Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA), award of 16 December 2019

Panel: Prof. Petros Mavroidis (Greece), Sole Arbitrator

Football
Disciplinary sanction for failure to comply with a previous FIFA decision
Transparency and predictability of disciplinary sanctions
Proportionality of the amount of a fine
Restriction of power of review of sanctions limited to evident and gross disproportionate sanctions
Obtention of a reasoned decision

1. **What matters for the principles of transparency and predictability to be observed, is whether the relevant methodology has been laid out *ex ante*, so as to allow an interested party to be sufficiently aware of the magnitude of eventual (potential) sanctions, even if their actual magnitude might differ across cases. The mere exercise of discretion by a deciding body entrusted with such powers does not, in and of itself, run afoul predictability. What matters is whether a such body has used or abused its discretion.**

2. **The comparator to discuss the proportionality of the amount of a fine is the violation observed. Accordingly, past practice provides a benchmark to discuss proportionality. Where a long line of cases has adopted a similar response when sanctioning comparable violations, then CAS panels would be in presence of *prima facie* evidence that a challenged decision adhered to the principle of proportionality.**

3. **A mere disagreement of CAS panels with the level of sanction(s) imposed does not suffice, in and of itself, to undo a decision of disciplinary nature. CAS panels must satisfy themselves that the sanction(s) are evidently and grossly disproportionate to the offence, before proceeding to rescind the sanction(s) imposed.**

4. **The FIFA Disciplinary Committee does not have to cite one-by-one all its prior cases where a sanction has been imposed in order to observe art. 94 of the FIFA Disciplinary Code (FDC). As long as it has imposed a proportional sanction, has warned the addressee about the potential for escalation (art. 64 FDC), and is confident that it is not deviating from prior practice, it has observed art. 94 para. 2, lit. e) of the FDC according to which the parties may obtain a reasoned decision.**

I. PARTIES

1. Club Raja Casablanca (the "Appellant" or the "Club") is a football club with its registered office in Casablanca, Morocco. It is a member of the Royal Moroccan Football Federation, itself affiliated with the Fédération Internationale de Football Association.

2. The Fédération Internationale de Football Association (The "Respondent" or "FIFA") is the international governing body of football.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, which include two witness/expert statements that the Appellant communicated to the Court of Arbitration of Sport ("CAS"). References to additional facts and allegations found in the Parties' submissions will be made, where relevant, to the extent warranted and necessary to support the legal analysis and findings. Consequently, while the Sole Arbitrator has considered all facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he will refer, in this Award, only to some of them, namely, to whatever he thinks is necessary to explain the reasoning that leads to the ultimate decision.

4. On May 21, 2015, the DRC had decided that the Club was under the obligation to pay A. the sum of USD 54,000. An interest of 5% *p.a.* payable as of May 1, 2016 was added to the sum due to A. No appeal was ever lodged against the decision of May 21, 2015, and, consequently, it became final, and, of course, binding.

5. Due to the failure of the Club to implement its obligation, A. addressed on October 23, 2018, a letter to the FIFA Players' Status Department, asking that the Club should be made aware that, failing immediate payment of the amount due, the case would be forwarded to the FIFA Disciplinary Committee. The request was granted, and the Club was informed on November 15, 2018, that the matter had been transmitted to the FIFA Disciplinary Committee.

6. On April 30, 2019, the FIFA Disciplinary Committee formally opened proceedings against the Club, and invited it to submit its observations by May 6, 2019. Failing submission by the Club of its position, the FIFA Disciplinary Committee clarified to the Club that it would be deciding the case based on the documents that it already had in its possession.

7. On May 14, 2019, the FIFA Disciplinary Committee issued a decision which is under appeal in this procedure (the "appealed decision"). In what follows, The Sole Arbitrator describes the key elements of the decision that the Club is appealing against. The Sole Arbitrator will then move to discuss briefly the background to this decision, as it is quite relevant in understanding the nature of the present dispute. The quintessential elements of the appealed decision are the following:

   - The Club was found to be in infringement of Article 64 of the FIFA Disciplinary Code ("FDC"), because it had not complied with a decision issued by the Dispute Resolution Chamber ("DRC"), which had been issued on August 31, 2017. It is this latter decision

that had condemned the Club to pay A., a former employee of the Club, the sum of USD 54,000, to which a 5% interest rate *p.a.*, had been added as of May 1, 2016.

- The Club was granted a final deadline of thirty days (counting from the notification of the appealed decision), in order to settle its debt with A. In case it failed to do so, the Club would be banned from registering new players (for all its eleven-a-side teams from youth categories to its first team), for one entire registration period. If following the passage of the registration period, the Club has not paid A., the latter could request that the transfer ban extends to one additional registration period. In case of non-payment after the end of additional registration period, the FIFA Disciplinary Committee could, upon request from A., decide the relegation of the Club to the next lower division in the championships organized by the Royal Moroccan Football Federation.

- The Club was further asked to pay a fine of USD 7,500 within 30 days counting from the date of notification of the appealed decision.

8. The Club was notified of the appealed decision on May 16, 2019. Following a request to this effect submitted to the FIFA Disciplinary Committee on May 27, 2019, the Club was further notified the grounds of the appealed decision on May 29, 2019.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

9. On June 19, 2019, the Club filed its statement of appeal with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (hereinafter the "Code"). The Appellant requested to submit this matter to a Sole Arbitrator. The Respondent agreed to such request but objected to the arbitrator initially suggested by the Appellant.

10. On July 11, 2019, within the extension granted by the CAS Court Office, the Club filed its Appeal Brief, in accordance with Article R51 of the Code.

11. The Answer of FIFA was submitted on August 28, 2019, that is, within the statutory deadline foreseen in Article R51 of the Code.

12. Through the same letter, dated August 28, 2019, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had appointed Mr Petros Mavroidis, Professor, Commugny, Switzerland, as Sole Arbitrator.

13. On September 16, 2019, following an extension agreed to this effect between the Parties and the Sole Arbitrator, the Club submitted two witness/expert statements, following a request to this effect that Sole Arbitrator had tabled.

14. Having read the statements, the Sole Arbitrator decided that a hearing was not necessary. By letter of September 18, 2019, consequently, the Parties were informed that the Sole Arbitrator had decided to not hold a hearing. He would issue his decision based on all evidence before him, which, in his view sufficed by and large to this effect.

15. On September 18, 2019, the CAS Court Office communicated the Order of Procedure to the Parties. Both Parties signed the Order of Procedure, confirming their agreement that the Sole Arbitrator decide this matter based on the Parties' written submissions and their right to be heard had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

16. The Club submitted the following requests for relief:

1- To set aside the Appealed Decision.

2- To refer the case back to the FIFA Disciplinary Committee for a new decision, in light of the grounds of the Appealed Decision.

3- To order FIFA to pay the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel.

Alternatively and only if the above is rejected:

4- To conform that the sanctions imposed on the Appellant in relation to the fine and a transfer ban are set aside.

5- To confirm that paragraph 2 of item III of the Appealed Decision shall be amended as follows:

> *2. The Debtor is order to pay a fine to the amount of CHF 3,240. The fine is to be paid within 30 days of notification of the present decision. Payment can be made either in Swiss francs (CHF) to account no. […], with reference to case no. 190065 spi.*

6- To confirm that paragraph 4 of item III of the Appealed Decision shall be amended as follows:

> *4. If payment is not made to the Creditor and proof of such payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the Moroccan Football Association by this deadline two (2) points will be deducted automatically by the Moroccan Football Association without a further formal decision having to be taken or any order to be issued by the FIFA Disciplinary Committee or its secretariat.*

7- To order FIFA to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS; and

8- To order FIFA to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel.

17. The Club also submitted an *"evidentiary request"*, as it termed it, invoking Article R44 para. 3 of the CAS Code, namely:

> *"Appellant herein request FIFA to permit the former to have access to the database of the decisions rendered by the FIFA Disciplinary Committee, at least of all those rendered by the referenced judicial body in the last 6 (six) months".*

18. The submissions of the Club, in essence, may be summarized as follows:

- FIFA, like any other association registered in the Commercial Register of the Canton of Zurich (and any other association registered with a Cantonal Commercial Register) must, in accordance with Article 60 of the Swiss Civil Code, have its statutes in written form, and they must contain the necessary provision regarding the goal, resources and organization of the association.

- FIFA must disclose all material in its possession which might assist a person/entity charged with a disciplinary offence, and must guarantee access to file to these persons/entities. This is a matter of good governance, which FIFA organs, including its Disciplinary Committee must observe.

- For unfathomable reasons, FIFA routinely refuses to publish decisions by its members. Lack of publication (transparency) is prejudicial to persons/entities affected, and contravenes the principle of good governance.

- References to cryptic terms, such as the *"Committee's well-established practice"* fall short of guaranteeing transparency, and adherence to good governance. In the absence of clarity as to what exactly the *"Committee's well-established practice"* is, which can be clarified only through publication of the relevant decisions, the use of similar terms does not serve to ensure protection of the fundamental rights of charged persons/entities, as these rights are understood in Swiss law, TFEU, and the European Convention of Human Rights.

- The observed lack of transparency furthermore, falls short of meeting the requirements of Article 94 of the FDC, and more particularly, its lit. e) para. 2, which reflects the right of parties to obtain a reasoned decision.

- FIFA uses a *"confidential database"* for its own exclusive benefit during the disciplinary proceedings. The existence of this scheme negatively affects the right of persons/entities, who, as a result of this asymmetric information are denied *paritas armis*.

- The lack of transparency is all the more prejudicial for the rights of charged persons/entities, since Article 64 of the FDC does not provide interested parties with any parameters that will help them evaluate whether basic principles of good governance, such as the principle of proportionality and/or equal treatment have been adhered to.

- In this case, by not providing any explanation why a fine of CHF 7,500 was appropriate, and in the absence of transparency regarding past practice as explained in the preceding

paragraphs, FIFA has violated Article 94 of the FDC, the TFEU, the European Convention of Human Rights, due process, and the right to be heard by the Appellant.

B. The Respondent

19. FIFA submitted the following requests for relief:

> *"a. To reject the Appellant's appeal in its entirety;*
>
> *b. To confirm the decision 190065 PST MAR AUH rendered by the FIFA Disciplinary Committee on 14 May 2019; and,*
>
> *c. To order the Appellant to bear all costs incurred with the present procedure and to cover all the legal expenses of FIFA related to the present procedure".*

20. FIFA's submissions may be summarized as follows:

- The scope of the appeal circumscribes the ambit of review by the Sole Arbitrator. The matter before CAS is not the content of the DRC decision, but the question whether the Appellant has fulfilled its obligations. In other words, the issue before CAS is not whether the DRC decision is lawful or not. The issue before CAS is whether the appealed decision, that is, the legal instrument to enforce the DRC decision, has been observed or not. The appealed decision is the outcome of disciplinary proceedings for violation of Article 64 of FDC, which results from the failure to comply with the DRC decision.

- The one and only question before the Sole Arbitrator is, thus, whether the Club paid (or not) its debts to A., as it had to do following the issuance of the appealed decision. The Club did not pay, and, furthermore, it never provided any proof that could justify the failure to pay the due amount to A. In fact, the Club did not even claim that it had not breached Article 64 of the FDC.

- The Club has attempted to sidestep the process, by putting forward arguments about the applicability of the Treaty on the Functioning of the European Union (TFEU), which is irrelevant to the present process.

- The Club embarks on a futile exercise, in this context, arguing that basic legal principles, such as the need to provide legal certainty and predictability, have been eviscerated to redundancy, because of FIFA's attitude. This is plain wrong, as these principles are not ill-served, simply because the *ratione materiae* competent bodies have discretion to adjust lawful sanctions, that is, sanctions that the relevant statute provides for.

- The Club's invocation of the principle of good governance, and its ensuing claim of violation of this principle in this case, should be rejected as well. This principle refers to institutional issues, such as separation of powers, or, at a more dis-aggregated level, the appointment of impartial and independent judged. It does not extend to the *ex ante* measurement of sanctions.

- The Club's claims based on the relevance of the recent decision of the European Court of Human Rights (ECHR) on Claudia Pechstein, and Adrian Mutu v. Switzerland, should be discarded as well. These cases do not concern the issues discussed in these proceedings, and the Club has failed to demonstrate why the opposite is the case.

- The Sole Arbitrator should further refute the claim put forward by the Club, that its right to be heard has been violated. In fact, as of April 30, 2019, when the Club had received an invitation to this effect, it has enjoyed ample opportunity to present its views between the competent FIFA bodies. It decided to decline the offer, and, as a result, its right to be heard.

- The Sole Arbitrator, on the other hand, is entitled to evaluate whether the sanction imposed through the appealed decision are proportional or not. When doing so, he must abide by the standard of review that long-standing practice in CAS has established. He must not discard the sanction imposed simply because he disagrees with it. Conversely, he can do so, if the Arbitrator takes the view that the sanction imposed is *"evidently and grossly disproportionate to the offence"*. This is not the case in the present dispute. Both the fine imposed, as well as the registration ban that the Club must observe, meet the benchmark of proportionality, as the latter has been understood in FIFA-Committee practice, as well as CAS jurisprudence.

V. JURISDICTION

21. The jurisdiction of the CAS, which is not disputed, derives from the Articles 57 *et seq.* (and, crucially, Article 58.1) of the applicable FIFA Statutes, as well as Article R47 of the CAS Code. It is further confirmed by the order of procedure duly signed by the Parties (CAS letter of September 23, 2019).

22. Furthermore, Article 64 para. 5 of the FDC states that:

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

23. There is no doubt that here the Sole Arbitrator is dealing with an appeal against a decision passed in accordance with Article 64 of the FDC. Consequently, it follows that for this, as well as the other grounds mentioned above, the CAS has jurisdiction to decide on the present dispute. Furthermore, both Parties confirmed the jurisdiction of CAS to hear this dispute by signing the Order of Procedure.

24. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

VI. APPLICABLE LAW

25. 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

26. Pursuant to Article 57 para. 2 of the applicable FIFA Statutes,

"[t]he 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".

27. The Parties do not agree entirely on the applicable law.

28. The Club claims that Swiss law and the TFEU should apply primarily in order to address the claims raised in the present dispute. It does not dispute that the relevant FIFA regulations, namely, the 2017 Edition of the FDC also apply. It mentions this statute though in its Appeal Brief, at the end of the section dealing with applicable law, and does not frame the applicability of Swiss law and the TFEU as a gap-filling exercise, to the extent that is, that gaps in the relevant FIFA statutes exist.

29. The Club in fact, cites case law by the Swiss Federal Tribunal to make the point that Swiss arbitral tribunals are competent to apply the TFEU. It further claims that, by virtue of Article 186 para. 1 of the Swiss Private International Law Act, one is led to the same conclusion. Since the TFEU encompasses references to the European Convention of Human Rights, the Sole Arbitrator should apply this body of law as well, in order to resolve the present dispute.

30. Conversely, FIFA has taken the view that the applicable FIFA regulations, and more specifically, the 2017 Edition of FDC, is, in principle, applicable to the present dispute. FIFA does not disagree that Swiss Law, as per a consistent line of CAS jurisprudence to this effect, should apply. Nevertheless, it should apply only to the extent warranted, that is, to the extent that recourse to this body of law is necessary in order to address gaps in the FIFA statute. In this line of reasoning, recourse to Swiss law is on auxiliary basis only. Finally, FIFA totally rejects the applicability of the TFEU to the present dispute.

31. FIFA denies the applicability of the TFEU and/or the European Convention of Human Rights.

32. The Sole Arbitrator fails to see how the claims advanced by the Club hold. Indeed, even if the dispute concerned only the proportionality of the sanction imposed, he would have had, anyway, to first review the relevant FIFA statutes that served as legal basis for the issuance of the appealed decision. The imposition of sanctions is impossible absent statutory basis, and the statutes that FIFA organs base themselves to impose sanctions are, of course, the FIFA statutes. All the more so, since the Club has raised arguments relating to, among other things, good governance. How can the Sole Arbitrator decide whether a breach has been committed in this context, absent evaluation of the statutory underpinnings of good governance? Good governance is not an a-contextual maxim of law. It is translated into specific legal provisions in

statutes. When it comes to claims lack of good governance by the FIFA organs, it is of course, the relevant FIFA statutes that provide the pertinent to the evaluation statutory underpinnings. This is so, since FIFA organs are called to abide by the statutes they are designed to serve, that is, the FIFA statutes.

33. To the extent of course, that the Club aims to put into question the overarching understanding of good governance by the FIFA organs (and indeed, some of the language used when formulating its claims could be interpreted in this way), the Sole Arbitrator declines to pronounce on the legitimacy of similar claims. It is not the role of an arbitral tribunal, the CAS included, to act as principal, but as an agent. Given thus, the law, the question is whether a particular measure is lawful or not. The quality of the law as such is the *domaine reservé* of the legislative, not the adjudicatory function.

34. Thus, the Sole Arbitrator will examine the claims on good governance in a narrower context, that is, the question whether due process has been served in this case, namely by ensuring the right of the Club to be heard, and by providing a well-reasoned decision, which observes the principles of transparency and proportionality.

35. In doing that, the starting point of the analysis will be the relevant FIFA statutes. To the extent that there are gaps in these statutes, the Sole Arbitrator will have recourse to Swiss law (which, anyway reflects a standard of protection of human rights at least equivalent to that embedded in the European Convention on Human Rights) in order to fill the observed gaps.

36. The next logical question is, which FIFA statute is relevant in order to evaluate the well-founded of the claims advanced by the Club? Since the Sole Arbitrator is dealing with an issue of disciplinary nature, it must be the FDC.

37. The analysis above, leaves us with one final question to answer to, namely, which Edition of the FDC is applicable to the present dispute.

38. The Sole Arbitrator has already noted above, that the appealed decision was issued on May 14, 2019. By letter issued on October 23, 2018, the Club had been informed that, absent payment of his obligations, the case would be transmitted to the FIFA Disciplinary Committee. Since the Club did not proceed to payments, it was informed already by November 15, 2018, that the dispute had been effectively transmitted to the FIFA Disciplinary Committee. In light of the above, it is the 2017 Edition of FDC that is applicable in the present dispute.

39. As already briefly mentioned, the Sole Arbitrator agrees with the parties that Swiss law is applicable, as well. A long-standing CAS jurisprudence (see for example, the decision issued for the joint cases CAS 2018/A/5955, and CAS 2018/A/5981, where the CAS Panel re-visited past case law on this score *in extenso*) stands for the proposition that, Swiss law will apply subsidiarily, that is, to the extent necessary to fill in for gaps left open by the FIFA statutes when regulating a specific transaction. The Sole Arbitrator endorses this approach.

40. This leaves us with the question of the eventual applicability of the TFEU, as the Club maintains. The Sole Arbitrator does not agree with the position advanced by the Club, even though for reasons somewhat different from the reasons advanced by FIFA to this effect.

41. Recall, that the present dispute concerns a disciplinary sanction. The eventual applicability of the TFEU, can be decided when recourse to Swiss law has been made. This is so, since nowhere do the relevant FIFA statutes request recourse to the TFEU. Under Swiss law, as FIFA correctly underscores in para. 9 *et seq.* of its Appeal Brief, arbitral tribunals, like the CAS, have discretion to decide whether recourse to TFEU (or other foreign law) will be made.

42. The Sole Arbitrator is of course, not dealing here with a case, where the choice of law made by the parties included recourse to the TFEU. Rather, the Sole Arbitrator is dealing with an appeal against a decision of a FIFA organ, which decided the matter before it, by reference to the relevant FIFA statutes only. In other words, the question before us, could be reformulated as follows: does CAS have to apply the TFEU, even when dealing with an appeal against a decision by a FIFA organ, which resolved the matter before it by reference to FIFA statutes, and without any consideration of the TFEU?

43. The short question is no. FIFA organs do not have to observe the TFEU. Nowhere do their statutes impose a similar obligation. And of course, FIFA organs are called to implement/enforce the FIFA statutes. If they do not have to observe the TFEU, it would be illogical, and legally impermissible anyway, to request from CAS to effectively add to the balance of rights and obligations as struck by the framers of the FIFA statutes.

44. The response the Sole Arbitrator has provided so far, suffices by and large to put this issue to rest. In order to leave no doubt that this is the legally sound position to take, the Sole Arbitrator will address the question from the perspective of the amount of discretion embedded in CAS Panels, as effectively the Club wants us to do.

45. Since CAS is an arbitral tribunal headquartered in Switzerland, and since Swiss arbitral tribunals have discretion as to whether to apply the TFEU, the question is whether a proper exercise of discretion should lead the Sole Arbitrator in this case to apply the TFEU in order to resolve the present dispute.

46. The metric to decide whether, TFEU is (or is not) applicable to the present case, is the nexus between the matter before us and the TFEU. In the present case, the Sole Arbitrator is dealing with a claim that FIFA, a Swiss private association of enterprises, has violated its obligations vis-à-vis the Club, an association of Moroccan origin. The nexus with the TFEU, *prima facie* at least, is spurious, if not inexistent altogether.

47. Furthermore, and with this the Sole Arbitrator concludes the question of applicable law, nowhere in its pleadings has the Club explained why recourse to the TFEU (and more specifically, the provisions on EU antitrust law, a body of law principally aiming at preserving rivalry within relevant product markets) is warranted to resolve a dispute concerning the legality of a disciplinary measure adopted by FIFA.

48. In light of the analysis above, the Sole Arbitrator has decided to have recourse to the 2017 Edition of the FDC, and, subsidiarily, when warranted, to Swiss law, in order to resolve the present dispute between the Club and FIFA.

VII. ADMISSIBILITY

49. The appeal is admissible as the Club submitted it within the deadline provided by Article R49 of the Code as well as by Article 58 para. 1 of the applicable FIFA Statutes. It complies with all the other requirements set forth by Article R48 of the Code.

50. Furthermore, FIFA, the defendant in this case, has not contested the admissibility of the present appeal. It has explicitly (para. 5 of the Appeal Brief) conceded that:

> *"the admissibility of the Appelant's appeal is not contested by FIFA".*

VIII. MERITS

51. A couple of observations are warranted before the Sole Arbitrator addresses the merits head on. Recall that the Club has claimed that the Sole Arbitrator should employ Swiss law, the TFEU, the European Convention on Human Rights, as well as the 2017 Edition of the FDC, as benchmark (legal standard) to pronounce on the consistency of the challenged measure. Recall further, that the Sole Arbitrator has already in part discarded this view, for the reasons explained supra in Section VI.

52. The Club nevertheless, has specified that the measures adopted by the FIFA Disciplinary Committee, violate the legal maxims of predictability, proportionality, and equal treatment. FIFA, in its pleadings (para. 21 *et seq.*), has explicitly admitted to the relevance of these principles, which guide the decisions of all FIFA organs. These principles are present of course in both the FIFA statutes as well as in Swiss law (which, as already discussed, encompasses at the very least the standard of protection embedded in the European Convention on Human Rights).

53. The Sole Arbitrator has, consequently, decided to proceed and examine whether the challenged measure violates these principles, the relevancy of which FIFA has admitted. In doing that though, the Sole Arbitrator will be using the applicable law, as defined in Section VI, as the appropriate legal benchmark to evaluate the well-founded of the claims advanced.

54. The main issues thus, to be resolved by the Sole Arbitrator in deciding this dispute are the following:

A. Has FIFA acted in a manner that violates the legal maxim of predictability in this case?

B. Has FIFA acted in a manner that violates the legal maxim of proportionality in this case?

C. Has FIFA acted in a manner that violates the legal maxim of equal treatment in this case?

55. The Sole Arbitrator will, at the end of this analysis examine separately whether FIFA has violated Article 94 of the FDC. The reason for proceeding in this way, is that, the claim with respect to Article 94 of the FDC largely overlaps with the subject-matter of the three claims the Sole Arbitrator has mentioned in the preceding paragraph under A., B., and C., even though the overlap is not absolute. Thus, the decision with respect to each one of the three claims under A., B., and C., will, to a considerable extent, provide the response to the claim under Article 94 of the FDC as well.

56. Depending on the response to these questions, the Sole Arbitrator will then draw the appropriate conclusions, and the warranted legal consequences.

A. Has FIFA acted in unpredictable manner?

57. The alleged unpredictability claimed by the Club, consists in FIFA's decision to impose a sanction, which the Club could not have reasonably anticipated. The sanction, the Sole Arbitrator recall, consisted in a fine of USD 7,500, as well as a registration ban for one entire period. The legal question thus, before us is, whether a recalcitrant agent can expect similar sanctions or not, when operating within the FIFA-system?

58. Unpredictability is of course, closely linked to transparency. Lack of transparency as to the action eventually taken, can often lead to unpredictable results. Indeed, the Club did raise a transparency-related claim in this respect, and the Sole Arbitrator will discuss it jointly with the claim regarding the unpredictable nature of FIFA's claims, in light of the close interlinkage between the two concepts/maxims.

59. The level of aggregation is what matters most in this discussion. The claim is that transparency has been violated, but transparency at what level? Should FIFA, in other words, be obliged to *ex ante* determine all possible sanctions against all possible violations of the FIFA statutes? Should FIFA be further compelled to adopt a rule (*e.g.*, precise calculation of all possible sanctions for all possible violations) as opposed to a standard (*e.g.*, reference to general principles, such as the principle of proportionality) in this respect? Or, conversely, should reference to standards, that is, a few general principles reflected in the statute, suffice for transparency to be observed, leaving it to the exercise of future discretion to decide on the actual sanction on a case-by-case basis?

60. A case-by-case analysis, the Sole Arbitrator should add before attempting to provide the response to the question he asks here, is not necessarily pathway towards arbitrariness. What matters for the principles of transparency and predictability to be observed, is whether the relevant indicators have been laid out *ex ante*, so as to allow interested parties to be sufficiently aware of the magnitude of the eventual (potential) sanction. What matters, in other words, in a

case-by-case analysis, is the methodology used by those entrusted with the discretion to decide. Robust methodologies will lead to predictable results, even if their actual magnitude might differ across cases (depending of course, on the factors taken into account each time).

61. In fact, CAS jurisprudence (CAS 2014/A/3665, 3666 & 3667) has already explicitly acknowledged that the mere exercise of discretion by a body entrusted with similar powers does not, in and of itself, run afoul predictability. What matters is whether the decision-making body has properly used (and, in this case, the principle of predictability has been observed), or abused (and, in this case, the principle of predictability has been violated) its discretion.

62. Discretion is of course, not limitless. FIFA organs are not called to decide *ex aequo et bono*. Article 64 of the FDC provides the type of sanctions, which the competent FIFA organs can impose, and the sequence to be followed when sanctioning persons/entities, depending on the behaviour of the addressee of the sanctions imposed. Predictability as to the identity of the sanction is thus, served through the enactment of this provision.

63. Indeed, in this case, the FIFA Disciplinary Committee imposed a fine and a registration ban. Fines are explicitly provided for in Article 64.1(a) of the FDC. Registration bans are equally explicitly provided for in Article 64.1(c) of the FDC.

64. The claim of the Club about lack of predictability, as formulated in the Appeal Brief submitted by the Club, is not exhausted in the question of the identity of the sanction. It extends to its measurement, as well. This question nevertheless, almost totally overlaps with a distinct claim put forward by the Club, namely, whether the sanction imposed by the FIFA Disciplinary Committee was proportional or not. Indeed, disproportional sanctions (irrespective of the benchmark of proportionality) are by construction unpredictable. Conversely, to the extent that sanctions imposed have been proportional, and since proportionality must be observed at all times, they will *ipso facto* be predictable as well. The Sole Arbitrator turns to the question concerning the proportionality of the imposed sanctions, in what now follows.

B.- Is the sanction imposed disproportional?

65. Proportionality requires of course, a benchmark. A sanction must be proportional to a comparator. The comparator can differ. It could be the gravity of the violation committed. It could also be the distance between the *status quo*, and whatever is needed for compliance to be achieved. The latter benchmark is usually commonplace in criminal proceedings, especially when dealing with recalcitrant, and/or repeat offenders. The case before us, does not at all belong to this latter category.

66. Proportionality can of course, be imposed on agents entrusted with discretion through statutory means. Indeed, Article 64.3 of the FDC does as much when it explicitly states that:

> *"If points are deducted, they shall be proportionate to the amount owed".*

67. Deduction of points is one of the sanctions provided for in the body of Article 64. A compelling contextual argument could be made to the effect that proportionality is relevant to any one of

the sanctions reflected in the body of this provision. Indeed, there is nothing special about points deduction, and the only reason why proportionality has been spelled out explicitly for this sanction only, must be that the link between illegality and sanction is, in this case, not obvious.

68. In the present case, there is no dispute between the parties regarding the question whether proportionality must be observed. They both agree that this must be the case when the FIFA Disciplinary Committee sanctioned the Club. Rather, the dispute concerns the question whether, when exercising its discretion, the FIFA Disciplinary Committee did *de facto* observe proportionality.

69. Recall, finally, that the Club has not claimed that it did not breach Article 64 of the FDC. This implicit, at least, admission is quite important, as far as its repercussions on the sequence of sanctions embedded in Article 64 of FDC are concerned. Paragraphs (a)-(d) establish a sequential increase in sanctions imposed, dependent on the (un-)cooperative behaviour of the interested party:

    1. A fine will be imposed anyway. The imposition of the fine is the automatic consequence of the failure to comply with a decision by the competent FIFA body. In the instant case, a fine of USD 7,500 was imposed because the Club had not paid its debt to A.

    2. The payment of the fine is not the end of the story. FIFA bodies will establish a new deadline within which the author of the illegal act must bring its measures into compliance with its obligations under the FIFA statutes. In this case, the FIFA Disciplinary Committee handed the Club a new deadline within which it would have to compensate A. From here onwards, the logic of Article 64 of the FDC becomes two-tiered:

        a) if payment occurs, to the full satisfaction of course of the party entitled to the payment, then the matter is definitively closed;

        b) if not, a club might be facing a point deduction, or even a relegation to a lower division, as well as a registration ban. The threat of sanctions to this effect is pronounced already when the deadline is set within which the payment of the due sum must occur.

70. Since the Club does not claim that it was not in breach of Article 64 of the FDC, it must accept the right of FIFA organs to sequence sanctions, in the manner described above. Under the circumstances, there are two questions that the Sole Arbitrator needs to address in order to decide on the proportionality of the sanction. First, was the imposition of a registration ban proportional in light of the absence of payment of the sum USD 54,000 to A.? Second, was the imposition of a fine of USD 7,500 proportional in light of the absence of payment of the sum USD 54,000 to A.?

71. Before the Sole Arbitrator takes this discussion any further though, he needs to establish the standard of review, adopted in CAS jurisprudence, when facing claims to the effect that a FIFA body has not observed proportionality when sanctioning a club. In CAS/2017/A/5031, the

Panel, having visited prior case law on this score, concluded that it would find for the appellant (p. 10):

"only if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence".

This means, that a mere disagreement of the Sole Arbitrator (or any CAS adjudicator to this effect) with the level of sanction imposed does not suffice, in and of itself, to undo the decision by the FIFA Disciplinary Committee. The Sole Arbitrator must satisfy itself that the fine of CHF 7,500 and the registration ban are *"evidently and grossly disproportionate to the offence"*, before proceeding to rescind the sanction imposed.

72. The Sole Arbitrator starts his analysis with question whether the imposition of the fine of CHF 7,500 is in conformity with the obligation to observe proportionality when sanctioning under Article 64 of the FDC. It bears repetition, that, when imposing a fine, a FIFA organ does not enjoy boundless discretion. In fact, FIFA statutes go some way towards prejudging the ambit of discretion. Specifically, FIFA organs must abide by the discipline embedded in Article 15 of the FDC, which relevantly provides that:

1. Fines must be expressed in two currencies only, either USD or CHF. This is a non-issue in the case under consideration, as the fine imposed was expressed in Swiss francs (CHF).

2. The minimum amount of a fine is CHF 300, whereas the maximum is CHF 1,000,000. The Sole Arbitrator should note that the two commas in Article 15.2 of the FDC (one following the words "CHF 300", and the other following the words "CHF 200"), make it clear that the upper bound of CHF 1,000,000 covers both cases discussed in this provision, namely, cases where there is and there is no limit as to the age of competitors. It is thus, within these parameters that the question of the proportionality of the fine imposed in this case (CHF 7,500) will be discussed. The FIFA Disciplinary Committee could not have imposed a fine less than CHF 300, or more than CHF 1,000,000, since in either case it would be acting *ultra vires*. This did not happen in this case.

3. The body imposing the fine has the right to decide the terms and time limits. In our case, the FIFA Disciplinary Committee had the right to do so. As far as our inquiry into whether the FIFA Disciplinary Committee respected proportionality when doing so is concerned, the question to ask is whether the imposition of a fine of CHF 7,500 payable within 30 days is proportional in light of the fact that the violation consisted in the non-payment of a sum of USD 54,000.

73. The claim that the sanction imposed is disproportional, is the centrepiece of the assault against the Appealed Decision. In fact, one of the cited requests of the Club is to reduce the amount of the fine imposed. In similar vein, the two witness/expert statements submitted by the Club to support its case, conclude on this note, arguing that the sanction imposed was not in line with the principle of proportionality. While not questioning the fact that the Club was still in breach of Article 64 of the FDC, they urge CAS to recommend a more lenient sanction. The Sole Arbitrator cites the two key paragraphs, which are identical in the two statements:

"Moreover, considering the heavy load of pending payments, a period of 30 days for the completion of the payment of approximately USD 60,000 and other expenses, is an unrealistic and highly unreasonable time frame which has been provided by the FIFA authorities.

In line with the above, therefore, the FIFA authorities should prescribe a period of at least 60 days for the completion of the outstanding payments relating to the matter at hand, since it seems more reasonable and realistically balanced with the pending amount of approximately USD 60.000".

74. The witnesses seem to place the accent on the deadline within which the payment of the outstanding amounts should take place. The Club on the other hand, has also claimed, as the Sole Arbitrator has argued above, that the fine itself, that is, the amount of CHF 7,500, is disproportional.

75. The Sole Arbitrator has already explained why the comparator to discuss the proportionality of the amount of the fine imposed, is the violation observed. The Club owes A. the sum of CHF 54,000 for over four years now. Four years later, and in light of the absence of payment of the due amount, the competent FIFA body imposed a fine which does not exceed 14% of the principal amount due. In fact, in light of the interest rates already due, the fine is approximately 12% of the principal sum.

76. The question thus, before us, is whether a similar sanction is disproportional. Past practice provides a benchmark to discuss proportionality. Assuming that long line of cases has adopted a similar (to the Appealed Decision) attitude when sanctioning illegalities, then, the Sole Arbitrator would be in presence of *prima facie* evidence that the Appealed Decision has adhered to the principle of proportionality.

77. Past practice of the sort, will also be quintessential input in our evaluation whether the Appealed Decision observes equal treatment as well, as the Sole Arbitrator will see in the next Section. And of course, the Sole Arbitrator should keep in mind the appropriate standard of review: only if the Sole Arbitrator takes the view that, through the Appealed Decision, a sanction has been imposed that is evidently and grossly disproportionate to the offence, shall the Sole Arbitrator proceed to overturn it.

78. When looking into past practice, point-to-point comparisons, are uninformative. It is trends that matter. One can always point to an outlier, which remains unchallenged. When doing so, the judgment of proportionality will suffer, since the comparison will be suffering from sample bias.

79. There is voluminous practice on the question of proportional sanctions in CAS jurisprudence. The Appellant has selectively cited some of it, but there is much, much more, of course. Except for the cited CAS 2017/A/5031, the decisions in CAS 2018/A/5900, CAS 2018/A/5683, CAS 2017/A/5401, CAS 2016/A/4910, CAS 2016/A/4595, CAS 2016/A/4387, CAS 2013/A/3321, CAS 2009/A/1917, CAS 2009/A/1844, CAS 2006/A/1175, CAS 2005/A/830, CAS 2004/A/690, to cite but a few, have grappled with this issue.

80. Some of them, like CAS 2013/A/3321 ended up with accepting as proportional, fines almost identical to the one imposed in the present case: in this case a fine of CHF 7,500 was deemed to be proportional sanction, when the unpaid debt was 58,000 euros. These numbers are strikingly similar to the case before us (fine of CHF 7,500 for a debt of CHF 54,000). There are cases where a lower fine was imposed: in CAS 2018/A/5900 the fine was 4.37% of the unpaid debt. There are also cases where a higher fine was imposed: in CAS 2016/A/4910, the fine was 20% of the unpaid debt.

81. When the Sole Arbitrator looks thus, at the range of fines judged proportional, as opposed to isolated cases such as those cited by the Appellant, the inescapable conclusion is that the fine imposed in the Appealed Decision is proportional to the illegality committed. This conclusion is all the more so robust, where we are to factor in the standard of review established in CAS jurisprudence, and applicable to cases like the present one.

82. The deadline set is not disproportional either. The FIFA body set a very realistic deadline of one month for the payment of a sum, which, had it been effectuated, it is highly unlikely that it would have jeopardized the financial situation of the Club. In fact, similar deadlines have been set in the majority of the cases discussed above, where questions regarding adherence to proportionality have been raised.

83. The registration ban is not disproportional either. Recall that, under Article 64.1(c) of the FDC, the competent FIFA organ may impose a registration ban, if two conditions have been cumulatively met. First, the club concerned must have been warned and notified accordingly of the potential for sanction, in case no payment has been made before the expiry of the deadline set by the FIFA organ. Second, and quite naturally so, the registration ban will be imposed, only if no payment has been made during this deadline.

84. The Club has not claimed that it has not been warned of the potential for sanction of this sort. The Club, furthermore, has not disputed that it has not paid the adjudicated sum of CHF 54,000 to A. As the deadline set is quite reasonable as well, the registration ban is a proportional sanction in light of the illegality committed.

C. Has FIFA violated equal treatment?

85. Since the Sole Arbitrator has concluded that the measure is proportional, the question of equal treatment loses much of its interest. Indeed, if treatment has been unequal, then it is findings in other transactions that risked being problematic, since, by construction, they would be disproportional.

86. Disproportionality obtains, irrespective whether the sanction imposed is too demanding or too lenient. In both cases, it is not proportional to the gravity of the measure that has been judged unlawful.

87. Since nevertheless, the Club has raised this question, and in order to complete the analysis on this score, the Sole Arbitrator has decided to address the issue anyway. The Sole Arbitrator will

first address the question of equal treatment with respect to the fine imposed, followed by an evaluation of whether equal treatment has been observed when imposing the registration ban.

88. The Sole Arbitrator should underscore at the outset, that the number of previous transactions in this context (practice under Article 64 of the FDC) is almost dispositive. Indeed, the greater the number of sanctions imposed in the past, the unlikelier that proportionality/equal treatment have been disrespected. Affected parties would have challenged decisions before CAS, and the FIFA Disciplinary Committee would have corrected failures, whenever appropriate. The Sole Arbitrator is in the realm of a provision with very substantial practice, that much is for sure. With this in mind the Sole Arbitrator turns to the facts of the case.

89. The range of fines (CHF 300 to CHF 1,000,000) is such, that there is large scope for treating similar transactions in, *prima facie* at least, unequal manner. What matters thus, is the comparability factors, that is, the comparators, the indicators that the FIFA Disciplinary Committee has used in order to decide similar cases.

90. For starters, an element to be taken into account is that the absolute sum involved (CHF 7,500) is quite close to the lowest possible fine (CHF 300), and quite afar from the highest possible fine (CHF 1,000,000). Since these sums have been included in the 2017 Edition, which has been informed by previous practice, and because FIFA must observe proportionality, the Sole Arbitrator is led to conclude that the sum of CHF 7,500 is warranted when misdemeanours (as opposed to grave violations) have been committed.

91. In para. 87 of its Answer, FIFA provides a table of cases concerning similar violations. The comparator when calculating the amount of the fine is the outstanding amount, which is the sum due. The range is between debts rising up to CHF 53,429.99 to debts of CHF 74,301.7. In all these cases, the FIFA Disciplinary Committee has imposed a fine of CHF 7,500.

92. The current dispute is roughly at the 40% point between the lowest and the highest number in the cited margin, since, as the Sole Arbitrator has stated already, the interest of 5% *p.a.*, is due as of May 1, 2016. When thus, the FIFA Disciplinary Committee took action, the debt was slightly higher than USD 60,000. The exchange rate between USD and CHF has been fluctuating from 0.99 to 1.

93. But even assuming *arguendo*, that the list of cases provided by FIFA is selective, and suits its case, the wider sample of cases that the Sole Arbitrator has provided in the previous Section, amply supports the conclusion that there is no case of unequal treatment. Indeed, the Sole Arbitrator has cited a large amount of cases where, for similar/comparable violations, similar/comparable sanctions were imposed.

94. The question of equal treatment does not, of course, invite comparison between two transactions. It invites comparison of one specific transaction to a trend. The trend as evidenced in the Answer of FIFA clearly supports that the Sole Arbitrator is not facing a case of unequal treatment here.

95. By this, the Sole Arbitrator does not want to totally discard the relevance of transaction-to-transaction comparisons. Indeed, it could very well be the case that one might be in position to find an outlier, one specific transaction, where either a substantially lower or a substantially lower fine has been imposed to a recalcitrant party, which owes the same amount of money.

96. Assuming that FIFA has not used other comparators (*e.g.*, capacity to pay; or, the occurrence of an exceptional circumstance), the Sole Arbitrator would still have found that, the lack of equality notwithstanding, the fine should have been upheld. This is the case because proportionality, in case of conflict with equal treatment, is the overarching benchmark. If proportionality has been served, then it is the other transactions that suffer legally, since, by construction, the fine imposition in similar cases must have been disproportional.

97. Finally, the Club has not claimed that the FIFA Disciplinary Committee has changed different comparators in this, and the other cases it has brought to our attention.

D. Has FIFA Violated Article 94 of the FDC?

98. The Club also claims that the FIFA Disciplinary Committee has violated Article 94 of the FDC. In fact, the claim is that the FIFA Disciplinary Committee violated para. 2, lit. e). The Club nevertheless, did not state that the rest of the provision is irrelevant for the purposes of its Appeal.

99. Article 94 of the FDC reads:

> *1. The parties shall be heard before any decision is passed.*
>
> *2. They may, in particular:*
>
> *a) refer to the file;*
>
> *b) present their argument in fact and in law;*
>
> *c) request production of proof;*
>
> *d) be involved in the production of proof;*
>
> *e) obtain a reasoned decision.*
>
> *3. Special provisions may apply in certain circumstances.*

100. The claim under para. 2, lit. e) consists in arguing that the decision was not reasoned because it was unclear, that is, it did not provide a clear explanation why the sanction was proportional and observed equal treatment. The heart of the claim is that reference to the well-established Committee practice does not suffice to ensure consistency with Article 94 of the FDC.

101. The Sole Arbitrator disagrees. The Sole Arbitrator has found that the sanction is proportional, hence by definition predictable. The FIFA Disciplinary Committee does not have to cite one-by-one all its prior cases where a sanction has been imposed in order to observe Article 94. As long as it has imposed a proportional sanction, has warned the addressee about the potential for escalation as per Article 64 of the FDC, and is confident that it is not deviating from prior practice, the Committee has observed Article 94 para. 2, lit. e).

102. Actually, in the Sole Arbitrator's view, the Committee would have been in a duty to explain more, in case it had deviated from prior practice. It is in this case that it would not be adhering to proportionality, and equal treatment (and, ultimately, predictability).

103. As the Club has not substantiated its claim in this respect any further with respect to the remaining paragraphs of Article 94, the Sole Arbitrator rejects its claim that the FIFA Disciplinary Committee has violated this provision.

104. Finally, the Club has also submitted an evidentiary request. The Sole Arbitrator has noted above that the Club has requested from CAS to order the FIFA Disciplinary Committee to produce its database with all referenced (similar) decisions for the last six months.

105. To be sure, this is not a claim to the effect that Article 94 para. 2, lit. a), c) or d) have been violated. This is not a request for access-to-file. The Club is asking for production of documents, which evidence the long-standing practice of the Committee.

106. The Sole Arbitrator cannot see, even if he had granted this request, the outcome of this dispute would have been any different. The Sole Arbitrator established that the sanction imposed is transparent, proportional, observes equal treatment, and is thus, predictable. The Sole Arbitrator has further rejected the claim that Article 94 of the FDC has been violated. Under the circumstances, it is really irrelevant for the purposes of resolving this dispute, whether the records are transmitted to the Club or not.

107. But there is an additional concern why this request cannot be granted. The records might contain confidential information, which, if divulged, might prejudice parties not participating in this dispute. It is one thing to publish a decision. It is a totally different thing to open up the whole record of a case to the public.

E. Conclusions

108. In light of the foregoing, the Sole Arbitrator finds that the Appealed Decision must be upheld in its entirety.

109. This conclusion makes it unnecessary for the Sole Arbitrator to consider the other requests and submissions submitted by the Parties. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the Club Raja Casablanca against the decision issued on May 14, 2019 by the FIFA Disciplinary Committee is dismissed.

2. The decision issued on May 14, 2019 by the FIFA Disciplinary Committee is confirmed.

3. (…).

4. (…).

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