Arbitration CAS 2018/A/5588 Kayserispor Kulübü v. Fédération Internationale de Football Association (FIFA), award of 10 September 2018

Panel: Mr Fabio Iudica (Italy), President; Mr Ricardo de Buen Rodríguez (Mexico); Mr Lars Hilliger (Denmark)

Football
Transfer
Absence of novation based on an extension of a deadline to pay a debt
Discretion of FIFA judicial bodies regarding the sanction to be imposed on the basis of article 12bis para. 4 RSTP
Restriction of power of review of sanctions limited to evident and grossly disproportionate sanctions
Automatic revocation of a suspended registration ban in case of new infringement during the probationary period

1. **A club's acceptance to postpone a time limit for the payment of a contractual instalment does not involve any novation of the original debt relationship between the parties.**

2. **Article 12bis para. 4 of the FIFA Regulations on the Status and Transfer of Players (RSTP) provides the FIFA judicial bodies with a wide discretion regarding the choice of the sanction(s) to be imposed on a club failing to meet its financial obligation(s). Said bodies may consider the actual overdue amount but also the specific circumstances of the case, such as a debtor's behaviour during the proceedings, the seriousness of the infringement or whether a club has been previously sanctioned for having had overdue payables. Such repeated offence shall be considered as an aggravating circumstance and lead to a more severe penalty.**

3. **Notwithstanding a panel's power to review a case *de novo*, the review and the power to amend a disciplinary decision of a judiciary body should only take place in cases in which such body has exceeded the margin of discretion accorded to it by the principle of association authority, *i.e.* only in cases in which said body must be held to have acted arbitrarily. This assumption is absent if a panel merely disagrees with a sanction. Only if a sanction must be considered as evidently and grossly disproportionate to the offence will a panel have the authority to amend or set aside a decision.**

4. **According to para. 8 of Article 12bis RSTP, if a club benefiting from a suspended registration ban commits another infringement during the probationary period, the suspension is automatically revoked and the registration ban executed. It is added to the sanction pronounced for the new infringement.**

I. INTRODUCTION

1. This appeal is brought by Kayserispor Kulübü (the "Appellant" or the "Kayserispor") against the decision rendered by the Bureau of the Players' Status Committee (the "PSC") of the Fédération Internationale de Football Association (the "Respondent" or "FIFA") on 20 December 2017 (the "Appealed Decision"), regarding a contractual dispute between Kayserispor Kulübü and FC Bayern München ("Bayern").

II. PARTIES

2. The Appellant is a professional football Club, based in Kayseri, Turkey, competing in the Turkish Süper Lig and affiliated with the Turkish Football Federation ("TFF") which in turn is affiliated with FIFA.

3. The Respondent is the international governing body of football, having its headquarters in Zurich, Switzerland.

(The Appellant and the Respondent are hereinafter jointly referred to as the "Parties").

III. FACTUAL BACKGROUND

A. Background facts

4. 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 Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 13 June 2017, Kayserispor and Bayern entered into an agreement for the transfer of football player E. from Bayern to Kayserispor (the "Transfer Agreement").

6. In accordance with the Transfer Agreement, the Appellant agreed to pay Bayern a transfer compensation in the total amount of EUR 50,000 in two equal instalments of EUR 25,000 each, respectively due on 15 July 2017 and 15 July 2018.

7. On 12 October 2017, Bayern filed its first claim with FIFA, which was further completed on 30 October 2017, with respect to the payment of the first instalment which was not paid.

8. On 17 October 2017, Bayern put Kayserispor in default of payment of the first instalment of the transfer compensation, granting the Appellant a further time limit until 28 October 2017 in order to remedy the default.

9. Failing any payment by Kayserispor within the mentioned deadline, on 30 October 2017, Bayern confirmed its claim before FIFA against the Appellant, requesting the payment of the overdue amount of EUR 25,000 corresponding to the first instalment due under the Transfer Agreement, as well as interest based on Article 104 of the Swiss Code of Obligations.

10. Kayserispor completely failed to reply to the claim submitted by Bayern, despite the fact that it had been granted the requested extension of the time limit to provide its position before the PSC.

11. In accordance with a subsequent agreement between the Kayserispor and Bayern, in view of an amicable settlement of the dispute, Bayern accepted that the payment of the first instalment by the Appellant be executed by 26 January 2018.

12. Notwithstanding the above, the Appellant failed to make the relevant payment within the new deadline.

13. On 2 February 2018, the PSC notified the Appealed Decision passed on 20 December 2017, the operative part of which reads as follows:

> *"1. The claim of the Claimant, FC Bayern München, is accepted.*
>
> *2. The Respondent, Kayserispor Külübü Dernegi, has to pay to the Claimant,* ***within 30 days*** *as of the date of notification of this decision, overdue payables in the amount of EUR 25,000 as well as interest at the rate of 5% per year as of 12 October 2017 until the date of effective payment.*
>
> *3. If the aforementioned amount, plus interest, is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee, for consideration and a formal decision.*
>
> *4. The final costs of the proceedings in the amount of CHF 5,000 are to be paid by the Respondent* ***within 30 days*** *as from the notification of the present decision, as follows:*
>
> *4.1 The amount of CHF 1,000 has to be paid to the Claimant.*
>
> *4.2 The amount of CHF 4,000 has to be paid to FIFA to the following bank account with reference to case nr. 17-01781/ssa:*
>
> *(…)*
>
> *5. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittances under points 2. And 4.1 are to be made and to notify the Bureau of the Players' Status Committee of every payment received.*

6. *The suspension of the ban, imposed on the Respondent in case 16-01475/huk, is lifted and, thus, the Respondent shall be banned from registering any new players, either nationally or internationally, for the next entire registration period following the notification of the present decision.*

7. *The Respondent shall be additionally banned from registering any new players, either nationally or internationally, for one registration period. The execution of this registration ban is suspended during a probation period of eighteen months following the notification of the present decision. If the Respondent commits another infringement during the probationary period, the suspension is automatically revoked and the registration ban executed.*

8. *The Respondent is ordered to pay a fine in the amount of CHF 25,000. The fine is to be paid* ***within 30 days*** *of notification of the present decision to FIFA to the bank account foreseen in point 4.2 above with reference to case nr. 17-01781/ssa".*

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

- As a preliminarily point, the PSC established that it was competent to deal with the present dispute based on the provision of Article 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, Edition 2017 (the "Procedural Rules"), in conjunction with Article 23 para. 1 and 4, as well as Article 22 lit. f) of the FIFA Regulations on the Status and Transfer of Players, edition 2016 (the "FIFA Regulations"), since it concerns a dispute between two clubs affiliated to different associations.

- Moreover, the PSC considered that the 2016 Edition of the FIFA Regulations was applicable to the substance of the matter, considering that the claim was lodged by Bayern in front of FIFA on 12 October 2017.

- With regard to the merits, the PSC first took into account that Bayern and Kayserispor signed a transfer agreement in accordance with which Bayern was entitled to receive from Kayserispor the total amount of EUR 50,000, in two instalments of EUR 25,000 each, respectively due on 15 July 2017 and 15 July 2018.

- In this context, the PSC considered that Kayserispor was put in default of payment of the first instalment by a letter from Bayern on 17 October 2017, granting the Appellant a further deadline until 28 October 2017 to pay its debt, pursuant to the requirement set under article 12bis para. 3 of the FIFA Regulations, and that the payment was not executed within the relevant time limit.

- Moreover, since Kayserispor failed to provide its position with respect to the claim lodged by Bayern, the PSC considered that it had renounced its right to defence, thus accepting the allegations of the claimant and that the decision of the relevant case shall be based on the documents on file, *i.e.* upon the statements and documents presented by Bayern.

- In this respect, it was established that Kayserispor was liable to pay the amount of EUR 25,000 to Bayern corresponding to the first instalment of the transfer compensation under the Transfer Agreement and that, following the claimant's request and according to the constant practice of the PSC, interests were also due at the rate of 5% on the outstanding amount, as from 12 October 2017 until the date of effective payment.

- Moreover, considering that Kayserispor had delayed a due payment for more than 30 days without a *prima facie* contractual basis, article 12bis, para. 2 of the FIFA Regulations applies to the present case, imposing a sanction to the debtor in accordance with article 12bis, para. 4 of the same Regulations.

- In addition, the PSC emphasized that, Kayserispor had already been found to have delayed payments to other clubs or players, for more than 30 days without a *prima facie* contractual basis and without providing valid reasons for non-payment, and namely on 17 April 2015 (case ref. 15-00394/mba); on 4 February 2016 (case ref. 15-01733/mfl), on 29 July 2016 (case ref. 16-00699/ecl), on 24 November 2016 (case ref. 16-01465/ecl, 16-01475/huk, 16-01785/maa) and on 23 March 2017 (case ref. 16-01916/abr).

- In particular, the Appealed Decision refers to the decision passed by the FIFA Dispute Resolution Chamber (the "DRC") on 24 November 2016, by which Kayserispor was banned from registering new players, either nationally or internationally, for one entire registration period, the execution of which was suspended during a probation period of one year following the notification of the decision, *i.e.* as from 11 January 2017. The PSC underlined that according to the said decision, if Kayserispor would commit another infringement during the probation period, the suspension would automatically be revoked, and the registration ban executed.

- In light of the above, the PSC concluded that Kayserispor was found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis for the eighth time and that the default of payment of the amount due to Bayern occurred during the probation period granted under the DRC's decision on 24 November 2016.

- As a consequence, in accordance with article 12bis para. 5 of the FIFA Regulations, the PSC decided that the ban of one registration period imposed on the Appellant in FIFA case 16-01475/huk shall become effective as of the notification of the Appealed Decision.

- Furthermore, in consideration of the specific circumstances of the present case, in relation to the repeated offence by the Appellant, the PSC decided to impose a fine on Kayserispor in the amount of EUR 25,000 to be paid to FIFA, in accordance with article 12bis, para. 4, lit c) of the FIFA Regulations. In addition, the Appellant was subjected to a further ban from registering new players, either nationally or internationally for one entire registration period, in accordance with article 12bis par. 4 lit d) in conjunction with article 12bis para. 7 and 8 of the FIFA Regulations, subject to suspension under a

probation period of eighteen (18) months following the notification of the Appealed Decision.

- Finally, Kayserispor was also ordered to pay the entire costs of the FIFA proceedings in the amount of CHF 5,000.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 23 February 2018, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (the "CAS") against FIFA with respect to the Appealed Decision, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"). In its statement of appeal, the Appellant nominated Mr José Maria Cruz as an arbitrator and applied for the stay of the execution of the Appealed Decision, with regard to the imposition of sporting sanctions.

16. On 15 March 2018, the Respondent informed the CAS Court Office that it did not object to the Appellant's request to stay the execution of the Appeal Decision with regard to the sporting sanction imposed by the PSC. In addition, the Respondent appointed Mr Lars Hilliger as an arbitrator in these proceedings.

17. On 16 March 2018, the CAS Court Office informed the Parties that the President of the Appeals Arbitration Division had decided to confirm the stay of the execution of the Appealed Decision.

18. On 20 March 2018, following an agreed upon extension of time, the Appellant filed its appeal brief, in accordance with Article R51 of the CAS Code.

19. On 22 March 2018, the CAS Court Office informed the Parties that, following the Respondent's request on the same day, pursuant to Article R55 para. 3 of the CAS Code, the time limit to file the Answer was set aside and that a new time limit would be fixed after the payment of the relevant advance of costs by the Appellant.

20. On 26 March 2018, the Parties were informed that Mr José Maria Cruz did not accept his nomination as an arbitrator in the present procedure, and therefore, the Appellant was invited to nominate another arbitrator within ten (10) days.

21. On 6 April 2018, the Appellant nominated Mr Ricardo de Buen Rodríguez as its arbitrator in the present proceedings.

22. On 11 May 2018, the CAS Court Office acknowledged receipt of the Appellant's payment of the advance of costs of the present procedure and granted the Respondent a twenty (20) day deadline to file its Answer.

23. On 24 May 2018, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

President: Mr Fabio Iudica, Attorney-at-Law in Milan, Italy

Arbitrators: Mr Ricardo de Buen Rodríguez, Attorney-at-Law in Mexico, Mexico
Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark

24. On 7 June 2018, following an agreed-upon extension of time, the Respondent filed its answer in these proceedings, in accordance with Article R55 of the CAS Code.

25. On 24 July 2018, the CAS Court Office forwarded the Parties copy of the Order of Procedure, which was returned duly signed by the Appellant on 24 July 2018 and by the Respondent on 26 July 2018. By signature of the Order of Procedure, the Parties confirmed the jurisdiction of the CAS in the present matter.

26. On 31 July 2018, a hearing took place in Lausanne, Switzerland.

27. In addition to the members of the Panel and Mrs Delphine Deschenaux, Counsel to the CAS, the following persons attended the hearing:

For the Appellant: Mr Paolo Torchetti and Mr Samir Dinç, counsels

For the Respondent: Mrs Isabel Falconer, member of the Players' Status Department.

At the outset of the hearing, the Appellant asserted an alleged violation of the principle of proportionality, while the Respondent highlighted that the sanctions imposed by the Appealed Decision are appropriate pursuant to article 12bis of FIFA Regulations in relation to the repeated offences by the Appellant.

28. In their pleadings, the Parties presented their respective cases, basically confirming the arguments already put forward in their written submissions.

29. In particular, the Appellant stressed the fact that, although the first instalment was originally due on 15 July 2017 according to the Transfer Agreement, by virtue of the subsequent agreement between the Parties on 16 January 2018, Bayern accepted that the payment of the first instalment by the Appellant be postponed until 26 January 2018. Therefore, Kayserispor was actually granted a sort of "period of grace", and, as a consequence, there was no liability for any overdue payables. Moreover, the further delay of the relevant payment with respect to the new deadline, was due to an *"error in the banking information"*, thus preventing the Appellant to execute the bank transfer on 2 February 2018. In any case, the payment was promptly made on the first following business day, *i.e.* on 5 February 2018 (as 2 February was Friday). With regard to the other overdue payables cases in which the Appellant is allegedly involved according to FIFA, the Appellant specified that almost all of them have been settled by conciliation and therefore only 2/3 remaining cases are still pending.

30. FIFA reiterated that the Appellant completely failed to provide its position during the FIFA proceedings and was only making such submission before the CAS for the first time; that, in

any event, the Appellant did not comply with the terms of the Transfer Agreement and failed to meet the new deadline agreed upon with Bayern and that, ultimately, it deferred the payment until it received the notification of the Appealed Decision. The Respondent also emphasized that the sanction imposed by the Appealed Decision is crucial for the purpose of preventing future infringements by the Appellant and noted that the execution of the first ban deriving from FIFA case ref. 16-01475/huk is mandatory according to article 12bis, para. 8 of the FIFA Regulations and that, on the other hand, the new ban imposed with the Appealed Decision is suspended and is made conditional upon the future conduct of the Appellant itself, since it will not be implemented in the absence of new infringement during the probationary period.

31. The Appellant concluded by arguing that FIFA's discretion in determining the amount of disciplinary sanctions is excessive and that the CAS has the authority to divert from FIFA decisions based on its full power of review.

32. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their rights to be heard and to be treated equally had been duly respected.

33. After the hearing, and on the same day, the CAS Court Office, on behalf of the Panel, invited the Parties to provide the following documents to the CAS Court Office:

- as for the Appellant, to provide copy of the proof of payment of the second instalment due to Bayern on 15 July 2018, with relevant English translation;

- as for the Respondent, to provide a proof of the date of notification to the Appellant of the decision in case 16-01475/huk.

34. On 7 August 2018, the Appellant forwarded copy of the receipt of a wire transfer executed on 18 July 2018 in favour of Bayern in the amount of EUR 25,000.

35. On 8 August 2018, the Respondent provided the CAS Court Office with the receipt of notification to the Appellant of the decision in case ref 16-01475/huk, showing the date of 11 January 2017.

V. SUBMISSIONS OF THE PARTIES

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

37. The Appellant's submissions in its statement of appeal and in its appeal brief may be summarized as follows.

38. Basically, Kayserispor acknowledged having failed to pay the first instalment of the transfer compensation in the amount of EUR 25,000 to Bayern within the time limit set forth under the Transfer Agreement (15 July 2017).

39. With regard to the rescheduling of the debt agreed upon with Bayern, the Appellant maintained that the reason why the payment was neither executed within the new deadline (26 January 2018) is connected with an alleged *"error in the banking information"*.

40. In fact, Kayserispor asserted having duly instructed the relevant bank (Sekerbank) to transfer the outstanding amount to Bayern on the due date and contended having further discovered on 2 February 2018 that the transaction was not successful, following which an immediate further payment was successfully made on 5 February 2018, *i.e.* only three days after the notification of the Appealed Decision.

41. With this respect, the Appellant stressed the fact that it finally satisfied the debt towards Bayern and that, in any case, the payment was executed *"as soon as the FIFA PSC Decision was issued"*, as to underline the club's alleged good will; so that the potential transfer ban of two registration periods is considered to be excessive in consideration of the present circumstances.

42. In fact, the Appellant maintained that the facts of the case demonstrates that it never tried to avoid the payment, and on the contrary, that it clearly intended to satisfy its debts, as it results from the request of an extension of the deadline set forth under the Transfer Agreement; the instruction sent to the bank in order to execute the bank transfer to Bayern on the new deadline; the immediate payment as soon as it realized that the first transaction was not successful.

43. As a consequence, there was no outstanding debt or overdue payable to Bayern at the time when the present appeal was lodged with the CAS.

44. As to the merits of the appeal, Kayserispor argued that the sanctions imposed by the Appealed Decision are not consistent with the principle of proportionality, contrary to the well-established CAS jurisprudence. In this regard, the Appellant also referred to alleged similar cases to the one at hand where the FIFA PSC deviated from the Appealed Decision, by imposing lower fines compared to those imposed to the Appellant, with respect to more serious violations (larger amounts of overdue payables).

45. In particular, the Appellant contested that the amount of the fine imposed by the Appealed Decision is equal to 100% of the amount in dispute, which has the effect to double the amount owed by Kayserispor and also claimed that the transfer ban imposed by the PSC is clearly disproportionate in comparison to the limited overdue amount of EUR 25,000.

46. In its statement of appeal, the Appellant submitted the following requests for relief (emphasis in original):

> *"2. To accept this appeal where the Decision is varied by vacating the following disciplinary sanctions:*
>
> *a. The prohibition of the Appellant from registering any new players, nationally and internationally, for the next entire registration period following the notification of the Decision, being the summer transfer window of 2018;*
>
> *b. The additional prohibition of the Appellant from registering any new players, nationally and internationally, for one additional registration period, where the execution of this ban is suspended during a probation period of 18 months; and*
>
> *c. The imposition to pay the fine in the amount of CHF 25,000.*
>
> *3. In the alternative, to reduce the sanctions imposed by reducing the fine payable and to reduce the transfer ban to one transfer period.*
>
> *4. Independently of the decision to be issued, the Appellant requests the Panel:*
>
> *a. to fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant, to help the payment of its legal fees and costs;*
>
> *b. to order the Respondent to pay the whole CAS administration costs and the Arbitrators' fees".*

47. The Appellant's requests for relief in the appeal brief were submitted as follows:

> *"1. To accept this appeal and set aside the Decision rendered by the FIFA* [PSC].
>
> *2. In the alternative, to adopt an award varying the Decision where the Appellant is only to pay a fine in the amount of 10,000* [CHF] *without suffering a transfer ban.*
>
> *(…)*
>
> *4. Independently of the decision to be issued, the Appellant requests the Panel:*
>
> *a. To fix a sum of 10,000 CHF to be paid by the Respondent to the Appellant, to help the payment of its legal costs.*
>
> *b. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators' fees".*

B. The Respondent's Submissions and Requests for Relief

48. The position of the Respondent is set forth in its answer and can be summarized as follows.

49. The grounds of the Appealed Decision are rightful and fully justified and must therefore be entirely upheld.

50. Moreover, the Appellant did not present any well-founded argument that would justify any different conclusion than those reached by the PSC in the Appealed Decision.

51. On the contrary, FIFA maintained that the Appellant appears to be rather seeking for invalid argument in order to further delay the execution of the registration ban that was previously imposed in the FIFA case ref. 16-01475/huk and that CAS should not protect nor support such dilatory tactics.

52. With regard to the correctness of the sanctions imposed by the Appealed Decision, the Respondent refers to article 12bis of the FIFA Regulations which purpose is to ensure that clubs properly comply with their financial obligations.

53. In this respect, the Appellant's arguments that it has shown a proactive attitude and willingness to comply with its obligations towards Bayern is completely refuted by the following facts: a) the Appellant did not observe the first deadline under the Transfer Agreement and also failed to comply with the rescheduling of the payment agreed upon with Bayern; b) the Appellant benefited of more than a month to settle the present matter between being informed of the submission of the case to the PSC (12 December 2017) and the date of notification of the Appealed Decision (2 February 2018), but failed to do so; and only proceeded with the payment after notification of the Appealed Decision, which fact contradicts with the alleged good will of the Appellant or the status of good complier with its financial obligations; c) the Appellant did not submit any *"clear and strong"* argument which can lead to the annulment of the sanctions imposed on the club, contrary to the long standing CAS jurisprudence; d) the Appellant refrained from providing its position before the PSC, although it was invited to do so, and the existence of overdue payables toward Bayern remained completely undisputed; e) the fact that the payment was finally executed *"only"* three days after notification of the Appealed Decision does not show any particular effort towards financial compliance, but yet proves that the application of article 12bis of the FIFA Regulations was necessary in order to compel the Appellant to pay the outstanding amount to Bayern; f) actually, the Appellant has in fact delayed the payment of uncontested overdue payables to Bayern for more than six months.

54. Therefore, the requirements of article 12bis of the FIFA Regulations are clearly met.

55. In particular, the PSC imposed to Kayserispor the sanctions available in article 12bis, para. 4 of the FIFA Regulations, taking into account the overall circumstances of the present case as well as the existence of previous "overdue payables decisions" against the Appellant in view of which the sanctions imposed with the Appealed Decision are adequate measures in order to make the Appellant aware of the importance of respecting its financial duties.

56. What is more, since the Appellant committed a new infringement after the entry into force of the one-year probationary period set forth in case ref. 16-01475/huk, the application of article

12bis, para. 8 is mandatory, with the consequence that the suspension is automatically revoked, and the registration ban executed.

57. Furthermore, in its point II.19, the Appealed Decision also warned the Appellant that *"a repeated offence will be considered as an aggravating circumstance and lead to a more severe penalty"*.

58. FIFA therefore emphasized that the sanctions imposed by the PSC are the result of a series of offences committed by Kayserispor which were reported in the Appealed Decision, thus demonstrating that the status of repeat offender by the Appellant has been consolidated in front of the relevant FIFA deciding bodies.

59. As a consequence, the imposition on the Appellant of the relevant sanctions in the case at hand was not only perfectly predictable and legally foreseen as per article 12bis, para. 4 to 8 of the FIFA Regulations, but, also, it was a necessary measure to be applied on the Appellant considering both the unjust breach of its agreement with Bayern and the Appellant's repeated and consistent situation of non-respect of its contractual obligations towards other clubs and/or players over the recent years.

60. With specific regard to the proportionality of the fine, which is contested by the Appellant (*"the fine is equal to 100% of the amount at issue"*), FIFA stressed that the disciplinary decision of a FIFA deciding body shall only be amended by the CAS in cases in which the sanction concerned is to be considered as evidently and grossly disproportionate to the offence, thus, when the FIFA deciding body is found to have acted arbitrarily.

61. In this context, the Respondent made reference, by analogy, to article 75 of the Swiss Civil Code, which provides that ordinary courts are only allowed to declare the decision of a private association void, if the relevant association body exceeded the margin of discretion accorded to it by association law, which, in fact, only occurs in case of grossly disproportionate decisions.

62. In addition, it is to be noted that article 12bis of the FIFA Regulations gives the FIFA deciding bodies a wide discretion regarding the choice of sanction to be imposed in cases of clubs failing to meet their contractual financial obligations.

63. Regarding the Appellant's argument that the fine imposed is excessive since it is equal to 100% of the amount of the overdue payables in dispute, the Respondent replied that article 12bis para. 4, lit. c) allows the FIFA deciding bodies to determine the relevant fine based on different criteria and not only the amount of the overdue amount, such as the specific circumstances of the case, the conduct of the parties during the investigation, the importance of the infringement and whether the sanctioned party has been previously found responsible of having overdue payables.

64. In light of the above, FIFA maintained that the fine imposed on the Appellant by the PSC was appropriate in consideration of all the circumstances of the present case and, in particular, having in mind that it was the eighth time that the Appellant was found to be in violation of article 12bis of the FIFA Regulations, *i.e.* that the Appellant is a repeat offender in OP, which

fact is considered to be an aggravating circumstance as per article 12bis para. 6 of the FIFA Regulations.

65. With regard to the other cases before FIFA and CAS, mentioned by the Appellant in order to sustain the alleged disproportionality of the fine, FIFA argued that they are not similar to the case at hand in that they all refer to cases in which it was the debtor's first offence in overdue payables proceedings (save for the case CAS 2015/A/4232 which dealt with the second offence in overdue payables), and therefore they cannot be compared to the Appealed Decision.

66. On the contrary, FIFA jurisprudence in cases which are actually comparable to the one at hand, appears to be consistent with the Appealed Decision with regard to the duality of the sanctions imposed on the concerned debtors and, with regard to the extent of the fine imposed, the same amount of CHF 25,000 appears to have been established in the context of infringement that were not as considerable as the one *in casu*.

67. Moreover, a mild fine would frustrate the repressive and deterrent purpose inherent in the provision of article 12bis and would therefore fail to encourage the prompt fulfilment of obligations in the future by the repeat offender.

68. In view of all the foregoing, FIFA concluded that the Appealed Decision is rightfully and fully justified and shall be confirmed.

69. In its answer, the Respondent submitted the following requests for relief:

> *"1. In the light of all the above considerations, we request for the present appeal against the challenged decision of the PSC dated 20 December 2017 to be rejected and the relevant decision to be confirmed in its entirety. All costs related to the present procedure as well as the legal expenses of the Respondent shall be borne by the Appellant".*

VI. JURISDICTION

70. 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.*

71. The Appellant relies on Article 57 and 58 of the FIFA Statutes as conferring jurisdiction to the CAS.

72. The jurisdiction of the CAS was not contested by the Respondent.

73. The signature of the Order of Procedure confirmed that the jurisdiction of the CAS in the present case was not disputed. Moreover, at the hearing, the Parties expressly reiterated that CAS has jurisdiction over the present dispute.

74. Accordingly, the Panel is satisfied that CAS has jurisdiction to hear the present case.

75. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

VII. ADMISSIBILITY

76. 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"*.

77. The Panel notes that the PSC rendered the Appealed Decision on 20 December 2017 and that it was notified to the Parties on 2 February 2018. Considering that the Appellant filed its statement of appeal on 23 February 2018, *i.e.* within the deadline of 21 days set in the FIFA Statutes, the Panel is satisfied that the present appeal was filed timely and is therefore admissible.

VIII. APPLICABLE LAW

78. Article R58 of the 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.*

79. 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.*

80. The Panel notes that the Appellant maintains that the relevant FIFA regulations and notably the FIFA Regulations on the Status and Transfer of Players and the FIFA Disciplinary Code primarily, and subsidiarily, Swiss law, shall apply, which is not contested by the Respondent.

81. In consideration of the above and pursuant to Article R58 of the CAS Code, the Panel holds that the present dispute shall be decided principally according to FIFA Regulations, with Swiss law applying subsidiarily.

82. With regard to the applicability *ratione temporis* of the relevant FIFA Regulations, the Panel considers that the present case is governed by the 2016 edition, given that the relevant dispute was submitted to FIFA on 12 October 2017.

IX. MERITS

83. By addressing the merits of the present case, the Panel first observes that it is undisputed between the Parties that the Appellant failed to pay the first instalment due under the Transfer Agreement in the amount of EUR 25,000 within the prescribed deadline of 15 July 2017.

84. In this regard, it is noteworthy that not only did the Appellant acknowledge its failure to comply with the deadline of the payment of the first instalment, but it even failed to provide any justification thereof.

85. What is disputed in the present case is whether the sanctions imposed by the PSC with the Appealed Decision, both with regard to the registration ban as well as the fine in the amount of CHF 25,000, as a consequence of the delayed payment, are applicable and appropriate, as maintained by FIFA or, on the contrary, whether the imposition of the sanctions in the present case is unwarranted or, alternatively, whether the principle of proportionality has been violated, as contended by the Appellant.

86. In essence, the Appellant maintains that, although the deadline of 15 July 2017 was not met, Kayserispor cannot be considered liable for any overdue payables with reference to the first instalment of the transfer fee for the following reasons: a) according to a subsequent agreement with Bayern, the deadline for the payment of the first instalment was postponed until 26 January 2018, which means that Kayserispor was granted a "period of grace" and no responsibility for default of payment can be ascribed to the Appellant under these circumstances; b) the Appellant duly instructed the bank to transfer the relevant amount to Bayern in accordance with the new deadline; c) the reason why the new deadline of 26 January 2018 was not met is connected to an *"error in the banking information"*; and d) in any event, the relevant payment was finally executed on 5 February 2018, as soon as the Appellant realized that the first wire transfer was not successful and only three days after notification of the Appealed Decision, which fact demonstrates the good will of the Appellant.

87. Based on the abovementioned circumstances, the Appellant affirmed that, at the time when the Appealed Decision was issued, no overdue payables were pending or, at least, no responsibility for overdue payables (if any) may be attributed to the Appellant. Consequently, according to Kayserispor, the sanctions imposed by the Appealed Decision are unjustified and shall be revoked, or, in any case, they are excessive with respect to the particular circumstances of the present case and shall therefore be reduced since they are not consistent with the principle of proportionality. In particular, the Appellant objected that the fine of CHF 25,000 actually equals the 100% of the alleged overdue amount and the registration bans are clearly disproportionate in consideration of the small amount at issue and in comparison with the sanctions imposed by the FIFA in previous cases allegedly similar to the one at hand.

88. On the other hand, the Respondent argued that the Appellant failed to submit any valid and consistent argument that would justify any different conclusions than those reached by the PSC. Primarily, FIFA stressed the following facts as demonstrating that Kayserispor never shown any willingness to comply with its financial obligations: a) that the Appellant, after failing to comply with the first deadline set forth under the Transfer Agreement, also failed to meet the new deadline agreed upon with Bayern; b) that the club waited until notification of the Appealed Decision in order to proceed with the relevant payment; c) that the Appellant also failed to provide its position in the course of the FIFA proceedings, leaving the claim lodged by Bayern completely undisputed; and d) as a result, the Appellant has in fact delayed the payment of uncontested overdue payables to Bayern for more than six months.

89. As to the proportionality of the sanctions imposed by the Appealed Decision, which was objected to by the Appellant, the Respondent emphasized that the Appellant shall be considered a repeat offender with respect to the violation of article 12bis of the FIFA Regulations, which fact constitutes an aggravating circumstance when determining the applicable penalty.

90. In fact, FIFA referred to many other similar cases (which were reported in the Appealed Decision), stemming from violations of article 12bis of the FIFA Regulations instigated against Kayserispor, including case ref 16-01475/huk, under which the Appellant was sanctioned with a registration ban subject to a probationary period of one year. In this respect, FIFA recalled that, due to the new infringement of article 12bis committed by the Appellant pending the above-mentioned probationary period, the revocation of the suspension with the following execution of the registration ban is mandatory under article 12, para. 8, of the FIFA Regulations. In consideration of these circumstances, and in view of the discretionary power of FIFA deciding bodies within the application of article 12bis of FIFA Regulations, the Respondent maintained that the Appealed Decision could only be amended by a CAS panel if it is to be considered as evidently and grossly disproportionate to the offence, which is not the present case. Therefore, FIFA insisted that the Appealed Decision be entirely confirmed by the Panel.

91. In view of the positions of the Parties as summarized above, the Panel observes that in order to decide the present case, the following shall be established:

    a) whether the Appellant is responsible for violation of article 12bis of the FIFA Regulations, with respect to the payment of the first instalment due under the Transfer Agreement and,

    b) in case of an affirmative answer to the question above, whether the sanctions imposed to the Appellant with the Appealed Decision are appropriate and proportionate under the terms of article 12bis of the FIFA Regulations, in relation to the circumstances of the present case.

92. In order to address the first issue, the Panel recalls that clubs' responsibility for *"overdue payables"* shall be assessed in accordance with the combined provisions of article 12bis, para. 1, 2 and 3 of FIFA Regulations, reading as follows:

"1. Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements.

2. Any club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned in accordance with paragraph 4 below.

3. In order for a club to be considered to have overdue payables in the sense of the present article, the creditor (player or club) must have put the debtor club in default in writing and have granted a deadline of at least ten days for the debtor club to comply with its financial obligation(s)".

93. Against this background, the Panel observes that the Appellant admittedly failed to meet the deadline of 15 July 2017 set forth under the Transfer Agreement for the payment of the first instalment due to Bayern in the amount of EUR 25,000, without any justification. It is also undisputed that Bayern put the Appellant in default with a letter of warning on 17 October 2017, by which the Appellant was granted a further time limit until 28 October 2017 to comply with the relevant payment, which did not happen. In consideration of the persistent default by the Appellant, a claim was lodged by Bayern with FIFA on 30 October 2017, following which, on 16 January 2018, upon proposal by the Appellant, Bayern accepted a new deadline until 26 January 2018 as an amicable solution for the payment of the first instalment. Finally, the relevant payment was executed by the Appellant on 5 February 2018, after the Appealed Decision was served to the Parties on 2 February 2018.

94. The Panel also notes that the Appellant argues that it actually complied with the second deadline agreed upon with Bayern, as it duly instructed the bank of the relevant payment on 26 January 2018; nonetheless, only on 2 February 2018, the Appellant became aware of the fact that the wire transfer was unsuccessful because of an *"error in the banking information"*. Therefore, the Appellant assumes that it cannot be considered liable for this further delay and, that in any event, it cannot be considered responsible for any overdue payables at least until 26 January 2018, since it benefited from a "period of grace" due to the postponement agreed upon with Bayern. As a consequence, no overdue payables would be attributable to the Appellant.

95. The Panel is not persuaded by the Appellant's argument.

96. As the Appellant alleges that the wire transfer was not successful due to an *"error in the banking information"*, the Panel believes that such a justification is not suitable to exclude the Appellant's responsibility for the non-fulfilment of the relevant deadline. In fact, the Appellant failed to provide any tangible evidence that the failure of the bank transfer occurred because of reasons not attributable to the Appellant, or that Kayserispor was prevented from complying with the deadline on 26 January 2018 for reasons beyond the sphere of its responsibility.

97. Furthermore, from the documentation in the file (see Annex 2 to the appeal brief), it is established that by letter to Kayserispor on 20 February 2018, Bayern acknowledged having accepted on 16 January 2018 a new deadline of the first instalment until 26 January 2018, in view of an amicable settlement. It is the Panel's opinion that such an agreement merely constitutes an extension of the deadline initially set forth under the Transfer Agreement and does not involve any novation of the original debt relationship between the Parties. This

consideration is also supported by the provision of article 116 of the Swiss Code of Obligations which, in the relevant part, reads as follows: *"Where a new debt relationship is contracted, there is no presumption in respect of an old one"*. As a consequence, by not complying with the new deadline, as mentioned above, the Appellant terminated the settlement agreement by breach, with the consequence that it cannot avail itself of the "period of grace" granted by Bayern with the purpose of excluding the violation of article 12bis of the FIFA Regulations. In this regard, having in mind the first deadline set forth under the Transfer Agreement, the Panel establishes that the Appellant has delayed the payment of the first instalment for more than 30 days without a *prima facie* contractual basis.

98. In view of the above, and since the Appellant was put in default in writing by Bayern and was granted a deadline of at least 10 days to comply with its financial obligations, the Panel is satisfied that the requirements under article 12bis, para. 1-3 of the FIFA Regulations are met and therefore, that the relevant sanctions set forth under para. 4 of the same provision are applicable to the present case.

99. Being established that the Appellant was responsible for violation of article 12bis of FIFA Regulations, the Panel shall now address the issue regarding the proportionality of the sanctions imposed by the Appealed Decision, which is contested by the Appellant.

100. In this regard, the Panel notes that article 12bis, para. 4, of the FIFA Regulations provides the FIFA judicial bodies with a wide discretion regarding the choice of the sanction to be imposed in cases of clubs failing to meet their financial obligations, judging on the basis of the specific circumstances of each case and that, on the other side, CAS panels' power to review based on Article R57 of the CAS Code will be narrower and limited when applied to the issue of a disciplinary sanction imposed on a party by FIFA (see CAS 2016/A/4719; CAS 2016/A/4595; CAS 2015/A/4232; CAS 2014/A/3562; CAS 2009/A/1817 & 1844; CAS 2004/A/690; CAS 2005/A/830; CAS 2006/A/1175; CAS 2007/A/1217; CAS 2009/A/1870).

101. According to CAS jurisprudence, in fact, CAS panels shall give a certain level of deference to decisions of sports governing bodies in respect of the proportionality of sanction; those sanctions 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 2009/A/1817 & 1844): *"Notwithstanding the Panel's power to review a case de novo according to Article R57 of the CAS Code, the Panel finds that the review and the power to amend a disciplinary decision of a FIFA judiciary body should only take place in cases, in which the Panel finds that the relevant FIFA judiciary body has exceeded the margin of discretion accorded to it by the principle of association authority, i.e. only in cases in which the FIFA judiciary body concerned must be held to have acted arbitrarily. However, this assumption is not present, if the Panel merely disagree with a specific sanction. Only if the sanction concerned must be considered as evidently and grossly disproportionate to the offence, will the Panel have the authority to amend or set aside the decision"* (CAS 2015/A/4291).

102. When exercising its wide discretion in the application of disciplinary sanctions based on article 12bis of the FIFA Regulations, FIFA deciding bodies may take a number of various factors into consideration, which are not limited to the actual overdue amount, but also the specific

circumstances surrounding the particular case, such as the behaviour of the club during the investigation, the seriousness of the infringement, or whether the club has been previously sanctioned for having overdue payables, so that disciplinary bodies may evaluate any aggravating and /or extenuating circumstances that might be related to the infringement (see CAS 2016/A/4719; CAS 2016/A/4595): *"While a CAS panel's scope of review of a disciplinary sanction under appeal is narrower and more limited, it also considers that FIFA's deciding bodies have a wide discretion when it comes to sanction clubs in order to preserve and uphold the goal of art. 12bis of the RSTP. Accordingly, a wide range of factors may be taken into account to determine the quantum of a sanction, such as the behaviour of the debtor during the investigation, the amount awarded, the seriousness of the infringement, or whether such debtor has been previously sanctioned for having overdue payables (aggravating circumstance of "repeated offender")"* (CAS 2016/A/4719).

103. The Panel fully adheres to the abovementioned jurisprudence and finds that the sanctions imposed to the Appellant can only be reviewed if they are considered to be evidently and grossly disproportionate to the offence.

104. In this context, the Panel considers that the Appellant is liable for having overdue payables in the amount of EUR 25,000 towards Bayern within the meaning of article 12bis of the FIFA Regulations; that the Appellant, both failed to comply with the original deadline set forth under the Transfer Agreement, nor with the postponement granted by Bayern; that the Appellant failed to submit its position during the FIFA proceedings; that in the present proceedings, the Appellant did not put forward any tangible element that could justify the delay of the relevant payment towards Bayern, nor any mitigating circumstances; that it resulted that the Appellant was involved in several other cases before FIFA deciding bodies regarding overdue payables and that therefore it can be considered a "repeated offender"; that the present infringement occurred during the one-year probationary period set forth under FIFA case ref. 16-01475/huk.

105. With regard to the decision of the PSC to lift the suspension of the ban imposed on the Appellant in case ref. 16-01475/huk above, the Panel refers to the provision of para. 8 of article 12bis of FIFA Regulations according to which *"If the club benefiting from a suspended registration ban commits another infringement during the probationary period, the suspension is automatically revoked and the registration ban executed; it is added to the sanction pronounced for the new infringement"*. The Panel notes that from the relevant wording it is clear that the execution of a suspended ban in case of new infringement during the probationary period is mandatory and therefore no issue of proportionality can be raised in this regard. As a consequence, the Panel decides that the relevant part of the Appealed Decision is confirmed.

106. With regard to the two sanctions imposed with the Appealed Decision (a fine in the amount of CHF 25,000 and a registration ban (on probation) for one registration period), the Panel rejects the argument put forward by the Appellant as to the alleged disproportionality, considering that, in determining the relevant amount, the PSC also took into account all the previous infringements committed by the Appellant to article 12bis of the FIFA Regulations and not only did it consider the extent of the specific infringement related to the present case, which is consistent with the scope of article 12bis itself. In fact, the Panel reminds that, according to

para. 6 of article 12bis *"A repeated offence will be considered as an aggravating circumstance and lead to a more severe penalty"*.

107. With this regard, the Panel considers that the Appellant has demonstrated with its conduct to have repeatedly and consistently failed to fulfil its contractual obligations towards other clubs or players. In consideration of all the circumstances above, with respect to the discretionary power accorded to the PSC in determining disciplinary sanctions under article 12bis of FIFA Regulations, and also taking into account the overview presented by the Respondent with regard to FIFA practice in similar repeated offences, the Panel believes that the relevant sanctions are not evidently or grossly disproportionate and therefore, that the relevant part of the Appealed Decision shall be upheld.

108. In view of the reasoning above, the Panel rejects the present appeal and confirms the Appealed Decision in its entirety.

109. The stay of the Appealed Decision with regard to the execution of the registration ban imposed in FIFA'S case 16-01475/huk is lifted and the Appellant shall thus be banned from registering any new players, either nationally or internationally, for the next entire registration period as from the date of notification of the present award. Furthermore, the stay of the probation period of eighteen months following the notification of this award with regard to the additional ban from registering any new players, either nationally or internationally, for one registration period, is also lifted from the date of notification of the present award.

110. All other motions or requests for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Kayserispor Kulübü against Fédération International de Football Association (FIFA) on 23 February 2018 is dismissed.

2. The decision rendered by the FIFA Bureau of the Players' Status Committee on 20 December 2017 is confirmed.

3. (…).

4. (…).

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