contracts, between different parties, and it is plausible that the negotiations relating to these contracts were made on different terms.

12. The Claimant has produced no satisfactory evidence in support of its allegation that the actual transfer fee was EUR 20,000,000. Therefore, based on the clear evidence on record, the Panel determines that the amount of the transfer fee was EUR 15,000,000.

B. *Deductions*

13. The Claimant submits that it is entitled to receive 10% of the full transfer fee, i.e., EUR 1,500,000. The Respondent contends that a number of deductions must be made. The Panel will examine each purported deduction below.

14. However, the Panel shall first address the issue of the definition of the “*full transfer sum / contribution*” mentioned in Clause 5 of the Transfer Agreement and which is disputed by the parties.

15. Clause 5 of the Transfer Agreement states the following:

*“Feyenoord remains the owner of 10% of the economic rights of Fred. This means that in the event that the player Fred is transferred in the future from Cruzeiro to another professional football club Feyenoord shall remain entitled to a percentage of 10% of the full transfer sum / compensation due or in other words Feyenoord will be entitled to 10% of all revenue with respect to this transfer”.*

16. The parties disagree about the meaning of this contractual provision. The Claimant submits that the “*full transfer sum / compensation*” means the total amount of the transfer fee as provided in the OL Transfer Agreement, i.e., EUR 15,000,000. On the other hand, the Respondent contends that the “*full transfer sum / compensation*” means the amounts that the Respondent actually received from Olympique Lyonnais, i.e., EUR 15,000,000 less any amounts that the Respondent undertook to pay to third parties.

17. Under Swiss law, pursuant to Article 1 of the Swiss Code of Obligations (CO), a contract requires the mutual agreement of the parties. Such agreement may be either express or implied.

18. When the meaning of a contractual clause is disputed, the judge seeks to determine the actual common intentions of the parties, without regard to incorrect statements or expressions used by the parties, whether by mistake or in order to conceal the true nature of the contract (Article 18 para. 1 CO). When the actual common intentions of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to determine how a statement or an external manifestation by a party could have been reasonably understood by the other party, based on the particular circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

19. The requirements of good faith tend to give preference to an objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable person

- would have understood that party's statements (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).
20. Even though other elements may be taken into account, the starting point in interpreting a contractual clause is the wording of the clause itself.
  21. In the present case, there are no elements on record that establish that the parties had any particular and identified intentions that would differ from the wording of Clause 5 of the Transfer Agreement. Therefore, the Panel considers that this provision must be interpreted in accordance with the principles of good faith as summarized above.
  22. Clause 5 of the Transfer Agreement states that the fee to be paid to the Claimant is *"10% of the full transfer sum / compensation due or in other words Feyenoord will be entitled to 10% of all revenue with respect to this transfer"*. It is also apparent from this clause that the 10% to which the Claimant is entitled correspond to 10% of the economic rights of the player Fred.
  23. Therefore, in the Panel's view, and based on how a reasonable person would understand this provision, the 10% fee must be calculated on the full value that the Respondent and Olympique Lyonnais attributed to the player.
  24. According to Clause 1 of the OL Transfer Agreement, the *"Definitive transfer amount [“Montant de l'indemnité de mutation définitive” in the original French version] [is] fifteen million euros (15 000 000 euros)"*. The Panel shall now determine, for each deduction that the Respondent purports to make, whether such deduction is an indication that the "full value" of the player Fred was different than the amount set out in the OL Transfer Agreement.
- a) Solidarity Contribution
25. The Respondent explained during the proceedings that it agreed with Olympique Lyonnais to pay the 5% Solidarity Contribution that should normally have been borne by Olympique Lyonnais. The Respondent submits that this contribution, amounting to EUR 750,000 should be deducted from the transfer fee before calculating Feyenoord's 10% fee.
  26. Article 1 of Annex 5 to the FIFA Regulations for the Status and Transfer of Players provides as follows:  
*"If a Professional moves during the course of a contract, 5% of any compensation, with the exception of Training Compensation, paid to his Former Club shall be deducted from the total amount of this compensation and distributed by the New Club as a solidarity contribution to the club(s) involved in his training and education over the years. [...]"*
  27. In the present case, the Respondent and Olympique Lyonnais agreed that the Solidarity Compensation would be paid by the Respondent instead of Olympique Lyonnais. According to the Respondent's own statements, the amount of this contribution was EUR 750,000, i.e.

5% of EUR 15,000,000, this latter amount being thus the “*total amount of this compensation*” under the meaning of Article 1 of Annex 5 cited above.

28. Therefore, the Panel considers that the amount of the Solidarity Contribution does not modify the total economic value of the player Fred, as agreed between the Respondent and Olympique Lyonnais. On the contrary, it confirms that such value is EUR 15,000,000, since this is the amount on which it was calculated.
  29. The fact that, in the negotiations between the Respondent and Olympique Lyonnais – to which the Claimant was not a party – the former agreed to make the payment instead of the French club should not impact the Claimant’s entitlement to 10% of the “*full transfer sum*”, i.e., 10% of the player’s economic rights.
  30. Hence, the Panel rules that the amount of EUR 750,000 should not be deducted from the transfer sum of EUR 15,000,000 for purposes of calculating the Claimant’s fee.
- b) Fred’s economic rights
31. The Respondent explained during the proceedings that, in order to complete the transaction with Olympique Lyonnais, it was required to buy from Fred a share of 15% of Fred’s economic rights, which was owned by the player himself. This 15%-share was purchased for a price of EUR 3,000,000, which the Respondent claims should be deducted from the EUR 15,000,000 transfer fee before calculation of the Claimant’s fee.
  32. According to the Respondent’s statements on record, and in accordance with the clear wording of the Sale Agreement, the situation concerning Fred’s economic rights before the transaction with Olympique Lyonnais was as follows: the Respondent held 75% of the rights, Fred himself held 15%, and the Claimant held 10%.
  33. After purchase of Fred’s 15% share by the Respondent, the Respondent held 90% of the player’s economic rights, and the Claimant still held 10%.
  34. It is evident from these calculations, presented by the Respondent in the course of the proceedings, that the amount that was paid to Fred to purchase his 15% share did not diminish the full economic value of the player. In particular, it did not impact the Claimant’s 10% share. The fact that the Respondent had to pay a certain amount of money to purchase Fred’s remaining rights, in order to be able to transfer the full rights to Olympique Lyonnais has no impact on the total value of the player, which was set by the parties to the OL Transfer Agreement at EUR 15,000,000.
  35. Therefore, the Panel rules that the amount of EUR 3,000,000 should not be deducted from the transfer sum of EUR 15,000,000 for purposes of calculating the Claimant’s fee.



36. In addition, the Respondent explained that, in furtherance of an agreement it had with Fred, it paid an amount of EUR 510,913 as income taxes, which should normally have been borne by the player. This agreement to take financial responsibility for these taxes has no impact on the value of Fred's economic rights. It is a separate understanding, to which the Claimant is not a party and which cannot be relied upon against it. As a consequence, there is no reason to deduct this amount from the "full transfer sum" before calculating the Claimant's 10% fee.

c) Olympique Lyonnais' agent

37. The Respondent explained in the course of the proceedings that it agreed with Olympique Lyonnais to pay an amount of EUR 1,400,000 to Olympique Lyonnais' agent. It submits that this amount should be deducted from the total economic value of the player when determining the Claimant's fee.

38. There are no elements on record evidencing the legal or contractual obligation of the Respondent to make this payment. In addition, there are no elements on record that indicate that this payment obligation had any relationship with the amount of the transfer fee of EUR 15,000,000 set out in the OL Transfer Agreement.

39. On the contrary, the OL Transfer Agreement makes no reference to any obligation imposed on the Respondent to pay any amount to Olympique Lyonnais' agent.

40. The Panel is satisfied with the Respondent contention, which is not disputed by the Claimant and is supported by evidence, that it did indeed pay a sum of EUR 1,400,000 to this agent. However, there is no indication that this payment had any impact on the total economic value of the player Fred and on the total transfer fee agreed upon by the Respondent and Olympique Lyonnais.

41. As set out above, the Panel considers that the Respondent's undertaking, negotiated with Olympique Lyonnais separately from the OL Transfer Agreement itself, negotiations to which the Claimant was not a party, has no impact on the transfer sum and cannot be relied upon against the Claimant.

42. The Panel therefore rules that the amount of EUR 1,400,000 paid by the Respondent to Olympique Lyonnais' agent should not be deducted from the EUR 15,000,00 full transfer fee set out in Clause 1 of the OL Transfer Agreement.

C. *Interests for late payment*

43. In its written submissions, the Claimant claimed interest for late payment at the rate of 7% per year from the due date until the date of receipt by the Claimant of the amount due as determined by CAS. During the hearing, the Claimant specified that interest should run as from the date of its invoice, i.e., 10 October 2005. This claim is disputed by the Respondent.

44. The Transfer Agreement does not contain any clause providing for the payment of interest in case of late payment. However, under Swiss law, a debtor in default of paying amounts due under a contract must pay interest in arrears at the rate of 5% per year, unless the contract provides for a higher rate, in which case the latter applies (Article 104 CO). According to Article 102 CO, a debtor is in default upon receipt of a notice by a creditor demanding performance. However, if the parties have agreed on a specific date or event for performance of a contractual obligation, the debtor of such obligation will be in default upon the occurrence of such date or event.
45. In the present case, Clause 6 of the Transfer Agreement notably provides that the amounts due by the Respondent to the Claimant shall be paid *“within 30 days after the transferring party has received the first or only instalment of the transfer sum / compensation or revenue from the other professional club”*. The first of the two instalments due by Olympique Lyonnais to the Respondent was paid by bank transfer upon signing of the OL Transfer Agreement, on 29 August 2005. Therefore, in accordance with the terms of the Transfer Agreement, the Respondent’s obligation to pay the amounts due to the Claimant accrued on 28 September 2005.
46. It is not disputed that the Claimant did not make any payment on, or even after, 28 September 2005. It was thus in default as from that date. However, the Claimant claims for interest which should account only from the date of its invoice, i.e., 10 October 2005. The Panel may not rule *ultra petita* and will therefore grant interest on the amounts due, at the statutory rate of 5% per year, as from 10 October 2005, as requested by the Claimant.

D. *Extra-judicial costs*

47. In its prayers for relief, the Claimant requested the Panel to decide that the Respondent shall pay *“an amount of EUR 20,000 for extra-judicial costs or any amount of extra-judicial costs to be determined in good justice by the CAS”*.
48. Under Swiss law, a party that suffered damages as a result of a breach of contract by another party may claim monetary compensation corresponding to the damages suffered, provided certain conditions are met. In particular, the Claimant must prove the existence and amount of damages (see Article 97 CO).
49. In the present case, the Claimant did not substantiate its request. It did not state how the EUR 20,000 figure was calculated, nor to what it corresponds. Moreover, it did not produce any evidence relating to this claim.
50. The Panel, therefore, dismisses this prayer for relief.

### **Confidentiality**

51. According to Article R43 of the Code, proceedings are confidential and the parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings. Awards shall not be made public unless the award itself so provides or all parties agree.
52. At the hearing, both parties declared that they agreed to the publication of the award.

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

1. Cruzeiro Esporte Club shall pay to Feyenoord Rotterdam an amount of EUR 1,500,000 (one million five hundred thousand Euro), plus interest at the rate of 5% (five percent) per year as from 10 October 2005.
- (...)
5. All other prayers for relief are dismissed.
6. This award will be made public.