Arbitration CAS 2017/A/5203 Clube Atlético Mineiro v. Udinese Calcio S.p.A. & Fédération Internationale de Football Association (FIFA), award of 20 June 2018

Panel: Prof. Petros Mavroidis (Greece), President; Mr Manfred Nan (the Netherlands); Mr Lars Halgreen (Denmark)

Football
Transfer
Allocation of a payment to a debt
Interpretation of a debtor's declaration of allocation of payment

1. **According to art. 86 of the Swiss Code of Obligations (CO), a debtor has the right to declare which one of its debts towards the same creditor it is honouring by its payment. In the absence of declaration by the debtor, the creditor may specify on the payment receipt to which one of the debtor's debts the payment is allocated, unless the debtor immediately objects to such allocation. Said objection does not necessarily have to be made directly to the creditor. Art. 86 CO is completed by art. 87 CO which sets forth the payment allocation scheme to be applied in the absence of (valid) specifications made either by the debtor or the creditor.**

2. **The content of the debtor's declaration must be interpreted in light of its real intention. Should it be unclear for the creditor, it must then be interpreted according to the principle of good faith according to which the debtor's declaration must be understood on the basis of its wording, the context as well as the relevant circumstances, for example if the amount paid coincides with the amount of one contractually agreed debt. The creditor must be in position to ascertain the identity of the payment.**

I. THE PARTIES

1. Clube Atlético Mineiro ("CAM" or "the Appellant"), is a Brazilian professional football club, with its registered office in Belo Horizonte, Brazil. It is a member of the Brazilian Football Federation (Confederação Brasileira de Futebol - CBF), itself affiliated with the Fédération Internationale de Football Association.

2. Udinese Calcio S.p.A. ("Udinese" or the "First Respondent"), is an Italian professional football club, with its registered office in Udine, Italy. It is a member of the Italian National Football Association (Federazione Italiana Giuoco Calcio - FIGC), which is, in turn, affiliated with the Fédération Internationale de Football Association.

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

A. Background facts

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, and evidence adduced. References to additional facts and allegations found in the Parties' written submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence that it deems is necessary to explain its reasoning.

B. The contract signed between CAM and Udinese on 10 August 2014

6. D. (the "Player") was born in 1994 and is of Brazilian nationality. In 2014, he was registered as a professional player with Udinese.

7. By means of a contract signed on 10 August 2014 (the "Transfer Agreement"), Udinese accepted to transfer the Player to CAM on a temporary loan basis, effective from 12 August 2014 until 5 August 2015. It was agreed among the clubs that a loan fee of EUR 100,000 would be paid within seven work days from the receipt of the Player's international transfer certificate.

8. Pursuant to Article 5 of the Transfer Agreement, CAM had a *"purchase right for the definitive acquisition of the 100% (…) sport and economic rights related to the PLAYER for the net amount of EUR 2,858,820"*. This option had to be exercised by CAM on or before 21 July 2015, in which case, the transfer fee had to be paid in the following five instalments:

   - Article 5 a): EUR 571,764 by 31 August 2015;
   - Article 5 b): EUR 571,764 by 28 February 2016;
   - Article 5 c): EUR 571,764 by 31 August 2016;
   - Article 5 d): EUR 571,764 by 28 February 2017 (on the contract the deadline is 28 February 2016, but the Parties seem to agree that the actual relevant year is 2017);
   - Article 5 e): EUR 571,764 by 31 August 2017.

9. Article 6 of the Transfer Agreement provides that an interest rate of 5% per year would apply *"starting from the date of default"*.

10. On 5 January 2015, Udinese urged CAM to pay the amount of EUR 100,000 corresponding to the loan fee under the Transfer Agreement. CAM complied with this financial obligation on 23 January 2015.

11. On 15 July 2015, CAM confirmed to Udinese its decision to exercise its option for the definitive acquisition of the rights of the Player, who was therefore transferred to CAM on a permanent basis.

C. Proceedings related to the payment of the first instalment under the Transfer Agreement

12. On 28 August 2015, CAM was not in a position to pay the first instalment under the Transfer Agreement on time and applied for a 60-day extension of its deadline, which was eventually granted by Udinese.

13. CAM still failed to comply with its payment obligation.

14. On 1 December 2015, Udinese sent a payment reminder to CAM, urging the latter to pay the first instalment. This notice remained without effect.

15. Udinese initiated proceedings before the Single Judge of the FIFA Players' Status Committee (the "Single Judge") in order to obtain the payment of the first instalment provided under the Transfer Agreement. In a decision dated 14 March 2016 and notified on 17 March 2016, the Single Judge ruled that CAM had to pay to Udinese EUR 571,764 as well as interest at a rate of 5 % per year as from 1 September 2015 until the date of effective payment and CHF 5,000 of the costs of the proceedings before FIFA.

16. On 7 April 2016, CAM filed an appeal against the decision of the Single Judge before the Court of Arbitration for sport ("CAS"). The case was recorded under CAS 2016/A/4546.

17. On 5 June 2016, CAM withdrew its appeal before CAS and the President of the CAS Appeals Arbitration Division rendered a Termination Order on 15 June 2016.

18. On 2 March 2017, as CAM had still not managed to comply with its payment obligation and at the request of Udinese, FIFA informed the Parties that it had opened disciplinary proceedings against CAM in respect of a violation of article 64 of the FIFA Disciplinary Code ("FDC").

D. Proceedings related to the payment of the second instalment under the Transfer Agreement

19. On 28 January 2016, the second instalment of EUR 571,764 under the Transfer Agreement matured but CAM failed to pay it.

20. On 30 March 2016, Udinese sent to CAM a payment reminder in relation with the remittance of the second instalment.

21. On 21 April 2016, as the second instalment had still not been paid, Udinese initiated proceedings with the Single Judge to order CAM to pay in its favour the second instalment of EUR 571,764, plus interest.

22. On 13 June 2016, the Single Judge issued a decision regarding the second instalment and ruled, among other things, that *"*[CAM] *has to pay to* [Udinese]*, **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"*. It also ordered CAM to pay to Udinese CHF 5,000 of the costs of the proceedings before FIFA.

23. In an award issued on 31 March 2017 and following an appeal filed by CAM, the CAS confirmed the decision of the Single Judge. In addition, the CAS Panel ordered CAM to pay to Udinese an amount of CHF 4,000 as a contribution towards the legal fees incurred in connection with the arbitration proceedings. The case was recorded under CAS 2016/A/4719.

24. On 5 April 2017, Udinese urged CAM to pay immediately EUR 571,764 as well as interest at a rate of 5% per year as from 29 February 2016, CHF 5,000 of the FIFA costs of proceedings and CHF 4,000 awarded as contribution towards its legal fees incurred in connection with the case CAS 2016/A/4719.

25. On 29 April 2017, Udinese asked FIFA to submit the case related to the second instalment to its Disciplinary Committee for a formal decision.

E. Proceedings related to the payment of the third instalment under the Transfer Agreement

26. On 31 August 2016, the third instalment of EUR 571,764 under the Transfer Agreement matured.

27. On 14 November 2016, Udinese urged CAM to pay the above amount within 10 days.

28. On 7 December 2016, Udinese initiated proceedings with FIFA to order CAM to pay in its favour the third instalment of EUR 571,764. It further asked to be awarded interest of 5% per year as of 1 September 2016. The matter was recorded under the number n°16-02185/ssa.

29. In its reply to the claim, CAM held that it failed to proceed with the payment of the relevant instalment because Udinese had allegedly not provided it with its bank account details, as set forth under the Transfer Agreement. In addition, it argued that it had not received the default notice allegedly sent on 14 November 2016.

30. On 27 March 2017, FIFA advised both clubs that the investigation-phase of the matter registered under the number n°16-02185/ssa was closed and that the case would be submitted to the Players' Status Committee for consideration and a formal decision.

31. On 25 April 2017, FIFA advised both clubs that the matter registered under the number n°16-02185/ssa would be submitted to the Bureau of the Players' Status Committee for consideration and a formal decision within the next 5 to 7 days.

32. On 10 May 2017, CAM instructed its bank to transfer in favour of Udinese the amounts of EUR 571,764 and EUR 19,633.17.

33. On 12 May 2017 and with reference to the matter registered under n°161160/lim related to FIFA Disciplinary proceedings initiated following the non-payment of the **first** instalment, Udinese confirmed to FIFA that, on 10 May 2017, it had received from CAM EUR 571,714, which corresponded to the first instalment under the Transfer Agreement. It further insisted that *"5% interest per year on the amount of EUR 571,714 as from 1 September 2015 as well as CHF 5,000 of procedural costs to date remain outstanding"* and required from FIFA to continue with the disciplinary procedure initiated against CAM.

34. On 15 May 2017 and still with reference to FIFA Disciplinary procedure n°161160/lim, Udinese informed FIFA that, on 12 May 2017, it had received from CAM EUR 19,573.17, which was to be allocated to the payment of the remaining amount of the first instalment. It also explained that *"5% interest per year on the amount of EUR 571,764 as from 1 September 2015 until 11 May 2017 constituted EUR 47,634.51. Therefore, the foregoing payment of EUR 19,573.17 does not cover the overall amount of interest accrued, since EUR 28,061.34 remain outstanding. Furthermore, CHF 5,000 of procedural costs remain outstanding"*.

35. Via facsimile sent on 15 May 2017 and with reference to FIFA's letter of 25 April 2017 as well as to the matter n°16-02185/ssa related to the FIFA proceedings initiated following the non-payment of the **third** instalment, CAM informed FIFA that it had paid to Udinese *"the total amount due as third instalment for the permanent transfer of the player* [D] *(…) plus the applicable default interests"*. CAM attached to its mail two bank statements dated 10 May 2017, confirming that EUR 571,764 and EUR 19,633.17 had been transferred to Udinese.

36. On 16 May 2017, and with reference to the matter n°16-02185/ssa, FIFA informed the two clubs that it had received the confirmation of the payment by CAM of the total amount of EUR 591,397.17 on 10 May 2017. It forwarded the mail of CAM dated 15 May 2017 to Udinese and asked the latter to confirm, whether it had received the said amounts and whether it considered the matter as settled. It insisted on the fact that *"should we not receive any further correspondence in this regard* ***until 26 May 2017****, we will assume that the parties have amicably solved the present matter and would proceed to close the present affaire without further notice. On the contrary, if the present matter is not considered to be settled, our services will not fail to proceed with the notification of the decision passed on 12 May 2017"*.

37. In its appeal lodged in the present arbitration proceedings, CAM claims that *"The FIFA players' Status did not communicated any further communication to* [CAM] *and as such, the latter had no doubt that in the view of the supposed silence from* [Udinese] *the matter had been solved"*.

38. However, it appears that, on 18 May 2017, Udinese sent to FIFA the following mail:

> *"*[Udinese] *would like to point out that indeed on 11 May 2017 our Club received from* [CAM] *the amounts of EUR 571,714 and EUR 19,573.*
>
> *However, contrary to the assertions of* [CAM]*, the foregoing amounts referred to the first instalment of the transfer fee due to* [Udinese] *in accordance with the transfer agreement, dated 10 August 2014 (…), whereas the dispute in question relates to the failure of* [CAM] *to pay the third instalment due thereunder, for which no payment has been received so far.*
>
> *Pursuant to the Decision passed by the Single Judge of the Players' Status Committee on 14 March 2016 (case ref. OP 16-00074/bsc),* [CAM] *was condemned to pay to Udinese Calcio EUR 571,764 plus 5% interest per year from 1 September 2015 until the date of effective payment as well as CHF 5,000 of the costs of proceedings before FIFA.*
>
> *Considering that so far* [CAM] *has only partially paid the amount due to Udinese in accordance with the afore-mentioned Decision and neither had* [CAM] *covered the costs of the proceedings before FIFA, Udinese Calcio requested the FIFA Disciplinary Committee to continue with the disciplinary procedure (ref. no. 161160 lim) and to impose accordingly the disciplinary sanctions on* [CAM]*"*.

39. It is undisputed that FIFA did not forward this correspondence immediately to CAM.

40. On 6 June 2017, FIFA notified to CAM and to Udinese the decision taken on 12 May 2017 by the Bureau of the Players' Status Committee, which held that CAM failed to remit the third instalment under the Transfer Agreement (the "Appealed Decision"). The operative part of the Appealed Decision rendered by the Bureau of the Players' Status Committee provides, so far as material, as follows:

> *"1. The claim of* [Udinese] *is partially accepted.*
>
> *2.* [CAM] *has to pay to* [Udinese] ***within 30 days*** *as of the date of notification of this decision, overdue payables in the amount of EUR 571,764 as well as interest at the rate of 5% per year as of 1 September 2016 until the date of effective payment.*
>
> *3. If the aforementioned amount, plus interest, is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee, for consideration and a formal decision.*
>
> *4. Any further claim of* [Udinese] *is rejected.*

5. *The final costs of the proceedings in the amount of CHF 25,000 are to be paid by* [CAM] ***within 30 days*** *as from the notification of the present decision, as follows:*

   5.1 *The amount of CHF 5,000 has to be paid to* [Udinese].

   5.2 *The amount of CHF 20,000 has to be paid to FIFA to the following bank account with reference to case nr. 16-02185/ssa (…).*

6. [Udinese] *is directed to inform* [CAM] *immediately and directly of the account number to which the remittance under points 2 and 5.1 are to be made and to notify the Bureau of the Players' Status Committee of every payment received.*

7. *In the event that the amount due to* [Udinese] *is not paid by* [CAM] ***within the stated time limit****,* [CAM] *shall be banned from registering any new players, either nationally or internationally, for the next entire registration period following the notification of the present decision".*

41. The same day, CAM acknowledged receipt of the Appealed Decision and informed FIFA of its surprise as it had complied with its obligations towards Udinese. It claimed that the sanctions imposed upon it were groundless and invited FIFA to annul the Appealed Decision.

42. On 8 June 2017, FIFA acknowledged receipt of CAM's mail of 6 June 2017 and informed the clubs that it was not *"in the position to comment on or modify any formal decision passed by our competent deciding bodies. (…) Finally, we acknowledge receipt of* [Udinese's] *correspondence dated 18 May 2017, in reply to our correspondence dated 16 May 2017, a copy of which is herewith enclosed for* [CAM's] *perusal".*

43. On 8 June 2017 and with reference to the FIFA procedure recorded under n°16-02185/ssa, Udinese sent a facsimile to CAM requesting the payments of the amounts awarded in the Appealed Decision.

F. Proceedings related to the payment of the fourth instalments under the Transfer Agreement

44. On 26 April 2017, Udinese initiated proceedings with FIFA to order CAM to pay in its favour the fourth instalment of EUR 571,764. It further asked to be awarded interest of 5% per year as of 1 March 2017.

45. In a decision dated 28 August 2017 and notified on 4 September 2017, the Bureau of the Players' Status Committee ruled that CAM had to pay to Udinese EUR 571,764 as well as interest at a rate of 5 % per year as from 1 March 2017 until the date of effective payment and CHF 5,000 of the costs of the proceedings before FIFA.

46. On 21 September 2017, CAM informed FIFA that it had complied in full with the decision of 28 August 2017 and filed copies of bank statements establishing that EUR 571,764 and EUR 15,089.19 had been paid. However, Udinese allocated these amounts to the payment of the second instalment.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

47. On 19 June 2017, CAM lodged its statement of appeal against the Appealed Decision with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code").

48. On 23 June 2017, the CAS Court Office acknowledged receipt of CAM's statement of appeal and took note of its nomination of Mr Manfred Nan as arbitrator. It invited:

- the Parties to state within three days whether they agreed to submit the present procedure to the same Panel as in the proceedings *CAS 2017/A/5202 Clube Atlético Mineiro v. Udinese Calcio S.p.A. & FIFA*;

- the Respondents to file within 5 days their position on CAM's request for a stay of the Appealed Decision.

49. On 26 and 29 June 2017 respectively, Udinese, CAM and FIFA expressly accepted that the proceedings CAS 2017/A/5202 and CAS 2017/A/5203 be submitted to the same Panel.

50. On 30 June 2017, Udinese informed the CAS Court Office that it was appointing Mr Lars Halgreen as arbitrator.

51. On 3 July 2017, FIFA confirmed to the CAS Court Office that it agreed a) to the appointment of Mr Lars Halgreen as common arbitrator for the Respondents and b) to CAM's request for a stay of the Appealed Decision.

52. On 3 July 2017, Udinese informed the CAS that *"should the President of the CAS appeals Arbitration Division or the Panel, if constituted, consider the* [CAM's request for provisional measures] *as justified, then* [it would] *not oppose to it"*.

53. In an order issued on 6 July 2017, the President of the Appeals Arbitration Division of the CAS decided to grant CAM's request for a stay of the Appealed Decision.

54. On 13 July 2017, CAM filed its appeal brief in accordance with Article R51 of the Code.

55. On 2 August 2017, the CAS Court Office informed the Parties that the Panel to hear the dispute had been constituted as follows: Prof. Petros Mavroidis, President of the Panel, Mr Manfred Nan and Mr Lars Halgreen, arbitrators. Mr Patrick Grandjean was appointed and acted as *ad hoc* clerk.

56. On 8 August 2017, FIFA filed its answer in accordance with Article R55 of the Code.

57. On 18 August 2017, Udinese filed its answer in accordance with Article R55 of the Code.

58. On 21 August 2017, the Parties were invited to inform the CAS Court Office whether their preference was for a hearing to be held.

59. On 24 and 28 August 2017, FIFA confirmed to the CAS Court Office that it preferred for the matter to be decided solely on the basis of the Parties' written submissions, whereas CAM expressed its preference for a hearing to be held. Udinese declared that it was *"at disposal to hold a hearing"*.

60. On 25 September 2017, the CAS Court Office, on behalf of the Panel, informed the Parties that a hearing had been scheduled for 19 December 2017.

61. On 26 September 2017, the CAS Court Office sent to the Parties the Order of Procedure which was returned duly signed by Udinese and by FIFA on 27 September 2017 and by CAM on 3 October 2017.

62. On 23 November 2017 and on behalf of the Panel, the CAS Court Office sent to the Parties a list of questions to be answered by 7 December 2017. Each party complied within the prescribed deadline.

63. The hearing was held on 19 December 2017 at the CAS premises in Lausanne. The Panel members were present and assisted by Mr Daniele Boccucci, Counsel to the CAS, and by Mr Patrick Grandjean.

64. The following persons attended the hearing:

- CAM was represented by its finance director, Mr Carlos Fabel, accompanied by its legal counsel, Mr Breno Costa Ramos Tannuri, assisted by Mr Ciro Tavares, interpreter.

- Udinese was represented by its legal counsels, Mr Gianpaolo Monteneri and Mrs Anna Smirnova.

- FIFA was represented by Mrs Sarah Solemale and Mr Mario Flores Chemor, legal counsels of its Players' status Department.

65. At the outset of the hearing, the Parties confirmed that they did not have any objection as to the composition of the Panel. No witness was called to testify.

66. At the end of the hearing, the Parties confirmed that their right to be heard and to be treated equally in the present proceedings before the Panel had been fully respected. CAM and Udinese declared that they would use their best efforts to resolve the dispute amicably on or before the end of January 2018. After the Parties' final arguments, the Panel closed the hearing and announced that, should the dispute not be resolved to the mutual satisfaction of the Parties, it would render its award in due course.

67. On 29 January 2018, the Parties were requested to inform the CAS Court Office on the status of their negotiations.

68. On 2 February 2018, Udinese informed the CAS Court Office that *"so far Udinese Calcio S.p.A. and Club Atletico Mineiro have not particularly succeeded in their negotiation, and no settlement agreement was reached (…). Should there be any further development in relations between* [the clubs]*, we will inform accordingly"*.

69. On 7 February 2018, the CAS Court Office advised the parties that, unless they would inform it otherwise by 12 February 2018, the Panel would proceed with the drafting of the award.

70. The Parties left the letter of the CAS Court Office of 7 February 2018 unanswered.

IV. THE SUBMISSIONS OF THE PARTIES

A. The Appellant

71. CAM submitted the following requests for relief:

> *"The Appellant respectfully submits to the attention of the CAS the following requests for relief:*
>
> *FIRST - To decide that the Second Respondent failed to comply with its obligations when conceived to issue a motivated decision regarding that the ban and the payments complied by the Appellant;*
>
> *SECOND - To return the Appealed Decision for consideration and decision of the FIFA PSC with instructions to the finally and formally deliberate about the ban and the payments complied by the Appellant;*
>
> *THIRD - The Respondents shall be ordered to pay the Appellant a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel.*
>
> *Alternatively and only in the event the above is rejected:*
>
> *FOURTH - To confirm that the Appellant complied with the payment of the amount due as third instalment of the fee regarding the permanent transfer of the Player to the First Respondent and as such, the ban imposed by the FIFA PSC shall be cancelled immediately; and*
>
> *FIFTH - The Respondents shall be ordered to pay the Appellant a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel".*

72. At the hearing before the CAS, CAM insisted that, regardless of the outcome of the present procedure, it was willing to bear the costs of the arbitration in their entirety.

73. The submissions of CAM, in essence, may be summarized as follows:

- Some years ago and in an unexpected manner, the Brazilian tax authorities initiated legal proceedings against CAM, which had resulted in the freezing of its bank accounts and

other assets. As a consequence, CAM faced numerous financial difficulties but still managed to comply with its obligations towards *"the members of the so-called "FIFA Family""*. Consequently, *"it is undisputed that the Appellant is (still) pacing through a very turbulent financial moment but, on the other hand, it is incontestable that the latter is complying with these outstanding financial obligations as much as possible and as soon as possible"*. Under these circumstances, it cannot be reasonably alleged that CAM is acting in bad faith.

- It cannot be disputed that the payment made by CAM on 10 May 2017 is related to the third instalment provided under Article 5 of the Transfer Agreement. Under these circumstances, FIFA should have dismissed the claim of Udinese as it had become devoid of any purpose. Instead, on 16 May 2017, FIFA asked Udinese whether it considered the matter as settled and, somehow, placed Udinese in a position to decide on the course of the proceeding pending before FIFA and, particularly, on the disciplinary sanctions to be imposed upon CAM. Such an approach is incompatible with the applicable rules as only FIFA has the authority to impose disciplinary sanctions.

- FIFA failed to communicate to CAM the letter sent by Udinese on 18 May 2017. With this omission, considering the importance of this document, FIFA clearly violated the fundamental legal principle of equal treatment between the parties.

- Under Swiss law, a debtor with several debts owed to the same creditor is entitled to state at the time of payment which debt he means to redeem. In the present case, in its letter of 15 May 2017 sent to FIFA, CAM expressly indicated that the payment of EUR 591,397.17 was made in relation with the FIFA procedure recorded under n°16-02185/ssa, *i.e.* the procedure related to the payment of the third instalment provided under Article 5 of the Transfer Agreement. Hence, *"the referenced documentation does not leave any room for doubt nor misunderstanding,* [CAM] *wondered and paid the (principal) amount due as the third instalment and the default interest"*.

- FIFA failed to forward to CAM the letters sent by Udinese on 12, 15 and 18 May 2017, whereby it informed FIFA of the fact that the payment received was allocated to the remittance of the first instalment. *"As such,* [CAM] *never had the opportunity to eventually (immediately) object the attempt of* [Udinese] *to allocate such payments as those relating to the first instalment (in lieu of the third instalment)"*.

B. The First Respondent

74. Udinese submitted the following requests for relief:

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

1) to reject the appeal;

2) to uphold the Challenged Decision;

3) to condemn the Appellant to the payment in favour of the First Respondent of EUR 571,674 as well as interest at the rate of 5% per year as of 1 September 2016 until the date of effective payment and CHF 5,000 of the costs of proceedings before FIFA;

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

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

75. The submissions of Udinese, in essence, may be summarized as follows:

- It is common practice for CAM not to comply with its contractual obligations. Udinese has already initiated several proceedings before FIFA and before the CAS to obtain the payment of the instalments provided under the Transfer Agreement. The present procedure is the third one and follows the failure of CAM to pay the third instalment of the Transfer Agreement. CAM is using all the possible means to delay its contractual and financial commitments. CAM has unquestionably been acting in bad faith since it entered into the Transfer Agreement. This is even more true as CAM has been able to transfer the Player for an amount of EUR 7,500,000. CAM has also adopted the same dilatory attitude with regard to the payment of the transfer fee of Mr M, object of a transfer agreement signed on 1 May 2014.

- *"According to Art. 86 par. 1 of SCO, for the debtor to be in a position to select which debt it intends to redeem, the debtor must make the relevant statement* ***at the time of payment****. This shall occur via a letter sent by the debtor to the creditor directly. It is therefore fundamental that the debtor enters* ***directly*** *in contact with the creditor, so as to inform it accordingly".* At the moment of the relevant payment, CAM did not give any indication directly to Udinese as to which outstanding debt the sum of EUR 591,397.17 paid on 10 May 2017 was to be allocated. As a matter of fact, the bank notices related to the payment of this sum make no reference to a specific case, player or instalment. Under these circumstances, Udinese was allowed to consider that the amounts received were to redeem the first instalment.

Likewise, CAM sent its letter of 15 May 2017 only to FIFA, who is obviously not its creditor. As a consequence, this document does not meet the requirements of Article 86 para. 1 of the Swiss Code of obligations ("CO").

It is not disputed that CAM has not received copies of the facsimiles sent by Udinese to FIFA on 12, 15 and 18 May 2017. However, on 8 June 2017 and with reference to the FIFA procedure recorded under n°16-02185/ssa, Udinese sent a facsimile to CAM requesting the payments of the amounts awarded in the Appealed Decision. Under these circumstances, CAM could not ignore anymore that the sum of EUR 591,397.17 had been allocated to the payment of another debt. Had CAM disagreed, it should have raised an objection to this notice of payment immediately. *"However, no reaction and in particular no objection from the side of* [CAM] *followed".*

"Since the first instalment of the Contract fell due before the third instalment, [Udinese] *correctly and in conformity to Art. 87 par. 1 SCO allocated the payments received from the Appellant on 10 and 11 May 2017 to the first instalment due under the Contract".*

C. The Second Respondent

76. FIFA submitted the following requests for relief:

> *"1.* [W]*e request that the CAS rejects the present appeal and confirms the decision passed by the Bureau of the Players' Status Committee on 12 May 2017 in its entirety.*
>
> *2. Finally, we ask that the CAS orders the Appellant to bear all the costs incurred with the present procedure, and to cover all legal expenses of FIFA related to the proceedings at hand".*

77. The submissions of FIFA, in essence, may be summarized as follows:

- FIFA fully endorses the findings of the Bureau of the Players' Status Committee.

- The financial difficulties of CAM do not excuse its failure to satisfy its contractual obligations. *"In casu, we consider that at the moment* [CAM] *concluded the transfer agreement with* [Udinese]*, it should have realised the consequences deriving from such agreement, as per the legal principle of pacta sunt servanda. We thus strongly believe that the reported financial difficulties allegedly caused by the constraints of the Brazilian tax authorities are risks to be borne by* [CAM] *only and do not validate the transfer fee concerning the player to remain outstanding*".

- CAM has transferred the Player to the German club Hamburger SV for an amount of EUR 7,500,000 without settling the debt towards Udinese. CAM was clearly in a position to meet all of its financial obligations deriving from the Transfer Agreement, but it preferred to adopt a dilatory strategy in an abusive and unfair manner.

- At the time of payment, CAM has not informed Udinese as to which outstanding instalment it intended to cover with the amount of EUR 591,397.17. The letter of CAM of 15 May 2017 was only sent to FIFA and not to Udinese. In light of the foregoing, the requirements of Article 86 para. 1 CO were not met. As a consequence, Udinese *"lawfully decided to allocate the payment made by* [CAM] *on 10 May 2017 to the first instalment of the transfer fee"*. CAM has therefore not complied with the Appealed Decision.

- With regard to the ban, CAM has not argued its legitimacy or its proportionality. It must therefore be confirmed.

V. JURISDICTION

78. The jurisdiction of the CAS, which is not disputed, derives from Articles 57 *et seq.* of the applicable FIFA Statutes (April 2016 edition) and Article R47 of the Code. It is further confirmed by the order of procedure duly signed by the Parties.

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

80. Under Article R57 of the Code, the Panel has the full power to review the facts and the law.

VI. ADMISSIBILITY

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

VII. APPLICABLE LAW

82. Article R58 of the Code provides the following:

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

83. Pursuant to Article 57 para. 2 of the applicable FIFA Statutes, *"[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

84. As a result, and in light of the foregoing, subject to the primacy of the applicable FIFA regulations, Swiss Law shall apply complementarily, whenever warranted. The Panel is comforted in its position by the fact that, in their respective submissions, all the Parties referred to Swiss law, as regards the issue related to the allocation of the EUR 591,397.17.

85. The present case was submitted to FIFA on 7 December 2016, *i.e.* after 27 April 2016 and 1 June 2016, which are the dates when a) the FIFA Statutes, edition 2016 and b) the Regulations on the Status and Transfer of Players, edition 2016, came into force. These are the editions of the rules and regulations under which the present case shall be assessed.

VIII. MERITS

86. The main issue to be resolved by the Panel is to identify the instalment (among the various unpaid instalments) that has been honoured with the payment of EUR 591,397.17 made by CAM on 10 May 2017. The identification has important legal consequences for the outcome of this dispute.

87. In the previous CAS case regarding the same Transfer Agreement CAS (2016/A/4719), CAM tried to delay the payment of its debt by arguing that Udinese was not entitled to the payment

of the agreed instalments because it failed to provide *"in writing"* its bank details as contractually agreed.

88. In the present case, CAM argues that it actually had paid the third instalment of the Transfer Agreement and that the present proceeding is therefore without any object. Udinese and FIFA claim that CAM changed its original tactics (which proved to be inefficient) with a new strategy to delay the payment of its debt. It is the Respondents' case that the amounts paid by CAM cover the first instalment of the Transfer Agreement and that CAM has not complied with the Appealed Decision, which must be confirmed.

89. The situation is not governed by FIFA Regulations, and must therefore be assessed according to Swiss law. The pertinent provisions are:

> *Article 86 of the Swiss Code of obligations ("CO") entitled "In the case of multiple debts a. At the discretion of debtor or creditor"*
>
> 1 *A debtor with several debts to the same creditor is entitled to state at the time of payment which debt he means to redeem.*
>
> 2 *In the absence of any statement from the debtor, the payment will be allocated to the debt indicated by the creditor in his receipt, unless the debtor objects immediately.*
>
> *Article 87 (CO) entitled "In the case of multiple debts b) By the law"*
>
> 1 *Where no valid debt redemption statement has been made and the receipt does not indicate how the payment has been allocated, it is allocated to whichever debt is due or, if several are due, to the debt that first gave rise to enforcement proceedings against the debtor or, in the absence of such proceedings, to the debt that fell due first.*
>
> 2 *Where several debts fell due at the same time, the payment is offset against them proportionately.*
>
> 3 *If none of the debts is yet due, the payment is allocated to the one offering the least security for the creditor.*

90. In substance, it is the position of the Respondents that, at the time of the payment, CAM should have expressly and directly informed Udinese of the fact that the sum of EUR 591,397.17 was allocated to the third instalment. For Udinese, no express information to this effect was ever transmitted to it.

91. Article 86 CO gives priority to the debtor to identify the debt it will be honouring through a specific payment, when in presence of multiple debts. Should the debtor fail to exercise its right as provided under Article 86 para. 1 CO, the choice shall pass to the creditor, subject to an immediate opposition on the part of the debtor. This "cascade system" is completed with Article 87 CO, which determines the order of the allocation in the absence of choice made by

either the debtor or the creditor (LOERTSCHER D., in Commentaire Romand, Code des obligations I, 2ème edition, 2012, ad. Art. 86, page 682).

92. Article 86 CO applies in situations where the debtor has several debts owed to the same creditor and its payment is not sufficient to pay them all. In this case, the legislator envisages independent debts, which may or may not be based on the same legal cause (Judgement of the Swiss Federal Tribunal, 4A_71, consid. 8.2.1, of 25 March 2009).

93. The debtor exercises its choice by means of a declaration, or by a unilateral legal act, well-received by the creditor ("soumis à réception"). This declaration must occur at the time of payment (Article 86 CO), but may also occur prior to the payment; the debtor may also reserve the right to a subsequent determination. The content of the statement must be interpreted in light of the debtor's real intention. Should it be unclear for the creditor, it must then be interpreted according to the principle of good faith according to which the debtor's declaration must be understood on the basis of its wording, the context as well as the relevant circumstances (Judgement of the Swiss Federal Tribunal, 4A_321, consid. 4.3, of 16 October 2017). The allocation made by the debtor may result not only from an express declaration on its part, but also from the circumstances, for example if the amount paid coincides with the amount of the contractually agreed debt. The creditor must be in position to ascertain the identity of the payment (LOERTSCHER D., op. cit. N. 5, page 683 and references).

94. The creditor cannot oppose the choice duly made by the debtor (Judgement of the Swiss Federal Tribunal, B_132/06, consid. 3.2, of 21 August 2007).

95. In the present case, on 10 May 2017, CAM ordered its bank to transfer to Udinese the sums of EUR 571,764 and EUR 19,633.17. According to the bank statements, the amounts were paid on 10 May 2017 at 10:53.59 and at 10:54.00; *i.e.* simultaneously. On 18 May 2017, Udinese confirmed that it received both payments on 11 May 2017. Under these circumstances, Udinese had to infer that a) both amounts were connected, b) EUR 571,714 was the principal and c) EUR 19,633.17 the interest. Udinese has never argued otherwise.

96. According to the Panel's own calculations, the sum of EUR 19,633.17 corresponds - within Euros - to the interest related to the third instalment, which ran as of 1 September 2016 until 10 May 2017. Hence, it appears that at the moment of payment, CAM clearly expressed its intention to redeem the third instalment, and only the third instalment. Udinese could obviously not understand it otherwise. Bearing in mind its specificity, the amount of EUR 571,714 has evidently its origin in the Transfer Agreement and not in another contractual obligation. The amount of EUR 19,633.17 could only be related to the third instalment, the first and the second ones matured much earlier and therefore the corresponding interest due would have been much higher. In this respect, Udinese expressly admitted it: on 15 May 2017, it informed FIFA that it had allocated the amount of EUR 19,573.17 to the payment of the remaining amount of the first instalment; *i.e.* the interest as well as the awarded procedural costs. It declared that *"5% interest per year on the amount of EUR 571,764 as from 1 September 2015 until 11 May 2017 constituted EUR 47,634.51. Therefore, the foregoing payment of EUR 19,573.17 does not cover the overall amount of*

interest accrued, since EUR 28,061.34 remain outstanding. Furthermore, CHF 5,000 of procedural costs remain outstanding".

97. In view of the above, the Panel finds that, at the moment of payment, Udinese could not reasonably ignore that the sum it received on 11 May 2017 was meant to remit the third instalment.

98. On 15 May 2017 and with the express reference to the matter registered under the number n°16-02185/ssa, CAM wrote to FIFA to confirm that it had given the instructions for the payment of the third instalment, which was the subject-matter of proceedings pending before the Bureau of the Players' Status Committee. It is undisputed that this letter was not directly addressed to Udinese. Ideally, this should have been done by CAM. The Panel nevertheless, does not see how this failure could affect the finding that the payment was meant to honour the third instalment, for the reasons explained here below.

99. CAM and Udinese were opposing parties before FIFA. Under these circumstances, it makes sense for CAM to assume that an information, as important as the full payment of the claim, must be communicated first and foremost to the judging body, which would then forward it to the creditor. Payment would be tantamount to an action appropriate to bring a formal end to the dispute. This is all the more true that, given para. 6 of the operative part of the Appealed Decision, the Bureau of the Players' Status Committee requires to be informed (by Udinese) *"of every payment received"*. Here, the information was provided by CAM. It must also be noted that the letter of CAM of 15 May 2017 was indeed forwarded by FIFA to Udinese on 16 May 2017. In addition, FIFA even confirmed that it would consider the dispute as settled unless Udinese expressly objected. Under these circumstances, the Respondents' approach, according to which CAM failed to notify expressly and directly Udinese of the fact that the sum of EUR 591,397.17 was allocated to the third instalment, seems overly formalistic.

100. Bearing in mind the above findings, there is no need to assess whether CAM raised immediately an objection against the allocation of the EUR 591,397.17 to the payment of the first instalment, as provided under Article 86 end of para. 2 CO. As a matter of fact, this provision has never come into play, as the requirements of Article 86 para. 1 were met. Nevertheless, the Panel observes that before the date of the notification of the Appealed Decision, CAM had no reason to believe that the payments made on 10 May 2017 were not allocated to the remittance of the third instalment. As soon as it was notified of the Appealed Decision, CAM immediately informed FIFA of its surprise and invited it to annul the Appealed Decision, hence expressing its objection. It must be observed that Article 86 para. 2 CO does not require that the objection be made directly to the creditor.

101. Based on the foregoing considerations, the Panel finds that CAM complied with the requirements set under Article 86 para. 1 CO and that it validly, and in a binding manner, expressed its intention to redeem the third instalment of the Transfer Agreement with the payment of the amount of EUR 591,397.17. The claim of Udinese, object of the matter registered under the number n°16-02185/ssa, has therefore been settled.

102. Hence, the appeal filed by CAM against the Appealed Decision must be partially upheld. As a matter of fact, in view of the outcome of the present procedure, CAM's requests for relief n°1, 2, 3 and 5 must be dismissed. Regarding the first one, no blame can be imputed to FIFA, as its decision was taken before the payment of the third instalment. The second request for relief must also be denied as the CAS Panel has the jurisdiction to rule over the present dispute and obviously did not intend to refer the case back to FIFA. The third and fifth requests for relief are without object for the reasons exposed hereafter, under chapter IX [Costs]. Finally, it must be observed that CAM, in its request for relief n°4, did not request to set aside the Appealed Decision. It only sought to obtain the confirmation that it complied with the payment of the amount due as third instalment and that the transfer ban shall be cancelled as such. In this respect, it must be observed that the Appealed Decision imposes on CAM several financial obligations: a) the payment of the third instalment as provided under the Transfer Agreement, b) interest at a rate of 5% per year as of 1 September 2016 until the date of effective payment and c) *"The final costs of the proceedings in the amount of CHF 25,000 (…) to be paid by* [CAM] ***within 30 days*** *as from the notification of the present decision, as follows: 5.1 The amount of CHF 5,000 has to be paid to* [Udinese]. *5.2 The amount of CHF 20,000 has to be paid to FIFA to the following bank account with reference to case nr. 16-02185/ssa (…)".* CAM failed to comply with the payment of the *"final costs of the* [FIFA] *proceedings in the amount of CHF 25,000".*

103. As indicated above, the Panel observes that the amount of EUR 19,633.17 paid by CAM to Udinese on 10 May 2017 more or less corresponds with interest at a rate of 5% *per annum* over the amount of EUR 571,764 accrued between 1 September 2016 and the date of payment, *i.e.* 10 May 2017.

104. Finally, the Panel notes that CAM requests that the *"ban imposed by the FIFA PSC shall be cancelled immediately"* in its request for relief nº 4. The Panel however notes that no ban has been imposed by the FIFA Players' Status Committee to date, that it is unlikely that such ban be imposed in the light of the present decision and that it is therefore impossible to cancel such ban.

105. All other prayers for relief are rejected. The Panel would like to re-iterate that its decision concerns the narrow issue whether the payment by CAM corresponds to the fourth instalment, and does not address any other issue beyond this narrow question.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Clube Atlético Mineiro against the decision issued by the Bureau of the Players' Status Committee on 12 May 2017 (case ref. 16-02185/ssa) is partially upheld.

2. The decision issued by the Bureau of the Players' Status Committee on 12 May 2017 (case ref. 16-02185/ssa) is confirmed.

3. Clube Atlético Mineiro complied with para. 2 of the operative part of the decision issued by the Bureau of the Players' Status Committee on 12 May 2017 (case ref. 16-02185/ssa) by paying the amounts of EUR 571,764 and EUR 19,737.60 to Udinese Calcio S.p.A. on 5 June 2017.

4. (…).

5. (…).

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