



**Arbitration CAS 2017/A/5496 FK Olimpik Sarajevo v. Fédération Internationale de Football Association (FIFA), Football Association of Bosnia and Herzegovina, NK Sesvete and Croatian Football Federation, award of 16 May 2018**

Panel: Mr Fabio Iudica (Italy), Sole Arbitrator

*Football*

*Disciplinary sanction for failing to comply with the decision of a FIFA body*

*Standing to be sued with respect to disciplinary sanctions imposed by FIFA*

*Scope of CAS review*

*Principles for the analysis of disciplinary matters*

*Extent of the power of review with respect to disciplinary sanctions*

*Irrelevance of financial difficulties to excuse non-compliance with a payment obligation*

*Force majeure*

- 1. FIFA disciplinary proceedings are primarily meant to protect an essential interest of FIFA and FIFA (direct or indirect) members, *i.e.* the full compliance with the rules of the association and/or with the decisions rendered by FIFA. Consequently, in an appeal against a decision of FIFA by means of which disciplinary sanctions have been imposed on a party for failing to comply with a previous FIFA decision, only FIFA has standing to be sued.**
- 2. Where the execution of a final and binding decision of FIFA's deciding bodies is requested, the task of the FIFA Disciplinary Committee (FIFA DC) is to ascertain whether the relevant party complied with the decision or not, with no possibility to address the merits of the underlying dispute. As a consequence, the object of an appeal against a subsequent decision issued by the FIFA DC cannot extend beyond the limits of a review of the legal basis and of the *quantum* of the sanction imposed.**
- 3. In disciplinary matters, each situation must be evaluated on a case-by-case analysis and interests at stake have to be balanced in respect of the principle of proportionality of the sanction(s).**
- 4. While reviewing disciplinary sanctions, a CAS' panel shall give a certain level of deference to decisions of sports governing bodies. Sanctions imposed by FIFA disciplinary bodies can only be reviewed when they are evidently and grossly disproportionate to the offence.**
- 5. Financial difficulties or the lack of financial means of a club, even though caused by sporting conditions, can generally not be invoked as a justification for the non-compliance with a payment obligation.**

6. **Force majeure implies an objective rather than a personal impediment, beyond the control of the relevant party, that is unforeseeable, that cannot be resisted, and that renders the performance of an obligation impossible.**

## I. INTRODUCTION

1. This appeal is brought by FK Olimpik Sarajevo against the decision rendered by a Member of the Disciplinary Committee of the Fédération Internationale de Football Association (“FIFA”) on 17 October 2017 (the “Appealed Decision”), regarding the failure to comply with the decision rendered by the Single Judge of the sub-committee of FIFA Dispute Resolution Chamber on 3 April 2016 in relation with a training compensation dispute between FK Olimpik Sarajevo and NK Sesvete.

## II. PARTIES

2. FK Olimpik Sarajevo (“Olimpik” or the “Appellant”) is a professional football club, based in Sarajevo, Bosnia and Herzegovina. It is a member of the Football Association of Bosnia and Herzegovina.
3. The Fédération Internationale de Football Association (“FIFA” or the “First Respondent”) is the international governing body of football at worldwide level, having its headquarters in Zurich, Switzerland.
4. The Football Association of Bosnia and Herzegovina (also referred to as the “Second Respondent”), based in Sarajevo, is the governing body of football in Bosnia Herzegovina. It is affiliated with FIFA.
5. NK Sesvete (“Sesvete” or the “Third Respondent”) is a professional football club based in Zagreb, Croatia. It is a member of the Croatian Football Federation.
6. The Croatian Football Federation (also referred to as the “Fourth Respondent”), based in Zagreb, is the governing body of football in Croatia. It is affiliated with FIFA.

(The Appellant and the Respondents are hereinafter jointly referred to as the “Parties”).

## III. FACTUAL BACKGROUND AND FIFA PROCEEDINGS

7. Below is a summary of the main relevant facts and allegations based on the Parties’ oral and written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations may be set out, where relevant, in connection with the further legal

discussion. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

8. By a decision rendered on 3 April 2016 by the Single Judge of the sub-committee of the FIFA Dispute Resolution Chamber (hereinafter, the “FIFA Single Judge”), Olimpik was ordered to pay to Sesvete the amount of EUR 60,000, within 30 days as from the date of notification of the said decision, plus interest at 5% *p.a.* as of 13 March 2014 until the date of effective payment.
9. The findings of the relevant decision were communicated to Olimpik and Sesvete via TMS on 8 April 2016. The grounds of the decision were not requested by the parties and neither Olimpik nor Sesvete filed appeal against the decision within the prescribed time-limit, resulting in the decision becoming final and binding.
10. As the stated amount was not paid to Sesvete within the prescribed deadline, the secretariat to the FIFA Disciplinary Committee finally opened disciplinary proceedings against Olimpik on 12 July 2017.
11. As a first consequence, Olimpik was urged to pay by 26 July 2017, at the latest, the outstanding amount and it was informed that in case of failure to do so, or to submit any statement by the specified deadline, the case would be referred to a member of the FIFA Disciplinary Committee and decided, based on the documents in its possession.
12. On 26 July 2017, Olimpik informed the secretariat to the FIFA Disciplinary Committee that it was facing financial difficulties and also claimed to have paid to Sesvete EUR 9,000 on 11 May 2017 as “*default interest in accordance with the agreement [it has] made*” with the creditor.
13. With this regard, on 31 August 2017, Sesvete confirmed to the secretariat to the FIFA Disciplinary Committee it had entered into a “settlement agreement” with Olimpik on 20 March 2017, according to which it had already received a first instalment of EUR 9,000. However, Sesvete requested that the disciplinary proceedings be continued since Olimpik had not acted in accordance with the abovementioned agreement.
14. On 5 September 2017, the FIFA Disciplinary Committee set a new deadline for Olimpik to pay the outstanding amounts by 12 October 2017.
15. On 16 October 2017, Sesvete informed the FIFA Disciplinary Committee that the outstanding amounts due by Olimpik had not been paid.
16. In view of the foregoing, by decision of 17 October 2017, Olimpik was found guilty under the terms of article 64 of the FIFA Disciplinary Code, for failing to comply with the decision passed by the FIFA Single Judge on 3 April 2016 and was ordered to pay a fine in the amount of CHF 7,500, payable within 30 days as from notification of the relevant Appealed Decision; in addition, Olimpik was granted a final period of grace of 30 days to settle its debt to Sesvete.

17. The operative part of the Appealed Decision reads as follows:

1. *“The club FK Olimpik Sarajevo is pronounced guilty of failing to comply with the decision passed by the Single Judge of the sub-committee of the Dispute Resolution Chamber on 3 April 2016 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*
2. *The club FK Olimpik Sarajevo is ordered to pay a fine to the amount of CHF 7,500. The fine is to be paid within 30 days of notification of the present decision. (...).*
3. *The club FK Olimpik Sarajevo is granted a final period of grace of 30 days as from notification of the present decision in which to settle its debt to the creditor, the club NK Sesvete.*
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 FK Olimpik Sarajevo still fails to pay the amount due even after deduction of the points in accordance with point 4. above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor’s first team to the next lower division.*
6. *As a member of FIFA, the Football Federation of Bosnia and Herzegovina is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Football Federation of Bosnia and Herzegovina does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.*
7. *The costs of these proceedings amounting to CHF 1,000 are to be borne by the club FK Olimpik Sarajevo and shall be paid according to the modalities stipulated under point 2. above.*
8. *The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received”.*

18. The grounds of the Appealed Decision were served by facsimile to the Olimpik on 1 December 2017.

#### **IV. GROUNDS OF THE APPEALED DECISION**

19. The grounds of the Appealed Decision can be summarized as follows:

20. The FIFA Disciplinary Committee is empowered by the FIFA Statutes as well as the FIFA Disciplinary Code to pronounce sanctions on member associations, clubs, official, players, intermediaries and licensed match agents.
21. Specifically, article 64 of the FIFA Disciplinary Code provides that anyone who fails to pay another person (either a natural person or a legal person, such as a player, a coach, or a club), or FIFA, a sum of money in full or in part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS decision, shall be subject to the following measures:
  - will be fined for failing to comply with a decision;
  - will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due;
  - 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.
22. Moreover, pursuant to article 78 para. 2 of the FIFA Disciplinary Code, cases involving matters under article 64, as is the present case, may be decided by one member of the Disciplinary Committee alone.
23. That being established, the designated member of the Disciplinary Committee emphasized that, in conformity with the competence of any enforcement authority, he was not authorized to review or modify as to the substance a previous decision, which was final and binding and thus, had become enforceable.
24. Consequently, the member of the FIFA Disciplinary Committee considered that he was not allowed to check the correctness of the amount ordered to be paid but had the sole task to analyse if the debtor complied with the decision of the FIFA Single Judge which had become final and binding.
25. Since it was ascertained that the debtor failed to comply with the payment order towards Sesvete, the member of the Disciplinary Committee consider that Olimpik was guilty under the provisions of art. 64 of the FIFA Disciplinary Code.
26. With regard to the extent of the sanction to be imposed, within the range between CHF 300 and CHF 1,000,000 according to article 64 in combination with article 15 para. 2 of the FIFA Disciplinary Code, the member of the FIFA Disciplinary Committee decided that, in consideration of the outstanding amount due as well as the other circumstances of the case, a

fine in the amount of CHF 7,500 was appropriate. Moreover, the Appealed Decision set a final deadline of 30 days for Olimpik to pay its debt to Sesvete, failing which a deduction of 6 points would be imposed on request of the creditor, and in case of persistent default of payment, demotion to a lower division could be ordered.

## V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 13 December 2017, the Appellant filed its statement of appeal with the Court of Arbitration for Sport, (the “CAS”) against the Respondents with respect to the Appealed Decision, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration, 2017 edition (the “CAS Code”), requesting that the present case be submitted to a sole arbitrator. The Appellant chose English as the language of the present arbitration proceedings.
28. In the statement of appeal, the Appellant also applied for the stay of the execution of the Appealed Decision, alleging that it was in a difficult financial situation following its relegation to the second division at the end of the 2016-2017 sporting season.
29. On 29 December 2017, the CAS Court Office, *inter alia*, invited the Respondents to state whether they agreed to the appointment of a sole arbitrator; in addition, with regard to the Appellant’s request for a stay of the execution of the Appealed Decision, it pointed out that, in accordance with CAS jurisprudence, a decision of financial nature issued by a private Swiss Association is not enforceable while under appeal, as is the present case, and therefore, it invited the Appellant to declare whether it maintained or withdrew its application for a stay.
30. On the same day, the Appellant informed the CAS Court Office that its statement of appeal shall be considered as its appeal brief in the present matter; consequently, the CAS Court Office invited the Respondents to file their answers within the next 20 days, failing which, the Sole Arbitrator would nevertheless proceed with the arbitration and deliver an award.
31. On 8 January 2018, FIFA and the Football Association of Bosnia and Herzegovina, respectively informed the CAS Court Office that they agreed with the appointment of a sole arbitrator to decide the present matter.
32. On 10 January 2018, Sesvete filed its answer in the present proceedings, informing the CAS Court Office that it also agreed with the appointment of a sole arbitrator.
33. On 12 January 2018, the Football Association of Bosnia and Herzegovina filed its answer to the present appeal.
34. On 12 January 2018, by fax letter to the CAS Court Office, the Croatian Football Federation provided its position with respect to the appeal filed by Olimpik, denying having standing to be sued in the present arbitration proceedings, “*since we have not been involved in the proceedings that preceded to the appeal, nor we have had any influence to the outcome of those proceedings*”.

35. On 15 January 2018, the CAS Court Office invited the Croatian Football Federation to clarify whether it requested to be excluded as a party in these proceedings, for the reasons set forth in its letter of 12 January 2018.
36. On 16 January 2018, the CAS Court Office informed the Parties that, since the Appellant failed to submit its position regarding the chance to maintain or to withdraw its application for the stay of the Appealed Decision, within the given time limit, it was presumed that the relevant request had been maintained by the Appellant. The Respondents were granted a deadline of 10 days to file their position on the Appellant's request.
37. On 17 January 2018, the Croatian Football Federation informed the CAS Court Office that it requested to be excluded as a party in the present proceedings. On the same day, the CAS Court Office invited the Appellant to provide its position on the Fourth Respondent's request.
38. On 22 January 2018, the Football Association of Bosnia and Herzegovina, as well, requested to be excluded as a party in the present proceedings, *"as there are no reasonable and justified grounds for Football Association of Bosnia and Herzegovina to be involved in this process"*.
39. On 23 January 2018, FIFA filed its answer in the present procedure.
40. Failing any comments by the Appellant with regards to the Croatian Football Federation's request to be excluded from the present arbitration proceedings within the prescribed time limit, on 24 January 2018, the CAS Court Office informed the Parties that the Croatian Football Federation was maintained as a Respondent in the present proceedings. On the same day, the CAS Court Office also invited the Appellant to submit its position on the request for exclusion by the Football Association of Bosnia and Herzegovina.
41. On 1 February 2018, the CAS Court Office informed the Parties that since the Respondents had failed to submit their position on provisional measures, an Order on Request for a Stay would be issued by the President of the CAS Arbitration Division, or her Deputy, in due course.
42. On 2 February 2018, the Parties were informed by the CAS Court Office that, failing any comments by the Appellant with regards to the Football Association of Bosnia and Herzegovina's request to be excluded from the present procedure, the latter was maintained as a Respondent.
43. On 5 February 2018, the CAS Court Office informed the Parties that Mr Fabio Iudica, attorney-at-law in Milan, Italy, had been appointed as a sole arbitrator in the present proceedings; moreover, the Parties were invited to state by 14 February 2018 whether they preferred a hearing to be held in the present proceedings or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.
44. On the same day, pursuant to Article R37 of the CAS Code, the Deputy President of the Appeals Arbitration Division issued an Order on Request for a Stay whereby the Appellant's

request was rejected, considering that, according to the consistent CAS jurisprudence, due to the financial nature of the Appealed Decision, it was not enforceable during the time of the appeal and could therefore not be stayed.

45. On 8 February 2018, 12 February 2018 and 13 February 2018, respectively, FIFA, the Football Association of Bosnia and Herzegovina and Sesvete informed the CAS Court Office that they did not request a hearing to be held in the present proceedings.
46. On 14 February 2018, the Appellant filed unsolicited documentation relating to its bank accounts, allegedly issued by the Central Bank of Bosnia and Herzegovina. In this regard, on 16 February 2018, the CAS Court Office invited the Appellant to file an English translation of the enclosure to its letter, which was provided by the Appellant on 20 February 2018.
47. On the same day, the CAS Court Office invited the Respondents to file their comments on the Appellant's new exhibit, including its admissibility, by 23 February 2018.
48. On 22 and 23 February 2018, respectively, FIFA and Sesvete filed their position with respect to the Appellant's new exhibit, both objecting to the admissibility of the relevant document.
49. On 23 February 2018, the CAS Court Office informed the Parties that pursuant to Article R57 of the CAS Code, the Sole Arbitrator had decided to render an award in the present case based solely on the Parties' written submissions and forwarded them copy of the Order of Procedure.
50. The Order of Procedure was returned to the CAS Court Office in duly signed copies respectively on 26 February 2018 by the Fourth Respondent, on 28 February 2018 by the Second and Third Respondent, on 2 March 2018 by the First Respondent and on 7 March 2018 by the Appellant.
51. The Second and the Fourth Respondent did not provide any comments on the Appellant's new exhibit within the prescribed deadline.
52. On 7 March 2018, the CAS Court Office informed the Parties that, in view of the objection raised by the First and the Third Respondent and in consideration of the fact that the Appellant did not submit any exceptional circumstance which would justify the late filing, the Sole Arbitrator had decided to dismiss the Appellant's request to introduce an additional exhibit.
53. The Fourth Respondent did not file any answer in these proceedings, within the time limit granted.

## **VI. SUBMISSIONS OF THE PARTIES**

54. The following outline is a summary of the Parties' arguments and submissions which the Sole Arbitrator considers relevant to decide the present dispute and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator has nonetheless

carefully considered all the submissions made by the Parties, even if no explicit reference has been made in the following summary. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

#### **A. The Appellant's submissions and requests for relief**

55. The Appellant's submissions in its statement of appeal/appeal brief may be summarized as follows.
56. Olimpik did not contest its failure to comply with the FIFA Single Judge's decision. On the other side, it contended that the fine imposed was too high and disproportionate in consideration of the fact that it had demonstrated its intention to fulfil its obligations towards Sesvete by entering into negotiations with the latter, although, eventually, the agreement was not accomplished.
57. The Appellant referred to its good will in negotiating the settlement with Sesvete in order to find the best solution to their dispute, as well to the fact that it already made a partial payment under the agreement concluded with Sesvete and would pay the residual amount as soon as it had the financial possibility to do so.
58. According to Olimpik, the abovementioned circumstances were not duly taken into account by the Disciplinary Committee in determining the extent of the sanction.
59. The Appellant pointed out that since 2015, its financial situation drastically got worse as it was relegated to the lower division in the season 2016/2017, resulting in the loss of many sponsors and other economic benefits.
60. Moreover, according to the Appellant, Sesvete was not willing to accept the proposed payment plan although it was informed of Olimpik's financial difficulties.
61. In this context, the Appellant maintained that it was unable to comply with the decision of the FIFA Single Judge due to "force majeure".
62. The Appellant submitted the following requests for relief:

*"Request for relief in a way that Court of Arbitration for Sport (CAS) acting upon this appeal issue the Decision by which appeal will be adopted in entirety and accordingly change the Decision of the FIFA Disciplinary Committee in order to abolish the fine, or if find the reasons of the appeal to be based, lower the fine pronounced by the Decision of the FIFA Disciplinary Committee (Decision 170643 PST BiH ZH) issued on 17<sup>th</sup> October 2017".*

#### **B. The First Respondent's submissions and requests for relief**

63. The position of the First Respondent is set forth in its answer and can be summarized as follow.

64. By failing to comply with the decision of the FIFA Single Judge, Olimpik violated article 64 of the FIFA Disciplinary Code, which fact led to the commencement of disciplinary proceedings against the Appellant.
65. In fact, the spirit of article 64 of the FIFA Disciplinary Code is to enforce decisions comparable to judgement that had been rendered by a body, a committee or an instance of FIFA or CAS, which are final and binding. In this context, the FIFA Disciplinary Committee could be regarded as acting similarly as an “enforcement authority” and the purpose of relevant disciplinary proceedings as the imposition of a sanction for breach of the association’s regulations.
66. In view of the considerations above, the Disciplinary Committee, equal to the competence of any “enforcement authority”, cannot review or modify, as to the substance, a previous decision which is final and binding and thus has become enforceable, but it has the sole task to establish whether the debtor complied or not with the final and binding decision.
67. Likewise, the CAS should only address the question whether Olimpik respected and fulfilled the FIFA Single Judge’s decision but no longer its content.
68. Since it is uncontested that the Appellant was ordered to pay EUR 60,000 plus 5% to Sesvete and that it only paid an instalment of EUR 9,000 under the agreement concluded on 20 March 2017, it is also undisputed that the Appellant failed to comply with the decision of the FIFA Single Judge, thus resulting in the disciplinary proceedings being rightfully instigated.
69. In fact, the Appellant does not contest the application of art. 64 of the FIFA Disciplinary Code, but only claims that, due to its difficult financial situation, it could not comply with the FIFA Single Judge’s decision.
70. In this respect, FIFA argued that such a personal impediment of the Appellant cannot be considered as a case of “force majeure” as alleged by Olimpik, since either the financial difficulties as well as the relegation of the team in a lower division and relevant consequences cannot be considered as events falling beyond the control of the obliged party.
71. In addition, FIFA pointed out that the Appellant at no time participated in the proceedings before the FIFA Single Judge although it was invited to do so and only informed FIFA of its financial difficulties on 26 July 2017, yet failing to provide any evidence to support its arguments.
72. Moreover, FIFA emphasised that the alleged financial difficulties of the Appellant apparently started after its relegation at the end of the sporting season 2016/2017, while the decision of the FIFA Single Judge was notified almost one year before that time and therefore, the Appellant had enough time to settle its debt before it allegedly started to face financial difficulties.

73. As a consequence, the member of the FIFA Disciplinary Committee correctly applied article 64 of the FIFA Disciplinary Code.
74. With regards to the extent of the sanction imposed by the Appealed Decision, the First Respondent contended that the CAS shall amend a disciplinary decision of a FIFA judicial body only in cases in which it finds that the relevant FIFA judicial body exceeded the margin of discretion accorded to it by the principle of association autonomy, *i.e.* only in cases where the concerned judicial body must be held to have acted arbitrarily, which occurs when the sanction imposed is to be considered as evidently and grossly disproportionate to the offence.
75. In determining the sanction, the member of the Disciplinary Committee complied with the requirements under article 39 para. 4 of the FIFA Disciplinary Code, by taking into consideration all the specific circumstances of the case at stake and decided in line with the longstanding jurisprudence of the Committee, within the range set forth under article 15 of the FIFA Disciplinary Code.
76. Moreover, the amount of the fine imposed on Olimpik respects the deterrent purpose of the relevant sanction and is proportionate to the outstanding debt and, in any case, the Appellant failed to provide any tangible evidence to the contrary. Likewise, the application of additional sanctions (if any), such as the deduction of (6) points and the possible relegation to a lower division in case of persistent failure by the Appellant, is also in compliance with article 64 of the FIFA Disciplinary Code as well as the FIFA Disciplinary Committee's longstanding practice. In such context, FIFA submitted copies of several decisions passed by the FIFA Disciplinary Committee in cases similar to the one at stake where the fine imposed was the same as the one imposed on Olimpik.
77. The First Respondent's requests for relief are the following:
- *"To reject the Appellant's appeal in its entirety.*
  - *To confirm the decision hereby appealed against.*
  - *To order the Appellant to bear all costs incurred with the present procedure".*

### **C. The Second Respondent's submissions and requests for relief**

78. The Football Association of Bosnia and Herzegovina first rejected having legitimacy as a respondent and requested to be excluded from the present proceedings.
79. As to the substance, it maintained that the disciplinary proceedings were correctly instigated against the Appellant; that the Appealed Decision was accurate and lawful, and that the sanction imposed was appropriate and proportional.

80. The Second Respondent noted that the Appellant itself does not contest the legality or the merits of the disciplinary proceedings and relevant Appealed Decision, but it merely maintains that it was allegedly not in the position to comply with the payment order of the FIFA Single Judge's decision due to financial difficulties, which confirms that the FIFA judicial bodies acted rightfully.
81. As a consequence, the appeal filed by Olimpik is unfounded and unjustified as well as the alleged "vis major" argument is completely unsubstantial.
82. Therefore, in its requests for relief, the Second Respondent requested the CAS:
83. *"to decide this issue and terminate the process by concluding a decision in which the first-instance decision will be confirmed, and the appeal of the Appellant dismissed as completely unfounded"*.

#### **D. The Third Respondent's submissions and requests for relief**

84. Basically, the Third Respondent rejected the Appellant's arguments with regards to the disproportionality of the sanction imposed by the FIFA Single Judge, as well as the circumstances according to which it allegedly refused the proposed payment plan, while the Appellant allegedly stayed in constant contact to negotiate the best option to settle the dispute.
85. On the contrary, Sesvete argued that after the first breach of the settlement agreement, it was impossible for the Third Respondent to establish any communication with the Appellant, which only answered to the official claim lodged by Sesvete with FIFA.
86. In addition, the proposal made by Olimpik in order to restore its debt in 12 equal instalments of EUR 5,000 was clearly unsatisfactory and unacceptable, while the Appellant never replied to the counter proposal forwarded by Sesvete (the payment of a down payment of EUR 20,000 and subsequent instalments of EUR 10,000 each for the remaining amount). Likewise, the offer to pay the outstanding amount *"as soon as would exist the possibilities to do so"* is clearly unreasonable within any settlement agreement.
87. Concerning the other contentions put forward by the Appellant, and particularly those in relation with the Appellant's financial conditions, its demotion to a lower division and relevant difficulties in complying with the payment of the outstanding debt, the Third Respondent argued that it has no knowledge of the relevant facts and that the Appellant, failed, in turn, to provide tangible evidence supporting those allegations.
88. In any event, Sesvete contended that a club's inability to comply with its financial obligations due to relegation does not constitute a case of "vis major", contrary to the Appellant's contentions.
89. In view of the foregoing, the Third Respondent requested the CAS to dismiss the present appeal.

## **E. The Fourth Respondent's position**

90. The Fourth Respondent claimed that it did not have standing to be sued and requested to be excluded from the proceedings. It did not file any answer on the merits.

## **VII. JURISDICTION**

91. Article R47 of the CAS 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 him prior to the appeal, in accordance with the statutes or regulations of that body.*

92. In its statement of appeal/appeal brief, the Appellant relies on Article 64 para. 1 and 5 of FIFA Disciplinary Code as conferring jurisdiction to the CAS.
93. The jurisdiction of the CAS was not contested by the Respondents.
94. The Sole Arbitrator observes that according to article 64 para. 5 and 74 of FIFA Disciplinary Code, decisions passed by FIFA Disciplinary Committee in accordance with article 64 shall be appealed against directly before the CAS.
95. The signature of the Order of Procedure confirmed that the jurisdiction of the CAS in the present case was not disputed.
96. Accordingly, the Sole Arbitrator is satisfied that CAS has jurisdiction to hear the present case.

## **VIII. ADMISSIBILITY OF THE APPEAL**

97. According to Article 67 para. 1 of the FIFA Statutes: *“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”*.
98. The Sole Arbitrator notes that the member of the FIFA Disciplinary Committee rendered the Appealed Decision on 17 October 2017 and that the grounds of the Appealed Decision were notified to the Parties on 1 December 2017. Considering that the Appellant filed its statement of appeal on 13 December 2017, *i.e.* within the deadline of 21 days set in the FIFA Statutes, the Sole Arbitrator is satisfied that the present appeal was filed timely and is therefore admissible.

## **IX. APPLICABLE LAW**

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

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

100. Article 57 para. 2 of the FIFA Statutes so provides:

*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.*

101. In consideration of the above and pursuant to Article R58 of the CAS Code, the Sole Arbitrator holds that the present dispute shall be decided principally according to FIFA various regulations, with Swiss law applying subsidiarily.

102. With regard to the applicability *ratione temporis* of the relevant FIFA regulations, Article 4 of the 2018 FIFA Disciplinary Code provides that “*This code applies to facts that have arisen after it has come into force. It also applies to previous facts if it is equally favourable or more favourable for the perpetrator of the facts and if the judicial bodies of FIFA are deciding on these facts after the code has come into force*”. Given that the present award will be rendered after the entry into force of the 2018 edition of the FIFA Disciplinary Code and since none of the parties argued that the 2018 edition was less favourable to the Appellant than the 2017 edition, the Sole Arbitrator holds that the present case is governed by the 2018 edition of the FIFA Disciplinary Code.

## **X. MERITS**

### **A. Preliminary considerations – standing to be sued of the Respondents in the present proceedings**

103. By addressing the merits of the present case, the Sole Arbitrator notes that the appeal filed by Olimpik concerns the challenge by the Appellant of the imposition of the fine by the member of the FIFA Disciplinary Committee, in compliance with article 64 of the FIFA Disciplinary Code. In fact, the Appellant requests the CAS to alternatively abolish the fine entirely, or to reduce its amount.

104. In this context, it must be noted that appeals against the decisions rendered by the FIFA disciplinary bodies fall into the category of the decisions emanating from article 75 of the Swiss Civil Code, according to which: “*Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof*”, as they merely concern the existence of a disciplinary infringement under the applicable FIFA rules, the power of FIFA to impose sanctions and the appropriateness and proportionality of such FIFA sanctions.

105. Consequently, in appeals brought before the CAS against similar decisions of the FIFA Disciplinary bodies, the appellant is seeking a remedy against FIFA only and therefore only FIFA has standing to be sued (CAS 2006/A/1206; CAS 2015/A/4310).
106. In fact, according to CAS jurisprudence, *“FIFA disciplinary proceedings are primarily meant to protect an essential interest of FIFA and FIFA (direct or indirect) members, i.e. the full compliance with the rules of the association and/or with the decisions rendered by FIFA’s decision-making bodies. As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party for failing to comply with a previous FIFA decision, only FIFA has standing to be sued, and not the (previously) opposing party in the original dispute before the competent FIFA bodies such as the FIFA Dispute Resolution Chamber. Consequently, it is well-established that an appeal against a sporting sanction inflicted by a FIFA decision-making body must be directed at FIFA (and the decision-making body), that is, the body that has the power to impose and enforce disciplinary sanctions on clubs that have contravened, for example Article 12bis of the FIFA RSTP or, more frequently, Article 64 of the FIFA Disciplinary Code”* (CAS 2015/A/4310).
107. In addition, it is established by CAS jurisprudence that a party has standing to be sued in CAS proceedings only if it has a stake in the dispute, because, for example, something is sought from it (CAS 2014/A/3831; CAS 2014/A/3850; CAS 2015/A/4310).
108. Therefore, the Sole Arbitrator first notes that there is an issue regarding the correct identification of the Respondents by the Appellant in the present proceedings. In fact, although the Appellant named four respondents to the present appeal, the only entity which would have the authority to withdraw the disciplinary sanction or to reduce it, should the Appellant’s claim be successful, would only be FIFA, with the exclusion of the Second, the Third and the Fourth Respondent, since none of them has the power to directly affect the legal position of the Appellant in this respect, nor would be directly affected from the reversal of the Appealed Decision.
109. In consideration of the above, the Sole Arbitrator considers that, in light of the requests for relief presented by the Appellant, the Football Association of Bosnia and Herzegovina as well as Sesvete and the Croatian Football Federation have no legitimacy as respondents in the present proceedings in connection with the relevant subject matter.
110. Therefore, the request submitted by the Appellant by the present appeal shall only be assessed vis-à-vis FIFA, while it has no effect with regards to the position of the other Respondents, except for the consequences set forth under the following section relating to the costs of these proceedings.

## **B. The challenge of the sanction imposed by the FIFA Disciplinary proceedings**

111. Entering into the substance of the matter, the Sole Arbitrator observes that it is undisputed between the Parties that the decision rendered by the FIFA Single Judge on 3 April 2016 became final and binding before the opening of the disciplinary proceedings against the Appellant and

that the Appellant failed to fully comply with the FIFA Single Judge's decision, except for the payment of EUR 9,000 on 11 May 2017.

112. The Sole Arbitrator reminds that, according to the FIFA Single Judge's decision, the Appellant was ordered to pay to Sesvete the amount of EUR 60,000 as well as 5% interest *p.a.* on the said amount as of 13 March 2014 until the date of effective payment. In this respect, the Sole Arbitrator notes that on 17 October 2017 (*i.e.* when the Appealed Decision was issued), interests on the outstanding amount had already accrued in the amount of EUR 10,603,97 (of which EUR 9,493.15 on the amount of EUR 60,000 as from 13 March 2014 until 11 May 2017; and EUR 1,110.82 on the amount of EUR 51,000 as from 11 May 2017 until 17 October 2017).
113. As a consequence, it is also undisputed that Olimpik still had to pay to Sesvete EUR 51,000, plus the aforesaid interests when the disciplinary proceedings were commenced.
114. The Sole Arbitrator observes that the Appealed Decision is based on Article 64 of the FIFA Disciplinary Code which, in the relevant part, provides as follows:

*"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".*

115. Moreover, the Sole Arbitrator reminds that, according to Article 15, para. 2 of the FIFA Disciplinary Code *"The fine shall not be less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than CHF 1,000,000"*.
116. In continuation, the Sole Arbitrator considers that, since the decision of the FIFA Single Judge became final and binding, the sole task of the member of the FIFA Disciplinary Committee was to ascertain whether Olimpik had complied with the relevant decision or not, with no possibility to address the merits of the previous dispute between Olimpik and Sesvete.
117. In this sense, the Sole Arbitrator notes that this practice has been confirmed by CAS jurisprudence dealing with this issue: *"[T]he Panel finds 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, i.e. the Player, or if for whatever reason the above mentioned amount was still due” (CAS 2013/A/3323).*

118. As a consequence, in accordance with the provisions of Article R57 of the CAS Code with regard to the scope of the panel’s review, the object of the present appeal cannot extend beyond the limits of a review of the sanction imposed by the member of the FIFA Disciplinary Committee, with respect to its legal basis and *quantum*.
119. In this respect, the Sole Arbitrator agrees with the member of the FIFA Disciplinary Committee that since Olimpik failed to comply with the payment ordered in the decision of the FIFA Single Judge, the criteria for the application of Article 64 of the FIFA Disciplinary Code were met.
120. Moreover, the Sole Arbitrator is satisfied that before the Appealed Decision was rendered, the Appellant was granted the possibility, on several occasions, to avoid the application of a sanction by restoring the debt towards Sesvete, but completely failed to do so.
121. With reference to the extent of the sanction imposed, the Appellant maintains that the member of the FIFA Disciplinary Committee did not take into account the fact that Olimpik had already made a partial payment to Sesvete, in the amount of EUR 9,000 nor did it consider that the club was facing financial difficulties which allegedly prevented it to comply with the relevant payment, thus resulting in the sanction imposed to be “*significantly high*”.
122. On the other hand, FIFA claims that the fine imposed on the Appellant is justified and in line with the well-established FIFA practice in similar cases. FIFA also emphasises that imposing a fine below a certain limit would frustrate the deterrent effect of the sanction and would therefore fail to encourage the prompt fulfilment of obligations. In support of its argument, FIFA filed copies of 12 decisions rendered by the FIFA Disciplinary Committee in cases in which similar outstanding amounts were due, the same fine was imposed and the same number of points were threatened to be deducted in case of persistent failure.
123. In this context, the Sole Arbitrator concurs with the CAS panel in CAS 2016/A/4595 that in disciplinary matters, each situation must be evaluated on a case-by-case basis and interest at stake have to be balanced in respect of the principle of proportionality. Moreover, it is further consistent CAS jurisprudence that CAS panels shall give a certain level of deference to decisions of sports governing bodies in respect of the proportionality of sanctions and that sanctions imposed by FIFA disciplinary bodies can only be reviewed when they are evidently and grossly disproportionate to the offence (CAS 2016/A/4595; CAS 2004/A/690; CAS 2005/A/830; CAS 2006/A/1175; CAS 2009/A/1917 & CAS 2009/A/1844).
124. The Sole Arbitrator fully adheres to this consistent jurisprudence and finds that the fine imposed by the member of the FIFA Disciplinary Committee in the Appealed Decision can only be reviewed if it is considered to be evidently and grossly disproportionate to the violation.

125. The Sole Arbitrator is not convinced by the arguments put forward by the Appellant in support of its request to reject the imposition of the fine or, alternatively, to reduce its amount.
126. First of all, Olimpik failed to provide any tangible evidence that it was prevented from complying with the decision passed by the FIFA Single Judge for reasons beyond the sphere of its responsibility.
127. Moreover, the alleged financial difficulties of a club, as well as its possible relegation to a lower division cannot be considered as “force majeure”, contrary to the Appellant’s allegations.
128. In fact, according to CAS jurisprudence, “*Force majeure implies an objective rather than a personal impediment, beyond the control of the <obliged party>, that is unforeseeable, that cannot be resisted, and that renders the performance of the obligation impossible. In this respect, financial problems or the lack of financial means of a club can generally not be invoked as a justification for the non-compliance with an obligation*” (CAS 2014/A/3533).
129. Furthermore, “*A difficult financial and sporting situation alleged by a club is not a justification for its failure to pay its debt to another subject. Lack of financial means, even though caused by sporting conditions, to satisfy an obligation of payment does not excuse the failure to make the required payment*” (CAS 2006/A/1008).
130. Therefore, the Sole Arbitrator concludes that the facts alleged by the Appellant, besides being unsupported, cannot be legitimately invoked by Olimpik in order to escape disciplinary responsibility for its failure to pay the outstanding amount under the decision of the FIFA Single Judge.
131. With regard to the impact of the partial payment made by the Appellant (EUR 9,000), the Sole Arbitrator considers that, apart from being a small payment with respect to the outstanding amount due, Article 64 of the FIFA Disciplinary Code establishes the disciplinary duty of FIFA members to fully comply with the decisions of FIFA bodies and that a partial payment does not correspond to a full compliance.

*“A different interpretation would be inconsistent not only with the text of the rule, but also with its aim. In addition, it would be odd to admit that even a small payment - out of a large debt – allows a debtor to escape the disciplinary responsibility: the effectiveness of the system, and the binding force of the disciplinary principle underlying it, i.e. that the decisions of the FIFA bodies have to be fully complied with, would be seriously impaired”* (CAS 2006/A/1008).

132. Turning the attention to the amount of the sanction imposed, in consideration of the cases presented by FIFA, and taking into account the degree of the violation committed by the Appellant, together with all the other specific circumstances of the present case, the Sole Arbitrator believes that the fine imposed on Olimpik was clearly not evidently and grossly disproportionate in comparison with FIFA’s practice in disciplinary context, with reference with the Appellant’s default of payment.

133. Consequently, the Sole Arbitrator finds that the disciplinary sanction imposed on the Appellant by means of the Appealed Decision shall be confirmed.
134. Any other claims or requests of relief are rejected.

### **ON THESE GROUNDS**

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

1. The appeal filed by FK Olimpik Sarajevo against FIFA, the Football Association of Bosnia and Herzegovina, NK Sesvete and the Croatian Football Federation is dismissed.
2. The decision rendered by the member of the FIFA Disciplinary Committee on 17 October 2017 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.