Arbitration CAS 2015/A/3909 Club Atlético Mineiro v. FC Dynamo Kyiv, award of 9 October 2015

Panel: Mr Efraim Barak (Israel), President; Prof. Gustavo Albano Abreu (Argentina); Mr François Klein (France)

Football
Transfer Agreement
Discharge of the burden of proof
Force majeure
Principle of "factum principis"
Principle of "substantial performance"
Discretion and limits in the reduction of a contractual penalty
Default interest

1. **It is a generally accepted principle that each party must provide evidence for any fact on which it intends to rely.**

2. **The legal concept of force majeure is widely and internationally accepted and is valid and applicable under Swiss law. It also forms a well-established doctrine in CAS jurisdiction. Specifically, under CAS jurisprudence force majeure implies an objective (rather than a personal) impediment, beyond the control of the "obliged party", that is unforeseeable, cannot be resisted and which renders the performance of the obligation impossible. Notwithstanding, CAS jurisprudence has also warned that the conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation.**

3. **For the principle of *factum principis* to be applicable there has to be a general public measure adopted by a State or the State's authorities addressed to a general group of people or entities with an impact on an existing contract. Financial coercive measures adopted by a State court to enforce tax debts incurred by a party cannot be considered as a general measure adopted by the respective State with an impact on an existing contract and therefore those measures do not constitute a situation of *factum principis*.**

4. **The principle of "substantial performance" may be relevant when a contractor's performance is in some way deficient, through no wilful act of the contractor or due to reasons for which the contractor is not responsible, yet is so nearly equivalent that it would be unreasonable for the other party to deny the payment agreed upon. If a contractor successfully demonstrates "substantial performance", the other party may remain obliged by a court to comply with its payment obligations, deducted however with damages incurred as a result of the deficiencies in the performance of the other party. Such doctrine is however totally irrelevant in cases where a player's transfer has fully taken place, in full and due performance of a transfer agreement.**

5. Whereas article 163(1) of the Swiss Code of Obligation ("SCO") provides that parties may freely determine the amount of a contractual penalty, it follows from article 163(3) of the SCO that an arbitral tribunal has the duty to reduce the amount of the penalty if it considers this amount to be excessive. However, the possibility to reduce liquidated damages is against the principles of contractual freedom and contractual loyalty and should therefore be applied with reluctance. There must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of liquidated damages.

6. On the basis of article 104(2) of the SCO, parties are free to negotiate a higher amount of interest as the default interest of 5% per annum contemplated for in said article. However, this freedom is not unlimited as the outcome would have to remain compatible with Swiss public policy.

I. PARTIES

1. Club Atlético Mineiro (the "Appellant" or "Atlético Mineiro") is a football club with its registered office in Belo Horizonte, Brazil. Atlético Mineiro is registered with the Brazilian Football Federation (*Confederação Brasileira de Futebol* – hereinafter: the "CBF"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Football Club Dynamo Kyiv (the "Respondent" or "Dynamo Kyiv") is a football club with its registered office in Kiev, Ukraine. Dynamo Kyiv is registered with the Football Federation of Ukraine (the "FFU"), which in turn is also affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeals arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On 19 July 2011, Dynamo Kyiv and Atlético Mineiro concluded a loan agreement (the "Loan Agreement") for the temporary transfer of Mr André Felipe Ribeiro de Souza (the "Player") to Atlético Mineiro from 19 July 2011 until 30 June 2012. This Loan Agreement contained an option clause for the permanent transfer of the Player, which could be executed until 31 May 2012.

5. On 20 April 2012, Dynamo Kyiv and Atlético Mineiro concluded a permanent transfer agreement (the "Transfer Agreement") regarding the transfer of the Player to Atlético Mineiro. The Transfer Agreement contains, *inter alia*, the following terms:

> *"2.3.* [Atlético Mineiro] *shall be obliged:*
>
> […]
>
> *2.3.2. To pay to Dynamo the transfer compensation for the transfer of the Player to* [Atlético Mineiro] *on a permanent basis in the amount of 5'800'000 (five million eight hundred thousand) Euros, net (without any deductions), as follows:*
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> *a) 2'300'000 (two million three hundred thousand) Euros by 1 July 2012 at the latest;*
> *b) 760'000 (seven hundred sixty thousand) Euros by 10 July 2013 at the latest;*
> *c) 760'000 (seven hundred sixty thousand) Euros by 15 December 2013 at the latest;*
> *d) 760'000 (seven hundred sixty thousand) Euros by 10 July 2014 at the latest;*
> *e) 760'000 (seven hundred sixty thousand) Euros by 15 December 2014 at the latest;*
> *f) 460'000 (four hundred sixty thousand) Euros by 10 July 2015 at the latest.*
>
> *4.2 In case of untimely or incomplete execution by* [Atlético Mineiro] *of any of the payments under the present* [Transfer Agreement]*,* [Atlético Mineiro] *shall be obliged to additionally pay to* [Dynamo Kyiv] *a penal clause of 10% of the respective unpaid amount, as well as a fine (financial penalty) of 1% of the amount due per each month (30 days) of the delay of such payment".*

6. On 18 July 2012, following a request of Atlético Mineiro, that was accepted by Dynamo Kyiv, the parties concluded an additional agreement to the Transfer Agreement, according to which the terms of clause 2.3.2. a) of the Transfer Agreement were amended. Instead of having to pay the amount of EUR 2,300,000 by 1 July 2012, the parties agreed that Atlético Mineiro had to pay an amount of EUR 1,000,000 by 18 July 2012 and EUR 1,300,000 by 18 August 2012. After the payment of this total amount of EUR 2,300,000, Atlético Mineiro however no longer complied with its payment obligations towards Dynamo Kyiv under the Transfer Agreement.

7. On 3 September 2013, as the amount mentioned in article 2.3.2.b of the Transfer Agreement remained unpaid, Dynamo Kyiv submitted a claim with the Players' Status Committee of FIFA (the "FIFA PSC") against Atlético Mineiro, requesting payment of EUR 760,000.

8. On an unspecified date, Dynamo Kyiv amended its claim since also the amount mentioned in article 2.3.2.c of the Transfer Agreement remained unpaid. Dynamo Kyiv also requested the contractual penalties to be imposed.

9. On 15 January 2014, the Single Judge of the FIFA PSC (hereinafter: the "Single Judge") rendered his decision with, *inter alia*, the following operative part:

"1. The claim of [Dynamo Kyiv]*, is partially accepted.*

2. [Atlético Mineiro]*, has to pay to* [Dynamo Kyiv]*, within 30 days as from the date of notification of this decision, the amount of EUR 1,596,000 as well as 12% interest p.a. on the amount of EUR 760,000 as from 11 July 2013 until the date of effective payment.*

[…]

4. Any further claim lodged by [Dynamo Kyiv], *is rejected".*

10. Neither party lodged an appeal against this decision, nor did any of the parties ask for the grounds. As such, this decision became final and binding.

B. Proceedings before the Single Judge of the Players' Status Committee of FIFA

11. On 29 July 2014, as the amount mentioned in article 2.3.2.d of the Transfer Agreement remained unpaid, Dynamo Kyiv lodged another claim with the FIFA PSC against Atlético Mineiro, requesting payment of EUR 760,000 plus the amount of EUR 76,000 as a contractual penalty in accordance with article 4.2 of the Transfer Agreement, an additionally agreed financial penalty of 1% of the amount due per each month of delay of such payment and CHF 5,000 paid as the advance of costs.

12. Atlético Mineiro did not deny not having paid the amount of EUR 760,000 on time, but argued that it encountered enormous financial difficulties as a consequence of some claims presented by the Brazilian Treasury Department, that caused the abrupt and illegal block of its credits and funds, that this constituted a situation of *force majeure* and that it expected to *"restart its financial movement"* in February 2015.

13. On 20 November 2014, the Single Judge rendered its decision (the "Appealed Decision") with, *inter alia*, the following operative part:

"1. The claim of [Dynamo Kyiv]*, is partially accepted.*

2. [Atlético Mineiro]*, has to pay to* [Dynamo Kyiv]*, within 30 days as from the date of notification of this decision, the amount of EUR 760,000 plus 12% interest p.a. on said amount as from 11 July 2014 until the date of effective payment.*

[…]

4. [Atlético Mineiro] *has to pay to* [Dynamo Kyiv] *the amount of EUR 76,000 as a penalty fee, within 30 days as from the date of notification of this decision.*

5. In the event that the amount due to [Dynamo Kyiv] *in accordance with the above-mentioned number 4. is not paid by* [Atlético Mineiro] *within the stated time limit, interest at a rate of 5% p.a. will apply as of the expiry of the stipulated time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

6. Any further claim lodged by [Dynamo Kyiv] *is rejected.*

[…]*".*

14. On 9 January 2015, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"Having duly examined the argumentation put forward by* [Atlético Mineiro]*, the Single Judge concluded that* [Atlético Mineiro] *did not provide any valid argument which would justify the non-payment of the fourth instalment of the agreed transfer compensation. In particular, and while referring to the principle of the burden of proof as contained in art. 12 par. 3 of the Procedural Rules, the Single Judge stressed that* [Atlético Mineiro] *did not provide any evidence that due to a claim of the Brazilian Treasury Department its account was blocked, this allegedly leading to a situation of force majeure. Thus, regardless of the question whether the situation outlined by* [Atlético Mineiro] *would indeed correspond to a situation of force majeure, the Single Judge decided that* [Atlético Mineiro] *had not provided any documentary evidence in support of its defence. For this reason, the Single Judge concluded that* [Atlético Mineiro] *had failed to respect the terms of the* [Transfer Agreement] *it had entered into with* [Dynamo Kyiv] *on 20 April 2012 and emphasized that, in any case, the rights of* [Dynamo Kyiv] *could not be affected by the financial situation of* [Atlético Mineiro].

- *Consequently, the Single Judge addressed the remaining two requests of* [Dynamo Kyiv]*, namely, its request for a penalty fee corresponding to 10% of the fourth instalment of the transfer compensation as well as its request for interest at a rate of 1% per month, i.e. 12% per annum.*

- *In this context, the Single Judge observed that both the penalty fee as well as the interest rate had not been challenged by* [Atlético Mineiro]. *Taking into account the foregoing as well as considering that both the penalty fee as well as the interest rate were stipulated in the* [Transfer Agreement] *and that the Single Judge did not consider them to be excessive or disproportionate, the Single Judge determined to accept both requests of* [Dynamo Kyiv].

- *As a consequence of the foregoing consideration, the Single Judge determined that i)* [Atlético Mineiro] *has to pay to* [Dynamo Kyiv] *the amount of EUR 76,000 as a penalty fee corresponding to 10% of the fourth instalment of the transfer compensation, and ii) that* [Atlético Mineiro] *has to pay to* [Dynamo Kyiv] *interest at the rate of 12% p.a. on the amount of EUR 760,000 as from 11 July 2014 until the date of effective payment".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 29 January 2015, Atlético Mineiro filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), in accordance with Article R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"). In this submission, Atlético Mineiro nominated Professor Gustavo Albano Abreu, Professor of Law, Buenos Aires, Argentina, as arbitrator.

16. On 12 February 2015, Atlético Mineiro filed its Appeal Brief, in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the challenge of the Appealed Decision, submitting the following requests for relief:

"a) order the appeal to have suspensive effect (Article 67.4 of the FIFA Statutes c.c. Swiss Law, as the article 315 of the Swiss Civil Procedure Code), considering the presence of the "fumus boni iuris" and the "periculum in mora";

b) Entirely cancel the appealed decision;

c) Recognize the presence of release of liability of the Appellant in this case and that the procedure should be suspended by FIFA, as well (i) determine the suspension of the proceedings at least until July 2016, granting Clube Atlético Mineiro a new deadline to pay the amount due to the Respondent or (ii) stipulate a new deadline for the payment of the instalment claimed, in accordance with the occurrence of some conditions related to the financial situation of the Appellant.

d) Establish that the Appellant is not liable to pay to the Respondent any interest related to the instalment claimed, considering the circumstances that caused the payment delay – or at least (i) reduce the interest percentage and (ii) postpone the date that the interest starts to be due as from.

e) Establish that the Appellant is not liable to pay to the Respondent any penalty fee related to the instalment claimed, considering the circumstances that caused the payment delay – or at least reduce the respective penalty fee.

f) Accept the request of financial compensation drawn up by arbitration by CAS for all costs of the Appellant to appeal the decision (e.g. CAS' fees, legal costs, legal assistance, interpreter's fees, accommodation and travel expenses, amongst other)".

17. On 20 February 2015, Dynamo Kyiv nominated Mr François Klein, Attorney-at-Law in Paris, France, as arbitrator.

18. On 23 February 2015, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present appeal arbitration proceedings.

19. On 23 March 2015, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:

- Mr Efraim Barak, Attorney-at-Law, Tel Aviv, Israel, as President;
- Prof. Gustavo Albano Abreu, Professor of Law, Buenos Aires, Argentina; and
- Mr François Klein, Attorney-at-Law, Paris, France, as arbitrators.

20. On 10 April 2015, Dynamo Kyiv filed its Answer, pursuant to Article R55 of the CAS Code, whereby it requested CAS to decide the following:

"1. Dismiss all claims made by the Appellant.

2. Not to hold the hearing in the present case (based on part 2 of Art.57 of the CAS Code).

3. If "Brazilian Finances Minister and General Counsel of the Republic decisions", referred to by the Appellant as allegedly attached to Appeal Brief among exhibits, will be submitted later – to exclude

them from evidence based on part 3 of Article R57 of the CAS Code on grounds of Appellant having violated requirements of part 1 of Art. R51 of the CAS Code.

4. *Based on part 3 of Article R57 of the CAS Code to exclude evidence in the form of perspective witness testimonies, requested by the Appellant, summary of which is manifestly invalid; and accordingly – to deny Appellant's procedural request, contained in the Appeal Brief, to call the above witnesses on grounds of Appellant having violated requirements of part 2 of Art. R51 of the CAS Code.*

5. *If the request # 2 is denied and honorable Panel will decide to hold the hearing – to call as witness Dynamo's International Affairs Manager Mr Anatoliy Volk* […].

6. *To grant to the Respondent a contribution towards its expenses, incurred in connection with the proceedings, amount of which will be finally defined later considering all the relevant actual expenditure (and might enlarge substantially if we would have to call expert in Brazilian legislation if our plea # 4 is denied) but not less than 30.000 CHF".*

21. On 15 and 21 April 2015 respectively, Atlético Mineiro requested a hearing to be held, whereas Dynamo Kyiv indicated that it did not deem it necessary to hold a hearing.

22. On 17 June 2015, the CAS Court Office, on behalf of the Panel, invited Atlético Mineiro to file either witness statements or more detailed summaries of the expected testimony of each of the witnesses and the "Brazilian Finance Minister and General Counsel of the Republic decisions" as well as any agreement entered into with the Brazilian Financial Authorities.

23. On 24 June 2015, Dynamo Kyiv filed a new exhibit with the CAS Court Office, invoking exceptional circumstances. Dynamo Kyiv also filed a decision of the Single Judge of the FIFA PSC dated 22 April 2015, with the grounds having been forwarded to the parties on 8 June 2015. According to Dynamo Kyiv, this decision concerned the fifth instalment of the transfer compensation, *i.e.* the amount based on article 3.2.3.e of the Transfer Agreement.

24. On 29 June 2015, Atlético Mineiro filed an explanation regarding the testimony of the witnesses called and provided additional documents allegedly evidencing that it entered into an agreement with the Brazilian Financial Authorities and that it was still suffering funds' and accounts' blocks.

25. On 1 July 2015, Dynamo Kyiv objected to the admissibility of the new documents filed by Atlético Mineiro.

26. On 3 July 2015, the CAS Court Office informed Atlético Mineiro that *"according to CAS jurisprudence, a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal. It may not, therefore, be stayed and an application in that respect – being moot – would in principle be dismissed. In such circumstances, the Appellant might have to bear the consequential arbitration costs"*. Atlético Mineiro was invited to inform the CAS Court Office whether it maintains or withdraws its application for a stay.

27. On 4 July 2015, Atlético Mineiro withdrew its request for a stay.

28. On 8 July 2015, the CAS Court Office informed the parties that the Panel had decided to admit the documents filed by Atlético Mineiro to the file, including the translation of such documents.

29. On the same date, the Respondent filed a decision rendered by the FIFA PSC on 22 April 2015 in virtue of which the Appellant was ordered to pay EUR 760'000 in accordance with clause 2.3.2 e) of the Agreement.

30. On 9 July 2015, upon request of the President of the Panel, pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the present matter.

31. On 9 July 2015, Atlético Mineiro filed translations of the new documents filed on 29 June 2015. The translations also contained two documents in English that were not submitted before and that were not referred to by Atlético Mineiro as such.

32. On 13 and 21 July 2015 respectively, Atlético Mineiro and Dynamo Kyiv returned duly signed copies of the Order of Procedure.

33. On 13 July 2015, Atlético Mineiro informed the CAS Court Office that it had lodged and appeal against the decision rendered by the FIFA PSC on 22 April 2015 and, therefore, such decision is not final.

34. On 16 July 2015, the CAS Court Office, on behalf of the Panel, informed the parties that, since Atlético Mineiro did not provide its comments on the admissibility of the FIFA PSC decision dated 22 April 2015, such decision is deemed admissible and added to the file.

35. On 23 July 2015, the CAS Court Office, on behalf of the Panel, informed the parties that, since Atlético Mineiro failed to provide detailed witness statements as requested by the Panel within the deadline granted (and even failed to do so in spite of the fact that such deadline had been extended by the Panel upon the request of Atlético Mineiro), the Panel would not allow and would not hear any fact that was not detailed in the summary of the testimonies.

36. On 24 July 2015, further to an invitation from the Panel, Dynamo Kyiv filed its comments and complimentary submissions limited to the new facts stated and presented in Atlético Mineiro's new documents filed on 29 June 2015, by which it, *inter alia*, objected to the new documents submitted by Atlético Mineiro on 9 July 2015.

37. On 28 July 2015 a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.

38. In addition to the Panel, Mr Antonio de Quesada, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For Atlético Mineiro:

1) Mr Lucas Thadeu de Aguiar Ottoni, Counsel

b) For Dynamo Kyiv:

1) Mrs Olga Zhukovska, Counsel;
2) Mr Dmytro Brif, In-house lawyer of Dynamo Kyiv

39. The Panel heard evidence from the following persons in order of appearance:

1) Mr Anatoliy Volk, International Affairs Manager of Dynamo Kyiv

40. Although Atlético Mineiro initially requested to hear Mr Carlos Antônio Silva Fabel, financial director of Atlético Mineiro, and Mr Rodolfo de Lima Gropen, management director of Atlético Mineiro, Atlético Mineiro informed the Panel at the occasion of the hearing that these witnesses, nor any member of Atlético Mineiro, would testify at the hearing.

41. At the outset of the hearing, the Panel dealt with the objection raised by Dynamo Kyiv against the admissibility of the new documents filed by Atlético Mineiro on 9 July 2015 together with the translations requested by the Panel. Atlético Mineiro argued that the documents were not fraudulently inserted in the file, but agreed voluntarily to withdraw exhibit 6 and 8 enclosed the Atlético Mineiro's submission dated 9 July 2015.

42. At the outset of the hearing the Panel also dealt with an objection raised by Dynamo Kyiv against the admissibility of all documents filed by Atlético Mineiro on 29 June 2015. After having allowed both parties to comment, the Panel decided to dismiss Dynamo Kyiv's objection and to confirm its decision of 8 July 2015 that the documents are admitted to the file since these documents were presented by Atlético Mineiro following a request of the Panel.

43. The witness heard by the Panel (Mr Anatoliy Volk, International Affairs Manager of Dynamo Kyiv) was invited by its President to tell the truth subject to the sanctions of perjury. Both parties and the Panel had the opportunity to examine and cross-examine the witness. The parties then were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

44. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure and that their right to be heard had been respected.

45. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

46. The following outline of the parties' positions is illustrative only and does not necessarily encompass every contention put forward by the parties. However, the Panel has carefully considered all the written and oral submissions made by the parties, even if there is no specific reference to those submissions in the following summaries.

47. Atlético Mineiro's submissions, in essence, may be summarised as follows:

- Atlético Mineiro argues that in July 2014 it was already experiencing serious financial problems due to claims presented by the Brazilian Treasury Department, a *force majeure* event which ultimately and illegally blocked its bank accounts, credits and prevented its financial transactions, disallowing the payments and obligations assumed by Atlético Mineiro. The reason of the claims of the Brazilian Treasury Department are very old tax debts of Atlético Mineiro with the Brazilian Federal Revenue, caused by mismanagement of previous executive boards. Atlético Mineiro considers this to be a case of *"factum principis"*.

- Atlético Mineiro argues that the existence of the aforementioned debits and the risk of the mentioned blocks *"were not well known by its actual executive boards of the Appellant at the time of signing the Transfer Agreement with the Respondent"* and that it was impossible to foresee that Atlético Mineiro would be suffering such serious financial difficulties on the date specified for the payment of the second instalment.

- Atlético Mineiro maintains that it has been negotiating an agreement with the Brazilian Federal Revenue and expects that its financial situation *"starts to return to normal soon"*. On this basis, Atlético Mineiro argues that the present proceedings shall be suspended until the decisions of the Brazilian Finance Minister and General Counsel of the Republic have been complied with, entailing a *"subdivision of the debt and consequently the end of the blocks"* and that it expects this to occur at the end of 2015 or 2016.

- Atlético Mineiro purports that it must be emphasised that it has complied with more than 75% of its debt towards Dynamo Kyiv and that based on this fact *"the basic legal principle of "Substantial Performance" shall be invoked, and the pacta sunt servanda mitigated. This principle is relevant when a contractor's performance is in some way deficient, through no wilful act by the contractor, yet is so nearly equivalent that it would be unreasonable for the other party to deny the agreed upon payment"*.

- Atlético Mineiro submits that the penalty set in the Transfer Agreement is disproportionate and must be set aside, or at least mitigated based on article 163 of the Swiss Code of Obligations (the "SCO").

- Finally, Atlético Mineiro argues that it should not be condemned to pay 12% interest *p.a.*, or at least it must be reduced and Atlético Mineiro refers to Swiss literature in this respect.

48. Dynamo Kyiv's submissions, in essence, may be summarised as follows:

- Dynamo Kyiv submits that Atlético Mineiro had tax debts at the time of signing the Transfer Agreement and that the Federal Government of Brazil had already initiated court proceedings against Atlético Mineiro. As such, not only the "old" management, but also the "new" management of Atlético Mineiro was aware of the tax debts and did not handle the problem efficiently as it nevertheless concluded the Transfer Agreement with Dynamo Kyiv. By doing so, Dynamo Kyiv finds that Atlético Mineiro acted in bad faith.

- Dynamo Kyiv argues that Atlético Mineiro only made the first two payments in accordance with the Transfer Agreement, but then stopped making further payments. Dynamo Kyiv argues that *"although clearly Atletico Mineiro has certain financial difficulties, it is as much clear that they brought those difficulties upon themselves by not paying taxes in timely manner"*. Dynamo Kyiv further submits that during the period of alleged financial difficulties, Atlético Mineiro nevertheless continued its transfer activities and acquired the services of several players.

- Dynamo Kyiv avers that Atlético Mineiro on the one hand argues that it is impossible for it to pay the due amounts, but on the other hand maintains that payment would worsen its financial situation and that almost all its credits are blocked, which presupposes that execution is possible, but not desirable.

- Dynamo Kyiv concludes that the arguments of Atlético Mineiro in respect of the unlawful claim instigated against it by the Brazilian Government remains unproven.

- As to the principle of *force majeure* invoked by Atlético Mineiro, Dynamo Kyiv maintains that the concept of *force majeure* is not applicable if a party had demonstrated fault and that Atlético Mineiro is indeed responsible for the difficult financial situation itself.

- Dynamo Kyiv argues the concept of *factum principis* invoked by Atlético Mineiro is not applicable as the Brazilian state has not interfered in a private legal relationship between Atlético Mineiro and its partners, but strictly in a relationship between the Brazilian Federal Government and Atlético Mineiro.

- Dynamo Kyiv contends that Atlético Mineiro's reliance on the principle of substantial performance is irrelevant as the payments referred to by Atlético Mineiro were made in accordance with the Loan Agreement and can therefore not be considered to have been made in accordance with the Transfer Agreement and that Atlético Mineiro should in any event comply with the contractual obligations that it freely entered into.

- With reference to article 163 of the SCO, Dynamo Kyiv maintains that this provision provides for the possibility to enlarge the sum of penalties by parties. The Single Judge of the FIFA PSC deemed that this penalty was not excessive or disproportional. Since Atlético Mineiro did not challenge the decision of the Single Judge of the FIFA PSC

dated 15 January 2014 to award the penalty and the higher interest, it implicitly agreed thereto. Dynamo Kyiv maintains that the penalty was agreed upon by the parties as a compromise between the interests of the parties.

- Finally, as to the interest at a rate of 12% *per annum*, Dynamo Kyiv states that Atlético Mineiro failed to ground its objection on any relevant legal provision and that such interest is by no means significantly disproportional.

V. JURISDICTION

49. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes (2014 edition) as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

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

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

VI. ADMISSIBILITY

52. The appeal was filed within the 21 days set by article 67(1) of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

53. It follows that the appeal is admissible.

VII. APPLICABLE LAW

54. Article R58 of the CAS Code provides the following:

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

55. The Panel notes that article 66(2) of the FIFA Statutes stipulates the following:

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

56. Atlético Mineiro submits that *"[b]y accepting CAS jurisdiction pursuant to article 9 of the Transfer Agreement, both parties subjected themselves to this provision. Consequently, the law applicable in the procedure shall be the FIFA Regulations and additionally Swiss Law"*.

57. Dynamo Kyiv argues that the *"[a]pplicable legislation in the present case should be mainly CAS Code, CAS case-law, FIFA regulations and Swiss Law only as subsidiary one"*.

58. Consequently, in view of the parties' agreement, the Panel will decide the present dispute primarily in accordance with the FIFA regulations and, subsidiarily, Swiss law should the need arise to fill a possible gap in the regulations of FIFA.

VIII. MERITS

A. The Main Issues

59. The Panel observes that it is not in dispute between the parties that Atlético Mineiro failed to pay to Dynamo Kyiv the amount of EUR 760,000, Atlético Mineiro however submits that it was not able or not required to pay for several reasons.

60. The Panel finds that, since it remained undisputed that Dynamo Kyiv is in principle entitled to receive the amount of EUR 760,000 from Atlético Mineiro based on the Transfer Agreement and because it is Atlético Mineiro invoking several arguments to justify its lack of payment towards Dynamo Kyiv, it is in principle for Atlético Mineiro to establish that such arguments are indeed justifiable, *i.e.* the burden of proof lies with Atlético Mineiro.

61. The Panel feels itself comforted in this conclusion by CAS jurisprudence:

> *"According to the general rules and principles of law, facts pleaded have to be proven by those who plead them, i.e. the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proven by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based.*
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> *This principle is also stated in the Swiss Civil Code. In accordance with Article 8 of the Swiss Civil Code "Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right" (free translation from the French original version – "Chaque partie doit, si la loi ne prescript le contraire, prouver les faits qu'elle allègue pour en déduire son droit').*
>
> *It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites include the concept of 'burden of proof' are (i) the 'burden of persuasion' and (ii) the 'burden of production of the proof'. In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequences envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been*

transferred to the other party" (CAS 2007/A/1380, with further references to CAS 2005/A/968 and CAS 2004/A/730).

62. It is against this background that the Panel will examine whether Atlético Mineiro has satisfied its "burden of persuasion" and "burden of production of proof".

63. As such, the main issues to be resolved are:

i. Did Atlético Mineiro establish that, under any valid legal concept, it was not required to proceed with the payment of EUR 760,000 to Dynamo Kyiv on time?
ii. Shall the present appeal arbitration proceedings be suspended?
iii. Is the principle of "substantial performance" applicable?
iv. Is Atlético Mineiro required to pay a contractual penalty of 10% over the principal debt to Dynamo Kyiv?
v. Is Atlético Mineiro required to pay interest at a rate of 12% *p.a.* over the principal debt to Atlético Mineiro?

i. Did Atlético Mineiro establish that, under any valid legal concept, it was not required to proceed with the payment of EUR 760,000 to Dynamo Kyiv on time?

64. Atlético Mineiro argues that it is suffering from serious financial problems because the Brazilian Treasury Department illegally blocked its bank accounts and that this was a situation of *force majeure* that prevented it from making financial transactions. Atlético Mineiro argues that it is entitled to receive an amount of EUR 25,000,000 from FC Shakhtar Donetsk for the transfer of a player, but that this amount is blocked and that almost all other credits of the club that have to be paid are also blocked.

65. Atlético Mineiro also relies on the legal principle of *factum principis*, which it explains to comprise *"a situation when the State, for various reasons and public interest, interfere in a private legal relationship, changing their effect and unbalancing legal relationships already established"*.

66. Dynamo Kyiv argues that the application of the concept of *force majeure* requires that, even if foreseen, it could not have been prevented and that this feature is extraordinary. Dynamo Kyiv purports that the financial difficulties of Atlético Mineiro could and should have been foreseen, could have been prevented and are not extraordinary. In any event, the concept of *force majeure* is not applicable if a party had demonstrated fault.

67. Dynamo Kyiv further argues the concept of *factum principis* invoked by Atlético Mineiro is not applicable for various reasons related to the right application of this concept. Dynamo Kyiv, *inter alia*, argued that the Brazilian state did not interfere in a private legal relationship between Atlético Mineiro and its partners, but that this was strictly a relationship between the Brazilian Federal Government and Atlético Mineiro.

68. The Panel finds that the arguments of Atlético Mineiro must be dismissed for several reasons.

69. First of all, the Panel notes that Atlético Mineiro indeed provided evidence that its accounts or some of them are partially blocked. However, crucially, the Panel finds that Atlético Mineiro failed to establish that the Brazilian Treasury Department illegally blocked its accounts. As admitted by Atlético Mineiro itself, *"[t]he reason of the claims is very old tax debts of the Appellant with the Brazilian Federal Revenue, caused by mismanagement of previous executive boards"*. The Panel finds that this does not justify in any way that the blocks were illegal. To the contrary, the Panel finds that this admission of Atlético Mineiro is sufficient to deny the attempt of Atlético Mineiro to rely on the concepts of *force majeure* and *factum principis*. From this admission, it clearly derives that the Brazilian Treasury Department had sufficient legal grounds to block the accounts of Atlético Mineiro because it had *"old tax debts"*, otherwise the Brazilian courts would not have allowed the blocks.

70. In this respect, the Panel finds that it must be emphasised that executive boards represent a football club and that the contractual arrangements entered into by executive boards bind the football club as a legal entity. As such, mismanagement by a previous executive board of a club can, even if this were established to be the reason of the present financial difficulties, not justify any overdue payables of the club under a new executive board.

71. In view of the admission of Atlético Mineiro that it has *"very old tax debts"*, the Panel finds that Atlético Mineiro failed to establish that the blocking of its accounts by the Brazilian Treasury Department constitutes a situation of *force majeure*, as it was responsible for the block itself.

72. The Panel first of all notes that the legal concept of *force majeure* is widely and internationally accepted and, in particular, is valid and applicable under Swiss law. As a general rule it could be said that, under some extraordinary and limited circumstances, a party who does not fulfil a contractual obligation could be excused for his breach in case he proves that such breach is due to the concurrence of an event or an impediment that is not only beyond his control (and that he cannot avoid to overcome) but also that could not have been reasonably expected or taken into account when he assumed the relevant obligation that has been breached.

73. Taking into account that the applicable law to the present dispute is Swiss law, the Panel notes that this legal principle is also applied under Swiss law. In particular, according to the jurisprudence of the Swiss Federal Tribunal (2C_579/2011), *"Il y a force majeure en présence d'événements extraordinaires et imprévisibles qui surviennent en dehors de la sphère d'activité de l'intéressé et qui s'imposent à lui de façon irrésistible". (*That can be freely translated into English as follows: *"Force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner").*

74. This legal principle has also been considered and applied by CAS in previous cases, giving rise to a well-established doctrine. For instance, in the award resolving the case CAS 2013/A/3471 it is stated that *force majeure* implies an objective (rather than a personal) impediment, beyond the control of the "obliged party", that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible. Notwithstanding, CAS jurisprudence has also warned that *"The conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation"* (CAS 2006/A/1110).

75. The Panel finds that the financial difficulties of Atlético Mineiro are caused by its own conduct and voluntary behaviour. Such situation cannot be detrimental to the rights of Dynamo Kyiv and, ultimately, cannot justify the breach of Atlético Mineiro's obligations, particularly since a lack of financial means cannot be invoked as a justification for the non-compliance with an obligation.

76. The Panel neither finds that the principle of *factum principis* is applicable to the present matter, since the Brazilian state did not interfere in a private relationship. The blocking of the accounts of Atlético Mineiro is the consequence of a direct and specific request of the Brazilian state from Atlético Mineiro and is not a general measure adopted by the State or the Brazilian authorities addressed to a general group of people or entities with an impact on an existing contract that could constitute a situation of *factum principis*. The Brazilian Treasury Department requested the permission of Brazilian courts to block the accounts of Atlético Mineiro, which permission was apparently granted. Such request could however also have been made by any other private creditor.

77. In view of the fact that the Brazilian courts permitted the blocking of Atlético Mineiro's accounts, the block never entered the realm of a unilateral general public action of the Brazilian Treasury Department, but it remained a private action. As such, the Panel finds that there are no distinguishing features between the claim of the Brazilian Treasury Department and any other private creditor, legitimising the application of the principle of *factum principis*.

78. The Panel finds that the financial coercive measures that a State Court can adopt to enforce tax debts incurred by a party, by no means can be considered as a general measure adopted by a State with an impact on an existing contract that could constitute a situation *factum principis*. On the contrary, such Court intervention is nothing but the result of a mere legal procedure *inter partes* that does not affect or modify the Transfer Agreement itself. It only affects to the financial situation of Atlético Mineiro.

79. In any event, the Panel finds that the fact remains that if Atlético Mineiro had complied with its *"very old tax debts"*, the accounts would not have been blocked and it would have been able to pay Dynamo Kyiv in time. Atlético Mineiro is therefore ultimately the sole entity responsible for the blocking of its accounts and a creditor like Dynamo Kyiv should not incur the consequences of the mismanagement of a debtor like Atlético Mineiro.

80. Consequently, the Panel finds that Atlético Mineiro did not establish that it was prevented or not required to proceed with the payment of EUR 760,000 to Dynamo Kyiv.

ii. Shall the present appeal arbitration proceedings be suspended?

81. Atlético Mineiro argues that it has been negotiating an agreement with the Brazilian Federal Revenue and that it is expected that its financial situation will return back to normal soon. On this basis, Atlético Mineiro submits to expect that it can proceed with the payments that were not made due to blocking of its account during the second semester of 2015 or 2016.

82. In this respect, Atlético Mineiro purports that *"if the execution of the decision appealed keep progressing, the Appellant will be in even worse financial difficulties, and will be unable to meet its most basic commitments, as the payment of salaries of players and staff, which would be very damaging to a financial crisis that is already almost solving"*. Therefore, Atlético Mineiro requests the proceedings to be suspended or that the Panel imposes a new deadline for payment.

83. Dynamo Kyiv maintains that there are no and could be no arguments why it has to suffer from another lengthy or indefinite suspension and considers it be unfair if it would become a hostage of Atlético Mineiro's ill management of its obligation to pay taxes.

84. The Panel considers it crucial that Atlético Mineiro is currently not in a situation of insolvency or bankruptcy or planning to apply for such a situation on short notice, as was confirmed by counsel for Atlético Mineiro during the hearing. To the contrary, Atlético Mineiro is currently still able to pay the salaries of players and staff as it argued that *"if the execution of the decision appealed keep progressing, the Appellant […] will be unable to meet its most basic commitments, as the payment of salaries of players and staff […]"*. As such, the Panel finds that it must be concluded that all the bank accounts of Atlético Mineiro are not blocked or entirely blocked and that the non-payment to Dynamo Kyiv is merely a voluntarily decision of Atlético Mineiro based on its own preferences. The Panel has no hesitation in determining that such conduct is no valid reason for Atlético Mineiro not to pay the amounts owed to Dynamo Kyiv.

85. As long as Atlético Mineiro did not seek the protection from its creditors by applying for a situation of bankruptcy or insolvency, it is not for Atlético Mineiro to decide which creditor deserves a preferential treatment (*i.e.* whether the salaries of players and staff need to be paid before Dynamo Kyiv).

86. The Panel finds that, in any event, Atlético Mineiro failed to establish with any certainty when it would exactly be possible to settle its debt towards Dynamo Kyiv. The allegation that Atlético Mineiro would be able proceed with the payments during the second semester of 2015 or 2016 appears unreliable. In this respect, the Panel notes that during the proceedings before the FIFA PSC Single Judge, Atlético Mineiro mentioned that it would be able to pay in February 2015. This date however passed and no payment was made. It appears that Atlético Mineiro currently simply mentions some new dates without even attempting to justify why it was not able to pay Dynamo Kyiv in February 2015. In any event, Atlético Mineiro's statement that it will pay Dynamo Kyiv during the second semester of 2015 or 2016 is not substantiated with any evidence.

87. Furthermore, the Panel finds that Atlético Mineiro did not establish any valid legal reasons to support its request for a suspension of the present appeal arbitration proceedings and that this request is therefore to be dismissed.

88. Consequently, the Panel concludes that the present appeal arbitration proceedings shall not be suspended and that no new deadline for payment is imposed on Atlético Mineiro.

iii. Is the principle of "substantial performance" applicable?

89. Atlético Mineiro avers that it paid more than 75% of the amount due on the basis of the Transfer Agreement, noting that the amounts due on the basis of the Loan Agreement and the first three instalments on the basis of the Transfer Agreement, *i.e.* a total amount of more than EUR 6,020,000 were already paid to Dynamo Kyiv.

90. On this basis, Atlético Mineiro argues that the principle of "substantial performance" shall be invoked and the principle of *pacta sunt servanda* mitigated. According to Atlético Mineiro, this principle *"is relevant when a contractor's performance is in some way deficient, though no wilful act by the contractor, yet is so nearly equivalent that it would be unreasonable for the other party to deny the agreed upon payment"*.

91. Dynamo Kyiv contends that Atlético Mineiro's reliance on the principle of "substantial performance" is irrelevant as the payments referred to by Atlético Mineiro were made in accordance with the Loan Agreement and can therefore not be considered to have been made in accordance with the Transfer Agreement and that Atlético Mineiro should in any event comply with the contractual obligations that it freely entered into.

92. The Panel finds that Atlético Mineiro's attempt to rely on the principle of "substantial performance" in the circumstances of the present case is merely an unacceptable attempt to avoid a payment obligation by invoking a totally irrelevant principal.

93. The principle of "substantial performance", which is sometimes invoked in cases of construction contracts or sell of goods, may be relevant when a contractor's performance is in some way deficient, through no wilful act of the contractor or due to reasons for which the contractor is not responsible (which, as established *supra*, is not the case here), yet is so nearly equivalent (which, again, is not the case here) that it would be unreasonable for the other party to deny the payment agreed upon. If a contractor successfully demonstrates "substantial performance", the other party may remain obliged by a court to comply with its payment obligations, deducted however with damages incurred as a result of the deficiencies in the performance of the other party. The Panel finds such doctrine to be totally irrelevant to the case at hand since the Player was transferred as agreed. Atlético Mineiro enjoyed the full and due performance of the Transfer Agreement by Dynamo Kyiv, but is now trying to avoid its payment obligations towards Dynamo Kyiv based on financial difficulties for which Atlético Mineiro admitted to be responsible.

94. The Panel finds that the principle of "substantial performance" is not applicable to the matter at hand, and that the principle of *pacta sunt servanda* prevails.

95. Indeed, as maintained by Dynamo Kyiv, Atlético Mineiro did not pay 75% of the amounts due on the basis of the Transfer Agreement, but it only paid the amount of EUR 2,300,000 voluntarily and that the intervention of the FIFA DRC was necessary to make Atlético Mineiro comply with the second and third instalment in the amount of EUR 760,000 each. Since the total amount due on the basis of the Transfer Agreement is EUR 5,800,000, Atlético Mineiro therefore only proceeded to pay 65% of the total amount due thus far.

96. Regardless of the above, even if Atlético Mineiro would have paid 75% of the total amount due on the basis of the Transfer Agreement to Dynamo Kyiv, still, the Panel finds that this would not justify the application of the principle of "substantial assistance". Both parties consciously entered into the Transfer Agreement and all contractual commitments towards each other deriving from such agreement must in principle be complied with, especially considering that Dynamo Kyiv fully complied with its obligations under the Transfer Agreement.

97. Consequently, the Panel finds that the principle of "substantial assistance" is not applicable.

iv. Is Atlético Mineiro required to pay a contractual penalty of 10% over the principal debt to Dynamo Kyiv?

98. Atlético Mineiro refers to article 163(2) and (3) of the SCO in submitting that it should not be condemned to pay the penalty fee, or that such penalty shall at least be reduced.

99. Dynamo Kyiv maintains that article 163 of the SCO provides for the possibility to enlarge the sum of penalties by parties. The Single Judge of the FIFA PSC deemed that this penalty was not excessive or disproportional. Since Atlético Mineiro did not challenge the decision of the Single Judge of the FIFA PSC dated 15 January 2014 to award the penalty and the higher interest, it implicitly agreed thereto. Dynamo Kyiv maintains that the penalty was agreed upon by the parties as a compromise between the interests of the parties.

100. The Panel observes that article 4.2 of the Transfer Agreement determines the following:

> *"4.2 In case of untimely or incomplete execution by* [Atlético Mineiro] *of any of the payments under the present* [Transfer Agreement]*,* [Atlético Mineiro] *shall be obliged to additionally pay to* [Dynamo Kyiv] *a penal clause of 10% of the respective unpaid amount, as well as a fine (financial penalty) of 1% of the amount due per each month (30 days) of the delay of such payment".*

101. The Panel notes that Atlético Mineiro freely accepted to commit itself to such contractual obligation.

102. The Panel observes that according to article 163 of the SCO – Swiss law being the law subsidiarily applicable to the matter at hand – determines the following:

> *"1. Die Konventionalstrafe kann von den Parteien in beliebiger Höhe bestimmt werden.*
>
> *2. Sie kann nicht gefordert werden, wenn sie ein widerrechtliches oder unsittliches Versprechen bekräftigen soll und, mangels anderer Abrede, wenn die Erfüllung durch einen vom Schuldner nicht zu vertretenden Umstand unmöglich geworden ist.*
>
> *3. Übermässig hohe Konventionalstrafen hat der Richter nach seinem Ermessen herabzusetzen".*

Which can be translated as follows:

> *"1. The parties are free to determine the amount of the contractual penalty.*
>
> *2. The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.*
>
> *3. At its discretion, the court may reduce penalties that it considers excessive".*

103. Thus, whereas article 163(1) of the SCO provides that parties may freely determine the amount of a contractual penalty, on the basis of article 163(3) of the SCO, the Panel considers that it has the duty to reduce the amount of the penalty if it considers this amount to be excessive.

104. In several cases, the Swiss Federal Tribunal underlined that the discretion of the judge according to article 163(3) of the SCO should be used with reluctance: The possibility to reduce liquidated damages by the judge is against the principles of contractual freedom and contractual loyalty and, therefore, should be applied with reluctance (SFT 4C.5/2003; 114 II 264; 103 II 135). According to legal commentators, there must be a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand, in other words a massive imbalance is required for interfering with the parties' agreed assessment of the liquidated damages (GAUCH/SCHLUEP/SCHMID/REY, Schweizerisches Obligationenrecht, Allgemeiner Teil, 8th Ed. (2003), N 4049).

105. In view of the above legal framework, the Panel however does not consider a penalty of 10% of the principal debt to be excessive or that there is a massive imbalance.

106. The Panel finds that it merely seems that, as argued by Dynamo Kyiv, while Dynamo Kyiv initially wanted the transfer sum to be paid immediately in full, Atlético Mineiro applied for a more flexible and lenient payment schedule. According to Dynamo Kyiv and as confirmed by Mr Volk during his testimony, the contractual penalty was integrated in the Transfer Agreement as a compromise. According to Mr Volk, it was counsel for Atlético Mineiro who proposed to reduce the contractual penalty to 10%, which was subsequently done.

107. The Panel also deems it relevant that Atlético Mineiro did not challenge the decision of the Single Judge dated 15 January 2014 to CAS, by which also a contractual penalty of 10% was imposed on Atlético Mineiro.

108. Consequently, the Panel finds that Atlético Mineiro is required to pay a contractual penalty of 10% over the principal debt to Dynamo Kyiv.

v. Is Atlético Mineiro required to pay interest at a rate of 12% p.a. over the principal debt to Dynamo Kyiv?

109. Atlético Mineiro maintains that it should not be condemned to pay 12% interest *per annum*, or that this percentage shall at least by reduced.

110. Dynamo Kyiv states that Atlético Mineiro failed to ground its objection on any relevant legal provision and that such interest is by no means significantly disproportional.

111. The Panel observes that, besides the 10% contractual penalty, article 4.2 of the Transfer Agreement determines that also *"a fine (financial penalty) of 1% of the amount due per each month (30 days) of the delay of such payment"* shall be paid in case of untimely or incomplete execution of the Transfer Agreement.

112. The Panel observes that while reference is made to 1% per month, this was interpreted as 12% per year by the Single Judge in the Appealed Decision and that neither of the parties objected thereto in the proceedings before CAS.

113. The Panel also notes that Atlético Mineiro freely accepted to commit itself to such contractual obligation.

114. Although the parties specifically refer to this percentage as a *"fine (contractual penalty)"*, the Panel however does not consider such percentage to be a fine, which would have constituted a second penalty in addition to the 10% penalty discussed *supra*, but merely as a specification of the interest rate to be applied on default payments to compensate Dynamo Kyiv for the financial (interest) losses as a result of depriving Dynamo Kyiv, due to the delayed payments, from the payments it is entitled to.

115. The Panel observes that article 104 of the SCO determines as follows:

> *"1. Ist der Schuldner mit der Zahlung einer Geldschuld in Verzug, so hat er Verzugszinse zu fünf vom Hundert für das Jahr zu bezahlen, selbst wenn die vertragsmässigen Zinse weniger betragen.*
>
> *2. Sind durch Vertrag höhere Zinse als fünf vom Hundert, sei es direkt, sei es durch Verabredung einer periodischen Bankprovision, ausbedungen worden, so können sie auch während des Verzuges gefordert werden.*
>
> *3. Unter Kaufleuten können für die Zeit, wo der übliche Bankdiskonto am Zahlungsorte fünf vom Hundert übersteigt, die Verzugszinse zu diesem höheren Zinsfusse berechnet werden".*

Which can be translated into English as follows:

> *"1. A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract.*
>
> *2. Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.*
>
> *3. In business dealings, where the normal bank discount rate at the place of payment is higher than 5%, default interest may be calculated at the higher rate".*

116. On the basis of article 104(2) of the SCO, the Panel finds that parties are free to negotiate a higher amount of interest as the default interest of 5% *per annum* contemplated for in article 104(1) of the SCO.

117. However, as determined by a previous CAS panel, this freedom is not unlimited as the outcome would have to remain compatible with Swiss public policy:

> *"Public policy is violated if an arbitral award violates the fundamental legal principles and is therefore incompatible with Swiss law and values. The Panel has no doubts that to grant to a creditor a late payment interest rate of 198% would violate Swiss fundamental legal principles – and probably not only Swiss principles.*
>
> *The Panel observes that under Swiss Law it is considered usury as per art. 157 of the Swiss Penal Code where a loan is granted with an interest rate of 18% to 20% p.a. or where there is a disproportion of 25% between the value of the obligations of the Parties. Further, Swiss law foresees a maximum of 15% p.a. for loans granted to consumers.*
>
> *Based on the above, and taking in consideration the circumstances of the case and in particular on the commercial nature of the contract and the value of the obligations of the Parties, the Panel deems in this case an annual default interest rate of 17% p.a. as being the maximum rate that can be granted without violating Swiss public policy" (CAS 2010/A/2128, §108-110; with further references).*

118. In view of this and in the absence of any concrete arguments of Atlético Mineiro as to why interest at a rate of 12% *per annum* would be disproportionate, the Panel finds that there is no reason to reduce the interest rate of 12% *per annum* to a lower percentage.

119. Consequently, the Panel finds that Atlético Mineiro is required to pay interest at a rate of 12% *per annum* over the principal debt.

B. Conclusion

120. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

i. Atlético Mineiro did not establish that it was prevented or not required to proceed with the payment of EUR 760,000 to Dynamo Kyiv.
ii. The present appeal arbitration proceedings are not suspended and no new deadline for payment is imposed on Atlético Mineiro.
iii. The principle of "substantial performance" is not applicable.
iv. Atlético Mineiro is required to pay a contractual penalty of 10% over the principal debt to Dynamo Kyiv.
v. Atlético Mineiro is required to pay interest at a rate of 12% *per annum* over the principal debt to Dynamo Kyiv.
vi. Consequently, the Appealed Decision is confirmed in full.

121. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 29 January 2015 by Club Atlético Mineiro against the Decision issued on 20 November 2014 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The Decision issued on 29 January 2015 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

(…)

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