Arbitration CAS 2016/A/4580 Botafogo de Futebol e Regatas v. Sharjah FC, award of 14 December 2016

Panel: Mr Fabio Iudica (Italy), President; Mr Clifford Hendel (USA); Mr Mark Hovell (United Kingdom)

Football
Refund by the former club of a transfer fee paid by the new club
Discretion of a CAS panel to exclude new evidence
Burden of proof

1. **Discretion of a CAS panel to exclude evidence according to article R57 para. 3 of the CAS Code shall be used with restraint in order to preserve the fundamental *de novo* character of the review by the CAS. Such a cautiousness is particularly justified considering the panel's primary obligation to respect the parties' right to be heard. Moreover, from the very wording of the provision (*"the Panel has discretion"*) it must be understood that this is not a limitation imposed on the panel, but rather the right not to admit systematically all evidence filed by the parties. More significantly, it has been supported that the rationale of Article R57 para 3 of the Code is to avoid evidence being submitted in an abusive way and/or retained by the parties in bad faith in order to bring it for the first time before the CAS. Accordingly, full review by the CAS should only be limited in exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence. Besides that, traditionally, the debate between the full power of review and the limitation of the admission of evidence is about finding the right balance between the search for a judicial truth and the economy of the procedure.**

2. **According to the general rules and principles of law, facts pleaded have to be proven by those who plead them, i.e. the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proven by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. This principle is also stated at Article 8 of the Swiss Civil Code. Any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites included in the concept of 'burden of proof' are (i) the 'burden of persuasion' and (ii) the 'burden of production of the proof'. In order to fulfil its burden of proof, a party must, therefore, provide the panel with all relevant evidence that it holds, and, with reference thereto, convince the panel that the facts it pleads are true, accurate and produce the consequences envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.**

I. INTRODUCTION

1. This appeal is brought by Botafogo de Futebol e Regatas against the decision rendered by the Single Judge of the Players' Status Committee (the "Single Judge") of the Fédération Internationale de Football Association ("FIFA") on 16 March 2016 with regard to a contractual dispute between Botafogo de Futebol e Regatas and Sharjah FC in relation to the transfer of the player F. (the "Appealed Decision").

II. PARTIES

2. Botafogo de Futebol e Regatas is a professional football club based in Rio de Janeiro, Brazil, competing in the "Campeonato Brasileiro Série A", the Brazilian First League, affiliated with the Confederação Brasileira de Futebol (the "CBF"), which in turn is affiliated with FIFA (the "Appellant" or "Botafogo").

3. Sharjah FC is a professional football club with registered office in Sharjah, United Arab Emirates, competing in the UAE Arabian Gulf League, affiliated with the United Arab Emirates Football Association (the "UAEFA"), which in turn is affiliated with FIFA (the "Respondent" or "Sharjah").

(Botafogo and Sharjah are hereinafter jointly referred to as the "Parties").

III. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' oral and written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 1 July 2013, the Parties concluded an agreement for the transfer of the player F. from Botafogo to Sharjah (the "Transfer Agreement").

6. Pursuant to clause 2.1, in combination with clause 2.4 and clause 2.6 of the Transfer Agreement, Sharjah undertook to pay to Botafogo a transfer fee amounting to USD 323,830.00 to be credited to the bank account of Botafogo at Banco Modal by 18 July 2013.

7. On 22 July 2013, Sharjah proceeded to make the payment in compliance with its obligations under the Transfer Agreement by means of a wire transfer from Standard Chartered Bank to Banco Modal through Al Ansari Exchange with reference N. 4102023006274 (the "Transaction").

8. According to an international interbank message sent to Standard Chartered Bank on 28 February 2014 with reference to the Transaction, Banco Modal instructed the return of the

relevant funds as per request of Botafogo: *"Beneficiary: Botafogo Futebol Regatas, Ordering: Alanaeaa, Abu Dhabi AE. Ref: OGB Ref 4102023006274. Please return funds as the beneficiary request. Warrant in the debit our account"*.

9. By email communication on 21 March 2014, Botafogo informed Sharjah that due to some alleged (unspecified) problems in relation to the credit of the wire transfer to its bank account, the relevant sum had been returned to the sender: *"By this e-mail, BOTAFOGO DE FUTEBOL E REGATAS, regarding the value agreed with SHARJAH FC, as a transfer fee, for the definitive transfer of the player F., declares that, because of some problems here in Brazil with the reception of the value, the amount sent by SHARJAH FC was reversed to UAE. In this way, we are solving this issue and, as soon as possible, BOTAFOGO will tell you how to proceed, so that the value can be, in fact, received by BOTAFOGO"*.

10. In this respect, the Financial Director of Botafogo confirmed that *"Botafogo de Futebol e Regatas received a payment order in the amount of UDS 323,830, sent by Sharjah…. However, such amount has been never integrated in Brazilian Reais in any banking account of Botafogo de Futebol e Regatas. In order to release the funds, making the conversion to Brazilian Reais and receiving it in the banking account, we should file relevant documentation with Banco Modal SA in Brazil. Such documentation has been never presented to the bank and the payment order remained untouched for 8 months. Due to this fact, on 28 February 2014 the amount of USD 323,830 was returned to the banking account of Sharjah with Al Ansari Exchange"*.

11. According to the correspondence between the Parties, on 9 December 2014, Sharjah apparently requested Botafogo to be provided with a written confirmation of the Appellant's request to Banco Modal to return the wire transfer to Sharjah: *"Referring to the e-mail sent from us on 7/12/2014, please provide us as soon copy of the request from your club to your bank to refund the Transfer fee of player F. in order to refund to UAE"*.

12. On the same date, in reply to Sharjah's abovementioned request, Botafogo sent an e-mail to Sharjah with an attached (although unspecified) document.

13. On 16 June 2015, Botafogo lodged a claim in front of FIFA against Sharjah requesting payment of the amount of USD 323,830 corresponding to the transfer fee, plus 5% interest as from 18 July 2013, based on the fact that the relevant sum had been allegedly returned to Sharjah.

14. During the FIFA proceedings, Botafogo submitted a copy of an international interbank message on 22 September 2015 with regard to the Transaction, by which Standard Chartered Bank (an intermediary bank) informed Banco Modal that *"we have returned the subject pymt to the originating bank, Alanaeaa* [Al Ansari Exchange's swift code], *on 3-Mar-14 for 323,568.50 under ref CA 00100005115772. Pls contact originating bank directly for further inquiry on the subject matter"*.

15. In reply to Botafogo's claim, Sharjah argued that while the Transaction was actually successful, and therefore it was undoubted that Botafogo received the transfer fee in its bank account, on the contrary, there was no evidence that the relevant sum was actually returned to Sharjah since Al Ansari Exchange is a third party having no legal relationship with it. In any event, Sharjah maintained it never received the money back in its bank account.

16. On 16 March 2016, the FIFA's Single Judged rendered the Appealed Decision by which the claim lodged by Botafogo was rejected. In fact, the Single Judge found that there was no evidence in the file that the relevant transfer compensation was eventually refunded to and received by Sharjah and that, by refunding the money to Al Ansari Exchange, the relevant amount actually came back in the possession of Sharjah.

17. The grounds of the Appealed Decision were served by facsimile to the Parties on 11 April 2016.

18. The grounds of the Appealed Decision can be summarized as follows:

- As a preliminarily point, the Single Judge established that he was competent to deal with the present dispute based on the provision of article 3 para 1 and 2 of the Rules Governing the Procedures of the Players' Status Committee (the "Procedural Rules") in conjunction with article 23 para 1 and 3, as well as article 22 lit. f) of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations"), since it concerns a dispute between clubs affiliated to different associations.

- With regard to the merits, the Single Judge noted that Botafogo maintained that it was entitled to receive transfer compensation from Sharjah in the amount of USD 323,830.00 under the Transfer Agreement since the relevant payment initiated by Sharjah in July 2013 was never credited to its bank account due to "administrative problems" and it was actually returned to Sharjah in February 2014 by bank transfer to Al Ansari Exchange Company.

- On the other side, Sharjah objected that the relevant payment was indeed transferred to Botafogo's bank account and that it never received any refund from Botafogo. In this respect, Sharjah argued that Al Ansari Exchange Company is a simple currency exchange company and had no legal relation with it.

- Therefore, the Single Judge observed that the question to be answered was whether or not Sharjah received in return the relevant amount corresponding to the transfer compensation in February 2014.

- In this respect, it was undisputed that, in July 2013, Sharjah duly complied with its contractual obligations by initiating the payment to the bank account of Botafogo.

- However, the reason why the relevant bank transfer was allegedly not completed was due to a *"lack of action on the side of Botafogo"*, as resulted from the statement by the Financial Director of Botafogo confirming that the club had not filed certain documentation which was allegedly required in order for the sum to be credited to the bank account of the recipient.

- As a consequence, the Single Judge found that Botafogo was at least responsible for the fact that the amount was not eventually "integrated" in its bank account, and, moreover, it was the burden of Botafogo to demonstrate that the payment of the

transfer compensation initiated by Sharjah in July 2013 was returned to and received by Sharjah in February 2014.

- In this regard, taking into consideration all the documents in the file, the Single Judge concluded that Botafogo had failed to prove, beyond doubt, that the relevant transfer compensation was eventually refunded to, and received by Sharjah.

- In particular, the Single Judge observed that Botafogo provided no evidence confirming that Al Ansari Exchange Company actually received the transfer of the money ordered by Banco Modal through Standard Chartered Bank: *"In particular, in view of the fact that in the <answer> of Standard Chartered Bank dated 22 September 2015, said bank confirmed: <pls contact originating bank directly for further inquiry on the subject matter>"*.

- Furthermore, the Single Judge held that it was equally not proven that Al Ansari Exchange Company was indeed the official bank of the Respondent and that by refunding the money to Al Ansari Exchange Company the relevant transfer compensation actually came back in the possession of Sharjah.

- As a consequence, the claim filed by Botafogo was rejected.

19. After the Appealed Decision was rendered, other new facts emerged, and the Appellant brought them before the CAS in the present proceedings.

20. On 20 April 2016, Habib American Bank, a correspondent bank of Al Ansari Exchange, confirmed to Banco Modal through an international interbank message that the relevant sum had been returned to Al Ansari Exchange: *"Kindly note we have returned the subject pymt to the originating institution, Alanaeaa, on 3-Mar-14, for 323,568.50 Ref CA00100005115772. Pls contact them directly for further inquiry on the subject matter. We close our files"*.

21. On 25 April 2016, by means of an international interbank message with reference to the Transaction, Al Ansari Exchange informed Banco Modal of the following: *"We confirm that we have received the return of funds of the above mentioned transaction in our account and have refunded it to the remitter on 31 March 2014"*.

IV. PROCEEDINGS BEFORE THE CAS

22. On 2 May 2016, Botafogo filed a statement of appeal before the Court of Arbitration for Sport (the "CAS") against Sharjah with respect to the Appealed Decision in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "Code"). The Appellant nominated Mr Clifford J. Hendel as an arbitrator and chose English as the language of the present arbitration. The appeal was not directed at FIFA.

23. On 11 May 2016, the Appellant filed its appeal brief in accordance with Article R51 of the Code.

24. On 18 May 2016, the Respondent informed the CAS Court Office that it agreed with the Appellant's choice of language and nominated Mr Mark A. Hovell as an arbitrator in accordance with Article R53 of the Code.

25. On 23 May 2016, due to the untimely nomination by the Respondent of its arbitrator, the CAS Court Office invited the Appellant to state within 3 days whether it objected to such nomination.

26. On 24 May 2016, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings.

27. On 31 May 2016, lacking any objection by the Appellant within the prescribed deadline, the CAS Court Office informed the Parties that the nomination of Mr Mark A. Hovell had been confirmed.

28. On 29 June 2016, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division informed the Parties that the Panel appointed to decide the present dispute was constituted as follows:

President: Mr Fabio Iudica, Attorney-at-law in Milan, Italy

Arbitrators: Mr Clifford J. Hendel, Attorney-at-law in Madrid, Spain
Mr Mark A. Hovell, Solicitor in Manchester, United Kingdom

29. In accordance with Article R55 of the Code, the Respondent filed its answer on 16 July 2016.

30. On 19 July 2016, the CAS Court Office invited the Parties to inform the CAS whether they preferred a hearing to be held in the present arbitration proceedings or for the Panel to issue an award based solely on the Parties' written submissions.

31. On 19 and 22 July 2016, the Appellant and the Respondent, respectively, informed the CAS Court Office that they preferred a hearing to be held in the present arbitration proceedings.

32. On 2 and 9 September 2016, the Respondent and Appellant, respectively, signed and returned to the CAS Court Office a duly signed copy of the Order of Procedure. With the signature of the Order of Procedure, the Parties confirmed the jurisdiction of the CAS over the present dispute.

33. On 21 September 2016, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the Panel, nor to the jurisdiction of the CAS.

34. In addition to the Panel and Mr Jose Luis Andrade, Counsel to the CAS, the following persons attended the hearing:

<u>For the Appellant</u>
Mr Eduardo Carlezzo

For the Respondent
Mr Luca Smacchia

35. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their rights to be heard and treated equally were respected.

V. SUBMISSIONS OF THE PARTIES

36. The following outline is a summary of the main positions of the Appellant and the Respondent which the Panel considers relevant to decide the present dispute and does not comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Appellant and the Respondent, even if no explicit reference has been made in what follows. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. Appellant's Submissions and Requests for Relief

37. The Appellant made a number of submissions in its statement of appeal and in its appeal brief which can be summarized as follows.

38. Although the Appellant basically recognized that on 22 July 2013 Sharjah made the payment due under the Transfer Agreement, it argued that the relevant amount was subsequently returned to the Respondent which therefore, has allegedly still not discharged its obligation to pay the transfer fee.

39. According to the Appellant, the refund was executed upon request of Botafogo to Banco Modal, by means of a wire transfer to the "Originating Institution", i.e. Al Ansari Exchange, through the intermediary services of Standard Chartered Bank and Habib Bank, each single passage of the return process being demonstrated by the relevant international interbank messages produced by Botafogo.

40. In particular, the Appellant contended that according to an international interbank message from Al Ansari to Banco Modal dated 25 April 2016, it is demonstrated that the amount transferred by Sharjah to Botafogo on 22 July 2013, was actually repaid on 31 March 2014: *"Dear Sir, with reference to transaction No. 4102023006274 for USD323613.50 FAO Botafogo Futebol Regatas we confirm that we have received the return of funds of the above mentioned transaction in our account and have refunded it to the remitter on 31 March 2014"*.

41. As a further confirmation, the Appellant also relied upon a written statement by the Director of Banco Modal, dated 3 May 2016 which read as follows: *"We refer to our letter dated as of September 16, 2015 in which we explained how we received and returned the amount of USD 323,830.00 to Sharjah Football Club, through Al Ansari Exchange. In addition to that statement, we would like to add that Banco Modal S.A., through swift messages, received on April 20, 2016, a reply from the Habib American Bank, the intermediary bank of Al Ansari Exchange, saying that it returned the funds to Al*

Ansari Exchange on March 03, 2016. Additionally, we also received an answer, on April 25, 2016, by swift message, from Al Ansari Exchange, informing that they returned the amount to Sharjah Football Club on 31 March 2014".

42. Since Al Ansari Exchange was the intermediary bank through which Sharjah ordered the payment in favour of Botafogo on 22 July 2013, and also considering that the message confirming the final refund to Sharjah referred to the number of the Transaction (i.e. No. 4102023006274), it was undisputable that the relevant amount was finally received by the Respondent.

43. In this respect, the Appellant underlined that international interbank messages ("swift") are the mandatory communication between banks in relation to payment orders and, as such, they constitute the best evidence in terms of international wire transfers.

44. With regard to the Respondent's allegation that the money was refunded to a third party, having no legal relationship with Sharjah, the Appellant objected that according to the official information contained in the "swift" messages, it was undisputable that the refund was made to Al Ansari Exchange, which was the original "Ordering Institution" of the Transaction.

45. In consideration of the foregoing, the grounds of the Appealed Decision according to which there was a lack of evidence that the money was actually refunded to Sharjah were no longer valid in the light of the new evidence produced by the Appellant and namely in the light of the "swift" message on 25 April 2016 by which Al Ansari Exchange acknowledged having returned the sums to the original sender.

46. As a consequence, it results that Sharjah is retaining money (enriching itself) without just cause to the damage of the Appellant; therefore, also based on article 62 of the Swiss Code of Obligations, the restitution of USD 323,830.00 is well grounded.

47. In its appeal brief, the Appellant submitted the following requests for relief:

a) Accept this Statement of Appeal filed by Botafogo de Futebol e Regatas against the decision of FIFA passed on 16 March 2016;

b) Set aside the decision of FIFA, condemning Sharjah FC to pay the total transfer compensation due to Botafogo de Futebol e Regatas, in the amount of USD 323,830 (three hundred and twenty-three thousand, eight hundred and thirty American Dollars), in accordance with the transfer agreement signed between the parties, plus an interest rate of 5% per year calculated since the date in which the payment should have been concluded, which is 18 July 2013;

c) Condemn the Respondent to pay CHF 15,000 for the legal expenses of the Appellant, as well as all the expenses incurred by the Appellant during these procedures, and finally, paying the totality of the advance of costs and FIFA's costs.

B. The Respondent's Submissions and Requests for Relief

48. The position of the Respondent is set forth in its answer and can be summarized as follows.

49. Sharjah basically argued that, after having made regular payment of the transfer compensation, it never received any refund from Botafogo in its bank account and, in any case, there was no compelling document filed by Botafogo demonstrating that Sharjah actually received the money back to its bank account.

50. More specifically, the Respondent contended that: a) the refund of the money was unrequested and in any case, Botafogo informed Sharjah that it had ordered the return of the relevant sum without any prior notice nor any reasonable justification therefor; b) contrary to what the Appellant argues, the Transaction was successful and therefore the money was credited to the Appellant's bank account and generated interest; c) the sum was returned to a third party (Al Ansari Exchange) having no legal relationship with the Respondent; d) in addition, Al Ansari Exchange is not a bank but an agency providing money transfer services; and e) Botafogo should have contacted Sharjah before ordering the relevant refund in order to enquire about the way and terms for reimbursement.

51. The present appeal is completely groundless and not supported by conclusive evidence notwithstanding the burden of proof which is incumbent on Botafogo, as was correctly established by the Single Judge. In this respect, the Appellant maintained that the CAS shall apply the same standard of proof considered in the first instance, which is to say that the Appellant shall discharge the burden of proof beyond doubt.

52. With regard to the new documentation submitted by the Appellant in the present procedure, the Respondent contested that *"a written message sent by a third subject not party in the present dispute to another subject, not present in the proceedings, that has not been confirmed by anyone and it is not signed has no legal value and it is not a conclusive evidence allowing to assess that a transfer of money effectively occurred"*. In addition, some documents of the Appellant were contradictory to one another and moreover, with reference to Exhibits n. 5, 6 and the second part of Exhibit n. 9, the Respondent asserted that the Panel should exclude them pursuant to Article R57 of the Code since they could reasonably have been discovered by the Appellant beforehand.

53. Moreover, the Respondent maintained that Botafogo was in bad faith when it ordered the return of the funds. In this respect, Sharjah submitted several documents showing that the Appellant had been severely indebted, had entered into an agreement with creditors under the control of the Tribunal of Rio de Janeiro for the repayment of its debts which Botafogo eventually was no longer able to fulfil. Moreover, the Appellant apparently used to hide its revenues in order to escape its monthly obligations toward the creditors and it was also found that it tried to conceal the incomes of a controlling company.

54. In this context, the Respondent emphasized that on 12 June 2013, Botafogo was served with a writ of attachment issued by the *"11 Vara Federal de Execuçâo Fiscal do Rio de Janeiro"* ordering the club, in the event it would have transferred the player F., to use the relevant compensation to pay its debts: *"Botafogo is ordered to deposit at the Bank account of the Tribunal the sum deriving from the negotiation of the abovementioned transfer up to the amount of […] providing with a signed copy of the contract of transfer of the federative rights of the player"*.

55. Accordingly, Banco Modal also received the order from the competent Tribunal to freeze the Appellant's bank account.

56. As a consequence, the Respondent stressed the fact that despite the excuses adduced by Botafogo as impediment to the regular credit of the Transaction to its bank account, the reason why Botafogo ordered the return of the sum was the intention to elude the judicial order with the view to keep these funds from its creditors, which fact finally resulted in an infringement of Brazilian civil law and criminal law by the Appellant.

57. In any event, and irrespective of the above, the Appellant unilaterally decided to refund the money without any previous agreement with (or even notice to) Sharjah, thus taking the relevant risk that the refund would not be successful, as was the present case.

58. From a legal point of view, the Respondent further objected that a) the Appellant's claim cannot be grounded on article 12bis of the FIFA Regulations, since the request for payment was not founded on a contract; b) Botafogo was not even entitled to restitution since, according to article 66 of the Swiss Code of Obligations, which is also similar to Brazilian law, *"no right of restitution exists in respect of anything given with a view to producing an unlawful or immoral outcome"*; c) in any case, the claim for restitution for unjust enrichment is time-barred according to article 62 of the Swiss Code of Obligations since Botafogo returned the money on February 2014 but lodged its claim before FIFA in June 2015; and d) finally, the Appellant's claim has no basis in any of the provisions of the FIFA Regulations.

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

i. To confirm the decision passed by the Single Judge of the FIFA Player's Status Committee on 16 March 2016, dismissing Botafogo's appeal.

ii. To condemn Botafogo to pay all the arbitration costs as well as to pay a contribution towards Sharjah equal to CHF 20,000.00 or to the sum deemed opportune by the Panel, for the expenses and legal costs in relation to the present procedure.

VI. JURISDICTION

60. The Appellant relied on article 67, para 1 of the FIFA Statutes as conferring jurisdiction to the CAS while the Respondent made reference to both article 67 of the FIFA Statutes and Article R47 of the Code, which reads as follows: *"An Appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body"*.

61. The Panel further observes that according to Clause 7.2 of the Transfer Agreement, the Parties agreed as follows: *"Any and all appeals against the decision of that body of FIFA shall be instituted and prosecuted in accordance with the regulations in force at the Court of Arbitration for Sport, based in Switzerland"*.

62. The signature of the Order of Procedure confirmed that the jurisdiction of the CAS in the present case was not disputed. Moreover, at the hearing the Parties expressly reiterated that CAS has jurisdiction over the present dispute.

63. Accordingly, the Panel is satisfied that it has jurisdiction to hear the present case.

64. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

VII. ADMISSIBILITY OF THE APPEAL

65. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".*

66. More specifically, the Panel notes that article 67 para 1 of the FIFA Statutes determines as follows: *"Appeals 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".*

67. The Panel notes that the FIFA DRC rendered the Appealed Decision on 16 March 2016 and that the grounds of the Appealed Decision were notified to the Parties on 11 April 2016. Considering that the Appellant filed its statement of appeal on 2 May 2016, i.e. within the deadline of 21 days set in the FIFA Statutes, the Panel is satisfied that the present appeal was filed timely and is therefore admissible.

VIII. APPLICABLE LAW

68. Article R58 of the Code provides the following:

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.

69. Article 66 para 2 of the FIFA Statutes so 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.

70. In their written submissions, the Parties referred to FIFA Regulations and to Swiss law as the applicable law in the present proceedings.

71. In consideration of the above and pursuant to Article R58 of the Code, the Panel holds that the present dispute shall be decided principally according to FIFA Regulations with Swiss law applying subsidiarily.

72. With regard to the applicability *ratione temporis* of the relevant FIFA Regulations, the Panel holds that the present case is governed by the 2015 edition, given that the Player lodged his claim with FIFA on 16 June 2015.

IX. MERITS

a. Preliminary Issues

73. Before addressing the merits of the present case, the Panel preliminarily notes that at the hearing, the Respondent raised an objection to the competence of FIFA to adjudicate the present dispute in the first instance.

74. According to the Respondent, the Appellant's claim is not founded on a contract and, as a consequence, article 12bis of the FIFA Regulations would not be applicable to the present case.

75. The Panel is not persuaded by the Respondent's argument since it believes that the request by Botafogo stems from the Transfer Agreement; the fact that Botafogo actually returned the amount which was transferred by Sharjah for some alleged difficulties in crediting the money has indeed created the conditions for the delay of the Respondent's performance, but does not change the substance of the Respondent's obligation as stipulated in the relevant contract. Therefore, the Panel holds that the Appellant's request still relates to the fulfilment by the Respondent of the obligation to pay the transfer compensation.

76. Irrespective of the above, the Panel also notes that according to article 22 lit. f) and article 23 of the FIFA Regulations, the FIFA Single Judge would be competent in any case.

77. As a second preliminary issue, the Panel notes that the Respondent requested that Exhibits 5 and 6, as well as the second part of Exhibit 9 submitted by the Appellant, be excluded from the present proceedings pursuant to Article R57 of the Code since it alleged that they could reasonably have been discovered by the Appellant beforehand.

78. The Panel reminds that the relevant part of Article R57 para 3 of the Code reads as follows: *"The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered".*

79. In this context, the Panel first observes that according to CAS legal doctrine, such a provision shall be used with restraint in order to preserve the fundamental *de novo* character of the review by the CAS (see MAVROMATIS/REEB, Commentary on the CAS Code, R57, page 519). Such a cautiousness is particularly justified considering the Panel's primary obligation to respect the parties' right to be heard.

80. Moreover, from the very wording of the provision (*"the Panel has discretion"*) it must be understood that this is not a limitation imposed on the Panel, but rather the right not to admit systematically all evidence filed by the parties (see Commentary on the CAS Code, *ibidem*).

81. More significantly, it has been supported that the rationale of Article R57 para 3 of the Code is to avoid evidence being submitted in an abusive way and/or retained by the parties in bad faith in order to bring it for the first time before the CAS. Accordingly, full review by the CAS should only be limited in exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence. Besides that, traditionally, the debate between the full power of review and the limitation of the admission of evidence is about finding the right balance between the search for a judicial truth and the economy of the procedure (see Commentary on the CAS Code, *ibidem*).

82. With specific regard to the documents objected to by the Respondent, the Panel notes that Exhibit 5 corresponds to a swift message from Habib American Bank to Banco Modal dated 20 April 2016 confirming that the relevant sum had been returned to Al Ansari Exchange on 3 March 2014; while Exhibit 6 is the swift message from Al Ansari Exchange to Banco Modal dated 25 April 2016 confirming that the Transaction had been refunded to the "remitter" on 31 March 2014, and is dated 25 April 2016. The second part of Exhibit 9 is the communication by the Director of Banco Modal dated 3 May 2016 reporting the relevant circumstances referred to under the above mentioned swift messages.

83. In this respect, the Panel believes that, irrespective of the date in which the relevant messages were apparently issued by the corresponding bank institution (i.e. 20 and 25 April, and 3 May 2016), there is no reasonable element suggesting that Botafogo submitted the documents concerned in an abusive way or in bad faith and on the contrary, it is hard to believe that the Appellant would have any interest in retaining these documents if they were in its possession at an earlier stage.

84. Therefore, within its discretionary powers in accordance with Article R57 of the Code, the Panel considers that Exhibits 5 and 6 and the second part of Exhibit 9 submitted by the Appellant are admissible.

b. Substantive Issues

85. The foregoing being established, the Panel addresses the merits of the present case.

86. In this respect, the Panel observes that it is undisputed between the Parties that on 22 July 2013 Sharjah duly paid the transfer compensation to Botafogo in compliance with its obligations under the Transfer Agreement and that, several months later, Botafogo unilaterally instructed Banco Modal to refund the money, without any previous notice or agreement with the Respondent.

87. Moreover, the Panel considers that the Respondent implicitly recognizes the fact that Botafogo returned the relevant sum to Al Ansari Exchange.

88. What it contested by the Respondent is that Al Ansari Exchange is a third party having no legal relationship (i.e. ownership) with Sharjah, that Sharjah has no bank account at Al Ansari Exchange, and that, as a consequence, the fact that the Appellant allegedly returned the money to Al Ansari Exchange does not demonstrate that the relevant amount was finally received by Sharjah.

89. According to the Respondent, the documents filed by Botafogo (even assuming they were admissible), are not capable to satisfy the applicable standard of proof since they are contradictory and inconclusive.

90. Therefore, according to the Respondent, Botafogo still failed to discharge its burden of proof beyond doubt and its claim shall be rejected.

91. In this regard, the Panel reminds that consistent with the well-established CAS jurisprudence:

According to the general rules and principles of law, facts pleaded have to be proven by those who plead them, i.e. the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proven by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. This principle is also stated in the Swiss Civil Code. In accordance with Article 8 of the Swiss Civil Code: Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.

It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites include the concept of 'burden of proof' are (i) the 'burden of persuasion' and (ii) the 'burden of production of the proof'. In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequences envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party" (CAS 2015/A/309; CAS 2007/A/1380, with further references to CAS 2005/A/968 and CAS 2004/A/730).

92. In consideration of the above, the Panel believes that the document submitted by the Appellant under Exhibit 6, which was not included in the FIFA file, is crucial for the purpose of deciding the present case.

93. As mentioned above, on 25 April 2016, by means of an international interbank message, Al Ansari Exchange informed Banco Modal of the following: *"Dear Sir, with reference to the transaction No. 4102023006274 for USD 323,613.50 FAO Botafogo Futebol Regatas. We confirm that we have received the return of funds of the above mentioned transaction in our account and have refunded it to the remitter on 31 March 2014".*

94. Considering that the reference number is the same of the Transaction, and also taking into consideration all the previous steps of the path from Banco Modal to Al Ansari Exchange, the Panel is persuaded that the relevant document demonstrates that, after receiving the

money back from Banco Modal through the intermediation of Standard Chartered Bank, Al Ansari Exchange finally transferred the amount to the "remitter", i.e. the Respondent's bank account.

95. Pursuant to the rules governing the burden of proof, as mentioned above, it was the burden of the Respondent to demonstrate any possible existing facts preventing or excluding the efficacy of the fact proved by the Appellant.

96. On the contrary, the Respondent merely insisted in arguing that the Appellant failed to provide adequate proof of the alleged fact, but actually refrained from assisting the Panel in the search for truth. In this regard, it is noteworthy that Sharjah not only omitted to provide any counter-evidence in order to demonstrate that it never received the relevant amount, in contrast with the Appellant's documentation, but also the Respondent's legal representative, Mr Ehab Mohamed Sale renounced his right to participate in the hearing and finally it was even impossible for the Panel to reach him on the phone (and, accordingly, impossible for the Appellant's counsel to cross-examine him with respect to his witness statement).

97. In view of the foregoing, the Panel is satisfied that, according to the documentation in the file, the legitimacy or validity of which the Respondent failed to duly rebut, the amount paid by Sharjah on 22 July 2013 as transfer compensation pursuant to the Transfer Agreement was refunded to it on 31 March 2014. In this respect, the Panel also notes that the reasons why Botafogo ordered the return of the Transaction, as well as the way in which the amount was refunded, are irrelevant with respect to the decision of the present case.

98. With regard to the Appellant's request for payment of the legal interest accrued on the relevant amount, in accordance with article 104 of the Swiss Code of Obligations, the Panel holds that, since the delay was actually caused by the conduct of the creditor itself, interest at the rate of 5% per annum shall accrue from the date in which the present dispute was submitted to FIFA (i.e. 16 June 2015) and not from the date of 18 July 2013, as requested by the Appellant.

99. Therefore, the Panel establishes that the claim filed by Botafogo shall be accordingly upheld and the Appealed Decision shall consequently be set aside.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Botafogo de Futebol e Regatas against Sharjah FC is partially upheld.

2. The decision rendered by the Single Judge of FIFA Players' Status Committee on 16 March 2016 is set aside.

3. Sharjah FC is ordered to pay to Botafogo de Futebol e Regatas the amount of USD 323,830.00 as compensation for the transfer of the player F. together with interest at the rate of 5% per annum as of 16 June 2015;

4. (…).

5. (…).

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