Arbitration CAS 2022/A/8835 Club Olimpia v. Emmanuel Adebayor, award of 28 March 2023

Panel: Prof. Luigi Fumagalli (Italy), Sole Arbitrator

Football
Contractual dispute for failing to comply with the terms of a termination agreement
Discretion of a CAS panel to exclude evidence
Interest rate

1. **Article R57.3 of the CAS Code gives a CAS panel discretion, and not the obligation, to exclude evidence, if the conditions therein mentioned are met. Such discretion is to be used with restraint, in order to preserve the *de novo* power of review of the dispute, which is a fundamental feature of CAS adjudication in the appeals proceedings, pursuant to Article R57, first paragraph of the CAS Code, and means that the CAS panel is not limited to considerations of the evidence that was adduced before the instance below and can consider all new evidence produced before it. As a result, such discretion to exclude evidence should be exercised only if there is a clear showing of bad faith, because the party deliberately retained evidence, available to it, in order to bring it for the first time to CAS.**

2. **In general terms, a 12% annual interest rate is not contrary to Swiss law or to Swiss public policy. In fact, Swiss law admits an even higher amount. In addition, CAS precedents found that a (higher) annual default interest rate of 15% could not be considered excessive, and held as invalid only much larger measures. In a specific case, the assessment of the measure of the interest rate will also take into account reasons such as whether the party now challenging it was the one who proposed it, whether the interest rate was agreed in a context of mutual compromise, with waivers and concessions given by both parties, or whether the agreement appears to be affected by any imbalance.**

I. PARTIES

1. Club Olimpia ("Olimpia Asunción", the "Club" or the "Appellant") is a football club with registered office in Asunción, Paraguay. Olimpia Asunción is a member of the Paraguayan Football Association (Asociación Paraguaya de Futbol: the "APF"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA"), the world governing body of football, headquartered in Zurich, Switzerland.

2. Emmanuel Adebayor (the "Player" or the "Respondent") is a professional football player of Togolese nationality born on 26 February 1984.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions as lodged with the Court of Arbitration for Sport (the "CAS"). Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 6 February 2020, the Player and the Club concluded a *"Sport Work Contract"* (the "Employment Contract") valid from 6 February 2020 until 31 December 2020 (Article 2). The Employment Contract provided *inter alia* for the following payments due by the Club to the Player:

   i. a total annual salary of USD 2,000,000 net (Article 2.I.II), payable as follows:

      - USD 200,000 net in February 2020;
      - USD 180,000 net per month from March to December 2020;

   ii. a signing fee, defined as a *"premium"*, of USD 375,000 net (Article 2.I.I) payable in two instalments, with the first of USD 200,000 net falling due on 14 February 2020 and the second instalment of USD 175,000 net falling due on 15 June 2020.

5. On 14 February 2020, the Club paid the Player the first instalment of USD 200,000 of the *"premium"*.

6. On 13 March 2020, due to the Covid-19 pandemic, the organized football in Paraguay was suspended.

7. Around the end of March 2020, the Player travelled to Togo to be with his family. In a letter of 20 March 2020, however, the Club, while recognizing the Player's *"liberty of travel"*, expressed his disagreement with the intention the Player had expressed to return to Togo.

8. On 30 June 2020, the Player and the Club concluded a termination agreement (the "Termination Agreement") putting an end to the Employment Contract *"on an amicable basis, considering the excellent relationship between them"*. The Termination Agreement contained the following provisions:

   "Whereas: as of the date of this Termination Agreement, the CLUB only paid ADEBAYOR the PREMIUM of … 200,000.- USD … on February 14, 2020 agreed under the Employment Contract. However, the Monthly Permanent Remuneration of ADEBAYOR from the CLUB for the months of February, March, April, May and June 2020 remain unpaid. …

   1. Purpose

   1.1 Subject to the fulfilment of the condition under clause 1.5, the Parties hereby agree to terminate their relationship in relation to the Employment Contract granting to each other a full, general and irrevocable

release of any and all obligations arising under the herefrom referenced and terminated contracts, except that ones are recognized in preceding clauses.

1.2 For the termination of the Employment Contract, the Parties agrees that the CLUB will pay to ADEBAYOR the total amount of net six hundred fifty thousand American dollars (USD 650.000) without any deduction of taxes (which will be paid by the CLUB in addition), charges, fees, etc. The payment will be in four installments as follows:

1. First installment: of net fifty thousand American dollars (USD 50.000), no later than three days after the signature of this agreement.

2. Second instalment: of net two hundred thousand American dollars (USD 200.000), on August 30th 2020.

3. Third instalment: of net two hundred thousand American dollars (USD 200.000), on October 30th 2020.

4. Fourth instalment: of net two hundred thousand American dollars (USD 200.000), on December 30th 2020.

The payment will be made via bank transfer to the account that ADEBAYOR notify to the CLUB. The CLUB shall provide ADEBAYOR tax certificates for the above mentioned amounts, showing the total tax paid by the CLUB to the Paraguay Tax Authorities, in addition to the above net payments.

1.3. Subject to timely payment of the First instalment in clause 1.2 and fulfilment of the condition in clause 1.5 below, the Parties hereby irrevocably waive and renounce any rights, and/or claims they may have against each other to pursue any legal action and/or initiate any Judicial or extrajudicial proceeding against each other, whether concerning fees, salaries, wages, bonus, etc., based the Employment Contract.

1.4. Subject to timely payment of the First instalment in clause 1.2 and fulfilment of the condition in clause 1.5 below, the parties will not institute, bring or commence any action at law in any court before the arbitration mechanisms of FIFA and/or the Court of Arbitration for Sport, based upon the Employment Contract.

1.5. The parties agree that the validity of this agreement is subject to the effective and timely payment of the first instalment in clause 1.2 by the CLUB to ADEBAYOR. In case that CLUB fails to pay the First Instalment stipulated in clause 1.2 on or before its due date, this agreement will be automatically considered as null and void, and the Employment Contract will continue to be effective and binding between the Parties, entitling ADEBAYOR to all his overdue and future remuneration. In such case, the CLUB agrees to immediately pay ADEBAYOR his total overdue remuneration from the CLUB as of the date of this Termination Agreement arising from the Employment Contract along with the accrued interest starting from the respective due date of each overdue payment. Furthermore, the CLUB also agrees to complete the necessary arrangements for ADEBAYOR to travel to Paraguay and provide his services under the Employment Contract.

1.6. In case the CLUB fails to pay the subsequent instalments in clause 1.2 on their respective due dates, the remaining instalments will immediately become due and payable by the CLUB to ADEBAYOR

without the need of a notice or warning. In addition, the CLUB will pay to ADEBAYOR a <u>*monthly interest*</u> *of one percent (1%) of the overdue amount until the date of effective payment.* [underscore in the original] …

4. Governing Law and Jurisdiction

The parties agree to submit any dispute arising out of the performance or interpretation of this agreement, to the jurisdiction of the Dispute Resolution Chamber or to the FIFA Players' Status Committee, as applicable, to resolve at first instance and the Court of Arbitration for Sport (TAS-CAS) of Lausanne (Switzerland) to rule on appeal, using as a priority applicable law any other right, as provided in the FIFA Regulations Player, as well as in the resolutions and rules that develop it, and, alternatively, Paraguayan national legislation.

The arbitral panel of TAS-CAS shall consist of three arbitrators appointed from the list of the Arbitrators, which shall decide in accordance with law, being the final and binding arbitration award for the parties. The Code of Arbitration in sports matters and other provisions governing such proceedings at the time of request shall apply, declaring the parties to know and accept the ones in force, including in order to their expense and expense regime, deeming them part of this contract. The language of the procedure will be Spanish".

9. On 2 September 2021, the Player's counsel sent a letter (the "Default Notice") to the Club noting that the second instalment of USD 200,000 net due on 30 August 2020 under the Termination Agreement had not been paid, and therefore that also the third and fourth instalment of USD 200,000 net each had become due and payable by the Club on 31 August 2020 in accordance with Article 1.6 of the Termination Agreement. As a result, the Club was requested to pay the Player the total net amount of USD 600,000 within 10 days, including the total accrued interest of 1% per month starting from 31 August 2020 until the date of effective payment. The Club was also informed that the Player would initiate legal action in case of the Club's failure to pay the due amount.

10. The Club did not reply to the Default Notice.

11. On 17 September 2021, the Player filed a claim before the FIFA Dispute Resolution Chamber (the "DRC"), with respect to the Club's failure to comply with the financial obligations arising out of the Termination Agreement, requesting payments with interest of 1% per month as accrued from the due date until the date of effective payment. At the same time, the Player requested the imposition of sporting sanctions on the Club, pursuant to Article 12*bis* of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"). In the course of the proceedings, then, the Player, who had originally requested the payment of USD 600,000, acknowledged receipt of USD 40,000 paid by the Club on 22 September 2020 and of USD 50,000 paid on 8 February 2021.

12. On 27 January 2022, the DRC issued a decision on the Player's claim (the "Appealed Decision"), finding as follows:

"1. The claim of the Claimant, Emmanuel Adebayor, is accepted.

2. *The Respondent, Club Olimpia, has to pay to the Claimant, the amount of USD 510,000 plus 12 % interest p.a. as follows:*

   - *on the amount of USD 40,000 from 31 August 2020 until 22 September 2020;*
   - *on the amount of USD 50,000 from 31 August 2020 until 8 February 2021;*
   - *on the amount of USD 110,000 from 31 August 2020 until the date of effective payment;*
   - *on the amount of USD 200,000 from 31 October 2020 until the date of effective payment;*
   - *on the amount of USD 200,000 from 31 December 2020 until the date of effective payment.*

3. *A warning is imposed on the Respondent.*

4. *Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.*

5. *Pursuant to art. 24 of the Regulations on the Status and Transfer of Players if full payment (including all applicable interest) is not made within 45 days of notification of this decision, the following consequences shall apply:*

   1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration the ban shall be of three entire and consecutive registration periods.*

   2. *The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.*

6. *The consequences shall only be enforced at the request of the Claimant in accordance with article 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*

7. *This decision is rendered without costs".*

13. On 6 April 2022, the Appealed Decision was notified to the Parties.

14. In the Appealed Decision, the DRC, considered the merits of the dispute as follows:

    i. as to the *"main legal discussion and considerations"*:

    "32. The … Chamber … took note of the fact that the parties strongly dispute the payment of certain financial obligations by the Respondent as per the agreement, namely:

    - *the interest of 1% per month starting from 31 August 2020 until 22 September 2020 for the amount of USD 40.000.*
    - *the interest of 1% per month starting from 31 August 2020 until 8 February 2021 for*

the amount of USD 50.000.

- *USD 510,000 net as the remaining amount owed by the club related to the second, third and fourth instalment of the agreement with its accrued interest of 1% per month starting from 1 September 2020 until the date of effective payment.*

33. *In this context, the Chamber acknowledged that its task was to determine, based on the evidence presented by the parties, whether the claimed amounts had in fact remained unpaid by the Respondent and, if so, whether the latter had a valid justification for not having complied with its financial obligations.*

34. *The Chamber took particular note of the fact that, on 2 September 2021, the Claimant put the Respondent in default of payment of USD 600,000, setting a time limit of 10 days in order to remedy the default.*

35. *Consequently, the DRC concluded that the Claimant had duly proceeded in accordance with art. 12bis par. 3 of the Regulations, which stipulates that 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).*

36. *Subsequently, the Chamber acknowledged that the Respondent submitted evidence of having allegedly paid to the player a total amount of USD 105,000, i.e.*

- *USD 48,500 on 03 July 2020*
- *USD 1,500 with the instruction to be paid to a third person on 10 June 2020*
- *USD 40,000 on 22 September 2020*
- *USD 15,000 on 06 November 2020*
- *USD 50,000 on 08 February 2021*

37. *In this respect, the Chamber noted that the Claimant confirmed having received the payments made by the club on 10 June 2020 (USD 1,500) and 3 July 2020 (USD 48,500) which were related to the first instalment (USD 50,000).*

38. *The Chamber recalled that the Claimant lodged the present claim requesting the payment of the second, third and fourth instalments established in the agreement.*

39. *Therefore, the DRC concluded that the payments made by the Respondent on 10 June 2020 and 3 July 2020 related to the first instalment are irrelevant for the matter at stake.*

40. *In continuation, the Chamber focused its attention to the payment of USD 15,000 allegedly paid by the Respondent to the Claimant on 6 November 2020.*

41. *The Chamber acknowledged that the Claimant contested said payment since the amount of USD*

15,000 was transferred to a bank account of a third person.

42. In this regard, the DRC pointed out that the Respondent failed to present evidence of being authorized by the Claimant to transfer the relevant payment to a different bank account.

43. As a result, the Chamber concluded that the payment of USD 15,000 performed by the Respondent on 6 November 2020 should be disregarded.

44. Finally, the Chamber focused its attention to the payments made by the Respondent on 22 September 2020 and 8 February 2021 for USD 40,000 and USD 50,000 respectively.

45. In this respect, the Chamber took note that the Claimant confirmed having received said payments.

46. The Chamber underlined that the evidence provided by the Respondent does not prove the payment of the total amount claimed as outstanding by the Claimant. Furthermore, the DRC held that no reasonable justification was presented by the Respondent for not having fully complied with the terms of the agreement";

ii. as to the *"consequences"* of such finding:

"47. At this stage, the Chamber established that the Respondent had delayed a due payment for more than 30 days without a prima facie contractual basis.

48. As a consequence, and in accordance with the general legal principle of pacta sunt servanda, the Chamber decided that the Respondent is liable to pay to the Claimant the outstanding amount deriving from the agreement concluded between the parties, i.e. USD 510,000.

49. In continuation, the Chamber focussed his attention to the Claimant's request for an interest at a rate of 1% monthly on the outstanding amounts based on article 1.6 of the agreement.

50. The Chamber pointed out that article 1.6 of the agreement clearly established a default monthly interest of 1% in case of late payment of the instalments by the Respondent.

51. At this stage, the Chamber took note of the Respondent's argument that the special interest should not apply since the player allegedly did not wait 30 days as established in article 12bis of the Regulations.

52. In this regard, the Chamber pointed out that the outstanding instalments established in the agreement were due on 30 August 2020; 30 October 2020 and 30 December 2020 and that the Claimant sent the default notice to the Respondent on 2 September 2021, i.e. after than 30 days of delay.

53. As a result, the Chamber pointed out that the cited Respondent's argument should be rejected.

54. Furthermore, the Chamber held that based on its standard practice, a default interest of 12% p.a. is considered reasonable.

55. Therefore, the Chamber decided to award an annual interest of 12% on the late partial payments made by the Respondent (i.e. USD 40,000 and USD 50,000) and on the outstanding amount of USD 510,000 as from the respective due dates until the date of effective payment.

56. In this respect, the DRC recalled that the Respondent made two partial payments, i.e. USD 40,000 on 22 September 2020 and USD 50,000 on 8 February 2021. Consequently, the Chamber decided to apply an annual interest of 12% from the due date of the second instalment (cf. articles 1.2 and 1.6 of the agreement) until the date of the each of the partial payments.

57. With regard to the outstanding amount of USD 510,000, the Chamber pointed out that the annual interest of 12% should apply as follows:

- *on USD 110,000 as balance of the second instalment, from 31 August 2020 until the date of effective payment;*
- *on USD 200,000 as outstanding third instalment, from 31 October 2020 until the date of effective payment and*
- *on USD 200,000 as outstanding fourth instalment, from 31 December 2020 until the date of effective payment"*;

iii. as to the *"compliance with monetary decisions"*:

"58. In continuation, … the Chamber referred to art.12bis par. 2 of the Regulations, which stipulates that 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 art. 12bis par. 4 of the Regulations.

59. The DRC established that in virtue of art. 12bis par. 4 of the Regulations it has competence to impose sanctions on the Respondent. Therefore, and in the absence of the circumstance of repeated offence, the DRC judge decided to impose a warning on the Respondent in accordance with art. 12bis par. 4 lit. a) of the Regulations.

60. In this respect, the DRC wished to highlight that a repeated offence will be considered as an aggravating circumstance and lead to more severe penalty in accordance with art. 12bis par. 6 of the Regulations.

61. Finally, taking into account the applicable Regulations, the Chamber referred to art. 24 par. 1 and 2 of the Regulations, which stipulate that, with its decision, the pertinent FIFA deciding body shall also rule on the consequences deriving from the failure of the concerned party to pay the relevant amounts of outstanding remuneration and/or compensation in due time.

62. In this regard, the DRC highlighted that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of 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 shall be of up to three entire and consecutive registration periods.

63. Therefore, bearing in mind the above, the DRC decided that the Respondent must pay the full

amount due (including all applicable interest) to the Claimant within 45 days of notification of the decision, failing which, at the request of the Claimant, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become immediately effective on the Respondent in accordance with art. 24 par. 2, 4, and 7 of the Regulations.

64. …

65. The DRC recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24 par. 8 of the Regulations".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 27 April 2022, Olimpia Asunción filed a Statement of Appeal with the CAS Court Office in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code") against the Respondent, to challenge the Appealed Decision. In its Statement of Appeal, the Appellant requested that the matter be submitted to a Sole Arbitrator.

16. On 5 May 2021, the CAS Court Office forwarded the Statement of Appeal to the Respondent and informed FIFA that an appeal had been lodged against the Appealed Decision, but that the appeal was not directed against FIFA. As a result, the CAS Court Office advised FIFA that, in the event it intended to participate in the proceedings, it had to file an application to that effect. Thereafter, FIFA informed the CAS that it renounced its right to request its intervention in this arbitration.

17. On 10 May 2022, the Respondent informed the CAS Court Office that he agreed that the matter be submitted to a Sole Arbitrator.

18. On 16 May 2022, the Appellant filed its Appeal Brief with the CAS Court Office, in accordance with Article R51 of the CAS Code.

19. On 14 June 2022, the Player filed his Answer with the CAS Court Office, in accordance with Article R55 of the CAS Code.

20. In a letter dated 14 June 2022, the CAS Court Office requested the Parties to indicate their preference as to whether a hearing ought to be conducted in this arbitration. Both Parties informed the CAS that they preferred an award be issued on the basis solely of the Parties' written submissions.

21. On 6 July 2022, the CAS Court Office informed the Parties that Prof. Luigi Fumagalli, Milan, Italy, had been appointed as the Sole Arbitrator by the President of the CAS Appeals Division, pursuant to Article R54 of the CAS Code.

22. On 3 August 2022, the CAS Court Office informed the Parties that the Sole Arbitrator considered himself sufficiently informed to decide the matter without the need to hold a hearing and that he would render an arbitral award on the basis of the Parties' written submissions.

23. On 4 August 2022, the CAS Court Office communicated to the Parties the Order of Procedure issued on behalf of the Sole Arbitrator.

24. On 8 August 2021 and 4 August 2021, the Appellant and the Respondent respectively submitted to the CAS Court Office a signed copy of the Order of Procedure. By signing the Order of Procedure, the Parties confirmed (i) the jurisdiction of CAS, (ii) their agreement that the Sole Arbitrator issues the award on the basis solely of the Parties' written submissions and that their right to be heard had been fully respected by the Sole Arbitrator.

IV. THE PARTIES' SUBMISSIONS

25. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Appellant

26. In its Statement of Appeal, the Appellant requested the CAS:

"a) To accept the present appeal

b) To appoint a sole arbitrator.

c) As to the substance, to revoke FIFA's decision.

d) To allocate the costs of this procedure to the respondent.

e) To impose the respondent a contribution towards the appellant's costs in the amount of CHF 5.000".

27. In its Appeal Brief, the Appellant requested the CAS:

"to render an award:

1.- Amending the FIFA DRC's decision under appeal in the terms above exposed, hence, reducing the applicable interest rate to a 5% annual rate.

2.- Allocating all legal costs of the present proceedings to the respondent".

28. In support of its requests, the Appellant first describes the *"relevant facts"*, then deals with the *"legal merits"* of his appeal.

29. As to the *"facts"*, the Appellant underlines the following:

- in light of the financial terms set out in the Employment Contract, the Player was by far the best paid footballer in Paraguay at the time;

- after the signature of the Employment Contract, the Player played for Olimpia Asunción in four games, two of the Paraguayan championship and two of the Copa Libertadores, for a total of 214 minutes. In his second Copa Libertadores match, however, he received a red card for a "karate kick";

- almost immediately after the beginning of the employment relationship, the world was hit by the Covid-19 pandemic, which caused (i) the suspension of Paraguayan football for more than three months, and Copa Libertadores for nearly six months, and thereafter (ii) the playing of matches behind closed doors. The effects of these circumstances on Olimpia Asunción's finances were devastating, as its income was reduced by 60% for nearly two years, in total disbalance with the Player's salary;

- due to the pandemic, the Player decided to return to Togo. On 20 March 2020, Olimpia Asunción sent a letter to the Player informing him that the Club did not agree with such travel, even though no restriction applied under the Employment Contract. The fears then expressed by Olimpia Asunción became later a reality: it became impossible for the Player to return to Paraguay due to the many restrictions imposed on international travel at that time;

- despite this reality, the Player did not agree to a renegotiation of his Employment Contract, and only accepted to sign the Termination Agreement;

- at that time, the Player was legally entitled to two months of salary (February and March 2020), equal to USD 360,000, and to a part of the signing on fee (2/11th of USD 375,000), equal to USD 68,181. Even though he had already received a payment of USD 200,000, as *"premium"* due on 14 February 2020, he agreed on a termination sum of USD 650,000, for a total of USD 850,000, double the amount he was legally entitled to receive;

- Olimpia Asunción paid the first instalment and half of the second one, but failed to pay the remaining amounts.

30. As to the *"legal merits"* of the case, the Appellant submits that it does not challenge the settlement amount specified in the Termination Agreement, but only the improper interest rate applied by the DRC.

31. In fact, even though the commitment to pay the amount indicated in the Termination Agreement was excessive, Olimpia Asunción accepted the Player's claim for reasons related to public relations and image, and due to the fact that the Player is an international football star with a global reach. In any case, the Appellant notes that, even though a termination agreement must contain reciprocal, balanced and proportional concessions and commitments by both Parties, Olimpia Asunción got nothing from it. The amounts paid were equal to the amounts the Player was entitled to receive had he stayed at the Club for the period July to December 2020. The mere "release" constitutes no proportional "concession" compared to the amounts accepted as termination sum.

32. On the other hand, however, the interest rate admitted by the DRC is improper and

unreasonable in the circumstances of the present case and in light of the context in which the Termination Agreement was signed. Indeed, while is true that Swiss law and CAS jurisprudence admit in general an interest rate up to 17% and considers as usury any amount beyond that percentage, a decision about the proper interest rate must be made on a case by case basis. In the present case, in consideration of all its particular aspects, a 12% annual rate is excessive for the following reasons:

- the Player was not performing its duties due to (at least in part) his own fault for leaving Paraguay to Togo in the mid of the Covid-19 pandemic and without the Club's consent;
- the Player only played four matches for Olimpia Asunción, receiving USD 200,000 as advance payment;
- the Termination Agreement provided for a settlement amount equal to the double the Player was entitled to;
- all this in the context of the Covid-19 pandemic that severely impacted Olimpia Asunción's finances (like most of the club's worldwide);
- a 12% annual rate is close to the 15% maximum rate for consumers and the 17% for usury. Moreover, the disproportion between the Parties' commitments clearly exceeds 25%;
- the applied rate has a punitive nature.

33. With all this in mind, the applicable interest rate should be reduced to 5% as provided for in the Swiss Code of Obligations (the "CO").

B. The Respondent

34. In his Answer, the Respondent requested the CAS:

"1. To reject the claims of the Appellant and confirm the FIFA decision dated 27 January 2022,

2. To condemn the Appellant to the payment of CHF 10.000 in the favour of the Respondent of the legal expenses incurred;

3. To establish that the costs of the present arbitration procedure shall be borne by the Appellant".

35. In support of his request, the Respondent submits the following:

i. during the FIFA proceedings the Appellant did not raise any argument regarding (i) the absence in the Termination Agreement of reciprocal commitments for the Parties and/or (ii) the financial conditions of the Appellant due to the Covid-19 pandemic, and (iii) the fact that, because of such special circumstances, the interest rate stipulated in the Termination Agreement must be considered excessive. Instead, in the FIFA proceedings the Appellant argued that the interest rate had to be fixed at 5% p.a. only because of other

reasons, related to the sending of the Respondent's default notice. The newly presented arguments and evidence should not be taken into consideration by the Panel, pursuant to Article 57(3) of the CAS Code, as they could have been presented before the DRC;

ii. the Termination Agreement was proposed and prepared by the Appellant. Even though the facts leading to its signature are irrelevant in the present appeal, since the Appellant is accepting the validity of the Termination Agreement, the false arguments raised by the Appellant need to be clarified:

- the number of matches played by the Respondent before the Covid-19 pandemic or the red card he received are not relevant in this dispute;

- the Respondent had the right to travel to his home country to be his family, when football activities were suspended due to the pandemic. This fact was also accepted by the Appellant in its letter of 20 March 2020. Even though the Appellant argues that it could have terminated the Employment Agreement without any financial consequences for the Club, this argument is irrelevant, since the Parties freely entered into a Termination Agreement;

- the Appellant did not try to renegotiate the Employment Contract's financial terms, but wanted to mutually terminate the Employment Contract. This request was shared by the Appellant with the Respondent and his agent and it was accepted;

- the Appellant has not presented any evidence of the alleged *"stubbornness"* of the Respondent to renegotiate the Employment Contract or his alleged "force" over the Appellant to enter into a Termination Agreement. On the contrary, it was the Appellant who prepared the Termination Agreement on its letterhead and sent it to the Respondent. The conditions of the Termination Agreement were negotiated and agreed by the Parties. During these negotiations, the Appellant did not submit that it was being forced by the Respondent to enter into the mutual termination or that the interest rate was excessive. Again, on the contrary, the Appellant clearly acknowledged the interest rate stipulated in the Termination Agreement in an e-mail of June 2020 sent by its representative, transmitting *"the fourth version of the contract"* and stating that *"the only change is the percentage of monthly interest, that must be one percent. … so if you agree, please obtain the signature of the player"*. In other words, the conditions of the Termination Agreement were proposed by the Appellant and accepted by the Respondent;

iv. the Termination Agreement contains reciprocal commitments. By entering into the Termination Agreement, the Respondent not only waived his future salaries after 30 June 2020 (until the end of December 2020), but also a large part of his overdue and unpaid remuneration in the amount of USD 445,000, which made the total waived amount to correspond to USD 1,525,000. In other words, the Appellant was no longer required to pay the Respondent his guaranteed remuneration equal to USD 1,525,000 and even his conditional "variable" remuneration which could have been due and payable had the Employment Contract remained effective. Consequently, it is clear that the Termination

Agreement contained reciprocal commitments and was even to the advantage of the Appellant;

v. the Termination Agreement was signed on 30 June 2020, more than 3 months after the outbreak of the Covid-19 pandemic. At that moment, the Appellant was well aware of its financial conditions and still proposed to pay the Respondent the amount stipulated in the Termination Agreement and the interest rate in case of failure to timely pay the instalments. Therefore, the pandemic and its alleged financial effects on the Appellant cannot be considered as a special circumstance for the interest rate set in the Termination Agreement to be considered excessive;

vi. on the date of signing the Termination Agreement, the Respondent was entitled to his salaries up to and including June 2020, as indicated in its text;

vii. the interest rate is not excessive and should be considered reasonable. The Parties' conditions before and after the signing of the Termination Agreement do not justify the reduction to 5% p.a. of the applicable interest rate, because:

- the Termination Agreement was proposed and prepared by the Appellant;
- the Appellant willingly and freely accepted the conditions of the mutual termination and in particular the interest rate applicable in case of late payment;
- the interest rate was even underlined in the Termination Agreement (Article 1.6);
- the Appellant admitted that the Respondent's fixed remuneration for February, March, April, May and June 2020 was due and unpaid as of the date of the Termination Agreement. This amount was equal to USD 1,095,000, but the Respondent accepted to settle for USD 650,000, therefore waiving his entitlement to the overdue amount of USD 445,000;
- this interest rate is within the applicable limits established in Swiss law and CAS jurisprudence. The Appellant, in fact, acknowledges that Swiss law and CAS precedents admit in general an interest rate up to 17% p.a.;
- this interest rate was included in the agreement to make sure that the Respondent would receive his payments on time.

V. JURISDICTION OF THE CAS

36. Article R47 of the CAS Code provides as follows:

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

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

37. Pursuant to Article 56(1) of the FIFA Statutes (2021 Edition, in force as of 21 May 2021, when the Appealed Decision was issued and the Appeal was filed with CAS), FIFA recognises the jurisdiction of the CAS to *"resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents".*

38. Further pursuant to Article 57(2) of the FIFA Statutes, *"recourse may only be made to CAS after all other internal channels have been exhausted".* The Appealed Decision was issued by the FIFA DRC, and it is not disputed that all internal channels within FIFA have been exhausted.

39. CAS jurisdiction is not disputed by the Parties. It follows that the CAS has jurisdiction to hear the Appeal filed by the Club.

VI. ADMISSIBILITY

40. The admissibility of the Appeal is not challenged. The Statement of Appeal also complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

41. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

42. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

"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. Pursuant to Article 56(2) of the FIFA Statutes:

"[t]he provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and additionally, Swiss law".

44. The Termination Agreement (Article 4, first paragraph) provided, in the event of dispute arising out of its performance or interpretation, for the *"priority"* application of the FIFA regulations, and *"alternatively, Paraguayan national legislation".*

45. The Sole Arbitrator notes, however, that in the course of the present arbitration he was not directed to the application of any provision of Paraguayan law. On the contrary, the Parties referred to Swiss law and CAS precedents applying Swiss law. As a result, the Sole Arbitrator, based on the Parties' submissions in this arbitration, finds that the various regulations of FIFA,

and chiefly the RSTP, are primarily applicable. Swiss law applies subsidiarily, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS OF THE APPEAL

46. The object of the present arbitration is the Appealed Decision, which (i) found that the Appellant was responsible for breach of the Termination Agreement, (ii) ordered the Appellant to pay to the Respondent (a) the amount due under it, plus interest from the due date until the final payment, as well as (b) interest on some amounts already paid, to be calculated from the dates on which they were due and the date on which they were paid, and (iii) imposed sanctions on the Appellant.

47. However, the Appellant does not challenge before CAS the Appealed Decision where it found that the Player was entitled to payments under the Termination Agreement and ordered the Appellant to comply with its obligations. In the same way, the portion of the Appealed Decision whereby sanctions were imposed on the Appellant is not disputed.

48. The only point disputed in these proceedings, in fact, concerns the interest that the Appellant was ordered to pay on the amounts overdue to the Player. And also in this respect, the challenge concerns only the rate (1% per month) of such interest, applied by the DRC on the basis of the Termination Agreement, and not other aspects, such as, for instance, the dates relevant to its calculation.

49. In other words, before this Sole Arbitrator there is only one narrow question to be determined: is 1% per month, as set by the Termination Agreement, a valid interest rate in the circumstances of the case? The Appellant submits it is not, and advances a number of reasons in support of its contention that such rate be replaced by the default measure of 5% per annum set by the CO.

50. Before turning to the examination of such issue, the Sole Arbitrator notes that the Respondent has raised a preliminary objection, noting that the Appellant's challenge to the applicable interest rate has been based before CAS on new arguments, not adduced before the DRC, even though available at the time of the FIFA proceedings. As a result, according to the Respondent, the newly presented arguments and evidence should not be taken into consideration by the Sole Arbitrator, pursuant to Article 57, third paragraph of the CAS Code, as they could have been presented before the DRC.

51. Article R57.3 of the Code provides that:

"The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. …".

52. Such provision gives the Sole Arbitrator discretion, and not the obligation, to exclude evidence, if the conditions therein mentioned are met. In this Sole Arbitrator's opinion such discretion is to be used with restraint, in order to preserve the *de novo* power of review of the dispute, which is a fundamental feature of CAS adjudication in the appeals proceedings, pursuant to Article

R57, first paragraph of the Code, and means that the Panel is not limited to considerations of the evidence that was adduced before the instance below and can consider all new evidence produced before it. As a result, such discretion to exclude evidence should be exercised only if there is a clear showing of bad faith, because the party deliberately retained evidence, available to it, in order to bring it for the first time to CAS.

53. In the case at hand, no evidence exists to prove that the Appellant failed negligently to present a complete case file to the DRC, knowing that in any event its case would be heard by CAS. To the contrary, the Appellant's "new" submissions appear to be linked to an important criticism to the Appealed Decision, *i.e.* that the interest rate eventually applied is not valid.

54. As a result, the Sole Arbitrator can proceed to the examination of the disputed issue (§ 49 above) on the basis of the contentions put forward by the Appellant in this arbitration, irrespective of whether they had been submitted to the DRC or not.

55. In this respect, the Sole Arbitrator finds that 1% per month, as set by the Termination Agreement, is a valid interest rate in the circumstances of the case, and that it was therefore correctly applied by the Appealed Decision.

56. The Sole Arbitrator is led to this conclusion by several reasons:

i. in general terms, the Appellant does not submit that a 12% annual interest rate would be contrary to Swiss law or to Swiss public policy. The Appellant, in fact, concedes that Swiss law admits an even higher amount. In addition, CAS precedents found that the (higher) annual default interest rate of 15% could not be considered excessive (CAS 2016/A/4858), and held as invalid only much larger measures (198% *p.a.* in CAS 2010/A/2128; 48% *p.a.* in CAS 2018/A/6023);

ii. in the specific case, the measure of the interest rate, now challenged by the Appellant, was proposed by the Appellant itself in the framework of the negotiation of the Termination Agreement, when, in June 2020, one of its representatives wrote to the Player that *"the percentage of monthly interest … must be one percent"*. Such proposal, that ended up in a underlined passage of the Termination Agreement eventually signed by the Parties, was made when (a) the Covid-19 pandemic had already led to a suspension of the football activities in Paraguay (and the world), (b) the impact of the pandemic on the Club's finances could be easily foreseen, (c) the limited number of matches played by the Appellant for the Club was already defined, (d) the post-termination financial obligations of the Club, and the Player's entitlements, were agreed;

iii. the interest rate was agreed in a context of mutual compromise, with waivers and concessions given by both Parties: on one side, the Player renounced to a portion of the payments he was already entitled to receive (monthly salaries of January to June 2020, as indicated in an introductory recital to the Termination Agreement); on the other side, the Club was exonerated from making all payments due under the Employment Contract. In that context, a significant (but still legal) interest rate had an economic meaning, as a pressure put on the Club to comply timely with the payment obligations it was

undertaking;

iv. the Termination Agreement does not appear to be affected by any imbalance, as it remained well within the scope of exercise of the contractual freedom by the Parties. In any case, the Appellant did not even put forward any argument disputing the validity or enforceability of the Termination Agreement in itself

57. Based on the above, the Sole Arbitrator considers that there are no reasons to reduce the interest rate contractually agreed in the present case.

58. As a result, the Appeal lodged against the Appealed Decision has to be dismissed and the Appealed Decision confirmed.

59. Any further claims or requests for relief are to be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 April 2022 by Club Olimpia against the decision rendered by the FIFA Dispute Resolution Chamber on 27 January 2022 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber 27 January 2022 is confirmed.

3. (…).

4. (…).

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