



**Arbitration CAS 2018/A/6027 Sociedade Esportiva Palmeiras v. Fédération Internationale de Football Association (FIFA), award of 30 December 2019**

Panel: Mr Sofoklis Pilavios (Greece), President; Mr Daniel Lorenz (Portugal); Mr Efraim Barak (Israel)

*Football*

*Transfer*

*Purpose of Art. 18bis RSTP*

*Inclusion of clubs in the scope of Art. 18bis RSTP*

*Validity and/or binding nature of the contractual provisions enabling a party to exercise undue influence*

*CAS power of review as regards sanctions*

1. The purpose of Article 18bis of the FIFA Regulations on the Status and Transfer of Players (RSTP) is to increase the independence of clubs and protect the integrity of football and increase transparency by preventing all types of external influence on clubs. The wording of the provision is intentionally broad in determining who the subject of exercise of the forbidden undue influence may be, namely *any other party to that contract or any third party*. It is clear from the literal interpretation of the provision that Article 18bis is meant to prevent anyone (either being a party to the contract concerned or not) from acquiring the ability to exercise undue influence on football clubs. The quality of the person or legal entity enabled by the football club to exercise undue influence as external (meaning outside football) is irrelevant and has no legal basis.
2. Whereas Article 18bis RSTP was indeed amended in 2015, the wording “*which enables the counter club/counter clubs*” that was added (compared to “*which enables any other party to that contract*” of the 2010 edition) in no way means that clubs were not included in the scope of the provision until 2015. The 2010 edition of the RSTP adopts a wide scope including any and all counter-parties to the contract concerned. It is true that that scope is limited by the 2015 amendment to the rule, to define as counter parties football clubs only, but this certainly does not mean that a contract with a football club as counter party would escape the scope of the 2010 rule; the contrary is the case. The intentionally broad formulation *any other party* is decisive here; had the FIFA legislator wanted to exclude football clubs as counter parties, he would most certainly have done so in an explicit way.
3. Article 18bis RSTP is not concerned with the issue of the validity and/or the binding nature of the contractual provisions enabling a party to an agreement to exercise undue influence to its counter party-football club. This is a matter to be settled under the applicable law, which is the task of the FIFA Players’ Status Committee (PSC) when called to examine the validity and the binding nature of the same contractual provisions in the context of a contractual dispute that is brought before the FIFA PSC. It is perfectly possible that said contractually agreed provisions are enforceable under a set

of applicable (civil law) rules and at the same time fall foul of Article 18bis RSTP (which at any case does not and cannot determine whether they are illegal, invalid or unenforceable).

4. **The wide exercise of the discretionary powers that the decision-making bodies of sports associations enjoy is to be restrained by the CAS power to review their exercise only in cases in which the sanction imposed is grossly disproportionate. The test to be applied by a CAS panel is therefore not whether the fine imposed on a club is in accordance with the FIFA Disciplinary Committee’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 CAS panel is convinced that it is evidently and grossly disproportionate in comparison with FIFA’s practice regarding the imposition of fines.**

## **I. PARTIES**

1. Sociedade Esportiva Palmeiras (the “Appellant” or “Palmeiras”) is a football club, with seat in São Paulo, Brazil. Palmeiras 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 24 January 2012, Liga Deportiva Universitária, a professional football club with seat in Quito, Ecuador (“Liga” or “LDU”) and Palmeiras entered into an “Assignment of Rights” agreement (the “Transfer Agreement”) for the transfer of the federative rights of the Argentine professional football player H. (the “Player”), then under contract with LDU.

5. The relevant provisions of the Transfer Contract provide as follows:

*“1.1 LIGA assigns and transfers to PALMEIRAS seventy percent (70%) of the Economic Rights, credits, benefits and financial revenues arising from the temporary or definitive transfer of the Federative Rights of the PLAYER which it owns, retaining ownership of the remaining thirty percent (30%), and assigns to PALMEIRAS 100% of the Federative Rights of the PLAYER (...).*

*1.2 LIGA definitively assigns and transfers to PALMEIRAS 100% of the Federative Rights of the PLAYER (...).*

*2.1 The price of this assignment is agreed to be USD 4,000,000 net, to be paid by PALMEIRAS to LIGA as follows: (...).*

*3.1 The PARTIES, either jointly or individually, may negotiate in their own name or in the name of any other party, with any third party, the transfer of the Federative Rights and the totality or part of the Economic Rights, keeping the other party informed of the negotiations in writing and by reliable means.*

*(...)*

*3.4 The parties shall immediately share with each other all the information available in the event of a possible transfer.*

*3.5 The minimum transfer price must be equal to or greater than USD 8,000,000 net, and both PALMEIRAS and LIGA may mutually bind one another, by written notification in accordance with this agreement, to the sale and transfer of the Federative Rights or their part of the Economic Rights. The parties also agree that, at the request of either party, the transfer may be made for a price lower than that indicated in this clause but always respecting the percentages and amounts of the other parties as if the transfer had taken place for the sum of USD 6,000,000.*

*(...)*

*3.7 For the loan or temporary transfer of THE PLAYER to a third club (without constituting a sale or transfer of the federative rights on a permanent basis) Palmeiras shall request the written consent of LIGA with prior communication of all details of the loan or temporary transfer (including copies of all relevant documentation held by whoever gets the offer).*

*3.8 The parties by mutual agreement provide that, in the event of a future sale a “mixed operation” is excluded and expressly prohibited, this being understood to be a transaction including as consideration the transfer of another player in exchange for a percentage of the Rights assigned, or one which includes the simultaneous sale of Economic or Federative Rights of another player, or for which an aggregate amount is paid without detailing the real value of the transfer of the Rights of THE PLAYER.*

*(...)*

*3.10 Neither party may assign or sell to third parties, in whole or in part, the percentage of Economic Rights or Federative Rights which they have and corresponds to them regarding THE PLAYER, without the express written consent of the other parties. Failure to comply with this obligation will entitle the compliant parties to*

*ignore the assignment that has been effected and to demand compensation from the party in breach in the amount of USD 2,000,000.*

(...)

*3.12 To monitor, participate in, manage or negotiate a future definitive or temporary transfer of the rights of THE PLAYER (whether Federative Rights or Economic Rights or both), LIGA gives exclusive authorization to the AFA players' agent Mr. Gustavo Lesovich, as its only agent for the purpose.*

*4.1 THE PLAYER, who is a witness to the signing of this agreement, accepts the conditions thereof and signs a sports employment contract with PALMEIRAS to be effective from January 24, 2012, to December 31, 2014. Furthermore, and in relation to the said contract, a termination clause pursuant to Article 17 of the FIFA Regulations on the Status and Transfer of Players, is agreed in favor of THE PLAYER for an amount of EUR 15,000,000, with the PLAYER and the new club engaging the PLAYER being jointly responsible for payment.*

(...)

*4.4 In the event that PALMEIRAS fails to comply with all the above obligations and THE PLAYER becomes free to contract as a result of not receiving payment, or if such freedom of contract is acquired by mutual agreement between THE PLAYER and PALMEIRAS, or on termination of the contract through the fault of PALMEIRAS, the latter shall pay an indemnity to LIGA in the amount of USD 2,000,000 within 10 days of the date on which the freedom of contract is acquired. (...).*

*4.5 In the event that THE PLAYER early terminates his Employment Contract with PALMEIRAS, or if such termination is determined by THE PLAYER as a result of injury by PALMEIRAS, or is decided by PALMEIRAS through the fault of the PLAYER, LIGA shall be entitled to receive from PALMEIRAS its 30% share of the amount fixed as compensation or indemnity for such termination. (...)."*

6. On 8 February 2013, the Player was transferred to the Brazilian club Grêmio Football Portoalegrense.
7. On 8 May 2013, LDU filed a claim for breach of the Transfer Agreement against Palmeiras in front of the FIFA Players' Status Committee ("PSC"), which was partially accepted by the FIFA PSC on 26 March 2015.
8. On 12 May 2015, FIFA Transfer Matching System ("TMS") sent a letter to Palmeiras requesting its position on the matter of an apparent violation of Article 18bis of the FIFA Regulations on the Status and Transfer of Players ("Regulations") concerning the Transfer Agreement.
9. On 26 and 28 May 2015, Palmeiras provided FIFA TMS with its position on the matter.
10. On 1 September 2015, FIFA TMS informed Palmeiras that the case was transferred to the FIFA Disciplinary Committee.

**B. Proceedings before the FIFA Disciplinary Committee**

11. On 22 July 2016, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against Palmeiras and requested its position with respect to the apparent violation of Article 18bis of the FIFA Regulations by certain provisions of the Transfer Agreement.
12. On 22 August 2016, Palmeiras submitted its answer and contested the alleged violation of Article 18bis of the FIFA Regulations by arguing, *inter alia*, that the clauses of the Transfer Agreement at issue had already been declared valid by the FIFA PSC that ruled in favour of LDU's claim on the basis of the same provisions.
13. On 9 December 2016, the FIFA Disciplinary Committee rendered its decision ruling that:

*"1. The club SE Palmeiras is liable for the violation of art. 18bis par. 1 of the Regulations on the Status and Transfer of Players for entering into an agreement that enables a third party to acquire the ability to influence in employment and transfer-related matters the club's independence and policies, with regard to the transfer of the player H. (TMS instruction references 46168 / 46386).*

*2. The club SE Palmeiras is ordered to pay a fine to the amount of CHF 50,000. The fine is to be paid within 30 days of receipt of the ruling. (...).*

*3. In application of art. 10 a) and art. 13 of the FIFA Disciplinary Code, the club SE Palmeiras is warned on its future conduct. The club SE Palmeiras shall take all the appropriate measures to ensure respect for the FIFA Regulations (in particular the FIFA Disciplinary Code and the FIFA Regulations on the Status and Transfer of Players). In the event that any such violations occur in the future, the FIFA Disciplinary Committee may impose harsher sanctions on the club.*

*4. The costs and expenses of the proceedings amounting to CHF 3,000 are to be borne by the club SE Palmeiras and shall be paid according to the modalities stipulated under par. 3 above".*

14. On 31 January 2018, the FIFA Disciplinary Committee communicated to Palmeiras the grounds of its decision, which, *inter alia*, determined the following:

*"(...)*

*51. As a preliminary remark, the Committee notices that according to clause 1.1 of the Transfer Agreement, LDU assigned and transferred to SE Palmeiras 70% of the economic rights, credits, profits and economical incomes related to the transfer of the federative rights of the Player, retaining the remaining 30% and transferring to SE Palmeiras 100% of the federative rights of the Player.*

*52. In this sense, according to clause 3.2 of the Transfer Agreement, in the event that the parties disposed a future transfer of the Player to any other club, under any modality, either permanently or temporary, in Brazil or abroad, the transfer fee would be distributed between SE Palmeiras and LDU following the agreed conditions, namely 70% to SE Palmeiras and 30% to LDU.*

*53. Subsequently, clause 3.1 of the Transfer Agreement stipulates that:*

*“Each party of the Agreement (LDU and SE Palmeiras) will be entitled to negotiate, either individually or jointly, on its own behalf and on behalf of the other party, with any other third party, the transfer of the Federative Rights and the totality of the Economic Rights of the Player, always informing the other party in writing”. (...).*

54. *Likewise, the Committee observes that clause 3.4 of the Transfer Agreement establishes that:*

*“The parties will immediately inform each other about all the details concerning a possible transfer”. (...).*

*(...)*

56. *Subsequently, the Committee observes that point 3 of the Transfer Agreement contains several clauses concerning the modalities on which the Player can be transferred, namely: Clause 3.5: (...), Clause 3.7: (...), Clause 3.8: (...), Clause 3.10: (...), Clause 3.12: (...).*

57. *Subsequently, the Committee notes that point 4 of the Transfer Agreement refers to the relation between the Club and the Player as follows: (...).*

58. *In this context, the Committee considers that the mentioned clause allow LDU to exert influence on SE Palmeiras’ independence in employment and transfer-related matters as well as its policies for the reasons set forth in the following paragraphs.*

59. *First, according to clause 3.1 of the of the Transfer Agreement, LDU is entitled to negotiate with any other third party the transfer of the Player, either independently or together with the Club. Likewise, in accordance with clause 3.4 of the Transfer Agreement, the parties have to inform each other immediately about all details of a possible transfer.*

*(...)*

62. *Subsequently, the Committee analyses the following clauses of point 3 of the Transfer Agreement.*

*(...)*

68. *In this sense, the Committee considers that the set of clauses mentioned above deeply restricted the freedom and independence of the Club regarding the Player’s future transfer.*

*(...)*

72. *With regard to these clauses, the Committee is of the opinion that such clauses correspond to a clear limitation of the independence of SE Palmeiras to carry out any operation concerning the transfer of the Player, since the Club was not allowed to conclude any “mixed operation”, the loan of the Player needed to be approved by LDU and Mr Lesovich was the only person entitled to take care of the transfer of the Player.*

73. *Likewise, the freedom and independence of the Club was subjected to further restrictions by the fact that, if it had transferred the Player without the approval of LDU, it should have paid a penalty fee of USD 2,000,000.*

74. *In this respect, the Committee firmly believes that the inclusion of this clause in the Transfer Agreement could significantly limit the independence of the Club. In fact, and in order to avoid to pay such a considerable amount, SE Palmeiras could have desisted to transfer the Player for a convenient price only because LDU did not give its authorization to do so and even if such transfer was favourable in the context of the sporting and transfer-related policies of the Club.*

75. *The Committee continues to examine the clauses of point 4 of the Transfer Agreement.*

(...)

79. *In this sense, the Committee is of the opinion that the aforementioned clauses of the Transfer Agreement established several limits to the Club's independence concerning employment-related matters. The Committee considers that the fact that the duration of the employment agreement was agreed upon with LDU, which was not a party to said contract, proves that the Transfer Agreement enabled LDU to influence SE Palmeiras in its independence and policies concerning employment-related matters.*

80. *Likewise, clauses 4.4 and 4.5 of the Transfer Agreement established that SE Palmeiras would have faced serious financial consequences in case the employment contract with the Player was terminated or the Player became a free agent, regardless the reasons behind it. This would mean for instance that, in a hypothetical scenario where SE Palmeiras had just cause to terminate the contract with the Player, it would still decide to maintain the employment relationship in order to avoid the consequences foreseen by the Transfer Agreement.*

81. *The Committee wishes also to underline that the existence of all the aforementioned clauses enabling LDU to influence SE Palmeiras in employment and transfer-related matters is clearly explained by the fact that the former owned 30% of the economic rights of the Player and was therefore interested in guaranteeing to itself a high profit from the future transfer of the Player.*

82. *In view of the foregoing, the Committee considers that the aforementioned clauses of the Transfer Agreement (namely clauses 3.1, 3.4, 3.5, 3.7, 3.8, 3.10, 3.12, 4.1, 4.4 and 4.5) enabled LDU to acquire the ability to influence the independence and policies of SE Palmeiras in employment and transfer-related matters. Therefore, SE Palmeiras is liable for the violation of art. 18bis of the RSTP.*

(...)

100. *When evaluating the degree of the liability of the Club in the context of sanctioning the violation of art. 18bis of the RSTP, the seriousness of the violations and/or the endangerment of the legal asset protected by this provisions shall first be taken into account.*

(...)

104. *In this regard, the Committee is of the opinion that SE Palmeiras was absolutely free to reach an agreement with LDU that did not imply an attack to its independence with regard to employment and transfer related matters. The alleged financial and sporting crisis does not justify the decision to enter into such an agreement. If the only way to transfer the Player from LDU was to accept the conditions foreseen in the Transfer Agreement, the SE Palmeiras was free to look elsewhere for another player and negotiate with a club that did not demand to interfere in its independence and policies.*

105. *Additionally, the Committee points out that both SE Palmeiras and LDU are professional football clubs, and therefore considers quite unlike that the latter was in a dominant position that could justify the imposition of an agreement against the willingness of the former. On the contrary, the Committee firmly believes that SE Palmeiras freely decided to sign the Transfer Agreement disregarding the prohibition foreseen under art. 18bis of the Regulations.*

106. *The Committee considers that the Club's intention -at the time of entering into the Transfer Agreement- was to obtain a preferential position vis-à-vis its direct opponents, who, by respecting the Regulations, did not enter into such kind of agreement with third parties.*

107. *In view of the aforementioned circumstances, the Committee considers that the liability of SE Palmeiras is serious and that its negligence cannot be justified.*

108. *Furthermore, even though the Club was cooperative in the context of the present proceedings, at no time has it manifested a minimum regret or remorse of any kind nor did it admit to any violations of FIFA regulations.*

109. *As a consequence of the foregoing, the Committee concludes that the appropriate sanction to be imposed on SE Palmeiras for violation of art. 18bis of the RSTP is a fine (art. 10 and art. 15 of the FDC).*

110. *In this respect, pursuant to the provisions of art. 10 of the FDC in conjunction with art. 15 of the FDC, the FIFA Disciplinary Committee notes that the fine cannot be less than CHF 300 and cannot exceed CHF 1,000,000 (cf. art. 15 par. 2 of the FDC). Taking into consideration the aforementioned principles and considerations, as well as the fine previously imposed for similar violations, the Committee considers a fine in the amount of CHF 50,000 being appropriate.*

111. *Furthermore, the Club is warned as to its future conduct according to art. 13 of the FDC”.*

15. On 2 February 2018, Palmeiras informed FIFA that it intended to appeal against the decision of the FIFA Disciplinary Committee.

16. On 20 April 2018, the FIFA Appeal Committee rendered its decision (the “Appealed Decision”) ruling that:

*“1. The appeal lodged by the club SE Palmeiras against the decision rendered by the FIFA Disciplinary Committee on 9 December 2018 is partially upheld.*

*2. Paragraph 2 of the decision 160532 TMS BRA ZH passed by the FIFA Disciplinary Committee is amended as follows: The club SE Palmeiras is ordered to pay a fine to the amount of CHF 25,000. This fine is to be paid within 30 days of receipt of the ruling. (...).*

*3. The other points of the decision 160532 TMS BRA ZH passed by the FIFA Disciplinary Committee are confirmed and all other prayers for relief rejected.*

*4. The costs and expenses of the proceedings amounting to CHF 3,000 are to be borne by the club SE Palmeiras. This amount is set off against the appeal fee of CHF 3,000 already paid by the club SE Palmeiras”.*



17. On 5 November 2018, the FIFA Appeal Committee communicated to Palmeiras the grounds of its decision, which, *inter alia*, determined the following:

“(…)

11. *First, the Committee takes note of the Club’s request to be provided with the file pertaining to the disciplinary proceedings against LDU, in order to be able to address its content.*

12. *In this respect, the Committee wishes to clarify that, as a general rule, disciplinary proceedings involve the accused only. When several perpetrators commit a violation of the FIFA regulations, different disciplinary proceedings will be opened for each perpetrator and are dealt with separately.*

13. *Art. 94 of the FDC, which was invoked by the Club in its submission, establishes that: “1. The parties shall be heard before any decision is passed. 2. They may, in particular: a) refer to the file; [...].”*

14. *The foregoing clearly provides for some procedural rights of the parties subject to disciplinary proceedings. It is clear that SE Palmeiras was not a party in the proceedings involving LDU for a possible violation of art. 18bis of the RSTP. Moreover, the Appellant does not have a direct and legitimate interest in the outcome of such proceedings. Therefore, the Committee sees no reason to depart from the aforementioned general rule in the present case and to provide the Appellant with a copy of the file belonging to another procedure.*

15. *In view of the foregoing, the Club’s request to receive a copy of the file concerning the disciplinary proceedings against LDU is rejected.*

“(…)

21. *The Committee notices that the provision foresees a clear prohibition for any club, such as SE Palmeiras, to enter into an agreement, which enables either a third party or another party to that agreement, such as LDU in the context of the Transfer Agreement, to influence in employment, and transfer-related matters its independence, its policies or the performance of its teams.*

22. *Therefore, it is evident from the plain understanding of such article that the legislator’s intention was to ensure that, in line with art. 18bis of the RSTP, clubs could always take its decisions independently of any external body, regardless of such body being a stakeholder within or outside the football pyramid.*

23. *A different interpretation of the provision would jeopardize the protection of the integrity and reputation of football. Indeed, if a club enables another club to interfere on its independence, policies and team performances this would also put at risk the integrity of the sport and might give rise to conflicts of interests that could easily bring to match fixing practices.*

24. *Therefore, a different interpretation would contradict the aim of the legislator and would prevent the provision from reaching the purpose sought.*

25. *Having said that, the Committee notes that LDU is clearly another party to the Transfer Agreement, which implies that art. 18bis of the RSTP applies to the matter at stake. Moreover, at no point in the Appeal Decision did the FIFA Disciplinary Committee compare LDU to a third party alien to the world of football,*

as claimed by the Appellant. To the contrary, the Committee is of the opinion that the FIFA Disciplinary Committee correctly considered LDU to be a third party with respect to SE Palmeiras.

26. In the light of the foregoing, the Committee considers that the FIFA Disciplinary Committee correctly applied art. 18bis of the RSTP to the present case.

*D. Alleged contradiction between the decisions of the Single Judge of the Players' Status Committee and the FIFA Disciplinary Committee*

27. The Committee notes that according to the Appellant there is a contradiction between the decision of the Single Judge of the Players' Status Committee and the Appealed Decision. Additionally, the Appellant underlined that in the context of the appeal proceedings before CAS, the parties reached an agreement recognizing that no violation of art. 18bis of the RSTP occurred.

28. In this sense, the Committee wishes to clarify, as it has been previously done in the Appealed Decision, that the Players' Status Committee and the FIFA Disciplinary Committee have different competences. Whereas the former decides, *inter alia*, on the merits of contractual disputes involving clubs belonging to different associations, the latter rules on possible breaches of the FIFA regulations. Thus, whereas the first type of ruling refers exclusively to a dispute between two (indirect) members of FIFA and falls therefore in the category of "horizontal decisions", the second type of ruling is of a disciplinary nature and aims to sanction the misbehaviour of an (indirect) member of FIFA, falling therefore within the category of "vertical decisions".

29. Moreover, it must be noted that the FIFA Disciplinary Committee is a fully independent body, which functions and passes its decisions independently. This corresponds to the basic rule of natural justice *nemo iudex in causa sua*, according to which each issue shall be determined by a body that is and is seen to be impartial and independent. Therefore, the FIFA Disciplinary Committee is not legally bound by any of the considerations made by another body of FIFA.

30. Additionally, SE Palmeiras was already warned by the Single Judge of the Players' Status Committee that the content of the clause 3.5 of the Transfer Agreement might correspond to a breach of art. 18bis of the RSTP and could be therefore subject to an investigation of the FIFA Disciplinary Committee.

31. In this regard, the Committee concurs with the considerations of the FIFA Disciplinary Committee, according to which "[...] taking into consideration the different competences of the two bodies of FIFA, a possible decision passed by the [FIFA Disciplinary] Committee considering the clauses at stake contrary to art. 18bis of the RSTP would not correspond to a declaration of invalidity of the Transfer Agreement and therefore would not contradict the decision of the Single Judge of the Players' Status Committee dated 26 March 2015" (cf. par. II.94 of the Appealed Decision).

32. In other words, both bodies of FIFA have analysed the Transfer Agreement from their own and distinct viewpoints; the Single Judge of the Players' Status Committee confirmed that certain provisions of the agreement had been breached while the FIFA Disciplinary Committee considered that said clauses, despite having been agreed freely by both clubs, infringed art. 18bis of the RSTP.

33. Finally, the Committee wishes to clarify that the agreement reached by SE Palmeiras and LDU in the context of the proceedings before CAS is limited to the financial dispute between them and cannot prevent the

*FIFA Disciplinary and Appeal Committees from sanctioning a possible breach of the FIFA regulations. In other words, the parties are not entitled to decide that their behaviour did not violate the applicable regulations. Such value judgement only corresponds, in what concerns art. 18bis of the RSTP, to the FIFA judicial bodies.*

*E. As to the content of the Transfer Agreement*

*34. The Committee notes that the Appellant did not enter into the merits of the analysis made by the FIFA Disciplinary Committee with regard to the different clauses of the Transfer Agreement.*

*35. Therefore, the Committee notices that the Appellant did not dispute that the Transfer Agreement enabled LDU to acquire the ability to influence its independence and policies with respect to employment and transfer related matters.*

*36. Despite the Appellant's silence in this respect, the Committee considers important to emphasize that it does concur with the analysis made and the conclusions drawn by the FIFA Disciplinary Committee in the Appealed Decision. In particular, the Committee considers that several clauses of the Transfer Agreement (namely clauses 3.1, 3.4, 3.5, 3.7, 3.8, 3.10, 3.12, 4.1, 4.4 and 4.5) enabled LDU to acquire the ability to influence the independence and policies of SE Palmeiras in employment and transfer-related matters. Therefore, SE Palmeiras is liable for the violation of art. 18bis of the RSTP.*

*F. Mitigating circumstances and determination of the sanctions*

*37. After having established that the Club breached art. 18bis of the RSTP, the Committee takes note that the Appellant referred to several alleged mitigating circumstances, namely:*

- the economic and sporting crisis suffered between 2002 and 2013;*
- the lack of experience of its president;*
- the commercial advantage used by LDU to impose the contract to SE Palmeiras;*
- the fact that SE Palmeiras transferred the Player to Grêmio not allowing any interference by LDU;*
- the cooperation of the Appellant during the proceedings.*

*38. First, the Committee is of the opinion that the economic and sporting crisis experienced by the Club is not a justification nor a mitigating circumstance in the present case. Each club is responsible for the good administration of its finances and is expected to operate in accordance with its actual budget. If the Appellant was not in a position to pay the transfer of the Player, it should have negotiated other contractual conditions or hired a more affordable player. By not doing so and signing the Transfer Agreement, the Club obtained a preferential position vis-à-vis its direct opponents that, by respecting the Regulations, did not enter into such kind of agreement with third parties.*

*39. Likewise, the alleged lack of experience of the president of the Club cannot be considered a valid mitigating circumstance. In this respect, the Committee refers to the legal principle *ignorantia juris non excusat* and considers that SE Palmeiras is bound by the FIFA regulations regardless the level of experience of its president. In this sense, the Committee would like to refer to the reasoning previously made by the FIFA Disciplinary*

*Committee, according to which a professional club such as SE Palmeiras, having a long and consolidated tradition, is supposed to be aware of the legal framework within which it operates (cf. point II.102 of the Appealed Decision).*

40. *Also, the Committee believes that SE Palmeiras freely decided to sign the Transfer Agreement. Even though the reasons why SE Palmeiras decided to enter into the Transfer Agreement are irrelevant to establish whether art. 18bis of the RSTP was breached, the Committee is of the opinion that the Club saw in the Transfer Agreement a good opportunity to hire a player that, as confirmed by the Appellant itself, could not be afforded otherwise. Nevertheless, the Committee considers that it cannot be argued that LDU was in a position to impose the Transfer Agreement to SE Palmeiras.*

41. *Indeed, if SE Palmeiras had considered those clauses of the Transfer Agreement to be abusive, it could have refused to sign the agreement and look for another player that could be hired under other conditions. To the contrary, SE Palmeiras accepted to sign the Transfer Agreement disregarding the prohibition established under art. 18bis of the RSTP. Therefore, also this argument brought forward by the Appellant cannot be considered to be a mitigating circumstance in the present case.*

42. *Notwithstanding the foregoing, the Committee believes that the fact that SE Palmeiras independently negotiated the transfer of the Player to Grêmio is to be considered as a mitigating factor. In fact, the Committee is of the opinion that, even though some clauses of the Transfer Agreement could potentially limit the independence of SE Palmeiras and enable LDU to influence it, such an influence eventually was not exercised. Indeed, SE Palmeiras, by transferring the Player for an amount lower than the one established in the Transfer Agreement, using a mixed operation and without the prior approval of LDU, acted independently and did not allow LDU to influence its independence in transfer-related matters.*

43. *Having said that, the Committee would like to recall that the aim of art. 18bis of the RSTP is to increase the independence of clubs, their contractual stability and freedom between players and clubs, protect the integrity of the game and increase transparency and the monitoring of the players' transfers. The Committee is therefore of the opinion that this provision has an essential role and that any breach shall be sanctioned accordingly.*

44. *In the light of the foregoing, the Committee decides to decrease the fine imposed by the FIFA Disciplinary Committee. In this sense, the Committee considers a fine of CHF 25,000 to be appropriate considering the seriousness of the infringement as well as the abovementioned mitigating circumstances.*

45. *Additionally, in view of the Appellant's unlawful conduct and of the importance to guarantee the respect of FIFA regulations in general and of art. 18bis of the RSTP in particular, the Committee decides to maintain the warning issued by the FIFA Disciplinary Committee".*

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

18. On 23 November 2018, the Appellant filed a statement of appeal before the CAS against the Respondent. The Appellant nominated Mr. Daniel Lorenz, attorney-at-law in Porto, Portugal, as arbitrator. The Appellant also requested in its statement of appeal from CAS "(...) (ii) To order the FIFA to disclose the documents regarding the disciplinary proceedings against LDU, Santos FC, Sevilla FC, K St Truidense VV and FC Twente, as it will be specified on the appeal brief".

19. On 10 December 2018, the Appellant filed its appeal brief requesting, inter alia, the Panel to order FIFA to disclose the decision of the disciplinary proceeding opened against LDU, as well as several other decisions and to allow the Appellant to comment on them.
20. On 14 December 2019, the Respondent nominated Mr. Efraim Barak, Attorney-at-law in Tel Aviv, Israel, as arbitrator.
21. On 16 January 2019, the Respondent filed its answer.
22. On 17 January 2019, the CAS Court Office invited the parties to state whether they prefer that a hearing be held in the present arbitration.
23. On 23 January 2019, the Appellant replied to the CAS Court Office stating that *“Should the Panel grant the Appellant’s request and it be given an opportunity to comment (i.e. file written submissions) on the documents disclosed by FIFA (and to be disclosed by FIFA, subject to the Panel’s ruling), it does not deem a hearing necessary. Should the Panel not allow the Appellant to file written submissions on the documents disclosed by FIFA (and to be disclosed by FIFA, subject to the Panel’s ruling), it therefore wishes that a hearing be held in the case at hand”*.
24. On 24 January 2019, the Respondent wrote to the CAS Court Office that *“we do not require a hearing to be held and would agree that the Panel issues an award on the sole basis of the written submissions. However, should the Panel wish to hold a hearing, it goes without saying that we will be pleased to attend”*.
25. On 8 February 2019, the CAS Court Office informed the parties that the Panel was constituted as follows:  
  
President: Mr. Sofoklis P. Pilavios, attorney-at-law, Athens, Greece  
Arbitrators: Mr. Daniel Lorenz, Attorney-at-Law, Porto, Portugal  
Mr. Efraim Barak, Attorney-at-law in Tel Aviv, Israel
26. On 2 May 2019, the CAS Court Office informed the parties that the Panel decided to hold a hearing in this arbitration and that the Panel had decided to dismiss the Appellant’s request for production of documents by FIFA (see paras. 18 and 19 above).
27. On 7 June 2019, the CAS Court Office informed the parties that the hearing in this matter was to be held in Lausanne on 8 July 2019.
28. On 19 June 2019, the CAS Court Office sent to the parties a copy of the Order of Procedure in this matter, which was signed and returned by both parties on 19 June 2019.
29. On 8 July 2019, a hearing took place in Lausanne, Switzerland.
30. The Panel sat in the following composition:  
  
President: Mr. Sofoklis P. Pilavios, attorney-at-law, Athens, Greece  
Arbitrators: Mr. Daniel Lorenz, Attorney-at-Law, Porto, Portugal  
Mr. Efraim Barak, Attorney-at-law in Tel Aviv, Israel

31. The Panel was assisted by Mr. Daniele Boccucci, CAS Counsel.
32. 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.
33. The following persons attended the hearing:
  - The Appellant was represented by Mr Americo Espallargas, counsel;
  - The Respondent was represented by Ms Audrey Cech and Messrs Jaime Cambreleng Contreras and Jacques Blondin, counsels.
34. 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.

#### **IV. SUBMISSIONS OF THE PARTIES**

##### **A. The Appellant**

35. The Appellant's submissions, in essence, may be summarised as follows:
  - FIFA violated the Appellant's right to due process by not disclosing the contents of the decision rendered by the FIFA Disciplinary Committee in the case concerning LDU and the Transfer Agreement.
  - Article 18bis of the FIFA Regulations cannot apply on the Transfer Agreement and football clubs do not qualify as third parties under the wording of the provision, as applicable at that time. The applicable version of the provision aims to limiting the influence of third (external) parties to football, whereas LDU is not an investor or an alien party to football, but a football club and a party to the agreement in question. This is evident from the definition of "third party" which was added in the FIFA Regulations in 2014 and expressly includes football clubs, meaning that football clubs were not to be considered as third parties until that time, *i.e.* under the 2010 version of Article 18bis of the FIFA Regulations.
  - The Appealed Decision is in open contradiction with the decision of the FIFA PSC that held that the Appellant was in breach of its contractual obligations towards LDU under the provisions at stake of the Transfer Agreement (establishing a right of first refusal of LDU) and, deeming such provisions as valid, partially accepted the claim of LDU against the Appellant. In this way, the FIFA PSC decision considered the Transfer Agreement clauses, which are of a purely commercial nature, as legally binding, whereas the Appealed Decision held that they constitute a violation of Article 18bis of the FIFA Regulations and enable undue influence.

- The inclusion of clauses of that nature is absolutely common in the football world in contracts regarding the sharing of economic rights, in light of the uncertainty and risk of a player not being transferred before his contract expires. The impact of the line of reasoning of the Appealed Decision will be immense and a lot of clubs worldwide will have to face disciplinary proceedings.
- A second contradiction is to be found between the Appealed Decision and the decision passed by FIFA in the disciplinary proceeding against LDU, which found LDU not guilty of a violation. Considering that the clauses of the Transfer Agreement were more beneficial to LDU than to Palmeiras, by dismissing the charges against Palmeiras FIFA sends the message that under the FIFA rules a club is allowed to interfere in another club's business, but it is not allowed to be influenced. Additionally, how can it be that a club that was found to be able to influence another has not faced sanction, if any at least in parameters of fairness and equity, while the influenced club was found to be guilty of a disciplinary offence?
- Alternatively, the Appellant submits that the sanction imposed by the Appealed Decision should be reduced as it is disproportionate compared to sanctions imposed on clubs that have breached Article 18bis of the FIFA Regulations in much more grievous circumstances, as they were found to allow third parties, external to football, to exert influence upon them. Further than that, the Appellant finds that there are mitigating factors that should be taken into account in the matter at hand, such as the sporting and economic crisis suffered by the Appellant until 2013, the lack of experience of the club's president at the time the Transfer Agreement was concluded, the advantage enjoyed by LDU as the owner of the Player's federative rights and the fact that the Appellant did not allow LDU to exercise its rights under the Transfer Agreement as the Player was transferred without LDU's consent.

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

*“(i) To enforce CAS’ competence to rule on the matter;*

*(...);;*

*(iv) To uphold the Appeal, set aside the Appealed Decision, rule that Palmeiras did not breach Article 18bis of the Applicable Regulations and lift the warning and fine imposed on Palmeiras by the FIFA AC;*

*(v) To order FIFA to bear the costs of the proceeding, if any, and reimburse Palmeiras accordingly pursuant to Articles 105, 123.3 and 123.4 of the FDC and art. R64.5 of the Code.*

*(...). Alternatively:*

*(i) To acknowledge Palmeiras has mitigated any influence by LDU;*

*(ii) To substantially reduce the fine imposed on Palmeiras by FIFA AC;*

*(iii) To lift the warning imposed on the Appellant by the FIFA AC;*

*(vi) To order FIFA to bear the costs of the proceeding, if any, and reimburse Palmeiras accordingly pursuant to Articles 105, 123.3 and 123.4 of the FDC and art. R64.5 of the Code.*

*(...). In any event:*

*(i) To order the Respondent to pay a contribution towards the Appellant's legal fees and other expenses incurred in connection with the proceedings in an amount deemed fit by the Hon. Panel".*

## **B. The Respondent**

37. The Respondent's submissions may be summarised as follows:

- The Appellant's right to be heard is not violated by FIFA's refusal to disclose the contents of the decision taken in the disciplinary proceedings against LDU. The Appellant was given three opportunities to defend itself and state its case before FIFA bodies (FIFA TMS, FIFA Disciplinary Committee and FIFA Appeal Committee). In addition, the Appellant was not a party to the disciplinary proceedings involving LDU and, as such, it has no right of access to the file of that case, which is confirmed by CAS case-law (case 2015/A/3874, Football Association of Albania v. UEFA & Football Association of Serbia). Moreover, any comments of the Appellant on another FIFA decision are not relevant in the matter at hand, which deals exclusively with the conduct and liability of the Appellant. At any case, FIFA submits that in its press release of 27 January 2017, it had provided an explanation concerning the different outcomes of the two disciplinary proceedings ("*... all charges against the club LDU ... were dismissed given that SE Palmeiras was not granted any ability to influence LDU Quito's independence in employment and transfer-related matters...*"). Lastly, there was no motivated decision in the LDU case as LDU did not request grounds.
- A decision passed by the FIFA PSC concerning a contractual dispute does not prevent the FIFA Disciplinary Committee from deciding on breaches of the FIFA Regulations concerning clauses of said contract. The distinction of competencies between both Committees is essential as it directly determines to which extent each body can intervene, which in turn has a direct impact on the merits of the decisions. FIFA PSC renders decisions based on principles of contractual civil law whereas the FIFA Disciplinary Committee intervenes in cases of violations of private regulations of an association.
- Consequently, a contractual clause that is contrary to the private regulations of an association is not necessarily contrary to principles of contractual civil law, and any dispute arising therefrom will be dealt accordingly by the FIFA PSC, which renders decisions of a "horizontal" nature, whereas the FIFA Disciplinary Committee may equally examine a possible breach of FIFA's regulations without discussing whether the contract is valid from the perspective of civil law principles (cases of a "vertical" nature). In addition, the FIFA PSC Single Judge did in fact warn the Appellant that the content of the Transfer Agreement may correspond to a possible breach of Article 18bis of the FIFA Regulations.



- Moreover, the Appellant did not demonstrate that the clauses in dispute correspond to a common and/or worldwide practice nor that these decisions would have such consequences in football as the ones claimed by the Appellant.
- It was clear to the Appellant from the outset of the disciplinary proceedings that the applicable version of the FIFA Regulations was the 2010 edition. The FIFA Committees never made any reference to the 2015 edition of the Regulations that contained the wording “*the counter club/ counter clubs, and vice versa, or any third party*”.
- FIFA considers that the wording of the provision of Article 18bis is clear and leaves no room for possible interpretations. The provision is addressed to clubs only and it is intentionally broad, in order to encompass all types of external influence on clubs, regardless of whether this comes from another club or a person that does not belong to the football system. Moreover, since the introduction of Article 18bis, this has always prevented all types of external influence regardless of whether this came from a stakeholder belonging to the football system or not. Therefore, the theory of the Appellant that before 2015 Article 18bis did not prohibit influences exercised by another club does not stand. In fact, the implementation of the 2015 edition of the FIFA Regulations (which at any case is not applicable in the matter at hand) means that now the FIFA Disciplinary Committee can also sanction those clubs that had acquired the ability to influence and not only the influenced clubs, as was the case until that time.
- As to whether the Appellant breached Article 18bis, FIFA submits that there are several clauses by means of which the Appellant enabled LDU “*to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams*” and that the Appellant did not submit any argument proving that LDU was not entitled to exercise an influence on it, whereas a violation of Article 18bis would occur even though no influence is eventually exercised.
- The sanction imposed by the FIFA Appeal Committee is just and proportionate. A CAS Panel has the authority to amend a FIFA disciplinary decision only in cases in which it finds that the relevant body exceeded the margin of discretion accorded to it by the principle of association autonomy and acted arbitrarily, namely only if the sanction concerned is evidently and grossly disproportionate to the offence. The provision of Article 18bis plays an essential role and a breach cannot go unsanctioned. The Appellant is a renowned professional football club with ample experience in the world of professional football. Nevertheless, it freely decided to conclude an agreement bluntly opposed to the content of Article 18bis of the FIFA Regulations. Thus it is clear that the Appellant attempted to obtain an advantageous position with respect to its direct opponents which did not conclude similar contracts.
- Lastly, FIFA submits that the mitigating factors advanced by the Appellant cannot be taken into consideration: each club is responsible for the good administration of its finances and is bound by the FIFA Regulations regardless of the level of experience of its staff and administration, the Appellant could have refused to sign the Transfer Agreement and look for another player that could be hired and afforded under other conditions and there was no

absolute necessity for the Appellant to conclude a contract with LDU with the content of the Transfer Agreement.

38. 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 160532 APC BRA ZH rendered by the FIFA Disciplinary Committee on 20 April 2018 hereby appealed against.*

*3. To order the Appellant to bear all costs and legal expenses related to the present procedure”.*

## **V. JURISDICTION**

39. 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”.*

40. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) of the FIFA Statutes (2018 edition) 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 receipt of the decision in question”.*

41. 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**

42. The 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 5 November 2018 and the Appellant filed its statement of appeal with CAS on 23 November 2018.

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

44. It follows that the appeal is admissible.

## VII. APPLICABLE LAW

45. 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”.*

46. 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”.*

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

48. The applicable version of the FIFA Disciplinary Code in the matter at hand is the 2011 edition which came into force on 1 August 2011 according to its Article 147(2).

49. The applicable version of the FIFA Regulations in the matter at hand is the 2010 edition, which is not disputed by the parties. The relevant provisions of Article 18bis of the FIFA Regulations (2010 edition) determine that:

*“18bis Third-party influence on clubs*

*1. No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*

*2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article”.*

## VIII. MERITS

50. 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, par. 21).

51. In light of the facts of the case and the arguments of the parties, the Panel must first address, as a preliminary matter, the Appellant’s argument on violation of due process before the FIFA

judicial bodies and the Appellant's request for evidentiary measures. After dealing with such matters, the Panel shall examine whether the Transfer Agreement concluded between the Appellant and LDU falls under the scope of Article 18bis of the FIFA Regulations and, in the affirmative, whether the conditions for imposing sanctions for a violation of Article 18bis of the FIFA Regulations were met in the present case. Finally, the Panel shall assess the Appellant's argument that the sanctions imposed should be reduced or eliminated as disproportionate.

**A. Preliminary matters**

**1. *The Appellant's argument on violation of due process before the FIFA judicial bodies***

52. The Appellant claims that its right to due process has been violated by FIFA "*as the Respondent did not disclose the contents of the disciplinary decision rendered by FIFA to LDU and, likewise, did not allow the Appellant to comment on such decision*".

53. In this respect, the Panel notes that its power of the *de novo* power of review means that any violations of the parties' procedural rights at the previous instance can be "cured" by the appeal before CAS and the ensuing proceedings. The healing effects of the appeal to CAS have been affirmed by numerous CAS Panels (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Article R57, no. 29 with references to CAS case-law). As rightly put in the relevant legal doctrine "*Since the availability of a full-fledged appeal to the CAS has the effect of remedying prior procedural flaws, CAS panels will not entertain arguments alleging violations of due process by the first instance hearing bodies*" (RIGOZZI/HASLER, Commentary on Article R57 CAS Code, in: ARROYO M. (ed.), Arbitration in Switzerland – the Practitioner's Guide, Biggleswade 2013, p. 1038, no 10 with references).

54. As a result, the Panel cannot entertain the Appellant's argument alleging violations of due process by the previous instance bodies.

55. For the sake of completeness, however, the Panel refers to the considerations included in the following section of this award, which are also relevant for this matter, particularly as regards the relevance of *the contents of the disciplinary decision rendered by FIFA to LDU* to the present matter and the Appellant's possibility to comment on them.

**2. *The Appellant's request for evidentiary measures***

56. In its appeal brief the Appellant requested, *inter alia*, the Panel to order FIFA "*to disclose the decision of the disciplinary proceeding opened by FIFA against LDU in connection with the Transfer Agreement, as well as the transcripts of such FIFA DC's ruling, and to allow Palmeiras to comment on the documents disclosed before a decision is passed by the Panel (...)*" and "*the decisions and transcripts of the disciplinary proceedings opened by FIFA against Santos FC, Sevilla FC, K St Truidense VV and FC Twente, be those before FIFA's competent bodies or the CAS, and to allow Palmeiras to comment on the documents disclosed before a decision is passed by the Panel*".

57. In its answer the Respondent refused the Appellant's request regarding the LDU case stating that the Appellant was not a party in the parallel disciplinary proceedings involving LDU and, therefore, has no right of access to that file. The Respondent further objected to the relevance of said decision to the matter at hand and referred to the contents of its press release of 27 January 2017, which explain the reasons why all charges against LDU were dismissed. The Respondent submitted the rest of the decisions requested by the Appellant.
58. In this respect, the Panel notes that the joint reading of Article R44.3(1) and Article R57(3) of the Code provides, *inter alia*, that:
- "A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant"*.
59. In this context, the Panel notes that the Appellant did not elaborate on how *the decision of the disciplinary proceeding opened by FIFA against LDU in connection with the Transfer Agreement*, the outcome of which is not disputed between the parties, is relevant to the matter at hand. In addition, the Appellant had ample opportunity to comment on the findings of the FIFA Disciplinary Committee in the disciplinary matter related to LDU, both in the previous instance as well as in its submissions before the CAS (paragraphs 80-91 of the Appellant's appeal brief). Last but not least, the Panel notes that, as submitted by FIFA, there is no reasoned decision containing the grounds for the dismissal of the disciplinary charges against LDU.
60. In view of the above, the Panel decided to dismiss the Appellant's request for disclosure as not relevant for the resolution of this dispute considering that the outcome of the said disciplinary proceedings (that LDU was not found guilty of any disciplinary offence) is not disputed between the parties and, most importantly, that there is no reasoned decision that would offer any additional information on this issue than the ones already submitted by FIFA in its answer (paragraphs 22-33).

## **B. Appeal grounds**

### **1. *Does the Transfer Agreement concluded between the Appellant and LDU fall under the scope of Article 18bis of the FIFA Regulations?***

61. As to the first issue to be examined, the Panel observes that the wording of the applicable version of Article 18bis provides that *"No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams"*.
62. The Appellant disputes the application of Article 18bis to the matter at hand arguing in essence that: (i) the Appealed Decision erred in qualifying LDU as a third party alien to the world of football and to the Transfer Agreement; (ii) Article 18bis is not directed to football clubs but only meant to protect them from external influence and, therefore, the provisions of an agreement between clubs cannot violate Article 18bis; (iii) the 2015 version of the FIFA

Regulations expressly mentioning the “*counter club/counter clubs*” as addressees of Article 18bis is proof that football clubs were not included as such until that time.

63. As to the first point, the Panel notes that the Appellant’s line of reasoning cannot be followed. Both decisions of the FIFA judicial bodies in the previous instance clearly qualify LDU as “*one of the two parties to the Transfer Agreement*” (paragraph D.47 of the decision of the FIFA Disciplinary Committee) and as “*another party to that agreement*” (paragraph 21 of the Appealed Decision), which therefore clearly falls within the scope of Article 18bis (“... *which enables any other party to that contract*...”, emphasis added).
64. As to the second point, it is certainly true that the purpose of Article 18bis is to prevent all types of external influence on clubs. However, the Panel concurs with the argument of FIFA that the wording of the provision is intentionally broad in determining who the subject of exercise of the forbidden undue influence may be, namely *any other party to that contract or any third party*. The Panel finds that it is clear from the literal interpretation of the aforementioned extract that Article 18bis is meant to prevent anyone (either being a party to the contract concerned or not) from acquiring the ability to exercise undue influence on football clubs. The quality of the person or legal entity enabled by the football club to exercise undue influence as external (meaning outside football) is irrelevant and has no legal basis. In arguing otherwise, the Appellant is seeking to rely on a subjective interpretation which diverges from the literal interpretation of the text and has no basis. As a result, the Panel cannot follow the reasoning of the Appellant in that regard either.
65. As far as the third point is concerned, the Panel observes that the 2015 version of the FIFA Regulations is not applicable in the matter at hand. At any case, the Panel shall examine the Appellant’s argument and, in doing so, observes that whereas the provision was indeed amended, the wording “*which enables the counter club/counter clubs*” added in 2015 (compared to “*which enables any other party to that contract*” of the 2010 edition) in no way means that clubs were not included in the scope of the provision until 2015. The 2010 applicable edition of the Regulations adopts a wide scope including any and all counter-parties to the contract concerned. It is true that that scope is limited by the 2015 amendment to the rule, to define as counter parties football clubs only, but this certainly does not mean that a contract with a football club as counter party would escape the scope of the 2010 rule; the contrary is the case. The intentionally broad formulation *any other party* is decisive here; had the FIFA legislator wanted to exclude football clubs as counter parties, he would most certainly have done so in an explicit way.
66. As a result, the Appellant’s position cannot be entertained and the Panel finds that the Transfer Agreement concluded between the Appellant and LDU falls under the scope of Article 18bis of the FIFA Regulations.

## **2. *Is there a breach of Article 18bis of the FIFA Regulations?***

67. The Panel notes that the Appellant did not submit any arguments or claims disputing that the Transfer Agreement, and in particular clauses 3.1, 3.4, 3.5, 3.7, 3.8, 3.10, 3.12, 4.1, 4.4 and 4.5,

did enable LDU to exercise an influence on the Appellant, which was the finding of the Appealed Decision.

68. Therefore, there is nothing in the appeal grounds or other submissions of the Appellant to challenge such finding of the Appealed Decision.
69. As a result, and in the absence of any argument or allegation of the Appellant to the contrary, the Panel cannot but find that the aforementioned clauses of the Transfer Agreement did in fact enable (in line with the reasoning of the Appealed Decision in its relevant section, namely in paragraphs 52-82) LDU to influence in employment and transfer-related matters the independence and policies of the Appellant, which constitutes a violation of Article 18bis of the FIFA Regulations.
70. For the sake of completeness, the Panel shall examine the arguments of the Appellant on the alleged contradiction of the Appealed Decision with the decision of the FIFA PSC that held that the Appellant was in breach of its contractual obligations towards LDU under the provisions at stake of the Transfer Agreement and with the decision passed by FIFA in the disciplinary proceeding against LDU, which found LDU not guilty of a violation.
71. The Panel observes that Article 18bis is not concerned with the issue of the validity and/or the binding nature of the contractual provisions enabling a party to an agreement to exercise undue influence to its counter party-football club. This is a matter to be settled under the applicable law, which is the task of the FIFA PSC when called to examine the validity and the binding nature of the same contractual provisions in the context of a contractual dispute that is brought before the FIFA PSC. It is perfectly possible that said contractually agreed provisions are enforceable under a set of applicable (civil law) rules and at the same time fall foul of Article 18bis of the FIFA Regulations (which at any case does not and cannot determine whether they are illegal, invalid or unenforceable). Likewise in the matter at hand, the FIFA PSC confirmed that certain provisions of the Transfer Agreement had been breached while the FIFA Disciplinary Committee considered that said clauses, despite having been agreed freely by both clubs, infringed Article 18bis of the FIFA Regulations. The Panel finds no contradiction in that. Indeed, FIFA could have decided to clearly state in the FIFA RSTP that agreements that contain provisions that violates the FIFA Regulations will not be enforced or will not be “recognized”, as was done in another situation when FIFA did include such a clause in its Regulations (see, Article 18 (2) of the FIFA Regulations). But with respect to agreements such as the one at hand FIFA had chosen not to do so.
72. As to the second point, in view of the wording of the 2010 edition of Article 18bis, only the influenced football clubs were subject to the prohibition established therein and, consequently, to sanctions. This was not the case, however, for the clubs that had been enabled to influence them. As a result, the Panel finds that, even though one may express legitimate doubts as to the fairness of said provision, which probably led FIFA to amend it in 2015, it is beyond doubt that the 2010 edition of the FIFA Regulations left no discretion to the FIFA judicial bodies to sanction LDU for acquiring the ability to influence the Appellant.
73. Therefore, the arguments of the Appellant on the alleged contradiction lack legal basis.

**3. Proportionality of the sanctions imposed by the Appealed Decision**

74. Finally, as to the Appellant's proportionality defence, the Panel notes that Article 15 of the FIFA Disciplinary Code (2011 edition) 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.*

*(...)"*.

75. In addition, the Panel notes that FIFA submits that the fine imposed by the Appealed Decision is clearly below the financial sanctions imposed. The Panel also recalls that FIFA, in support of its arguments concerning the compliance of the Appealed Decision with the principle of proportionality as well as with the longstanding practice of the FIFA Disciplinary Committee, filed seven of its decisions and one CAS award in which similar cases of violations of Article 18bis of the FIFA Regulations were heard and higher fines were imposed, as set out below:

| Case number     | Fine        |
|-----------------|-------------|
| 131017 XX ZH    | CHF 50,000  |
| 131051 XX ZH    | CHF 50,000  |
| 140435 XX ZH    | CHF 50,000  |
| CAS 2017/A/5463 | CHF 55,000  |
| 150315 XX ZH    | CHF 75,000  |
| 150946 XX ZH    | CHF 60,000  |
| 160096 XX ZH    | CHF 185,000 |
| 170457 XX ZH    | CHF 110,000 |

76. The Panel concurs with FIFA that the purpose of Article 18bis of the FIFA Regulations is to increase the independence of clubs and protect the integrity of football and increase transparency and, as such, any breach should be sanctioned accordingly. In addition, the Panel finds that the mitigating factors advanced by the Appellant cannot be taken into account in order to further reduce or eliminate the fine imposed by the Appealed Decision and do not render the fine imposed in the matter at hand disproportionate.

77. In this respect, 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 cases in which the sanction imposed is grossly disproportionate. For instance, the



CAS Panel in cases CAS 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)”*.

78. 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 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, par. 60).
79. In light of all the facts of the case and, in particular, the decisions submitted by the Respondent citing fines imposed in similar cases, 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 was clearly not disproportionate in view of FIFA’s longstanding practice, as it was significantly lower than the fines imposed on other clubs for very similar violations, as set out in detail in the above considerations.
80. 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, the Panel finds that the disciplinary sanctions imposed by the Appealed Decision were proportional, appropriate and justified and are, therefore, confirmed.
81. 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 Sociedade Esportiva Palmeiras on 23 November 2018 against the decision issued on 20 April 2018 by the FIFA Appeal Committee is dismissed.
2. The decision issued on 20 April 2018 by the FIFA Appeal Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.