



Arbitration CAS 2014/A/3723 Al Ittihad FC v. Fluminense FC, award of 22 January 2015

Panel: Mr Marco Balmelli (Switzerland), Sole Arbitrator

Football

Solidarity contribution

Burden of proof in case of request for suspension of CAS proceedings

Inclusion of third parties in pending CAS proceedings

Club liable for solidarity contribution

Solidarity contribution in case of contingent transfer fee payments

Principle of "ne eat iudeo ultra petita partium"

1. When requesting the suspension of pending CAS proceedings in order to avoid contradictory judgments in other pending case(s) in which the party requesting the suspension is involved, the party requesting the suspension needs to provide evidence of the allegedly pending proceedings. The mere statement that the other pending case(s) would be related to the case for which suspension of the CAS proceedings is requested fails to meet the essential requirements of the rules on the burden of proof.
2. Following an international transfer of a football player the former club of the player in the meaning of the Regulations on the Status and Transfer of Players (the “RSTP”) cannot be joined as a party in pending CAS proceedings between the new club of the player and a training club of the player resulting from the international transfer of the player if it has not been called as a respondent by the appellant or if otherwise, the respondent has not requested such joinder in accordance with Article R41.2 of the CAS Code.
3. Any stipulation between the parties to a transfer agreement consisting in an obligation of the former club of the transferred player to pay a possible solidarity contribution would not affect the training club(s) of the transferred player since it would not be viable to expect the club(s) involved in the training and education of the player to have full knowledge of contractual stipulations between the parties to a transfer agreement concerning such player. Therefore, the training club always has to claim its share of the solidarity contribution from the new club which will be allowed to reclaim it from the former club of the player if and when this amount should not have been deducted from the total transfer sum. Furthermore it clearly follows from the Commentary on the RSTP (the “RSTP-Commentary”) on Annex 5 Article 2 of the RSTP that it is the responsibility of the new club of a player to calculate and distribute the solidarity contribution and that it has to contact the former club(s) of the player in order to receive the necessary bank details.
4. Despite the wording of Article 2 para. 1 of the RSTP the relevant criterion for solidarity

contribution payments does not consist in the actual execution of a contingent payment (of the transfer fee) but in the maturity of the payment in question. Put differently, in case of contingent payments, the solidarity contribution for the respective contingent payment has to be paid 30 days after the due date of the instalment in question. It follows from the above that the new club of a player which does not comply with the stipulated payment dates of a transfer agreement cannot use its non-compliance with the provisions of a transfer agreement as an argument for not paying the solidarity contribution.

5. According to the principle of "*ne eat iudex ultra petita partium*" a CAS panel cannot grant anything going beyond what has been specifically requested by the parties to the CAS proceedings.

I. THE PARTIES

1. Al Ittihad FC (hereinafter referred to as the "Appellant") is a Saudi football club based in Jeddah which competes in the Saudi Professional League (first division). It is a member of the Saudi Arabian Football Federation (hereinafter referred to as the "SAFF") which is affiliated to FIFA.
2. Fluminense FC (hereinafter referred to as the "Respondent") is a Brazilian football club based in Laranjeiras which competes in the Campeonato Brasileiro Série A (first division). It is a member of the Confederação Brasileira de Futebol (hereinafter referred to as the "CBF") which is affiliated to FIFA.

II. THE DECISION AND ISSUES ON APPEAL

3. The Appellant appealed a decision of the FIFA Dispute Resolution Chamber (hereinafter referred to as the "FIFA DRC") dated 9 May 2014 (hereinafter referred to as the "Appealed Decision") imposing a solidarity contribution payment of EUR 102,535 plus interest following the transfer of the professional player D., born in 1985 (hereinafter referred to as "the Player") from the Brazilian club Clube de Regatas Vasco da Gama (hereinafter referred to as "Vasco da Gama") to the Appellant.
4. The Appellant considers that Vasco da Gama is the party responsible for the payment of the solidarity contribution because this was stipulated between these two parties in the transfer agreement.

III. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written

submissions and evidence adduced. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 23 July 2012, the Appellant and Vasco da Gama concluded a transfer agreement (hereinafter referred to as the “Transfer Agreement”) concerning the Player’s transfer from Vasco da Gama to the Appellant. Thereafter, the Player was registered with the Appellant on 28 July 2012 as a professional. Regarding the transfer fee to be paid by the Appellant to Vasco da Gama, the parties to the Transfer Agreement stipulated the following:

“3.1. Transfer Fee: For the definitive transfer of Player, Al Ittihad agrees to pay a total transfer fee in the net amount of 5,000,000€ (five million Euros) (“Transfer Fee”), which is inclusive of any and all amounts that would be due to Vasco and to any other club or third party in concept of solidarity mechanism and/or training compensation. For the sake of clarity, if any other club claims solidarity mechanism, Vasco will be the one to pay it. The Transfer Fee gives Al Ittihad 100% of the economic rights of the Player”.

7. Concerning the conditions of the payment of the stipulated transfer amount of EUR 5,000,000, the parties to the Transfer Agreement came to the following understanding:

“3.2. Payment Conditions: The net amount of 5,000,000€ (five million Euros) shall be paid by Al Ittihad in accordance with the following schedule:

- a) 1,000,000.00€ (one million Euros) shall be paid on or before 25 July 2012 (the “First Installment”);
 - b) 1,500,000.00€ (one million and five hundred thousand Euros) shall be paid on or before 10 August 2012 (the “Second Installment”); and
 - c) 2,500,000.00€ (two million and five hundred thousand Euros) shall be paid on or before 15 January 2013 (the “Third Installment”).
8. According to FIFA and the CBF and undisputed by the Parties, the Player was registered with the Respondent as from 9 May 2001 (16th birthday) until 7 July 2005 (20th birthday). The football season in Brazil follows the calendar year. After the abovementioned transfer of the Player had been completed, the Respondent requested to receive its share of the solidarity contribution which it did not receive.

IV. SUMMARY OF THE PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION COMMITTEE

9. On 2 October 2012, the Respondent filed a claim before the FIFA DRC, requesting its share of the solidarity contribution in connection with the transfer of the Player from Vasco da Gama to the Appellant. In particular, the Respondent requested the payment of 2.0507% of the total amount due to Vasco da Gama under the Transfer Agreement between the Appellant and Vasco da Gama. Additionally, the Respondent claimed to receive the payment of 5% interest from the date the initial payment should have been executed.

10. Despite having been invited by FIFA to start paying the relevant solidarity contribution to the Respondent or to provide valid reasons which could justify a possible refusal, the Appellant neither reacted to the claim lodged by the Respondent nor did it respond to attempts of the FIFA DRC trying to contact the Appellant. The Appellant did, however, not deny that it had received the communication addressed to it.
11. On 9 May 2014, the FIFA DRC rendered its decision in the matter at hand (the “Appealed Decision”). Upon request of the Appellant, the FIFA DRC notified to the Parties the legal grounds of said decision on 12 August 2014.
12. The FIFA DRC noted that the Appellant failed to present its response to the claim of the Respondent and therefore “*renounced to its right of defence and, thus, accepted the allegations*” of the Respondent.
13. Furthermore, the FIFA DRC pointed to Article 21 of the Regulations on the Status and Transfer of Players (the “RSTP”) in connection with Annex 5 of the RSTP. According to these provisions, the new club of a player is to distribute 5% of any compensation, with the exception of training compensation paid to the player’s former club, to the clubs involved in the training and education of a player in proportion to the number of years the player has been registered with the relevant clubs between the seasons of his 12th and 23rd birthdays. The provisions read as follows:

“21 Solidarity mechanism

If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annex 5 of these regulations”.

“Annexe 5

Solidarity mechanism

1 Solidarity contribution

If a professional moves during the course of a contract, 5% of any compensation, not including training compensation paid to his former club, shall be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years. This solidarity contribution reflects the number of years (calculated pro rata if less than one year) he was registered with the relevant club(s) between the seasons of his 12th and 23rd birthdays, as follows:

- Season of 12th birthday: 5% (i.e. 0.25% of total compensation)
- Season of 13th birthday: 5% (i.e. 0.25% of total compensation)
- Season of 14th birthday: 5% (i.e. 0.25% of total compensation)

- Season of 15th birthday: 5% (i.e. 0.25% of total compensation)
- Season of 16th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 17th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 18th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 19th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 20th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 21st birthday: 10% (i.e. 0.5% of total compensation)
- Season of 22nd birthday: 10% (i.e. 0.5% of total compensation)
- Season of 23rd birthday: 10% (i.e. 0.5% of total compensation)

2 Payment procedure

1. *The new club shall pay the solidarity contribution to the training club(s) pursuant to the above provisions no later than 30 days after the player's registration or, in case of contingent payments, 30 days after the date of such payments.*
 2. *It is the responsibility of the new club to calculate the amount of the solidarity contribution and to distribute it in accordance with the player's career history as provided in the player passport. The player shall, if necessary, assist the new club in discharging this obligation.*
 3. *An association is entitled to receive the proportion of solidarity contribution which in principle would be due to one of its affiliated clubs, if it can provide evidence that the club in question – which was involved in the professional's training and education – has in the meantime ceased to participate in organized football and/or no longer exists due to, in particular, bankruptcy, liquidation, dissolution or loss of affiliation. This solidarity contribution shall be reserved for youth football development programmes in the association(s) in question.*
 4. *The Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this annex".*
14. The FIFA DRC concluded from the above-mentioned regulations, and from the fact that the Player was registered with the Respondent as from 9 May 2001 (16th birthday) until 7 July 2005 (20th birthday), that the Respondent is entitled to receive solidarity contribution for the following periods of time:
- For 8 months of the season of the Player's 16th birthday;
 - For 12 months of the season of the Player's 17th birthday;
 - For 12 months of the season of the Player's 18th birthday;

- For 12 months of the season of the Player's 19th birthday;
 - For 6 months of the season of the Player's 20th birthday.
15. As a result, the FIFA DRC calculated that the Respondent was entitled to the claimed proportion of 2.0507% of the total transfer compensation, *i.e.* EUR 102,535.
16. The FIFA DRC then turned its attention to the calculation of the interest payments owed by the Appellant to the Respondent. It noted that the parties to the Transfer Agreement stipulated that the total amount of EUR 5,000,000 had been divided in three installments of EUR 1,000,000 payable until 25 July 2012, EUR 1,500,000 payable until 10 August 2012 and EUR 2,500,000 payable until 15 January 2013. The FIFA DRC then concluded that the claimed 5% default interest depends on the due date of the single installments. In this regard, the FIFA DRC noted that a grace period of 30 days had to be observed and therefore interest is owed as follows:
- 5% p.a. on EUR 20,507 as from 25 August 2012;
 - 5% p.a. on EUR 30,760.5 as from 11 September 2012; and
 - 5% p.a. on EUR 51,267.5 as from 15 February 2013.
17. Finally, the FIFA DRC condemned the Appellant to bear the costs of the procedure in the amount of CHF 15,000.
18. The Appealed Decision reads as follows:
- “1. *The claim of the Claimant, Fluminense Football Club, is accepted.*
2. *The Respondent, Al Ittihad Football Club, has to pay to the Claimant the amount of EUR 102,535 within 30 days as from the date of notification of this decision, plus 5% interest p.a. until the date of effective payment, as follows:*
- a) *5% p.a. on the amount of EUR 20,507 as from 25 August 2012;*
- b) *5% p.a. on the amount of EUR 30,760.5 as from 11 September 2012;*
- c) *5% p.a. on the amount of EUR 51,267.5 as from 15 February 2013.*
3. *In the event that the aforementioned 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. *The final costs of the proceedings in the amount of CHF 15,000 are to be paid by the Respondent within 30 days of notification of the present decision, as follows:*
- 4.1. *CHF 13,000 to FIFA to the following bank account with reference to case no. 12-03249/fes: [...] .*

4.2. CHF 2,000 to the Claimant.

5. *The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittances are to be made and to notify the Dispute Resolution Chamber of every payment received”.*

V. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 1 September 2014, the Appellant filed an appeal against the Appealed Decision with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (hereinafter referred to as the “Code”).
20. On 11 September 2014, the Appellant filed its Appeal Brief, requesting the CAS:

“A.1). To suspend the present arbitration proceedings until a final award is rendered on the case CAS 2014/A/[3664 Al Ittihad FC v. Club de Regatas Vasco da Gama].

OR, IN THE ALTERNATIVE

A.2.1). To fully accept the present appeal against the Decision of the Single Judge of the FIFA Dispute Resolution Chamber dated 9 May 2014.

A.2.2). As consequence, to adopt an award declaring that:

a. Clube de Regatas Vasco da Gama is officially involved in the present arbitration proceedings.

b. Clube de Regatas Vasco da Gama carries the exclusive obligation to burden the solidarity contribution related to the definitive transfer of the Player from the later club to Al Ittihad, in the light of the long-standing FIFA DRC and CAS jurisprudence.

c.1. To establish that Clube de Regatas Vasco da Gama shall pay directly to the Fluminense FC any amount that the later may be entitled to as per the solidarity mechanism,

OR,

c.2. To establish that the Appellant shall pay to the Fluminense FC any amount that the later may be entitled to as per the solidarity mechanism, ONLY UPON RECEIPT of the same sum from the Clube de Regatas Vasco da Gama.

A.3.1). To fully accept the present appeal against the Decision of the Single Judge of the FIFA Dispute Resolution Chamber dated 9 May 2014.

A.3.2). As consequence, to adopt an award annulling said decision and to send the case back to FIFA, pursuant to Article R57 of the CAS Code.

- B). *To fix a sum of 5,000 CHF to be paid by the Respondent to the Appellant, to help the payment of its legal fees and costs.*
- C). *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrator(s) fees.*
- D). *Awarding any such other relief as the Panel may deem necessary or appropriate".*

21. On 6 October 2014, the Respondent filed its answer, requesting:

"VI.a) to inform us if the payment of the entire advance of costs has been made, and, if it has not been paid by the Appellant, to immediately stop the execution of any procedural acts in the present proceeding deeming this appeal withdrawn and terminating immediately this arbitration, according to Article R64.2 para. 2;

In case the advance of costs is entirely paid by the Appellant:

VI.b) to deny the request for suspension of the proceeding made by the Appellant, once it is impossible for requests to suspend the present proceeding "until a final award is rendered on the case CAS 2014/A/3723 Al Ittihad FC v. Fluminense FC" (sic), i.e., in this present proceeding);

VI.c.1) Clube de Regatas Vasco da Gama is not involved in the present arbitration proceedings, or, alternatively, is involved in a subsidiary character;

VI.c.2) Al Ittihad FC has the obligation to pay to Fluminense FC the relevant solidarity contribution concerning the transfer of the player [D.] (as stated in the appealed decision), and that, according to the rules of FIFA RSTP and to FIFA DRC jurisprudence, Al Ittihad FC has solely the right to ask CR Vasco da Gama a reimbursement of the amounts paid to Fluminense FC;

VI.c.3) Al Ittihad FC shall pay the solidarity contribution due to Fluminense FC immediately, with the relevant interest as from the dates in which the payments should have been done (25 August 2012, 11 September 2012 and 15 February 2013), in the terms defined in the appealed decision;

VI.d) to order the Appellant to bear entirely the costs and fees related to the present proceeding, in attention to R64.4 of the Code".

22. On 2 October 2014, the CAS Court Office informed the Parties that pursuant to Articles R33 and R54 of the Code, the Panel appointed to decide the case was constituted as follows:

Sole Arbitrator: Dr. Marco Balmelli, Attorney-at-Law, Basel, Switzerland

23. By a letter dated 10 October 2014, the Appellant renounced its right to request a hearing in the case at hand and therefore requested that the Sole Arbitrator issues an award based on the Parties' written submissions. Thereafter, the Respondent agreed to the same by letter dated 15 October 2014.

24. On 13 October 2014, the CAS Court Office informed the Parties that the Sole Arbitrator denied

the Appellant's request for a suspension of the proceedings and also that Vasco da Gama cannot be joined as a party in the proceedings as it has not been called as a Respondent by the Appellant and that the Respondent did not request such joinder in accordance with Article R41.2 of the Code.

25. The Parties signed and returned the Order of Procedure respectively on 23 and 28 October 2014. Both Parties confirmed that their right to be heard and to be treated equally has been respected.

VI. SUMMARY OF THE PARTIES' SUBMISSIONS

26. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in what immediately follows. The Parties' written submissions and the contents of the Appealed Decision were all taken into consideration.

A. Al Ittihad FC

i. *Obligation of Vasco da Gama to pay the solidarity contribution*

27. In its Appeal Brief, the Appellant argues that the total transfer fee in the amount of EUR 5,000,000 includes the solidarity contribution which, as the parties to the Transfer Agreement stipulated, had to be paid by Vasco da Gama. The Appellant, in this regard, refers to paragraph 3.1 of the Transfer Agreement which states:

"3.1. Transfer Fee: For the definitive transfer of Player, Al Ittihad agrees to pay a total transfer fee in the net amount of 5,000,000€ (five million Euros) ("Transfer Fee"), which is inclusive of any and all amounts that would be due to Vasco and to any other club or third party in concept of solidarity mechanism and/or training compensation. For the sake of clarity, if any other club claims solidarity mechanism, Vasco will be the one to pay it. The Transfer Fee gives Al Ittihad 100% of the economic rights of the Player".

28. The Appellant implies that its freedom of contract and the principle of "*pacta sunt servanda*" would be violated if this clause of the Transfer Agreement would not be respected.

ii. *Ongoing proceedings which could have an impact on the present case*

29. Furthermore, the Appellant indicates that it is involved in two current and ongoing proceedings having an influence on the matter at hand: one concerning the termination of the Player's contract with the Appellant where the Appellant states that a claim has been lodged before the FIFA DRC (Ref. no. 12-03024/fes) and the other one in connection with the payment of the transfer fee agreed upon in the Transfer Agreement which had been decided by the FIFA DRC (Ref. no. lza 12-03110) and where the Appellant appealed against said decision before CAS (CAS 2014/A/3664).

30. The Appellant moreover claims that since the solidarity contribution is calculated on the basis

of the transfer fee stipulated between two clubs when transferring a player and in the present case, according to the Appellant, these two clubs are in a dispute over the payment of the transfer fee which has not been executed yet, the amount of the solidarity contribution remains unclear and can therefore not be calculated until the dispute between the parties of the Transfer Agreement has been settled.

B. Fluminense FC

i. *Exclusion of evidence presented by the Appellant*

31. The Respondent first argues in its answer that the appeal should not be heard because the Appellant acted in bad faith by not participating in the procedure before the FIFA DRC. The Appellant did not submit any information or evidence in this procedure. It never contacted neither the Respondent nor the FIFA DRC although FIFA notified the Appellant twice through the Saudi Arabian Football Federation. Since there was no answer of the Appellant, the FIFA DRC requested the direct fax number of the Appellant to which it sent a letter dated 27 November 2012 informing it about the procedure and requesting a copy of the relevant transfer contract signed between the Appellant and Vasco da Gama related to the transfer of the Player.
32. During this whole procedure, the Appellant did not exercise its right of defence, although it had been notified to do so on multiple occasions by FIFA. The first time the Appellant reacted to the proceedings was when it requested the grounds of the Appealed Decision.
33. With its Appeal Brief, the Appellant presented for the first time the Transfer Agreement and letters proving the existence of the two other proceedings *sub judice* which the Appellant claims to most likely have an impact on the current proceeding.
34. The Respondent then points towards Article R57 of the Code which states the following:

“R57 Scope of Panel’s Review – Hearing

The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise.

The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply.

If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may

nevertheless proceed with the hearing and render an award”.

35. Considering the abovementioned article, and in particular para. 3, the Respondent is of the opinion that the Appellant withheld information available to it during the whole duration of the proceedings before the FIFA DRC and that therefore all evidence presented by the Appellant in its Appeal Brief should be excluded by the Sole Arbitrator. The reason to do so, according to the Respondent, lies in the abusive way in which the Appellant retained said evidence in order to be able to submit it directly before the CAS, causing an unnecessary delay of the proceedings and showing a deep disrespect towards the Respondent and to FIFA.

ii. Violation of FIFA rules and jurisprudence by the Transfer Agreement

36. Concerning the contractual agreement between the parties to the Transfer Agreement, the Respondent states that this agreement ignores and therefore violates the “*FIFA rules as well as FIFA DRC jurisprudence on the matter*”. In this regard, the Respondent cites Decision no. 09121350 of the FIFA Players’ Status Committee, passed on 25 September 2012 and stating the following:

“11. With due consideration to the above, the Committee referred to the well-established jurisprudence of the Dispute Resolution Chamber (DRC) with regard to cases in which the player’s new club does not withhold 5% of the agreed transfer compensation when paying such transfer compensation, but nevertheless is asked to distribute solidarity contribution to the player’s training clubs.

12. According to the mentioned jurisprudence, the player’s new club is ordered to remit the relevant proportion(s) of the 5% solidarity contribution to the club(s) involved in the player’s training and education in strict application of art. 21 and art. 1 and art. 2 of Annexe 5 of the Regulations. At the same time, according to said well-established jurisprudence, the player’s former club is ordered to reimburse the same proportion(s) of the 5% of the compensation that it received from the player’s new club”.

37. With regard to this jurisprudence of the FIFA Players’ Status Committee, the Respondent argues that, even if the Appellant would have presented the Transfer Agreement and its clause stating that Vasco da Gama would have to pay the solidarity contribution, the FIFA DRC would still have decided that the Appellant is the party obliged to pay the relevant solidarity contribution to the Respondent. The Appellant then would only be entitled to receive a reimbursement from Vasco da Gama of the amounts it had to pay.

iii. Further stipulations of the Transfer Agreement

38. Furthermore, the Respondent claims that the Appellant did in fact consider the possibility of being a respondent party in a claim related to solidarity contribution over the transfer of the Player. Clause 6.7.2. of the Transfer Agreement states the following:

“6.7.2. Vasco hereby represents and warrants to Al Ittihad that it is fully entitled and authorized to execute the terms of this Transfer Agreement and that it has not entered into any arrangements with any third party relating to the Player and/or his playing registration and that no other football club, team, national association,

league, individual or any other legal entity shall bring a claim against Al Ittihad in respect of its registration of the Player, with exception to those regarding the distribution of the Solidarity Mechanism”.

iv. Influence of the pending cases on the present one

39. Concerning the pending procedures, the Respondent is of the opinion that there is no reason to suspend the current case.
40. According to the information of the Appellant, the case mentioned before the FIFA DRC (Ref. no. 12-03024/fes) concerns the termination of the contract between the Player and the Appellant. Considering the information provided by the Appellant, there will be no effect regarding the amount owed under the claim for solidarity contribution, as the latter derives from the Transfer Agreement signed between the Appellant and Vasco da Gama which does not correlate to the employment relationship between the Appellant and the Player.
41. Regarding the second case mentioned by the Appellant which, according to the information provided by the Appellant, had been decided by the FIFA DRC (Ref. no. lza 12-03110) and where the Appellant appealed against said decision before CAS (CAS 2014/A/3664), the Respondent also claims that the Appellant was not able to prove the importance of suspending the case at hand in order for CAS to primarily decide on this cause pending between the Appellant and Vasco da Gama. At least, according to the Respondent, there is no compelling evidence provided by the Appellant showing reasonable doubt that the amount of the transfer fee as the basis of the calculation of the solidarity contribution could be influenced by this proceeding.
42. In the latter proceeding, according to the Respondent, the Appellant was at first instance ordered to pay the full transfer fee as well as a fine and interest, plus the costs of the proceeding.
43. In addition, the Respondent states that even if the mentioned proceedings would affect the Appealed Decision, the circumstances in which the Appellant presented this evidence should lead the Sole Arbitrator to fully disregard it.

v. Impact of actual payment of stipulated installments on solidarity contribution

44. Regarding the alleged condition of the payment of the transfer fee to the payment of solidarity contribution, the Respondent argues that, first of all, the Appellant could already have presented these arguments before the FIFA DRC and that, secondly, the Appellant's interpretation of the RSTP regulations cannot be accepted by the Respondent. The Respondent refers to Article 2.1 of Annex 5 of the RSTP which states:

“2 Payment procedure

- 1. The new club shall pay the solidarity contribution to the training club(s) pursuant to the above provisions no later than 30 days after the player’s registration or, in case of contingent payments, 30 days after the date of such payments”.*

45. The Respondent states that a literal interpretation of this clause would result in two different criteria for the deadline to claim solidarity contribution, *i.e.* the player's registration and the date of the payments. The Respondent then refers to the CAS jurisprudence, when dealing with the interpretation of the rules of sports associations and cites the CAS award of 30 March 2012, CAS 2011/A/2563 which states the following:

"3. The rules and the statutes of an association have to be interpreted either in accordance with the subjective will of the rulemaking persons (the so-called "Willensprinzip", i.e. principle of the will) or with the objective meaning that the addressees of the rule would give to that rule, in good faith (the so-called "Vertrauensprinzip", i.e. principle of confidence or of good faith). Swiss jurisprudence has applied from time to time one or the other principle".

46. As to the jurisprudence of the CAS, the Respondent argues that from a principle of will perspective, an unequal system, concerning the point in time when the solidarity contribution is owed, does not seem to be the intention of FIFA when redacting the quoted rule. The Respondent acknowledges that it is, on one hand, reasonable to affirm that the parameters, *i.e.* the 30 day payment term, should be the same whether two clubs agree to a payment of the transfer fee at once or in several installments. On the other hand, the Respondent claims that it would not be fair to leave it at the discretion of a club obligated to pay a solidarity contribution to decide when this solidarity contribution shall be paid to the training clubs. Additionally, in the view of the Respondent, it would not make sense to allow the club entitled to receive the transfer fee to be able to file a claim before the competent FIFA decision-making bodies and to not grant the same rights to the club which should receive the solidarity contribution.
47. Also, from a practical point of view, the Respondent claims that it would not make sense for the clubs which are entitled to receive the solidarity contribution if they had to make special inquiries in order to find out whether a new club has already paid the stipulated transfer fee to the former club of the player in question.

vi. *The Appellant's behaviour in the proceedings*

48. In general, the Respondent is of the opinion that the Appellant should not be able to take advantage from its non-compliance with contractual obligations and of "*non-presenting of defense*". Otherwise, the situation would collide with the principle of "*nemo auditor propriam turpitudinem allegans*" and "*the doctrine of estoppel*". The Respondent concludes that there appears to be no "*fumus boni iuris*" in favor of the Appellant.

VII. JURISDICTION OF THE CAS, ADMISSIBILITY AND SCOPE OF REVIEW OF THE PANEL

49. Pursuant to Article R47 of the Code:

"An appeal against the decision of a federation, association or sports-related body may be filed with the 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 him prior to the appeal, in accordance with the statutes or regulations of that body".

50. The jurisdiction of the CAS to hear this dispute derives from Articles 66 and 67 of the FIFA Statutes, which state in particular that CAS has jurisdiction to consider appeals against a decision of the FIFA DRC.

51. In particular, Article 67.1 of the FIFA Statutes provides as follows:

“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”.

52. The signature of the Order of Procedure by the Parties confirmed that the jurisdiction of the CAS in the present case was not disputed.

53. The motivation of the Appealed Decision having been notified to the Parties on 12 August 2014, the appeal filed by the Appellant on 1 September 2014 is therefore admissible.

54. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law and may issue a “de novo” decision superseding, entirely or partially, the appealed one. In this respect, the Sole Arbitrator deems it not necessary to deal with the Respondent’s request that the evidence produced in the present CAS proceedings be deemed inadmissible by applying Article R57, para. 3 of the Code in view of the findings on the merits below.

VIII. APPLICABLE LAW

55. Article R58 of the Code provides as follows:

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

56. Article 66.2 of the FIFA Statutes provides as follows:

“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”.

57. In view of the above, the Sole Arbitrator considers that this appeal is governed by the FIFA Statutes and regulations, and Swiss law where appropriate.

IX. MERITS OF THE APPEAL

58. The Appellant primarily requests the Sole Arbitrator to suspend the present proceedings.

59. In the alternative, the Appellant requests the Sole Arbitrator to set aside the Appealed Decision and demands that the Sole Arbitrator declares Vasco da Gama to be “officially involved in the present

proceedings". Furthermore, the Appellant requests the Sole Arbitrator to decide that Vasco da Gama carries the exclusive obligation to bear the solidarity contribution related to the transfer of the Player from Vasco da Gama to the Appellant and also to establish that Vasco da Gama shall pay said solidarity contribution directly to the Respondent or that the Appellant shall pay said solidarity contribution to the Respondent upon receipt of the same sum from Vasco da Gama.

60. In the further alternative, the Appellant requests the Sole Arbitrator to annul the Appealed Decision and to refer the case back to the FIFA DRC, pursuant to Article R57 of the Code.
61. Additionally, the Appellant requests the Respondent to be ordered to bear the Appellant's legal fees and costs amounting to CHF 5,000 and also the CAS costs.
62. The Respondent, on the other hand, requests that the claims of the Appellant should be dismissed and especially that the Sole Arbitrator rules that the Appellant is responsible for the payment of the solidarity contribution according to the decision of the FIFA DRC.
63. It follows from the above that the central issues to be determined in the present matter are (i) whether the present proceedings have to be suspended in order to avoid contradictory judgments in the cases in which the Appellant seems to be involved, (ii) whether Vasco da Gama can be included in the present proceedings in the way the Appellant requests, (iii) what effects the stipulation between the parties to the Transfer Agreement concerning the payment of the solidarity contribution has on the present case. Furthermore, the Sole Arbitrator will need to discuss (iv) whether, in general, the non-payment of the transfer fee affects the payment procedure for the solidarity contribution and (v) whether the amount and maturity of the solidarity contribution have been calculated correctly in the matter at hand.

i. Do the present proceedings need to be suspended?

64. The first question the Sole Arbitrator has to answer is whether the proceedings before CAS have to be suspended in order to prevent contradictory judgments in the cases pending before CAS concerning the Transfer Agreement.
65. The Appellant requests such suspension on the grounds that one of the cases still *sub judice* (CAS 2014/A/3664) is related to the payment of the transfer fee from the Appellant to Vasco da Gama.
66. The Appellant states in its Appeal Brief that "*said dispute – related to the transferfee in connection with the transfer of the Player – is inextricably linked to the present one for obvious reasons. In particular due to the fact that the solidarity contribution is calculated on the basis of the payment of the transferfee by and between the “new club” and the “former club” of the Player. Accordingly, if the very payment of the transferfee has not occurred yet as said legal issue is still sub judice, it is impossible to rule on the consequences related therewith, i.e. calculating the correct amount of solidarity contribution to be paid and establish the timeline for the triggering of the obligation to effect said payments in relation to the solidarity mechanism*".
67. Although the Sole Arbitrator, in general, shares the view of the Appellant that, if the amount to

be paid under a transfer agreement is not clear yet, the calculation of a solidarity contribution is problematic, the Sole Arbitrator nonetheless holds that the mere statement that the pending case would be related to the transfer fee fails to meet the essential requirements of the rules on the burden of proof. The Sole Arbitrator notes that the Appellant did not provide compelling evidence demonstrating that the proceeding mentioned by the Appellant could affect the matter at hand.

68. Since the Appellant could not prove the alleged connection, the Sole Arbitrator denied the request for a suspension of the present proceedings. The Parties were advised of this decision by letter dated 13 October 2014.

*ii. **Can Vasco da Gama be included in the present proceedings?***

69. In the alternative to the suspension of the present proceedings, the Appellant requests the Panel to “*adopt an award declaring that (...) Clube de Regatas Vasco da Gama is officially involved in the present arbitration proceedings*”.
70. As the Sole Arbitrator already made clear by the abovementioned letter dated 13 October 2014, Vasco da Gama cannot be joined as a party in the present proceedings as it has not been called as a Respondent by the Appellant and that the Respondent in the present case has not requested such joinder in accordance with Article R41.2 of the Code.

*iii. **What effects would the stipulation between the parties to the Transfer Agreement concerning the payment of the solidarity contribution have on the present case?***

71. According to Annex 5 of the RSTP, the 5% solidarity contribution shall be deducted from the total amount of compensation under a transfer agreement and shall be distributed by the new club to the club(s) involved in the training and education of the specific player over the years. The stipulation between the parties to the Transfer Agreement consisting in an obligation of Vasco da Gama to pay a possible solidarity contribution would not affect the Respondent since it would not be viable to expect the club(s) involved in the training and education of a player to have full knowledge of contractual stipulations between the parties to a transfer agreement concerning such player. Therefore, the training club always has to claim its share of the solidarity contribution from the new club which will be allowed to reclaim it from the former club of the player if and when this amount should not have been deducted from the total transfer sum.
72. This interpretation of Annex 5 of the RSTP is further supported by the Commentary on the Regulations for the Status and Transfer of Players (hereinafter referred to as the “RSTP-Commentary”) on Annex 5 Article 2 of the RSTP, stating that it is clearly the new club’s responsibility to calculate and distribute the solidarity contribution and that it has to contact the former club(s) in order to receive the necessary bank details.

iv. Does the non-payment of the installments of the transfer fee affect the payment procedure for the solidarity contribution?

73. In the case at hand, it seems to be contestable whether the Appellant has paid the stipulated installments of the transfer fee to Vasco da Gama. Article 2 para. 1 of the RSTP reads as follows:

"1. The new club shall pay the solidarity contribution to the training club(s) pursuant to the above provisions no later than 30 days after the player's registration or, in case of contingent payments, 30 days after the date of such payments".

74. A literal interpretation of this provision could lead to the conclusion that the solidarity contribution would depend on the actual payment of certain installments of the transfer fee. The RSTP-Commentary does not explicitly clarify this question by stating that in a case of contingent payments, the solidarity contribution does not have to be paid at once since this "*would represent an undue enrichment of the clubs receiving this contribution, with respect to those installments that have not yet matured*". The Sole Arbitrator infers from this statement that the relevant criterion for the contribution payment does not consist in the actual execution of a contingent payment but in the maturity of the payment in question. With regard to Article 2 para. 1 of the RSTP this leads to the conclusion that, in a case of contingent payments, the solidarity contribution for this payment has to be paid 30 days after the due date of the installment in question. A new club of a player which does not comply with the stipulated payment dates of a transfer agreement cannot use its non-compliance with the provisions of a transfer agreement as an argument for not paying the solidarity contribution.

v. Calculation of the solidarity contribution and the maturity of the payments

75. The FIFA DRC considered in its decision that the Respondent is entitled to receive a solidarity contribution for 8 months of the season of the Player's 16th birthday, for 12 months of the season of the Player's 17th birthday, for 12 months of the season of the Player's 18th birthday, for 12 months of the season of the Player's 19th birthday and for 6 months of the season of the Player's 20th birthday. As a result, the FIFA DRC concluded that the Respondent is entitled to 2.0507% of the total transfer compensation, *i.e.* EUR 102,535 plus interest as follows: 5% p.a. on EUR 20,507 as from 25 August 2012, 5% p.a. on EUR 30,760.50 as from 11 September 2012 and 5% p.a. on EUR 51,267.50 as from 15 February 2013.

76. Although, in the view of the Sole Arbitrator, the FIFA DRC slightly miscalculated those figures considering the relevant percentage of the transfer fee owed as a solidarity contribution (which by calculation of the Sole Arbitrator would amount to 2.0822% instead of 2.0507%) and also with regard to the maturity of one contingent payment (interest of 5% p.a. as from 10 September instead of 11 September), the Sole Arbitrator will not correct the calculated amount owed to the Respondent since the latter did not request such a correction by appealing against the Appealed Decision. Otherwise, the Sole Arbitrator would violate the principle of "*ne eat index ultra petita partium*".

X. CONCLUSION

77. In view of all factors in the case at hand, the Sole Arbitrator upholds the decision of the FIFA DRC in its entirety.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 1 September 2014 by Al Ittihad FC against the decision adopted by the FIFA Dispute Resolution Chamber on 9 May 2014 is dismissed.
2. The decision adopted by the FIFA Dispute Resolution Chamber on 9 May 2014 is confirmed.
(...)
5. All other motions or prayers for relief are dismissed.