Arbitration CAS 2015/A/4232 Al-Gharafa S.C. v. F.C. Steaua Bucuresti & Fédération Internationale de Football Association (FIFA), award of 14 June 2016

Panel: Mr Sofoklis Pilavios (Greece), Sole Arbitrator

Football
Overdue payables regarding an international transfer
Contractual principle exceptio non adimpleti contractus under Article 82 of the Swiss CO
Conditions for relying on the exceptio non adimpleti contractus of Article 82 of the Swiss CO
New evidence and additional statements and documents according to Article 9(4) of the FIFA Procedural Rules
New evidence admitted after the time limit for appeal and Article R56 of the CAS Code
Discretion of FIFA to impose sporting sanctions under Article 12bis of the FIFA RSTP

1. **Article 82 of the Swiss CO incorporates the general contractual principle *exceptio non adimpleti contractus*. Said article provides that a party to a bilateral contract may not demand performance until he has discharged or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date. The provision is based on the principle that, in the absence of other statutory provision or contractual agreement, the obligations of synallagmatic contracts of exchange must be met simultaneously. The party which has already met its obligation or is ready to do so may accordingly hold further performance back until the other party meets its obligation.**

2. **A party cannot rely on the *exceptio non adimpleti contractus* if the issuing of an invoice is a secondary obligation arising from the agreement and, as such, cannot be invoked by a party in order to hold performance from its part and if the other party has already met its obligation from the agreement.**

3. **According to Article 9(4) of the FIFA Procedural Rules, the parties are perfectly able to supplement or amend their requests, to produce new exhibits or to specify further evidence up until notification of the closure of the investigation by FIFA, whereas the same provision allows FIFA administration at any time, i.e. even after closure of the investigation, to request from the parties additional statements and documents.**

4. **In principle, new evidence should be admitted if it has become available after the time limit for filing the appeal brief and a CAS panel may accept late submission on the basis of exceptional circumstances in accordance with Article R56(1) of the CAS Code.**

5. **FIFA enjoys a wide discretion when imposing sporting sanctions to safeguard contractual stability: the FIFA deciding bodies have full authority to impose to clubs any of the sanctions listed under paragraph 4 of Article 12bis of the FIFA Regulations on the Status and Transfer of Players for clubs failing to meet their contractual financial**

obligations, by judging on the basis of the particular and specific circumstances of each case and without violating the principle of proportionality.

I. PARTIES

1. Al-Gharafa S.C. ("Al-Gharafa" or the "Appellant") is a football club, with seat in Al-Gharafa, Qatar. Al-Gharafa is affiliated to the Football Federation of Qatar, which is a member of the Fédération Internationale de Football Association (FIFA).

2. F.C. Steaua Bucuresti ("Steaua Bucuresti" or the "First Respondent") is a football club, with seat in Bucharest, Romania. Steaua Bucuresti is affiliated to the Football Federation of Romania, which is a member of the Fédération Internationale de Football Association (FIFA).

3. The Fédération Internationale de Football Association ("FIFA" or the "Second Respondent") is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich, Switzerland.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions. Additional facts and allegations found in the parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

5. On 18 February 2015, the Appellant and the First Respondent entered into a transfer agreement (the "Agreement") for the transfer of the player C. (the "Player") from the Appellant to the First Respondent.

6. The Agreement contained, *inter alia*, the following provisions:

> *"**2. Transfer Fee***
>
> *2.1. GHARAFA shall pay to STEAUA the total amount of EUR 2,300,000 (two million three hundred thousand Euros) due as compensation for the early termination of the Player Contract and in consideration of the permanent transfer of the PLAYER.*
>
> *2.2. The abovementioned payment will be made by international transfer of funds by GHARAFA to STEAUA as follows:*

(i) EUR 1,200,000 (one million two hundred thousand Euros) due within 5 (five) natural days after the issuance of the PLAYER's International Transfer Certificate.

(ii) EUR 1,100,000 (one million one hundred thousand Euros) due on 1 June 2015. In case of non-payment, penalties of 5% per annum shall be due.

2.3. The aforementioned transfer compensation shall be paid to the following bank account of STEAUA:

(…)

STEAUA will provide to GHARAFA, as well, the entitled invoice.

3. Notices

3.1. Any and all notifications or notices in respect of the present Agreement shall be made in writing and may be delivered personally, transmitted by facsimile, sent by e-mail, or by post to the official address of the parties or to the football associations with which they are affiliated (i.e. QFA and FRF).

(…)

5. Attorney's Fees and Costs

5.1. In the event of disputes and/or controversy relating to this Agreement, each party shall accomplish and be responsible for its own costs, including attorney's fees, incurred which relate to any such or controversy, including costs arising out of mediation, arbitration, litigation, or any other alternative dispute resolution".

7. On 24 February 2015, the First Respondent sent an email to the email address "qnnp@live.com", reportedly belonging to Mr. Fahd Al Yahri, who is the General Manager of the Appellant, stating: *"Dear Sir, please find attached the invoice for the transfer of the player C. Best regards, Simona Niculescu-Mizil"*. The email contained as an attachment an invoice for the amount of EUR 2,300,000 corresponding to the transfer compensation in accordance with the terms of the Agreement.

8. On 19 March 2015, the First Respondent sent a default letter to the same email address "qnnp@live.com" requesting payment of the outstanding amount of EUR 1,200,000 corresponding to the first instalment of the transfer compensation agreed by the parties to the Agreement, within 5 days from receipt of said letter.

B. Proceedings before the FIFA Players' Status Committee

9. On 27 April 2015, the First Respondent lodged a claim with the Players' Status Committee of FIFA (the "FIFA PSC") against the First Respondent, requesting payment of EUR 1,200,000 corresponding to the first instalment of the transfer compensation agreed between the parties.

10. On 3 June 2015, the First Respondent sent a second default letter to the Appellant by facsimile requesting payment of the aforementioned amount of EUR 1,200,000 within 10 days.

11. On 18 June 2015, the First Respondent submitted a revised claim before the FIFA Players' Status Committee requesting that the Appellant be ordered to pay the total outstanding amount of EUR 2,300,000 in accordance with the Agreement, plus interest at a yearly rate of 5% and that a fine and a ban from registering new players be imposed on the Appellant.

12. By way of its response dated 2 July 2015, the Appellant rejected the First Respondent's claim arguing that it received no default notice in accordance with the provisions of Article 12bis of the FIFA Regulations on Status and Transfer of Players and section 3 of the Agreement.

13. The First Respondent further sent to the Appellant several default notices by facsimile for the total outstanding amount of EUR 2,300,000 on 1 July 2015, on 9 and on 18 September 2015.

14. On 16 July 2015, the FIFA PSC rendered its decision (the "Appealed Decision"), by which it upheld the First Respondent's claim of 27 April 2015. The operative part of the Appealed Decision reads as follows:

"1. The claim of the Claimant, FC Steaua Bucuresti, is accepted.

2. The Respondent, Al-Gharafa SC, has to pay to the Claimant, ***within 30 days*** *as from the date of notification of this decision, overdue payables in the amount of EUR 1,200,000.*

3. If the aforementioned total amount is not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

4. The Respondent, Al-Gharafa SC, is ordered to pay a fine in the amount of CHF 30,000, ***within 30 days*** *as from the date of notification of the present decision to FIFA.*

5. The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Al-Gharafa SC, ***within 30 days*** *as from the notification of the present decision, as follows:*

a) The amount of CHF 5,000 has to be paid to the Claimant, FC Steaua Bucuresti.

b) The amount of CHF 15,000 has to be paid to FIFA.

(…)".

15. On 17 September 2015, FIFA communicated to the parties the grounds of the Appealed Decision, following a request of the Appellant, *inter alia*, determining the following:

"5. (…) [T]he Single Judge acknowledged that the Claimant and the Respondent signed a transfer agreement dated 18 February 2015, in accordance with which the Claimant was entitled to receive from the Respondent, inter alia, the total amount of EUR 2,300,000, payable in one instalment of EUR 1,200,000 within five days after the issuance of the Player's International Transfer Certificate, i.e. on 23 February 2015, as well as in one instalment of EUR 1,100,000 on 1 June 2015.

(…)

7. In this context, the Single Judge took particular note of the fact that, on 3 June 2015, the Claimant put the Respondent in default of payment, setting a time limit of 10 days in order to remedy the default.

8. Consequently, the Single Judge 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 obligations.

9. Subsequently, the Single Judge took into account that the Respondent, for its part, held that the communication approaches of the Claimant, in particular the default notice, were addressed to a non-official address and, therefore, the Respondent had no obligation to remedy the default.

10. In this regard, the Single Judge considered that the arguments raised by the Respondent cannot be considered a valid reason for non-payment of the monies claimed by the Claimant, in other words, the reasons brought forward by the Respondent in its defence do not exempt the Respondent from its obligation to fulfil its contractual obligations towards the Claimant.

11. Consequently, the Single Judge decided to reject the argumentation put forward by the Respondent in its defence.

12. Having said this and taking into account the documentation presented by the Claimant in support of its petition, the Single Judge concluded that the Claimant had substantiated its claim pertaining to overdue payables with sufficient documentary evidence.

13. On account of the aforementioned considerations, the Single Judge established that the Respondent failed to remit the total amount of EUR 1,200,000 to the Claimant.

(…)

17. The Single Judge established that in virtue of art. 12bis par. 4 of the Regulations he has competence to impose sanctions on the Respondent. Moreover, the Single Judge referred to art. 12bis par. 6 of the Regulations, which establishes that a repeated offence will be considered as an aggravating circumstance and lead to more severe penalty. Bearing in mind that the Respondent has replied to the claim of the Claimant as well as the consideration under number II./14. above, the Single Judge decided to impose a fine on the Respondent, in accordance with art. 12bis par. 4 lit. c) of the Regulations. Furthermore, taking into consideration the amount due of EUR 1,200,000, the Single Judge regarded a fine amounting to CHF 30,000 as appropriate and hence decided to impose said fine on the Respondent".

16. On 16 October 2015, the First Respondent informed FIFA that the Appellant paid the amount of EUR 1,100,000, corresponding to the second instalment of the transfer compensation as agreed in the Agreement.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 7 October 2015, the Appellant submitted a statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") to the Court of Arbitration for Sport ("CAS"), challenging the Appealed Decision.

18. With its statement of appeal, the Appellant also requested that its appeal be submitted to a Sole Arbitrator in accordance with Article R50 of the Code.

19. On 20 October 2015, both the First and the Second Respondent informed the CAS that they did not agree with the appointment of a Sole Arbitrator in this matter.

20. On 22 October 2015, the Appellant filed its appeal brief requesting from the CAS:

"FIRST – To set aside the Appealed Decision in full;

SECOND – To confirm that the First Respondent failed to comply with the contractual obligations set out in clause 2.3 of the Transfer Agreement, in casu, to address the invoice regarding the first instalment due as fee for the permanent transfer of the Player;

THIRD – To uphold, in the scenario above, that the Appellant was entitled to hold the payment of the amount established as first instalment for the permanent transfer of the Player until the First Respondent complied with its obligations towards the Employment Contract (cf. Art. 82 of the Swiss CO); and

FOURTH – To confirm that the Appellant shall only comply with the payment of the amount established in the first instalment and due as fee for the permanent transfer of the Player when the First Respondent finally addressed a proper invoice to one of the official addresses set out in clause 3.1 of the Transfer Agreement.

Alternatively and only in the event the above is rejected:

FIFTH – To uphold, assuming but not admitting, that the Appellant is considered to having failed to pay the amount established in the referenced first instalment, that the latter, even though, shall not be considered to have overdue payables in the sense of Art. 12bis of the FIFA RSTP;

SIXTH – To confirm, therefore, that the FIFA Single Judge had no legal basis to impose any sanction on the Appellant since the provisions set out in Art. 12bis of the FIFA RSTP does not apply in the case at hand;

Alternatively and only in the event the above is rejected:

SEVENTH – To confirm, assuming but not admitting, that the provisions set out in Art. 12bis of the FIFA RSTP are valid and may be applicable to the ongoing matter, that the sanction imposed on the Appellant is baseless and disproportionate in accordance to current Lex Sportiva;

EIGHTH – To uphold, assuming but not admitting, that the provisions set out in Art. 12bis of the FIFA RSTP are valid and may be applicable to the ongoing matter, that the sanction imposed on the Appellant shall be reduced to a warning or a reprimand;

NINETH – To establish that any procedure or legal cost determined by the Panel and relating to the proceedings before the FIFA Players' Status Committee or this arbitration shall be calculated paying due consideration to the terms and conditions as set out in clause 5.1 of the Transfer Agreement".

21. On 5 November 2015, the CAS Court Office informed the parties that a Sole Arbitrator would be appointed in this matter.

22. On 1 December 2015, the CAS Court Office invited the Appellant to submit proof that it paid the advance of costs within the time limit granted to it, *i.e.* until 20 November 2015.

23. On 7 December 2015, the Appellant submitted to the CAS the requested bank transfer report, which indicated that the instruction towards the bank had been made on 22 November 2015 because the last day of the time limit granted to the Appellant (the 20th of November) was a bank holiday in Qatar.

24. On 11 December 2015, the First Respondent wrote to the CAS stating that the enclosures to the Appellant's letter of 7 December 2015 were not legible and requested that a copy of the letter and enclosures be sent again.

25. On 15 December 2015, the Appellant sent again to the CAS via email the aforementioned bank transfer report.

26. On 11 January 2016, the Second Respondent filed a letter requesting that the present appeal be rejected and the Appealed Decision be confirmed in its entirety and that all costs related to the present proceedings as well as the Second Respondent's legal expenses be borne by the Appellant.

27. On 15 January 2016, the Appellant submitted a translation into English of the request sent to the Appellant's bank related to the transfer of the advance of costs to the CAS dated 22 November 2015.

28. On 20 January 2016, the First Respondent filed its answer in accordance with Article R55 para. 1 of the Code requesting the CAS to:

"a) Establish that the advance of costs were paid outside the fixed deadline and to declare the appeal inadmissible;

Alternatively to point a) to confirm the decision of the FIFA PSC Single Judge dated 16 July 2015 and, more specifically, hold that the Appellant:

b) correctly received the invoice and the default notices sent by Steaua either via email and/or fax;

c) has overdues towards Steaua for the amount of EUR 1,200,000;

d) the Appellant shall pay interests at a rate of 5% per annum as of 23 February 2015;

e) shall reimburse Steaua Bucharest the procedural costs it incurred at FIFA level.

And in any case to hold that:

f) the Appellant shall bear 100% of arbitration costs at CAS;

Alternatively to f) to hold that:

g) if a violation of due process took place, that FIFA shall bear the arbitration costs of this procedure together with the Appellant, who in any case has overdues payables towards Steaua".

29. On 22 January 2016, the CAS Court Office invited the parties to inform the CAS whether they prefer a hearing to be held in this matter.

30. On 25 and on 27 January 2016 and on 2 February 2016 respectively, the Second Respondent, the First Respondent and the Appellant informed the CAS Court Office that they did not deem a hearing necessary and that they preferred that the Sole Arbitrator issue an award in this matter based solely on the parties' written submissions.

31. On 5 February 2016, the CAS Court Office informed the parties that the Sole Arbitrator deems himself sufficiently well-informed to decide this matter based solely on the parties' submissions, without a hearing, according to Article R57 of the Code.

32. On 22 February 2016, the CAS Court Office issued an order of procedure, which was signed and returned to the CAS on 23 February 2016 by the Second Respondent, on 27 February 2016 by the Appellant and on 10 March 2016 by the First Respondent, all confirming their waiver of a hearing and that their right to be heard has been respected.

33. On 12 May 2016, the Appellant filed by email an uninvited letter with the CAS Court Office enclosing the award rendered by another CAS Panel in the matter CAS 2015/A/4153 between the same Appellant, Mr Nicolas Fedor and FIFA as Respondents and requesting, as already requested in the appeal brief, that the Sole Arbitrator *"reduce to a warning or a reprimand the sanction imposed on the Appellant"*.

34. On 13 May 2016, the CAS Court Office invited the Respondents to file their observations with regard to the Appellant's submission.

35. The First Respondent filed its observations on 18 May 2016 and the Second Respondent on 20 May 2016, both in essence requesting that the Appellant's submission be declared inadmissible due to its late filing and the lack of exceptional circumstances justifying it

IV. SUBMISSIONS OF THE PARTIES

36. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the parties. The Sole Arbitrator has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

37. The Appellant's submissions, in essence, may be summarized as follows:

- The First Respondent failed to comply with its obligation under section 2.3 of the Agreement, *i.e.* to provide a valid invoice to the Appellant for the payments of the transfer fee as stipulated in the Agreement. As a result, the Appellant was entitled to delay its performance until the other party discharged its own obligation, in accordance with Article 82 of the Swiss Code of Obligations (CO).

- The Appellant never refused its obligations under the Agreement and that is the reason why it already made the payment of the second instalment to the First Respondent.

- The Appellant argues that the First Respondent did not provide any evidence that the mentioned email of 19 March 2015 did indeed contain as an attachment a default notice to the Appellant and that, at any rate, such communication does not comply with the notification requirements pursuant to clause 3.1 of the Agreement, as it was not sent to the Appellant's official email address, which was available in the Appellant's website.

- The Appellant asserts that it never received the second default notice of the First Respondent, which was supposedly sent to the former by facsimile on 3 June 2015 and claims that the First Respondent submitted no proof of receipt of the communication by the Appellant to the FIFA PSC. However, in the event that the First Respondent did in fact sent the second default notice, by sending it after having filed its complaint before FIFA, the First Respondent clearly violated the principle of good faith.

- Considering that the second default notice allegedly sent by the First Respondent, was sent more than 30 days after filing its claim with the FIFA PSC, and also that the claim lodged by the First Respondent with FIFA on 27 April 2015 did not contain any request for the imposition of sanctions as per Article 12bis of the FIFA Regulations, the Appellant concludes that it was the FIFA PSC secretariat that instructed the First Respondent to send the notice to the Appellant, in order to fulfil the requirements of the aforementioned provision. In this respect, the Appellant further argues that by providing instructions to the First Respondent, the FIFA PSC secretariat violated fundamental principles of due process, namely the principle of the equal treatment of the parties.

- The Appellant also puts forward that the alleged second default notice of the First Respondent, assuming that such notice was in fact properly delivered to the Appellant, does not meet the conditions established by the FIFA legislator in Article 12bis of the FIFA Regulations and, therefore, provides no legal basis for the FIFA PSC to impose any sanctions as no such request is made in the claim of the First Respondent lodged with FIFA on 27 April 2015.

- Finally, in the event that the CAS holds that the sanction at hand was imposed with a valid legal basis, the amount of the fine is clearly disproportionate and a warning or a reprimand should be imposed instead.

38. The First Respondent's submissions, in essence, may be summarized as follows:

- The Appellant failed to pay the advance of costs within the deadline set by the CAS Court Office without any valid excuse and, as a result, the appeal is inadmissible and the arbitration proceedings should be terminated.

- As far as the substance of the case is concerned, the First Respondent argues that the appeal is without merits, that the Appellant does not disputes its obligation to pay the agreed transfer fee and that its goal is to further delay the execution of the payment.

- The First Respondent asserts that it provided the Appellant via email with an invoice related to the payment of the first and second instalment on 24 February 2015. The email was sent to the email address "qnnp@live.com", which belongs to Mr. Fahd Al Yahri (General Manager of the Appellant), was used during the negotiations between the parties and is also used by the Appellant in the FIFA TMS. Moreover, the First Respondent points out that the same email address was used by the Appellant on 8 October 2015, in order to provide the First Respondent with proof of payment of the second instalment of the transfer fee.

- On 19 March 2015, the First Respondent sent to the Appellant the first default notice by email and, on 3 June 2015, the second default notice was sent via fax and the First Respondent submits a positive fax transmission report to prove it.

- The First Respondent sent the second default notice to the Appellant following FIFA's request of 2 June 2015 to the former to supplement the petition it had submitted, in order for the requirements of the FIFA Regulations to be met. Such FIFA's request constitutes no violation of the Appellant's rights, as alleged in the appeal. On the contrary, it falls within the power of the FIFA judicial bodies. In addition, the First Respondent had every right to supplement or amend its claim, in accordance with Article 9(2) and 9(4) of the FIFA Procedural Regulations. At any case, all procedural irregularities, if any, are cured by the *de novo* character of the CAS proceedings.

- The Appellant argues in bad faith that it did not receive the invoices or the default notices of the First Respondent. If the Appellant had not received the invoices and default notices, how was it able to make the payment of the second instalment on 6 October 2015?

- In addition, the Appellant is not entitled to refuse payment on the grounds of not having received any proper invoice by the First Respondent as there is no wording in the Agreement to support the view that an invoice from the First Respondent was agreed as a *conditio sine qua non* for the execution of the payments. Moreover, the Agreement clearly sets out the payment dates and the bank details of the First Respondent.

- The Appellant failed to discharge its burden of proof that it was prevented from making the payments without any valid invoice because of Qatari legislation on money laundering.

- The second notice of the First Respondent meets the requirements set out in Article 12bis of the FIFA Regulations and, as a result, the decision of the FIFA PSC to impose a fine on the Appellant should be upheld.

- Section 5.1 of the Agreement does not apply on the procedural costs as it only covers legal fees and costs of each party and it cannot affect FIFA or CAS rules on awarding a contribution on the other party's costs.

39. The Second Respondent's submissions, in essence, may be summarized as follows:

- The introduction of Article 12bis of the FIFA Regulations on 1 March 2015 is intended to establish a stronger system with regard to the respect of financial contractual obligations of clubs towards players and other clubs.

- After receiving the First Respondent's claim on 27 April 2015, FIFA administration merely informed it that for a claim in the basis of Article 12bis of the FIFA Regulations to be taken at hand, proof of a default notice would need to be provided. In doing so, FIFA administration did not violate the principle of equal treatment of the parties. Such default notice was sent by the First Respondent on 3 June 2015, granting to the Appellant a new deadline of 10 days to comply with its obligations, almost 4 months after the due date.

- Section 3.1 of the Agreement did not refer to any specific email address of the parties or to any particular website. Hence, the FIFA PSC had no reason to question the sending of a document to one of the employees of the Appellant and in an email address which has already been used in the negotiations between the parties (with respect to the first default notice) or that the First Respondent properly fulfilled the requirements set in Article 12bis of the FIFA Regulations (with respect to the second default notice).

- The main obligation of the First Respondent under the Agreement was to release the player in favour of the Appellant and the main obligation of the Appellant was to proceed with the payment of the agreed compensation on the due dates. Therefore, the FIFA PSC rightly concluded that the arguments of the Appellant do not exempt it from fulfilling its contractual obligations towards the First Respondent considering that even in the event that the First Respondent did not address a proper invoice to the Appellant, *quod non*, the breach of said ancillary obligation would never justify the non-payment of the first instalment of the transfer compensation. The respective argument of the Appellant is merely an indication of its bad faith and dilatory tactics.

- According to the letter and the spirit of Article 12bis of the FIFA Regulations, FIFA judicial bodies, considering the specific circumstances of each case, have the power to impose a sanction on a club that has delayed a due payment for more than 30 days without a *prima facie* contractual basis and was put in default by the other party, granting the former a deadline of 10 days to fulfil its contractual obligations. In addition, the imposition of the sanction is performed *ex officio* by the Chamber and is absolutely independent from the existence or not of a respective request from the counterparty, as it constitutes part

of FIFA's own interest to apply measures aiming at securing the respect of its regulations. CAS jurisprudence goes even further by stating that that it is not up to the party lodging a claim before FIFA to request sanctions (CAS2 2014/A/3707). As a result, the Appellant's accusation against FIFA of having acted *extra petita* is unfounded.

- FIFA PSC has the duty to assess the adequacy of the sanction imposed. In the case at hand, considering the level of compliance of the Appellant with its contractual obligations, the Appellant having been already sanctioned with a "warning" in a previous case and the substantial sum due to the First Respondent, the Single Judge was right to conclude that imposing on the Appellant a fine in the amount of CHF 30,000 was fully justified.

V. JURISDICTION

40. The jurisdiction of CAS, which is not disputed, derives from article 67 par. 1 of the FIFA Statutes (2015 edition) as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

41. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

42. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

43. The appeal was filed within the 21 days set by article 67 par. 1 of the FIFA Statutes (2015 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

44. With respect to the request of the First Respondent that the appeal be declared as inadmissible and the arbitration be terminated due to late payment of the advance of costs from the Appellant, the Sole Arbitrator considers that the Appellant has sufficiently established that the last day of the time limit granted to it, *i.e.* the 20th of November 2015, was a bank holiday in Qatar. As a result, instruction to the bank was given by the Appellant on the first subsequent business day, *i.e.* on 22 November 2015, in accordance with the relevant provision of Article R32 par. 1 of the Code.

45. It follows that the appeal is admissible and, as a result, the request of the Respondent that the appeal be declared as inadmissible should be rejected.

VII. APPLICABLE LAW

46. Article R58 of the Code provides 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

47. The Sole Arbitrator notes that Article 66 par. 2 of the FIFA Statutes stipulates the following:

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

48. Consequently, the Sole Arbitrator will decide the present dispute primarily in accordance with the FIFA Regulations and, subsidiarily, apply Swiss law in case of a possible gap in the FIFA Regulations.

49. The case at hand was submitted to the DRC on 27 April 2015, hence after 1 April 2015, which is the date when the revised Regulations for Status and Transfer of Players (April 2015 edition, hereinafter referred to as the "FIFA Regulations") and the FIFA Statutes (2015 edition) came into force respectively (see Articles 26 and 29 of the FIFA Regulations and Article 87 of the FIFA Statutes). These are the editions of the rules and regulations under which the case shall be assessed.

VIII. MERITS

50. According to Article R57 par. 1 of the Code, the Sole Arbitrator has *"full power to review the facts and the law"*. As repeatedly stated in CAS jurisprudence, by reference to this provision the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of the Sole Arbitrator to make an independent determination as to merits (see CAS 2007/A/1394).

51. The Sole Arbitrator notes that it is not in principle disputed between the parties that the First Respondent is entitled to receive the amount of EUR 1,200,000 from the Appellant. The Appellant however submits that it was not required to pay for several reasons and also disputes the fine imposed to it on the basis of Article 12bis of the FIFA Regulations. As a result, it is in principle for the Appellant to establish that the arguments brought forward can indeed justify its non-payment of the amount in dispute, *i.e.* the burden of proof lies with the Appellant.

52. Considering the above, the Sole Arbitrator shall firstly examine whether the Appellant established that it was not required to proceed with the payment of EUR 1,200,000 to the First Respondent and, secondly, whether the fine imposed on the Appellant by the FIFA PSC in the appealed decision is justified and proportionate.

A. Did the Appellant establish that it was not required to proceed with the payment of EUR 1,200,000 to the First Respondent?

53. The Appellant justifies the non-payment of the first instalment of the agreed transfer compensation by claiming that the First Respondent was the party that failed to meet its obligations arising from the Agreement by not sending to the Appellant an invoice regarding the payment of the first instalment as provided under clause 2.3 of the Agreement. In this respect, the Appellant relies on Article 82 of the Swiss CO and requests that it be acknowledged that it is entitled to withhold payment until the First Respondent complies with its aforementioned obligation.

54. The Appellant further submits that the first default notice was not sent to its formal email address and that the First Respondent did not provide proof of having actually sent the second default notice to the Appellant by facsimile. Additionally, in the event the second notice was indeed sent, the Appellant argues that it was done more than 30 days after the First Respondent lodged its claim with FIFA and following an invitation from FIFA, which constitutes a violation of due process and, in particular, of the principle of equal treatment of the parties.

55. The First Respondent, on the other hand, argues that issuing an invoice was not expressly agreed in the Agreement as a condition of the execution of the payment on behalf of the Appellant and that, at any case, the Appellant had no right to withhold the payment as the Agreement included all the relevant payment details, such as the bank details of the First Respondent and, in addition, stipulated a due date for the payment.

56. In accordance with the principle of the burden of proof, which is a basic principle in every legal system that is also established in Article 8 of the Swiss Civil Code, each party to a legal procedure bears the burden of corroborating its allegations. In other words, any party deriving a right from an alleged fact shall carry the burden of proof and, in the matter at hand, it is up to the party invoking arguments to justify the non-payment to establish the existence of the facts founding such arguments (see IBARROLA J., *La jurisprudence du TAS en matière de football – Questions de procédure et de droit de fond*, in BERNASCONI/RIGOZZI (eds.), The Proceedings before the Court of Arbitration for Sports, Berne 2007, p. 252; see also, *ex multis*, CAS 2009/A/1810 & 1811).

57. Therefore, the question for the Sole Arbitrator to decide is whether the Appellant has discharged its burden of proof in establishing the facts and arguments alleged by it in its appeal brief.

58. The Sole Arbitrator finds that the arguments of the Appellant must be dismissed for several reasons.

59. First of all, the Sole Arbitrator notes that each party is under the obligation to fulfil its duties under the Agreement in accordance with the general legal principle of *"pacta sunt servanda"*.

60. The Appellant relies on Article 82 of the Swiss CO which incorporates the general contractual principle *exceptio non adimpleti contractus*. Said article, loosely translated into English, provides that *"[a] party to a bilateral contract may not demand performance until he has discharged or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date"*. The provision is based on the principle that, in the absence of other statutory provision or contractual agreement, the obligations of synallagmatic contracts of exchange must be met simultaneously. The party which has already met its obligation or is ready to do so may accordingly hold further performance back until the other party meets its obligation.

61. In this respect, the Sole Arbitrator finds that the Appellant cannot rely on *exceptio non adimpleti contractus* for the following reasons: (a) issuing an invoice is, if anything, a secondary obligation arising from the Agreement and, as such, cannot be invoked by the Appellant in order to hold performance from its part; and (b) the First Respondent has already met its obligation from the Agreement, *i.e.* to transfer the player to the Appellant, which, in turn, cannot reasonably hold further performance back on the pretext of the invoice.

62. Irrespective of the above, however, and contrary to the Appellant's allegations, the Sole Arbitrator finds that the First Respondent did in fact issue and sent an invoice to the Appellant regarding the payment of the first instalment. Such invoice was included as an attachment to an email that was sent by the First Respondent to the email address "qnnp@live.com" on 24 February 2015 stating: *"Dear Sir, please find attached the invoice for the transfer of the player C. Best regards, Simona Niculescu-Mizil"*.

63. The email address "qnnp@live.com" belongs to Mr. Fahd Al Yahri, who is the General Manager of the Appellant, a fact that is not disputed by the Appellant.

64. In addition, the same email address is used by the Appellant in the online platform of the FIFA Transfer Matching System (TMS), whereas sections 2.3 or 3.1 (*"Notices"*) of the Agreement do not define a specific email address which is to be used for delivering notices to the Appellant nor do they make exclusive reference to the contact details indicated in the Appellant's "official website".

65. In view of the above, and considering particularly that the Appellant paid to the First Respondent the amount of the second instalment on 16 October 2015 without having received a new invoice from the latter, the Sole Arbitrator finds that the Appellant has failed to establish that the First Respondent did not issue and deliver to the former a proper invoice for the payment of the amount in dispute, and in doing so it violated its obligations under sections 2.3 and 3.1 of the Agreement.

66. Consequently, the Sole Arbitrator does not consider that the Appellant has produced convincing evidence that it was not required to proceed with the payment of EUR 1,200,000 to the First Respondent and finds this to be sufficient ground to reject the appeal.

B. Is the fine imposed on the Appellant by the FIFA PSC in accordance with the provisions of Article 12bis of the FIFA Regulations and the principle of proportionality?

67. The Sole Arbitrator is also called upon to decide on the Appellant's request that the fine imposed by the Appealed Decision should be set aside or, alternatively, be reduced to a warning or a reprimand.

68. The legal basis for imposing the fine at question is laid down in Article 12bis of the FIFA Regulations. The said provision states that:

"[...]

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".

69. In support of its appeal, the Appellant contends (a) that the First Respondent did not establish that it indeed sent a default notice that met the requirements of the aforementioned provision, (b) that at any case it did not receive any such notice and (c) that, should the CAS accept that the notice was indeed sent, it was induced by FIFA in violation of the principle of equal treatment of the parties.

70. The Appellant also puts forward that the fine at hand was imposed by FIFA *extra petita*, is disproportionate and a warning or a reprimand should be imposed instead.

71. However, the Sole Arbitrator finds that the Appellant's arguments in the circumstances of the present case are merely an attempt to avoid the consequences of not fulfilling its contractual financial obligations.

72. As the burden of proof of the facts alleged lies with the Appellant, the Sole Arbitrator finds that the Appellant failed to establish that no default notice conforming to the requirements of Article 12bis of the FIFA Regulations was sent to it by the First Respondent. On the contrary, the Sole Arbitrator is convinced that the Appellant was put on notice by the First Respondent by means of a facsimile that was sent to the Appellant's fax number on 3 June 2015, proof of which is submitted by the First Respondent (the relevant fax receipt). The Appellant does not dispute that this is its official facsimile number, as it is in fact stated in its website.

73. The Sole Arbitrator neither finds that the notice did meet the criteria of Article 12bis of the FIFA Regulations, as the payment was delayed for more than 30 days and the debtor was given a deadline of 10 days to conform.

74. The Appellant did not establish any valid legal reasons to support its argument that the involvement of the FIFA administration after the claim having been lodged with its services violated due process. FIFA merely referred the First Respondent to the requirements of Article 12bis of the FIFA Regulations. In this respect, according to Article 9(4) of the FIFA Procedural Rules, the parties are perfectly able to supplement or amend their requests, to produce new exhibits or to specify further evidence up until notification of the closure of the investigation by FIFA, whereas, quite tellingly, the same provision allows FIFA administration at any time, *i.e.* even after closure of the investigation, to request from the parties additional statements and documents. Notwithstanding the intervention of the FIFA services, the fact remains that the Appellant failed to make a due payment to the First Respondent, even after it was put in default by the latter with the notice of 3 June 2015.

75. Furthermore, application of Article 12bis of the FIFA Regulations does not require a relevant request from the interested party, as argued by the Appellant.

76. Lastly, as far as proportionality of the fine is concerned, the Sole Arbitrator notes that Article 12bis (4) provides the FIFA judicial bodies with a wide discretion regarding the choice of the sanction to be imposed in cases of clubs failing to meet their contractual financial obligations. Said sanctions are to be imposed in view of the special circumstances of each case and the conduct of the parties.

77. In this context, the Sole Arbitrator refers to the uninvited letter of the Appellant of 12 May 2016. By means of said letter the Appellant submitted the award rendered by another CAS Panel on 9 May 2016 in the matter CAS 2015/A/4153 between the same Appellant, the player Nicolas Fedor and FIFA as Respondents, which partially upheld the appeal setting aside the sanction of a warning imposed on the Appellant by FIFA. In doing so, the Appellant requested once more that the fine imposed in the present matter by the FIFA PSC be replaced by a warning or a reprimand, as the aggravating circumstances upon which the Appealed Decision relied, no longer exist.

78. After considering the objections expressed by the Respondents with regard to the admissibility of the letter of the Appellant of 12 May 2016, the Sole Arbitrator notes that said letter is indeed filed late. However, in view of the fact that, in principle, new evidence should be admitted if it has become available after the time limit for filing the appeal brief (RIGOZZI/HASLER, *Sports*

Arbitration under the CAS Rules, in: ARROYO M. (ed.), Arbitration in Switzerland. The Practitioner's Guide, Kluwer Law International 2013, p. 1034), the Sole Arbitrator decides to admit the Appellant's late submission on the basis of exceptional circumstances in accordance with Article R56(1) of the CAS Code.

79. The Sole Arbitrator also finds that it is not necessary to dismiss the Appellant's submission as it does not influence the outcome of the present proceedings.

80. As it is correctly noted by the Second Respondent in its observations of 20 May 2016, the sanction of a warning imposed on the Appellant was overturned by the CAS Panel in the matter CAS 2015/A/4153 due to a purely formal reason, *i.e.* the application of a previous version of the FIFA Regulations on the Status and Transfer of Players which did not contain Article 12bis. At the same time, the CAS Panel did in fact upheld the part of the FIFA decision regarding the Appellant being in breach of its financial obligations towards a player and ordered it to pay to the latter the outstanding amount of EUR 750,000 plus interest.

81. The above clearly contradict the Appellant's position that the *"alleged aggravating circumstances"* in the Appealed Decision no longer exist. In addition, the Sole Arbitrator notes that paragraphs 4 and 6 of Article 12bis of the FIFA Regulations provide for a wide discretion of the FIFA deciding bodies to impose any of the sanctions listed under paragraph 4 to the clubs which are in breach of their financial obligations towards players and other clubs. There is no proof supporting the Appellant's line of argumentation that first-time offenders should be sanctioned exclusively with a warning or a reprimand and FIFA should reserve more serious forms of sanction, such as the fine imposed in the matter at hand, for repeat offenders only. In line with well-established CAS jurisprudence with respect to the wide discretion FIFA enjoys when imposing sporting sanctions to safeguard contractual stability, the Sole Arbitrator considers that the FIFA deciding bodies have full authority to impose to clubs any of the sanctions listed under paragraph 4 of Article 12bis of the FIFA Regulations, judging on the basis of the particular and specific circumstances of each case.

82. The Sole Arbitrator is satisfied from the evaluation of the individual circumstances made by the FIFA PSC, as the absence of valid contractual reasons for the Appellant to delay the payment and the substantial sum due to the First Respondent constitute aggravating circumstances, apart from the involvement of the Appellant to other cases, and clearly justify the fine imposed by the FIFA PSC.

83. In view of the evidence and facts adduced by the parties in the present arbitration and particularly the amount of the outstanding instalment, the fact that the Appellant is involved in other overdue payables cases as well, as submitted by the Second Respondent, and that the Appellant is clearly trying to delay the payment of its financial obligations towards the First Respondent by invoking unsubstantiated arguments and while at the same time admits that it is obliged to pay the amount at question to the First Respondent, the Sole Arbitrator has no hesitation to confirm the Appealed Decision on this point as well.

84. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Al-Gharafa S.C. on 7 October 2015 against the decision issued on 16 July 2015 by the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The decision issued on 16 July 2015 by the Players' Status Committee of the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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