Arbitration CAS 2015/A/4271 Club Kabuscorp do Palanca v. Rivaldo Vitor Borba Ferreira & Fédération Internationale de Football Association (FIFA), award of 26 January 2017

Panel: Mr Lars Halgreen (Denmark), President; Mr Bernhard Heusler (Switzerland); Mr Mark Hovell (United Kingdom)

Football
Failure to comply with a final and binding FIFA decision (article 64 FDC)
Standing to be sued
Scope of CAS power to review a FIFA final and biding disciplinary decision

1. **The standing to be sued should be treated as an issue of merits and not as a question for the admissibility of appeal. An entity has standing to be sued (*légitimation passive*), and can therefore be summoned as a party in a CAS arbitration, only if something is sought from it and it is personally obliged by the "disputed right" at stake. Against this background, even though a player can be interested in the outcome of the CAS proceedings, he has no standing to be sued, if he was neither a party to the first instance proceedings at the FIFA level, nor may he be considered to have any part of or influence over the disciplinary powers of FIFA, which is the subject of the appeal. Thus, where the core of the FIFA Disciplinary Committee decision and of the appeal regards only the existence of a disciplinary infringement by the appellant i.e. a club, and the power of FIFA to sanction it, the player cannot be considered as "the passive subject" of the claim brought before the CAS by way of appeal against the decision.**

2. **Notwithstanding the CAS panel's power to review a case *de novo* according to Article R57 of the CAS Code, the review and the power to amend a disciplinary decision of a FIFA judiciary body should only take place in cases in which the panel finds that the relevant FIFA judiciary body has exceeded the margin of discretion granted to it by the principle of association authority, i.e. only in cases, in which the FIFA judiciary body concerned must be held to have acted arbitrarily. However, this assumption is not present, if the panel merely disagrees with a specific sanction. Only if the sanction concerned must be considered as evidently and grossly disproportionate to the offence, will the panel have the authority to amend or set aside the decision.**

I. THE PARTIES

1. Club Kabuscorp do Palanca (hereinafter referred to as the "Club" or the "Appellant") is an Angolan football club with its registered office in Luanda, Angola. It is affiliated to the Angolan Football Association, which in turn is affiliated to Fédération Internationale de

Football Association.

2. Rivaldo Vitor Borba Ferreira (hereinafter referred to as the "Player" or the "First Respondent") is a professional football player of Brazilian nationality.

3. Fédération Internationale de Football Association (hereinafter referred to as "FIFA" or the "Second Respondent") is the international federation responsible for all football-related activities worldwide. FIFA's headquarter is located in Zurich, Switzerland.

4. The Appellant and the First and Second Respondents together shall hereinafter be referred to as the "Parties".

II. FACTUAL BACKGROUND

5. The circumstances and provisions discussed below constitute a summary of the relevant facts and evidence as set forward by the Parties in their respective written submissions and during the hearing. This factual background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out where relevant, in connection with the legal discussion.

6. On 27 May 2014, FIFA's Dispute Resolution Chamber decided on an employment related dispute between the First Respondent and the Appellant ("DRC Decision"). The FIFA Dispute Resolution Chamber ruled that the Appellant was to pay the Player an amount of USD 750,000 within 30 days as of the date of notification of the decision and interest of 5% p.a. as from 2 August 2012.

7. The terms of the decision were notified to the Player and the Club on 21 July 2014 and no request for grounds was made by either of the Parties.

8. On 2 September 2014, the legal representative of the First Respondent informed the FIFA Players' Statute and Governance Department that the Appellant had not made any payment of the amount due despite having been provided with the relevant bank details on 15 August 2014. Despite numerous attempts initiated by the FIFA Players' Statute and Governance Department in the period from September 2014 until the summer of 2015, the awarded sum, or any part hereof, was not paid by the Appellant to the First Respondent.

9. Due to the Club's failure to respect the final and binding decision reached by the FIFA Dispute Resolution Chamber on 27 May 2014, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings on 3 July 2015 against the Appellant.

10. On 28 July 2015, the secretariat to the FIFA Disciplinary Committee urged the Appellant for the final time to pay the outstanding amount by 17 August 2015 and informed the Appellant that the case would be submitted to the FIFA Disciplinary Committee on 4 September 2015. Moreover, the Appellant was informed that the FIFA Disciplinary Committee would take a

decision using the file in its possession in accordance with Article 110, par. 4, of the FIFA Disciplinary Code (hereinafter referred to as the "FDC") should the Appellant fail to submit a statement or pay the outstanding amount. No answer was received by the Appellant.

11. Against this background the FIFA Disciplinary Committee on 4 September 2015 passed the following decision in the matter (the "Appealed Decision"):

> *1. The club Kabuscorp S.C. Do Palanca is pronounced guilty of failing to comply with the decision passed by the Dispute Resolution Chamber on 27 May 2014 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*
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> *2. The club Kabuscorp S.C. Do Palanca is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 30 days of notification of the present decision (…).*
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> *3. The club Kabuscorp S.C. Do Palanca is granted a final period of grace of 30 days as from notification of the present decision in which to settle its debts to the creditor, the player Rivaldo Vitor Borba Ferreira.*
>
> *4. If payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that six (6) points be deducted from the first team of the club Kabuscorp S.C. Do Palanca in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the point deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
>
> *5. If the club Kabuscorp S.C. Do Palanca still fails to pay the amounts due even after deduction of the points in accordance with point 4. above, the FIFA Disciplinary Committee will decide on a possible relegation of the first team of the club Kabuscorp S.C. Do Palanca to the next lower division.*
>
> *6. As a member of FIFA, the Angolan Football Association is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Angolan Football Association does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.*
>
> *7. The costs of these proceedings amounting to CHF 2,000 are to be borne by the club Kabuscorp S.C. Do Palanca and shall be paid according to the modalities stipulated under point 2. above.*
>
> *8. The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received.*

12. On 6 September 2015, the terms of the Appealed Decision were duly communicated by fax to the Appellant and to the First Respondent by his legal representative.

13. On 26 September 2015, the Appellant informed the secretariat to the FIFA Disciplinary Committee via the Angolan Football Association that it had received the Appealed Decision

without grounds. After an exchange of correspondence at the end of September and beginning of October 2015 between the Appellant, the Angolan Football Association and the Second Respondent, the grounds of the Appealed Decision were duly communicated by fax on 7 October 2015 to the Appellant and the First Respondent as well as to the Angolan Football Association.

III. PROCEEDINGS BEFORE THE CAS

14. On 28 October 2015, the Appellant filed its Statement of Appeal before the Court of Arbitration for Sport (hereinafter referred to as the "CAS") against the Respondents with respect to the Appealed Decision of 4 September 2015. The Appellant nominated Mr Bernhard Heusler as arbitrator in the present proceedings.

15. On 6 November 2015, FIFA nominated Mr Mark Hovell as arbitrator in the present proceedings.

16. On 8 November 2015, the Appellant filed his Appeal Brief in accordance with Article R51 of the CAS Code (the "CAS Code").

17. On 10 November 2015, the First Respondent confirmed the joint nomination of Mr Hovell as arbitrator along with FIFA.

18. On 1 December 2015, the CAS Court Office informed the Parties that the Panel appointed to hear the case was constituted as follows:

President:	Mr Lars Halgreen, attorney-at-law in Copenhagen, Denmark
Arbitrators:	Mr Bernhard Heusler, attorney-at-law in Basel, Switzerland
	Mr Mark Hovell, solicitor in Manchester, United Kingdom.

19. On 2 and 3 December 2015 respectively, the First Respondent and the Second Respondent filed their Answers with the CAS Court Office in accordance with Article R55 of the CAS Code.

20. On 25 May 2016, the CAS Court Office issued, on behalf of the President of the Panel, an Order of Procedure, which was signed by the Appellant and the Second Respondent on 31st May and by the First Respondent on 1 June 2016.

21. On 7 June 2016, a hearing was held in Lausanne, Switzerland, at the CAS headquarters. The Panel was assisted at the hearing by Mr Daniele Boccucci, counsel to the CAS.

22. The Appellant was represented by Mr Duarte Costa, attorney-at-law in Lisbon, Portugal; the First Respondent was represented by Mr Breno Costa Ramos Tannuri, attorney-at-law, São Paulo, Brazil, and the Second Respondent was represented by Mr Jaime Campreleng Contreras and Ms Alejandra Salmerón Garcia, legal counsels in the FIFA Disciplinary & Regulatory

Department, Zurich, Switzerland. No witnesses were called to the hearing

23. The Parties presented their statements and conclusions. All parties declared at the end of the hearing that they had no objections with respect to the way in which these proceedings had been conducted or to the formation of the panel, and that their right to be heard and to be equally treated had been granted.

IV. SUBMISSIONS OF THE PARTIES

A. The position of the Appellant

24. In the Appeal Brief, the Appellant challenged the Appealed Decision, submitting the following requests for relief to the CAS:

"On these grounds, Club Kabuscorp do Palanca, hereby respectfully asks the Court of Arbitration for Sport to set aside the decision passed on 4 September 2015 by the FIFA Disciplinary Committee".

25. The Appellant's submission in essence, may be summarized as follows.

- The Appealed Decision was erroneous, because it was based *"on ill reasoning, wrong presumptions and incorrect assessment of the facts of the case and the evidence collected"*.
- The 30-day period of grace granted to the Appellant to settle its debts towards the First Respondent is unfair and too short, and it appears as though the FIFA Disciplinary Committee has "double standards" in the application of penalties and deadlines as the Appellant refers to another similar case (the FIFA Disciplinary Committee case reference 150147), in which a club was granted a period of grace of 180 days.
- Moreover, the Appellant objects against the amount of the fine of CHF 25,000 on the basis that the Club has been trying hard to reach a payment agreement with the Player and never refused the payment of its debts, secondly that the previous legal representative of the Club had behaved negligently and had not used any of the legal opportunities to defend the Club's position within the FIFA system or through an appeal to the CAS.
- Finally, the Appellant submits that the Appealed Decision should be set aside in order to protect the Appellant from irreparable harm as the Appellant is in great financial turmoil and the payment of the fine will obviously cause prejudice to other debts to club employees. The Appellant has suffered the financial losses and has been forced to transfer its best players because of the overall economic crisis in Angola. The outcome of this case may determine whether the Club would survive or not.

B. The position of the First Respondent

26. In his Answer, the First Respondent submitted the following request for relief to the Panel:

"FIRST - to confirm that the First Respondent has no stand to [be] sued by the Appellant based upon the appeal decision issued by the FIFA DC and in accordance to the FIFA statutes and Swiss law;

SECOND - to uphold the lack of jurisdiction of the CAS over the First Respondent, since pursuant to the long understanding of the CAS, FIFA is the only respondent in the ongoing arbitration;

THIRD - to order the Appellant to pay the full amount of the CAS arbitration costs;

FOURTH - to order the Appellant to pay a contribution towards the legal costs and other related expenses of the First Respondent, at least in the amount of EUR 20,000 (twenty thousand euros);

FIFTH - to set aside any request made by the Appellant in order for the Panel to hear any witness whatsoever since the Appellant failed to comply with the provisions set out in Article R68 of the CAS Code;

SIXTH - to confirm that the period of grace of 30 days to pay the outstanding amount to the First Respondent and the fine applied by the FIFA DC are in accordance to the FIFA Disciplinary Code and the current lex sportiva, taking into account the period and the refusal of the Appellant not to comply with its contractual obligations;

SEVENTH - to uphold that the Appellant failed to discharge the burden of proof regarding an alleged misconduct of a legal counsel supposedly hired during the procedures before the FIFA and that such supposed unethical behaviour somehow prevented the Appellant to comply with the Appeal Decision;

EIGHTH - to uphold that lack of financial means cannot be invoked as a justification for the non-compliance with an obligation according to the well-established jurisprudence issued by the CAS;

NINTH - to order the Appellant to pay the full amount of the CAS arbitration costs; and

TENTH - to order the Appellant to pay a contribution towards the legal costs and other related expenses of the First Respondent, at least in the amount of EUR 20,000 (twenty thousand euros)".

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

i) Lack of Jurisdiction / Standing to be sued

- The well-established jurisprudence issued by the CAS and Swiss law clearly confirms that a party has standing to be sued and may thus be summoned before the CAS, only if it has some stake in the dispute, because something is sought against it, cf. CAS 2006/A/1189, CAS 2006/A/1192, CAS 2007/A/1329 & CAS 2007/A/1370, CAS 2008/A/1517 and CAS 2008/A/1518.
- The defending party has standing to be sued, if it personally is obliged by the "disputed right" at stake, cf. CAS 2006/A/1206, CAS 2008/A/1468, CAS 2008/A/1517 and CAS 2008/A/1518. In this case and in line with the above jurisprudence, it is beyond any doubt that the First Respondent has no standing to be sued by the Appellant. The Appellant therefore had to submit the present appeal *in casu* exclusively against FIFA and against FIFA only.
- Under these circumstances, the CAS *data venia* has no jurisdiction whatsoever over the First Respondent regarding the object of the ongoing arbitration. The appeal decision issued by the FIFA Disciplinary Code ("FIFA D.C".) had one purpose and one purpose

only, i.e. to protect the interests of FIFA and its regulations as a whole and obligate the enforcement of the directives and decisions established in its rules and regulations.

- In conclusion, any eventual request for relief somehow addressed by the Appellant against the First Respondent shall be *ex officio* dismissed by the Panel, since there is no legal procedural basis whatsoever, pursuant to the fundamental principles of law set out in the FIFA statutes, the CAS Code and the Swiss law.

ii) The Substantive Part of the Appealed Decision

- Assuming, but not admitting, that the First Respondent somehow had standing to be sued by the Appellant, the First Respondent submits the following as regards the merits of the case.
- As for the Appellant's accusation that the 30-day period of grace represented a double standard in the application of penalties and grant deadlines, the First Respondent *prima facie* points out that any decision rendered by the decision bodies of FIFA are not obligated to comply with *stare decisis* principles.
- In fact, the Appellant has had more than 180 days to comply with its obligations. To date, it is approximately 3 1/2 years ago since the amount was due to the First Respondent, but the Appellant has still failed to pay. Thus, the period of grace of 30 days was more than fair and proportional to the conditions regarding the case at hand.
- With respect to the Appellant's disagreement with the amount of the fine allegedly because the Club had never refused the payment of its debts and was trying to reach a payment agreement with the Player, the First Respondent objects to this argument. On the contrary, the Appellant has had more than 3 1/2 years to pay the amount due or to negotiate a settlement agreement with the First Respondent. The Appellant has accomplished neither. Moreover, the fine of CHF 25,000 represents less than 3.3 % of the amount owed to the Player, which means that the amount of fine established by the FIFA D.C. is totally in compliance with the principle of proportionality and the fundamental disciplinary premises established by FIFA.
- The First Respondent also dismisses that the Appellant may justify the failure to comply with its obligation in view of any alleged misconduct of the counsel previously hired to assist the Club during the proceedings before the FIFA deciding bodies.
- The First Respondent rejects the Appellant's argument that it has *"never refused the payment of its debts"*. The First Respondent submits that no evidence whatsoever has been presented by the Appellant to substantiate this statement and, according to Article 8 of the Swiss Civil Code and well-established CAS jurisprudence; it falls on the Appellant to carry the burden of proof regarding the existence of an alleged fact.
- Finally, the First Respondent rejects the Appellant's argument that the financial crisis in Angola could justify the non-payment of the debt owed for more than 3 1/2 years to the First Respondent. The lack of financial means cannot be invoked as a justification for the non-compliance of an obligation, cf. CAS 2006/A/1110, CAS 2014/A/3840 and CAS 2015/A/3909.

C. The position of the Second Respondent

28. In its answer, the Second Respondent submitted the following requests for relief:

1) To reject the Appellant's appeal in its entirety;

2) To confirm the decision hereby appealed against;

3) *To award the Appellant to bear all costs incurred with the present procedure and to cover all the Second Respondent's legal expenses relating to the present procedure.*

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

i) Breach of Article 64 of the FDC by the Appellant

- Solely for the sake of completeness, the Second Respondent submits that the Swiss Federal Supreme Court has deemed that the sanctions used by FIFA in the event of non-compliance with its decisions and those of CAS, are lawful (cf. decision of the Swiss Federal Supreme Court dated 5 January 2007 4P240/206).
- Pursuant to Article 64, para. 1 - 3, of the FDC, anyone who fails to pay another person a sum of money in full or part even though instructed to do so by a body, a committee or an instance of FIFA or subsequent CAS appeal decision will be fined for failing to comply with such a decision and will be granted a final deadline by the judicial bodies of FIFA, in which to pay the amount due or to comply with the (non-financial) decision. If it is a club, it will be warned and notified that, in the case of default or failure to comply with the decision within the period stipulated, points will be deducted or demoted to a lower division. A transfer ban may also be pronounced. This article provides FIFA with a legal tool enabling it at a certain extent through the application of sanctions to have the rights of the creditor finally respected.
- The disciplinary sanctions provided pursuant to Article 64 of the FDC derive *in casu*, from the non-respect by the Appellant of the decision of the FIFA Dispute Resolution Chamber of 27 May 2014, which was not appealed by the Appellant and therefore has become final and binding.
- In this context, the Second Respondent stresses that the FIFA Disciplinary Committee cannot review or modify as to the substance of a previous decision, which is final and binding and thus has become enforceable. Consequently, the FIFA Disciplinary Committee is not allowed to analyse a case decided by the relevant body, *in casu* the FIFA Dispute Resolution Chamber, as to the substance, but has as a sole task to analyse if the debts are complied with in accordance with the final and binding decision of the relevant body (cf. CAS 2006/A/1008, CAS 2008/A/1610, CAS 2013/A/3323 and CAS 2013/A/3380).
- No time during the proceedings before the FIFA bodies, the Appellant has made an effort to settle its debt or even part of it despite numerous correspondence sent reminding it of its uncontested obligations. Therefore, it is without a doubt that the

FIFA Disciplinary Committee correctly applied Article 64 of the FDC, in particular considering that the Appellant was in breach by not complying with a final and binding decision passed by a FIFA body. Consequently, the FIFA Disciplinary Committee correctly imposed disciplinary measures on the Appellant in accordance with the conditions set out in Article 64, par. 1, of the FDC.

ii) The Sanction imposed on the Appellant are Proportionate

- The Second Respondent submits that - notwithstanding its power to review a case *de novo* - the CAS Panel shall amend the disciplinary decision of a FIFA judicial body only in cases, in which it finds that the relevant FIFA judicial body exceeded the margin of discretion accorded to it by the principle of association autonomy (i.e. only in cases, in which the FIFA judicial body concerned must be held to have acted arbitrarily). This is, however, not the case, if the Panel merely disagrees with a specific sanction, but only if the sanction concerned must be considered as evidently and grossly disproportionate to the offence. This has been established in a large number of CAS cases.
- As regards the Appellant's allegation that the *"FIFA Disciplinary Committee has double standards in the application of penalties and grant deadlines"*, as well as the fact the Appellant disagrees with the amount of the fine, the Second Respondent stresses that the Appellant merely has mentioned one decision of the FIFA Committee to justify its position and to argue about an alleged differentiation of treatment. It is the Second Respondent's position that the decision mentioned by the Appellant actually represents the exception, which has been based on very specific circumstances (extremely tense political and social environment in Libya) and that the committee uniformly and constantly grants final deadlines of 30 days to debtors to settle their debts.
- In this case, the FIFA Disciplinary Committee considered that a fine in the amount of CHF 25,000 was appropriate and proportionate in light of the amount of the outstanding debt. A higher fine would not be proportionate and would contradict the long-standing jurisprudence of the FIFA Committee. Furthermore, a smaller fine would contradict the principle of repression and prevention and would fail to encourage the prompt fulfilment of the obligations. Thus, the Second Respondent deems it sufficiently founded that the fine of CHF 25,000 is appropriate and has been imposed in compliance with the overruling principle of proportionality according to the long-standing practice of the FIFA Disciplinary Committee.
- As for the grace period of 30 days, which has been challenged by the Appellant for being too short, the Second Respondent submits that the 30-day deadline has been established as the general rule, since the FIFA Committee aims to avoid that the creditor may be imposed an extensive time limit in which to receive its money, bearing in mind the numerous reminders sent to the debtor prior to the submission of the case to the FIFA Disciplinary Committee - unless it may be justified by "exceptional circumstances".
- Such "exceptional circumstances" were present in the case 150147PSTLBYZH mentioned by the Appellant, in which the FIFA Disciplinary Committee took into consideration the specific social and political context that the debtor's country was

undergoing, i.e. an ongoing, armed conflict in Libya. As a result and taking into account all the specific and extraordinary circumstances of such case, the FIFA Disciplinary Committee decided to exceptionally grant a 180-day deadline for the Libyan debtor to offset its debts. Other cases involving countries, where the impossibility to pay within a given deadline, was due to ongoing exchange of financial restrictions imposed on the country (Argentina and Greece) or where an ongoing armed conflict in the country (Ukraine and Libya) made it difficult for the debtor to pay its debt, have resulted in granting a longer grace period.

- Contrary to the aforementioned cases, the FIFA Disciplinary Committee did not find any exceptional circumstances in the present case that may have justified the extension of the generally granted 30-day period of grace, in which to pay the outstanding amount.
- Consequently, the Second Respondent finds it sufficiently substantiated that the Appeal Decision was completely proportionate in all its aspects and in line with the long standing jurisprudence of the FIFA Disciplinary Committee, namely in what concerned the amount of the imposed fine, the duration of the final period of grace in which to pay both the fine and the amount owed to the First Respondent.

iii) Additional Considerations

- Finally, the Second Respondent rejects the Appellant's argument that its previous legal representative acted negligently and that this negligence should have an impact on the Appeal Decision. On the contrary, the Second Respondent stresses that at no time during the proceedings held before the FIFA Dispute Resolution Chamber or the FIFA Disciplinary Committee was the Club ever represented by a legal representative, nor did it provide FIFA with any power of attorney. Thus, with reference to Article 8 of the Swiss Civil Code, the Second Respondent is of the opinion that the Panel should not even take into consideration such argument, as the alleged fact has not been established by the Appellant.

V. CAS JURISDICTION

30. 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 the 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 him prior to the appeal, in accordance with the statutes or regulations of that body".

31. The jurisdiction of CAS derives from Article 64, par. 5 of the FDC and Article 63, par. 1 of the FIFA Statutes. No formal objections have been raised by the Parties as to the jurisdiction of the CAS. However, the First Respondent's submission regarding the question of standing to be sued in these arbitration proceedings shall be treated as an issue of merits and not as a question of jurisdiction or admissibility of the appeal. The Panel refers to the discussion below regarding the first of those issues. Therefore, the Panel confirms that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

32. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".

33. The grounds of the Appealed Decision were communicated to the Parties on 7 October 2015, and the Appellant filed its Statement of Appeal on 28 October 2015. Moreover, no objections to the admissibility of the appeal have been raised by the Respondents. Therefore, the Appeal is admissible.

VII. APPLICABLE LAW

34. Article R58 of the CAS 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".

35. Article 66, par. 2, of the FIFA Statutes provides:

"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".

36. In these proceedings, it is thus undisputed by the Parties that the CAS should apply the various regulations of FIFA and additionally Swiss law to decide this matter.

37. Having concluded that the regulations of FIFA are applicable, the applicable version of those regulations, which shall apply during this arbitration, must be specified. Thus, Article 147, par. 2, of the FDC provides *in fine* as follows: *"This Code comes into force on 1 August 2011".*

38. The procedures before the FIFA Disciplinary Committee regarding the ongoing matter began on 3 July 2015, when the FIFA General Secretariat formally informed the FIFA Disciplinary Committee that the Appellant had not complied with its obligation to fulfil the decision issued by FIFA DRC on 27 May 2014. Therefore, the 2011 version of the FDC shall apply in these proceedings.

VIII. SCOPE OF THE PANEL'S REVIEW

39. According to Article R57 of the CAS Code:

"The Panel shall have full power to review the facts and the law. It may issue a new decision, which replaces the decision challenged, or annul the decision and refer the case back to the previous instance…"

IX. THE MERITS

40. The following issues shall be determined by the Panel in these proceedings:

Question 1:
Does the First Respondent have standing to be sued in these appeal proceedings?

Question 2:
Is there any legal basis for the Panel to set aside or amend the Appealed Decision passed on 4 September 2015?

A. Analysing Question 1

41. As for the question whether the Player has standing to be sued in these arbitration proceedings, the Panel concurs with the understanding expressed in previous CAS jurisprudence (CAS 2009/A/1869) that the standing to be sued should be treated as an issue of merits and not as a question for the admissibility of appeal.

42. Under Swiss law, an entity has standing to be sued (*légitimation passive*), and can therefore be summoned as a party in a CAS arbitration, only if something is sought from it and it is personally obliged by the "disputed right" at stake (SUTTER-SOMM/HASENBÖHLER/LEUENBERGER-ZÜRCHER in: *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO),* 2nd ed., 2013, No. 67 zu Art. 59 ZPO; STAEHELIN/STAEHELIN/GROLIMUND, Zivilprozessrecht, 2nd ed., 2013, § 13 no. 20; BGE 107 II 82 E. 2a); such definition has been expressly endorsed by a long standing jurisprudence of CAS: (CAS 2006/A/1189; CAS 2006/A/1206; CAS 2007/A/1367; CAS 2012/A/3032).

43. Even though the Player for obvious reasons is interested in the outcome of these proceedings, he was not a direct party to the FIFA proceedings leading to the Appealed Decision, presently challenged. In fact, the FIFA proceedings were solely meant to ensure the Appellant's commitment as a debtor towards the Player as a creditor and to sanction the Appellant for not complying with the DRC Decision of 27 May 2014. The proceedings before the FIFA Disciplinary Committee were therefore intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the FIFA Disciplinary Committee decision and of the appeal brought in this proceedings against it, regards only the existence of a disciplinary infringement by the Appellant and the power of FIFA to sanction it.

44. Therefore, the Player cannot be considered as "the passive subject" of the claim brought before this Panel by way of appeal against the Appealed Decision, as the Player's rights are not concerned by the Appealed Decision and the Player has no power whatsoever to sanction the Appellant's failure to comply with the original DRC Decision. It is hence clear that the Player does not have any standing to be sued and cannot as such be identified as a respondent in the present arbitration.

45. Against this background, the Panel concludes that the Player in these appeal proceedings has no standing to be sued, as he was neither a party to the first instance proceedings at the FIFA level, nor may he be considered to have any part of or influence over the disciplinary powers of FIFA, which is the subject of the Appeal in this matter. This results both from the application of fundamental principles under Swiss law as well as long standing CAS jurisprudence.

B. Analysing question 2

46. In order for the Panel to establish, whether there are sufficient legal grounds to set aside or amend the Appealed Decision, it is important that the Panel outlines the relevant legal and factual context in these appeal proceedings.

47. On 27 May 2014, FIFA Dispute Resolution Chamber ruled in favour of the First Respondent and held that the Appellant was obliged to pay the Player an amount of USD 750,000 for failing to comply with its payment obligations in an employment relationship with the Player. The FIFA Dispute Resolution Chamber's decision of 27 May 2014 was not appealed to the CAS in accordance with Article 67, par. 1, of the FIFA Statutes, and therefore became final and binding after the expiry of the 21-day deadline as from the time of notification on 21 July 2014.

48. Despite numerous attempts initiated both by the First Respondent and as of 2 September 2014 subsequently the FIFA Players' Statute and Governance Department, the awarded sum or any part hereof was not paid by the Appellant to the First Respondent.

49. The continued breach of the Appellant's payment obligations towards the First Respondent led to the submission of the case to the FIFA Disciplinary Committee. Against this background, the FIFA Disciplinary Committee on 4 September 2015 passed the Appealed Decision pronouncing the Appellant guilty of failing to comply with the decision passed by FIFA Dispute Resolution Chamber on 27 May 2014 being therefore in violation of Article 64 of the FDC.

50. Pursuant to this provision, anyone who fails to pay another person a sum of money in full or in part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision, or anyone who fails to comply with another decision passed by a body, or a committee or an instance of FIFA or CAS:

a) will be fined for failing to comply with a decision;

b) will be granted a final deadline by the judiciary bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;

c) if it is a club, it will be warned and notified that in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.

51. When assessing the Panel's scope of review according to Article R57 of the CAS Code, it is important to stress that these appeal proceedings solely concern the Appealed Decision of 4 September 2014, as the Panel has no jurisdiction to review or modify the FIFA Dispute Resolution Chamber's decision of 27 May 2014. The latter decision is final and binding upon expiry of the deadline for its appeal to the CAS and is therefore not in any way under review by the Panel in these proceedings.

52. Likewise, the Panel concurs with the opinion of the Second Respondent that the FDC did not allow the FIFA Disciplinary Committee to review or modify as to the substance of a previous decision, which is final and binding and thus has become enforceable. The Panel also concurs with the consequence hereof, namely that the FIFA Disciplinary Committee is not allowed to analyse a decision by the relevant body, *in casu* the FIFA Dispute Resolution Chamber, as to the substance, but has a sole task to analyse, if the debts are complied with in accordance with the final and binding decision of the relevant body. This interpretation of the scope of the FIFA Disciplinary Committee's review according to the FDC has been acknowledged in a number of CAS decisions cited by FIFA (cf. CAS 2006/A/1008, CAS 2008/A/1610, CAS 2013/A/3326 and CAS 2013/A/3380).

53. Thus, the scope of the Panel's review in accordance with Article R57 of the CAS Code in these proceedings can only concern the Appealed Decision itself and not the final and binding FIFA Dispute Resolution Chamber Decision of 27 May 2014.

54. Notwithstanding the Panel's power to review a case *de novo* according to Article R57 of the CAS Code, the Panel finds that the review and the power to amend a disciplinary decision of a FIFA judiciary body should only take place in cases, in which the Panel finds that the relevant FIFA judiciary body has exceeded the margin of discretion granted to it by the principle of association authority, i.e. only in cases, in which the FIFA judiciary body concerned must be held to have acted arbitrarily. However, this assumption is not present, if the Panel merely disagrees with a specific sanction. Only if the sanction concerned must be considered as evidently and grossly disproportionate to the offence, will the Panel have the authority to amend or set aside the decision.

55. This scope of a CAS Panel's review in disciplinary cases has been established through a substantial number of CAS cases (cf. CAS 2014/A/3562, par. 119; CAS 2009/A/1817 & 1844, par. 174; CAS 2004/A/690, par. 86; CAS 2005/A/830, par. 10.26; CAS 2006/A/1175, par. 90; CAS 2007/A/1217, par. 12.4; CAS 2009/A/1870, par. 125 and the advisory opinion CAS 2005/C/976 & 986, par. 143).

56. Having therefore established this limited scope of review in a disciplinary case like the present, the Panel will now examine the various submissions and arguments put forward by the Appellant in support of its request to set aside the Appealed Decision.

57. With respect to the Appellant's submission that the FIFA Disciplinary Committee has exercised a "double standard" in the application of penalties and deadlines in the present proceedings, the Panel finds no evidence for this accusation and rejects the Appellant's submission in this respect. The Panel's rejection of this argument is first and foremost based on the fact that the decision-making bodies of the FIFA are not in the first place obligated to comply with the *stare decisis* principles, as they decide each matter on a case-by-case basis. That being said, this Panel has been presented with compelling evidence that the FIFA Disciplinary Committee uniformly and constantly grants final deadlines of 30 days to debtors to settle their debts. Only in a very few and extreme situations has the FIFA Disciplinary Committee made exceptions to this rule and granted payment deadlines of up to 180 days.

58. It is the opinion of this Panel that the Appellant has not presented the Panel with any evidence in these proceedings to substantiate or even suggest that a "double standard" has been applied by the FIFA Disciplinary Committee. For the sake of completeness, the Panel also points out that to date it is approximately 3 ½ years since the amount USD 750,000 was due to the First Respondent and in addition hereto, almost a year has passed since the Appealed Decision was rendered, and no payment has yet been made by the Appellant.

59. As regards the amount of the fine of CHF 25,000 itself, the Appellant has alleged that this amount is too high and disproportionate. Likewise, the Panel must reject this allegation by the Appellant based on the evidence presented during these proceedings. The Panel is satisfactorily convinced that the fine in question in the amount of CHF 25,000 was both appropriate and proportionate in light of the amount outstanding debt of USD 750,000 plus interest. The Panel finds nothing to suggest that the treatment of the Appellant in relation to the amount of the fine is or has been contrary to the long-standing jurisprudence of the FIFA Disciplinary Committee in cases such as this. The Panel notes that the Appellant has not brought forward any evidence to suggest that the amount of the fine should be unfair, disproportionate or even arbitrarily high. The amount of the fine is approximately 3.3% of the amount due to the First Respondent and given the circumstances that no payments whatsoever has been made and no payment plans have been presented by the Appellant, the amount of the fine cannot and should not be set aside by this Panel.

60. As for the additional arguments and submissions that the Appellant has brought forward, such as that the Appellant has never refused to pay its debts, that the Appellant's former legal counsel has acted negligently and that the economic crisis in Angola has prevented the Appellant from making the payments to the First Respondent, the Panel is of the firm opinion that these submissions and allegations are totally unsubstantiated and must be rejected. In support hereof, the Panel emphasises that the Appellant neither before the FIFA Disciplinary Committee, nor during these CAS proceedings has presented the Panel with any written evidence or brought forward any witnesses in support of these allegations. According to Article 8 of the Swiss Civil Code and well-established CAS jurisprudence, the Appellant has

therefore not carried the burden of proof regarding the existence of these alleged facts.

VI. CONCLUSION

61. Based on the foregoing, the Panel concludes that the Appellant's requests for relief should be rejected and that the appealed FIFA decision should be upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Kabuscorp do Palanca on 28 October 2015 against the decision issued by the FIFA Disciplinary Committee on 4 September 2015 is dismissed.

2. The decision issued by the FIFA Disciplinary Committee on 4 September 2015 is confirmed.

3. (…).

4. (…).

5. (…).

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