



Arbitration CAS 2017/A/5401 Clube Atlético Mineiro v. Fédération Internationale de Football Association (FIFA), award of 12 July 2018

Panel: Mr Sofoklis Pilavios (Greece), President; Mr João Nogueira Da Rocha (Portugal); Mr Pedro Tomás Marqués (Spain)

Football

Disciplinary sanction for failure to comply with a CAS award

Scope of the intervention of the FIFA Disciplinary Committee under art. 64 of the FIFA Disciplinary Code

Principle of proportionality of disciplinary sanctions

Arguments not qualifying as exceptional circumstances justifying the unfulfillment of an obligation

Limit to the discretionary powers of deciding bodies in relation to disciplinary sanctions

- 1. When it intervenes on the basis of art. 64 of the FIFA Disciplinary Code, the FIFA Disciplinary Committee can only examine whether a party complied with a final and binding decision. It cannot review arguments related to the substance thereof.**
- 2. In disciplinary matters, each situation must be evaluated on a case-by-case basis and interests at stake have to be balanced in respect of the principle of proportionality. The purpose of a fine is to serve as a deterrent while the deciding body's intention is not to create an additional severe financial burden to a debtor. Account must be taken of the seriousness of the facts and other related circumstances as well as of the damage that the penalised conduct entails for the parties involved, for the federation in question and for its sport. In the same way, disciplinary bodies may evaluate any aggravating and/or extenuating circumstances.**
- 3. The arguments that a club paid several creditors, that it made a partial payment to its counterparty and presented it a payment plan do not qualify as exceptional circumstances that justify the (partial) unfulfillment of an obligation.**
- 4. The measure of a sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when a sanction is evidently and grossly disproportionate to the offense.**

I. PARTIES

1. Clube Atlético Mineiro (the “Appellant” or the “Club”) is a football club, with seat in Belo Horizonte, Brazil. The Club is affiliated to the Football Federation of Brazil, which is a member of the Fédération Internationale de Football Association (FIFA).

2. The Fédération Internationale de Football Association (the “Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion 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 it considers necessary to explain its reasoning.
4. On 10 December 2013, the Single Judge of the FIFA Players’ Status Committee passed a decision rejecting a claim lodged by the Argentine football club Atlético Boca Juniors in a dispute against Clube Atlético Mineiro.
5. On 4 June 2014, the grounds of the decision were communicated to the parties by FIFA.
6. On 24 June 2014, Atlético Boca Juniors filed an appeal with the Court of Arbitration for Sport (CAS) against Atlético Mineiro (case CAS 2014/A/3646).
7. On 24 August 2015, CAS issued its decision in the aforementioned case, partially upheld the appeal of Atlético Boca Juniors and set aside the decision of the Single Judge of the FIFA Players’ Status Committee ruling *inter alia* that:
 - “3. *Clube Atlético Mineiro is ordered to pay Club Atlético Boca the amount of USD 1,500,000 (One Million Five Hundred Thousand US Dollars)*”.
8. On 2 June 2016, the FIFA Players’ Status Department sent a letter to Atlético Mineiro, reminding it of its obligations under the above CAS decision and requesting it to comply with them.

B. Proceedings before the FIFA Disciplinary Committee

9. On 6 April 2017, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against Atlético Mineiro as the aforementioned amounts were not paid to Atlético Boca Juniors.

10. On 17 May 2017, the secretariat to the FIFA Disciplinary Committee invited Atlético Mineiro in writing to pay the outstanding amounts by 30 May 2017 at the latest.
11. On 30 May 2017, Atlético Mineiro requested the FIFA Disciplinary Committee to confirm that there is no factual or legal basis for FIFA to impose a fine or sanctions, to grant the former a period of grace of 150 days and, alternatively, to impose no fine higher than CHF 5,000.
12. On 9 June 2017, the FIFA Disciplinary Committee rendered its decision (the “Appealed Decision”) ruling that:
 - “1. *The club Atlético Mineiro is pronounced guilty of failing to comply with the decision passed by the Court of Arbitration for Sports on 24 August 2015 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*
 2. *The club Atlético Mineiro is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision. (...)*
 3. *The club Atlético Mineiro is granted a final period of grace of 90 days as from notification of the present decision in which to settle its debt to the creditor, the club Atlético Boca Juniors.*
 4. *If payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that six (6) points be deducted from the debtor’s first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
 5. *If the club Atlético Mineiro still fails to pay the amount due even after deduction of the points in accordance with point 4. above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor’s first team to the next lower division.*

(...)

 7. *The costs of these proceedings amounting to CHF 3,000 are to be borne by the club Atlético Mineiro and shall be paid according to the modalities stipulated under point 2. above”.*
13. On 18 October 2017, FIFA communicated to the parties the grounds of the Appealed Decision, which, *inter alia*, determined the following:
 - “2. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (art. 64 par. 1 of the FDC):*
 - a) *will be fined for failing to comply with a decision;*

- b) *will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due;*
- c) *if it is a club, it will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.*

If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened (art. 64 par. 2 of the FDC).

(...)

- 5. *In view of what has been explained under paragraph ii./3 above, the Committee is not allowed to analyse the case decided by CAS as to the substance, in other words, to check the correctness of the amount ordered to be paid, but has as a sole task to analyse if the debtor complied with the final and binding decision rendered by the CAS.*
- 6. *As the debtor did not comply with the decision passed by CAS on 24 August 2015 and is consequently withholding money from the creditor, it is considered guilty under the terms of art. 64 of the FDC.*
- 7. *The fine to be imposed under the above-referenced art. 64 par. 1 a) of the FDC in combination with art. 15 par. 2 of the FDC shall range between CHF 300 and CHF 1,000,000. The debtor withheld the amount unlawfully from the creditor. Even FIFA's attempts to urge the debtor to fulfil its financial obligations failed to induce it to pay the total amount due. In view of all the circumstances pertaining to the present case and by taking into account the outstanding amount due, the Committee regards a fine amounting to CHF 30,000 as appropriate. This amount complies with the Committee's established practice.*
- 8. *In application of art. 64 par. 1 b) of the FDC, the Committee considers a final deadline of 90 days as appropriate for the amount due to be paid to the creditor.*
- 9. *In accordance with art. 64 par. 1 c) of the FDC, the debtor will be warned and notified that, in the case of default within the period stipulated, points will be deducted or demotion to a lower division be ordered. A deduction of points will occur if the creditor informs the secretariat to the FIFA Disciplinary Committee of the non-payment within the stipulated deadline and demands in writing that points be deducted from the debtor's first team in the national league. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the Committee. The order to implement the deduction of points will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
- 10. *With regard to the amount of points to be deducted, art. 64 par. 3 of the FDC is applicable, whereby the number of points deducted must be proportionate to the amount owed. In the light of the foregoing criteria, regarding the amount of the fine to be imposed and in keeping with the Committee's well-established practice, a deduction of six (6) points is considered appropriate.*

11. *The Committee decides based on art. 105 par. 1 of the FDC that the costs and expenses of these proceedings amounting to CHF 3,000 shall be borne by the debtor”.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 8 November 2017, the Appellant filed a statement of appeal before the CAS including a request for a stay of the Appealed Decision. The Appellant nominated Mr João Nogueira Da Rocha, attorney-at-law in Lisbon, Portugal, as arbitrator.
15. On 20 November 2017, the CAS Court Office invited the Respondent to file its position on the Appellant’s request for a stay of the Appealed Decision.
16. On 22 November 2017, the Appellant filed its appeal brief with CAS. On that same day, the Appellant also made a payment to Atlético Boca Juniors in the amount of USD 150,000.
17. On 1 December 2017, the Respondent nominated Mr Pedro Tomás Marqués, attorney-at-law in Spain, as arbitrator. With respect to the Appellant’s request for a stay of the Appealed Decision, the Respondent submitted that *“taking into consideration its financial nature, the content of art. 124 par. 2 of the FIFA Disciplinary Code and the fact that a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal (Orders on Provisional Measures in the cases CAS 2004/A/780 and CAS 2017/A/5274), please be informed that we consider that such a request is moot and should be consequently dismissed in line with previous CAS jurisprudence”.*
18. On 4 December 2017, the CAS Court Office invited the Appellant to inform the CAS by 7 December 2017 whether it wishes to maintain or withdraw its application for a stay.
19. On 6 December 2017, the Respondent requested the CAS to suspend its deadline to file the answer until the Appellant provides a brief summary of the expected testimonies of the witnesses mentioned in its appeal brief according to Article R51 of the CAS Code, or, alternatively, to declare the inadmissibility of the witnesses’ testimonies.
20. On 6 December 2017, the CAS Court Office invited the Appellant to submit its comments regarding the above mentioned request of the Respondent.
21. On 7 December 2017, the Appellant wrote to the CAS Court Office stating that *“the Appellant submitted (...) its request to stay the decision rendered by the FIFA Disciplinary Committee on alternative basis” and that “there is no need (nor legal basis) to the CAS provide any consideration whatsoever relating to any request to stay the decision rendered by the FIFA Disciplinary Committee”.* Further than that, the Appellant requested a time limit of 10 days to comply with the FIFA request of 6 December 2017.
22. On 7 December 2017, the CAS Court Office wrote to the parties stating that the Respondent’s deadline to file its answer is suspended and inviting the latter to inform the CAS Court Office whether it agrees with the Appellant’s request.

23. On 7 December 2017, the Respondent agreed to the Appellant's request to submit the witness statements within a deadline of 10 days, provided that the Respondent's deadline to file its answer is equally extended until 10 January 2018.
24. On 8 December 2017, the Appellant confirmed its agreement to the extension required by the Respondent.
25. On 11 December 2017, the CAS Court Office informed the parties that, in light of their agreement, the Appellant is invited to submit witness statements of the referred witnesses until 21 December 2017 and the Respondent is granted an extension of the time limit to file its answer until 10 January 2018.
26. On 21 December 2017, the Appellant submitted witness statements by Mr Carlos Antonio Silva Fabel and Mr Pedro Alberto de Souza.
27. On 28 December 2017, the CAS Court Office informed the parties that the Panel was constituted as follows:

President: Mr Sofoklis Pilavios, attorney-at-law, Athens, Greece

Arbitrators: Mr João Nogueira Da Rocha, attorney-at-law, Lisbon, Portugal

Mr Pedro Tomás Marqués, attorney-at-law, Sitges, Spain
28. On 10 January 2018, the Respondent filed its answer with CAS.
29. On 11 January 2018, the Respondent informed the CAS Court Office of its preference for an award to be rendered on the basis of the parties' written submissions only.
30. On 18 January 2018, the Appellant wrote to the CAS Court Office stating its preference for a hearing to be held in the matter at hand.
31. On 26 January 2018, the CAS Court Office informed the parties that the Panel decided to hold a hearing in this arbitration.
32. On 31 January 2018, the CAS Court Office sent to the parties a copy of the Order of Procedure in this matter, which was signed and returned by the Respondent on 1 February 2018 and by the Appellant on 8 February 2018.
33. On 31 January 2018, the CAS Court Office informed the parties that the hearing in this matter was to be held in Lausanne on 16 March 2018.
34. On 16 March 2018, a hearing took place at the Lausanne Palace Hotel, in Lausanne, Switzerland for the present case.

35. The Panel sat in the following composition:

President: Mr Sofoklis Pilavios, attorney-at-law, Athens, Greece

Arbitrators: Mr João Nogueira Da Rocha, attorney-at-law, Lisbon, Portugal

Mr Pedro Tomás Marqués, attorney-at-law, Sitges, Spain

36. The Panel was assisted by Mr Antonio de Quesada, CAS Counsel. At the outset of the hearing, the parties confirmed that they did not have any objection as to the constitution and composition of the Panel. Furthermore, the following persons attended the hearing:

- The Appellant was represented by Mr Breno Costa Ramos Tannuri, Tannuri-Ribeiro Advogados, São Paulo, Brazil;
- The Respondent was represented by Mrs Alejandra Salmeron Garcia, Group Leader in the FIFA Disciplinary department and Mrs Karin Schönenberger, Legal Counsel in the FIFA Disciplinary Department.

At the conclusion 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, following which the Panel closed the hearing.

37. On 3 April 2018, the Appellant sent a letter to the CAS Court Office informing it that it paid to Atlético Boca Juniors the amounts of USD 50,000 and USD 150,000 on 9 and 23 March respectively, enclosing the relevant bank transfer receipts.

IV. SUBMISSIONS OF THE PARTIES

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

- FIFA, being an association under Swiss law, must apply its own regulations correctly and pass decisions in a predictable and cognisable matter, notably to ensure equality of treatment and due process, as required in previous CAS awards. The Appealed Decision passed by FIFA and the sanctions imposed by it are lacking the necessary grounds as the procedure governed by the FIFA Disciplinary Code is unlawful and does not meet the aforementioned requirements.
- The applicable provisions of the FIFA Disciplinary Code on the imposition of a monetary fine do not establish in a clear manner the criteria which are to be taken into account when imposing a fine, as they only set out the minimum and maximum amounts of the fine. Therefore, it is not possible to assess whether the factors used to determine the amount of the fine in the Appealed Decision ("*the circumstances pertaining to the present case*" and "*the outstanding amount due*") are suitable and appropriate and, hence, to confirm the validity of the decision.

- The discretionary power of the FIFA bodies to impose a fine within the specified limits still does not suffice for the Appealed Decision to comply with the “*predictability test*”. The Appealed Decision provides no evidence as to what extent the fine imposed in the amount of CHF 30,000 is proportional to the outstanding amount owed to Atlético Boca Juniors or whether it was decided in accordance with the “*Committee’s established practice*”.
- Therefore, the Appealed Decision on the imposition of a monetary fine lacks the necessary grounds and was not rendered in a predictable manner. As such, it violates mandatory rules of the FIFA statutes and regulations and principles of Swiss law, such as the equality of treatment and due process.
- With respect to the deduction of points, the scope of the FIFA legislator was to introduce a “*proportional factor*” so that the amount of points to be deducted shall be proportionate to the amount owed. Even though it is not clear how this proportionality mechanism should work, the Appealed Decision still failed to provide any clear definition of the factors assessed in this proportionality test by simply stating that the decision was based on the “*Committee’s established practice*”. No similar case-law of the FIFA Disciplinary Committee was specifically mentioned in the Appealed Decision, in order to determine how the amount owed eventually led to the decision to deduct six points. The Appellant invokes another decision of the FIFA Disciplinary Committee passed in a case involving the Appellant, whereby FIFA deducted six points for a much higher outstanding amount that was not paid over a longer period of time.
- The Appellant further notes that the deduction of points is a severe sanction, in view of the promotion and relegation system of association football. By failing to provide the grounds of the Appealed Decision in this respect, FIFA again breached its own regulations and fundamental principles of Swiss law and did not even comply with its “*well-established practice*”.
- The Appellant requests that the CAS reduce the fine imposed and the points deducted by taking into account that the Appellant has submitted a detailed payment plan to Atlético Boca Juniors and that it has complied with several decisions ordering it to pay several amounts to other clubs.
- The Appellant also invokes the concept of “*exceptional circumstances*”, which is acknowledged by the FIFA Disciplinary Committee in its decisions. In this respect, the Appellant requests that the sanctions be reduced by 50%, on account of the fact that it has demonstrated its commitment to its obligations by paying a huge number of debts in the previous years and by submitting a payment plan to Atlético Boca Juniors for the total payment of the outstanding amount plus default interest in the coming months.

39. In consideration of the above, the Appellant is requesting the CAS:

“FIRST – To dismiss in full the Appealed Decision;

SECOND – To order the Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs (if applicable) paid to the CAS; and

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

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

FOURTH – To amend the Appealed Decision as follows:

1. (...)
2. *The club Atlético Mineiro is ordered to pay a fine to the amount of CHF 15,000. The fine is to be paid within 90 days of notification of the present decision. Payment can be made either in Swiss francs (CHF) to account no. [...];*
3. (...)
4. *If the payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that three (3) points to be deducted from the debtor's first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee;*
5. (...)

FIFTH – To order the Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs (if applicable) paid to the CAS; and

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

40. In turn, the Respondent's submissions may be summarised as follows:

- CAS has expressly dictated that under Swiss law the right of associations to impose sanctions or disciplinary measures on clubs is not the exercise of a power delegated by the state, but rather the expression of the freedom of associations and federations to regulate themselves. The FIFA disciplinary proceedings are meant to protect the essential objectives of FIFA, such as taking all appropriate steps to prevent infringements of the

Statutes, regulations or decisions of FIFA or of the Laws of the Game. Therefore, it has been confirmed by CAS that even if a principle of criminal law is the expression of this fundamental value system (across all areas of the law), it does not follow that the principle applies without exception and irrefutably in the relationship between a sports association and an athlete/club.

- The Respondent further asserts that CAS case-law indicates that disciplinary provisions and proceedings are in line with the principle *nulla poena sine lege* if the relevant regulations emanate from duly authorized bodies and have been adopted in constitutionally proper ways, are not the product of an obscure process of accretion, are not mutually qualifying or contradictory, are not able to be understood only on the basis of the *de facto* practice over the course of many years of a small group of insiders and if there is a clear connection between the incriminated behavior and the sanction imposed.
- In order for the principles of predictability and legality to be respected, it is not necessary that the sanctioned stakeholder should know in advance the exact sanction that will be imposed. The discretionary power of the deciding body is not inconsistent with those principles. Moreover, the Swiss Federal Tribunal has deemed as lawful the system of sanctions applied in the matter at hand. Therefore, the system and procedure of applying article 64 of the FIFA Disciplinary Code is solid and lawful.
- The Appellant has breached article 64 of the FIFA Disciplinary Code. The spirit of such provision is to enforce decisions which are final and binding. FIFA has no authority to analyse the case which was decided by the relevant body and is now final and binding; its sole task is to find out if the debtor complied with the final and binding decision of the relevant body, namely if the financial amounts had been paid to the creditor or not. The Appellant does not dispute that no payment was executed by it since the CAS decision was notified to the parties on 24 August 2015 and by the time the Appealed Decision was passed. Moreover, the Appellant did not participate in the disciplinary proceedings until the final day of the deadline granted by FIFA, *i.e.* 30 May 2017, when it submitted that it started paying some money to other creditors and requested a final period of grace of 150 days. In spite of that, after 215 days over 90% of the outstanding debt still remained unpaid. Moreover, the only attempt of the Appellant to reach a settlement with the creditor was made on 20 November 2017, *i.e.* five months after FIFA rendered the Appealed Decision, meaning that FIFA could not possibly have considered this element at the time it analysed the case and passed the Appealed Decision. As a result, the Committee correctly applied article 64 of the FIFA Disciplinary Code and determined that it had been breached by the Appellant.
- As to the determination of the sanctions imposed and the consideration of the circumstances of the case, the Respondent firstly disputes the Appellant's argument that the fact of the latter paying other debts constitutes an exceptional circumstance. In fact, the Appellant's argument only proves that the Appellant was in a position to pay the amount owed, as the payments made to other clubs were executed after the debt to Atlético Boca Juniors had become due and payable.

- With respect to the proportionality of the sanctions imposed, the Respondent argues that CAS may amend a disciplinary decision only in cases in which it finds that the deciding body exceeded the margin of discretion accorded to it by the principle of association autonomy and acted in an arbitrary way. Similarly to applying article 75 of the SCC, a challenge against a decision of an association is only successful in case of grossly disproportionate decisions that constitute a violation of the association's own statutes and other regulations.
- In view of the amounts due by the Appellant (USD 1,500,000, CHF 3,000 and CHF 43,526.70), the Committee considered that a fine of CHF 30,000 would be appropriate and proportionate. To reduce it by 50%, as requested by the Appellant, would contradict the principle of repression and prevention and would fail to encourage the prompt fulfillment of obligations. The purpose of the fine is to serve as a deterrent to parties who do not wish to comply with FIFA decisions. In this context, the Respondent provides a non-exhaustive list of Disciplinary Committee decisions that impose a CHF 30,000 fine and a deduction of six points in cases in which similar outstanding amounts were due. The case-law invoked by the Appellant, whereby FIFA imposed a fine in the same amount also in cases when the outstanding amount was higher than in the present case, does not affect the application of proportionality principle as the underlying intention of FIFA is not to create an additional financial burden to the debtor.
- The Appellant had up until today 870 days as of the notification of the final CAS award in this matter to comply with its financial obligations.
- In addition, the deduction of points is certainly not one of the most severe sanctions FIFA can impose. FIFA also points out that in the present case a deduction of points may only be imposed after the Appellant has unlawfully withheld a considerable amount of money from the creditor for more than two years, which undisputedly creates serious financial consequences on the creditor.
- CAS has regularly confirmed the legality and the proportionality of the FIFA enforcement system, part of which is article 64 of the FIFA Disciplinary Code.

41. In consideration of the above, the Respondent is requesting the CAS:

1. *To reject the Appellant's appeal in its entirety.*
2. *To confirm the decision hereby appealed against.*
3. *To order the Appellant to bear all costs incurred with the present procedure and to cover all legal expenses of the First Respondent related to the present procedure".*

V. JURISDICTION

42. Article R47(1) of the Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or 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”.

43. The jurisdiction of CAS, which is not disputed, derives from Article 64(5) of the FIFA Disciplinary Code, which determines that:

“5. Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly”.

44. The jurisdiction of CAS is also confirmed by Article 58(1) of the FIFA Statutes that provides as follows:

“1. Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question”.

45. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties. It therefore follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

46. Article R49 of the Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/ his decision after considering any submission made by the other parties”.

47. The present appeal was filed within the 21 days set by Article 58(1) of the FIFA Statutes as the reasoned Appealed Decision was communicated to the Appellant by the Respondent on 18 October 2017 and the Appellant filed its statement of appeal with CAS on 8 November 2017.

48. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

49. It follows that the appeal is admissible.

VII. APPLICABLE LAW

50. Article R58 of the Code provides as follows:

“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”.

51. The Panel notes that Article 57(2) of the FIFA Statutes provides the following:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

52. The Panel therefore finds that the relevant FIFA rules and regulations, and more specifically the FIFA Disciplinary Code, as in force at the relevant time of the dispute, shall be applied primarily, and Swiss law shall be applied subsidiarily.

53. The relevant provisions of Article 64 of the FIFA Disciplinary Code applicable at the relevant time of the dispute (2011 version) determine that:

“1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision):

- a) will be fined for failing to comply with a decision;*
- b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
- c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced;*

(...)

2. If a club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.

3. If points are deducted, they shall be proportionate to the amount owed”.

VIII. MERITS

54. According to Article R57 of the Code, the Panel has “*full power to review the facts and the law*”. As is long-established in the jurisprudence of the CAS, by reference to this provision, a CAS arbitration procedure may entail a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of the Panel to make an independent determination as to merits (see CAS 2007/A/1394, para. 21).
55. In light of the facts of the case and the arguments of the parties, the Panel must first examine whether the conditions for imposing sanctions under Article 64 of the FIFA Disciplinary Code were met in the present case and, if this is the case, then the Panel shall assess the Appellant’s argument that the sanctions imposed should be reduced as they were disproportionate and not in accordance with FIFA’s own well established practice.
56. As to the first issue to be examined, the Panel observes that, since the ruling in the dispute between the Appellant and Atlético Boca Juniors became final and binding for the parties as of 24 August 2015, when the CAS passed its award in case 2014/A/3646, the sole task of the FIFA Disciplinary Committee was to examine whether the Appellant complied with that final and binding decision. The Panel’s position is supported by consistent CAS jurisprudence in similar matters, dictating that “*the FIFA Disciplinary Committee was limited to determine if the outstanding amount, as defined by the FIFA DRC decision, had been paid to the creditor, i.e. the Player, or if for whatever reason the above mentioned amount was still due*” (CAS 2013/A/3323, para. 72).
57. In this respect, the Panel notes that the Appellant does not contest the outstanding amount of its debt to the club Atlético Boca Juniors. Such debt was confirmed by the final CAS award in case 2014/A/3646, which certainly constitutes a “*subsequent CAS appeal decision (financial decision)*” in the meaning of Article 64(1) of the FIFA Disciplinary Code. In fact, the Appellant admits having failed to pay any amount at all to Atlético Boca Juniors since the CAS issued its award on 24 August 2015 and until 9 June 2017, when the FIFA Disciplinary Committee rendered the Appealed Decision. The Appellant made only one payment to Atlético Boca Juniors in the amount of USD 150,000 on 22 November 2017, *i.e.* on the day it filed its appeal brief in this arbitration and more than 5 months after the Appealed Decision was issued.
58. In fact, the Appellant does not submit any reasons to justify its non-payment of the outstanding debt to Atlético Boca Juniors.
59. Therefore, and on this basis, the Panel finds that the Appellant totally failed to comply with the final CAS award in case 2014/A/3646 without any valid justification and, as a result, the conditions provided in Article 64(1) of the FIFA Disciplinary Code for the imposition of disciplinary sanctions against a Club are met.
60. Having established the above, the Panel shall now address the second issue under examination, namely whether the sanctions imposed by the Appealed Decision should be reduced as they were disproportionate and not in accordance with FIFA’s well established practice.

61. The Panel observes that the Appellant failed to comply with the CAS final decision for a period of almost two years, from the time the CAS rendered its decision until 9 June 2017, when the Appealed Decision was passed. The Panel also notes that the outstanding debt is not fully paid until today, almost 3 years after the CAS decision, except for an amount of USD 150,000, which was paid by the Appellant on 22 November 2017, *i.e.* on the day it filed its appeal brief, and two other payments of USD 50,000 and USD 150,000 made on 9 and 23 March respectively. Further than that, the Appellant failed to comply with the CAS award despite having been reminded and urged to do so by FIFA on several occasions. As a consequence, the FIFA Disciplinary Committee finally imposed a fine of CHF 30,000 on the Appellant by means of the Appealed Decision, while granting it a final period of grace of 90 days to pay the amounts due, failing which the case will be resubmitted to FIFA in order to impose more severe sanctions.
62. As to the proportionality and “*exceptional circumstances*” arguments of the Appellant, the Panel refers to the findings of another CAS Panel stating that “*in disciplinary matters, each situation must be evaluated on a case-by-case basis and interests at stake have to be balanced in respect of the principle of proportionality. Account must be taken of the seriousness of the facts and other related circumstances as well as of the damage that the penalised conduct entails for the parties involved, for the federation in question and for its sport. In the same way, disciplinary bodies may evaluate any aggravating and/or extenuating circumstances that might be related to the infringement*” (CAS 2013/A/3358, also quoted in CAS 2016/A/4595).
63. In addition, the Panel takes due note of the Respondent’s argument that the purpose of the fine is to serve as a deterrent to parties which do not wish to comply with decisions of FIFA bodies.
64. The Panel observes that the Appellant challenges the Appealed Decision on the grounds that the imposed sanctions are disproportionate as they cannot be justified under the “*Committee’s established practice*” or under the “*exceptional circumstances*” invoked by the Appellant, namely that it had to pay a huge amount of outstanding debts in the last years and that it acknowledged the debt and addressed a payment plan to Atlético Boca Juniors. FIFA maintains that the fine and points deduction imposed are justified and refers to several decisions of its Disciplinary Committee that impose a CHF 30,000 fine and a deduction of six points in cases in which similar outstanding amounts were due.
65. In this respect, the Panel observes that Article 64(1) of the FIFA Disciplinary Code is very clear in determining the consequences of failure in full to respect decisions like the Appealed Decision, and observes that FIFA applied it correctly by imposing the sanctions at issue on the Appellant. As such, the fact that the Appellant paid a small part (a little less than 20%) of the outstanding amount to Atlético Boca Juniors cannot be taken into consideration as said payments were made after the Appealed Decision was passed and, at any case, because even partial failure to comply justifies the imposition of sanctions under the abovementioned FIFA provision.
66. Moreover, the Appellant’s arguments that it had to pay a huge amount of outstanding debts in the last years and that it acknowledged the debt and addressed a payment plan to Atlético Boca Juniors also cannot stand. The Appellant paying other obligations does not alter the fact that it failed to comply with the CAS final decision in favour of Atlético Boca Juniors; in fact, it only

raises the question why the Appellant did not try to settle its debt towards Atlético Boca Juniors too, as the Appellant was clearly in a position to pay the amount owed, at least partially. The same applies with respect to the Appellant submitting a payment plan and making a partial payment to Atlético Boca Juniors, as those clearly do not fall within the “*exceptional circumstances*” defence argument. They are rather actions undertaken by the Appellant to meet, in part and not in full, its – long overdue – obligations.

67. Therefore, the Panel does not find the Appellant’s defence to be a mitigating circumstance that should lead to a reduction of the fine imposed or the points that are to be deducted if payment is not made within the final period of grace of 90 days granted.
68. Finally, as to the Appellant’s proportionality defence, the Panel notes that Article 15 of the FIFA Disciplinary Code provides as follows:

“Article 15 Fine

1. *A fine is issued in Swiss francs (CHF) or US dollars (USD). It shall be paid in the same currency.*
2. *The fine shall not be less than CHF 300, or in case of a competition subject to an age limit not less than CHF 200, and not more than CHF 1,000,000.*
3. *The body that imposes the fine decides the terms and time limits for payment”.*

69. In addition, the Panel notes that FIFA submits that the fine and points threatened to be deducted in the present case fall within the FIFA Disciplinary Committee’s longstanding practice. The Panel also recalls that FIFA, in support of its arguments concerning the compliance of Appealed Decision with the principle of proportionality as well as with the longstanding practice of the FIFA Disciplinary Committee, filed seven of its decisions in which similar total outstanding amounts were due and in which cases a CHF 30,000 fine and a threat to deduct 6 points was imposed, as set out below:

Case number	Outstanding amount	Fine	Points to be deducted
130186 PST ZH	CHF 1,611,416	CHF 30,000	6
130394 PST ZH	CHF 1,173,040	CHF 30,000	6
160018 PST ZH	CHF 1,364,804	CHF 30,000	6
160191 PST ZH	CHF 976,054.58	CHF 30,000	6
161203 PST ZH	CHF 1,860,818	CHF 30,000	6
170919 PST ZH	CHF 1,171,692	CHF 30,000	6
170380 PST ZH	CHF 958,462	CHF 30,000	6

70. The Appellant on the other hand claims that there is no evidence that the Appealed Decision and the sanctions imposed are in line with FIFA’s established practice. To support its argument, the Appellant submits another decision of the FIFA Disciplinary Committee involving itself and concerning the failure to pay an outstanding debt of EUR 2,750,000 over a period of one year. In that case, despite the significantly different circumstances, so the Appellant, FIFA

imposed exactly the same sanctions on the Appellant as with the Appealed Decision (a CHF 30,000 fine and a deduction of 6 points).

71. The Panel concurs with FIFA that the purpose of the fine under Article 64(1) is to serve as a deterrent and that it also needs to be considered that the intention of FIFA by imposing the fine is not to create an additional severe financial burden to the debtor. Therefore, the Panel finds that the case-law mentioned by the Appellant does not render the fine imposed in the matter at hand disproportionate.
72. Moreover, the Panel points out that there is well-established CAS case-law with respect to the matter of the discretionary powers that the decision-making bodies of sports associations enjoy and the scope and extent of the CAS power to review their exercise. Such case law consistently allows for the wide exercise of such powers which is to be restrained by CAS only in extreme cases. For instance, the CAS Panel in cases 2009/A/1817 & CAS 2009/A/1844 has stated that: *“In this latter respect, this Panel agrees with the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see e. g. the awards of: 24 March 2005, CAS 2004/A/690, § 86; 15 July 2007, CAS 2005/A/830, § 10.26; 26 June 2007, 2006/A/1175, § 90; and the advisory opinion of 21 April 2006, CAS 2005/C/976 & 986, § 143)”*.
73. In the present case, the Panel is content to adopt the position articulated by the CAS in the abovementioned case for the reasons expressed there and, therefore, considers that the fine imposed and points threatened to be deducted by the Appealed Decision can only be reviewed if they are considered to be evidently and grossly disproportionate to the offence. To conduct this assessment, the Panel refers to the findings of another CAS award in a similar matter, stating that *“The test to be applied by the Panel is therefore not whether the fine imposed on the Club is in accordance with the FIFA DC’s longstanding practice, but rather whether the fine imposed on the Club is evidently and grossly disproportionate to the offence. In this respect, the fine imposed on the Club shall be reduced if the Panel is convinced that it is evidently and grossly disproportionate in comparison with FIFA’s practice regarding the imposition of fines”* (CAS 2016/A/4595, para. 60).
74. In light of all the facts of the case and, in particular, the Appellant’s conduct as analysed in the relevant sections of the merits and its refusal to pay or settle the outstanding amount towards Atlético Boca Juniors until the Appealed Decision was rendered by FIFA, without any justification grounds whatsoever, the Panel finds that FIFA took into due account all the circumstances of the case at the time of determining the sanctions imposed on the Appellant and that the fine imposed and points deducted were clearly not disproportionate in view of FIFA’s longstanding practice, as the sanctions were equal to those imposed on other clubs for very similar violations, as set out in detail in the above considerations.
75. The mere fact that there may occasionally have been FIFA decisions where the sanctions imposed were the same as in the matter at hand, whereas the circumstances of the case were different, as the one decision submitted by the Appellant, does not lead the Panel to any different conclusion, as the Panel is not convinced that this is evidence of constant practice of FIFA.

76. In light of these considerations, the Panel finds that the Appellant cannot invoke to its avail the circumstances referred to in its submissions, in order to escape disciplinary responsibility, or to soften the consequences arising thereby. On all those grounds, after taking into consideration the specific circumstances of the case and the outstanding amount due, the Panel finds that the disciplinary sanctions imposed by the Appealed Decision were proportional, appropriate and justified and are, therefore, confirmed.
77. Any other and further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Clube Atlético Mineiro on 8 November 2017 is dismissed.
2. The decision issued on 9 June 2017 by the FIFA Disciplinary Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.