Arbitration CAS 2018/A/5863 Al Arabi SC v. Anouar Kali & Fédération Internationale de Football Association (FIFA), award of 13 February 2019

Panel: Mr Mark Hovell (United Kingdom), President; Mr Mikal Brøndmo (Norway); Mr Manfred Nan (The Netherlands)

Football
Disciplinary sanctions for failure to comply with a CAS award
Power of a CAS panel to review disciplinary sanctions
Increase of sanctions in case of non-compliance
Difficult financial situation
Proportionality of a point deduction

1. **There is an established line of CAS jurisprudence which states that the sanctions imposed by a disciplinary body can only be amended by a CAS panel if the sanction(s) concerned is (are) evidently and grossly disproportionate to the offence.**

2. **It is the case with any disciplinary regime that a failure to comply with the sanctions imposed has to contain a mechanism for increasing those sanctions to bring about compliance. This is built into the FIFA rules with greater sanctions only being engaged after failure to settle payment in the first instance.**

3. **A difficult financial situation is not a valid justification for a club to fail to pay its debts.**

4. **If a 3 point deduction is appropriate in a case, it does not stand to reason that the same sanction should be imposed on a club when it owes 40 times more. If precedents demonstrate that a 6 point deduction in case of continued non-compliance with a FIFA DRC Decision related to clubs where amounts due are comparable or even lower does not deviate from FIFA DC's practice, then this 6 point deduction cannot be considered grossly disproportionate.**

I. PARTIES

1. Al Arabi SC (the "Club" or the "Appellant") is a football club with its registered office in Doha, Qatar. The Club is a member of the Qatari Football Association (the "QFA"), which in turn is affiliated to Fédération Internationale de Football Association.

2. Mr Anouar Kali (the "Player" or the "First Respondent") is a professional football player, born in Utrecht, The Netherlands, on 3 June 1991, and currently plays for NAC Breda in the Dutch Eredivisie.

3. Fédération Internationale de Football Association ("FIFA" or the "Second Respondent") is the governing body of world football and has its registered office in Zurich, Switzerland.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that 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.

A. Proceedings before the FIFA Dispute Resolution Chamber

5. On 24 November 2016, the FIFA Dispute Resolution Chamber (the "FIFA DRC") issued a decision in a case involving the Player and the Club as follows (the "FIFA DRC Decision") (emphasis in original):

> *"1. The claim of the* [Player] *is partially accepted.*
>
> *2. The* [Club] *has to pay to the* [Player], ***within 30 days*** *as from the date of notification of this decision, the outstanding amount of EUR 950,000 plus 10% interest p.a. on said amount as from 2 March 2016 until the date of effective payment.*
>
> *3. In the event that the abovementioned amount plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claim lodged by the* [Player] *is rejected. […]".*

6. On 23 February 2017, FIFA notified the grounds of the FIFA DRC Decision to the Club and the Player.

B. First proceedings before the Court of Arbitration for Sport

7. On 15 March 2017, the Player filed an appeal against the FIFA DRC Decision at the Court of Arbitration for Sport (the "CAS").

8. On 24 October 2017, the CAS issued a decision as follows (the "CAS Award"):

> *"1. The appeal filed on 15 March 2017 by* [the Player] *against* [the FIFA DRC Decision] *is dismissed.*
>
> *2. The* [FIFA DRC Decision] *is confirmed.*

3. The costs of these proceedings […] shall be borne by entirely by [the Player].

4. [The Player] *shall pay to* [the Club] *an amount of CHF 2,000 (Two thousand Swiss Francs) as contribution towards his legal fees and other expenses incurred in connection with these proceedings.*

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

9. On 27 October, 17 November and 8 December 2017, the Player requested FIFA to forward the case to the FIFA Disciplinary Committee in light of the continued non-payment by the Club.

10. On 14 December 2017, the FIFA Players' Status Committee (the "FIFA PSC") urged the Club to pay the relevant amounts to the Player by no later 22 January 2018, failing which the matter would be referred to the FIFA Disciplinary Committee (the "FIFA DC") for consideration and a formal decision.

C. Proceedings before the FIFA Disciplinary Committee

11. On 23 January 2018, the Player informed FIFA that the Club had not paid any amount thus far and asked for an immediate formal decision from the FIFA DC.

12. On 29 January 2018, the Parties were informed by the FIFA PSC that the matter was forwarded to the FIFA DC.

13. On 11 July 2018, a decision on this matter was issued by the FIFA DC (the "Appealed Decision"), as follows:

"1. The [Club] *is found to have infringed art. 64 of the FIFA Disciplinary Code as it is guilty of failing to comply with the* [CAS Award] *[…].*

2. The [Club] *is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision. Payment can be made either in Swiss francs […] or in US dollars […].*

3. The [Club] *is granted a final deadline of 90 days as from the notification of the present decision in which to settle its debt to the* [Player].

4. If payment is not made to the [Player] *and proof of such a payment is not provided […] by this deadline, six (6) points will be deducted automatically by the* [QFA] *without a further formal decision having to be taken by the FIFA Disciplinary Committee or its secretariat.*

5. In addition, if payment is not made to the [Player] *and proof of such a payment is not provided […] by the aforementioned deadline, a ban from registering new players, either nationally or internationally, for two (2) entire and consecutive registration periods will be imposed on the* [Club] *as from the first day of the next registration period following the expiry of the granted deadline. Once the deadline has expired, the transfer ban will be implemented automatically at national and international level by the*

[QFA] *and FIFA respectively, without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat. The transfer ban shall cover all men eleven-a-side teams of the* [Club] *– first team and youth categories -. The* [Club] *shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the transfer ban or upon the payment to the* [Player] *of the total outstanding amount, if this occurs before the full serving of the transfer ban. In particular, the* [Club] *may not make use of the exception and the provisional measures stipulated in art. 6 of the* Regulations on the *Status and Transfer of Players in order to register players at an earlier stage.*

6. If the [Club] *still fails to pay the amount due to the* [Player] *even after the deduction of points and the complete serving of the transfer ban in accordance with points 4 and 5 above, the FIFA Disciplinary Committee, upon request of the* [Player]*, will decide on a possible relegation of the* [Club's] *first team to the next lower division.*

7. As a member of FIFA, the [QFA] *is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted in due course and that the transfer ban has been implemented at national level. If the* [QFA] *does not comply with this decision, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from FIFA competitions.*

8. The costs of these proceedings amounting to CHF 3,000 are to be borne by the [Club] *and shall be paid according to the modalities stipulated under point 2 above.*

9. The [Club] *is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the* [QFA] *of every payment made and to provide the relevant proof of payment.*

10. The [Player] *is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the* [QFA] *of every payment received".*

14. On 19 July 2018, FIFA notified the Club and the Player of the findings of the Appealed Decision.

15. On 8 August 2018, following a request from the Club, the grounds of the Appealed Decision were communicated to the Club and the Player by email.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 13 August 2018, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), the Club filed a Statement of Appeal at the CAS against the Player and FIFA challenging the Appealed Decision. The Statement of Appeal requested the Panel to apply Article R57 of the CAS Code and hear the case *"de novo"*, and contained the following prayers for relief:

"(a) to the present appeal to be admissible;

(b) To change the sanction imposed by the FIFA Disciplinary Committee from 90 days to a minimum of 120 days to pay the amount owed;

(c) To change the consequence for the non-payment to only 3 (three) points initially to be deducted in the national league, instead of 6 (six);

(d) an order for the Respondents to bear the entire costs of these arbitration proceedings;

(e) an order for the Respondents to bear the entire costs of the Appellant's legal costs and expenses with the present arbitration proceedings".

17. In its Statement of Appeal, the Club nominated Mr Mikal Brøndmo, Attorney-at-law, Oslo, Norway, as an arbitrator.

18. On 20 August 2018, FIFA wrote to the CAS Court Office confirming that the Respondents jointly nominated Mr Manfred P. Nan, Attorney-at-law, Arnhem, The Netherlands, as an arbitrator.

19. On 21 August 2018, the Player wrote to the CAS Court Office requesting, *inter alia*, to be excluded from the present proceedings given it was not a procedural party in the disciplinary proceedings between the Club and FIFA.

20. On 23 August 2018, the CAS Court Office confirmed to the Parties that due to a lack of confirmation from the Club regarding the exclusion of the Player from the proceedings, the Player would remain as a respondent in the present proceedings.

21. On 6 September 2018, pursuant to Article R51 of the CAS Code, the Club submitted its Appeal Brief with the CAS Court Office. The Club stated that the matter should be capable of being determined without the need for an oral hearing. The Appeal Brief contained the following prayers for relief:

"(a) to the present appeal to be admissible;

(b) to uphold the Appeal, set aside and replace the [Appealed Decision] *by sanctioning the Club to pay the outstanding amounts within 120 days instead of 90;*

(c) to set aside and replace the [Appealed Decision] *by sanctioning the non-payment by the Club to only 3 (three) points initially to be deduced* [sic] *in the national league, instead of 6 (six);*

(d) to set aside and replace the [Appealed Decision] *by sanctioning the non-payment by the Club to a transfer ban of 1 (one) registration period instead of 2 (two);*

(e) an order for the Respondents to bear the entire costs of these arbitration proceedings;

(f) an order for the Respondents to bear the entire costs of the [Club's] *legal costs and expenses with the present arbitration proceedings in an amount to be determined when requested by the CAS;*

(g) alternatively, to apply Article R57 and hear the case "de novo" (the panel has the full power to review the facts and the law)".

22. On 10 September 2018, pursuant to Article R54 of the CAS 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 this case was constituted as follows:

President:	Mr Mark A. Hovell, Solicitor, Manchester, United Kingdom
Arbitrators:	Mr Mikal Brøndmo, Attorney-at-law, Oslo, Norway
	Mr Manfred P. Nan, Attorney-at-law, Arnhem, The Netherlands

23. On 3 October 2018, pursuant to Article R55 of the CAS Code, FIFA submitted its Answer to the CAS Court Office requesting the following prayers for relief:

"1. to reject the [Club's] *appeal in its entirety.*

2. to confirm the [Appealed Decision] *hereby appealed against.*

3. to order the [Club] *to bear all costs and to cover all legal expenses incurred within the present procedure".*

24. On the same date, the CAS Court Office confirmed to the Parties that the Player failed to submit an Answer within the specified time limit. Further, the CAS Court Office invited the Parties to confirm its preference regarding a hearing.

25. On 3 October 2018, the Club confirmed to the CAS Court Office that it did not consider a hearing to be necessary in this matter.

26. On 4 October 2018, FIFA confirmed to the CAS Court Office that it did not consider a hearing to be necessary in this matter.

27. On 5 October 2018, the CAS Court Office confirmed that the Panel would dispense with the need for a hearing and issue an Award based solely on the written submissions. On the same day, the CAS Court Office sent the Order of Procedure to the Parties for signature.

28. On 8 October 2018, the Parties each submitted a copy of the signed Order of Procedure.

IV. THE PARTIES' SUBMISSIONS

29. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Club's Submissions

30. In summary, the Club submitted the following in support of its Appeal:

1. The principle of proportionality

31. In the imposition of the sanctions on the Club, the FIFA DC failed to sufficiently apply the principle of proportionality in contravention of the FIFA Disciplinary Code ("FDC"), Swiss law and CAS jurisprudence. The Club submitted that there must be a reasonable balance between the sanction and the kind of misconduct. In pursuit of this, CAS jurisprudence has established that *"the sanction must not exceed that which is reasonably required in the search of the justifiable aim"* (CAS 2005/C/976 & 986).

32. Further, the Club submitted that the sanctions imposed in the Appealed Decision were disproportionate because:

- One of the three primary sanctions (fine, deduction of points and transfer ban) or the supplementary one (*i.e.* relegation) is enough to compel the Club to pay its debts. FIFA did not need to apply all of those sanctions at once;

- The grace period *"may as well"* be increased from 90 to 120 days as a way to enable the Club to gather the funds under the discretionary power of FIFA and the principle of proportionality of sanctions;

- The Club risks being *"put out of business"* due to the sanctions imposed in the Appealed Decision, *"which certainly does not justify the overall interest in achieving the envisaged goal"*;

- FIFA might not have had any discretion over the FIFA DRC Decision, but it does have the power and *"certainly the obligation"* to adjust the penalty to fit the crime on a case by case basis, which includes not only choosing the type of sanction but also the degree that each sanction should be applied;

- This was a first sanction and the Club is *"in a precarious financial condition and needs to be able to continue to function at the same time that it pays its debts"*. As such the FIFA DC had a larger range of possibilities to sanction the Club, including the possibility of granting the Club a 120 day grace period and imposing a 3 point deduction and a one window transfer ban;

- The Club were not trying to deviate from its obligation to pay, or evading the consequences of not paying, it was simply requesting that the sanctions imposed were proportionate. Doing so would enable the Club *"to better comply with the payment since the financial situation of the Club really is precarious, but, the Club is stone by stone trying to fix it"*.

33. Moreover, the Club argued that the Swiss Federal Tribunal ("SFT") has decided that, in cases where the likelihood of the debtor to comply with the sanction is not realistic, establishing a

fourth, complementary sanction (*i.e.* relegation) must be considered as excessive (Decision of the SFT 4A_558/2011 dated 27 March 2012).

34. The Club submitted that pursuant to Articles 42-44 of the Swiss Code of Obligations (the "CO"), the Panel has the discretion to estimate the damage and compensation to a party, so can *"scale down the penalties imposed by the* [FIFA DC] *taking into account the particular circumstances of the case in hand"*.

2. Grace period of 90 days

35. The Club also submitted that the 90 day deadline for payment is similarly disproportionate. In this regard, the Club submitted that a 120 day deadline provided more scope and was more appropriate than the 90 day deadline actually imposed in achieving the necessary objective (*i.e.* payment to the Player). The Club noted that the FIFA DC granted a period of 120 days to the debtor in CAS 2014/A/3803, so the Club's request was *"within the practice"* of the FIFA DC. As the Club was *"trying to settle its debts and* [was] *working on a general recovery plan"*, the Club submitted that an extra 30 days grace period would *"contribute immensely"* in the Club's effort to comply with its debts.

3. 6 point deduction

36. The Club argued that a 6 point deduction as a first penalty was disproportionate to the amount owed under Article 64.3 of the FDC. The Club submitted that a deduction of 3 points *"is a fairly common penalty imposed"* by the FIFA DC, and cited CAS 2015/A/3903 in this regard.

4. Two window transfer ban

37. The Club argued that a two window transfer ban was disproportionate as first time penalty. Given that a fine of CHF 30,000 was also imposed, the Club submitted that a one window ban, plus the amount owed, a 3 point deduction and a 120 day final grace period sanction would be appropriate.

B. The Player's Submissions

38. The Player did not file any written submissions in these proceedings.

C. FIFA's Submissions

39. In summary, FIFA submitted the following in its Answer to the Club's Appeal.

1. Breach of Art. 64 of the FDC by the Club

40. Firstly, FIFA submitted that the system of sanctions used by the FIFA DC has been confirmed by the SFT as being lawful (Decision of the SFT 4P.240/2006 dated 5 January 2007*)* and

proceedings under Article 64 of the FDC 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"*.

41. FIFA noted that the CAS Award was final and binding. As such, the sole task for the FIFA DC was therefore to analyse if the debtor (*i.e.* the Club) had complied with the CAS Award (FIFA cited, *inter alia*, CAS 2006/A/1008 and CAS 2013/A/3323). Similarly, the task of the Panel here was to analyse whether the Club respected and fulfilled the CAS Award, not to analyse its content (CAS 2012/A/3032).

42. FIFA noted that it could only take into account facts arising after the date on which the relevant decision (which needed to be complied with) had been made, and any other considerations were out of scope of the disciplinary proceedings (CAS 2016/A/4910). In that regard, FIFA noted that despite the CAS Award being passed in October 2017, at no point has the Club shown any willingness to pay the amounts due. The Club did not even attempt to participate in the disciplinary proceedings at the FIFA DC which led to the Appealed Decision. As such, there was no debate the Club were in breach of Article 64 of the FDC.

2. The sanctions imposed on the Club are proportionate

43. Secondly, FIFA submitted that, notwithstanding its *de novo* powers under Article R57 of the CAS Code, the Panel could only amend the disciplinary decision of a FIFA judicial body if it considered that it acted arbitrarily and it exceeded the margin of discretion afforded to it by the principle of association autonomy (cf. RIEMER H. M., Berner Kommentar, no. 230 on art. 70). That is to say, even if the Panel disagreed with a specific sanction, it should only amend it *"if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence"* (FIFA cited*, inter alia,* CAS 2014/A/3562; CAS 2009/A/1817 & 1844; CAS 2015/A/4271*).*

44. Moreover, FIFA submitted that Article 75 of the Swiss Civil Code ("CC") states that only grossly disproportionate decisions constitute violations of relevant laws and/or an association's own statutes and regulations. Only those alleged violations can be claimed in the context of challenges under Article 75 of the CC.

45. Further, FIFA argued that it has always dealt with cases on case-by-case basis taking into account the relevant circumstances pursuant to Article 39, par. 4 of the FDC and as confirmed by the CAS, *"similar cases must be treated similarly, but dissimilar cases could be treated differently"* (CAS 2012/A/2750).

46. FIFA submitted that as the Club had not at any time produced any evidence of financial difficulties despite claiming that the *"financial situation of the Club really is precarious"* the Panel should not give consideration to this argument in advance of the Club's claims on proportionality. FIFA noted that pursuant to Article 8 of the CC, the Club bore the burden of proof in establishing its allegedly precarious financial situation – which it failed to satisfy. FIFA argued that the Club's unsubstantiated claims that it was attempting to fix the aforementioned alleged financial difficulties should also be rejected for the same reasons.

47. FIFA also argued that the principle of *pacta sunt servanda* is of paramount importance for FIFA and a key issue to be protected by the FIFA Regulations on the Status and Transfer of Players ("RSTP"). Accordingly, clubs have a duty to be aware of its financial situation and only conclude contracts that can be fulfilled. In this respect, FIFA referred to Article 2 of the CC, according to which *"[e]very person is bound to exercise his rights and fulfil his obligations according to the principle of good faith"* (CAS 2010/A/2144). CAS jurisprudence has also made it clear that difficult financial situations are not a justification for failing to pay ones' debts (CAS 2013/A/3358 and CAS 2018/A/5622).

48. Further, FIFA submitted that in line with longstanding jurisprudence of the FIFA DC which has been repeatedly confirmed by the CAS (for example CAS 2012/A/2730*)*, the FIFA DC always has regard to the amount outstanding when deciding on the level of sanctions to be imposed. FIFA argued that the sanctions imposed on the Club in the Appealed Decision were proportionate. In support of this, FIFA submitted that the imposition of a fine of CHF 30,000 (3.2% of the amount owed) is well within the range set out in Article 15 of the FDC (the maximum being CHF 1,000,000) and hardly at the level that can create additional financial difficulties for the Club.

49. FIFA maintained that in the present case the FIFA DC acted in accordance with the overriding principle of proportionality as well as in line with the FIFA DC's established practice in setting the fine at the said level. In support of these arguments FIFA submitted a table showing a small sample of cases detailing amounts outstanding with the corresponding sanctions. This table is set out below:

Case number	**Outstanding amount**	**Fine**	**Period of grace**	**Deduction**
130394 PST ZH	CHF 1,173,040	CHF 30,000	90 days	6 points
160018 PST ZH	CHF 1,381,160	CHF 30,000	90 days	6 points
170317 PST ZH	CHF 1,043,766	CHF 30,000	90 days	6 points
170318 PST ZH	CHF 1,505,786	CHF 30,000	90 days	6 points
170380 PST ZH	CHF 958,462	CHF 30,000	90 days	6 points
170919 PST ZH	CHF 1,171,692	CHF 30,000	90 days	6 points
180310 PST MOW	CHF 1,103,600	CHF 30,000	90 days	6 points

50. Given the above, FIFA submitted that the Appealed Decision was clearly passed in accordance with the principle of proportionality and in line with the FIFA DC's practice. FIFA noted that the CAS has previously confirmed that a fine imposed on a club *"equal to fines*

imposed on other clubs for very similar violations" cannot be considered disproportionate in view of the FIFA DC's practice (CAS 2016/A/4595).

51. FIFA submitted that the Appealed Decision *"is in line with the longstanding jurisprudence of the Committee and confirmed by the CAS (cf. inter alia CAS 2012/A/3032, CAS 2013/A/3358 and CAS 2017/A/5031). Indeed the fine set is neither oppressive nor disproportionate and it is justified by the Appellant's attitude, which never even made an effort to settle its debt. The possible deduction of points as well as the granted period of grace is also proper and consistent with both CAS awards and judgements of the Swiss Federal Tribunal (4P.240/2006 of 5 January 2007)".*

52. FIFA also submitted that *"the CAS has regularly confirmed the legality and the proportionality of the enforcement system created by FIFA and the sanctions related thereto, in particular the deduction of points. Especially it should be noted that the CAS has persistently confirmed that the wording of art. 64 of the FDC provided with a clear statutory basis and precisely reflects the principle of proportionality: the first sanctions may be a fine and deduction of points, since they are the less severe and therefore proportionate sanctions for a first infringement of the obligation to comply with a decision of FIFA or CAS, however, in case of continued failure to comply with said decision, a more severe sanction must be possible, in order to take account of the continued disrespect of FIFA's judicial authority (cf. inter alia CAS 2005/A/944, CAS 2011/A/2646, CAS 2012/A/3032 and CAS 2017/A/5382)".*

3. Grace period of 90 days

53. FIFA submitted that the FIFA DC considered that a 90 day period is sufficient time to finally pay the due amounts and such a period of grace does not deviate from the FIFA DC's practice in cases where the amounts due were similar or even lower. FIFA rejected the Club's arguments regarding CAS 2014/A/3803, arguing that those were different circumstances given that the respondent in that case was a natural person (unlike the Club) and that those particular circumstances warranted the granting of a final grace period of 120 days. In any event, the granting of 120 days in that case did not mean that the granting of 90 days in the present proceedings was unfair or disproportionate.

54. Moreover, FIFA noted that the Club had 338 additional days (at the date of submission of FIFA's Answer) as of the notification of the CAS Award to pay the outstanding amounts but still failed to do so. In light of this lengthy period, it was *"remarkable and unacceptable"* that the Club were claiming that an extra 30 days would *"contribute immensely to the Club to comply"*. FIFA submitted that the Club were attempting to give the impression that 120 days would suffice in order for it to pay the amounts due, and it was just an attempt to continue circumventing its financial obligations to the Player.

4. 6 point deduction

55. FIFA rejected the Club's arguments in relation to the imposition of a 6 point deduction on the basis that CAS 2015/A/3903 was not analogous to the present case as the amount due by the debtor was CHF 26,848, which is 40 times lower than in the case at hand.

5. Two window transfer ban

56. In relation to the transfer ban, FIFA noted that FIFA Circular 1628 dated 9 May 2018 ("Circular") stated that the FIFA had implemented *"a system that will better ensure the respect of decisions passed by FIFA bodies and will ultimately induce debtor clubs to swiftly comply with their financial duties towards their creditors"*. Paragraph B.i.1. of the Circular stated (emphasis added by FIFA):

> *"Under the new procedure, if a party is to be found in violation of art. 64 of the FDC:*
>
> *1. The FIFA Disciplinary Committee will continue to apply par. 1a) in the same way; pronouncing a sanction against the debtor, by means of which it will inter alia be ordered to pay a fine and granted a final deadline to settle its debt to the creditor. In addition to the fine, the FIFA Disciplinary Committee will impose a point deduction and/or a* ***transfer ban that will be effective only as from expiry of the final deadline****. Consequently, the debtor club will be entitled to avoid said additional sanctions if it settles its debt to the creditor by such final deadline".*

57. Applying the above principles to the matter at hand, after having found that the Club were in breach of Article 64 of the FDC, the FIFA DC decided to impose a two window transfer ban. FIFA noted that the Club were not challenging the imposition of the transfer ban, rather it was challenging the length of it – *i.e.* it was requesting a one window ban instead of two. However, the Club's claim that a two window ban was disproportionate was not supported by any evidence, so FIFA requested the Panel to dismiss this argument.

58. FIFA also noted that the CAS, when analysing the principle of proportionality applied to a transfer ban, already confirmed that in order to determine if a sanction is to be considered proportionate, *"various benchmarks seem appropriate: the gravity of the illegal act (…); the power to dissuade the offender from repeating the same illegality in the future; the importance of the rule of law this is being protected"*. In particular these three benchmarks are the ones *"that most legal orders agree between them that must anyway be accounted for when measuring a 'proportional sanction'"* (CAS 2014/A/3793).

59. FIFA submitted that if those benchmarks were applied to the present matter, it was clear that Article 64 of the FDC (*i.e. "the rule of law that is being protected"*) is intimately linked to the principle of *pacta sunt servanda*, which is of paramount importance to FIFA. FIFA considered that the imposition of a two window transfer ban was an appropriate step in the present circumstances (CAS 2017/A/5011).

6. Repeat offender

60. FIFA noted that the Club has already been sanctioned on several occasions by the FIFA DC in the past for similar infringements of Article 64 of the FDC. As such, it appears to be clear that the sanctions previously imposed on the Club were not considered sufficient to discourage it from repeating its past offences. In that regard FIFA argued that not imposing sporting sanctions in a case like this would be disruptive to the integrity of a competition, given that the Club would have an advantage over other clubs who do abide by the rules and their financial obligations.

7. Accumulated sanctions

61. FIFA also rejected the Club's argument that one sanction alone is enough to bring about payment, but submitted that if the Club settled the debt to the Player it will indeed only be subjected to the one sanction - that being the fine totalling CHF 30,000. The sporting sanctions in the Appealed Decision were only applicable if the Club continued to fail to make the required payments. The Club was even free to enter into a payment plan with the Player (who was free to reject it), but had so far failed to do that.

V. JURISDICTION

62. Article R47 of the CAS Code provides as follows:

"An appeal against a 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".

63. The jurisdiction of the CAS, which is not disputed, derives from Article 58.1 of the FIFA Statutes (2016 edition) as it determines that:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".

64. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

VI. ADMISSIBILITY

66. The Statement of Appeal, which was filed on 13 August 2018, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

67. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

68. Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the

federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

69. 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".

70. Further, the Club and FIFA both submitted that the various regulations of FIFA should apply, with Swiss law applying on a subsidiary basis.

71. In light of the above, the Panel is satisfied that the various regulations of FIFA are applicable, with Swiss law applying to fill in any gaps or *lacuna* within those regulations.

VIII. MERITS

A. The Main Issues

72. The Panel notes that this is an Appeal against a decision by the FIFA DC, and it was undisputed between the Parties that the underlying CAS Award which the Club failed to comply with was final and binding.

73. The Panel also notes that the Player, who was included as a Respondent in this matter by the Club, requested to be excluded from the present proceedings given he *"was not a procedural party in the disciplinary proceedings between the Club and FIFA"*. When the CAS Court Office requested the Club to confirm whether the Player could be excluded, the Club remained silent. So the Player was therefore maintained as the First Respondent. However, the Player failed to take any further substantial part in the proceedings as he did not file any written submissions. Nevertheless, for completeness, the Panel notes that it did not need to address any issues regarding the Player, as no requests for relief – nor indeed any legal arguments- were addressed against the Player by the Club, nor were any requests for relief requested by the Player.

74. Accordingly, the Panel observes that the only issue to be resolved in this Appeal is whether the Appealed Decision should be amended for being disproportionate.

75. The Panel notes that there were three requests for relief by the Club in relation to amending the Appealed Decision, which were as follows:

> *"(b) to uphold the Appeal, set aside and replace the* [Appealed Decision] *by sanctioning the Club to pay the outstanding amounts within 120 days instead of 90;*
>
> *(c) to set aside and replace the* [Appealed Decision] *by sanctioning the non-payment by the Club to only 3 (three) points initially to be deduced* [sic] *in the national league, instead of 6 (six);*
>
> *(d) to set aside and replace the* [Appealed Decision] *by sanctioning the non-payment by the Club to a transfer ban of 1(one) registration period instead of 2 (two);"*

76. The Panel notes that there was no request by the Club to reduce the amount of the fine issued in the Appealed Decision. Accordingly, the Panel will not consider that element of the Appealed Decision and will limit its discussion to the issue of the grace period, the points deduction and the transfer ban.

77. At the outset, the Panel notes that there is an established line of CAS jurisprudence which states that the sanctions imposed by the FIFA DC can only be amended by a CAS panel if the sanction(s) concerned is (are) evidently and grossly disproportionate to the offence. Accordingly, the Panel considered that it could only grant the Club the requests for relief quoted above if it considered the sanctions imposed by the FIFA DC in the Appealed Decision to be 'evidently and grossly disproportionate to the offence'.

78. The Club's submissions broadly focussed on the proportionality of the sanctions imposed by the FIFA DC and contended that a more lenient approach would be as effective and more appropriate. Whilst the Panel notes this argument, it considers that the Club's position is severely undermined by the fact that almost 2 years have elapsed since the FIFA DRC Decision and over a year passed since the CAS Award was issued without any payment being made whatsoever. The Panel considers that the Club's failure to agree a payment plan or make any payment to the Player to date significantly weakens its position regarding proportionality.

79. It is the case with any disciplinary regime that a failure to comply with the sanctions imposed has to contain a mechanism for increasing those sanctions to bring about compliance. This is built into the FIFA rules with greater sanctions only being engaged after failure to settle payment in the first instance. As FIFA noted:

"The spirit of art. 64 of the FDC is to enforce decisions that had been rendered by a body, a committee or an instance of FIFA or CAS in a subsequent appeal decision, which are final and binding. The possible sanctions stipulated in this article and threatened to be imposed are designed to be applicable within the football family and on its direct and indirect members and to put the debtor under pressure to finally comply with the decision. This article provides FIFA with a legal tool ensuring to a certain extent that decisions passed by the relevant authority within FIFA (or CAS following an appeal) are respected and ergo the rights of players or clubs finally be guarded".

80. The legality and validity of the sanctions set out in Article 64 of the FDC have been considered and confirmed by the SFT (Decision of the SFT 4P.240/2006 dated 5 January 2007). Broadly, the Panel considers that the sanctions imposed (or threatened to be imposed) on the Club in the Appealed Decision fall within the scope of Article 64 of the FDC.

81. In relation to the Club's specific requests for relief in lowering the sanctions, firstly, the Club requested that the grace period allowed to make the required payment be increased from 90 days to 120 days. The Panel notes the Club has submitted that given its significant financial difficulties, an additional 30 days would *"contribute immensely"* to the Club's ability to comply with the Appealed Decision. Without more evidence, the Panel finds this to be a difficult argument to accept.

82. The Club repeatedly claimed that it was in a *"precarious"* financial situation, but did not submit a single piece of evidence to support this assertion. Pursuant to Article 8 of the CC, the Club bore the burden of proof in establishing its allegedly precarious financial situation. Similarly, the Club also alleged that it was attempting to settle its debts and was *"working on a general recovery plan"* but failed to submit any evidence to support this statement either. The Panel takes the view that in the absence of any evidence, the Club's claims regarding its financial position must be disregarded. In any event, CAS jurisprudence (see for example, CAS 2013/A/3358) is clear that a difficult financial situation is not a valid justification for a club to fail to pay its debts.

83. Moreover, the Panel finds it contradictory that on one hand the Club claims to be in a *"precarious"* financial position and would be unable to pay its debt of over EUR 950,000 within 90 days, but simultaneously also states that an extra 30 days would greatly assist it to pay this large sum of money. This contradiction is only exacerbated by the fact that the Player first filed a claim at FIFA against the Club more than 2 years ago. In those circumstances, the Panel does not believe that an additional 30 days grace period is warranted. The Club has entirely disregarded its financial obligations towards the Player for over 2 years. At the very least, the Club has known for a year (since the notification of the CAS Award) that it owed this money to the Player. The CAS Award is final and binding. The Panel were left with the impression that this request for an extra 30 days' grace period was made solely for the purposes of further delaying the Club's financial obligations towards the Player.

84. The Panel also rejects the Club's claim that it should be granted 120 days on the basis that other debtors (like the one in CAS 2014/A/3803) had been granted that period in the past. The Panel notes that the debtor in CAS 2014/A/3803 was a natural person (unlike the Club) and that FIFA demonstrated in the table of precedents (see above § 49) that a 90 day grace period is in line with its practice in cases related to clubs where amounts due were comparable or even lower. As FIFA noted, just because other debtors had been granted 120 days to make their payment does not mean that a 90 day period was unfair or disproportionate in these circumstances. Each matter can, and should, be considered on a case by case basis. Ultimately, the Panel concludes that the granting of a 90 day period, instead of a 120 day period, was not 'evidently and grossly disproportionate to the offence'. The Club's claim to extend the grace period by 30 days is therefore rejected.

85. The Club also requested the Panel to reduce the points deduction in the Appealed Decision from 6 points to 3 points. The Club cited CAS 2015/A/3903 and argued that a 3 point deduction was more appropriate.

86. Firstly, the Panel did not consider that since a 3 point deduction was appropriate in one case that it would also be appropriate in this case. Moreover, as FIFA pointed out in its submissions, the Club owes the Player an amount more than 40 times the amount owed by the debtor in CAS 2015/A/3903. The Panel does not consider the circumstances in the two cases to be analogous. If a 3 point deduction was appropriate in CAS 2015/A/3903, it does not stand to reason that the same sanction should be imposed on the Club when it owed 40 times more. The Panel also takes note of the table of precedents which FIFA submitted (see above § 49) which demonstrates that a 6 point deduction in case of continued non-compliance

with a FIFA DRC Decision related to clubs where amounts due were comparable or even lower does not deviate from FIFA DC's practice.

87. On balance, given the amount of money which is overdue (almost EUR 1,000,000) and the length of time it has been overdue (more than 2 years) the Panel was not convinced that a 6 point deduction was grossly disproportionate. Once again, the Club bore the burden of proof in this regard, and the Panel concluded the Club failed to meet its burden. Accordingly, the Club's request for the points deduction to be reduced from 6 points to 3 points is rejected.

88. Lastly, in relation to the transfer ban, the Panel notes that the Club was not requesting the transfer ban to be removed altogether, but was instead requesting it to be reduced from two registration windows down to one on the basis of proportionality. Whilst the Panel acknowledges that a two window ban could be seen as a strict sanction, once again, the Panel returns to the Club's own behaviour. The amount outstanding to the Player is almost EUR 1,000,000, which has been overdue for more than 2 years. In that time, it appears the Club have made no effort whatsoever to make any payment. If the Club had periodically paid whatever it could (or at least shown an indication of wanting to do so), the Panel may have been given the impression that the Club was trying to fulfil its obligations. Instead, by failing to make any effort to pay, the Panel was left with the distinct impression that this Appeal was simply an attempt by the Club to buy itself time.

89. Ultimately, the Club bore the burden of proof in establishing its argument that the sanction of a two window transfer ban was disproportionate, but as FIFA noted, the Club have failed to submit any evidence to support this argument. Accordingly, the Panel was not presented with any reason or evidence to conclude that a two window transfer ban was *"evidently and grossly disproportionate"* to the offence. As such, the Club's request for the transfer ban to be reduced is also rejected.

90. In any event, the Panel finds that the possible imposition of such sporting sanctions in case of continued non-compliance is not disproportionate, should the Club indeed fail to comply with the FIFA DRC Decision in the future.

91. In summary, the Panel considers that the sanctions imposed by the FIFA DC in the Appealed Decision were proportionate and found no reason to amend or reduce them in any way.

B. Conclusion

92. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel dismisses the Appeal by the Club in its entirety and upholds the Appealed Decision.

93. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed on 31 March 2018 by Al Arabi SC against the decision issued on 11 July 2018 by the FIFA Disciplinary Committee is dismissed.

2. The decision issued on 11 July 2018 by the FIFA Disciplinary Committee is confirmed.

3. (…).

4. (…).

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