



**Arbitration CAS 2017/A/5232 Clube Atlético Mineiro v. Fédération Internationale de Football Association (FIFA), award of 12 December 2018**

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

*Football*

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

*De novo ruling*

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

*Principle of proportionality of disciplinary sanctions*

*Arguments not qualifying as exceptional circumstances justifying the (partial) unfulfillment of an obligation*

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

1. According to art. R57 of the CAS Code, a CAS arbitration procedure may entail a *de novo* review of the merits of a case and is not confined merely to deciding whether the ruling appealed was correct or not. It is a panel's function to make an independent determination as to the merits of a dispute.
2. When it intervenes on the basis of art. 64 of the FIFA Disciplinary Code (FIFA DC), the FIFA Disciplinary Committee can only examine whether a party complied with a final and binding decision.
3. In disciplinary matters, each situation must be evaluated on a case-by-case basis and interests at stake have to be balanced in respect of the principle of proportionality. The purpose of a fine under art. 64 FIFA DC is to serve as a deterrent while the deciding body's intention is not to create an additional severe financial burden to a debtor. Account must be taken of the seriousness of the facts and other related circumstances as well as of the damage that the penalised conduct entails for the parties involved, for the federation in question and for its sport. In the same way, disciplinary bodies may evaluate any aggravating and/or extenuating circumstances.
4. The arguments that a club paid several creditors, that it made a partial payment to its counterparty and presented it a payment plan do not qualify as exceptional circumstances that justify the (partial) unfulfillment of an obligation.
5. The measure of a sanction imposed by a disciplinary body in the exercise of the discretion it is allowed by the relevant rules can be reviewed only when a sanction is evidently and grossly disproportionate to the offence.

## I. PARTIES

1. Clube Atlético Mineiro (the “Appellant” or “Atlético Mineiro”) is a football club, with seat in Belo Horizonte, Brazil. Atlético Mineiro is affiliated to the Football Federation of Brazil, which is a member of the Fédération Internationale de Football Association (FIFA).
2. The Fédération Internationale de Football Association (the “Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

## II. FACTUAL BACKGROUND

### A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. On 23 September 2014, the Single Judge of the FIFA Players’ Status Committee (“FIFA PSC”) passed a decision upholding a claim lodged by Al-Gharafa in a dispute against Atlético Mineiro related to the transfer of the player [D] from Al-Gharafa to Atlético Mineiro. The Single Judge ordered Atlético Mineiro to pay to Al-Gharafa the amount of EUR 2,500,000 as well as 12% interest *p.a.* on said amount as from 1 September 2013 until the date of effective payment. Atlético Mineiro was also ordered to pay to Al-Gharafa within 30 days the amount of EUR 250,000 as a penalty fee or, otherwise, interest at a rate of 5% *p.a.* would apply and, as costs of the proceedings, the amount of CHF 15,000 to FIFA and CHF 5,000 to Al-Gharafa.
5. On 12 November 2014, FIFA PSC communicated the grounds of the decision to the parties and on 2 December 2014 Atlético Mineiro filed an appeal against Al-Gharafa challenging said decision before the Court of Arbitration for Sport (case CAS 2014/A/3840).
6. On 5 June 2015, CAS issued its decision in the aforementioned case, dismissed the appeal of Atlético Mineiro and ordered it to pay an additional amount of CHF 8,000 to Al-Gharafa as contribution towards its legal fees and expenses incurred in connection with the CAS proceedings.
7. On 18 August 2015, FIFA PSC sent a letter to Atlético Mineiro reminding it of its obligations under the CAS decision and requesting it to comply with them.

8. On 1 October 2015, FIFA PSC informed Atlético Mineiro that the entire file of the case would be forwarded to the FIFA Disciplinary Committee for consideration and a formal decision.

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

9. On 3 June 2016, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against Atlético Mineiro as the aforementioned amounts were not paid to Al-Gharafa.
10. On 20 June 2016, the secretariat to the FIFA Disciplinary Committee invited Atlético Mineiro in writing to pay the outstanding amounts to Al-Gharafa by 29 July 2016 at the latest.
11. On 5 August 2016, Atlético Mineiro and Al-Gharafa jointly requested for a suspension of the proceedings for 25 days in view of the parties' attempts to reach an amicable settlement.
12. On 19 October 2016, the Football Federation of Qatar wrote a letter to the FIFA Disciplinary Committee informing it that Atlético Mineiro had still not complied with the CAS decision and requested that the proceedings be resumed.
13. On 2 November 2016, FIFA urged Atlético Mineiro for the final time to pay to Al-Gharafa the outstanding amounts by 3 December 2016.
14. On 5 December 2016, Atlético Mineiro wrote a letter to FIFA submitting that non-payment of outstanding amounts was due to exceptional circumstances, such as financial difficulties, devaluation of the Brazilian currency and debts to other football stakeholders. Furthermore, Atlético Mineiro claimed that it had paid the amount of EUR 1,000,000 to Al-Gharafa on 16 August 2016 and proposed a payment plan, which was not accepted. Consequently, Atlético Mineiro requested to be granted a 180-day period of grace to comply with the payments of the outstanding amounts and that no point deduction or transfer ban be imposed upon it by FIFA.
15. On 13 December 2016, the FIFA Disciplinary Committee rendered its decision (the "Appealed Decision") ruling that:

*"1. The club Atlético Mineiro is pronounced guilty of failing to comply with the decision passed by the Court of Arbitration for Sport (CAS) on 5 June 2015 following the decision of the Single Judge of the Players' Status Committee dated 23 September 2014 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*

*2. The club Atlético Mineiro is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision.*

*(...)*

*3. The club Atlético Mineiro is granted a final period of grace of 90 days as from notification of the present decision in which to settle its debt to the creditor, the club Al-Gharafa S.C.*

4. *If payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that six (6) points be deducted from the debtor's first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
5. *If the club Atlético Mineiro still fails to pay the amount due even after deduction of the points in accordance with point 4. above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.*

(...)

7. *The costs of these proceedings amounting to CHF 3,000 are to be borne by the club Atlético Mineiro and shall be paid according to the modalities stipulated under point 2. above”.*

16. On 21 February 2017, FIFA communicated to the parties the grounds of the Appealed Decision, which, *inter alia*, determined the following:

“2. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (art. 64 par. 1 of the FDC):*

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

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

(...)

4. *In the case at stake, the Committee notes that the decision passed by the Court of Arbitration for Sport on 5 June 2015 has been duly communicated on said date to the parties and that no appeal against such decision was lodged. Therefore, the decision became final and binding. Furthermore, and according to the information contained in the file at the disposal of the Committee, no agreement was reached between the parties.*
5. *In view of what has been explained under paragraph II./3. above, the Committee is not allowed to analyse the case decided by the Court of Arbitration for Sport as to the substance, in other words, to*

*check the correctness of the amount ordered to be paid, but has as a sole task to analyse if the debtor complied with the final and binding decision rendered by the Court of Arbitration for Sport.*

6. *As the debtor did not comply in full with the decision passed by the Court of Arbitration for Sport on 5 June 2015 and is consequently withholding money from the creditor, it is considered guilty under the terms of art. 64 of the FDC.*
7. *The fine to be imposed under the above-referenced art. 64 par. 1 a) of the FDC in combination with art. 15 par. 2 of the FDC shall range between CHF 300 and CHF 1,000,000. The debtor withheld the amount unlawfully from the creditor. Even FIFA's attempts to urge the debtor to fulfil its financial obligations failed to induce it to pay the total amount due. In view of all the circumstances pertaining to the present case and by taking into account the outstanding amount due, the Committee regards a fine amounting to CHF 30,000 as appropriate. This amount complies with the Committee's established practice.*
8. *In application of art. 64 par. 1 b) of the FDC, the Committee considers a final deadline of 90 days as appropriate for the amount due to be paid to the creditor.*
9. *In accordance with art. 64 par. 1 c) of the FDC, the debtor will be warned and notified that, in the case of default within the period stipulated, points will be deducted or demotion to a lower division be ordered. A deduction of points will occur if the creditor informs the secretariat to the FIFA Disciplinary Committee of the non-payment within the stipulated deadline and demands in writing that points be deducted from the debtor's first team in the national league. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the Committee. The order to implement the deduction of points will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
10. *With regard to the amount of points to be deducted, art. 64 par. 3 of the FDC is applicable, whereby the number of points deducted must be proportionate to the amount owed. In the light of the foregoing criteria, regarding the amount of the fine to be imposed and in keeping with the Committee's well-established practice, a deduction of six (6) points is considered appropriate.*
11. *The Committee decides based on art. 105 par. 1 of the FDC that the costs and expenses of these proceedings amounting to CHF 3,000 shall be borne by the debtor".*

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

17. On 3 July 2017, the Appellant filed a statement of appeal before the CAS against the Respondent and Al-Gharafa, including a request for a stay of the Appealed Decision. The Appellant nominated Mr João Nogueira da Rocha, attorney-at-law in Lisbon, Portugal, as arbitrator.
18. On 18 July 2017, the Respondent nominated Mr Pedro Tomás Marqués, attorney-at-law in Sitges, Spain, as arbitrator. With respect to the Appellant's request for a stay of the Appealed Decision, the Respondent submitted that *"taking into consideration its financial nature, the content of*

*art. 124 par. 2 of the FIFA Disciplinary Code and the fact that a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal (CAS 2004/A/780), please be informed that we refrain from objecting to the Appellant's request to stay the execution of the challenged decision in question".*

19. On 18 July 2017, Al-Gharafa and the Appellant informed the CAS Court Office in a joint letter that they had started *"negotiating the terms and conditions of an eventual settlement agreement concerning the outstanding amount"* and requested, subject to the consent of the Respondent, to suspend all time limits regarding the ongoing arbitration proceedings until 1 August 2017 in accordance with Article R32 of the Code of Sports-related Arbitration (the "CAS Code").
20. On 20 July 2017, the Respondent informed the CAS Court Office that it did not object to the request for suspension of the proceedings, in light of Al-Gharafa's prior acceptance of such request.
21. On 21 July 2017, the CAS Court Office informed the parties that, in view of their agreement, the arbitration was suspended until 1 August 2017.
22. On 1 August 2017, Al-Gharafa and the Appellant informed the CAS Court Office in a joint letter that they were *"still negotiating the terms and conditions of an eventual settlement agreement concerning the outstanding amount"* and requested the suspension to be extended until 1 October 2017.
23. On 2 August 2017, the CAS Court Office informed the parties that, unless FIFA disagreed, the suspension was extended until 1 October 2017.
24. On 3 August 2017, FIFA confirmed its agreement to the suspension of the proceedings.
25. On 2 October 2017, Al-Gharafa and the Appellant informed the CAS Court Office in a joint letter that they were *"still negotiating the terms and conditions of an eventual settlement agreement concerning the outstanding amount"* and requested the suspension to be extended until 31 October 2017.
26. On 4 October 2017, the CAS Court Office informed the parties that, unless FIFA disagreed, the proceedings shall remain suspended until 31 October 2017.
27. On 5 October 2017, FIFA confirmed its agreement to the suspension of the proceedings.
28. On 1 November 2017, Al-Gharafa and the Appellant requested that the proceedings remain suspended until 1 February 2018 and, following FIFA's confirmation, on 2 November 2017 the CAS Court Office informed the parties that the proceedings were suspended until 1 February 2018.
29. On 2 February 2018, Al-Gharafa and the Appellant informed the CAS Court Office in a joint letter that they were *"still negotiating the terms and conditions of an eventual settlement agreement concerning the outstanding amount"* and requested the suspension to be extended until 1 April 2018.

30. On 5 February 2018, the CAS Court Office informed the parties that, unless FIFA disagreed, the proceedings shall remain suspended until 1 April 2018.
31. On 6 February 2018, FIFA confirmed its agreement to the suspension of the proceedings.
32. On 26 February 2018, Mr Tannuri, counsel for Al-Gharafa in this arbitration, informed the CAS that *“unfortunately the parties have not reached an agreement, reason why the Appellant requires the immediate continuation of the arbitration proceedings”*.
33. On 28 February 2018, the CAS Court Office noted that Mr Tannuri had indicated that he was acting on behalf of the Appellant, whereas he was previously representing Al-Gharafa. It further noted that all parties had agreed for the proceedings to remain suspended until 1 April 2018. Consequently, the CAS Court Office invited the parties to file any observations with respect to the above.
34. On 28 February 2018, Mr Tannuri apologised for the mistake and confirmed that his letter of 26 February 2018 was addressed to the Court Office in his capacity as legal representative of Al-Gharafa and not of the Appellant.
35. On 28 February, the Appellant sent a letter to the CAS Court Office stating that Mr Tannuri was not empowered to represent the Appellant in this arbitration and that it was up to the President of the CAS Appeals Arbitration Division to decide on the reinstatement of the proceedings.
36. On 5 March 2018, FIFA wrote to the CAS Court Office stating that *“although it appeared that Mr Tannuri was acting on behalf of the Second Respondent in the present proceedings (as was the case during the FIFA disciplinary proceedings), it should be duly noted that the former in principle represents the Appellant in several other proceedings before FIFA or CAS (cf. in particular CAS 2017/A/5401 and CAS 2018/A/5551). Finally, should the Appellant and the Second Respondent not agree any more to maintain the proceedings suspended until 2 April 2018, we do not oppose to the immediate continuation of the proceedings”*.
37. On 6 March 2018, the CAS Court Office informed the parties that, in the absence of an express agreement from the Appellant, the proceedings shall remain suspended until 1 April 2018, but that the Appellant was entitled to request that the proceedings be resumed at any point prior to that.
38. On 5 April 2018, the CAS Court Office informed the parties that, in the absence of another request by the parties until 6 April 2018, the proceedings shall be immediately resumed. In accordance with the parties’ agreement, the Appealed Decision was stayed until the issuance of a final award.
39. On 10 April 2018, the Appellant filed its appeal brief in this matter.
40. On 10 April 2018, Al-Gharafa confirmed its agreement with the nomination of Mr Pedro Tomás Marqués, attorney-at-law in Sitges, Spain, as arbitrator by the Respondent.

41. On 23 April 2018, Al-Gharafa wrote a letter to the CAS Court Office stating that it was not a party to the FIFA proceedings that resulted in the Appealed Decision and that, as a result, it lacked standing to be sued in the present arbitration. In view of the above, Al-Gharafa requested to be excluded from the present arbitration.
42. On 26 April 2018, the Appellant stated in writing that it withdrew its appeal against Al-Gharafa. Consequently, on 30 April 2018, the CAS Court Office informed the parties that these proceedings shall continue under the reference: CAS 2017/A/5232 Clube Atlético Mineiro v. FIFA.
43. On 2 May 2018, Al-Gharafa informed the CAS Court Office that Mr Tannuri did not represent them any longer in the present arbitration.
44. On 7 May 2018, the Respondent filed its answer with CAS.
45. On 8 May 2018, the CAS Court Office invited the parties to state whether they prefer that a hearing be held in the present arbitration.
46. On 18 May 2018, the Respondent informed the CAS Court Office that it deemed that a hearing was not necessary and that a decision may be issued on the basis of the written submissions only.
47. On 23 May 2018, the Appellant sent a letter to the CAS Court Office stating that it *“prefers a hearing to be held in this matter”*.
48. On 5 June 2018, the CAS Court Office informed the parties that the Panel was constituted as follows:  
  
President: Mr Sofoklis Pilavios, attorney-at-law, Athens, Greece;  
  
Arbitrators: Mr João Nogueira da Rocha, attorney-at-law, Lisbon, Portugal;  
Mr Pedro Tomás Marqués, attorney-at-law, Sitges, Spain.
49. On 19 June 2018, the CAS Court Office informed the parties that the Panel had decided to hold a hearing in this arbitration.
50. On 20 June 2018, in view of the parties’ availabilities, the CAS Court Office informed the parties that the hearing in this matter was to be held in Lausanne on 19 September 2018.
51. On 5 July 2018, the CAS Court Office sent to the parties a copy of the Order of Procedure in this matter, which was signed and returned by the Respondent on 24 July 2018 and by the Appellant on 25 July 2018.
52. On 19 September 2018, a hearing took place at the Lausanne Palace Hotel, in Lausanne, Switzerland for the present case.

53. The Panel sat in the following composition:

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

Arbitrators: Mr João Nogueira da Rocha, attorney-at-law, Lisbon, Portugal.  
Mr Pedro Tomás Marqués, attorney-at-law, Sitges, Spain.

54. The Panel was assisted by Mrs Delphine Deschenaux-Rochat, CAS Counsel.

55. At the outset of the hearing, the parties confirmed that they did not have any objection as to the constitution and composition of the Panel.

56. The following persons attended the hearing:

- The Appellant was represented by Mr Lucas Ottoni, counsel ;
- The Respondent was represented by Mr Julien Deux, Group Leader in the FIFA Disciplinary Department and Mr Alexander Jacobs, Legal Counsel in the FIFA Disciplinary Department.

57. At the conclusion of the hearing, the parties confirmed that their right to be heard and to be treated equally in the present proceedings before the Panel had been fully respected, following which the Panel closed the hearing.

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

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

- On 16 August 2016, after the Respondent initiated the disciplinary procedure against the Appellant that led to the Appealed Decision, the Appellant paid to Al-Gharafa the amount of EUR 1,000,000 and proposed a payment plan for the remaining outstanding amount, which prove the Appellant's good faith. Al-Gharafa did not accept the proposed payment plan.
- During the disciplinary proceedings, the Appellant notified FIFA of the problems it was facing with the Brazilian tax authorities and its efforts to pay other debtors of the club, which were football stakeholders as well. The Appellant did not dispute the outstanding amount due to Al-Gharafa, its unconditional decision to pay such amount as soon as possible and its efforts to agree with Al-Gharafa to a settlement and payment plan.
- The Appellant also argued before FIFA that the above-mentioned circumstances qualify as "*exceptional circumstances*" and that, consequently, there is no reason for the imposition of a fine or a point deduction or a transfer ban by FIFA. In addition, they justify the granting of a period of grace of 180 days to pay the outstanding amount to the Appellant. FIFA disregarded those arguments and requests of the Appellant and rendered the

Appealed Decision, which is disproportionate, harmful and lacks both factual basis and legal merit.

- Should the sanction of deduction of six points be applied on the Appellant today, it would mean its relegation based on the current standing of the Brazilian football championship. At any case, deduction of six points is a severe sanction, which may affect the relegation to a lower league, the qualification to international competitions or even the championship winner club and its effect is going to be irreparable.
- The Appealed Decision “*violates imperative principles of Swiss laws, mostly those which limit the regulatory and decision freedom of an association and which have as main objective to protect its members. As such, the Panel shall completely dismiss the Appealed Decision*”. Moreover, the fine imposed is disproportionate to the outstanding amount and, in particular, to the amount already paid by the Appellant in the last months. Lastly, the period of grace of 90 days granted by the Appealed Decision does not correspond to the circumstances faced by the Appellant and is not justified in view of decisions issued in similar cases before the FIFA Disciplinary Committee.
- The Appellant is making significant efforts to comply with all its obligations. In the last years, the Appellant has paid significant amounts to other football stakeholders and also a considerable amount of the amount due to Al-Gharafa.
- The sanctions imposed on the Appellant are without grounds, baseless, extremely excessive, unfair and disproportionate. The Appealed Decision was neither predictable nor issued within a cognisable manner and it disregarded due process and failed to ensure equality of treatment during the proceedings.

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

- “(i) to dismiss in full the Appealed Decision;
- (ii) to accept the present appeal;
- (iii) to order the First Respondent and the Second Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS Court Office fee of CHF 1,000 and any other advance of costs paid to the CAS;
- (iv) to order First Respondent and the Second Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel”.

60. In turn, the Respondent’s submissions may be summarised as follows:

- The Respondent notes that the spirit of art. 64 of the FIFA Disciplinary Code is to enforce final and binding decisions of an instance of FIFA or CAS and the sanctions

threatened by that provision are designed to put the debtor under pressure to finally comply with the decision. Moreover, the Swiss Federal Supreme Court has deemed that the system of sanctions used by FIFA in the event of non-compliance with its decisions or those of CAS is lawful (decision dated 5 January 2007 4P.240/2006).

- In the context of art. 64 of the FIFA Disciplinary Code, the FIFA Disciplinary Committee cannot review or modify as to the substance a previous decision, which is final and binding and has thus become enforceable. In accordance with well-established CAS case law, the sole task of the FIFA Disciplinary Committee is to analyse whether the debtor complied with the final and binding decision of the relevant body, namely whether the financial amount defined by it had been paid to the party claiming it or if for a certain reason the outstanding amount is not due any more. Otherwise, the FIFA Disciplinary Committee is compelled to issue a decision imposing a fine on the debtor and a final period of grace in accordance with art. 64 of the FIFA Disciplinary Code.
- The Respondent further points out that even though the initial CAS decision was notified to the parties on 5 June 2015 and the Appellant was duly informed of the risks of non-compliance with the CAS decision, the Appellant has not paid the outstanding amount in full until today. Instead, the Appellant made a partial payment of EUR 1,000,000 to Al-Gharafa only after it had received the second letter from the secretariat of the FIFA Disciplinary Committee on 20 June 2016 and the parties never agreed to a payment plan. As a result, the Appellant was in breach of art. 64 of the FIFA Disciplinary Code.
- As to the argument raised by the Appellant with respect to the existence of “*exceptional circumstances*”, the Respondent sets out that its Disciplinary Committee has considered in the past as exceptional circumstances the impossibility to pay due to exchange or financial restrictions imposed on a country (such as Argentina and Greece), the ongoing armed conflicts (cases of Ukraine and Libya), or even having undertaken concrete steps to pay, *i.e.* through payment of instalments within a reasonable and concrete time period before the matter was submitted to the FIFA Disciplinary Committee. Therefore, the Appellant’s justification cannot qualify as “*exceptional circumstances*”. The Respondent also points out that the Appellant within the relevant time period has internationally engaged 9 new players paying considerable sums as transfer fees (EUR 12,358,820 and EUR 2,550,000) and has also internationally released 10 players receiving EUR 27,258,772.25 and USD 3,450,000, *i.e.* an amount more than sufficient to cover the debt at issue here.
- With respect to the proportionality of the sanctions imposed, the Respondent argues that CAS may amend a disciplinary decision only in cases in which it finds that the deciding body exceeded the margin of discretion accorded to it by the principle of association autonomy and acted in an arbitrary way. Moreover, a CAS Panel may only uphold an appeal against a disciplinary decision in case of sanctions that are evidently and grossly disproportionate to the offence.
- The Respondent underlines that the Committee always takes into consideration the outstanding amount due and decides in line with its longstanding jurisprudence, which

has been repeatedly confirmed by CAS. In view of the amounts due by the Appellant (CHF 1,909,146), the Committee considered that in the present case a fine of CHF 30,000 would be appropriate and proportionate. A higher fine may not have been proportionate while a meagre fine would contradict the principle of repression and prevention and would fail to encourage the prompt fulfilment of obligations.

- Moreover, a fair period of grace was granted to the Appellant in accordance with art. 64 of the FIFA Disciplinary Code and all of its arguments to the contrary must be dismissed. Lastly, as far as the points deduction is concerned, CAS has regularly confirmed the legality and the proportionality of the enforcement system created by FIFA and the sanctions related thereto, including in particular the points deduction. In addition, the deduction of points is certainly not one of the most severe sanctions FIFA can impose. FIFA also points out that in the present case a deduction of points may only be imposed after the Appellant has unlawfully withheld a considerable amount of money from the creditor for a significantly long period of time.
- FIFA also provides a non-exhaustive list of Disciplinary Committee decisions that impose a CHF 30,000 fine and a deduction of six points in cases in which similar outstanding amounts were due, such as in the present case.

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

- “1. To reject the Appellant’s appeal in its entirety.*
- 2. To confirm the decision 160475 PST BRA TKY rendered by the FIFA Disciplinary Committee on 13 December 2016 hereby appealed against.*
- 3. To order the Appellant to bear all costs incurred with the present procedure and to cover all the expenses of the Respondent related to the present procedure”.*

## V. JURISDICTION

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

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.*

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

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

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

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

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

## **VI. ADMISSIBILITY**

66. The appeal was filed within the 21 days set by Article 58(1) of the FIFA Statutes as the reasoned Appealed Decision was communicated to the Appellant by the Respondent on 12 June 2017 and the Appellant filed its statement of appeal with CAS on 3 July 2017.

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

68. It follows that the appeal is admissible.

## **VII. APPLICABLE LAW**

69. 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”.*

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

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

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

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

- “1. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision):*
- a) *will be fined for failing to comply with a decision;*
  - b) *will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
  - c) *(only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced;*
- (...)
2. *If a club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.*
3. *If points are deducted, they shall be proportionate to the amount owed”.*

## VIII. MERITS

73. According to Article R57 of the Code, the Panel has “*full power to review the facts and the law*”. As is long-established in the jurisprudence of the CAS, by reference to this provision, a CAS arbitration procedure may entail a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of the Panel to make an independent determination as to merits (see CAS 2007/A/1394, para. 21).
74. In light of the facts of the case and the arguments of the parties, the Panel must first examine whether the conditions for imposing sanctions under Article 64 of the FIFA Disciplinary Code were met in the present case and, if this is the case, then the Panel shall assess the Appellant’s argument that the sanctions imposed should be reduced as they were disproportionate and not in accordance with FIFA’s own well established practice.
75. As to the first issue to be examined, the Panel observes that, since the ruling in the dispute between the Appellant and Al-Gharafa became final and binding for the parties as of 5 June 2015, when the CAS passed its award in case 2014/A/3840, the sole task of the FIFA Disciplinary Committee was to examine whether the Appellant complied with that final and binding decision. The Panel’s position is supported by consistent CAS jurisprudence in similar matters, dictating that “*the FIFA Disciplinary Committee was limited to determine if the outstanding amount, as defined by the FIFA DRC decision, had been paid to the creditor or if for whatever reason the above mentioned amount was still due*” (CAS 2013/A/3323, para. 72).

76. In this respect, the Panel notes that the Appellant does not contest the outstanding amount of its debt to the club Al-Gharafa. Such debt was confirmed by the final CAS award in case 2014/A/3840, which certainly constitutes a “*subsequent CAS appeal decision (financial decision)*” in the meaning of Article 64(1) of the FIFA Disciplinary Code.
77. The Panel observes that it remained undisputed between the parties that the Appellant failed to pay the amounts awarded to Al-Gharafa by the abovementioned decision. The Appellant claims that it made only a partial payment to Al-Gharafa in the amount of EUR 1,000,000 on 16 August 2016, after it had received the second letter from the secretariat of the FIFA Disciplinary Committee on 20 June 2016.
78. Therefore, and on this basis, the Panel finds that the Appellant failed to comply with the final CAS award in case 2014/A/3840 without any valid justification and, as a result, the conditions provided in Article 64(1) of the FIFA Disciplinary Code for the imposition of disciplinary sanctions against a Club are met.
79. Having established the above, the Panel shall now address the second issue under examination, namely whether the sanctions imposed by the Appealed Decision should be reduced as they were disproportionate and not in accordance with FIFA’s well established practice.
80. The Panel also observes that the Appellant failed to comply with the PSC Decision, despite having been reminded and urged to do so by FIFA on several occasions. As a consequence, the FIFA Disciplinary Committee finally imposed a fine of CHF 30,000 on the Appellant by means of the Appealed Decision, while granting it a final period of grace of 90 days to pay the amounts due, failing which the case will be resubmitted to FIFA in order to impose more severe sanctions.
81. As to the proportionality and “*exceptional circumstances*” arguments of the Appellant, the Panel refers to the findings of another CAS Panel stating that “*in disciplinary matters, each situation must be evaluated on a case-by-case basis and interests at stake have to be balanced in respect of the principle of proportionality. Account must be taken of the seriousness of the facts and other related circumstances as well as of the damage that the penalised conduct entails for the parties involved, for the federation in question and for its sport. In the same way, disciplinary bodies may evaluate any aggravating and/or extenuating circumstances that might be related to the infringement*” (CAS 2013/A/3358, also quoted in CAS 2016/A/4595).
82. The Panel observes that the Appellant challenges the Appealed Decision on the grounds that the imposed sanctions are disproportionate as they cannot be justified under the “*Committee’s established practice*” or under the “*exceptional circumstances*” invoked by the Appellant, namely that it did in fact pay significant amounts to other football stakeholders and also a considerable amount of the amount due to Al-Gharafa.
83. In this respect, the Panel observes that Article 64(1) of the FIFA Disciplinary Code is very clear in determining the consequences of failure in full to respect decisions like the Appealed Decision, and observes that FIFA applied it correctly by imposing the sanctions at issue on the Appellant. As such, the fact that the Appellant claims that it paid a part of the outstanding

amount to Al-Gharafa (EUR 1,000,000) cannot be taken into consideration as said payment was made after the disciplinary procedure was initiated and since, at any case, even partial failure to comply justifies the imposition of sanctions under the abovementioned FIFA provision.

84. Moreover, the Appellant’s arguments that it had to pay a significant amount of outstanding debts in the last years and that it acknowledged the debt and addressed a payment plan to Al-Gharafa also cannot stand. The fact that the Appellant paid other financial obligations does not alter the fact that it failed to comply with the CAS final decision in favour of Al-Gharafa; in fact, it only raises the question why the Appellant did not try to settle its debt towards Al-Gharafa too, as the Appellant was clearly in a position to pay the amount owed. The same applies with respect to the Appellant submitting a payment plan and making a partial payment to Al-Gharafa, as those clearly do not fall within the “*exceptional circumstances*” defence argument. They are rather actions undertaken by the Appellant to meet, in part and not in full, its – long overdue – obligations.
85. Therefore, the Panel does not find the Appellant’s defence to be a mitigating circumstance that should lead to a reduction of the fine imposed or the points that are to be deducted if payment is not made within the final period of grace of 90 days granted.
86. Finally, as to the Appellant’s proportionality defence, the Panel notes that Article 15 of the FIFA Disciplinary Code provides as follows:

*“Article 15 Fine*

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

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

Case number	Outstanding amount	Fine	Deduction
130394 PST ZH	CHF 1,173,040	CHF 30,000	6 points
160018 PST ZH	CHF 1,364,804	CHF 30,000	6 points
160191 PST ZH	CHF 976,054.58	CHF 30,000	6 points
160376 PST ZH	CHF 760,218	CHF 30,000	6 points

160475 PST TKY	CHF 1,909,146	CHF 30,000	6 points
170318 PST ZH	CHF 1,505,786.70	CHF 30,000	6 points
170919 PST ZH	CHF 1,171,692	CHF 30,000	6 points

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

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

### **ON THESE GROUNDS**

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

1. The appeal filed by Clube Atlético Mineiro on 3 July 2017 is dismissed.
2. The decision issued on 13 December 2016 by the FIFA Disciplinary Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.