Arbitration CAS 2016/A/4719 Club Atlético Mineiro v. Udinese Calcio S.p.A & Fédération Internationale de Football Association (FIFA)

Panel: Mr Lars Halgreen (Denmark), President; Mr João Nogueira Da Rocha (Portugal); Mrs Margarita Echeverria (Costa Rica)

Football
Transfer
FIFA's exclusive and ex officio competence of sanctioning clubs for overdue payables pursuant to art. 12bis par. 4 RSTP
Restriction of power of review of sanctions limited to evident and gross disproportionate sanctions
Proportionality of a disciplinary sanction (fine) related to overdue payables

1. **Art. 12bis par. 4 of the FIFA Regulations on the Status and Transfer of Players (RSTP) gives an exclusive prerogative to FIFA to sanction debtors *ex officio* in each specific case. Consequently, no application of said provision needs to be requested by the claiming party for FIFA to be able to impose a sanction based on art. 12bis par. 4 and a FIFA deciding body's decision to sanction a party on such regulatory basis does not qualify as an *extra petita* ruling.**

2. **A CAS panel's power to review a case based on art. R57 of the CAS Code will be narrower and more limited when applied to the question of the justification of a disciplinary sanction imposed on a party by FIFA. Accordingly, only evidently and grossly disproportionate sanctions shall be amended or set aside by the CAS.**

3. **While a CAS panel's scope of review of a disciplinary sanction under appeal is narrower and more limited, it also considers that FIFA's deciding bodies have a wide discretion when it comes to sanction clubs in order to preserve and uphold the goal of art. 12bis of the RSTP. Accordingly, a wide range of factors may be taken into account to determine the quantum of a sanction, such as the behaviour of the debtor during the investigation, the amount awarded, the seriousness of the infringement or whether such debtor has been previously sanctioned for having overdue payables (aggravating circumstance of "*repeated offender*"). In the process of determining a fair and reasonable amount for a fine, reference can also be made by FIFA to the recognised proportionality of the fines imposed by FIFA's Disciplinary Committee and to the percentage such fine would represent compared to the owed amount. The fact that a debtor persisted to breach its financial obligations whereas it had already received a fee from a third party club for the transfer of the same player it had recruited from the creditor is an aggravating circumstance.**

I. THE PARTIES

1. The Appellant, the Club Atlético Mineiro (hereinafter "CAM" or "the Appellant"), is a Brazilian professional football club, organised and existing in accordance with the laws of Brazil with its head offices in Belo Horizonte, Brazil.

2. The First Respondent, the Udinese Calcio S.p.A. (hereinafter "Udinese" or "the First Respondent"), is an Italian professional football club, organised and existing in accordance with the laws of Italy, with its head offices in Udine, Italy.

3. The Second Respondent, the Fédération Internationale de Football Association (hereinafter "FIFA" or "the Second Respondent"), is the football word's governing body and an association registered in accordance with the laws of Switzerland, with its heads offices in Zurich, Switzerland.

4. The First Respondent and the Second Respondent are collectively referred to as "the Respondents". The Appellant and the Respondents are collectively referred to as "the Parties".

II. FACTUAL BACKGROUND

5. The circumstances and provisions discussed below constitute a summary of the relevant facts and evidence as set forward by the Parties in their respective written submissions. This factual 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.

6. On 10 August 2014, CAM and Udinese signed a transfer agreement (the "Transfer Agreement") regarding the transfer of D., a professional football player (the "Player"), from Udinese to CAM. Pursuant to article 4 of the Transfer Agreement, CAM was granted the right to engage the services of the Player on a loan basis from 12 August 2014 to 5 August 2015. CAM was subsequently under the obligation to pay a loan fee of EUR 100,000 payable within seven work days from the receipt of the Player's international transfer certificate.

7. Pursuant to article 5 of the Transfer Agreement and in the event CAM wanted to acquire definitively the "sport and economic" rights for the Player, CAM had to undertake to pay to Udinese the total amount of EUR 2,858,820, payable in five equal instalments of EUR 571,764 on 31 August 2015, on 28 February 2016, on 31 August 2016, on 28 February 2017 and on 31 August 2017, respectively.

8. In the last paragraph of both articles 4 and 5, the following payment instructions were stipulated:

> *"The above-mentioned amount shall be paid by the Brazilian Club on the due date for payment by bank transfer, to the account that the Italian Club will communicate in writing".*

9. On 5 January 2015, Udinese urged CAM to pay the overdue EUR 100,000 corresponding to the agreement on the loan fee. CAM processed the payment of the fee due to Udinese on 23 January 2015 into the bank account in Italy provided by Udinese to CAM pursuant to article 4.

10. On 15 July 2015, CAM informed Udinese of its will to acquire definitively the sporting and economic rights for the Player. As the option to purchase was exercised before the deadline of 21 July 2015, Udinese sent to CAM on 20 July 2015 the invoice pertaining to the payment of the first instalment of the transfer fee, *i.e.* EUR 571,764.

11. On 28 August 2015, CAM apologized for not being able to proceed with the first instalment payment and requested a 60-day extension, which was granted by Udinese. However, the latter never received the first instalment payment at the end of the extension period.

12. On 1 December 2015, Udinese sent a payment reminder to CAM by telefax, urging the latter to pay the first instalment, and provided CAM with a ten-day deadline for complying with its financial commitments.

a) The first instalment

13. As a matter of background information, proceedings were initiated by Udinese before the Single Judge of FIFA Players' Status Committee (the "Single Judge") to claim for the payment of the first instalment. In a decision dated 14 March 2016 (the "First Single Judge's Decision"), the Single Judge ruled that CAM had to pay the first instalment due to Udinese in full plus legal interest.

14. CAM filed a statement of appeal on 7 April 2016 before the Court of Arbitration for Sport against the First Respondent challenging the First Single Judge's Decision, but later withdrew its appeal on 15 June 2016.

15. On 22 March 2016, Udinese sent to CAM the account number on which the remittance was to be made. However, the first instalment was still not fully paid. Thus, Udinese reverted to FIFA Disciplinary Committee in order to seek the enforcement of the First Single Judge's Decision. The disciplinary procedure is still pending.

16. On 1 July 2016, the legal counsel of CAM emailed to Udinese the bank swift transfer confirming the partial payment of EUR 100,000 of the first instalment relating to the transfer of the Player. In this letter, CAM further explained that it had not been able to comply with its payment obligations due to financial hardship.

b) The second instalment

17. These proceedings do not concern the payment of the first instalment. In the following, the facts involve the second instalment only.

18. On 30 March 2016, Udinese addressed to CAM a telefax with a payment reminder urging CAM to proceed with the remittance of the second instalment, due since 28 February 2016, with a ten-day deadline for the compliance with its financial commitments.

19. On 21 April 2016, as the second instalment had still not been paid, Udinese initiated another action against CAM before the Single Judge to claim overdue payables in the total amount of EUR 571,764 corresponding to the second instalment.

20. On 13 June 2016, the Single Judge issued a decision (the "Appealed Decision") and ruled as follows:

> *"1. The Claim of the Claimant, Udinese Calcio, is partially accepted.*
>
> *2. The Respondent, Atlético Mineiro, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, overdue payables in the amount of EUR 571,764 as well as interest at a rate of 5% per year from 29 February 2016 until the date of effective payment.*
>
> *3. If the aforementioned amount plus interest is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee, for consideration and a formal decision.*
>
> *4. Any further claims lodged by the Claimant, Udinese Calcio, are rejected.*
>
> *5. The Respondent, Atlético Mineiro, is ordered to pay a fine in the amount of CHF 25,000,* ***within 30 days*** *as from the date of notification of the present decision, to FIFA.*
>
> *6. The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Atlético Mineiro,* ***within 30 days*** *as from the date of notification of the present decision (…).*
>
> *7. (…).*
>
> *8. The Claimant, Udinese Calcio, is directed to inform the Respondent, Atlético Mineiro, immediately and directly of the account number to which the remittances (…) are to be made and to notify the Single Judge of every payment received".*

21. On 24 June 2016, the General Secretariat of FIFA (the "FIFA General Secretariat") notified the Appealed Decision to the Appellant and to the First Respondent.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 15 July 2016, CAM filed a statement of appeal (the "Statement of Appeal") with the CAS against the Appealed Decision, pursuant to the Code of Sports-related Arbitration ("the Code") and to FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"). In its Statement of Appeal, CAM requested the President of the Appeals Arbitration Division of the CAS to appoint a sole arbitrator pursuant to article R40.1 of the Code.

23. On 27 July 2016, the CAS Court Office ("the CAS") invited the Parties to decide whether they would agree that the present case being referred to the same Panel as in CAS 2016/A/4718 (the *"proceeding CAS 2016/A/4718"*). The CAS also invited the Respondents to provide their position on whether they agreed with the Appellant's request for a sole arbitrator.

24. On 29 July 2016, Udinese informed the CAS that it did not object that the present arbitration proceeding be referred to the same panel as in the proceeding CAS 2016/A/4718, but it disagreed with the appointment of a sole arbitrator, and requested that the dispute be submitted to a panel of three arbitrators.

25. On the same date, CAM also agreed that the present arbitration proceeding should be submitted to the same panel as in the proceeding CAS 2016/A/4718 but reiterated its request for the appointment of a sole arbitrator.

26. On 29 July 2016, CAM submitted its appeal brief (the "Appeal Brief").

27. On 2 August 2016, FIFA informed the CAS of its preference for a panel of three arbitrators and requested to suspend the deadline for answering the request to refer the present arbitration to the same panel as in the proceeding CAS 2016/A/4718.

28. On 8 August 2016, the CAS communicated to the Parties the decision of the Deputy President of the CAS Appeals Arbitration Division (the "Deputy President") to submit the present procedure as well as the proceeding in CAS 2016/A/4718 to a panel composed of the three same arbitrators. Consequently, the CAS invited CAM to nominate an arbitrator.

29. On 18 August 2016, CAM informed the CAS that it nominated Mr João Nogueira Da Rocha, Attorney-at-Law, Lisbon, Portugal, as its arbitrator.

30. On 29 August 2016, the CAS invited Udinese and FIFA to nominate an arbitrator, and reminded them that the Deputy President had decided to submit the present arbitration proceedings to the same panel as the proceedings in CAS 2016/A/4718.

31. On 30 August 2016 and 1 September 2016 respectively, Udinese and FIFA informed the CAS of their decision to appoint Mrs Margarita Echeverria, Attorney-at-Law, San José, Costa Rica, as arbitrator.

32. On 6 September 2016, the CAS informed Udinese and FIFA that CAM had paid its share of the advance costs and therefore, both Respondents had twenty days to submit their Answer.

33. On 28 September 2016, FIFA submitted its answer to the Appeal Brief ("FIFA's Answer").

34. On 29 September 2016, the CAS informed the Parties that the panel of three arbitrators (the "Panel") was duly constituted as follows:

President: Mr Lars Halgreen, Attorney-at-Law, Copenhagen, Denmark

Arbitrator: Mr João Nogueira Da Rocha, Attorney-at-Law, Lisbon, Portugal,
Arbitrator: Mrs Margarita Echeverria, Attorney-at-Law, San José, Costa Rica.

35. On 5 October 2016, Udinese submitted its Answer to the Appeal Brief ("Udinese's Answer").

36. On 6 October 2016, the CAS invited the Parties to choose between a hearing to be held or for the Panel to issue an award based solely on the Parties' submissions.

37. On 10 October 2016 and 13 October 2016 respectively, the Parties informed the CAS that they did not deem that a hearing was needed.

38. On 22 November 2016, the CAS informed the Parties of the appointment of Mr. Hervé Le Lay as an *Ad hoc* Clerk and forwarded his statement of independence. The Parties made no objections regarding his appointment.

39. On 31 January 2017, the CAS issued an Order of Procedure, which was signed by the First Respondent, the Second Respondent and the Appellant on 1,7 and 20 February 2017 respectively. By the signature of the Order of Procedure, the Parties expressly authorized the Panel to decide on the sole basis of their written submissions, without the need to hold a hearing, and confirmed that their right to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES

A. The position of the Appellant

40. In the Appeal Brief, the Appellant challenged the Appealed Decision, submitting the following the requests for relief to the CAS:

> *"FIRST - To set aside the Appealed Decision in full;*
>
> *SECOND - To confirm that the First Respondent failed to comply with its obligations set out in the Contract, that is to say, to forward in writing to the Appellant the bank account details in order to permit the latter to pay the amount due as second instalment of the transfer fee for the permanent transfer of the Player;*
>
> *THIRD - To uphold, in the scenario above, that the Appellant was entitled to withhold the payment of the referenced amount due as second instalment, as well as there is no legal basis for the imposition of any default interest whatsoever (cf. Art 82 of the Swiss CO);*
>
> *FOURTH - To order the First Respondent and FIFA to pay the full amount of the CAS arbitration costs; and*
>
> *FIFTH - To order the First Respondent and FIFA to pay a significant contribution towards the legal costs and other related expenses of the Appellant, at least amounting CHF 20,000.*

Alternatively, and only in the event the above is rejected:

SIXTH - To uphold, assuming but not admitting, that (somehow) the First Respondent complied with the terms and conditions set out in Art. 5 of the Contract, in any event, FIFA Single Judge had no legal basis to impose any sanction on the Appellant, in casu, a fine of CHF 25,000 (cf. Art.12bis, par. 4 of FIFA RSTP);

SEVENTH - To order the First Respondent and FIFA to pay the full amount of the CAS arbitration costs; and

EIGTH - To order the First Respondent and FIFA to pay a significant contribution towards the legal costs and other related expenses of the Appellant, at least amounting CHF 20,000.

Alternatively, and only in the event the above is rejected:

NINTH - To uphold, assuming but not admitting, that (somehow) the First Respondent complied with the terms and conditions set out in Art. 5 of the Contract, in any event, the fine of CHF 25,000 violates the principle of proportionality and as such, shall be reduced to an amount no higher than CHF 14,294;

TENTH - To uphold, assuming but not admitting, that (somehow) the First Respondent complied with the terms and conditions set out in the Transfer Agreement, the decision to impose only to the Appellant the obligation to pay the procedural costs has no legal basis whatsoever. As such, the First Respondent had to pay an amount of at least CHF 5,000 and the Appellant the remaining CHF 15,000; and

ELEVENTH - To order the First Respondent and FIFA to pay the full amount of the CAS arbitration costs; and

TWELVETH - To order the First Respondent and FIFA to pay a significant contribution towards the legal costs and other related expenses of the Appellant, at least amounting CHF 20,000".

41. The Appellant's submissions, in essence, may be summarised as follows:

- Both FIFA Rules Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules") edition 2015 and FIFA RSTP edition 2015 apply to the dispute. Swiss procedural law is applicable to these proceedings as the seat of the arbitration is Lausanne, Switzerland, in particular the Swiss Private International Law Act (the "PILA").

- The Appealed Decision failed to comply with the procedural obligations set out in article 14 paragraph 4 of the FIFA Procedural Rules and CAS jurisprudence, notably the obligation to establish clear and predictable reasons for the findings of the conclusions.

- According to the Transfer Agreement, the Appellant undertook to pay a total transfer fee to the Respondent amounting to EUR 2,858,820 payable in five equal instalments upon

the receipt in writing of the bank account information in which such amounts had to be paid.

- The Appellant contends however that: (i) pursuant to article 5 of the Transfer Agreement, the Appellant and the First Respondent only agreed on written submissions, which is defined, through the complimentary application of the FIFA Regulations and articles 13, 14 and 16 of the Swiss Code of Obligations ("the Swiss CO") by a document in its original format with the original signature; (ii) according to the Appellant's witnesses Mr. C and Mr. L, such writing is a mandatory prerequisite for banks in Brazil to prove there is no involvement with terrorist organizations or money laundering; (iii) it never received in writing the referenced bank account, which was a *sine qua non* condition before the payment of the instalments; (iv) therefore the Appellant had contractual grounds to withhold the payment of instalments.

- The First Respondent failed to comply with its own obligations, and therefore it had no right, under article 82 of the Swiss CO, to claim the performance of the Appellant's obligations. By deciding otherwise, the Single Judge rejected what the Parties freely agreed on and violated the due process.

- The Appellant contends that pursuant to article 12bis of the FIFA RSTP, a club must be put in default in writing to consider that overdue payables exist.

- The Appellant asserts, however, that (i) it never received any notification in writing, such as a notice of default, by the First Respondent; and (ii) the First Respondent's facsimile on 30 March 2016 was sent via facsimile and therefore did not contain the original signature of the latter, which was in breach with what is required from a written notification.

- The First Respondent did not request the imposition of any sanction on the Appellant before the Single Judge, notably pursuant to article 12bis, paragraph 4 of the FIFA RSTP, and therefore the latter had no legal grounds to impose on the Appellant the CHF 25,000 fine. In any event, the CHF 25,000 fine for an outstanding amount of EUR 571,764 violates the principle of proportionality and shall not, therefore, exceed CHF 14,294.

- The Appellant should not be the only one to bear the procedural costs as they are to be divided, as stated in the Appealed Decision and pursuant to article 18 paragraph 1 of the FIFA Procedural Rules, upon *"the parties' degree of success in the proceedings"*. As the First Respondent's claim had only been partially accepted, the procedural costs shall be divided equally. The prevailing party should further receive a contribution towards its legal fees and other expenses incurred in connection with the proceedings.

B. The position of the First Respondent

42. In its Answer, the First Respondent submitted the following requests for relief:

"In view of the above, the First Respondent respectfully asks the Panel:

to reject the appeal;

to uphold the Appealed Decision;

to condemn the Appellant to the payment in favour of the First Respondent of EUR 571,764 plus 5% interest p.a. from 29 February 2016 until the date of effective payment and CHF 5,000 of the costs of proceedings before FIFA;

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

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

43. The First Respondent's submissions, in essence, may be summarised as follows:

- The applicable regulations are the FIFA regulations, more specifically FIFA Statutes and FIFA RSTP. Swiss law shall apply complementarily.

- The First Respondent always acted in compliance with the Transfer Agreement and the applicable regulations.

- The allegation of the Appellant denying the receipt of the facsimile dated 30 March 2016, addressing a payment reminder for the second instalment payment, must be rejected. Indeed, the fax report shows that the facsimile went regularly through.

- The First Single Judge's Decision already established the Appellant's bad faith.

- Indeed, this decision has already established that the Appellant had failed to comply with its contractual obligations and the Appellant already recognized that the reason for its non-compliance related to its financial difficulties.

- When the non-payment of the first instalment was considered by the Single Judge of the Players' Status Committee, the Appellant raised no concerns pertaining to the alleged failure of the First Respondent to issue in writing the bank details of the account on which the payment had to be transferred. The Appellant had even recognized, during the proceedings which led to the First Single Judge's Decision, the existence of the open debt towards the First Respondent.

- The Appellant cannot contend it did not have the bank account details of the First Respondent for the payment of the second instalment as: (i) the First Respondent did provide the Appellant with the bank account details and there was no need to repeat such action for further payments; (ii) the latter even acknowledged having paid the loan fee of EUR 100,000 to the First Respondent; (iii) the Appellant had therefore at its disposal the

First Respondent's contact information and could have, but never did, raised this issue at any time; (iv) had the Appellant been in good faith, it would have informed the First Respondent accordingly and done everything in its power to comply with its contractual obligations; (v) for the reasons above, the Appellant had no contractual grounds to withhold the payment of any instalment.

- Further, the obligations of the Appellant under the Transfer Agreement, mostly article 5 pertaining to the payment of the instalments, did not depend upon any communication in writing. The communication in writing of the bank account details by the First Respondent is not, contrary to the Appellant's contention, a condition *sine qua non* for the payment of the instalments; the only *sine qua non* condition was the definitive transfer of the Player.

- The payment of the two instalments in question was due and enforceable. Pursuant to Swiss Law, a claim is enforceable when (i) the claim exists and is legally valid and (ii) when it is matured. The existence and the legal validity of the transfer fee is undisputed and the claim is matured as the payment matures on the dates set out in the agreement for the relevant payment.

- Pursuant to article 102.2 of the Swiss CO, the debtor is automatically in default at such date, even without any formal notice of default. Accordingly, the First Respondent was under no obligation to send an invoice to the Appellant for each instalment, even less an *"original form"* of the invoice. The amounts to be paid were already known by the Appellant in the Transfer Agreement and invoices have a mere declaratory significance. Therefore, the existence and legal validity of a claim and its maturity does not depend upon the issuance of such invoice and the assertions of the Appellant's first witnesses, shall thus be rejected.

- In addition to the claim subject to this proceeding, the First Respondent contends that at this stage, the second and already the third instalments under article 5 of the Transfer Agreement matured and no relevant payment from the Appellant followed.

- Additionally, the Appellant transferred the Player to the club A for an amount of EUR 7,500,000, unduly enriching itself without complying with its previous financial obligations.

C. The position of the Second Respondent

44. In its Answer, the Second Respondent submitted the following request for relief:

> *"That the CAS rejects the appeal at stake and confirms the presently Appealed Decision passed by the Single Judge of the Players' Status Committee (…) on 13 June 2016 in its entirety.*
>
> *That the CAS orders the Appellant to bear all the costs of the present procedure.*

That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand".

45. The Second Respondent's submissions, in essence, may be summarised as follows:

- Contrary to the Appellant's contentions, the Appealed Decision did comply with the procedural obligations set out in article 14 paragraph 4 of the FIFA Procedural Rules as the Single Judge provided clear and predictable reasons for the findings of its conclusions.

- An alleged obligation of the First Respondent to provide *"in writing"* (whichever its meaning) its bank details to the Appellant cannot constitute, by any means, a valid reason for the latter to withhold the payment of the overdue amount. Thus, the Second Respondent disagrees with the senseless interpretation of the term *"writing"* used by the Appellant in its Appeal Brief and such interpretation must be dismissed.

- The Appellant submits that pursuant to article 12bis paragraph 2 and 3 of the FIFA RSTP, the Appellant must be found to have delayed due payments. Essentially, the Second Respondent's contentions are similar to the First Respondent's as: (i) the Appellant was perfectly aware of the First Respondent's bank account details, having processed the EUR 100,000 loan fee. Further, the Appellant did not even try to contact the First Respondent to raise this issue. Therefore, the Appellant failed to provide any pertinent evidence which could demonstrate it needed the bank account details in writing. Further, (ii) the default notice addressed on 30 March 2016 was effectively sent to the Appellant. No original version of the default notice is required by the FIFA RSTP.

- The witness statements submitted by the Appellant are from its own employees, which means these statements might be affected by diverse contextual factors and therefore, have practically no evidentiary value.

- The Single Judge did not rule *extra petita*. Indeed, pursuant to article 12bis of the FIFA RSTP, the Single Judge can apply measures aiming at securing the respect of FIFA regulations and therefore can ensure that the clubs comply with their contractual obligations. Thus, the fact that the First Respondent did not request the imposition of any sanction on the Appellant, did not hinder the Single Judge to assess such possibility and to ultimately impose these sanctions.

- Article 12bis of the FIFA RSTP gives the deciding bodies of FIFA a wide discretion when it comes to the sanctioning of clubs. Fines imposed by FIFA deciding bodies are not only based on the actual overdue amount but rather on a diverse series of factors and on the wide jurisprudence of the Disciplinary Committee.

- In the present case, the fine was not disproportional, considering the subsequent amount overdue and the fact that it was the third time that the Appellant had failed to comply with its contractual obligations. Eventually, the Appellant contended that the fine was

disproportional on the basis of only two cases, while the Second Respondent provides numerous cases proving that the current fine is not disproportional.

- It is only right that the Appellant alone must bear the costs of the proceedings as it (i) unnecessarily provoked the use of the resources of FIFA, (ii) wasted the time of the First Respondent, FIFA as well as the CAS and (iii) the First Respondent should not bear the costs of the proceedings as its main request - the payment of the second instalment - was accepted in full by the Single Judge.

V. JURISDICTION OF THE CAS

46. Article R47 of the Code provides as follows:

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

47. In its Statement of Appeal, CAM relied on articles 66 and 67 of the FIFA Statutes and article 23 paragraph 4 of the FIFA RSTP, which grant a right of appeal to the CAS.

48. The jurisdiction of the CAS was not contested by the First or the Second Respondents and the Order of Procedure was signed by all parties without any objections.

49. Accordingly, the CAS has jurisdiction to adjudicate in this matter.

VI. ADMISSIBILITY

50. The Single Judge issued the Appealed Decision on 13 June 2016 and the FIFA General Secretariat communicated it to the Parties on 24 June 2016. On 15 July 2016, the Appellant filed the Statement of Appeal to the CAS pursuant to the article R48 of the Code.

51. Pursuant to article R51 of the Code, the Appellant requested the Secretary General an exceptional 5-day extension of the time limit in order to lodge its Appeal Brief. On 27 July 2016, the CAS granted the requested extension of the time, and the Appeal Brief was filed on 29 July 2016.

52. Accordingly, and as none of the Parties contested the admissibility of the appeal, it follows that the Statement of Appeal and the Appeal Brief were filed in due time and are admissible.

VII. APPLICABLE LAW

53. The Appellant contends that the CAS Code, the FIFA Statutes, the FIFA Procedural Rules edition 2015 and the FIFA RSTP edition 2015 apply to the dispute and additionally, Swiss law.

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

55. Article R58 of the Code provides as follows:

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

56. Article 57 paragraph 2 of the FIFA Statutes provides as follows:

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

57. As a consequence, the applicable FIFA regulations and statutes will be applied primarily, and additionally Swiss Law shall apply.

58. For the sake of clarity, the pertinent parts of article 12bis of the FIFA RSTP (2015 ed.) provide:

> *"1. Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements. 2. Any club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned in accordance with paragraph 4 below.*
>
> *3. In order for a club to be considered to have overdue payables in the sense of the present article, the creditor (player or club) must have put the debtor club in default in writing and have granted a deadline of at least ten days for the debtor club to comply with its financial obligation(s).*
>
> *4. Within the scope of their respective jurisdiction (cf. article 22 in conjunction with articles 23 and 24), the Players' Status Committee, the Dispute Resolution Chamber, the single judge of the DRC judge may impose the following sanctions:*
>
> *a) a warning;*
>
> *b) a reprimand;*
>
> *c) a fine;*

d) a ban from registering any new players, either nationally or internationally, for one or two entire and consecutive registration periods. (…)".

VIII. THE MERITS

59. The following issues shall be determined by the Panel in these proceedings:

Question 1
Shall the decision of the Single Judge regarding the payment by the Appellant to the First Respondent of an amount of EUR 571,764 plus interest be upheld, amended, or set aside?

Question 2
Shall the decision of the Single Judge to order the Appellant to pay a fine in the amount of CHF 25,000 to FIFA be upheld, amended, or set aside?

i) Analysing question 1

60. In order for this Panel to establish, whether the Single Judge's decision to order the Appellant to pay the second instalment in the amount of EUR 571,764 to the First Respondent should be upheld or not, it is important that the Panel outlines the relevant legal and factual context in these appeal proceedings.

61. The First Respondent's legal demand for payment of EUR 571,764 is based on the Transfer Agreement entered into by the Appellant and the First Respondent on 10 August 2014. Pursuant to article 5 of the Transfer Agreement, the Appellant had exercised an option right on 15 July 2015 according to which the Appellant was entitled to acquire 100 % of the sporting and economic rights of the Player. Upon exercising this option right, the Appellant was obligated to pay to the First Respondent a total transfer sum of EUR 2,858,820 to be paid in five instalments. The second instalment amounted to EUR 571,764.

62. The Panel notes that it is undisputed among the Appellant and the First Respondent that the Transfer Agreement constituted a valid and binding contract and that the Appellant's decision to exercise the option was completed lawfully before the deadline stipulated to be 21 July 2015.

63. The Transfer Agreement also entailed pursuant to article 4 a right of the Appellant to engage the service of the Player on a loan basis from 12 August 2014 to 5 August 2015, and the loan fee was fixed at EUR 100,000. Although the loan period and the payment of the loan fee as well as the payment of the first instalment of the transfer sum is not directly part of the present dispute, the facts involving the payment of the loan fee and the first instalment are nevertheless of great importance as background information for the Panel in deciding the issue at stake in these proceedings.

64. Based on the evidence presented before the Single Judge and this Panel, the Panel must place paramount importance on the evidence at hand that the Appellant has constantly and from the very beginning of the contractual relationship not lived up to its contractual and economic

responsibilities. Thus, the Panel has noted that it is undisputed that the Appellant did not make the payment of the loan fee of EUR 100,000 before 23 January 2015 and only after the First Respondent had sent a payment reminder.

65. With respect to the payment of the first instalment of EUR 571,764, the Panel has also been made aware of the undisputed fact that this payment has not yet been made in full, despite another FIFA decision issued by the Single Judge on 14 March 2016 (*i.e.* the First Single Judge's Decision) ruling that the Appellant should pay the first instalment in full plus legal interest.

66. By the Appellant's own admission in relation to the only partial payment of EUR 100,000 of the first instalment, the Appellant has acknowledged that it had not been able to comply with the payment obligation under the Transfer Agreement allegedly due to financial hardship.

67. Moreover – which is of great significance in this matter – it is an uncontested fact that the Appellant was able to transfer the loan fee of EUR 100,000 to the First Respondent's bank account in Italy on 23 January 2015. Again, in July 2016 the Appellant was able to transfer the partial payment of EUR 100,000 of the first instalment to the First Respondent's bank account in Italy without any problems.

68. Against this background, the Panel will now deal with the arguments and submissions made by the Appellant, which allegedly made it impossible for the Appellant to fulfil its financial obligations towards the First Respondent to pay the second instalment of the transfer sum, *i.e.* EUR 571,764.

69. The Panel understands that the Appellant's arguments for not paying the second instalment goes to the actual wording of article 5 of the Transfer Agreement, which speaks of a payment of a transfer fee upon the receipt ***in writing*** of the required bank account information. In this context, the Appellant claims that this wording is to be construed through the complimentary application of the FIFA Regulations and articles 13, 14, and 16 of the Swiss CO by a document, in the original format with the original signature. Furthermore, such requirements are, in the opinion of the Appellant, mandatory prerequisites for banks in Brazil to prove that there is no involvement with terrorist organisations or money laundering, and that these requirements are therefore *sine qua non* conditions, before payments can be made in accordance with the Transfer Agreement.

70. After having carefully reviewed the contractual basis for the First Respondent's claim for payments under the Transfer Agreement, the Panel is of the firm opinion that the Appellant's submissions must be dismissed as groundless and without any legal merits.

71. Firstly, the Panel notes that both article 4 and article 5 contain identical wording, when it comes to the payment instructions in connection with the loan fee/instalments of the transfer sum. In both paragraphs it is stipulated that the payment shall be made *"by bank transfers, to the account that the Italian club will communicate in writing"*.

72. Nowhere in the contract is there, even remotely, any grounds to support or substantiate the Appellant's claims for a document in the original format with the original signature. It is also without any merits to claim that the contract in any way refers to *"mandatory prerequisites"* for Brazilian banks. The only original signatures, which are needed to establish the payment obligation of the Appellant, are the ones on the Transfer Agreement itself, which constitutes a valid and binding contractual relationship between the two parties. As noted above, the Appellant's argument in this respect falls flat on its face, when the record shows that the Appellant in two instances both when the loan fee and the partial payment of the first instalment was made, had no trouble whatsoever to transfer the money into the Italian bank account designated by the First Respondent.

73. These bank transfers categorically and without a shadow of a doubt eliminates the truthfulness of the Appellant's alleged reason for not making the payment. Instead, the Appellant's own admission that the reason for not making the payment of the first instalment on time was a financial hardship carries, in view of the Panel, a significantly higher amount of credibility as to the real reason why the transfer of the second instalment was not made.

74. Secondly, even though the Panel is satisfactorily convinced that the Appellant was in possession of all necessary bank account information from the two previous transfers, the Panel notes nevertheless that the First Respondent addressed a payment/default reminder for the second instalment payment by way of a telefax dated 30 March 2016 which was indeed sent to the Appellant as the telefax report shows that the facsimile went regularly through. In that case, the burden of proof to establish that the telefax did not reach the Appellant must fall on the Appellant itself, and the Panel has seen no evidence on record that such proof has been established.

75. In support of this reasoning, the Panel refers to decisions of other CAS Panels, which have dealt with the issue of missing or inaccurate bank account information, which allegedly has made it impossible for the debtor to fulfil its obligations. In CAS 2013/A/3323 the Panel was *"of the view that the utmost obligation of the debtor is to duly transfer the amount to the bank account provided by the Creditor, and, therefore it is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation in accordance with a FIFA decision* [*in casu* a contractual obligation]*"*. The same reasoning was confirmed by the Sole Arbitrator in CAS 2015/A/4342.

76. Thus, the Panel finds that both in accordance with CAS Jurisprudence and the debtor's obligations to its creditor under Swiss law, the Appellant has done absolutely nothing to convince the Panel that the real reason for not making the second transfer instalment was due to a genuine uncertainty about the proper bank account of the First Respondent as creditor. On the contrary, the Panel feels that the Appellant's behaviour may constitute a poor excuse for alleged economic hardship. However, the fact that the Appellant transferred the Player to the club A for an amount of EUR 7,500,000 without settling the debt towards the First Respondent is, in the Panel's opinion, clearly a pattern of extremely negligent behaviour and bad faith in a contractual relationship. In unduly enriching itself from the proceeds of the sale of the Player and not fulfilling any of its payment obligations on time, the Panel has clearly no

other choice than to uphold the Appealed Decision when it comes to the Appellant's obligation to pay the second instalment of EUR 571,764 plus legal interest.

77. Consequently, the Panel rejects all arguments and prayers for relief by the Appellant and confirms the Appealed Decision regarding the Appellant's obligation to pay the second instalment of EUR 571,764 with legal interests in full.

ii) Analysing question 2

78. Before examining, whether the fine in the amount of CHF 25,000, which the Single Judge ordered the Appellant to pay to the Second Respondent, was legitimate and proportional, the Panel will start by reviewing the Appellant's allegation that the Single Judge ruled *extra petita*, when he imposed the fine on the Appellant, as the First Respondent never requested the imposition of any sanction on the Appellant.

a) The alleged extra petita argument

79. Having examined article 12bis of the FIFA RSTP, the Panel puts emphasis on the overall reasoning behind the particular provision as a vehicle for FIFA to impose sanctions on any club held liable to have overdue payables. In fact, the Panel agrees that article 12bis, par. 4, is directly construed as an exclusive FIFA prerogative of the Players' Status Committee, the Dispute Resolution Chamber as well as their respective judges to render sanctions in each specific case. This prerogative is and has been performed *ex officio* by the FIFA competent body absolutely independent from the existence or not of a respective request from the other party (player/club) in the proceedings.

80. The Panel finds it noteworthy to refer in this context to the decision of the Sole Arbitrator in CAS 2015/A/4232, who confirmed the exclusive prerogative by stating that the *"application of Article 12bis of the FIFA Regulations does not require a relevant request from the interested party as argued by the Appellant"*. This Panel concurs fully with this view.

81. Hence, the Panel is in fact of the opinion that the First Respondent does not even have the standing to request the imposition of disciplinary sanctions pursuant to article 12bis of the FIFA RSTP, as this prerogative lies solely with the relevant bodies of FIFA. The Panel refers to consistent CAS Jurisprudence such as CAS 2014/A/3707 and CAS 2015/A/4220, which have confirmed the exclusive competence of FIFA's deciding bodies in these matters.

82. Consequently, the Panel must dismiss the Appellant's arguments regarding the alleged *extra petita* ruling by the Single Judge, since the exclusive competence and prerogative of sanctioning clubs for having overdue payables pursuant to article 12bis of the FIFA RSTP lies solely with FIFA.

b) The alleged disproportionality of the fine

83. Having established that the Single Judge did not rule *extra petita* based on the reasoning stated above, the Panel will now deal with the alleged disproportionality of the fine of CHF 25,000, which the Appellant was ordered to pay for violating article 12bis of the FIFA RSTP.

84. As a point of departure for this analysis, the Panel has examined the evidence presented during these appeal proceedings and has reached the conclusion that the conditions necessary to impose a sanction in accordance with article 12bis, par. 4, have all been met. As the evidence shows, the Appellant had delayed due payment for more than 30 days without a *prima facie* contractual basis, as the decision of the Panel as regards question i) containing the non-payment of the second instalment of the transfer sum has already been established. Hence, the requirements under article 12bis, par. 2, are fulfilled.

85. Likewise, the Panel must come to the same conclusion based on the evidence at hand as regards the fulfilment of the conditions in article 12bis, par. 3. The record shows without any doubt that the First Respondent on a number of occasions both with respect to the payment of the loan fee and the first and second instalments has put the Appellant as debtor in default in writing and has granted a deadline of at least ten days for the Appellant to comply with its financial obligations. All requirements for imposing a sanction pursuant to article 12bis, par. 4, are therefore fulfilled.

86. A CAS Panel would normally have a wide scope of review according to article R57 of the Code. However, in cases where the Panel is asked to review sanctions enforced by an international federation like FIFA, the scope of review is more narrow and limited, which has been acknowledged in a number of previous CAS awards. In a very recent decision (CAS 2015/A/4291 at para 53 and 54), the Panel stated the following with respect to its scope of review pursuant to article R57 of the Code:

> *"Notwithstanding the Panel's power to review a case de novo according to Article R57 of the CAS Code, the Panel finds that the review and the power to amend a disciplinary decision of a FIFA judiciary body should only take place in cases, in which the Panel finds that the relevant FIFA judiciary body has exceeded the margin of discretion according to it by the principle of association authority, i.e. only in cases, in which the FIFA judiciary body concerned must be held to have acted arbitrarily. However, this assumption is not present, if the Panel merely disagrees with a specific sanction. Only if the sanction concerned must be considered as evidently and grossly disproportionate to the offence, will the Panel have the authority to amend or set aside the decision.*
>
> *This scope of a CAS Panel's review in disciplinary cases has been established through a substantial number of CAS cases, cf. CAS 2014/A/3562, par. 119; CAS 2009/A/1817 and CAS 2009/A/1844, par. 174; CAS 2004/A/690, par. 86; CAS 2005/A/830, par. 10.26; CAS 2006/A/1175, par. 90; CAS 2007/A/1217, par. 12.4; CAS 2009/A/1870, par. 125 and the advisory opinion CAS 2005/C/976 & 986, par. 143)".*

87. Against this background and having acknowledged this limited scope of review in a disciplinary case like the present, the Panel will review the reasoning and considerations behind the decision of the Single Judge to order the Appellant to pay a fine of CHF 25,000.

88. Whereas the Panel's scope of review may be narrow and limited, the Panel on the other hand recognises that the deciding bodies of FIFA have a wide discretion, when it comes to the sanctioning of clubs in order to preserve and uphold the main goal of article 12bis of the FIFA RSTP, *i.e.* to ensure that clubs properly comply with their financial contractual obligations.

89. When exercising this wide discretion keeping the importance of the said aim in mind, this Panel also recognises that FIFA may take a number of various factors into consideration when deciding on the relevant sanction pursuant to article 12bis, par. 4.

90. These considerations will naturally include, but are not limited to, the actual overdue amount, but also the specific circumstances surrounding the particular case such as the behaviour of the club during the investigation, the amount awarded, the seriousness of the infringement, or whether the club has been previously sanctioned for having overdue payables may be taken into consideration.

91. Likewise, the Panel finds that it is both prudent and within the discretionary powers of the deciding bodies of FIFA to use as guidance, by analogy, the jurisprudence of FIFA's Disciplinary Committee in order to reach a fair and just amount when determining a fine. The overall proportionality of the fines imposed by FIFA's Disciplinary Committee has already been confirmed by the Swiss Federal Tribunal in its decision 4P.240/2006 of 5 January 2007, and the Panel concurs with the submissions of FIFA that this jurisprudence will also be a relevant guideline when imposing sanctions pursuant to article 12bis of the FIFA RSTP. Having taken all of these issues into consideration, the Panel holds that a sanction in the form of a fine of CHF 25,000 must be considered both legitimate and proportionate, given the fact that the Appellant in bad faith has neglected to meet its financial obligations more than three times; each with a significant amount. In the Panel's view, the Appellant is indeed a *"repeated offender*", which is considered as an aggravating circumstance according to article 12bis, par. 6, of the RSTP. Although this has not been specifically mentioned in FIFA's submissions, the Panel will also consider the fact that the Appellant sold the Player for a significant transfer amount to A without fulfilling its financial obligations towards the First Respondent, as an additional aggravating circumstance, which renders the Appellant's previous excuse vis-à-vis financial hardship very difficult to believe or accept.

92. In this context, the Panel refers to the considerations of the Sole Arbitrator in CAS 2016/A/4387, where a debtor club had also sold a player for a profit, but the sale proceeds were not used to clear the debt. In the Sole Arbitrator's opinion, this behaviour is exactly the reason for FIFA to bring in article 12bis (see para 174).

93. Finally, the Panel has been comfortably satisfied that the fine of CHF 25,000 is not disproportionate, also looking at the findings of the Sole Arbitrator in CAS 2015/A/4387, in which the Sole Arbitrator had made a thorough review of the recent FIFA jurisprudence in the

area of overdue payables and the application of article 12bis. *In casu*, the fine of CHF 25,000 corresponds to a 4.37 % of the overdue amount, which amount percentagewise falls well within the fines imposed by FIFA in other similar cases; thus confirming the proportionality of the fine itself.

94. In conclusion, the Panel is of the opinion that the sanction in the form of a fine of CHF 25,000 to be paid by the Appellant to FIFA pursuant to article 12bis of the FIFA RSTP is in no way whatsoever disproportionate or unwarranted. Hence, all prayers for relief rendered by the Appellant in respect of the proportionality of the fine is dismissed, and the Panel holds that the decision of the Single Judge with respect to fine of CHF 25,000 is upheld and confirmed.

IX. CONCLUSION

95. Consequently, the Appealed Decision is upheld in its entirety. All other motions or prayers for relief of the Appellant are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sports rules that:

1. The appeal filed by Club Atlético Mineiro on 15 July 2016 against the decision issued by the Single Judge at the FIFA Players' Status Committee on 13 June 2016 is dismissed.

2. The decision issued by the Single Judge at the FIFA Players' Status Committee on 13 June 2016 is confirmed.

3. (…).

4. (…).

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