



**Arbitration CAS 2018/A/5779 Zamalek Sporting Club v. Fédération Internationale de Football Association (FIFA), award of 31 October 2018**

Panel: Prof. Martin Schimke (Germany), President; Mr David Wu (China); Prof. Luigi Fumagalli (Italy)

*Football*

*Disciplinary sanction for failing to comply with a CAS award*

*Spirit of Art. 64 FDC*

*Scope of review of the FIFA Disciplinary Committee*

*Grounds for closing disciplinary proceedings*

*Definition of force majeure*

*Financial situation as justification for lack of payment*

*Debtor already in default when an alleged force majeure situation occurs*

*Discretion of the creditor with regard to fulfillment of obligations*

- 1. The spirit of Article 64 of the FIFA Disciplinary Code (FDC) is to guarantee respect of final and binding decisions that have been rendered by a body, a committee, or an instance of FIFA, or a subsequent CAS appeal decision. The possible sanctions stipulated in this article, and which may possibly be imposed here, are designed to apply within the football family and to its direct and indirect members, and to put the debtor under pressure to actually comply with the decision. This article provides FIFA with a legal tool for ensuring, to a certain degree, that decisions passed by the relevant FIFA or CAS authorities are being respected and the rights of the players and clubs are being safeguarded.**
- 2. The FIFA Disciplinary Committee cannot review or modify the substance of a previous FIFA or CAS decision that is final and binding and therefore enforceable. The sole task of the FIFA Disciplinary Committee is to determine whether the debtor complied with the final and binding decision of the relevant body. Therefore, in order to impose any possible disciplinary sanction, the main question for the FIFA Disciplinary Committee is simply whether or not the financial amounts as defined in the decision were paid by the debtor to the creditor.**
- 3. According to Article 107 FDC, disciplinary proceedings may be closed only in three specific cases, namely (a) if the parties reach an agreement, (b) if a party declares bankruptcy, or (c) if the proceedings become baseless. The existence of a *force majeure* situation is not a legitimate reason for the FIFA Disciplinary Committee to close or to somehow suspend the proceedings and refrain from making a decision on the matter.**
- 4. The legal concept of *force majeure* is widely and internationally accepted and, in particular, is valid and applicable under Swiss law. As a general rule it could be said that, under some extraordinary and limited circumstances, a party that does not fulfil a**

contractual obligation could be excused for its breach if it can prove that the breach is due to the occurrence of an event or an impediment that is not only beyond its control (and that it cannot avoid to get over) but also that it could not have been reasonably expected to have taken into account when it assumed the relevant obligation that was breached. Force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner. Force majeure implies an objective (rather than a personal) impediment, beyond the control of the “obliged party”, that is unforeseeable, that cannot be resisted, and that renders the performance of the obligation impossible. However, the conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation.

5. Financial difficulties or the lack of financial means of a club cannot be invoked as justification for not complying with an obligation to pay.
6. A debtor who has already defaulted on its financial obligations cannot benefit from an alleged force majeure situation that occurred after its default and use it as a ground for defence.
7. A creditor cannot be forced to accept alternative payment methods, despite the feasibility of them. It is to the discretion of the creditor to determine the details and the place of the bank account into which the amount due is to be transferred. It is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation and according to the creditor’s wishes. The latter is therefore free not to accept a payment which would not be made on the bank account which details he has been requested to provide, which obligation he met.

## **I. PARTIES**

1. Zamalek Sporting Club (the “Club” or the “Appellant”) is a professional football club with its registered office in Giza, Egypt. The Club is currently competing in the Egyptian first national division and is a member of the Egyptian Football Association, which in turn is affiliated to the Fédération Internationale de Football Association.
2. Fédération Internationale de Football Association (“FIFA” or the “Respondent”) is the world football governing body. It is an association of Swiss law with its seat in Zurich, Switzerland.

## **II. FACTUAL BACKGROUND**

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced during these proceedings. 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 Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 11 July 2017, the Court of Arbitration for Sport (the "CAS") passed an award in the case known as *CAS 2016/A/4520 Alexis Enam Mendo* and *CAS 2016/A/4521 Zamalek Sporting Club v. Alexis Enam Mendo & Club Al Raed* (the "CAS Award") in which it issued the following decision:

*"1. The appeal filed by Alexis Enam Mendo on 25 March 2017 is dismissed.*

*2. The appeal filed by Zamalek Sporting Club on 29 March 2017 is partially upheld.*

*3. Item 3 of the decision of the FIFA Dispute Resolution Chamber dated 15 October 2015 is amended as follows:*

*Zamalek Sporting Club has to pay to Alexis Enam Mendo outstanding remuneration amounting to USD 254'000 (instead of USD 265'000) and 5% interest per annum thereon, as of 16 November 2015.*

*4. The other elements of the decision of the FIFA Dispute Resolution Chamber dated 15 October 2015 are confirmed.*

*5. The costs of the arbitration procedure CAS 2016/A/4520, to be determined and served to the parties by the CAS Court Office, shall be borne by Alexis Enam Mendo.*

*6. The costs of the arbitration procedure CAS 2016/A/4521, to be determined and served to the parties by the CAS Court Office, shall be borne by Zamalek Sporting Club for 90% and by Alexis Enam Mendo for 10%.*

*7. Zamalek Sporting Club is ordered to pay Alexis Enam Mendo a total amount of CHF 8'500 towards the expenses incurred in connection with these arbitration proceedings.*

*8. Zamalek Sporting Club is ordered to pay Al Raed Club a total amount of CHF 1'500 towards the expenses incurred in connection with these arbitration proceedings.*

*9. All other motions or prayers for relief are dismissed".*

5. On 27 September 2017, Mr Alexis Enam Mendo (the "Player") informed the FIFA Players' Status Department that, to such date, the Club had not made any payment of the amounts due and requested FIFA to open disciplinary proceedings against the Club.
6. On 2 October 2017, the FIFA Players' Status Department invited the Club to immediately pay the relevant amounts to the Player.

7. On 24 November 2017, the Player informed the FIFA Players' Status Department again about the failure of the Club to comply with the CAS Award as the Club had not made any payment of the amounts due.
8. On 29 November 2017, the FIFA Players' Status Department informed the parties that the case was referred to the FIFA Disciplinary Committee.
9. On 1 February 2018, the Player informed the FIFA Disciplinary Committee that, to such date, the Club had not made any payment of the amounts due.
10. On 5 February 2018, the FIFA Disciplinary Committee informed the parties that it officially opened disciplinary proceedings against the Club in respect of a violation of Article 64 of the FIFA Disciplinary Code, due to its failure to respect the final and binding decision reached by CAS on 11 July 2017.
11. On 21 February 2018, the Player informed the FIFA Disciplinary Committee that, to such date, the Club had not made any payments of the amount due, and requested the FIFA Disciplinary Committee to render a decision.
12. On 6 March 2018, the FIFA Disciplinary Committee issued a decision (the "Appealed Decision") as follows:

*"1. The club Zamalek Sporting Club is pronounced guilty of failing to comply with the decision passed by the Court of Arbitration for Sport on 11 July 2017 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*

*2. The club Zamalek Sporting Club is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision. Payment can be made either in Swiss francs (CHF) to account no. [...], with reference to case no. 180031 sus.*

*3. The club Zamalek Sporting Club is granted a final period of grace of 90 days from notification of the present decision in which to settle its debt to the creditor, the player Alexis Enam Mendomo.*

*4. If payment is not made by this deadline, the creditor may demand in writing from the secretariat of the FIFA Disciplinary Committee that six (6) points be deducted from the debtor's first team 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 points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*

*5. If the club Zamalek Sporting Club still fails to pay the amount due even after deduction of points in accordance with point 4. above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.*

*6. As a member of FIFA, the Egyptian 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 Egyptian 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 3,000 are to be borne by the club Zamalek Sporting Club 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”.*

13. On 14 March 2018, the FIFA Disciplinary Committee notified the findings of the Appealed Decision to the parties.
14. On 18 May 2018, the FIFA Disciplinary Committee notified the grounds of the Appealed Decision to the parties.

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

15. On 8 June 2018, pursuant to Article R47 and R48 of the 2017 edition of the CAS Code of Sports-related Arbitration (the “CAS Code”), the Club filed a Statement of Appeal with the CAS directed against FIFA with respect to Appealed Decision. In its Statement of Appeal, the Club requested that the case be submitted to a Panel of three arbitrators and appointed Mr David W. Wu as an arbitrator.
16. On 15 June 2018, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, and pursuant to Article R50 (2) of the CAS Code, invited the parties to inform the CAS Court Office whether they agree to submit the present procedure to the same Panel nominated in the procedure *CAS 2018/A/5537 Zamalek Sporting Club v. FIFA*.
17. On 21 June 2018, FIFA informed the CAS Court Office that it agreed to refer the present procedure to the same Panel nominated in the procedure *CAS 2018/A/5537 Zamalek Sporting Club v. FIFA*.
18. On 22 June 2018, the Club filed its Appeal Brief with the CAS Court Office in accordance with Article R51 of the CAS Code, and informed the CAS Court Office that it agreed to refer the present procedure to the same Panel nominated in the procedure *CAS 2018/A/5537 Zamalek Sporting Club v. FIFA*. In its Appeal Brief, the Club applied for the stay of execution of the Appealed Decision during the CAS proceedings as a provisional measure.
19. On 27 June 2018, FIFA confirmed to the CAS Court Office that, in view of the financial nature of the Appealed Decision and following its own common practice, the disciplinary proceedings opened against the Club had already been suspended for the duration of the CAS proceedings. On 28 June 2018, consequently, the Club informed the CAS Court Office that it withdrew its request for provisional measures.
20. On 16 July 2018, FIFA filed its Answer with the CAS Court Office in accordance with Article R55 of the CAS Code.

21. On 17 July 2018, the CAS Court Office informed the parties that pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the Panel appointed to this case is constituted as follows:  
  
President: Prof. Dr Martin Schimke, Attorney-at-law in Düsseldorf, Germany  
Arbitrators: Mr David W. Wu, Attorney-at-law in Shanghai, China  
Prof. Luigi Fumagalli, Attorney-at-law in Milan, Italy
22. On 20 July 2018, the CAS Court Office informed the parties that Mr Willem-Alexander Devlies, Attorney-at-law in Leuven, Belgium had been appointed as *ad hoc* Clerk in this matter.
23. On 23 July 2018, the CAS Court Office informed the parties that a hearing would be held on 31 July 2018 at the CAS Court Office in Lausanne, Switzerland, and that this hearing would be held jointly with the hearing in proceedings CAS 2018/A/5537.
24. On 25 July 2018, the CAS Court Office issued, on behalf of the President of the Panel, an order of procedure (the “Order of Procedure”).
25. On 25 and 27 July 2018, the Club and FIFA respectively duly returned their signed copies of the Order of Procedure.
26. On 27 July 2018, FIFA filed with the CAS Court Office a new exhibit that contained updated information from the FIFA Transfer Matching System (“TMS”) regarding an incoming transfer of a new player to the Club, along with some submissions thereon. The Club was thus invited to file its comments on the admissibility of such submissions and documents at the hearing.
27. On 31 July 2018, a hearing was held at the CAS Court Office in Lausanne, Switzerland. In the absence of any objection from the parties a joint hearing was held for this procedure and the procedure *CAS 2018/A/5537 Zamalek Sporting Club v. FIFA*. In addition to the Panel and Mr Daniele Boccucci, Counsel to the CAS, the following persons attended the hearing:  
  
For the Appellant:                   - Mr Nasr-el-Din Azzam, legal counsel;  
  - Mr Alejandro Pascual Madrid, legal counsel;  
  - Mr Alfonso León Lleó, legal counsel;  
  
For the Respondent:                 - Mr Jacques Blondin, counsel;  
  - Mr Diego Florez, counsel;
28. At the start of the hearing, and after the parties had confirmed that they had no objection with respect to the constitution of the Panel, the Panel asked the Appellant whether or not it had any objection against the submission of the new exhibit produced by FIFA which contained updated information from FIFA TMS regarding the transfer of a new player to the Club (see para. 26 above). Thereupon, the Appellant confirmed that it had no objection against the submission of the document. The parties then made submissions in support of their respective cases.

29. At the closing of the hearing, the parties, after their final submissions, confirmed that they had no objections in respect to their right to be heard and that they had been given the opportunity to fully present their cases.
30. The Panel confirms that it carefully took into account in its deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

#### **IV. SUBMISSIONS OF THE PARTIES**

##### **A. The Appellant**

31. The Appellant's submissions, in essence, may be summarized as follows:
  - The Appellant is committed to fulfilling its obligations towards the Player in accordance with the CAS award of 11 July 2017, as the impossibility of it complying with its obligations was due to restrictions imposed by the Central Authorities in Egypt and the Central Bank of Egypt's internal procedures.
  - The Central Bank of Egypt required exceptional approvals to get foreign currency and, therefore, the transfer of money could not be completed due to a *force majeure* situation in Egypt where the international transfers were limited to the import of basic goods.
  - Such restrictions in relation to international payments and foreign currency were very tight as international transfers were limited to a yearly amount of USD 100,000 and a cap on depositing foreign currencies was established in the maximum amount of USD 10,000 per day or USD 50,000 per month.
  - The economic crisis in Egypt at the end of 2016, with the Egyptian currency losing more than 100% of its value, was a *force majeure* situation out of the Appellant's control, in addition to many other economical and bank restrictions, which made it almost impossible for the Appellant to complete the international transfers' requirements by the bank in its normal status and time.
  - In the light of the above the Appellant deems to have sufficiently proved that its failure to comply with the CAS Award was not due to its fault or negligence but it was rather caused by a *force majeure* situation which in no case can be attributed to the Appellant.
  - The Appellant proposed to the Player in good faith alternative payment methods in order to be able to continue fulfilling its payment obligations. These methods included the opening of a bank account in Egypt to which the Appellant could deposit the amounts directly, or, the Player coming to Egypt to collect the due amounts in cash. Nevertheless, the Player refused all the proposed alternative methods and requested for the due amounts to be paid by international bank transfers. Therefore, it is not just and fair to impose sanctions on the Appellant who is committed and willing to pay its debt but is

prevented from doing so due to a *force majeure* situation and due to the behaviour of the creditor.

32. The Appellant submitted in its Appeal Brief the following prayers for relief:

- “1. *To accept this Appeal against the Decision rendered by the Respondent.*
2. *To determine before 25<sup>th</sup> of July 2018 that the period of grace of 90 (ninety) days established by the Respondent shall automatically remain suspended until the existence of a final and binding award and consequently no further sanctions can be applied to the Appellant.*
  - a. *Alternatively, to accept before 25<sup>th</sup> July 2018 the provisional measures request in order to stay the execution of the FIFA Decision and, in any case, make a final determination.*
3. *To determine that the failure to comply with the award rendered by CAS on 11 July 2017 was due to a force majeure cause and, in any event, such failure can never be attributed to the Appellant.*
4. *To determine that no violation of Article 64 of the FIFA Disciplinary Code was committed and therefore no sanction shall be imposed to the Appellant.*
5. *To determine that the Appellant shall not pay any costs derived from the proceedings before the FIFA Disciplinary Committee.*
6. *To determine any other any other relief the Panel may deem appropriate.*
7. *To fix a sum of CHF 15,000.00/- (Fifteen Thousand Swiss Francs) to be paid by the Respondent to the Appellant, for the payment of its legal fees and costs.*
8. *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees, if any”.*

## **B. The Respondent**

33. The Respondent’s submissions, in essence, may be summarized as follows:

- It is clear and uncontested that the Appellant was ordered to pay the amounts of USD 254,000, USD 650,000 and CHF 8,500 to the Player by means of a final and binding CAS Award passed on 11 July 2017. It is equally undisputed that the Appellant has not yet paid the full amounts due to the Player. Consequently, the Appellant is in breach of Article 64 of the FIFA Disciplinary Code.
- The Appellant had plenty of time to fulfil its obligations and pay the outstanding amounts due to the Player before the Appealed Decision was passed. Such a delay in fulfilling its financial obligations is unacceptable and shows the Appellant’s complete disrespect towards the legal authority of the arbitral award of CAS.

- The justifications brought forward by the Appellant cannot be considered as causes of *force majeure* and are not a valid reason for not complying with the arbitral award of CAS.
- It seems to be correct that the Central Bank of Egypt had imposed a cap limiting international payments to a maximum of USD 100,000 per year since January 2014. However, after such restrictions were imposed, the Appellant was still able to make international transfers of players, committing itself to conduct international payments between March 2015 and July 2018, amounting to a total of USD 3,000,000 and EUR 675,000, which clearly exceed the cap imposed. As an example, the Club paid a transfer fee of EUR 175,000 in August 2015 for the transfer of a player from a Swiss football club.
- Notwithstanding the foregoing, even if the alleged cap would have applied to the Appellant, *quod non*, the Central Bank of Egypt removed such restriction on 14 June 2017, following which the Appellant had several months to fulfil its payment obligations by international bank transfers.
- Furthermore, the alleged financial difficulties faced by the Appellant due to the economic crisis that afflicted Egypt and the consequent loss of value of the local currency cannot be considered as a relevant argument in view of the constant and well-established jurisprudence of CAS, according to which financial difficulties or the lack of financial means of a club cannot be invoked as a justification for the non-compliance with an obligation.
- The Appellant claimed that its bank account was blocked due to a judicial seizure imposed according to a national court decision. Nevertheless, the seizure was caused by the Appellant itself in relation to other debts at national level, and was only imposed after the Appellant had defaulted on its financial obligations to the Player.
- Although the Appellant did not raise any arguments to the contrary, the Respondent is of the opinion that the disciplinary sanctions imposed on the Appellant are proportionate.

34. The Respondent submitted in its Answer the following prayers for relief:

- “1. To reject the Appellant’s appeal in its entirety.
2. To confirm the decision 180031 PST EGY ZH rendered by a member of the FIFA Disciplinary Committee on 6 March 2018 hereby appealed against.
3. To order the Appellant to bear all costs and legal expenses incurred with the present procedure”.

## V. JURISDICTION

35. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) of the FIFA Statutes (2016 edition) as it determines that “*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*” and Article R47 of the CAS Code.

36. Article 64 (5) of the FIFA Disciplinary Code (2011 edition) determines that:

*“Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly”.*

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

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

## **VI. ADMISSIBILITY**

39. The appeal was filed within the deadline set by Article 58(1) of the FIFA Statutes. The appeal complied with all other requirements of Articles R48 and R51 of the CAS Code, including the payment of the CAS Court Office fee.

40. It follows that the appeal is admissible.

## **VII. APPLICABLE LAW**

41. Article R58 of the CAS 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

42. The Panel notes that Article 57(2) of the FIFA Statutes stipulates the following:

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

43. The parties agree that CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

44. Consequently, the Panel will apply the various regulations of FIFA, in particular the FIFA Disciplinary Code and, subsidiarily, Swiss law.

## **VIII. MERITS**

### **A. Undisputed facts**

45. The Panel notes that it is undisputed between the parties that, on the basis of the CAS Award of 11 July 2017, the Appellant was ordered to pay a total amount of USD 254,000, USD 650,000 and CHF 8,500 to the Player.

46. The Panel further notes that it is undisputed between the parties that the Player informed FIFA for the first time on 27 September 2017 that no payments had been made by the Appellant thus far, and that no payments have been made thereafter.
47. The Panel observes that disciplinary proceedings were officially opened against the Appellant by the FIFA Disciplinary Committee on 5 February 2018 and that the parties did not agree on a payment plan, nor did the Appellant pay any amount thereafter.
48. The Panel finally notes that the Appellant does not dispute the outstanding amounts of its debt to the Player under the CAS Award of 11 July 2017 and that the Appellant states that it is still committed to pay the remaining amounts of its debts.

**B. Article 64 FIFA Disciplinary Code (2011 edition)**

49. Article 64 of the FIFA Disciplinary Code (2011 edition) states, *inter alia*, as follows:

*“1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA 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 a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision):*  
*a) will be fined for failing to comply with a decision;*  
*b) 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;*  
*c) (only for clubs:) 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 relegation to a lower division ordered. A transfer ban may also be pronounced”.*

50. The spirit of Article 64 of the FIFA Disciplinary Code is to guarantee respect of final and binding decisions that have been rendered by a body, a committee, or an instance of FIFA, or a subsequent CAS appeal decision. The possible sanctions stipulated in this article, and which may possibly be imposed here, are designed to apply within the football family and to its direct and indirect members, and to put the debtor under pressure to actually comply with the decision. This article provides FIFA with a legal tool for ensuring, to a certain degree, that decisions passed by the relevant FIFA or CAS authorities are being respected and the rights of the players and clubs are being safeguarded.
51. The FIFA Disciplinary Committee cannot review or modify the substance of a previous FIFA or CAS decision that is final and binding and therefore enforceable. The sole task of the FIFA Disciplinary Committee is to determine whether the debtor complied with the final and binding decision of the relevant body (*cf. CAS 2013/A/3380*). Therefore, in order to impose any possible disciplinary sanction, the main question for the FIFA Disciplinary Committee is simply whether or not the financial amounts as defined in the decision were paid by the debtor to the creditor.
52. The Panel finds that, after taking into account the undisputed facts, the Appellant failed entirely to comply with the CAS Award of 11 July 2017. The Panel therefore finds that all of

the requirements set out in Article 64 par. 1 of the FIFA Disciplinary Code for imposing disciplinary sanctions against the Appellant have been met.

53. The Appellant nevertheless challenges the Appealed Decision, arguing that the FIFA Disciplinary Committee should have suspended the proceedings and should have refrained from imposing disciplinary sanctions on the Appellant. The reason given was the existence of a *force majeure* situation, namely the enactment of urgent measures by the Egyptian authorities and the Central Bank of Egypt. These consisted of restrictions on international payments in foreign currencies through Egyptian banks as a consequence of the economic crisis in Egypt and a seizure of the Appellant's bank account following a national court decision that allegedly made it impossible for the Appellant to execute international bank transfers abroad.
54. With regard to this matter, the Panel observes that, according to Article 107 of the FIFA Disciplinary Code, disciplinary proceedings may be closed only in three specific cases, namely (a) if the parties reach an agreement, (b) if a party declares bankruptcy, or (c) if the proceedings become baseless.
55. In the present case, however, none of requirements provided for in Article 107 of the FIFA Disciplinary Code had been fulfilled at the time. Consequently, there was no legitimate reason for the FIFA Disciplinary Committee to close or to somehow suspend the proceedings and refrain from making a decision on the matter.

### **C. Burden of proof - force majeure**

56. The Panel subsequently turns to the related question as to whether the events cited by the Appellant, namely the restrictions on the international transfers of capital in foreign currencies through Egyptian banks and the seizure of the Appellant's bank account following a national court judgement in relation to other debts, constitute an occurrence of *force majeure* that can legitimately be invoked as adequate and sufficient grounds for refraining from imposing sanctions on the Appellant for its failure to pay the outstanding amounts under the CAS Award of 11 July 2017.
57. The Panel finds that since the Appellant is the party that is putting forth a number of arguments to justify its failure to pay the Player, it is in principle up to the Appellant to establish that such arguments are justified. In other words, the burden of proof on the occurrence of *force majeure* is on the Appellant (*cf. CAS 2007/A/1380; CAS 2015/A/3909*).
58. The Panel first of all notes that the legal concept of *force majeure* is widely and internationally accepted and, in particular, is valid and applicable under Swiss law. As a general rule it could be said that, under some extraordinary and limited circumstances, a party who does not fulfil a contractual obligation could be excused for his breach if he can prove that the breach is due to the occurrence of an event or an impediment that is not only beyond his control (and that he cannot avoid to get over) but also that he could not have been reasonably expected to have taken into account when he assumed the relevant obligation that was breached.

59. Taking into account that the law applicable to the present dispute is Swiss law, the Panel notes that this legal principle is also applied under Swiss law. In particular, according to the jurisprudence of the Swiss Federal Tribunal (2C\_579/2011), “*Il y a force majeure en présence d'événements extraordinaires et imprévisibles qui surviennent en dehors de la sphère d'activité de l'intéressé et qui s'imposent à lui de façon irrésistible*”. (That can be freely translated into English as follows: “*Force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner*”).
60. This legal principle has also been considered and applied by CAS in previous cases, giving rise to a well-established doctrine. For instance, in the award resolving the case CAS 2013/A/3471 it is stated that *force majeure* implies an objective (rather than a personal) impediment, beyond the control of the “*obliged party*”, that is unforeseeable, that cannot be resisted, and that renders the performance of the obligation impossible. Notwithstanding, CAS jurisprudence has also warned that “*The conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation*” (CAS 2006/A/1110).
61. After careful review of the exhibits and the submissions of the parties and of the applicable regulations introduced by the Central Bank of Egypt concerning urgent provisions imposing restrictions on international transfers of capital through Egyptian banks, the Panel concludes that Egypt did indeed suffer an economic crisis in the recent years and that the operations of the Egyptian banking sector have indeed been placed under strict regulatory restrictions since January 2014, whereby a cap of USD 50,000 per month and USD 100,000 per year on international payments with foreign currencies was imposed.
62. It is the Panel’s understanding, however, that these restrictions did not result in an outright ban on all international transfers of capital through Egyptian banks. In particular, with exceptional approval from the Egyptian authorities and/or the Central Bank of Egypt, international payments and transfers of capital abroad were made possible in certain instances and for specific purposes.
63. The Panel further observes that there apparently were several national court decisions on the basis of which the bank accounts of the Appellant were seized between 2016 and 2017 due to debts unrelated to the Player.
64. Whether or not these restrictions of the Central Bank of Egypt applied to the Appellant, and whether or not (all of) the Appellant’s bank accounts had been seized, the Appellant was apparently still able to make several international payments in foreign currencies during this period. For example, the Appellant paid its former player Manuel Agogo, on the basis of a CAS award of 31 October 2014, a total amount of USD 100,000 in November 2015, which clearly exceeded the monthly cap of USD 50,000, and a total of USD 200,000 in 2015, and USD 150,000 in 2017 (before the cap was lifted in June 2017), which on two occasions clearly exceeded the annual cap of USD 100,000.
65. Furthermore, the Appellant stated that it was able to make several international payments in foreign currency to the player Manuel Agogo due to the obtaining of exceptional approvals from the Egyptian authorities. However, the Appellant failed to submit to the Panel any

relevant documentation evidencing its request for other exceptional approvals to make international transfers of USD 50,000 each month to the player Manuel Agogo, and whether or not these requests were denied by the Egyptian authorities or the bank.

66. The Panel further observes that according to a FIFA TMS report of 13 February 2018, the Appellant, in the period of time during which the Appellant was allegedly prevented from making international payments to the Player, was still able to make international transfers and hire players. In particular, the Appellant signed the following transfer agreements: (i) on 28 January 2015 with a Portuguese club for the amount of EUR 500,000, (ii) on 5 August 2015 with a Swiss club for the amount of EUR 175,000, (iii) on 1 September 2015 with another Portuguese club for the amount of USD 650,000 and (iv) on 28 August 2017 with a Syrian club for the amount of USD 250,000.
67. Moreover, the Respondent submitted on 30 July 2018 a second FIFA TMS report of 27 July 2018, according to which the Appellant apparently signed another transfer agreement on 14 June 2018 with a Moroccan club for the total amount of USD 1,400,000. Regarding this transfer, two proofs of payment, each in the amount of USD 700,000, were also uploaded into said TMS-system by the Appellant on 22 July 2018.
68. At the hearing, the Appellant argued that it did not pay the transfer fees to the two Portuguese clubs, in relation to which two cases were also pending before the FIFA Disciplinary Committee, and that it had paid the transfer fee to the Swiss club after having obtained an exceptional approval from the bank. Regarding the latest transfer agreement, although the Appellant confirmed at the hearing prior to the opening statements that it did not object to the admission of this second TMS report although it had been submitted late, the Appellant requested that the Panel grant it a period of ten days to provide proof that the transfer fee of USD 1,400,000 was not paid by the club but by a third party.
69. The Panel denied the request. Firstly because the Appellant had had no reservations whatsoever about the admission of these documents at the beginning of the hearing, And secondly because any proof that the Appellant could provide would be irrelevant to the Panel due to the fact that it had already been established on the basis of the TMS Report. Namely, that the Appellant had concluded a transfer agreement for an amount it allegedly was not able to pay and that the Appellant apparently was able to make these international payments through its own bank account or through a third party.
70. The alleged financial difficulties the Appellant faced because of the economic crisis in Egypt, and the consequential loss of value of the local currency, are not valid arguments in view of well-established CAS jurisprudence. Financial difficulties or the lack of financial means of a club cannot be invoked as justification for not complying with an obligation to pay (cf. *CAS 2016/A/4402 par. 40*; *CAS 2014/A/3533, par. 59*; *CAS 2005/A/957, par. 24*).
71. In this respect, the Panel finds that the Appellant failed to discharge its burden of proof, as it did not sufficiently establish that the restrictions by the Central Bank of Egypt and the Egyptian authorities in force since January 2014, as well as the seizure of its bank accounts,

constituted an absolute obstacle to the transfer of capital that prevented it from settling its outstanding debt to the Player under the CAS Award.

72. And while the Panel recognises that the respective measures involved a bureaucratic procedure, it nevertheless considers that this did not entail an undue burden that ultimately made it impossible or extremely difficult for the Appellant to make payments abroad. Consequently, the Appellant cannot invoke a situation of *force majeure* for not making the outstanding payments under the CAS Award, at any stage after the opening of the disciplinary proceedings against it.
73. Furthermore, the events pleaded by the Appellant in relation to the seizure of its bank accounts arose for the first time in December 2016, namely after the Appellant had already defaulted on its financial obligations under the CAS Award. As a result, the Appellant cannot benefit from a situation that occurred after its default and use it as a ground for defence.
74. Finally, the Appellant argues that it proposed in good faith to the Player several alternative payment methods in order to continue fulfilling its obligations. These methods included the opening of a bank account in Egypt in which the Appellant could directly deposit the amounts due, or paying the Player's and his legal representative's travelling costs to come to Egypt and pick up the amounts due in cash. The Appellant argues that the Player's employment contract did not specify the payment method and that the Player therefore had no right to refuse the alternative payment methods proposed by the Appellant.
75. The Panel finds that the Player could not be forced to accept these alternative payment methods, despite the feasibility of them. The Panel finds that it is to the discretion of the creditor to determine the details and the place of the bank account into which the amount due is to be transferred. It is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation in accordance with a FIFA decision and according to the creditor's wishes. The latter is therefore free not to accept a payment made to a bank account other than the one he had duly specified.
76. In light of the foregoing, the Panel finds that the Appellant cannot successfully invoke these extraordinary circumstances to escape disciplinary responsibility or to soften the consequences arising therefrom. After due consideration of all of the specific circumstances of the case and the outstanding amount owing, the Panel finds that the disciplinary sanctions imposed by the Appealed Decision were proportional, appropriate, and justified.

#### **D. Conclusion**

77. Based on the foregoing, the Panel finds that the Appellant violated Article 64 of the FIFA Disciplinary Code and that the Appealed Decision of the FIFA Disciplinary Committee therefore must be affirmed in its entirety.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by Zamalek Sporting Club on 8 June 2018 against the decision rendered by the FIFA Disciplinary Committee on 6 March 2018 is dismissed.
2. The decision issued on 6 March 2018 by the FIFA Disciplinary Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.