



**Arbitration CAS 2018/A/5663 Clube Atlético Mineiro v. Fédération Internationale de Football Association (FIFA), award of 18 September 2018**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Francisco Müssnich (Brazil); Mr Frans de Weger (The Netherlands)

*Football*

*Disciplinary sanction for failure to comply with a CAS award*

*Predictability of FIFA Disciplinary Committee's sanctions*

*Correlation between the extent of an outstanding amount due and a disciplinary sanction*

*Proportionality of disciplinary sanctions*

*Exceptional circumstances justifying a reduction of disciplinary sanctions*

*Extension of the period of grace granted to a club by FIFA's Disciplinary Committee*

- 1. Art. 64(1) in conjunction with art. 15(2) of the FIFA Disciplinary Code (FDC) are clear in setting the applicable legal framework and enabling parties to oversee the potential consequences of a failure to comply with a decision rendered by a body of FIFA. The fact that art. 15(2) FDC defines in a broad way the range of a possible fine is not *per se* in contradiction with the principles of legality and predictability.**
- 2. The circumstances pertaining to a case and a deciding body's established practice can be considered in order to decide on the disciplinary sanctions to be imposed on a debtor. However, referring only to the unpaid owed amount is sufficient to substantiate a disciplinary sanction since the outstanding amount due is the most logical nexus between the severity of a violation and the disciplinary sanctions to be imposed. The correlation between the outstanding amount due and the measure of the sanction satisfies the principles of predictability, equal treatment and procedural fairness.**
- 3. The principle of proportionality of disciplinary sanctions implies that there must be a reasonable balance between a misconduct and a sanction. To be observed, the principle of proportionality requires that (i) a measure taken by a governing body is capable of achieving an envisaged goal, (ii) it is necessary to reach an envisaged goal, and (iii) the constraints which a party will suffer as a consequence thereof are justified by the overall interest to achieve the envisaged goal.**
- 4. A debtor's impossibility to pay within a deadline due to ongoing exchange or financial restrictions imposed on a country, an ongoing armed conflicts in a country, or a debtor having undertaken concrete steps into the payment of the owed amounts through payment of instalments within a reasonable and concrete time period before the matter was submitted to the FIFA Disciplinary Committee qualify as exceptional circumstances justifying the application of leniency in the imposition of disciplinary sanctions.**

5. It can be proper and fair to extend a party's period of grace to proceed to the payment of the sums decided by FIFA's Disciplinary Committee where two distinct disciplinary proceedings were opened regarding such party's failure to pay two separate instalments under the same transfer agreement and such occurrence somehow inflated the measure of its sanction, a measure that would not probably have been imposed if said party's breaches of its obligation to pay had been considered in a single disciplinary procedure. A risk of duplication arises also because of such party's effort to pay the two outstanding instalments in portions every month, with the consequence that by the expiration of the periods of grace as set by the aforesaid deciding body, neither of the two instalments will have been completely paid.

## I. THE PARTIES

1. Clube Atlético Mineiro is a professional football club with registered office in Belo Horizonte, Brazil (the "Appellant" or the "Club"). The Club is affiliated to the Brazilian Football Confederation (*Confederação Brasileira de Futebol* - "CBF"), which in turn is a member of the Fédération Internationale de Football Association. The Club plays in the first division of the Brazilian football championship (the "Brasileirão").
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 world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

## II. BACKGROUND FACTS

3. Below is a summary of the main relevant facts, as presented in the parties' written submissions in the course of the present proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.
4. On 20 April 2012, the Club and FC Dynamo Kyiv ("Dynamo"), a football club from Ukraine, entered into a transfer agreement (the "Transfer Agreement") regarding the permanent transfer of Mr A (the "Player") to the Club. Pursuant to the Transfer Agreement, the Club undertook to pay to Dynamo a transfer fee in the amount of EUR 5,800,000, as follows:
  - i. EUR 2,300,000 due on 1 July 2012;
  - ii. EUR 760,000 due on 10 July 2013;

- iii. EUR 760,000 due on 15 December 2013;
  - iv. EUR 760,000 due on 10 July 2014;
  - v. EUR 760,000 due on 15 December 2014 (the “Fifth Instalment”); and
  - vi. EUR 460,000 due on 10 July 2015 (the “Last Instalment”).
5. On 5 August 2015, Dynamo lodged a claim against the Club before the Players’ Status Committee of FIFA (the “PSC”), claiming the amount due as Last Instalment, *i.e.* EUR 460,000. In addition, Dynamo claimed, pursuant to Article 4.2 of the Transfer Agreement, a contractual penalty in the amount of EUR 46,000, plus default interest at a rate of 1% per month until the date of effective payment by the Club, and CHF 5,000 paid as the advance of costs.
6. On 24 November 2015, the Single Judge of the PSC rendered his decision (the “PSC Decision”), the operative part of which reads as follows (emphasis in the original):
- “1. The claim of [Dynamo] is partially accepted.*
  - 2. The [Club] has to pay to [Dynamo], **within 30 days** as from the date of notification of this decision, the amount of EUR 460,000 plus 12% interest p.a. on said amount as from 11 July 2015 until the date of effective payment.*
  - 3. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA’s Disciplinary Committee for consideration and a formal decision.*
  - 4. The [Club] has to pay to [Dynamo] the amount of EUR 46,000 as a penalty fee, **within 30 days** as from the date of notification of this decision.*
  - 5. In the event that the amount due to [Dynamo] in accordance with the above-mentioned number 4. is not paid by the [Club] within the stated time limit, interest at the rate of 5% p.a. will apply as of the expiry of the stipulated time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
  - 6. Any further claim lodged by [Dynamo] is rejected”.*
7. On 14 January 2016, the grounds of the PSC Decision were communicated to the Parties.
8. On 3 February 2016, the Club filed an appeal against the PSC Decision with the Court of Arbitration for Sport (“CAS”).
9. On 13 July 2016, CAS issued an arbitral award (the “CAS Award”) with the following operative part:

*“1. The appeal filed by [the Club] on 3 February 2016 against the [PSC Decision] is dismissed.*

*2. The [PSC Decision] is confirmed”.*

10. On 7 November 2016, Dynamo informed FIFA that the Club had not fulfilled its payment obligations.
11. On 28 November 2016, the FIFA Players’ Status Department informed the Club that it had to pay immediately the amounts due to Dynamo and FIFA pursuant to the PSC Decision, as confirmed by the CAS Award.
12. On 27 February 2017, following a letter received from Dynamo dated 20 February 2017, the FIFA Players’ Status Department informed the Club that the file would be forwarded to the FIFA Disciplinary Committee (the “DC”) for consideration and a formal decision.
13. On 27 September 2017, the Secretariat to the DC informed the Club of the opening of disciplinary proceedings in respect of a violation of Article 64 of the FIFA Disciplinary Code (the “FDC”).
14. On 11 October 2017, the Club filed a submission with the DC, seeking the following relief:

*“a)(...)*

- b) To confirm that there is no factual nor legal basis to [the Club] pays any fine;*
- c) To grant to [the Club] a period of grace of 150 days as from the notification of any decision to the latter comply with the payment in full of the outstanding amount to Dynamo;*
- d) To confirm that there is no factual nor legal basis to impose any sanction whatsoever, which deducts from [the Club] any points (or relegation to a lower division) in the domestic Brazilian National Championship; and*
- e) To waive [the Club] to pay any costs whatsoever relating the ongoing proceedings.*

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

- f) To do not impose any fine on [the Club] higher than CHF 5,000 since the latter in the last months demonstrated extremely good faith with matter at hand, fulfils within the so-called “exceptional circumstances” and provide clear evidences that the payment of the outstanding [sic] to Dynamo is a matter of time;*
- g) To at least grant a period of grace of at least 120 days of notification of any decision relating to the matter at hand, to [the Club] pay the outstanding amount to Dynamo;*
- b) To condition the deduction of any point (or relegation to a lower division) in the domestic Brazilian*

*National Championship to the non-payment of the outstanding amount to Dynamo only after expired the aforementioned period of grace; and*

- i) *To do not impose on [the Club] proceedings costs higher than CHF 1,000 since the latter in the last months demonstrated extremely good faith with matter at hand, fulfils within the so-called “exceptional circumstances” and provide clear evidences that the payment of the outstanding to Dynamo is a matter of time”.*
15. On 23 January 2018, the Secretariat to the DC informed the Club that the case would be submitted to the DC for evaluation on 31 January 2018 and granted the Club a final opportunity to pay the outstanding amounts.
16. On 31 January 2018, the DC issued the operative part of its decision (the “Appealed Decision”) holding as follows<sup>1</sup>:
- “1. The [Club] is pronounced guilty of failing to comply with the [CAS Award] and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*
  - 2. The [Club] is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 60 days of notification of the present decision (...).*
  - 3. The [Club] is granted a final period of grace of 60 days as from notification of the present decision in which to settle its debt to the creditor [Dynamo] and to FIFA.*
  - 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] 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.*
  - 6. As a member of FIFA, the Brazilian Football Association is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Brazilian Football Association does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.*
  - 7. The costs of these proceedings amounting to CHF 2,000 are to be borne by the [Club] and shall be paid according to the modalities stipulated under point (...) 2. above.*

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<sup>1</sup> Point 3 of such operative part was indeed amended by the DC when the grounds in support of the Appealed Decision were issued, with the addition of the words “and to FIFA”.

8. *The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received”.*
17. On 2 February 2018, the Appealed Decision was communicated to the Club.
18. On 11 February 2018, the Club requested that the grounds of the Appealed Decision be provided.
19. On 8 March 2018, the grounds of the Appealed Decision were communicated to the Club. They read, in the pertinent portions, as follows:
  5. *In view of what has been explained (...) above, the Committee is not allowed to analyse the [CAS Award] 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 CAS.*
  6. *In this respect, the Committee first acknowledges that the debtor apparently faced “several problems with creditors, notably, the Brazilian taxes authorities”, and that it reached a “formal agreement” on a “payment plan” with the Brazilian tax authorities. In particular, the Committee observes that the debtor allegedly started to “comply (...) with the terms and conditions” of said agreement with the tax authorities and that therefore the payment of the outstanding amounts due to the creditor “is a matter of time”.*
  7. *In light of these elements, the Committee finds it worthwhile to emphasise that a club has the duty to be aware of its actual financial strength, but also to constitute provision in anticipation of possible issues and finally to conclude contracts that can be fulfilled. In other words, the principle of pacta sunt servanda – more relevant in the context of contractual dispute per se – is of paramount importance for FIFA and a key issue to be protected among others by the Regulations on the Status and Transfer of Players. To that end, the Committee equally refers to the content of art. 2 of the Swiss Civil Code, according to which “[e]very person is bound to exercise his rights and fulfil his obligations according to the principle of good faith” (cf. in particular par. 45 ff. CAS 2010/A/2144 [...]). Thus, the sole fact that the debtor may be undergoing financial problems does not exonerate it from its obligations to pay the outstanding amounts owed to the creditor.*
  8. *Additionally, the Committee highlights that, on the basis of the documents at his disposal, it has no other alternative but to conclude that the parties did not reach any agreement in relation to the payment of the amount due to the creditor, which could justify a delay of said payment.*
  9. *Concerning the debtor’s request to be granted a final period of grace of 150 days (or alternatively 120 days) to pay the outstanding amount due to the creditor, the Committee recalls that due to the fact that the decision passed by the Single Judge of the Players’ Status Committee on 24 November 2015 is final and binding, it cannot decide to grant a possible deadline extension to pay the outstanding amount due and/or to impose a possible payment plan. As a consequence, a possible deadline extension and/or a possible payment plan would have to be agreed upon directly with the creditor, in the present case [Dynamo], which at its own discretion can accept or not the deadline extension and/or payment plan*

*proposed. In view of the foregoing, the Committee is eager to underline that in casu, according to the debtor, the creditor decided to ignore by the payment plan proposed by the debtor.*

10. *The Committee subsequently emphasises that, as the debtor did not fully comply with the [CAS Award] and is consequently withholding money from the creditor and FIFA, it is considered guilty under the terms of art. 64 of the FDC.*
11. *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 amounts 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 amounts due. In view of all the circumstances pertaining to the present case and by taking into account the outstanding amounts due, the Committee regards a fine amounting to CHF 25,000 as appropriate. This amount complies with the Committee's established practice.*
12. *In application of art. 64 par. 1 b) of the FDC, taking into consideration that the debtor already owes money to the creditor for a considerable period of time, the Committee considers a final deadline of 60 days as appropriate for the amounts due to be paid to the creditor and FIFA.*
13. *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.*
14. *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.*
15. *The Committee decides based on art. 105 par. 1 of the FDC that the costs and expenses of these proceedings amounting to CHF 2,000 shall be borne by the debtor".*

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

20. On 29 March 2018, the Appellant filed with CAS a statement of appeal pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code") against FIFA to challenge the Appealed Decision. In its statement of appeal, the Appellant nominated Mr Francisco Müssnich, Attorney-at-law in Rio de Janeiro and São Paulo, Brazil, as arbitrator.
21. On 13 April 2018, the Appellant filed its appeal brief, pursuant to Article R51 of the Code.

22. On 17 April 2018, the Respondent informed the CAS Court Office that it nominated Mr Frans de Weger, attorney-at-law, in Haarlem, the Netherlands, as arbitrator.
23. On 14 May 2018, the Respondent filed with CAS its answer, in accordance with Article R55 of the Code.
24. On 29 May 2018, pursuant to Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:
  - President: Prof. Luigi Fumagalli, Professor and attorney-at-law, in Milan, Italy;
  - Arbitrators: Mr Francisco Müssnich, Attorney-at-law in Rio de Janeiro and São Paulo, Brazil;  
  
Mr Frans de Weger, attorney-at-law, in Haarlem, the Netherlands.
25. On 8 June 2018, the Parties were informed that a hearing would be held on 2 July 2018 in Lausanne, Switzerland.
26. On 14 June 2018, the CAS Court Office issued, on behalf of the President of the Panel, an order of procedure (the “Order of Procedure”), which was signed by the Club and by FIFA on 21 June 2018.
27. On 2 July 2018, a hearing was held in Lausanne, Switzerland. In addition to the Panel and Mrs Delphine Deschenaux-Rochat, Counsel to the CAS, the following persons attended the hearing:
  - For the Appellant: Mr Carlos Fabel, Financial Director of the Club, and Mr Breno Costa Tannuri, counsel
  - For the Respondent: Mr Julien Deux, Group Leader, and Mr Baptiste Buntschu, Junior Legal Counsel, FIFA Disciplinary Department.
28. At the opening of the hearing, the Parties confirmed that they had no objections to the appointment of the Panel. The Appellant, then, indicated that a portion of the request for relief, as specified in the appeal brief, was the result of a clerical mistake: more specifically, the “*Second*” request in the primary case should be deleted.
29. The Panel, then, after introductory statements by the counsel of the Club, heard declarations of Mr Carlos Fabel, Financial Director of the Club. In his deposition<sup>2</sup>, Mr Fabel summarized the financial conditions of the Club and the efforts made to pay all outstanding debts. In that context, Mr Fabel indicated that a payment plan has been adopted (even though it has not been accepted by Dynamo) and complied with in order to pay Dynamo the amounts due under the

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<sup>2</sup> The summary which follows is intended to give an indication of only a few key points touched at the hearing. The Panel emphasises that it considered the entirety of the declarations made by Mr Fabel at the hearing.

Transfer Contract: as a result, the first four instalments (see para. 4 above) have been fully paid, the Fifth Instalment has been partially paid (in the amount of EUR 440,000, corresponding to 4 payments of EUR 110,000 each); and the Last Instalment (object of the PSC Decision and of the CAS Award) has also been partially paid (in the amount of EUR 150,000, corresponding to 3 payments of EUR 50,000 each). In support of the declarations of Mr Fabel the Club filed two new documents concerning payments made on 26 June 2018 to Dynamo for EUR 110,000 and EUR 50,000 with regard to the Fifth Instalment and the Final Instalment respectively.

30. The Parties, in their submissions in support of their respective cases, underlined *inter alia* the following:
  - i. the Appellant made reference to all proceedings before FIFA and CAS that it has been subjected to, including the CAS arbitration 2018/A/5551 concerning a decision taken by the DC on 20 July 2017 with regard to the Fifth Instalment<sup>3</sup>. It then insisted that FIFA breached the “due process” principle, insofar as the Appealed Decision made reference to the longstanding practice of FIFA, whereas the jurisprudence of the DC is not publicly available. In addition, the Appellant underlined that the DC failed to properly consider the efforts made by the Club to meet its financial obligations, and to overcome the problems it had, caused, *inter alia*, by actions taken by the tax authorities and the prohibition of TPO, which created a cash flow problem. Finally, the Club reiterated that the principle of proportionality had not been observed, since there was another possible sanction (ban on transfer of players) which was less onerous, but suitable to reach the same purpose sought by the point deduction, which would imply a loss of classification in the *Brasileirão* and a significant reduction of earnings;
  - ii. the Respondent noted that the problems faced by the Club were caused by a lack of financial means, which is of no excuse. In any case, the sanction imposed is fully justified and proportionate to the disciplinary violation: a different sanction would not be effective.
31. At the conclusion of the hearing, the Parties, after their final submissions, expressly stated that their right to be heard and to be treated equally in the CAS arbitration proceedings had been fully respected.

#### IV. THE POSITION OF THE PARTIES

32. The following outline of the Parties’ positions is illustrative only and does not necessarily comprise every submission advanced. The Panel confirms, however, that it has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

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<sup>3</sup> The object of such arbitration, as explained at the hearing, is the failure to comply with an award rendered by CAS on 13 July 2016 (CAS 2015/A/4121), which ordered the Club to pay to Dynamo the amount of EUR 760,000, plus EUR 76,000 as contractual penalty. As a result, the DC imposed on the Club a fine of CHF 30,000, granted a final grace period of 90 days, and set a deduction of 6 points to be applied in the absence of payment to Dynamo within the grace period.

**A. The Position of the Appellant**

33. The statement of appeal filed by the Appellant contained the following requests for relief:

*“FIRST – To dismiss in full the Appealed Decision;*

*SECOND – To accept the present appeal;*

*THIRD – 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 paid to the CAS; and*

*FOURTH – 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”.*

34. The requests for relief submitted by the Appellant in its appeal brief (and as modified with respect to the “SECOND” point, withdrawn at the hearing: para. 28 above) are the following (emphasis in original):

*“FIRST – To confirm that the Appealed Decision is null;*

*(...)*

*THIRD – 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*

*FOURTH – 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:*

*FIFTH – To amend the Appealed Decision as follows:*

*1. (...)*

*2. The club Atlético Mineiro is ordered to pay a fine to the amount of CHF 12,500. 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. 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, Football Club Dynamo Kyiv, and to FIFA.*

*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 a ban from transferring players during 6 months will be*

*applied. Once the creditor has filed this request, the debtor will be automatically banned without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the transfer ban will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee; and*

- 5. If the club Atlético Mineiro still fails to pay the amount due even after the aforementioned transfer ban, the FIFA Disciplinary Committee will decide on a possible deduction of points from the debtor's first team in the domestic league championship.*
- 6. If the club Atlético Mineiro still fails to pay the amount due even after deduction of the points in accordance with point III./4 above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.*
- 7. As a member of FIFA, the Brazilian Football Association is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Brazilian Football Association does not comply with this decision despite being ordered to do so, the Disciplinary Committee will decide on appropriate sanctions on the matter. This can lead to expulsion from all FIFA competitions.*
- 8. The costs of these proceedings amounting to CHF 2,000 are to be borne by Clube Atlético Mineiro and shall be paid according to the modalities stipulated under point III/.2 above.*
- 9. The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received.*

*and*

*SIXTH – 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*

*SEVENTH – 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:*

*EIGHTH – To amend the Appealed Decision as follows:*

- 1. (...)*
- 2. The club Atlético Mineiro is ordered to pay a fine to the amount of CHF 12,500. 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. *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, Football Club Dynamo Kyiv, and to FIFA.*
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 four (4) point [sic] 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; and*
5. (...)
6. (...)
7. (...)
8. (...)

*NINTH – 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*

*TENTH – 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”.*

35. The submissions of the Appellant, as contained in its written submissions and oral pleadings, in support of its prayers for relief may be summarized as follows:
  - i. pursuant to the CAS jurisprudence, and in accordance with Swiss law, sports organisations cannot impose sanctions without a proper legal or regulatory basis: therefore, FIFA has to comply with its own Statutes. In addition, such sanctions, whenever established or imposed, must be predictable. In other words, sanctions must comply with the fundamental “principle of legality” and the “predictability test”. Therefore, the Appealed Decision is not valid, because it did not depend on clear and predictable rules, in combination with its grounds and the criteria used;
  - ii. as to the fine imposed on the Club:
    - Article 64 para. 1 (a) FDC, read in conjunction with Article 15(2) FDC, provides that fines may range from CHF 300 to CHF 1,000,000. This minimum and maximum is not enough to comply with the “predictability test”, as the rule does not clarify which factors are considered relevant in establishing the fine to be imposed;

- in deciding to impose on the Club a fine of CHF 25,000, the DC used as main criteria the circumstances of the matter at hand, the amount owed by the Club, and the DC's established practice. If no impediment is found for the DC to use the referenced elements to establish the fine imposed on the Club, this does not mean that necessary grounds must not be provided. However, the reference in the Appealed Decision to "*the circumstances pertaining to the present case*" does not provide any clarification as to what this meant and how it influenced the fine imposed on the Club. By failing to render a decision with the necessary grounds and in a predictable manner, therefore, the FIFA rules and the principles of equality of treatment and due process were violated;
  - the Appealed Decision also made reference to the amount owed by the Club to justify the fine. However, the DC failed to clarify how the amount due could affect the *quantum* of the fine. This suggests that the DC tried to use a sort of proportionality parameter between the amount due and the fine imposed, but there is no indication how the amount of CHF 25,000 was set: for instance, the Appealed Decision does not contain any reference to other decisions to conclude that a fine of CHF 25,000 was fair and suitable;
  - in the same way, the Appealed Decision does not explain what the DC's "*established practice*" entails. By failing to do so, the Appealed Decision failed to respect fundamental principles of Swiss law;
- iii. as to the deduction of points:
- the Appealed Decision indicates that, pursuant to Article 64 para. 3 FDC, it must be proportionate to the amount owed. However, it is not clarified how such mechanism should work;
  - the Appealed Decision contains a reference to the DC's "*established practice*", without providing any clear or further definition as to what this entails. The DC did not refer to any other decisions. Since the deduction of points is a very severe sanction, and the DC failed to provide grounds, fundamental legal principles and premises of Swiss law were violated;
- iv. the period of grace of 60 days is unreasonable, as it does not make it possible for the Club to pay the outstanding amount due to Dynamo, and is unsupported by grounds justifying it;
- v. the equality of treatment was violated. In previous decisions of the DC sanctions corresponding to those applied by the Appealed Decision were imposed in cases where the outstanding amounts were much larger. This behaviour is actually in clear dissonance of the alleged "*well-established practice*" of FIFA;
- vi. the principle of proportionality was violated. In general, a sanction must be adequate,

necessary and proportionate, but the Appealed Decision failed to comply with all three of these prerequisites. The sanctions imposed on the Club in fact are not adequate, because the DC failed to attend to the principle of transparency, comprehensibility and plausibility. The possible deduction of 6 points is also not justified, as the DC had other alternatives at its disposal that would not disrespect the sporting integrity, such as for instance the imposition of a transfer ban. In imposing such severe disciplinary measures, the DC should have taken into account that the Club confirmed its debt to Dynamo and that the payment of the outstanding amount was a matter of time and a result of contingent and unexpected circumstances faced by the Club a few years ago. In addition, the sanctions were not necessary, because no reference is made in the Appealed Decision to other decisions, justifying the proportionality of the fine and the possible deduction of 6 points. Finally, imposing a fine of CHF 25,000 on the Club, taking into consideration in particular the outstanding amount in the case at stake, is highly excessive and therefore in violation of the principle of *“proportionality stricto sensu”*;

- vii. there is also a violation of due process and procedural fairness. The sanction imposed by means of the Appealed Decision was premised on *“the Committee’s longstanding practice”* or *“the Committee’s longstanding jurisprudence”*, while no access to such *“practice”* or *“jurisprudence”* is possible, and no further indications as to its meaning and content is given;
- viii. in the jurisprudence of the DC sometimes *“exceptional circumstances”* are taken into account (*e.g.*, exchange or financial restrictions imposed on a country, ongoing armed conflicts in a country, or the debtor having taken concrete measures into the payment of the owed amounts through payment of instalments). The behaviour of the Club in the matter at hand complies with this concept of *“exceptional circumstances”* by addressing a payment plan to Dynamo twice and taking concrete steps to pay the amounts due under the Transfer Agreement, while the failure to fulfil the Club’s liabilities was caused by *“an unexpected and abruptly scenario, which will never ever repeat again”*, and chiefly by the enforcement by the Brazilian tax authorities of debts created by the previous board, which led to the block of the Club’s bank accounts;
- ix. alternatively, the sanctions imposed on the Club should be reduced on the basis of the principle of proportionality, taking into account that the Club confirmed its debt towards Dynamo, resulting from the years between 2013 and 2015, when it was unable to operate its bank accounts for a few months and its assets were summarily confiscated by the Brazilian tax authorities, and is paying it in instalments. Therefore, the fine to be imposed on the Club should not exceed CHF 12,500 and the deduction of points should be replaced with a transfer ban, or reduced to 4 points. Finally, the period of grace granted to the Club should be extended to 150 days.

## **B. The Position of the Respondent**

- 36. In its answer, FIFA submitted the following requests for relief:

*“1. To reject the Appellant’s appeal in its entirety.*

*2. To confirm the decision 170953 PST BRA ZH rendered by the FIFA Disciplinary Committee on 31 January 2018 hereby appealed against.*

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

37. The position of FIFA in support of its requests may be summarised as follows:

- i. according to the CAS jurisprudence, the right of associations to impose sanctions or disciplinary measures on members is not the exercise of a power delegated by the State, but rather it is the expression of the freedom of associations and federations to regulate themselves. Indeed, the FIFA disciplinary proceedings are meant to protect the essential objectives of FIFA: the sanctions set out in Article 64 FDC are designed to put the debtor under pressure to finally comply with decisions rendered by FIFA bodies or by CAS upon appeals therefrom. However, the proceedings are to be considered not as enforcement but rather as the imposition of a sanction for breach of the association’s regulations and under the terms of association law;
- ii. there is a general consensus that certain contents of the *nulla poena sine lege* principle are also applicable to disciplinary provisions and proceedings in the context of sports organisations. The CAS in particular has adopted certain contents of this principle with regard to disciplinary proceedings and regulations of sports organisations by establishing a so-called “*predictability test*”. In CAS jurisprudence, disciplinary provisions and proceedings of sports organisations are considered to be in line with the principle of *nulla poena sine lege* if the relevant regulations and provisions emanate from duly authorized bodies; the relevant regulations and provisions have been adopted in constitutionally proper ways; the relevant regulations and provisions are not the product of an obscure process of accretion; the relevant regulations and provisions are not mutually qualifying or contradictory; the relevant regulations and provisions 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 there is a clear connection between the incriminated behaviour and the sanction imposed. All these preconditions are complied with in the matter at hand. In fact:
  - it was clear for the Club that not fulfilling its financial obligations towards the creditor was wrong, that it was breaching disciplinary regulations and that an appropriate sanction would therefore be 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. On the contrary, CAS jurisprudence has determined that “[s]uch fundamental principles are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction. The fact that the competent body applying the FIFA DC has the discretion

*to adjust the sanction mentioned in the rules deemed applicable to the individual behaviour of a player breaching such rules is not inconsistent with those principles*". Also the Swiss Federal Tribunal considered FIFA's sanctioning system lawful;

- the Club cannot argue that the Appealed Decision was not predictable, in particular considering that the DC already imposed similar sanctions on the Club for similar outstanding amounts due on a few occasions;
- iii. it is undisputed that the Club did not comply with the PSC Decision. Since the issuance of this decision, no agreement on a payment plan was reached with the creditor;
- iv. contrary to the Club's contention, there are no "*exceptional circumstances*" in the matter at hand. Indeed, the Club did not provide proof of its allegation that assets had been confiscated. Furthermore, between 10 July 2015 (the date on which the Last Instalment fell due) and 31 January 2018 (the date of the Appealed Decision), the Club internationally engaged 7 new players in exchange for considerable transfer fees (EUR 9,158,820 and USD 2,150,000). As a result, it appears that the Club deliberately chose to not pay the amounts due to the creditor, while still proceeding with the payment of transfer fees in order to engage new players and prioritising such transactions over the one for which it was now sanctioned. During the same period, the Club also internationally released 9 players and was entitled to receive EUR 21,508,772.26 and USD 8,200,000 in exchange;
- v. in accordance with CAS jurisprudence, the Panel shall amend a disciplinary decision of a FIFA judicial body only in cases in which it finds that the relevant FIFA judicial body exceeded the margin of discretion accorded to it by the principle of association autonomy. This is not the case if the Panel merely disagrees with a specific sanction, but only if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence;
- vi. the DC always deals with its cases on a case-by-case basis, analysing and taking into account all the specific circumstances of each case. In imposing sanctions, the DC always takes into consideration the outstanding amount. In the matter at hand, the DC took into account the outstanding debts due by the Club. A fine lower than CHF 25,000 would not have had an incentive effect on the Club to pay its debt towards the creditor, especially considering that the Club had already been fined by the DC on the basis of Article 64 FDC on several occasions;
- vii. in comparable cases in which similar total outstanding amounts were due decisions were passed by the DC in which the same fine of CHF 25,000 was imposed, the same 60-day period of grace was granted and 6 points were threatened to be deducted in case of persistent failure and as per the creditor's request. CAS jurisprudence determines that a fine imposed on a club which is "*equal to fines imposed on other clubs for very similar violations*" cannot be considered "*disproportionate in view of the [DC's] longstanding practice*". The DC has applied Article 64 FDC in a constant and consistent manner and therefore created

a longstanding practice. The fact that the DC's decisions are not public does not mean that the sanction was not predictable, nor that the Club was in a detrimental position. A fine representing approximately 5% of the total amounts due cannot be validly considered as being "highly excessive" or "creating additional financial difficulties" on the Club;

- viii. as to the alleged existence of "exceptional circumstances", the fact that a debtor has undertaken concrete steps into the payment of the owed amounts through payment of instalments within a reasonable and concrete period before the matter was submitted to the DC has been considered by the DC as an "exceptional circumstance" when analysing cases concerning the application of Article 64 FDC. The Club now appears to completely disregard all "exceptional circumstances" previously invoked. The mere fact that the Club paid another debt to Dynamo is not relevant for the present proceedings;
- ix. as to the Club's request to be granted a period of grace of 150 days instead of 90 days, there are no "exceptional circumstances" justifying such an extension.

## V. JURISDICTION

38. Article R47 of the Code provides as follows:

*"An appeal against the decision of a federation, association or sports-related body may be filed with CAS 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".*

39. The jurisdiction of CAS to hear the appeal filed by the Club against the Appealed Decision is not disputed and is contemplated by Article 57 *et seq.* of the Statutes of FIFA in the following terms:

Article 57 "Court of Arbitration for Sport (CAS)":

*"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.*

*2. 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".*

Article 58 "Jurisdiction of CAS":

*"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.*

*2. Recourse may only be made to CAS after all other internal channels have been exhausted".*

40. It follows, therefore, that CAS has jurisdiction to decide on the present dispute.

## **VI. ADMISSIBILITY**

41. Under Article R49 of the Code:

*“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”.*

42. Article 58 para. 1 of the Statutes of FIFA in that connection confirms that:

*“Appeals against final decisions passed by FIFA’s legal bodies (...) shall be lodged with CAS within 21 days of notification of the decision in question”.*

43. The grounds of the Appealed Decision were notified to the Appellant on 8 March 2018 and the Appellant filed its statement of appeal on 29 March 2018. Therefore, the 21-day deadline to file the appeal was met. In addition, the Statement of Appeal complies with all requirements of Article R48 of the Code.

44. The appeal, therefore, 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

46. The Panel notes that Article 57 para. 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 FDC, as in force at the relevant time of the dispute, shall be applied primarily, and Swiss law shall be applied subsidiarily.

48. In the context of the present dispute, Article 64 para. 1 FDC was specifically applied. Such provision reads as follows:

*“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”.*

49. Article 15(2) FDC then provides as follows:

*“The fine shall not be less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than CHF 1,000,000”.*

## VIII. MERITS

50. The object of the present dispute is the Appealed Decision, whereby the DC sanctioned the Club with a fine of CHF 25,000, to be paid within 60 days, for failure to comply with the CAS Award (which had confirmed the PSC Decision), granted a final period of grace of 60 days in which to settle its debt to Dynamo and FIFA and provided for the deduction of 6 points in the *Brasileirão* to be applied in the event the payment is not made before the expiration of the final period of grace. The Club challenges the Appealed Decision and requests it to be set aside; FIFA defends the Appealed Decision and asks the Panel to confirm it.

51. In essence, the Appellant submits that the Appealed Decision, and the specific sanctions imposed by the DC, are invalid because the principles of legality, predictability, equality of treatment, due process, procedural fairness and proportionality were breached. In addition, in the Appellant’s opinion, the DC failed to consider the “*exceptional circumstances*” of its case.

52. As a result of such submissions, the main issues to be resolved by the Panel are the following:

- i. is the Appealed Decision invalid?
- ii. are the sanctions imposed by the DC adequate and proportionate?

### *i. Is the Appealed Decision invalid?*

53. The Panel observes that Article 64 FDC provides FIFA with a clear legal basis to sanction a club that failed to pay another club a sum of money following an instruction to do so by the PSC. Indeed, Article 64 para. 1 FDC dictates that in case of such violation the club concerned: (i) will be fined; (ii) will be granted a final deadline before sanctions are implemented; and (iii)

will be warned and notified that in case of continued failure to comply with the decision concerned points will be deducted, the relegation to a lower division may be ordered, or a transfer ban may be pronounced.

54. At the same time, the Panel notes that it is undisputed that at the time the DC rendered the Appealed Decision (on 31 January 2018) the Club had not complied – not even partially – with the PSC Decision (issued on 24 November 2015) and the CAS Award (dated 13 July 2016) which confirmed it.
55. As a result, the Panel observes that the DC complied with the terms of Article 64 para. 1 FDC in the sense that it imposed a fine of CHF 25,000 on the Club and warned and notified the Club that in case of persistent failure to comply with the CAS Award, beyond the final period of grace of 60 days, 6 points would be deducted from the first team of the Club in the domestic league championship. Indeed, the fine of CHF 25,000 imposed on the Club by means of the Appealed Decision fell within the limits set by Article 15 para. 2 FDC.
56. In support of its request that the Appealed Decision be set aside, the Club maintains however that the sanctions thereby imposed were in contradiction with the principles of legality and predictability.
57. Contrary to the Appellant's submissions, the Panel finds that Article 64 para. 1 FDC, in conjunction with Article 15 para. 2 FDC, clearly sets out the legal framework applicable in the event of a club's failure to comply with payment obligations set by a body of FIFA. It therefore enables the Club to foresee the potential consequences of failing to comply with a decision passed by the PSC. Indeed, on its plain reading, it is clear that under Article 64 FDC a club, obliged to comply with the decisions of FIFA because of its affiliation to a domestic federation member of FIFA, may be subject to a number of measures in the event it disregards a decision ordering it to pay an amount of money to another club: in other words, not only the existence of a violation, but also the kind of sanction is clearly indicated. The fact that Article 15 para. 2 FDC defines in a broad way the range of a possible fine (from CHF 300 to CHF 1,000,000) is not *per se* in contradiction with the principles of legality and predictability: actually, the existence of a margin of appreciation allows FIFA to identify the proper measure of the fine according to the circumstances of the case.
58. In addition, the Panel remarks that such provision has been applied by CAS in several arbitrations and considered also by the Swiss Federal Tribunal (*e.g.*, decision of 5 January 2007, 4P.240/2006) and represents a fundamental feature of the FIFA regulatory framework, as it reinforces the obligations of the (direct and indirect) members of FIFA to abide by the decisions passed by its bodies: a club disrespecting an obligation can clearly expect that a sanction be imposed on it as a result of its behaviour.
59. Finally, the Panel is aware (although this fact does not affect the basis of the decision of the Panel) that it is not the first case that the Club had been faced with sanctions adopted under Article 64 FDC. As noted by FIFA, at the time the Appealed Decision was passed, a number of decisions concerning payments owed to other clubs, and to Dynamo also under the Transfer

Agreement, had been adopted against the Club. The application of sanctions for failure to comply with PSC decisions therefore could be largely expected by the Club, which could have avoided them by simply complying with binding payment obligations.

60. The Club criticizes as applied in an unpredictable way, and in violation of the principles of equal treatment and procedural fairness, also the three specific criteria that the DC adopted in imposing the relevant sanctions, *i.e.* the “*circumstances pertaining to the present case*”, the “*outstanding amounts due*” and the “*Committee’s established practice*”.
61. The Panel finds that it may have been worthwhile for the DC to specify the “*circumstances pertaining to the present case*” and to add whether these circumstances were considered to be of an aggravating or mitigating nature, and what the “*Committee’s established practice*” entailed, especially considering that the case law of the DC was not publicly available at the time. However, the Panel finds that the reference to the “*outstanding amounts due*” is sufficient to corroborate the sanctions imposed. Indeed, the Panel finds that the “*outstanding amounts due*” constitutes the most logical nexus between the severity of the violation committed and the sanctions to be imposed. As a result, irrespective of the absence of any explanation as to the meaning and effect of the “*circumstances pertaining to the present case*” and of the “*Committee’s established practice*”, the correlation between the “*outstanding amounts due*” and the measure of the sanction satisfies the principles of predictability, equal treatment and procedural fairness: any club could expect in good faith that the more severe is its violation, the more severe is the sanction it might be subjected to.
62. The Appellant criticizes the legality *per se* of the Appealed Decision on the basis of an alleged violation of the principle of proportionality, which would lead to the setting aside of the Appealed Decision because the principles of “*transparency, comprehensibility and plausibility*” were violated.
63. The Panel cannot follow the Appellant’s reasoning. The DC in fact indicated the elements (mentioned above) on which its determinations regarding the fine, the period of grace and the points to be deducted were based. The Panel finds those criteria, and chiefly the reference to the “*outstanding amounts due*”, to offer a reasonable basis for the determination of the sanction in accordance with Article 64 para. 1 FDC, although there is clearly room to further explain and develop the legal rationale behind the criteria. Therefore, the principles of “*transparency, comprehensibility and plausibility*” were not violated.
64. Consequently, the Panel finds that the Appealed Decision is not invalid.

***ii. Are the sanctions imposed by the DC adequate and proportionate?***

65. The Appellant invokes the principle of proportionality also as a ground to challenge the individual measures adopted by the DC for its failure to comply with the CAS Award. In addition, the Club submits that the fact that it offered payment plans and partially paid its debts to Dynamo (caused by a past and unexpected adverse scenario) during the present proceedings before CAS are to be considered as “*exceptional circumstances*” justifying a reduction of the sanctions.

66. The Panel notes that the principle of proportionality implies that there must be a reasonable balance between the kind of the misconduct and the sanction. To be observed, the principle of proportionality requires that (i) the measure taken by the governing body is capable of achieving the envisaged goal, (ii) the measure taken by the governing body is necessary to reach the envisaged goal, and (iii) the constraints which the affected person will suffer as a consequence of the measure are justified by the overall interest to achieve the envisaged goal. In other words, to be proportionate a measure must not exceed what is reasonably required in the search of the justifiable aim (CAS 2005/C/976 & 986, paras. 139-140, citing CAS precedents, legal doctrine and Swiss jurisprudence).
67. In addition, the Panel remarks that FIFA has confirmed that its DC considered in the past the following circumstances as being exceptional: (i) the impossibility to pay within a given deadline due to ongoing exchange or financial restrictions imposed on the country (Argentina and Greece); (ii) the ongoing armed conflicts in a country (Ukraine and Libya); and (iii) having undertaken concrete steps into the payment of the owed amounts through payment of instalments within a reasonable and concrete time period before the matter was submitted to the DC.
68. With regard to the issue of proportionality, the Panel notes the following:
- i. as observed above, the fine of CHF 25,000 falls within the scope allowed by Article 15 para. 2 FDC. However, this does not mean that a fine cannot be disproportionate *stricto sensu*. Whether or not a fine is to be considered disproportionate is to be considered on the basis of the specific circumstances of the case;
  - ii. the fact that the DC imposed in the past fines of similar amount for much higher debts does not prove that the fine of CHF 25,000 in the matter at hand is necessarily disproportionate. Indeed, FIFA provided in this arbitration indications that the sanctions imposed on the Club correspond to those applied in equivalent cases;
  - iii. considering that the overdue amount to Dynamo and FIFA in the matter at hand under the PSC Decision is approximately CHF 600,000 (corresponding to EUR 460,000, plus EUR 46,000, plus CHF 25,000), the Panel finds that, even disregarding the considerable amount of interest to be paid over the amount of EUR 460,000 at 12% *per annum* since 11 July 2015, it cannot be concluded that the sanctions imposed by means of the Appealed Decision are disproportionate. Indeed, the fine of CHF 25,000 amounts to around 4.2% of the Club's outstanding debt (excluding interest), whereas CAS has already determined (in another case coincidentally involving the Club) that a fine of CHF 25,000 representing 4.37% of the overdue amount was not considered disproportionate (CAS 2016/A/4719, para. 93 of the abstract published on the CAS website);
  - iv. the Club violated Article 64 FDC several times in the past, which can justifiably be considered as an aggravating factor, justifying the imposition of a higher sanctions as would be imposed in the absence thereof;

- v. as to the Club's argument that the DC should have imposed a transfer ban rather than a deduction of points, the Panel acknowledges that both sanctions have different consequences, but finds that both options were at the disposal of the DC pursuant to Article 64 para. 1(c) FDC and that its decision to opt for the deduction of points was not disproportionate, also considering that this indeed appears to have been the general practice of the DC;
  - vi. the fine imposed does not pose a threat for the future existence of the Club. Any such conclusion would be contradicted by the fact that, as highlighted by FIFA, the Club was quite active on the international transfer market between the date on which the debts towards Dynamo fell and the date the Appealed Decision was issued. Against this background, the payment of a fine in the amount of CHF 25,000 does not seem unreasonable and unaffordable.
69. Consequently, the Panel finds that the disciplinary sanctions imposed on the Club by the DC are not disproportionate.
70. As mentioned, the Club submits that "exceptional circumstances" exist justifying a reduction of the sanctions.
71. The Panel however finds that the mere fact that the Club offered a payment plan to its creditor could only be relevant if the creditor had accepted such payment plan. There is however no evidence on file that Dynamo ever accepted the payment plans offered to it by the Club. In this regard, the Panel notes that also Mr Fabel admitted during the hearing that no payment plan was accepted. Therefore, the offering of a payment plan and actually complying with it in the absence of an formal agreement of the creditor does not actually amount to an "*exceptional circumstance*". Actually, the Club is only complying with its "ordinary" obligation to pay its debts.
72. In that regard, however, the Panel notes an important point. As evidenced in the course of the arbitration, at the time of the hearing the Club had paid to Dynamo EUR 150,000 towards the Final Instalment (object of this arbitration) and EUR 440,000 towards the Fifth Instalment (object of the parallel CAS proceedings 2018/A/5551), in an effort to fully pay its debts to Dynamo under the Transfer Agreement. On such basis the Panel remarks that:
- i. if the Club had referred all its payments to the Final Instalment, this would have been entirely paid, and therefore the Club would have avoided the threat of points deduction;
  - ii. the fact that two distinct proceedings were opened because of the Club's failure to comply with its obligation to pay two separate instalments under the same Transfer Agreement somehow "inflated" the measure of the sanction, and chiefly the threatened points deduction, that was imposed on the Club, which risks a total deduction of 12 points in the Brazilian championship – a measure that would not probably have been imposed if the failure to comply with the payment obligations under the Transfer Agreement had been considered in a single disciplinary procedure. The risks of this duplication arises also because of the Club's effort to pay the Fifth Instalment and the

Final Instalment in portions every month, with the consequence that by the expiration of the periods of grace as now set neither of the two are completely paid;

- iii. that notwithstanding, no incentive should be given for the Club to pay the Fifth Instalment or the Final Instalment with preference on the other.

73. As a result, the Panel finds it proper and fair, while confirming the proportionality of the sanction imposed on the Club by the Appealed Decision, to extend to 31 December 2018 the period of grace to settle its debt to Dynamo and to FIFA, in order to allow it to satisfy its obligations before the points deduction under the Appealed Decision is applied. Point 3 of the Appealed Decision is to be modified accordingly.

## IX. CONCLUSION

74. Based on the foregoing, the Panel holds that the Appealed Decision is not invalid and that the disciplinary sanctions imposed on the Club by the DC are not disproportionate. However, for the reasons explained, the period of grace granted to the Club to settle its debt to Dynamo and to FIFA is extended to 31 December 2018. Point 3 of the Appealed Decision is to be modified accordingly. All other and further motions or prayers for relief are dismissed.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed by Clube Atlético Mineiro on 29 March 2018 against the decision issued on 31 January 2018 by the Disciplinary Committee of the Fédération Internationale de Football Association is partially granted.
2. The decision issued on 31 January 2018 by the Disciplinary Committee of the Fédération Internationale de Football Association is modified as follows:

*“3. The club Atlético Mineiro is granted a final period of grace until 31 December 2018 in which to settle its debt to the creditor, Football Club Dynamo Kyiv, and to FIFA”.*

3. All other points of the decision issued on 31 January 2018 by the Disciplinary Committee of the Fédération Internationale de Football Association are confirmed.

(...)

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