Arbitration CAS 2017/A/4981 Clube Atlético Mineiro v. Udinese Calcio SpA, award of 10 August 2017

Panel: Mr Alexander McLin (Switzerland), Sole Arbitrator

Football
Failure by a club to pay part of a transfer fee
Duty to comply with payment obligations
Lack of legal basis to reallocate the costs imposed by FIFA

1. **The utmost obligation of a debtor is to duly transfer the amount to the bank account provided by the creditor, and, therefore it is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation. If a club, despite additional evidence (from additional payments) that it had all the necessary banking information in its possession, continues to proffer the same disingenuous excuse for non-payment i.e. lack of communication of the creditor's banking details, one can only conclude that the club continues, in utter bad faith and entirely intentionally, to seek to avoid its very real and established payment obligations under the contract.**

2. **If FIFA is not a party to the proceedings, requests for relief directed at FIFA, including the claim regarding the awarding of costs, cannot be entertained. In any case, it is not for the CAS to reallocate the costs of the proceedings before a previous instance.**

I. PARTIES

1. Clube Atletico Mineiro ("CAM", or the "Appellant"), having its principal place of business at Av. Olegário Maciel 1516, Belo Horizonte, is a Brazilian football club affiliated with the Brazilian Football Confederation, itself a member of FIFA (Fédération Internationale de Football Association, the international governing body for the sport of football).

2. Udinese Calcio S.p.A., ("Udinese" or the "Respondent"), having its principal place of business at Viale A. e A. Candolini 2, 33100 Udine, is an Italian football club affiliated with the Italian Football Federation, itself a member of FIFA.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings 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, he refers in his Award only to the submissions and evidence it he considers necessary to explain his reasoning.

4. On 1 May 2014, CAM and Udinese signed a transfer agreement (the "Transfer Agreement") regarding the transfer of M., a Brazilian professional football player (the "Player"), from Udinese to CAM.

5. Pursuant to Article 3 of the Transfer Agreement, CAM undertook to pay to Udinese the total amount of EUR 3,315,000 payable in three equal instalments of EUR 830,000 and one instalment of EUR 825,000 on 15 January 2015, 15 July 2015, 15 January 2016, and on 15 July 2016, respectively.

6. Article 6 of the Transfer Agreement stated as follows:

"All sums payable under this contract will be paid by the Brazilian club on the due dates for payment by bank transfer to the account that the Italian club will communicate in writing".

7. On 5 January 2015, Udinese sent to CAM an invoice dated 22 August 2014 with its bank details with respect to the first instalment payment. On 23 January 2015, Udinese reminded CAM that the first instalment was due and requested the payment of EUR 830,000 plus 10 per cent interest as from 16 January 2015.

8. In several exchanges between the Parties, CAM informed Udinese that it could not process the payment of the first instalment due to financial difficulties. As a result, CAM offered to adapt and reschedule the payments owed to CAM.

9. On 17 June 2015, CAM and Udinese signed and concluded an amendment to the Transfer Agreement (the "Amendment"). Pursuant to Article 2 of the Amendment, CAM and Udinese agreed to reschedule the payment of the first two instalments of EUR 830,000. Accordingly, CAM and Udinese agreed to replace these by an aggregate amount of EUR 1,800,000 payable in monthly instalments of EUR 150,000 due on the last day of each month as of July 2015 and through June 2016. Article 3 of the Amendment provides that if any one payment is delayed or partially payed, the remainder of all rescheduled instalments automatically become immediately due and payable.

10. Having only received payment of the first two monthly instalments as agreed under the Amendment, Udinese requested, in a letter dated 29 October 2015, immediate payment of the rescheduled instalments which were outstanding under the Amendment.

11. On 27 November 2015, Udinese notified CAM that the latter had failed to pay the monthly instalments which had become due in September and October 2015 and indicated that, pursuant to the acceleration clause in the Amendment, CAM should now pay the full amount provided for in the Amendment; *i.e.* EUR 1,500,000.

12. On 29 December 2015, thus several months after the first rescheduled instalment was due, CAM informed Udinese that it had processed a further payment of EUR 150,000. No additional payment was made with respect to the amounts due to Udinese.

13. To claim payment of the first two instalments under the Transfer Agreement, Udinese initiated proceedings before the Single Judge of the FIFA Players' Status Committee (the "Single Judge"). In a decision dated 26 April 2016, (the "Single Judge's First Decision" or the "Appealed Decision"), the Single Judge ruled that CAM had to pay Udinese (i) EUR 1,350,000 as well as interest at a rate of 5 per cent per year as from 1 October 2015 until the date of effective payment and (ii) interest at a rate of 5 per cent per year on the amount of EUR 150,000 as from 1 October 2015 until 29 December 2015. The Single Judge's First Decision is the subject of the instant appeal before CAS.

14. On 23 May 2016, Udinese sent CAM the account number on which the remittance was to be made. However, CAM did not effect any payments, and the amounts ordered to be paid by the Single Judge remained unpaid.

15. On 15 January 2016, the third instalment of EUR 830,000 under the Transfer Agreement matured. In a telefax dated 21 March 2016, Udinese sent to CAM a corresponding payment reminder, to no avail.

16. Udinese then initiated a second procedure in front of the Single Judge in order to recover the amount corresponding to the third instalment.

17. On 13 June 2016, the Single Judge issued a decision regarding the third instalment (the "Single Judge's Second Decision"), ruling that CAM had to pay Udinese EUR 830,000 within 30 days of its decision, as well as interest at 5 per cent per year from 16 January 2016 until the date of effective payment. The Single Judge also fined CAM CHF 30,000, and directed CAM to pay the costs of the proceedings amounting to CHF 20,000. He also directed Udinese to inform CAM of the account number to which remittances were to be made.

18. On 24 June 2016, FIFA notified this decision to the parties, and Udinese sent CAM the account number to which remittance was to be made.

19. On 1 July 2016, the CAM paid Udinese EUR 100,000 as partial payment of a debt concerning another player and recognized its debt towards Udinese, explaining that it was facing significant financial hardship. It proposed *"systematic monthly payment of EUR 100,000 until the total payment of the current outstanding amount regarding both players"*, referring *inter alia* to the amounts owed for the Player. However, no payments followed the initial payment of EUR 100,000.

20. On 15 July 2016, CAM appealed the FIFA Single Judge's Second Decision of 13 June 2016 to CAS, seeking to have the decision set aside on the grounds that Udinese had not sent its account details in writing per the Transfer Agreement, and that CAM was therefore justified in withholding payment, and disputing the nature and basis for the Single Judge's imposition of the fine and allocation of costs of the FIFA procedure.

21. Also on 15 July 2016, as the fourth instalment under the Transfer Agreement matured, Udinese commenced (its third) proceedings before FIFA against CAM seeking payment thereof.

22. On 31 March 2017, in *CAS 2016/A/4718 Club Atlético Mineiro v. Udinese Calcio S.p.A. & FIFA*, a panel of three arbitrators dismissed CAM's appeal and confirmed the FIFA Single Judge's Second Decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 9 February 2017, the Appellant filed its statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code"). In its Statement of Appeal, the Appellant requested that a sole arbitrator be appointed by the CAS.

24. On 16 February 2017, the CAS Court office provided a copy of the statement of appeal to FIFA, in accordance with Article R41.3 of the Code, setting a ten-day deadline for FIFA to state whether it intended to join the proceedings as a party.

25. On 20 February 2017, the Respondent requested that the matter be submitted to a panel of three arbitrators. It also stated that these were the fourth proceedings brought against the Respondent by the Appellant in the preceding year, allegedly solely to delay payments due to the Respondent. The other proceedings referred to were *CAS 2016/A/4546 Clube Atlético Mineiro v. Udinese Calcio S.p.A.* (terminated at the time following the withdrawal of the appeal by the Appellant), *CAS 2016/A/4718 Clube Atlético Mineiro v. Udinese Calcio S.p.A. & FIFA (player: M.)* (award pending at the time), and *CAS 2016/A/4719 Clube Atlético Mineiro v. Udinese Calcio S.p.A. & FIFA (player: D.)* (award pending at the time).

26. On 21 February 2017, the CAS Court office acknowledged receipt of the Respondent's letter, noting that the matter of whether or not the appeal would be heard by a three-member panel or a sole arbitrator would be determined by the President of the Appeals Arbitration Division ("Division President").

27. On 23 February 2017, FIFA wrote to the CAS to announce that it renounced its right to be a party to the procedure, and sent a clean copy of the Single Judge's First Decision for the file.

28. On 24 February 2017 and in accordance with Article R51 of the Code the Appellant filed its Appeal Brief.

29. On 6 March 2017, the CAS Court office informed the parties of the Division President's decision to submit the dispute to a sole arbitrator.

30. On 9 March 2017, the CAS Court office informed the parties of the appointment of Alexander McLin as sole arbitrator.

31. On 3 April 2017, the Respondent filed its answer in accordance with R55 of the Code.

32. On 6 April 2017, the Respondent indicated that it did not deem a hearing to be necessary, and on 11 April 2017, the Appellant responded without indicating a preference as to the holding of a hearing. The CAS Court office responded on 12 April 2017, setting a new deadline of 18 April 2017 for response by the Appellant on the issue of whether or not to hold a hearing. On the same day (12 April 2017), the Respondent confirmed that it did not consider that a hearing was necessary.

33. On 18 April 2017, the CAS Court office informed the parties that the Sole Arbitrator deemed himself sufficiently well-informed to decide the case on the basis of the parties' submissions, without the need to hold a hearing.

34. On 10 May 2017, the CAS Court office acknowledged receipt of the Order of Procedure duly signed by each party.

IV. SUBMISSIONS OF THE PARTIES

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

- According to Article 6 of the Transfer Agreement, payments due to the Respondent must be made by bank transfer to the account that the Respondent *"will communicate in writing"*. Such communication of the account number must be made in writing with respect to each of the installments foreseen in the Transfer Agreement. The Appealed Decision failed to take into account the absence of such written notification, which the Appellant considers is a necessary precondition to the payment of each relevant installment owed to the Respondent.
- By neglecting the terms and conditions in the Transfer Agreement, the Respondent violated the principle of *pacta sunt servanda*, and was estopped from requesting the fulfillment of the Appellant's obligations in accordance with the principle of *exception non adimpleti contractus*.
- With respect to costs, the Appealed Decision violated Article 18 para. 1 of the FIFA Rules Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber (2017 ed.) (the "FIFA Procedural Rules") and Article 25 para. 2 of the FIFA RSTP, respectively by not awarding costs in proportion to the parties' degree of success, and by not sufficiently explaining the allocation of costs.
- The Appellant makes the following requests for relief:

  "The Appellant respectfully submits to the attention of the CAS the following requests for relief:

  FIRST — To set aside the Appealed Decision in full;

  SECOND — To confirm that the Respondent failed to comply with its obligations by not forwarding in writing to the Appellant the bank account details as set out in the Transfer Agreement;

  THIRD — To uphold, in the scenario above, that the Appellant was entitled to withhold the payment of the instalments, as well as there is no legal basis for the imposition of any default interest whatsoever (cf. Art. 82 of the Swiss CO);

FOURTH — The Respondent shall bear all the arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any advance of costs paid to the CAS;

FIFTH — The Respondent shall be ordered to pay the Appellant a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel.

Alternatively and only in the event the above is rejected:

SIXTH — To uphold, assuming but not admitting, that the Respondent complied with the terms and conditions set out in the Transfer Agreement, in any event, the fine of CHF 22,000 violates the principle of proportionality and Art. 18, par. 1 of the FIFA Procedural Rules;

SEVENTH — To uphold, assuming but not admitting, that (somehow) the Respondent complied with the terms and conditions set out in the Transfer Agreement, the decision to impose to the Appellant the obligation to pay the procedural cost has no legal basis whatsoever. As such, the Respondent had to pay an amount of at least CHF 5,000 and the Appellant the remaining CHF 17,000; and

EIGHTH — The Respondent shall bear all the arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any advance of costs paid to the CAS;

NINTH — The Respondent shall be ordered to pay the Appellant a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel".

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

- The Respondent complied at all times with the requirements of the Transfer Agreement and its Amendment (together, the "Contract"), and it is the non-payment of amounts owed thereunder by the Appellant that constituted the breach. The Appellant breached the Contract by not paying its first installment due under the Contract by its maturity date.
- The Contract is silent on the timing of the communication or nature of the document on which it the account should be specified. The notifications by the Respondent on two occasions of the relevant bank account, in writing on invoices sent to the Appellant on 5 January 2015 and again on 23 January 2015 were sufficient to meet the relevant administrative requirement.
- The only *conditio sine que non* for the payment of the transfer fee was the definitive transfer of the Player to the Appellant, which occurred and is not contested.
- Initially, the Appellant did not place particular importance on the communication of bank details. This is supported by the negotiation leading to the Amendment, under which smaller installments were provided for in order to alleviate liquidity challenges.
- The Appellant unjustly enriched itself by transferring the Player on a loan to UAE football club Al-Sharjah SCC for approximately EUR 500,000 on 30 June 2015, while still not meeting its financial obligations to the Respondent under the Contract.

- The Respondent remarks that the Appellant's *"Sixth"* and *"Seventh"* requests for relief should not be addressed by the Sole Arbitrator, given that they are addressed against FIFA, which is not a party to this procedure. As a result, these requests should be considered inadmissible.
- The Respondent makes the following requests for relief:

  "… the Respondent respectfully asks the Sole Arbitrator:

  1) to reject the appeal;

  2) to uphold the Challenged Decision;

  3) to condemn the Appellant to the payment in the favour of the Respondent of the legal expenses incurred;

  4) to establish that the costs of the arbitration procedure shall be borne by the Appellant".

V. JURISDICTION

37. Article R47 of the Code provides as follows:

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

38. In its Statement of Appeal, CAM relied on Article 58.1 of the FIFA Statutes and Article 23 paragraph 4 of the FIFA RSTP, which grant a right of appeal to the CAS.

39. The jurisdiction of the CAS was not contested by the Respondent and the Order of Procedure was signed by both parties without any objections.

40. Accordingly, the CAS has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

41. Art. 58.1 of the FIFA Statutes (2016) states:

Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.

42. Art. 58.2 of the FIFA Statutes (2016) states:

Recourse may only be made to CAS after all other internal channels have been exhausted.

43. The Parties received the grounds of the Single Judge's First Decision from FIFA on 19 January 2017.

44. The Appellant submitted its Statement of Appeal on 9 February 2017.

45. Accordingly, the appeal is therefore admissible.

VII. APPLICABLE LAW

46. Article 187(1) of the Swiss Private International Law Act ("SPILA") provides as follows:

The arbitral tribunal shall decide on the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

47. The Appellant contends that the Code, the FIFA Statutes, the FIFA Procedural Rules and the FIFA RSTP (2015 ed.) apply to the dispute and additionally, Swiss law.

48. The Respondent contends that the applicable regulations are the FIFA regulations, more specifically the FIFA Statutes and the FIFA RSTP. Swiss law shall apply complementarily.

49. Article R58 of the Code provides more specifically 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.

50. Article 57 para. 2 of the FIFA Statutes provides as follows:

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.

51. As a result, the applicable FIFA regulations and statutes will be applied primarily, and Swiss law shall apply subsidiarily.

52. For clarity, the pertinent parts of Article 12bis of the FIFA RSTP (2015 ed.) provide:

1. Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements.

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 of the DRC may impost 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 […].

VIII. MERITS

53. According to the Appellant, the Appealed Decision did not take into account whether the Respondent adequately communicated its bank account details in writing in the manner provided for in the Contract. Moreover, the costs imposed on the Appellant in the Appealed Decision was, in the Appellant's view, disproportionate as it did not take into account the relative nature of the parties' responsibilities.

54. The Sole Arbitrator observes that whatever flaws may be contained in the Appealed Decision are cured by the *de novo* nature of the proceedings before CAS. As such, these questions are considered anew as part of the present analysis.

55. The issues to consider are therefore the following:

a. Was the communication of the Respondent's banking details in writing to the Appellant a condition precedent to the payment of the sums owed under the Contract, the absence of which justified lack of payment by the Appellant?

b. Can the question of the proportionality of the costs imposed on the Appellant in the Appealed Decision be examined, and, if so, was the fine proportionate?

A. Was the communication of the Respondent's banking details in writing to the Appellant a condition precedent to the payment of the sums owed under the Contract, the absence of which justified lack of payment by the Appellant?

56. The Sole Arbitrator is aware of the fact that the present case is strikingly similar to *CAS 2016/A/4718 Club Atlético Mineiro v. Udinese Calcio S.p.A. & FIFA*. Indeed, this case concerns the same Player, and the amounts owed for said Player's transfer from the Respondent to the Appellant under the same Contract. The absence of FIFA as a party in the present case is relevant to the second question, addressed *infra*.

57. Whereas *CAS 2016/A/4718* dealt with the amounts owed to the Respondent under the third instalment of the Contract, the present case deals with the amounts owed under the first and second instalments, which were the subject of the Amendment.

58. The arguments that were raised by the Appellant in *CAS 2016/A/4718* as justification for non-payment of the third instalment are however seemingly identical. In both cases, the Appellant grounds its reason for non-payment in the fact that it was conditioned on the receipt of the Respondent's bank account details "in writing" (emphasis original), calling this an "imperative" condition which was not met. The Appellant's non-payment of its debt is, in its

view, justified under the principle of *exception non adimpleti contractus* as expressed in Art. 82 of the Swiss Code of Obligations ("CO").

59. As was the case in *CAS 2016/A/4718*, the existence of the underlying debt and the validity of the Contract are not questioned by the Appellant. Only the alleged lack of communication in writing is provided as the reason for which payment has not been made.

60. The Panel in *CAS 2016/A/4718* concluded the following, at para. 67-68:

"The only original signatures, which are needed to establish the payment obligation of the Appellant, are the ones on the Transfer Agreement itself, which constitutes a valid and binding contractual relationship between the two parties. As noted above, the Appellant's argument in this respect falls flat on its face, when the record shows that the Appellant without problems has transferred EUR 150,000 into the Italian bank account designated by the First Respondent.

This bank transfer categorically and without a shadow of a doubt eliminates the truthfulness of the Appellant's alleged reason for not making the payment".

61. Moreover, the Panel in *CAS 2016/A/4718* notes the established CAS case law stating that it is the debtor's *"utmost obligation of the debtor to duly transfer the amount to the bank account provided by the Creditor, and, therefore it is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation…" CAS 2013/A/3323*, confirmed in *CAS 2015/A/4342*.

62. The Sole Arbitrator notes that in the present case, as explained by the Respondent, the Appellant has made a total of three transfers of EUR 150,000 each, corresponding to the three first instalments under the Amendment. The last of these (made on 29 December 2015) followed a payment reminder (for the full outstanding amount of EUR 1,500,000) faxed by the Respondent to the Appellant on 27 November 2015. All of this followed the Appellant's receipt of the first invoice which was successfully faxed by the Respondent on 5 January 2015, and which contained the relevant bank details of the Respondent.

63. The Panel in *CAS 2016/A/4718* had found that *"the Appellant has done absolutely nothing to convince the Panel that the real reason for not making the third transfer instalment was due to a genuine uncertainty about the proper bank account of the First Respondent as creditor. On the contrary, the Panel feels that the Appellant's behaviour may constitute a poor excuse for alleged economic hardship. However, the fact that the Appellant transferred the Player to the UAE football club Al-Sharjah for an amount of EUR 500,000 without settling the debt towards the First Respondent is, in the Panel's opinion, clearly a pattern of extremely negligent behaviour and bad faith in a contractual relationship".*

64. In light of the earlier CAS finding in this matter, and bearing in mind the fact that the Appellant continues to proffer the same disingenuous excuse for non-payment despite additional evidence (from additional payments) that it had all the necessary banking information in its possession, the Sole Arbitrator can only conclude that the Appellant continues, in utter bad faith and entirely intentionally, to seek to avoid its very real and established payment obligations under the contract.

65. As a result, the Sole Arbitrator can only confirm the Appealed Decision with respect to the amounts owed by the Appellant to the Respondent under the Contract.

B. Can the question of the proportionality of the fine imposed in the Appealed Decision be examined, and, if so, was the fine proportionate?

66. The Appellant considers that while the Appealed Decision stated that the costs were *"to be borne in consideration of the parties' degree of success in the proceedings"*, according to the FIFA Procedural Rules, it did not provide sufficient reasons to explain why costs in the amount of CHF 22,000 were ultimately to be borne by the Appellant.

67. The Respondent notes that, unlike in *CAS 2016/A/4718*, FIFA is not a party to the present proceedings. The Sole Arbitrator agrees that the Appellant's sixth and seventh requests for relief are directed at FIFA, whose decision it was to award costs. As a result, he also agrees that the Appellant's claim regarding the proportionality of the FIFA decision cannot be entertained in its absence from these proceedings. Furthermore, as explained recently in *CAS 2017/A/4994* citing *CAS 2013/A/3054 Club Atlético River Plate v. US Città di Palermo*, para. 89 and *CAS 2016/A/4387 Delfino Pescara 1936 v. Royal Standard Liège & FIFA*, para 181:

"It is not for the CAS to reallocate the costs of the proceedings before previous instances…".

68. As a result of the foregoing, the Sole Arbitrator does not see a basis upon which to change the Single Judge's First Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Atlético Mineiro on 9 February 2017 against the decision issued by the Single Judge of the FIFA Players' Status Committee on 26 April 2016 is dismissed.

2. The decision issued the Single Judge of the FIFA Players' Status Committee on 26 April 2016 is confirmed.

3. (…).

4. (…).

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