



**Arbitration CAS 2020/A/7369 Cruzeiro Esporte Clube v. Fédération Internationale de Football Association (FIFA), award of 7 September 2021**

Panel: Mr Chris Georghiades (Cyprus), Sole Arbitrator

*Football*

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

*Applicable law*

*System of sanctions in article 64 FDC 2017*

*Proportionality of a sanction*

*Principle ne bis in idem*

1. Article R58 of the CAS Code imposes a strict hierarchy of norms in matters of substantive laws, given that the Parties are not allowed to oust the relevant applicable sports regulations, but only complement them by choosing a law that will apply subsidiarily to those regulations. Specificity of sport is not a separate or alternative source of regulation, but may be a correcting factor to be considered if argued properly and necessitated by the merits.
2. Article 64 of the FIFA Disciplinary Code (FDC) 2017 operates so as to provide FIFA with the mechanism to sanction a club that has failed to satisfy its obligations following instruction to do so. A club that fails to comply with a decision rendered by a competent FIFA organ may be subject to a number of measures, such as fines, point deduction(s), relegation to a lower division, etc. FIFA's regulations take care to provide for both the possible violation and the sanction resulting from the violations.
3. When determining whether a sanction is proportionate, various benchmarks seem appropriate: the gravity of the illegal act, the power to dissuade the offender from repeating the same illegality in the future, and the importance of the rule of law that is protected. Further, all disciplinary systems require to contain a mechanism for increasing the sanctions so as to bring about compliance in case of a failure to comply with the sanctions imposed.
4. The *ne bis in idem* principle does not prevent a judicial body from imposing multiple sanctions for the same violation, but only prevents a judicial body from imposing additional sanctions on the perpetrator for the same violation once sanctioned for such violation by the same judicial body.

## **I. INTRODUCTION**

1. This appeal is brought by Cruzeiro Esporte Clube against the decision rendered by the FIFA Disciplinary Committee (the “FIFA DC”) of the Fédération Internationale de Football Association (“FIFA”) on 9 August 2020 (the “Appealed Decision”) regarding the breach of Article 64 of the FIFA Disciplinary Code for failing to comply with a decision passed by CAS on 17 February 2020 confirming a decision rendered by the Single Judge of the FIFA Players Status Committee (the “PSC”) on 29 August 2017.

## **II. PARTIES**

2. Cruzeiro Esporte Clube (the “Club” or the “Appellant”) is a Brazilian football club, based in Belo Horizonte, Brazil. It is a member of the Brazilian Football Federation which in turn is affiliated with FIFA.
3. FIFA (or the “Respondent”) is the international governing body of football at worldwide level. It is an association under Swiss Law and has its registered office in Zurich, Switzerland.

## **III. FACTUAL BACKGROUND**

4. Below is a summary of the main facts and allegations based on the parties written submissions, pleadings and evidence adduced during the proceedings. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. The Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties. Reference in the award is made only to the submission and evidence the Sole Arbitrator considers necessary for the purpose of explaining his reasoning.

### **A. Proceedings before the FIFA Players Status Committee**

5. On 29 August 2017 the Single Judge of the Players Status Committee (the “PSC”) decided on the dispute between the Club Al-Wahda FC (“Al-Wahda”) and the Club to pay within 30 days as from the notification of the PSC decision the amount of EUR 850,000 plus interest at a rate of 5% p.a. to be calculated in accordance with the PSC decision (the “PSC Decision”).
6. The findings of the PSC Decision were communicated to the Parties on 8 September 2017 followed by the grounds of the PSC Decision on 27 November 2017.

### **B. First Proceedings before the Court of Arbitration for Sport**

7. On 18 December, 2017, the Club filed an appeal at the Court of Arbitration for Sport (the “CAS”) against Al-Wadha with respect to the FIFA PSC Decision. The proceedings before the CAS were registered as 2017/A/5481.

8. On 14 May 2018, CAS rendered an award (the “First CAS Award”) partially upholding the appeal of the Club, as a result of which, the PSC Decision was amended concerning interest due on two specific instalments. All other parts of the PSC Decision were confirmed.

**C. First Proceedings before the FIFA Disciplinary Committee**

9. On 13 December 2018 as the amounts due were not paid to Al-Wadha the Secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against the Club having failed to respect the First CAS Award. Additionally, the Secretary urged the Club to pay the outstanding amount by 14 January 2019 at the latest.
10. On 20 February 2019 the FIFA Disciplinary (“FIFA DC”) passed a decision against the Club imposing a fine of CHF 30,000 warning the Club that 6 points would be deducted in case the Club failed to pay the amount adjudicated by the FIFA PSC Decision within 90 days. The FIFA DC made known that in the case of failure to pay the amounts due, despite the deduction of the 6 points, the FIFA DC would, upon the request of Al-Wahda, consider the possibility of the Club been relegated. (the “First Disciplinary Decision”).
11. The terms of the decision were communicated on 22 February 2019 and the grounds of the First FIFA DC were communicated to the Club on 13 March 2019.

**D. Second Proceedings before the Court of Arbitration for Sport**

12. The Club following receipt of the grounds of the FIFA DC decision caused to file an appeal before the CAS (CAS 2019/A/6239).
13. On 17 February 2020 the CAS rendered its award in respect of CAS 2019/A/6239 dismissing the Club’s appeal confirming the First FIFA DC Decision (the “Second CAS Award”).

**E. Second Proceedings before the FIFA Disciplinary Committee**

14. The Club failed to honour the FIFA PSC Decision within the 90day grace period and, in accordance with the First Disciplinary Decision, confirmed by the Second CAS Award, 6 points were deducted from the Club’s domestic league championship.
15. On 12 July 2020 Al-Wahda requested the matter be brought before the FIFA DC with respect the possible relegation of the Club as per the First Disciplinary Decision of 20 February 2019.
16. On 9 August 2020, the FIFA DC passed a decision as follows (the “Appealed Decision”):

“1. *The club Cruzeiro Esporte (hereinafter, the Debtor) is found guilty of failing to comply in full with the decision passed by the Court of Arbitration for Sport on 14 May 2018 according to which it was ordered to pay to the club Al-Wahda FC (hereinafter, the Creditor) EUR 850,000 plus 5% interest p.a. to be calculated in accordance with the abovementioned decision.*

2. *The Debtor is granted a final deadline of 30 days as from the notification of the present decision in which to settle its debt to the Creditor.*
  3. *If payment is not made by this deadline, the Creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee to relegate the first team of the Debtor to the next lower division in the national league system for the next season. Once the Creditor has filed this request, the relegation will have to be implemented automatically by the Brazilian Football Association without a further formal decision having to be taken by the FIFA Disciplinary Committee.*
  4. *As a member of FIFA, the Brazilian Football Association is reminded by the Committee of its duty to implement this decision and, if requested, provide FIFA with proof that the first team of the Debtor has been relegated. If the Brazilian Football Association does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on Brazilian Football Association. This can lead to expulsion from all FIFA competitions.*
  5. *The Debtor is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the Brazilian Football Association of every payment made and to provide the relevant proof of payment.*
  6. *The Creditor is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the Brazilian Football Association of every payment received”.*
17. On 11 August 2020 the findings of the Appealed Decision were notified to the Club. The grounds of the Appealed Decision were duly communicated to the Club on 8 September 2020.

#### **IV. SUMMARY OF PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

18. On 11 September 2020, in accordance with Articles R47 and R48 of the Code of Sports related Arbitration (the “CAS Code”) the Club filed a Statement of Appeal at the CAS against FIFA challenging the Appealed Decision.
19. In its Statement of Appeal the Club requested that a sole arbitrator be appointed.
20. On 20 October 2020, in accordance with Article R51 of the Code, the Club filed its Appeal Brief.
21. On 9 November 2020, in accordance with Article 55 of the Code, the Respondent filed its Answer.
22. On 10 November 2020, the CAS Court Office informed the Parties, pursuant to R54 CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, that the arbitral tribunal appointed to decide the present matter was constituted by:

Sole Arbitrator: Mr. Chris Georghiades, Advocate, Limassol, Cyprus

23. On 10 November 2020, the Parties were asked by CAS to advise the CAS Court Office whether they prefer a hearing to be held or not.
24. On 17 November 2020 the Club's lawyers informed the CAS Court Office that due to the circumstances of the matter and due to its complexity of legal issues the Club preferred a hearing to be held.
25. On 18 November 2020 the CAS acknowledged receipt of the Club's letter of 17 November 2020 requesting a hearing, noting that the Respondent did not file any comment with regard the holding of a hearing advising the Parties that it would inform them of the decision of the Sole Arbitrator.
26. On 18 November 2020 the Respondent reverted making reference to the CAS correspondence of same day advising that the holding of a hearing in the particular case is not necessary and would only serve to support the Club's patent dilatory tactic.
27. On 24 November 2020 the CAS addressed the Parties informing that the Sole Arbitrator having regard to the Parties opposite views as to the need to hold a hearing and the Club emphasizing the necessity to hear the witnesses mentioned in his Appeal Brief decided to grant the Club a deadline until 4 December 2020 to file witness statements for such witnesses it had specified in its written submissions, the Respondent allowed to comment on such statements if it deemed necessary. Following the above the Sole Arbitrator would decide whether or not to hold a hearing.
28. On 2 December 2020, the Club submitted the witness statements of Messrs., Edison Travassos and Matheus Damasceno Rocha (the "Witness Statements").
29. On 10 December 2020, CAS informed the Parties of the Sole Arbitrators decision concerning a hearing and his conclusion that a hearing was not necessary. The Sole Arbitrator caused to note the following:
  - (i) *The main issue to be resolved is the applicability of the relevant provision of the FIFA Disciplinary Code (FDC) as set out in the 2017 or the 2019 edition;*
  - (ii) *The case does not reveal any particular factual disputes;*
  - (iii) *The oral presentation of witnesses and their statements does not appear to be relevant to the main issue of the appeal;*
  - (iv) *The main issue of the appeal can be readily considered and assessed on the basis of the Parties' submissions and documents already present in the case file.*
30. On 11 December 2020, the Respondent submitted a signed copy of the Order of Procedure.
31. On 21 December 2020 the Club submitted a signed copy of the Order of Procedure.

## V. SUBMISSIONS OF THE PARTIES

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

32. The Appellants submissions in its Appeal Brief may be summarized as follows:
33. The Appealed Decision violates mandatory principles set out in the FIFA DC as well as fundamental principles of law involving the European Convention on Human Rights ("ECHR") with regard to FIFA's authority to impose disciplinary sanctions.
34. According to CAS jurisprudence (CAS 2011/A/2426), Swiss public policy requires that "*parties to an arbitration are guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal*".
35. The application of the abovementioned principles represents a matter of good governance which is only achievable through the respect of the mandatory principle of transparency which FIFA is obliged to respect being itself a signatory of the "Transparency Register" and its recognition to follow the principles of good governance and transparency as per its statement of 19 November 2015.
36. The judicial bodies have to compulsory apply their own regulations correctly and properly and not arbitrarily taking into consideration the equal treatment of parties and especially the fundamental principles of due process, the FIFA DC failed to comply with most of them in the Appealed Decision.
37. The FIFA DC wrongly made use of the sanctions provided under the FDC 2017 instead of the FDC 2019, the sanctions of which are milder than those of the FDC 2017.
38. The breach dealt with by the FIFA DC occurred in May 2020 which was much after the issue of the FDC 2019 which came into force on the 15 July 2019.
39. Comparing the two FDC's it is obvious the terms and conditions set out in the FDC 2017 are much stricter than the one's in the FDC 2019. The deduction of points or a relegation to a lower division is a much stricter sanction than a transfer ban which can be lifted as soon as payment is made by the debtor.
40. The FIFA DC failed to clarify why it decided to apply the sanctions contained in the FDC 2017 instead of the FDC 2019, the said failure being *per se* a violation of mandatory principle of laws and the due process as whole.
41. The FIFA DC should have imposed a transfer ban on the Appellant only until the outstanding amounts were paid to Al-Wahda in accordance with Article 15 of the FDC 2019 instead of a relegation as per the FDC 2017.

42. Failure of the FIFA DC to apply the sanction under the correct regulations, rule or applicable law is one of those few possibilities, which grant to a CAS Panel the necessary jurisdiction to set aside a first instance decision rendered by the disciplinary body of a sport association.
43. Consequently, the Appealed Decision must be set aside in full and the case reverted to the FIFA DC to consider the sanctions to be imposed in accordance with the correct regulations, namely Article 15 of the FDC 2019 and not Article 64 of the FDC 2017.
44. In addition, the Appellant submitted that the Appealed Decision failed to comply with the principle of proportionality, in its threefold elements (adequacy, necessity and proportionality *stricto sensu*) which is a matter of public policy according to Article 90 of the Swiss PILA.
45. Furthermore, the Appellant states that “the imposition of new sanctions (relegation to a lower division, etc.) will violate the fundamental principle of law *ne bis idem* considering that the Appellant had already sanctioned with the deduction of six points”.

**B. Summary of the written witness statements submitted by the Appellant**

46. The Appellant submitted two witness statements which are briefly summarized as follows:
  - (i) Mr Edison Travassos, an officer in the in-house legal department of the Club, stated:
    - He was present when Al Wahda lodged a claim before FIFA which is still ongoing before CAS;
    - He confirmed that the Club suffered a severe financial crisis in the year 2015 and the Club is currently in a terrible financial situation which became worse after the deduction of 6 points;
    - He has been told that FIFA rendered a new decision, imposing a very severe sanction, which is the relegation to a lower division;
    - It is not in his expertise to affirm whether the FIFA decision is correct or not, nor which version of the FDC should be applied;
    - He has seen cases where FIFA imposed lighter sanctions on clubs which did not comply with their obligations;
    - The relegation will not solve the issue which is basically to settle the Club’s debt to Al-Wahda;
    - The Club is making its best efforts to pay all creditors and they are actually getting paid;
    - He described instances of payments made;

- The Club was relegated for the first time in its history;
  - The Brazilian FA suspended all football competition because of COVID-19;
  - As of 3 April 2020 payment of TV rights have been suspended;
  - There is severe difficulty to procure funds due to COVID-19 situation;
  - The Club is not receiving income from its sponsors, the sale of tickets, and image rights for the transmission of matches;
- (ii) Mr Mathens Damasceno Rocha, the Club's Chief Financial Officer (CFO) stated:
- He does not know the details of the dispute between Al-Wahda and the Club except that the Club has challenged the FIFA Disciplinary Decision;
  - He knows that after the deduction of 6 points there was a new decision to relegate the Club to lower division;
  - The Club on a number of occasions tried to reach an amicable settlement with Al-Wahda however Al-Wahda refused to negotiate;
  - The Club is struggling to find funds to avoid new sanction and solve the matter;
  - The Club's financial situation is the result of bad management by its former board;
  - The Club's intention has never been to withhold payment;
  - The reason for non-compliance with the Club's obligations is the present financial crisis;
  - Recently the Club has made a lot of payments and settled most of its debts;
  - The Club is not acting in bad faith, it is trying to settle all its debts;
  - The Club unfortunately has been relegated to the Brazilian second division for the first time in its history – this mainly due to financial problems; and
  - COVID-19 has caused financial problems to the Club, the Club is not receiving any income from TV rights, tickets, etc.

47. In its Appeal Brief, the Appellant submitted the following requests for relief:



*FIRST – To dismiss in full the Appealed Decision and revert it back to the FIFA Disciplinary Committee in order to permit said judicial body to provide a decision based upon the Old FIFA Disciplinary Code.*

*SECOND – To order the Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS; AND*

*THIRD – To order the Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 10,000 (ten thousand Swiss Francs).*

***Alternatively and only in the event the above is rejected:***

*FOURTH – To dismiss in full the Appealed Decision and revert back to the FIFA Disciplinary Committee in order to permit said judicial body to provide a decision based upon the New FIFA Disciplinary Code;*

*FIFTH – To confirm the imposition of transfer ban on the Appellant only until the outstanding amounts are paid to Al-Wadba;*

*SIXTH – To order the Respondent to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS; AND*

*SEVENTH – To order the Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 10,000 (ten thousand Swiss Francs).*

**C. The Respondent's submission and request for relief.**

48. The position of the Respondent is set forth in its Answer and can be summarised as follows:
49. The Appealed Decision is the result of disciplinary proceedings taken against the Appellant for violation of Article 64 of the FDC 2017 (currently, Article 15 of the FDC 2019) due to its failure to comply with the First CAS Award.
50. The Swiss Federal Tribunal has found that the system of sanctions established by Article 64 of the FDC 2017 for the purposes of non-compliance with FIFA's decisions or those of the CAS, is lawful (SFT 4 P.240/2006, decision of 5 January 2007).
51. The spirit of Article 64 of the FDC 2017 is to ensure the respect of decisions rendered by a body, committee, or an instance of FIFA or CAS. The pallet of sanctions stipulated in Article 64, are designed to apply within football, to both FIFA's direct.
52. The particular proceedings provided by Article 64 are the enforcement proceeding pursuant to Swiss law and the FIFA DC could be regarded as acting similarly to an "enforcement authority". Nonetheless, proceedings under Article 64 FDC 2017 are to be considered not as an enforcement but neither as an imposition of a sanction for breach of the associations' regulations and under the terms of association law and indirect members, as they serve as a means to put the debtor under pressure to comply with decisions. Article 64 provides FIFA

with a legal tool ensuring to a certain extent that decisions passed by the relevant authority within FIFA (or CAS following an appeal) are respected and ergo, the rights of players or clubs are finally guarded.

53. The FIFA DC cannot review or modify as to the substance a previous decision which is final and binding and therefore enforceable. The sole role of the FIFA DC is to analyse if the debtor complied with the final and binding decision of the relevant body. The CAS can only address the question whether the Appellant respected and fulfilled the decision, but it cannot address its content.
54. The main question to be answered by FIFA DC and by CAS is whether or not the financial amounts as defined in the final and binding decision have been paid to the claimant or if for any certain reason the outstanding amount is not due anymore.
55. The FIFA DC has to – and can only – take into consideration the facts that after the date the relevant decision was rendered, any other consideration falls out of the scope of the disciplinary proceedings under Article 64 of the FDC 2017.
56. It is clear and uncontested that the Appellant was ordered to pay a sum of money to Al-Wahda, it is undisputed that no payment was made and the Appellant as per its Appeal Brief (paragraphs 49, 76 and 81) acknowledges this. No serious agreement on a payment plan has ever been proposed, let alone agreed with Al-Wahda.
57. The various appeals proceedings initiated by the Appellant with respect the decisions of the competent organs of FIFA (Players Status Committee, FIFA Disciplinary) were for the purpose of gaining time, delaying payment of its obligations, the Appellant at no instance evidenced any serious willingness to comply with its financial obligations.
58. The Appellant's allegations with respect the difficult financial situation it has faced and that the sanction will aggravate the same should not be taken into consideration and should be dismissed as per the CAS jurisprudence.
59. The Appellant's persistent failure to comply with the First CAS Award left the FIFA DC with no other choice but to render the Appealed Decision.
60. The Appellants arguments highlighting Brazils' economic and political crisis are irrelevant. As such they were considered and dismissed by the sole arbitrator in CAS 2019/A/6278 Cruzeiro v FIFA.
61. The FIFA DC correctly applied Article 64 of the FDC 2017 to the facts of the case imposing disciplinary measures i.e. relegation to a lower division subject to the persistent payment failure within the period of grace and the request in writing by the creditor (Al-Wahda).
62. The sanctions imposed are proportionate and that no milder sanctions could be obtained from the application of FDC 2019.

63. The allegation of violation of the *ne bis idem* principle is unfounded.
64. The allegation that the FDC 2019 should be applied in the particular case instead of the FDC 2017 causing the case to be referred back to FIFA Disciplinary Committee to consider the case on FDC 2019 is wrong.
65. In its Answer, the Respondent submitted the following requests for relief:
  - (a) *To reject the Appellants appeal in its entirety;*
  - (b) *To confirm the decision 180908 rendered by the member of the FIFA Disciplinary Committee on 9 August 2020;*
  - (c) *To order the Appellant to bear all costs, incurred with the present procedure; and*
  - (d) *To order the Appellant to make a contribution to FIFA's costs”.*

## **VI. JURISDICTION**

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

*“An appeal against a decision of a federation, association or sports related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or regulations of that body”.*
67. The jurisdiction of the CAS, which was not disputed, derives from Article 58(1) of the FIFA Statutes (2016 edition) as it determines that:

*“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.*
68. None of the parties have objected to CAS jurisdiction the jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by the Parties.
69. It follows that the CAS has jurisdiction to decide on the present dispute.

## **VII. ADMISSIBILITY**

70. The Statement of Appeal, which was filed on 11 September 2020, complied with the requirements of Articles R47, R48, R49 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

71. It follows that the appeal is admissible.

### VIII. APPLICABLE LAW

72. Article R58 of the CAS Code provides the following with respect the substantive rules/laws to be applied to the merits of the dispute:

*“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”.*

73. Article 57 (2) of the FIFA Statutes provides the following:

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

74. The Parties agreed that the applicable regulations are those set by FIFA and that Swiss law applies subsidiarily. However, the Club also referred to “*specificity of sports*”, which should be taken into account and applied additionally, as well as EU law (namely Treaty on the Functioning of the European Union (“TFEU”), applicable to the case at hand because it constitutes a “*mandatory provision of foreign law*” in the sense of art.19 of the Swiss Federal Act on Private International Law (“PILA”).

75. FIFA, in its turn, objected to the application of EU law, in particular TFEU, because the Appellant failed to demonstrate and argue why EU competition law would be applicable to the present matter and had also disregarded the fact that Switzerland is not a member of the EU. FIFA submitted, that according to Swiss doctrine, “*an arbitral tribunal with seat in Switzerland may apply mandatory foreign law ex officio, but is under no obligation to do so and, thus, has wide discretion in deciding when mandatory EU law shall be applied to a specific case, for which the lex causae of a non-EU member state was chosen by the parties*”. FIFA underlined that there is no “close connection” between the TFEU and a decision of a Swiss (i.e. a non-EU state) private association sanctioning a Brazilian club and that the present matter did not concern any European stakeholder nor was it in any way related to competition law issues.

76. The Sole Arbitrator finds that the Parties agree that the applicable regulations in these proceedings for the purpose of Article 58 of the CAS Code are the rules and regulations of FIFA and, additionally, Swiss law since the present appeal is directed against a decision issued by the FIFA Disciplinary Committee applying the rules and regulations of the latter.

77. The Sole Arbitrator observes that Article R58 of the CAS Code does not admit any derogation from applicable sports regulations and imposes a strict hierarchy of norms in matters of substantive laws, given that the Parties are not allowed to oust the relevant applicable sports regulations, but only complement them by choosing a law that will apply subsidiarily to those regulations.

78. With regard to the Appellant's submission concerning the specificity of sport and the application of the TFEU, the Sole Arbitrator concurs with the position of the Sole Arbitrator in the CAS 2018/A/5959, whereby he stated: "*such applicability is not obvious and the Club failed to prove that any such provisions would be directly applicable in the matter at hand*".
79. In the present case, the Appellant as well failed to argue necessity of subsidiary application while the Respondent put forward valid grounds to rebut applicability. The Sole Arbitrator concludes that the Appellant failed to argue how applicability of the EU law, in particular TFEU, may influence the outcome of the case in its favour.
80. As regards *specificity of sport* it should be noted that it is not a separate or alternative source of regulation, but may be a correcting factor to be considered if argued properly and necessitated by the merits.
81. In light of the above, the Sole Arbitrator is satisfied that the various regulations of FIFA are applicable, with Swiss law applying to fill in any gaps or *lacuna* within those regulations.

#### **Applicable edition of FIFA Disciplinary Code ("FDC")**

82. The Appellant submits that the applicable version of the FDC is the 2019 edition ("FDC 2019") as it believes that its provisions provide for a milder or more favourable approach with respect to the breaches committed (*lex mitior*) than those provided by the 2017 edition ("FDC 2017").
83. Assessing the Appellant's submission one needs to revert to the factual background of the case taking the sequence of events from the point in time that the PSC Decision was notified to the Parties on 8 September 2017 and the Appellant ordered to pay the amounts due to Al Wahda. At this instance the Appellant chose to appeal the PSC Decision which resulted in the First CAS Award (14 May 2018). The Appellant continued to fail satisfying its obligations as per the PSC Decision and the First CAS Award which led the Respondent to initiate proceedings before the FIFA Disciplinary Committee (13 December 2018). The proceedings before FIFA Disciplinary Committee related to the Appellant's failure to satisfy the PSC Decision and the First CAS Award.
84. On the basis of the abovementioned factual background it is evident that the Appellant's breach was committed at a time that the only applicable FDC was the FDC 2017 which both the Players Status Committee and the FIFA Disciplinary Committee were obliged to apply. Indeed, on the 20 February 2019 when the FIFA Disciplinary Committee communicated its decision to impose CHF 30.000 as a fine, warning the Appellant of the possibility of a deduction of 6 points if within 90 days it failed to pay and of the further possibility of Al Wahda requesting for the Appellant's relegation the applicable FDC was the FDC 2017.
85. The FIFA Disciplinary Committee in its decision considered the issue of the applicable FDC and clearly stated "*that the disciplinary offence i.e. the potential failure to comply with the CAS Award dated*

*14 May 2018, was committed before the 2019 FDC entered into force. As a result of the Committee deemed that the merit of the present case fell under the 2017 edition of the FDC...*”.

86. On the basis of the above, the Sole Arbitrator is of the opinion that the Appellant failed to satisfy its obligations arising from the PSC Decision and the First CAS Award and the applicable FDC with respect the whole matter is the FDC 2017, and that the FIFA Disciplinary Committee correctly rendered the Appealed Decision on the provisions of FDC 2017.
87. Having said the above the Sole Arbitrator takes note of the Appellant’s submission and/or argument that the FDC 2019 is more favourable with respect the Appellant’s breach and should be applied. In this respect the Sole Arbitrator notes that the Appellant’s arguments center around the fact that the FDC 2019 provides for the transfer ban, instead of relegation, as the first sanction and submits that with respect the Appellant’s breach, the proper sanction to be imposed should be a transfer ban and not relegation.
88. The approach in sanctioning has not been radically changed by the FDC 2019. In FDC 2019 Article 15(1)(c) provision as to relegation to a lower division is provided in the event of persistent failure of Article 15 FDC 2019. The relevant provision reads as follows:

*“c) In the case of clubs, upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a transfer ban will be pronounced until the complete amount due is paid or the non-financial decision is complied with. A deduction of points or relegation to a lower division may also be ordered in addition to a transfer ban in the event of persistent failure, repeated offences or serious infringements or if no full transfer could be imposed or served for any reason”.*

As per FDC 2019 transfer ban has become the first option as compared to FDC 2017 where the first option was the deduction of points. The grace period is stipulated to be 30 days and is imperative in the sense that the FIFA DC has no more discretion in imposing more or less days of grace. The Appellants argument that only a transfer ban is applicable and should be made of use in the case at hand, using FDC 2019 is wrong.

89. As per the factual events the Appellant knew that in case of non-compliance with the PSC Decision and the First CAS Award, as per FDC 2017 the sanctions to be imposed, in case of persistent failure would be deduction of 6 points and relegation to a lower division. In the Appealed Decision it is clearly mentioned *“If the Debtor still fails to pay the amount due to the Creditor even after the deduction of points in accordance with point 4 above, the FIFA Disciplinary Committee, upon request by the Creditor, will decide on a possible relegation of the Debtor’s first team to the next lower division”.*
90. On 9 May 2018 FIFA issued Circular No. 1628 addressed to its member associations relating to Article 64 of the FDC concerning the new approach adopted by the FIFA Disciplinary Committee with respect to debtor clubs. The Circular concludes with the note that the procedural changes will apply to all disciplinary cases as from 23 May 2018 regardless of the date on which the procedure was opened and the member associations are requested to inform their affiliated stakeholders accordingly i.e. clubs.

91. The Circular clearly states that one of the tasks of the FIFA Disciplinary Committee is to ensure that decisions passed by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision are respected and complied with. In order to fulfil this objective, Art 64 of the FDC was implemented and has been applied in a consistent and systematic manner.
92. It is worth mentioning that in CAS 2020/A/6755, the Appellant claimed that the FDC 2017 should have applied instead of FDC 2019 as “*somehow presents a more favorable scenario to the Appellant in sense of applicability of a milder sanction for the same offence*”. In CAS 2019/A/6504 the Appellant requested the application of FDC 2017 because “*there is no room for doubts or misunderstandings that the terms and conditions set out in the FIFA New Disciplinary code is much stricter than the ones in the FIFA Old Disciplinary Code*”.
93. The Sole Arbitrator admits that he cannot follow the Appellant’s conflicting stand with respect the applicable FDC and can only conclude that this is done in an effort to abuse the system avoiding and/or prolonging compliance of its obligations as these have been pronounced by the PSC Decision and the First CAS Award and finds that there are no radical changes as between the FDC 2017 and FDC 2019, there are no milder sanctions in FDC 2019 since it equally provides for relegation as a sanction in case of persistent failure.
94. The Sole Arbitrator is therefore, satisfied that the applicable FDC is the FDC 2017.

## **IX. LEGAL ANALYSIS**

### **A. General**

95. The present appeal concerns the challenge of a decision rendered by the FIFA DC regarding the infringement by the Appellant of Article 64 of the FDC 2017 for failing to comply with the PSC Decision and the First CAS Award whereby the Appellant should pay to Al-Wahda the outstanding amount of EUR 850.000, plus interest.
96. The Appellant by its appeal to the CAS requests the CAS dismiss the Appealed Decision and refer it back to FIFA DC in order to render a new decision based on the FDC 2017. As an alternative in the case of rejection of the first request for relief, the Appellant requests the CAS to dismiss the Appealed Decision and refer it back to FIFA DC in order to render a new decision based on the FDC 2019.
97. With regard the specific matter, the Sole Arbitrator draws attention to the well-established jurisprudence of CAS which despite the wide scope conferred by Article R57 of the Code, where the matter relates to the review of sanctions conferred by an international federation as that of FIFA, the scope of review is limited. In addition the Sole Arbitrator notes that according again to CAS case-law concerning the discretionary powers that decision-making organs of sporting association have it acknowledges the relevant organs to have relatively wide powers which should not be restrained by the CAS except in extreme cases. Consequently, as it will be mentioned hereinbelow, the Sole Arbitrator is to review the exercise of the discretion allowed

by the relevant rules only if the sanction is found to be evidently and grossly disproportionate to the breach.

## **B. Merits**

98. The Sole Arbitrator notes that the Appellant does not dispute the fact that it has failed to make any payment to Al-Wahda with reference the relevant payment order as per the PSC Decision and that the amount(s) to be paid are outstanding.
99. The present proceedings concern the challenge of the Appealed Decision with respect the enforcement mechanism of Article 64 of FDC 2017, the breach of the Appellant's fundamental rights, the wrong application of the FDC, the violation by the FIFA DC of principles of legality, predictability, transparency and proportionality.
100. In a nutshell, according to the Appellant the Appealed Decision is wrong and needs to be set aside so that a fresh decision be taken whilst via the Witness Statements submitted it highlights the financial difficulties the Appellant has been facing for years primarily due to the serious economic and political crisis in Brazil.
101. The Respondent from its end highlights the Appellant's continuous infringement of Article 64 FDC 2017 having failed to comply with the PSC Decision and the First CAS Award with respect its financial obligations towards Al-Wahda, despite being instructed to do so by the PSC Decision. The Appellant for more than three years from the PSC Decision and despite the fine and six points deduction continues to disrespect the PSC Decision posing the question "*did the Appellant pay its debts to the creditor in compliance with the First CAS Award? The answer is "NO", given that the Appellant, despite being perfectly capable of paying the amounts that it is unlawfully withholding from the Creditor, has not honoured its obligations*", and draws attention to the Appellant's activity in international transfers of players paying and receiving substantial amounts.
102. The Respondent draws particular attention to the fact that the Appellant, unable to contest its default to satisfy its monetary obligations, puts forth "*a set of unsustainable, unsubstantiated – and some even false – side arguments in an attempt to attack the "enforcement" mechanism created by FIFA around Article 64 of the FDC 2017*", a system that has been confirmed and supported by CAS and the Swiss Federal Tribunal quoting the numerous CAS awards on the matter.
103. The Respondent holds the view that the Appellant is employing tactics used in previous cases in an effort to avoid complying with the First CAS Award, abusing the system, delaying payment to Al-Wahda, lodging an unfounded appeal to the CAS with respect the Appealed Decision. The arguments in the present case are the same as those presented by the Appellant in proceedings which have been considered and accordingly dismissed by the CAS or are currently ongoing.
104. The main issues to be resolved by the Sole Arbitrator are the following:



- Did the Respondents comply with the applicable laws and regulations during the process before FIFA DC?
  - Did the Respondent make use of the proper FDC?
  - Do the imposed sanctions violate the principle of proportionality?
  - Does the Appealed Decision violate the principle of ne bis in idem?
105. The Sole Arbitrator considers necessary to address first the critical issue of the use of the proper FDC which is of paramount importance in the particular case.
106. The issue of the proper FDC has already been dealt with by the Sole Arbitrator when dealing with the Applicable Law. The Sole Arbitrator in considering the issue of applicable law has concluded that the applicable FDC is the FDC 2017 as a result of which the question as to the use of the proper FDC has been considered by all what is mentioned in paragraphs 82-93 hereinabove which the Sole Arbitrator hereby repeats and adopts.
107. The present case relates to the alleged failure of the Appellant to comply with its obligations to pay Al-Wahda the outstanding amount of EUR 850.000 plus interest deriving from an order of the PSC Decision and the First CAS Award and therefore concerns the application of Article 64 of FDC 2017 the relevant parts of which provide as follows:
- “Anyone who fails to pay another person (such as 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) (...):*
- (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;*
  - (d) (...);*
- If a club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.*
- If points are deducted, they shall be proportionate to the amount owed.*
- (...);*

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

(...)"

108. The Appellant alleges that the FIFA DC violated due process in reaching the Appealed Decision. The Appealed Decision is the result of proceedings against the Appellant for breach of Article 64 FDC 2017 (currently Article 15 FDC 2019) having failed to comply with the First CAS Award.
109. The Sole Arbitrator repeats that the FIFA DC system of sanctions and proceedings have been confirmed by the SFT as being lawful.
110. Article 64 FDC 2017 operates so as to provide FIFA with the mechanism to sanction a club that has failed to satisfy its obligations following instruction to do so i.e. the PSC Decision. A Club that fails to comply with a decision rendered by a competent FIFA organ may be subject to a number of measures, such as fines, point deduction(s), relegation to a lower division, etc. FIFA's regulations take care to provide for both the possible violation and the sanction resulting from the violations.
111. The Appellant at all times was well aware of the provisions of the FIFA regulations and procedures, particularly Article 64 FDC 2017. The Appellant was obliged to comply with the PSC Decision and subsequent First CAS Award and failing to do so subjected itself to the various sanctions.
112. FIFA submitted that FIFA DC cannot review or modify the substance of a previous decision, which is final and binding and thus has become enforceable. Consequently, the FIFA DC was not allowed to analyse a case decided by the PSC, its sole task being to ascertain whether the Appellant complied with the final and binding decision of the PSC. The CAS should only address the question whether the Appellant respected and fulfilled the PSC Decision, but it can no longer address its content (CAS 2012/A/3032).
113. FIFA pointed out therefore, that in order to impose any possible disciplinary sanction as per Article 64 FDC 2017, the main question to be answered by the FIFA DC, and now by the CAS, is whether or not the financial amounts as defined in the final and binding decision have been paid to the party claiming them (Al-Wahda) or for a certain reason the outstanding amount is not due anymore.
114. Furthermore, FIFA added that if the FIFA DC is not provided with proof that the payment was made or a payment plan agreed, it will render a decision imposing a fine on the Appellant for failing to comply with the final and binding decision, granting a final period of grace from the notification of the decision to settle the debt so as to avoid further sanctions.
115. The FIFA DC can only take into consideration all possible facts arising after the date on which the decision has been rendered. Any other consideration falls out of the scope of the disciplinary proceedings under Article 64 of the FDC 2017.

116. The Sole Arbitrator assessing the facts of the case notes the following:
- (i) The Appellant was ordered to pay a sum of money to Al-Wahda (i.e. EUR 850.000 plus interest);
  - (ii) No payment was made;
  - (iii) No agreement was made with respect the payment of the monies due to Al-Wahda;
  - (iv) The Appellant choose to appeal the PSC Decision of 29 August 2017 (CAS 2017/A/5481);
  - (v) The First CAS Award dismissed the Appellant's appeal confirming the PSC Decision;
  - (vi) The FIFA DC was obliged, following the First CAS Award, to impose upon the Appellant a fine of CHF 30.000 warning of the consequences to follow in case the Appellant failed to pay the amounts due within a 90-day grace period (i.e. deduction of points), stressing that the persistent failure to pay the amounts due, could upon the request of Al-Wahda lead to the possible relegation to a lower division;
  - (vii) The Appellant once again caused to appeal the decision of the FIFA DC (CAS 2019/A/6239) which again was dismissed causing the deduction of 6 points;
  - (viii) The Appellant, despite all the above failed to satisfy its obligations, obliging Al-Wahda to request its relegation to a lower division;
  - (ix) The Appellant was duly notified of Al-Wahda's request for relegation and that the case was to be submitted to the FIFA DC;
  - (x) The FIFA DC, on the ground of the Appellants persistent failure to satisfy its obligations rendered the Appealed Decision which is now contested before CAS.
117. The Sole Arbitrator notes that sanctions which are decided upon by the FIFA DC are considered on a case to case basis and the FIFA DC in reaching its decision had before it the full picture of the situation. The Appellant had the right to contest the FIFA DC and its decision to the CAS hence the present case before the Sole Arbitrator which is required to inter alia decide whether the Appealed Decision violates fundamental principles of the ECHR, good governance, transparency and due process.
118. The Sole Arbitrator is of the opinion that given the legality of the sanctioning system adopted by the FIFA DC with the FDC 2017 found to be lawful by the SFT and the CAS and the Appellant full knowledge of its provisions, the proceedings and sanctions applicable in case of a persistent failure to satisfy its obligations cannot agree with the Appellant that the said

principles have been violated and accordingly dismisses the argument as to the non-compliance with the applicable laws, regulations and due process.

***Proportionality of the relegation to a lower division***

119. The Appellant alleges that the sanction of relegation to a lower division is disproportionate. The Appellant submits that the Appealed Decision violated the three components of the proportionality principle (adequacy, necessity and proportionality stricto sensu). The Respondent in its Answer took the position that the sanctions were proportionate.
120. The Sole Arbitrator notes that according to CAS consistent jurisprudence “*while reviewing disciplinary sanctions, a CAS panel shall give certain level of deference to decisions of sport governing bodies. Sanctions, imposed by FIFA disciplinary bodies can only be reviewed when they are evidently and grossly disproportionate to the offence*” (CAS 2017/A/5496).
121. As a result the Sole Arbitrator shall address the issue whether the sanctions imposed by the FIFA DC in the Appealed Decision are grossly disproportionate.
122. The Sole Arbitrator notes that in disciplinary matters, each case must be evaluated on a case to case basis, taking into account the specific circumstances, the behavior and degree of responsibility of the defaulting party, any aggravating or mitigating factor, as well as the main interests at stake, in respect of the principle of proportionality.
123. The CAS dealing with the principle of proportionality stated that determining whether a sanction is proportionate “*various benchmarks seem appropriate: the gravity of the illegal act; the power to dissuade the offender from repeating the same illegality in the future, the importance of the rule of law that is protected*”.
124. Applying the benchmarks to the facts of the case it is evident that Article 64 of FDC 2017 is the principle driver, the principle of *pacta sunt servanda*, is of paramount importance. The FIFA DC is the organ that needs to ensure that decisions passed by bodies of FIFA or the CAS are respected and complied with.
125. The relegation to a lower division in cases of persistent failure to comply with monetary obligations has been considered by the CAS which has positioned itself as follows: “*... insofar as the club intends to challenge the possible ... relegation in case of continued non-compliance with the FIFA DRC Decision, the Panel observes that the club did not submit any specific argument or evidence in this respect. In any event the Panel finds that the possible imposition of such sporting sanctions in case of continued non-compliance is not disproportionate... Consequently the Panel finds that the disciplinary sanction imposed on the Club by the FIFA Disciplinary Committee is not disproportionate*” (CAS 2017/A/5031, paragraphs 80 & 81).
126. The Appellant submits that relegation to a lower division violates the principle of proportionality because the decision of the FIFA DC to impose a harsh sanction and excessive sanction is probably not necessary in order to reach one of the main goals of the Appealed

Decision which is to force the Appellant to pay Al-Wahda the outstanding amount. The practical result of relegation of the Appellant will definitely limit its most important source of income and reduce chances of Al-Wahda receiving the outstanding amount. The debts which the Appellant accumulated were due to mismanagement and the new management is focused to repay all existing debts. There is an evident change of attitude concerning the Appellant complying with financial obligations and such change has to be taken into consideration and accordingly the sanctions have to be milder and proportional.

127. In view of the above the Appealed Decision becomes deficient and as such fails to attend the first element of *“adequacy”*, the second element of *“necessity”* and the third element of *“proportionality stricto sensu”*. Concluding the Appellant mentions that *“with all due respect, relegation to a lower league certainly goes far beyond what is strictly required in the case at hand”* and *“... the imposition of a milder sanction first and only afterwards a harsher one is not only a matter of fairness but also respect of the principle of proportionality”*.
128. The Sole Arbitrator, having the benefit of considering all facts and arguments cannot agree with the Appellant and rejects the argument of the violation of the principle of proportionality. The Appellant since the PSC Decision and the proceedings that followed before the CAS and/or the FIFA DC was not able to make any payment whatsoever, its failure to agree a payment plan or make a part payment to Al-Wahda weakens its position with respect proportionality. The Appellant during the ensuring period engaged in transfer activities receiving and spending money but failed or neglected to satisfy its obligations to Al-Wahda.
129. Further the Sole Arbitrator notes that in all disciplinary systems a failure to comply with the sanctions imposed requires to contain a mechanism for increasing the sanctions so as to bring about compliance. This principle is found in the FIFA rules where greater sanctions are triggered following a failure to settle original obligations. The legality and validity of the FDC 2017 has been the subject of scrutiny and confirmation of its lawfulness by the SFT and the CAS.
130. In the particular case the 6 points deduction and relegation after that due to the prolonged failure to comply occurred only after the Appellant continued its default having been adequately warned of this. The Appellant could have avoided the greater sanction if it caused to satisfy its obligations. The mere fact that there was a bundle of sanctions which were well known to the Appellant in case it did not satisfy its obligations do not amount to a violation of the principle of proportionality. The Appellant disregarded its obligations to Al-Wahda for over 3 years engaging proceedings which caused the serious delay.
131. In view of all the above the Sole Arbitrator is of the view that the Appellant deliberately and persistently withheld payment of the amounts due without any real justification and the alleged financial difficulties of the Appellant and/or the economic and political crisis in Brazil do not constitute a valid excuse for the default and accordingly dismisses the argument of disproportionality.

132. The Sole Arbitrator considers necessary to stress that the Appellant can avoid the relegation to a lower division if the Appellant pays the debt due within the granted 30-day deadline.

***Alleged violation of the ne bis in idem principle***

133. The *ne bis in idem* principle means that no one shall be sanctioned twice because of the same offence.
134. The Appealed Decision, according to Article 64 FDC 2017, sanctioned the Appellant for not complying with the decision of the Respondent's competent organ. The relegation measure was mentioned as early as from the passing of the First Disciplinary Decision to be imposed only in case the Appellant persistently failed to pay the amounts of the First CAS Award.
135. The Appealed Decision was rendered in the context of a disciplinary procedure, namely the non-compliance by the Appellant of the PSC Decision and the subsequent First CAS Award.
136. The procedure followed by FIFA DC was in line with the provisions of Article 64 FDC 2017 which as mentioned has as its principle purpose to ensure that the decisions passed by FIFA or CAS are respected by placing the necessary pressure upon those that ignore or otherwise do not comply with such decisions.
137. The practice of the FIFA DC is to impose at first instance a less stringent sanction such as is the point deduction applying more severe sanctions in case the defaulting party continues to ignore and/or disrespect the first set of sanction(s). This is briefly the mechanism adopted which has been acknowledged by the SFT and CAS.
138. On the facts of the case, the First Disciplinary Decision at first instance imposed a fine and specified that in case of the Appellant's persistent failure to comply with the First CAS Award the Appellant would be sanctioned with a point deduction and then, subject to the request of Al-Wahda, the relegation could be imposed. The above clearly evidences that the Appealed Decision took care of the continuous breach of Article 64 FDC for not complying with the First CAS Award.
139. The principle does not prevent a judicial body from imposing multiple sanctions for the same violation, but only prevents a judicial body from imposing additional sanctions on the perpetrator for the same violation once sanctioned for such violation by the same judicial body.
140. The manner by which the FIFA DC proceeded is correct and as such has been considered and confirmed by the CAS.
141. Consequently, the Sole Arbitrator dismisses the Appellant's allegation with respect the violation of the principle of *ne bis in idem*.

## **X. CONCLUSION**

142. Based on the foregoing and after taking into due consideration all the circumstances mentioned above the Sole Arbitrator concludes that the disciplinary measures imposed by the Appealed Decision were based upon valid provisions of the FDC and that the Respondent complied with the applicable rules and regulations during the proceedings and that the conditions were met for the application of Article 64 FDC 2017 so as to impose sanctions upon the Appellant that were proportionate to the offence. The *ne bis in idem* principle not been violated.
143. The Appellant has not satisfied the burden of its failure to pay the amount due to Al-Wahda, the lapse of time has operated in favour of the Appellant which should have found ways and means to mitigate its default.

## **ON THESE GROUNDS**

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

1. The appeal filed by Cruzeiro Esporte Clube on 11 September 2020 against the decision rendered by the Disciplinary Committee of FIFA on 11 August 2020 is dismissed.
2. The decision rendered by the Disciplinary Committee of FIFA on 11 August 2020 is confirmed.
3. (...).
4. (...).
5. Any other and further claims or requests for relief are dismissed.