Arbitration CAS 2013/A/3067 Málaga CF SAD v. Union des Associations Européennes de Football (UEFA), award of 8 October 2013 (operative part of 11 June 2013)

Panel: Prof. Ulrich Haas (Germany), President; Mr José Juan Pintó (Spain); Prof. Massimo Coccia (Italy)

Football
Disciplinary sanction due to violation of the UEFA Financial Fair Play Regulations
Law governing the existence of an obligation and the due date of the obligation
Uniform and autonomous definition of an overdue payable according to the UEFA Financial Fair Play Regulations
Agreement to extend the deadline for payment according to the FIFA Financial Fair Play Regulations

1. **In principle, the law governing the existence of an obligation also governs the due date of the latter. The question of whether a club has a debt towards the national tax authorities is a question that is governed by such national law. However, it is not a mandatory requirement that both questions (existence of an obligation and due date) be governed by the same law. In light of the freedom of association, the latter may provide in its rules and regulations that a different set of rules apply to both questions. This is all the more true if the association has set out to create a level playing field in international club competitions. The idea to define in a uniform manner – and independently of where a club is domiciled – the term "overdue" is, thus, not arbitrary, but instead perfectly in line with the principle of freedom of association.**

2. **There needs to be a uniform definition of what constitutes an overdue payable. The various legal systems differ as to what consequences follow from the fact that a debt is "overdue". If the term "overdue" were not defined in the UEFA Financial Fair Play Regulations, it would be difficult to know to what consequences the term "overdue" used in the Regulations refers. It follows from the Financial Fair Play Regulations that the term "overdue" is a defined term that must be interpreted autonomously, i.e. without reference to a national law. Therefore, recourse to a national law in the context of the Regulations is legitimate only (i) if necessary for the application of the Regulations and (ii) where recourse to national laws does not undermine the very purpose of the Regulations.**

3. **It does not follow from the wording of Nr. 2 lit. b of Annex VIII of the UEFA Financial Fair Play Regulations that the agreement to extend the deadline for payment must necessarily be found in a single document signed by both parties. Instead, what is intended by the rule is that the declaration of the creditor to accept the extension of the deadline for payment must be in writing. In order to comply with the said rule, it suffices that a request by the debtor to extend the deadline (be it orally or in written form) is accepted by the creditor in written form. The provision makes two things very clear. First, an extension of the deadline for payment is only accepted if there is a clear**

expression of will of the creditor in this respect. This is in particular made clear by the note in brackets according to which "keeping still" or not enforcing a claim cannot be qualified as a tacit consent by the creditor to extend the deadlines for payments. Secondly, the provision requires that the relevant expression of the creditor's will must be in writing.

1 THE PARTIES

1.1 Málaga Club de Futbol SAD ("Málaga", the "Club" or the "Appellant") is a Spanish football club affiliated with the Real Federación Española de Fútbol (the "RFEF"), currently playing in the Spanish 1st division ("Liga") and, at the time of the filing of the appeal discussed in the present proceedings, in the "UEFA Champions' League". The RFEF is a member of the Union des Associations Européennes de Football.

1.2 The Union des Associations Européennes de Football (the "UEFA" or the "Respondent") is an international association of European football federations, and is the governing body of European football, dealing with all matters relating thereto and exercising regulatory, supervisory and disciplinary functions over national federations, clubs, officials and players affiliated to the UEFA or participating in its competitions. The UEFA is the organizing authority of all football competition for clubs at European level, among which the UEFA Champions' League and the Europa League. The UEFA has its seat in Nyon (Switzerland) and enjoys legal personality under Swiss law.

2 BACKGROUND FACTS

2.1 The background facts stated herein are a summary of the main relevant facts, as established on the basis of the Parties' written and oral submissions and of the evidence examined in the course of the proceedings. Additional facts will be set out, where material, in connection with the discussion of the Parties' factual and legal submissions.

2.2 In accordance with the provisions in Articles 65 and 66 of the UEFA Club Licensing and Financial Fair Play Regulations, edition 2012, in force at the time of the facts discussed in these proceedings (the "CL&FFPR" or the "Regulations"), Málaga submitted to the RFEF its financial declaration stating that as of 30 June 2012 it had overdue payables of EUR 3,845,000 towards other football clubs and of EUR 5,575,000 towards social and/or tax authorities. Thus, the overall amount of overdue payables declared by Málaga in its financial statement was EUR 9,420,000. Accordingly, this financial statement by Málaga was forwarded by the RFEF to the UEFA on 16 July 2012.

2.3 On 3 August 2012, upon examination of the documentation submitted to it, the Investigatory Chamber of the UEFA Club Financial Control Body (the "Investigatory Chamber") found that Málaga was in breach of the indicator 4 as defined in Article 62, par. 3, of the CL&FFPR and decided to request an independent auditing firm (the "AF") to carry out a compliance audit" for the verification of the accuracy of the declarations submitted by Málaga.

2.4 On 27 August 2012, the AF issued its report (the "First Report"), confirming the existence of overdue payables on 30 June 2012 as communicated by Málaga and indicating that an additional amount of EUR 4,599,000, which had been considered by Málaga as deferred by the tax authorities, had actually to be considered as an overdue payable due to the lack of a written agreement signed by the tax authorities to extend the deadline for payment.

2.5 Following the outcome of the compliance report, on 25 September 2012, the Investigatory Chamber informed Málaga that the financial situation of the Club, with particular reference to the existence of overdue payables, had to be reviewed and that Málaga was invited to submit a declaration evidencing its financial situation as of 30 September 2012.

2.6 On 15 October 2012, the UEFA received from the RFEF the statement submitted by Málaga on the financial situation of the latter. In this statement, Málaga maintained that there were no overdue payables towards other clubs, employees and/or social/tax authorities, and further disclosed the existence of debts towards tax authorities for an overall amount of EUR 15,476,000, which, however, according to Málaga, had to be considered as deferred.

2.7 On the same date, the UEFA received a communication, dated 2 October 2012, by the Spanish tax authorities in which the latter informed the UEFA of the issuance of a seizure order for EUR 23,332,000 on any credits of the Club held by the UEFA. The tax authorities further informed the UEFA that no "installment agreements" had been approved and that, up to this date, *"revenues made were exclusively a result of enforcement actions by the Spanish Tax Agency"*. A seizure order had also been previously issued by the tax authorities on 15 June 2012 and reiterated on 2 July 2012.

2.8 On 29 October 2012, the Investigatory Chamber decided to request a further compliance audit in relation to the financial situation of the Club, in order to verify the accuracy of the declaration submitted by Málaga as on 30 September 2012.

2.9 On 5 November 2012, the AF issued its report (the "Second Report"). The findings of the Second Report were essentially that: (i) an amount of EUR 8,450,000, treated by Málaga as "deferred", had to be considered as "overdue", because of lack of written agreement between Málaga and the tax authorities; (ii) an amount of EUR 4,668,000 had to be considered as deferred, because the tax authorities had required the payment of that amount by 20 November 2012, *i.e.* after the reporting date of 30 September 2012.

2.10 On 8 November 2012, the Investigatory Chamber, finding that Málaga had overdue payables of EUR 14,019,000 as of 30 June 2012 and EUR 8,450,000 as of 30 September 2012, decided

to refer the Club to the Adjudicatory Chamber of the UEFA Club Financial Control Body (the "Adjudicatory Chamber") in accordance with Article 12, par. 1, lit. b) of the Procedural Rules governing the UEFA Club Financial Control Body.

2.11 On 9 November 2012, the Spanish tax authorities sent a letter to the UEFA, communicating, *inter alia*, what follows: *"PRE-AGREEMENT OF PAYMENT RESCHEDULING OF MALAGA CLUB DE FUTBOL SAD DEBTS.– In relation to the enforced collection administrative procedure of payment against MALAGA CLUB DE FUTBOL SAD (…), we inform you that, once MALAGA CLUB DE FUTBOL has made the payment of 9.000.000 € that this entity has to make to the Spanish Tax Agency (…), we will proceed to sign an agreement in order to split/postpone the outstanding payment in the next days. The date of payment for the outstanding amount will be within January of 2013 (also for new amounts accrued from today´s date)".*

2.12 On 26 November 2012, the Spanish tax authorities sent to the UEFA a further letter which stated that: (i) on 30 June 2012, the decision on the application for postponement of payment submitted by Málaga for the amount of EUR 4,599,712.71 was pending and that, accordingly, the enforcement of corresponding tax debt was deferred until 12 July 2012; (ii) on 30 September 2012, the decision on the application for postponement of payment submitted by Málaga for the amount of EUR 8,450,406.16 was pending and that, accordingly, the enforcement of the corresponding tax debt was deferred until 2 October 2012; (iii) the "conditional agreement" for the postponement of the payment of which the UEFA had been informed on 9 November 2012 (see *supra* par. 2.11) remained in force. However, the condition to be fulfilled by Málaga in order to obtain deferral was the payment of the amount of EUR 10,100,000, which the Club was expected to collect from its participation in the playoffs of the UEFA Champions' League; (iv) the measures adopted by the tax authorities on 15 October 2012 (*i.e.* the seizure order) with regard to the amounts which UEFA owed to the Club were "ordinary measures", *"in the sense that they [weren't] different than those adopted against other parties that may still owe amounts to Malaga".*

2.13 On 29 November 2012, the Spanish tax authorities lifted the seizure order issued against Málaga on 15 October 2012.

2.14 On 12 December 2012, a hearing was held before the Adjudicatory Chamber at the headquarters of the UEFA in Nyon. At the hearing, Málaga filed a letter of the Spanish tax authorities, dated 11 December 2012, stating that under the condition of the payment of the amount of EUR 10,100,000 by 20 December 2012, *"and following an analysis of the other circumstances of the proceedings to recover payment"*, the Club would have complied with the conditions required by Spanish tax law in order to obtain from the tax authorities a ruling providing for a deferral of the remaining amounts due. The latter must be paid in two installments, *i.e.* EUR 1,142,618 on 20 January 2013 and EUR 3,427,853 on 5 February 2013.

2.15 On 21 December 2012, the Adjudicatory Chamber rendered its decision on the case (the "Appealed Decision"). The operative part of the Appealed Decision, communicated to Málaga on the same date, reads as follows:

"The Adjudicatory Chamber of the UEFA Club Financial Control Body decides:

1. *To impose a fine of € 300,000 on Malaga CF.*
2. *To exclude Malaga CF from participating in the next UEFA club competition for which it would otherwise qualify on its results or standing in the next four seasons (i.e. 2013/2014, 2014/2015, 2015/2016, 2016/2017 seasons).*
3. *Subject to the condition set out at paragraph 4, to impose on Malaga CF a further exclusion from the next UEFA club competition for which it would otherwise qualify on its results or standing in the next four seasons (i.e. 2013/2014, 2014/2015, 2015/2016, 2016/2017 seasons).*
4. *If Malaga is able to prove by 31 March 2013 that it is in compliance with Articles 65 and 66 of the CL&FFP Regulations so that as at that date it has no overdue payables towards football clubs as a result of transfer activities or towards employees and/or social/tax authorities, then the exclusion referred to at paragraph 3 shall not take effect.*
5. *(…).*
6. *The prize-money withheld on 11 September 2012 by the CFCB Chief Investigator is to be released. (…)".*

2.16 On 4 January 2013, Málaga received from the Spanish tax authorities a document, dated 3 January 2013, which stated that – in view of the payments effectuated by Málaga – the request for deferral of outstanding amounts had been granted. Consequently, the Club had to pay the remaining amounts in two installments, *i.e.* EUR 1,362,568.52 by 20 January 2013, and EUR 3,869,185.06 by 5 February 2013.

2.17 On 14 January 2013, the grounds of the Appealed Decision were communicated to Málaga.

2.18 By 5 February 2013, Málaga had paid the outstanding amounts provided for in the deferral plan agreed with Spanish tax authorities (see *supra* paras. 2.14, 2.16).

3 THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

3.1 On 24 January 2013, Málaga filed a Statement of Appeal against the Appealed Decision with the CAS Court Office.

3.2 On 14 February 2013, following its request for an extension granted by the President of the CAS Appeals Arbitration Division, Málaga filed its Appeal Brief with the CAS Court Office.

3.3 On 11 March 2013, the Respondent filed its Answer.

3.4 On 28 March 2013, the CAS Court Office informed the Parties on the formation of the Panel in charge of the resolution of the dispute. The Panel was constituted as follows: Mr Ulrich Haas as President, Mr José Juan Pintó Sala as arbitrator appointed by the Appellant and Mr Massimo

Coccia as arbitrator appointed by the Respondent. No party, either at this or at any later stage, objected to the constitution and composition of the Panel.

3.5 On 3 May 2013, the CAS issued an Order of procedure which was duly signed by both Parties, respectively on 3 May 2013 (Málaga) and on 6 May 2013 (the UEFA).

3.6 On 23 May 2013, the Appellant filed with the CAS Court Office a document issued by the Spanish tax authorities on 20 May 2013. The aforementioned document stated – *inter alia* – that at the date of its issuance Málaga was in compliance with its financial obligations towards the Spanish tax authorities. In the cover letter to this document, the Appellant indicated that *"[t]he importance of such documents resides basically in the following points: the application to postpone debts made by Málaga CF were duly processed by the Spanish Tax Agency without finding any cause for their inadmissibility; the payment schedule set out in the postponement agreement has been fulfilled by Málaga CF within the voluntary terms provided; at the moment of the report Málaga CF is up-to-date with its tax obligations to the Spanish Tax Agency"*.

3.7 On 24 May 2013, the Appellant filed with the CAS Court Office a further document (dated 23 May 2013) issued by the Head of the Regional Department of the Spanish Tax Authority. The document referred to certain amounts that were due by Málaga to the tax authorities (for an overall amount of EUR 8.450.405,16) and stated, inter alia, that: *"[t]he application for postponement corresponding to such debts were processed by the Spanish Tax Agency without finding any cause for their inadmissibility according to the Spanish Tax Law (…). As recorded, the applications for postponement concerning the mentioned debts were filed within the voluntary term for payment (…). The said debts were not in enforcement period for payment on 30 September 2012, as a consequence of the processing status of the applications for postponement concerned, according to the Spanish Tax Law"*.

3.8 On 29 May 2013, the UEFA filed with the CAS Court Office its comments regarding the letters and documents filed by Malaga on 23 and 24 May 2013. In essence, the UEFA submitted that they were inadmissible pursuant to Article R56 of the Code of Sports-related Arbitration (referred to as the "CAS Code").

3.9 On 30 May 2013, the CAS Court Office informed the Parties on behalf of the Panel that the latter will decide on the admissibility of the (new) documents filed by Málaga at the outset of the hearing on 4 June 2013.

3.10 A hearing took place in Lausanne on 4 June 2013. The Appellant was represented by its Vice-President and President of the Board Mr Moayad Shatat, its Deputy Managing Director Mr Manuel Novo Gerasa, its General Director Mr Vicente Salgado Casado and by its Legal Manager Mr Joaquín Jofre Fernández-Abascal. Furthermore, the Appellant was represented and assisted by its attorneys-at-law Mr Juan de Dios Crespo Pérez and Mr Augustín Amorós Martínez. The UEFA was represented by its General Counsel Mr Alasdair Bell, its Legal Counsel Mr Julien Silberstein, its Senior Compliance Manager Mr Pablo Rodriguez, its Head of Disciplinary and Integrity Mr Emilio García Silvero and by its attorney-at-law Mr Ivan Cherpillod. The hearing was attended also by Mr Victor Gómez de la Cruz and Mr Raúl de

Francisco, who were heard as experts for the Appellant, and by Ms Clara Jimenez Jimenez and Ms Ana Mata Zapico, who were heard as experts for the UEFA. At the outset of the hearing, the Panel informed the Parties of its decision to admit the production of the new documents filed by Málaga on 23 and 24 May 2013. According to the Panel, the prerequisites of Article R56 of the CAS Code were fulfilled, since the Appellant could not have filed the documents in its Appeal Brief and filed them in a timely manner after having received them itself.

3.11 The Parties throughout the hearing did not raise any procedural objection and expressly confirmed at the end of the hearing that their right to be heard and to be treated equally had been respected, as they had been given ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel.

4 OUTLINE OF THE PARTIES' REQUESTS FOR RELIEF AND SUBMISSIONS

The following summaries of the Parties' positions are only roughly illustrative and do not purport to include every contention put forward by the Parties. However, the Panel has carefully considered and taken into account in its discussions and subsequent deliberations all of the evidence and arguments submitted by the Parties, even if there is no specific reference to those arguments in the following outline of their positions or in the ensuing analysis.

4.1 Málaga

4.1.1 In its Appeal Brief, Málaga requested the Panel:

"1. To accept [the] *Appeal against the decision of the Adjudicatory Chamber of the UEFA Club Financial Control Body dated 21 December 2012 and notified with its grounds on the 14th of January 2013.*

2. To adopt an award annulling the said decision and adopt a new one declaring that the Appellant should not be sanctioned.

3. Subsidiarily to 2, to adopt an award annulling the said decision and adopt a new one in which a mere reprimand is given to the Appellant.

4. Subsidiarily to 2 and 3, to adopt an award annulling the said decision and adopt a new one in which a fine is given to the Appellant.

5. Subsidiarily to 2, 3 and 4, to adopt an award annulling the said decision and take a new one excluding Málaga CF from participating in the next UEFA club competition for which it will qualify for the next three seasons but with a suspended sanction for a probationary period during those next three seasons.

6. To fix a sum of 40.000 CHF to be paid by the Respondent to the Appellant to aid the Appellant in the payment of its defence fees and costs.

7. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees".

4.1.2 The submissions of Málaga may be summarized as follows:

(a) Even if the CL&FFPR constitute the applicable (rules of) law on the merits, it is not possible to decide the issue whether or not certain debts are to be considered overdue without taking into due consideration the Spanish tax law. The latter is not only pertinent in relation to the question whether or not there are debts at all, but also whether or not these debts by Málaga towards the Spanish tax authorities were overdue on the two reporting dates, *i.e.* on 30 June and on 30 September 2012. This is all the more true, considering the character of the "income tax. These debts do not follow from a contract willfully entered into by a party, but from statutory provisions (*i.e.* Spanish tax law). According to the Appellant, it follows from a reading of Article 52.2 of the CL&FFPR that this rule can only be correctly interpreted and applied by making reference to the national law at the seat of the club.

(b) The scope of the monitoring procedure in Article 88.6 of the Regulations that is triggered in case a club is in breach of the CL&FFPR on the first deadline (*30 June of the year in which the UEFA club competitions commence*) is restrained to the analysis whether or not this violation still persist on the second reporting date (*the following 30 September*). Thus, the Appellant submits that the only issue to be decided is whether or not the Appellant on 30 September 2012 had overdue debts towards the Spanish tax authorities.

(c) According to the Spanish tax law, the amounts resulting from a self-assessment by the debtor and to be submitted the tax authorities on certain reporting dates must be paid within a specific time-limit called "voluntary term of payment". However, under Spanish law if the debtor submits a request for deferral of payment within the "voluntary term of payment" the tax authorities, in principle, are prevented from adopting any enforcement measures for the collection of the outstanding amounts until the tax authorities have decided on the request for deferral. As a consequence, the time-limit for the payment of taxes is automatically extended and, thus, considered deferred, if the taxpayer requests for a deferral of the payment within the "voluntary term of payment". This analysis is not contradicted by the fact that interests must be paid by the debtor on the amounts due after the expiring of the "voluntary term of payment". The facts and circumstances in this respect are analogous to the situation in which the parties agree on a loan. Here too, interest will have to be paid even though it is beyond doubt that the repayment of the loan is not to "overdue".

(d) The request for deferral submitted within "voluntary term of payment" can, obviously, be granted or denied by the tax authorities. In the first case (*i.e.* if granting the request), the tax authorities will issue a schedule for the payments (installments to be made at certain dates) of the outstanding amounts. The payments made in compliance with such calendar are then considered to be made within the "voluntary term of payment", with the consequence that the payments cannot be qualified as overdue. In the second case (*i.e.* in case the request is rejected), the tax authorities will set a (final) deadline for the payment, which is to be considered the final date of the voluntary term for payment. Consequently, as long as the final deadline set by the tax authorities has not elapsed, the debt cannot be considered overdue. It follows, therefore, that, irrespective of the decision of the tax authorities in relation to the request for deferral, the "voluntary term of

payment" is extended by such request and that as long as the tax payer complies with the directions given by the tax authorities, the debts cannot be considered to be overdue.

(e) The legal framework described above under (b) and (c) must be applied to the case at hand. Málaga submitted its request for deferral of payment before the expiration of the voluntary term of payment. The latter is confirmed by the letter of the Spanish tax authorities sent to the UEFA on 26 November 2012. Málaga cannot be blamed for the delay caused by the tax authorities for deciding on its request for deferral. Generally speaking, the timeframe in which Spanish tax authorities decide on requests for deferral depends on their workload and the complexity of the request submitted. However, the fact that the request was accepted for examination by the tax authorities and, eventually, granted, is clear evidence that all the prerequisites for a deferral of payment were satisfied at the time when Málaga submitted its request.

(f) The recourse to measures such as the issuance of a seizure order is quite common in the practice of the Spanish tax authorities, when dealing with a request for deferral of payment. This, however, does not have any influence on the proper qualification of the payment (as due or overdue), for which the deferral is requested. The above measures are only of a precautionary nature, as is confirmed by the reading of the letter sent by the Spanish tax authorities to the UEFA on 26 November 2012 and have no influence on the legal qualification of the debt at issue.

(g) Furthermore, the Appellant submits that it would be illogical to base a breach of the CL&FFPR and consequently a sanction based on the latter on the fact that the Spanish tax authorities took so much time to decide upon Málaga's request for deferral of payment. If the tax authorities would have supplied Málaga with a decision in relation to its request within shorter term (*i.e.* before 30 September 2012) the debt would have been considered as not overdue. Since Málaga had no possibilities to compel the Spanish tax authorities to act swiftly and promptly upon its request, no violation of the CL&FFPR can be asserted. The Adjudicatory Commission failed to apply the principle of "force majeure" provided for in Annex XI of the CL&FFPR to the facts and circumstances of the case.

(h) Málaga has fully complied with the terms of payment indicated in the document issued on 4 January 2013 by the tax authorities subsequent to the granting of the request. Moreover, by 5 February 2013, the Club had paid all of the outstanding debts towards the tax authorities (that were outstanding as of 30 September 2012).

4.2 The UEFA

4.2.1 In its Answer, the UEFA requested the Panel:

"to dismiss the appeal and to order payment by the Appellant of all costs of the arbitration as well as legal costs suffered by UEFA".

4.2.2 The submissions of the UEFA may be summarized as follows:

(a) Article 63.3 of the UEFA Statutes sets out that the proceedings before the CAS shall be regulated by the CAS Code. In accordance with the provision of Article R58 of the CAS Code, the law applicable to the present dispute are the regulations of the sports organisation that has issued the (appealed) decision. Consequently, the provisions applicable to the case at hand are the UEFA Statutes and the UEFA rules and regulations. By participating in the UEFA competitions (in particular in the UEFA Champions' League"), Málaga accepted to be subjected to the above-mentioned statutes, rules and regulations. Since the UEFA has its seat in Switzerland, it follows from Article R58 of the CAS Code that Swiss law applies to the dispute subsidiarily. However, no recourse may be made to Spanish law, which is irrelevant to the resolution of this dispute. If one were to follow a different view according to which the application/interpretation of the CL&FFPR would depend on the respective national laws of each club participating in the UEFA competitions, the scope of the CL&FFPR would by seriously jeopardized. The purpose of the CL&FFPR consists in establishing a level-playing field between the clubs and ensuring equal treatment among all participants in the UEFA competitions. This reasoning is also consistent with the case-law of the CAS. In order to ascertain whether the debts of Málaga towards the Spanish tax authorities were to be considered as overdue or not, therefore, the Panel must rely solely on the CL&FFPR and, as the case may be, subsidiarily on Swiss law. Instead, Spanish law is not to be taken into consideration.

(b) The promotion of football and of financial fair-play by the UEFA represents a legitimate goal which must be taken into account when interpreting the provisions contained in the UEFA Statutes and by-laws. The club licensing system, which is based on the monitoring of the financial situation of the clubs, demands that (all of) the clubs must be treated equally. A club, therefore, should not be allowed to take (unfair) advantage, – *i.e.* to dodge its responsibilities/obligations deriving from the CL&FFPR –from the peculiarities of its national law or from the support of State authorities that wish to "protect" their clubs.

(c) The term "overdue payables" is clearly defined in the CL&FFPR. Any reference to the national law is, therefore, not possible and would contradict the definition. In accordance with the CL&FFPR a payment must be deemed to be overdue when not made on the established deadline (*i.e.* the time-limit on which the payment must be made). With specific reference to the case at issue, the tax debt was overdue at both reporting dates, since the debt was not paid on the due date. It must also be pointed out that the possibility to start enforcement actions designed to collect the amounts due by the debtor is irrelevant for assessing whether or not a payment is to be considered as overdue.

(d) The CL&FFPR provide that a debt is not considered to be overdue if on the relevant date (*i.e.* respectively on 30 June/30 September of each year) the creditor has accepted in writing to extend the deadline for payment. Contrarily to what Málaga asserts, therefore, it is irrelevant that under Spanish law a written agreement may not be necessary, since national law cannot prevail over the CL&FFPR, which expressly request that any deferral

agreement shall be in writing and must be executed on or before the relevant reporting date. It is undisputed that no written agreement had been reached between Málaga and the Spanish tax authorities on the relevant reporting dates, in particular 30 September 2012. Therefore, the debts cannot be considered as deferred. It must be noted that the mere submission of a deferral request by the debtor that might be rejected at any time by the creditor cannot be qualified as a written agreement within the meaning of the CL&FFPR. For the same reasons, any agreement reached by Málaga and the Spanish tax authorities subsequent to 30 September 2012 is irrelevant for establishing whether or not the Club breached the provisions of the CL&FFPR.

(e) In any case, even assuming that Spanish law would be applicable to the present case, the debt of the Club towards the tax authorities must be considered as overdue. By referring of a voluntary term of payment, in particular, the Club tries to suggest that under Spanish law the debtor is entitled to decide whether to pay or not on that deadline. Indeed, even though the charging of delay interest on a specific amount is not necessarily a prerequisite in order to establish whether a payment is overdue, the fact that interest was charged by the tax authorities on the amounts due by Málaga is, nevertheless, clear evidence that the payment was not made on the due date and that such payment was overdue. By the same token, the issuance by the tax authorities of a seizure order on any amounts to which the Club was entitled in view of its participation in the UEFA competitions is a further confirmation that the payment to be made by Málaga to the tax authorities were overdue. On the contrary, the fact that the submission of the request for deferral entails the suspension of the enforcement for the collection of the amounts is not relevant.

(f) The Respondent further submits that the Club seeks to conceal the fact that a significant part of its debt toward the tax authorities could not be the object of a request for deferral. According to the Respondent, a request for deferral is not admissible if the amounts relate to "employees' tax payables" which are deducted by the employer from the employees' income and transferred (in the name of the employees) directly to the tax authorities. In addition, it must be noted that, at the time of the request for deferral, the Club was in insolvency proceedings. In such circumstances, a request for deferral is not admissible under Spanish law.

(g) The sanction imposed by the Adjudicatory Chamber on the Club was proportionate and adequate in view of the circumstances of the case and in light of the goal pursued by the UEFA through the club licensing system and the financial fair play provisions. As a matter of fact, the Respondent submits that Málaga did not challenge the proportionality of the sanction.

4.3 Clarifications made at the hearing

At the outset of the hearing, in consideration of the different amounts reported in the Parties' brief relating to the Appellant's debt on the relevant reporting dates, the Panel invited the Parties

to clarify their positions insofar. Following the invitation of the Panel, the Parties submitted the following figures:

(i) as of 30 June 2012:

- Málaga holds the view that it owed the following amounts: EUR 10,700,000 to tax authorities, EUR 2,700,000 to other clubs and EUR 5,800,000 to players. In relation to the amount owed to the tax authorities, Málaga submits that it had made a unilateral request to defer payment within the "voluntary term of payment". In relation to the debts owed towards other clubs and towards players, the Appellant admits that there was no debt deferral agreement in the amount of EUR 2,700,000.
- UEFA holds the view that Málaga owed overdue payables towards tax authorities in the amount of EUR 5,575,000 and overdue payables towards other clubs in the amount of EUR 3.845,000.

(ii) as of 30 September 2012:

- both Parties agree that Málaga owed EUR 15,400,000 towards tax authorities. The Parties further agree that there was a debt referral agreement in the amount of EUR 8,400,000. For the remainder (EUR 7,000,000), the Appellant requested a unilateral postponement within the "voluntary term of payment";
- as for the debt of EUR 2,700,000 towards clubs and of EUR 5,800,000 towards players/employees, it is undisputed between the Parties that there was a valid debt deferral agreement with the relevant creditors.

(iii) as of 31 March 2013:

- both Parties agree that Málaga is in compliance with Articles 65 and 66 of the CL&FFP.

5 JURISDICTION OF THE CAS

5.1 Article R47 of the CAS Code reads as follows:

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

5.2 The provision at issue provides for three prerequisites that must be fulfilled, namely:

- there must be a "decision" of a federation, association or another sports-related body;
- the "internal remedies available prior to the appeal" to CAS must have been exhausted, in accordance with the statutes or regulations of the mentioned bodies; and
- the parties must have submitted to the competence of the CAS.

5.3 The Appealed Decision must be considered as a "decision of an association" within the meaning of Article R47 of the CAS Code, so that the first prerequisite is fulfilled, since, as set out above, the UEFA is an international association regulating the sport of football at a continental level.

5.4 There are no internal remedies available to the Parties for appealing/objecting to the Appealed Decision. This can be inferred from Article 25 (*"Legal force of the final decision"*), para. 2, of the Procedural Rules governing the UEFA Club Financial Control Body (edition 2012), which provides that any decision issued by the Adjudicatory Chamber *"may only be appealed before the Court of Arbitration for Sport (…) in accordance with the relevant provisions of the UEFA Statutes"*. Furthermore, Article 62 (*CAS as Appeal Arbitration Body*), par. 1, of the UEFA Statutes (edition 2012) provides that: *"[a]ny decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration"*.

5.5 The third prerequisite is also met. This follows from the acceptance by Málaga – through its affiliation and registration in the UEFA competitions – of the arbitration clause in favour of the CAS, provided in the above-mentioned UEFA Statutes and by-laws.

5.6 Furthermore, the jurisdiction of the CAS in the present dispute can also be inferred from the content of the Order of Procedure, duly signed by all the Parties. Finally, the Panel notes that the jurisdiction of the Panel has not been contested by any party to this proceeding and, on the contrary, was explicitly recognised by the Parties in their briefs. It follows from all of the above that the CAS has jurisdiction in the present matter.

6 MISSION OF THE PANEL

6.1 According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

7 ADMISSIBILITY

7.1 Article R49 of the CAS Code reads as follows:

"In the absence of a time limit set in the statutes or regulation of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

7.2 The above provision of the CAS Code, therefore, gives autonomy to the Parties to deviate from the time-limit of 21 days for the filing of the appeal. In this regard, it must be noted that Article 62 (*CAS as Appeal Arbitration Body*), par. 3, of the UEFA Statutes (edition 2012) provides that:

"The time limit for appeal to the CAS shall be ten days from the receipt of the decision in question".

7.3 The Appealed Decision, reporting the grounds on which it is based, was communicated to Málaga on 14 January 2013.

7.4 On 24 January 2013, Málaga filed with the CAS Court Office its Statement of Appeal against the Appealed Decision.

7.5 In view of the above, the Panel concludes that the Appellant complied with the time-limits prescribed by the UEFA Statutes (edition 2012) and by the CAS Code. The appeal is, therefore, admissible.

8 APPLICABLE LAW

8.1 Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

8.2 The subject matter of the appeal relates to whether or not Málaga breached the UEFA CL&FFPR to which it has submitted. It is thus clear that for the resolution of the present dispute the UEFA Statutes, rules and by-laws, in general, and the CL&FFPR (in the edition applicable *ratione temporis* to the facts of the case) primarily must be applied.

8.3 The issue whether any – and if answered in the affirmative which – national law applies to the resolution of the dispute is contested between the Parties and shall, therefore, be discussed in the merits section of the case.

9 THE MERITS OF THE DISPUTE

a) The law applicable to the resolution of the dispute

9.1 The Parties are in dispute over which (national) law applies subsidiarily to the present dispute. This is particularly true for the question whether or not payables by Málaga were "overdue". According to the Club, whether or not payables are "overdue" (within the meaning of the CL&FFPR) towards the tax authorities of a specific country must be established in light of the national law that governs the debt, *i.e.* the law of the country in which the tax obligation (for which the payment is sought) arises. If one would follow this line of argument, then whether or not payables are "overdue" would have to be assessed not only according to the CL&FFPR, but also according to Spanish tax law.

9.2 The UEFA, on the contrary, holds that the rules of law applicable to the merits of the dispute are the CL&FFPR. The latter apply, in principle, to the exclusion of any national law. An exception is to be made where the CL&FFPR explicitly or implicitly refer to a certain national law. Another exception is to be made in light of Article R58 of the CAS Code according to which the law at the seat of the sports federation that issued the decision forming the matter in dispute applies. However, this law (Swiss law in the present case) only applies subsidiarily. According to the latter, Swiss law only applies inasmuch as the CL&FFPR contain a lacuna. Since, however, the term "overdue" is exhaustively defined in the CL&FFPR, there is no scope for the application of Spanish law (since the relevant rules do not contain any reference) or Swiss law (since there is no lacuna to be filled).

9.3 The term "overdue payables" within the meaning of the CL&FFPR is defined in Annex VIII of the Regulations, which reads as follows:

> *"1. Payables are considered as overdue if they are not paid according to the agreed terms.*
>
> *2. Payables are not considered as overdue, within the meaning of these regulations* [*i.e.* the CL&FFPR] *if the license applicant/licensee (i.e. the debtor club) is able to prove by 31 March (in respect of Articles 49 and 50) and by 30 June and 30 September (in respect of Articles 65 and 66) respectively that:*
>
> *a) it has paid the relevant amount in full; or*
>
> *b) it has concluded an agreement which has been accepted in writing by the creditor to extend the deadline for payment beyond the applicable deadline (note: the fact that a creditor may not have requested payment of an amount does not constitute an extension of the deadline); or*
>
> *c) it has brought a legal claim which has been deemed admissible by the competent authority under national law or has opened proceedings with the national or international football authorities or relevant arbitration tribunal contesting liability in relation to the overdue payables; however, if the decision-making bodies (licensor and/or UEFA Club Financial Control Body) consider that such claim has been brought or such proceedings have been opened for the sole purpose of avoiding the applicable deadlines set out in these regulations (i.e. in order to buy time), the relevant amount will still be considered as an overdue payable; or*
>
> *d) it has contested to the competent authority under national law, the national or international football authorities or the relevant arbitration tribunal, a claim which has been brought or proceedings which have been opened against it by a creditor in respect of overdue payables and is able to demonstrate to the reasonable satisfaction of the relevant decision-making bodies (licensor and/or UEFA Club Financial Control Body) that it has established reasons for contesting the claim or proceedings which have been opened; however, if the decision-making bodies (licensor and/or UEFA Club Financial Control Body) consider the reasons for contesting the claim or proceedings which have been opened as manifestly unfounded the amount will still be considered as an overdue payable".*

9.4 It is true that, in principle, the law governing the existence of an obligation also governs the due date of the latter. It is beyond dispute that whether or not Málaga owed a debt towards the Spanish tax authorities within the meaning of the CL&FFPR is a question that is governed by Spanish law. Insofar, the CL&FFPR implicitly refer to the Spanish law. However, it is not a

mandatory requirement that both questions (existence of an obligation and due date) be governed by the same law. In light of the freedom of association, the latter may provide in its rules and regulations that a different set of rules apply to both questions. This is all the more true if the association – as is the case here – has set out to create a level playing field in international club competitions (cf. CAS 2012/A/2702, para. 92). The idea to define in a uniform manner – and independently of where a club is domiciled – the term "overdue" is, thus, not arbitrary, but instead perfectly in line with the principle of freedom of association. This also follows from CAS jurisprudence (CAS 2012/A/2702, para. 91) according to which *"[p]ursuant to Art. 154 of the Swiss Act concerning Private Law, the UEFA regulations cannot be overridden by the national laws as this would lead to unequal treatment among clubs from different countries"*.

9.5 That there is a need to have a uniform definition of what constitutes an overdue payable cannot be disputed and is perfectly illustrated in the case at hand. It appears that the various legal systems differ as to what consequences follow from the fact that a debt is "overdue. In some jurisdictions the creditor may be entitled to file a claim and/or to seek enforcement of the claim; he may be (also) eligible for interests and/or entitled to offset a claim directed against him. The characterization of a debt as overdue may in addition – in some jurisdiction – also be a prerequisite when assessing whether or not a debtor is illiquid in terms of insolvency law. If the term "overdue" were not defined in the CL&FFPR, it would be difficult to know to what consequences the term "overdue" used in the CL&FFPR refers. In the case at hand, the Appellant is of the view that the decisive criteria to assess whether or not a payable is overdue is whether the creditor is entitled to commence enforcement proceedings against the debtor. The Respondent, on the contrary, asserts that the typical consequence of a debt being overdue is that the creditor must pay interest. It is exactly a dispute of this kind that the CL&FFP tries to avoid by uniformly defining the term "overdue. That the CL&FFP is designed to uniformly and autonomously define the term "overdue" clearly follows from the CL&FFP. There is no room for the application of the *contra proferentem* rule here. Thus, the Panel holds that – contrary to what the Appellant submits – Spanish law does not apply within the definition at UEFA level of the expression "overdue payables".

9.6 The question, however, is whether the CL&FFPR define the term "overdue" in respect of the debt at stake here (debt towards tax authorities). Doubts in this respect arise from the wording of Nr. 1 of Annex VIII of the Regulations. According to such provision, *"[p]ayables are considered as overdue if they are not paid according to the agreed terms"*. At first glance, thus, it may appear that the definition of "overdue" is only aimed at contractual obligations because only in relation to the latter there can be "agreed terms". However, if one takes Annex VIII of the Regulations in its entirety, it becomes evident that this provision not only deals with contractual debts, but with all kinds of obligation including statutory debts. Thus, it follows from the Regulations that the term "overdue" is a defined term that must be interpreted autonomously, *i.e.* without reference to a national law.

9.7 To conclude, therefore, the Panel finds that recourse to a national law in the context of the CL&FFPR is legitimate only (i) if necessary for the application of the CL&FFPR and (ii) where recourse to national laws does not undermine the very purpose of the CL&FFPR. Neither

prerequisite is fulfilled in the case at hand and, thus, only the CL&FFPR are applicable to the question whether or not the outstanding payables were "overdue".

b) The lack of a (written) agreement

9.8 It is undisputed that – originally – debts towards the tax authorities were due before 30 June 2012. What is disputed between the Parties is whether this was still the case on 30 September 2012. The latter depends on whether or not the deadline for the payment of the debt had been extended beyond 30 September 2012 or not. In this respect, the CL&FFPR provide that a debt becomes deferred if the debtor club *"has concluded an agreement which has been accepted in writing by the creditor to extend the deadline for payment beyond the applicable deadline (note: the fact that a creditor may not have requested payment of an amount does not constitute an extension of the deadline)"*. This provision is not easy to understand at first sight. According to the wording, there must be an agreement between creditor and debtor to extend the deadline for payment and (in addition) the agreement must "be accepted in writing" by the creditor. The Panel is of the view that it does not follow from the wording of Nr. 2 lit. b of Annex VIII of the Regulations that the agreement to extend the deadline for payment must necessarily be found in a single document signed by both parties. Instead, in the Panel's view, what is intended by the rule is that the declaration of the creditor to accept the extension of the deadline for payment must be in writing. The Panel is thus of the view that, in order to comply with the said rule, it suffices that a request by the debtor to extend the deadline (be it orally or in written form) is accepted by the creditor in written form. The provision, thus, makes two things very clear. First, an extension of the deadline for payment is only accepted if there is a clear expression of will of the creditor in this respect. This is in particular made clear by the note in brackets according to which "keeping still" or not enforcing a claim cannot be qualified as a tacit consent by the creditor to extend the deadlines for payments. Secondly, the provision requires that the relevant expression of the creditor's will must be in writing.

9.9 In light of the above, the Panel holds that the prerequisites of Nr. 2 lit. b of Annex VIII of the Regulations would have been fulfilled if the Appellant had made a request for deferral of payment that had been accepted in writing by the Spanish tax authorities. However, lacking any decision of the Spanish tax authorities and, thus, a clear expression of will to extend the deadlines of payment, the prerequisites of Nr. 2 lit. b of Annex VIII of the Regulation cannot deemed to be fulfilled. In coming to this conclusion, the Panel does not ignore that some national laws provide for a concept of "tacit approval" in case a private subject files a request with a public authority and the latter remains inactive. However, even if one were to assume that there was a tacit approval by the Spanish tax authorities in relation to the postponement of the deadline for payment, the conditions of Nr. 2 lit. b of Annex VIII of the Regulations would not be fulfilled. The latter expressly require that the consent given by the creditor be in writing. It is true that a conditional (written) consent was given by the Spanish tax authorities after 30 September 2012. This, however, is immaterial in the case at hand, since Nr. 2 of Annex VIII of the Regulations provides that the debtor must prove by the relevant reporting date (*i.e.* by 30 September 2012) that the conditions for deferred payments are fulfilled. This, however, is not

the case here. The first communication by which the tax authorities informed the UEFA of a possible agreement with the Club was sent on 9 November 2012, *i.e.* over a month after the expiring of the deadline of 30 September 2012 set forth in Article 66.6 of the CL&FFPR. In addition, the aforementioned correspondence did not affirm that an agreement had been reached with the Club, but merely informed the UEFA that the tax authorities were willing to sign an agreement with the Club subsequent to the payment by the latter of the amount of EUR 9,000,000.00. It was only on 3 January 2013 that the tax authorities communicated to the Club the granting of the deferral for the (outstanding) payments. Since the "agreement" within the meaning of the Annex VIII of the Regulations was only executed after the relevant reporting date, the Panel has no other choice than to conclude that the Club had overdue payables on 30 September 2012.

9.10 The above conclusion is not unreasonable and/or overly harsh. The Club submits that, once the request for deferral is submitted, the tax payer/debtor has no powers to compel the tax authorities to issue a decision within a specified deadline, but may only wait for the decision to be issued. According to the Appellant it would be unreasonable to sanction the Club for delays due to the workload of the Spanish tax authorities. The Appellant submits that it cannot be blamed for the fact that the tax authorities were unable to decide upon its request within a shorter deadline, *i.e.* within an appropriate term. Moreover, the Appellant alleges that the principle of "force majeure" enshrined in Annex XI of the CL&FFPR would be breached if one were not to take into account that it had no possibilities to compel the tax authorities to issue a decision. The Panel does not follow this reasoning. It must be noted that the situation at hand does not differ from a case in which a debtor requests from a private creditor (*e.g.* another club, banks or other creditor) the postponement of deadlines for payment. In such case, the debtor has no compelling powers to force the creditor to take a decision in relation to his request. This is no case of force majeure. The Panel fails to see why this case should be treated any different than the case at hand. Furthermore, the Panel is also mindful of the fact that – other than alleged by the Appellant – the debt payer has at least some kind of influence to receive a timely answer to its request. This influence consists in filing the deferral request as early as possible. The earlier the request is filed the sooner the tax authorities will decide upon the request for deferral. In the case at hand, the Panel notes that the request has been made – practically – at the latest moment possible before the reporting date of 30 June 2012. If, therefore, no "answer" was received from the tax authorities before 30 September 2012, not solely the tax authorities are to be blamed.

c) Proportionality of the sanction

9.11 Only a final and short remark is to be made on the issue of the proportionality of the sanction imposed on Málaga. The Appellant has not submitted any specific argument why the sanction imposed would not be in line with principles of proportionality. Contrarily to what the Club maintains, the mere (subsidiary) request by the Appellant to the CAS to amend the decision of the Adjudicatory Chamber cannot be considered as "arguments or allegations" aiming at contesting the proportionality of the sanction. However, absent any such arguments by the

Appellant and in view of the fact that the sanction imposed upon the Club seems to be proportionate (also in view of other CAS decisions issued in the context of the CL&FFPR) the decision of the Adjudicatory Chamber must be confirmed.

10 FINAL FINDINGS

10.1 In view of the above, the appeal filed by Málaga must be dismissed.

10.2 The decision issued by the Adjudicatory Chamber and the sanction imposed on Málaga must be confirmed.

10.3 All other or larger motions or prayers for relief of the Parties are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 24 January 2013 by Málaga CF SAD against the decision rendered by the Adjudicatory Chamber of the UEFA Club Financial Control Body on 21 December 2012 is dismissed.

2. The decision rendered by the Adjudicatory Chamber of the UEFA Club Financial Control Body on 21 December 2012 is confirmed.

(…)

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