CAS 2019/A/6392 Cruzeiro Esporte Club (Tigres) v. FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Sole Arbitrator: Dr Jan Räker, Attorney-at-law, Stuttgart, Germany

in the arbitration between

Cruzeiro Esporte Club, Belo Horizonte, Brazil
Represented by Mr Breno Costa Ramos Tannuri, Attorney-at-law, Tannuri Ribeiro Advogados, São Paulo, Brazil

- Appellant –

and

Fédération Internationale de Football Association (FIFA), Zürich, Switzerland

- Respondent -

I. INTRODUCTION

1. This appeal is brought by Cruzeiro Esporte Club (the "Club" or the "Appellant") against decision number 190310 PST rendered by the FIFA Disciplinary Committee (the "FIFA DC") of the Fédération Internationale de Football Association ("FIFA") on 28 May 2019 in the "Tigres" matter (the "Appealed Decision"), regarding the imposition of disciplinary sanctions on the Club.

II. PARTIES

2. The Appellant is a professional football club, based in Belo Horizonte, Brazil. The Appellant is affiliated with the Brazilian Football Confederation (the "CBF"), which in turn is affiliated with FIFA.

3. FIFA (the "Respondent") is the world governing body of football, whose headquarters are located in Zürich, Switzerland.

4. The Appellant and the Respondent are referred together as the "Parties".

III. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations found in the Parties' submissions may be set out, where relevant, in connection with the further legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Award only refers to the submissions and evidence it considers necessary to explain its reasoning.

A. Proceedings before the FIFA Player's Status Committee and Appeals to CAS

6. On 8 May 2017, the FIFA Player's Status Committee ("PSC") rendered a decision (the "FIFA PSC Tigres Decision"), in which the Club was ordered to pay to the Mexican club Tigres UANL (the "Creditor") as compensation for the transfer of the football player Mr Rafael Augusto Sobis (the "Player) the amount of USD 1,000,000 plus 5% p.a. interest as from 2 November 2016 and USD 5,000 as procedural costs. The grounds of the FIFA PSC Tigres Decision were communicated to the Club on 13 July 2017.

7. On 3 August 2017, the Club filed an appeal against the FIFA PSC Tigres Decision before the Court of Arbitration for Sport ("CAS") (*CAS 2017/A/5279*).

8. On 13 April 2018, the CAS issued an arbitral award in *CAS 2017/A/5279*, in which the FIFA PSC Tigres Decision was upheld.

9. This notwithstanding, the Club subsequently did not make any payments to the Creditor.

10. On 23 April 2019, in light of the above, the FIFA PSC referred the case to the FIFA DC.

B. Proceedings before the FIFA Disciplinary Committee

11. On 14 May 2019, the FIFA DC opened disciplinary proceedings against the Club for the possible violation of Article 64 of the FIFA Disciplinary Code ("FDC"). The FIFA DC further requested the Club to provide its position by 20 May 2019, and also informing the Club that the disciplinary proceedings would be closed if the outstanding amounts were paid by this date.

12. On 23 May 2019, the Club submitted its position to the FIFA DC.

13. On 28 May 2019, the FIFA DC rendered the Appealed Decision.

14. In the Appealed Decision, the FIFA DC held as follows:

> 1. "*The club Cruzeiro Esporte Clube (hereinafter, the Debtor) is found to have infringed art. 64 of the FIFA Disciplinary Code as it is guilty of failing to comply with the award issued by the Court of Arbitration for Sport (CAS) on 13 April 2018, according to which it was ordered to pay:*
>
> - *To the club FC Tigres (hereinafter, the Creditor):*
>
> o *USD 1,000,000 plus 5% interest p.a. as from 2 November 2016 until the date of effective payment;*
>
> o *CHF 2,000 as contribution towards the legal costs and expenses incurred in connection with the arbitration proceedings;*
>
> o *CHF 5,000 as procedural costs;*
>
> - *To FIFA:*
>
> o *CHF 10,000 as final costs of the proceedings.*
>
> 2. *The Debtor is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision.*
>
> 3. *The Debtor is granted a final deadline of 90 days as from notification of the present decision in which to settle its debt to the Creditor and FIFA.*
>
> 4. *If payment is not made to the Creditor and proof of such payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the Brazilian Football Association by this deadline, a ban from registering new players, either nationally or internationally, for two (2) entire and consecutive registration periods will be imposed on the Debtor as from the first day of the next registration period following the expiry of the granted deadline. Once the deadline has expired, the transfer ban will be implemented automatically at national and international level by the Brazilian Football Association and FIFA*

respectively; without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee […]. The Debtor shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the transfer ban or upon the payment to the Creditor of the total outstanding amount, if this occurs before the full serving of the transfer ban. […]

5. *If the Debtor still fails to pay the amount due to the Creditor even after the complete serving of the transfer ban in accordance with point 4 above, the Creditor may demand in writing, for the imposition of the appropriate disciplinary measures, including but not limited to an additional transfer ban for two (2) additional entire and consecutive registration periods or a potential relegation of the Debtor's first team to the next lower division.*

6. *As a member of FIFA, the Brazilian Football Association is reminded of its duty to implement this decision and provide FIFA with proof that the points have been deducted in due course. If the Brazilian Football Association does not comply with this decision, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to an expulsion from FIFA competitions.*

7. *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.*

8. *The Creditor is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the Brazilian Football Association of every payment received.*"

15. The FIFA DC's considerations leading to the Appealed Decisions were expressed as follows:

"*1. According to art. 53 par. 2 of the FIFA Statutes, the Disciplinary Committee (hereinafter also referred to as the Committee) may pronounce the sanctions described in the Statutes and the FIFA Disciplinary Code (hereinafter also referred to as the FDC) on member associations, clubs, officials, players, intermediaries and licensed match agents.*

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

a) will be fined for failing to comply with a decision;

b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due;

c) if it is a club, it will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be

deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.

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

3. Moreover, in line with art. 78 par. 2 of the FDC, cases involving matters under art. 64 of the FDC may be decided by one member of the Disciplinary Committee alone (hereinafter also referred to as member of the Committee).

4. The member of the Committee emphasises that equal to the competence of any enforcement authority, it cannot review or modify as to the substance a previous decision, which is final and binding and, thus, has become enforceable.

5. Having said that, the member of the Committee notes that the findings of the decision passed by the Single Judge of the Players' Status Committee on 8 May 2017 had been duly communicated on 30 May 2017, amongst others to the parties, and that the grounds had been requested by the Debtor and duly communicated on 13 July 2017 to the parties. The member of the Committee also notes that the Debtor lodged an appeal before the Court of Arbitration for Sport (CAS). On 13 April 2018, the CAS dismissed the appeal and confirmed the decision passed by the Single Judge of the Players' Status Committee on 8 May 2017. The member of the Committee finally notes that no appeal against the award passed by the Court of Arbitration for Sport was lodged before the Swiss Federal Tribunal. Therefore, the arbitral award of the Court of Arbitration for Sport became final and binding.

6. In view of what has been explained under paragraph II./4. above, the member of the Committee is not allowed to analyse the case decided upon by the CAS as to the substance, in other words, to check the correctness of the amount ordered to be paid, but has as a sole task to analyse if the Debtor complied with the final and binding award rendered by the CAS on 13 April 2018.

7. In this respect, the member of the Committee first acknowledges that the Debtor claimed that it is facing "exceptional circumstances" due to the financial recession and political crisis in Brazil as well as the devaluation of the Brazilian currency.

8. In light of these elements, the member of the Committee finds it worthwhile to emphasise that a club has the duty to be aware of its actual financial strength, constitute provision in anticipation of possible issues and finally conclude contracts that can be fulfilled. In other words, the principle of pacta sunt servanda – more relevant in the context of contractual dispute per se – is of paramount importance for FIFA and a key issue to be protected among others by the Regulations on the Status and Transfer of Players. To that end, the Committee equally refers to the content of art. 2 of the Swiss Civil Code, according to which "[e]very person is bound to exercise his rights and fulfil his obligations according to the principle of good faith" (cf. par. 45 ff. CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven). Thus, the sole fact that the Debtor may be undergoing financial problems does not exonerate it from its obligations to pay the outstanding amounts owed to the Creditor.

9. In addition to the above, the member of the Committee wishes to recall that the alleged financial difficulties the Debtor faces because of the economic crisis and the consequential loss of value of the local currency are not valid arguments, as already confirmed by the CAS: "the Sole Arbitrator fails to see how the fall in value of the Brazilian currency can either be a justification for non-payment, or how it amounts to "exceptional circumstances". The fluctuations of foreign currency are a standard risk in business dealings and any entity dealing in foreign currency […] ought to be aware of the possibility of it and should plan its financial dealings accordingly. Pursuant to the principle of pacta sunt servanda, the Club should have been aware of its financial situation" (cf. par. 118 CAS 2018/A/5864 Cruzeiro E.C. v FIFA).

10. Concerning the Debtor's request to be granted a "fair" final period of grace of 120 days to pay the outstanding amount due to the Creditor, the member of the Committee recalls that due to the fact that the award rendered by the CAS is now final and binding, it cannot decide to grant a possible deadline extension to pay the outstanding amount due and/or to impose a possible payment plan. As a consequence, a possible deadline extension and/or a possible payment plan would have to be agreed upon directly with the Creditor, in the present case the club Atlético Morelia [sic]*, which at its own discretion can accept or not the deadline extension and/or payment plan proposed.*

11. The member of the Committee subsequently emphasises that, as the Debtor did not fully comply with the award rendered by the CAS and is consequently withholding money from the Creditor, it is considered guilty under the terms of art. 64 of the FDC.

12. The fine to be imposed under the above-referenced art. 64 par. 1 a) of the FDC in combination with art. 15 par. 2 of the FDC shall range between CHF 300 and CHF 1,000,000. The Debtor withheld the amount unlawfully from the Creditor. Even FIFA's attempts to urge the Debtor to fulfil its financial obligations failed to induce it to pay the total amount due. In view of all the circumstances pertaining to the present case and by taking into account the outstanding amount due, the member of the Committee regards a fine amounting to CHF 30,000 as appropriate. This amount complies with the Committee's established practice.

13. In application of art. 64 par. 1 b) of the FDC, taking into consideration that the Debtor already owes money to the Creditor for a considerable period of time, the member of the Committee considers a final deadline of 90 days as appropriate for the amount due to be paid to the Creditor.

14. In accordance with art. 64 par. 1 c) of the FDC and with the Circular n° 1628, the Debtor is hereby warned and notified that, in the case of default within the period stipulated, points will be deducted, a transfer ban may also be pronounced or demotion to a lower division may be ordered.

15. In this regard, in case of non-compliance with the award rendered by CAS, a ban from registering any new players, either nationally or internationally, will be automatically imposed on the Debtor as from the first day of the next registration period following the expiry of the granted deadline.

16. In this sense, in view of the amount of the outstanding debt, the member of the Committee considers a transfer ban for two (2) entire and consecutive registration periods to be proportionate. Once the deadline has expired, the transfer ban will be implemented automatically at national and international level by the Brazilian Football Association and FIFA respectively, without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat.

17. The Brazilian Football Association is hereby reminded of its obligation to automatically implement the abovementioned transfer ban upon expiry of the final deadline without having received any proof of payment from the Debtor. In this respect, and for the sake of clarity, the Brazilian Football Association is referred to arts. 90 to 92 of the FDC in what concerns the calculation of time limits. Should the Brazilian Football Association fail to automatically implement said sanction and provide the secretariat to the FIFA Disciplinary Committee with the relevant proof of implementation of the transfer ban at national level, disciplinary proceedings – which may lead to an expulsion from all FIFA competitions – may be opened against it.

18. Finally, the member of the Committee considered that should the Debtor still fail to settle its debt to the Creditor even after the complete serving of the transfer ban, the Creditor may demand in writing, for further disciplinary measures to be imposed on the Debtor."

16. The grounds of the Appealed Decision were communicated to the Club on 4 July 2019.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 25 July 2019, the Club filed a Statement of Appeal with the CAS in accordance with Article 58 of the FIFA Statutes and Articles R47 and R48 of the Code of Sports-related Arbitration (2019 edition) (the "CAS Code"). In the Statement of Appeal, the Club proposed that this dispute be submitted to a sole arbitrator and suggested the appointment of Mr David M. Benck, Attorney-at-Law in Birmingham, Alabama, USA, in this regard.

18. On 2 August 2019, the CAS Court Office acknowledged the filing of the Statement of Appeal and invited the Club to file with the CAS, within ten days following the expiry of the time limit for the appeal, a brief stating the facts and legal arguments giving rise to the appeal. The CAS Court Office further invited FIFA to state whether FIFA consented to the appointment of a Sole Arbitrator in this case and, specifically, with the appointment of the arbitrator suggested by the Club.

19. On 8 August 2019, FIFA expressed its consent with the appointment of a Sole Arbitrator as long as the arbitrator was nominated by the President of the CAS Appeals Division (rather than appointing the Appellant's suggested appointee) from the football list of CAS arbitrators.

20. On 9 August 2019, inter alia the CAS Court Office invited the Parties to indicate whether they would agree to refer the procedure-at-hand and the procedure *CAS 2019/A/6393* to the same Sole Arbitrator, pursuant to Article R50 of the CAS Code.

21. On 9 August 2019, FIFA expressed its consent with the submission of both cases to the same Sole Arbitrator further to Article R50 of the CAS Code.

22. On 15 August 2019 the Club agreed to refer both cases to the same arbitrator further to Article R50 of the CAS Code and suggested that Ms Laura Abrahamson, Attorney-at-law, Los Angeles, California, USA, be appointed as the Sole Arbitrator in both cases.

23. On 16 August 2019, the CAS Court Office informed the Parties that, in light of their agreement, the procedures *CAS 2019/A/6392* and *CAS 2019/A/6393* shall be referred to the same Sole Arbitrator in accordance with Article R50 of the CAS Code. The CAS Court Office further informed the Parties that they may propose a joint nominee as the Sole Arbitrator to the Division President, but that this propsal would be subject to confirmation, and in this regard invited FIFA to inform the CAS Court Office whether FIFA agreed to propose the nomination of Ms Laura Abrahamson as the Sole Arbitrator.

24. On 19 August 2019, FIFA affirmed its previously stated positions, agreeing with the appointment of a Sole Arbitrator for both proceedings as long as the arbitrator was nominated by the President of the CAS Appeals Division from the football list.

25. On 19 August 2019, after an agreed extension, the Club filed its Appeal Brief pursuant to Article R51 of the CAS Code.

26. On 23 August 2019, the CAS Court Office acknowledged receipt of the Club's Appeal Brief dated 19 August 2019, and invited the Respondent to submit its Answer within 20 days following the receipt of that communication by courier.

27. On 26 August 2019, FIFA sent a letter to CAS in which FIFA alerted the CAS Court Office to the apparent non-payment of the Appellant's share of the advance of costs and requested that the deadline for FIFA's filing of its Answer be suspended and reset after the payment of the advance of costs by the Appellant further to Article R55 of the CAS Code.

28. By letter of the same date, the CAS Court Office informed the Parties that the time limit for FIFA's Answer was suspended and that a new time limit shall be fixed upon the Appellant's payment of its share of the advance of costs, in accordance with Article R55 of the CAS Code.

29. On 30 September 2019, the CAS Court Office acknowledged receipt of the Appellant's share of the advance of costs and granted FIFA a deadline of 20 days to file its Answer. The Parties were furthermore informed that the Panel appointed by the Deputy President of the CAS Appeals Division to decide the case pursuant to Article R50 of the CAS Code was constituted as follows:

Sole Arbitrator: Dr Jan Räker, Attorney-at-law, Stuttgart, Germany

30. On 4 November 2019, after an agreed extension, FIFA filed its Answer in accordance with Article R55 of the CAS Code.

31. On 7 November 2019, inter alia the Parties were invited to indicate whether they preferred a hearing to be held or for the Sole Arbitrator to issue the Award on the basis of the Parties' written submissions.

32. On 8 November 2019, FIFA informed the CAS Court Office that it was of the opinion that a hearing in this case was not necessary.

33. On 14 November 2019, the Club informed the CAS Court Office that its preference was that the Sole Arbitrator issue the Award on the basis of the written submissions instead of an oral hearing.

34. On 9 December 2019, the CAS Court Office informed the Parties that they were granted a second round of written submissions.

35. On 11 December 2019, the CAS Court Office informed the Parties that the Sole Arbitator, taking into consideration the Parties' positions with respect to a hearing, had decided not to hold a hearing in this matter further to Article R57 of the CAS Code and that the second round of submissions was granted in lieu of a hearing.

36. On 13 January 2020, after several agreed extensions, the Appellant filed its Reply.

37. On 10 February 2020, after being invited to file its Response by the CAS Court Office, the Respondent stated that it shall abstain from filing a Response.

38. On 2 July 2020, the Respondent returned a duly signed copy of the Order of Procedure to the CAS Court Office.

39. On 7 July 2020, the Appellant returned a duly signed copy of the Order of Procedure to the CAS Court Office.

V. SUBMISSIONS OF THE PARTIES

40. The Appellant's submissions may be summarized as follows:

- The jurisdiction of the CAS to decide upon the present matter is based on Article 58 of the FIFA Statutes and Article 64.5 of the 2017 edition of the FDC. In addition, the present appeal is admissible as it was initiated within the time limit provided under Article R51 of the CAS Code.

- As to the applicable law, the Appellant considers that, pursuant to Article R58

of the CAS Code in conjunction with Article 57.2 of the FIFA Statutes, the Sole Arbitrator should apply the regulations of FIFA, mainly the FDC, and alternatively, if necessary, Swiss law to the merits of the case-at-hand.

- In addition, the Appellant argues that in accordance with the jurisdiction of the Swiss Federal Tribunal ("SFT") and of CAS, CAS can declare itself to be competent to deal with issues relating to the Treaty on the Functioning of the European Union ("TFEU"), which the Appellant considers to be applicable law. Furthermore, the Appellant argues that in accordance with Article 186 para. 1 of the Swiss Private International Law Act ("PILA"), CAS shall consider cases and legal premises established by the European Commission, the EU White Paper-plus (which provides important considerations in relation to the *specificity of sport*), and also the European Convention on Human Rights ("ECHR"). The Appellant points to CAS jurisprudence which held that, while Article 6.1 of the ECHR was not directly applicable to decisions of sport governing bodies as such bodies are not public authorities which are bound to human rights, it was indirectly applicable in civil law proceedings before arbitral tribunals in the Swiss Confederation, which is a contracting party to the ECHR, insofar as the judges who shall check the arbitral awards will verify that these procedural guarantees, which form part of Swiss procedural public policy, were observed.

- The Appellant submits that, as a Swiss association registered under Article 60 of the Swiss Code of Obligations ("SCO"), FIFA shall comply with the terms and conditions established in its own statutes. In light of FIFA's public statement to promote and respect human rights, the Appellant also considers that certain premises and principles established in international treaties on human rights as applicable during proceedings of the FIFA DC.

- Within the statutes of FIFA, the Appellant considers it obvious that the FIFA legislator wanted to limit the regulatory and decisional freedom of its decision-making bodies, which are not entitled to render decisions which violate the regulations established by FIFA.

- The Appellant asserts that the fulfilment of the aforementioned legal principles was also a matter of good governance, which is only achievable with the necessary transparency. With regards to the importance of transparency, the Appellant points to Article 15 of the TFEU and the Decision of the European Court of Human Rights in the matters *Pechstein* and *Mutu*. Further, the Appellant remarks that FIFA was also one of the signatories of the EU Transparency Register.

- As to the merits, the Appellant considers that the Appealed Decision violates the legal principles of proportionality and legality.

- Regarding the legal principle of proportionality, the Appellant points out that in accordance with Article 190 para. 2 lit. e. of the PILA, arbitral awards may be set aside by the SFT if an award is incompatible with public policy. The Appellant further asserts that, among the legal principles which are part of public

policy, is the principle of proportionality, which consists of three components: (i) adequacy, i.e. if a measure is generally appropriate to achieve or contribute towards a goal; (ii) necessity, i.e. that there is no less incisive measure that would be equally adequate to achieve a goal; and (iii) proportionality *stricto sensu*, i.e. that the measure and its effects must be reasonable in relation to the goals pursued.

- The Appellant further points to Articles 101 and 102 of the TFEU, in which restrictions of competition and abuse of power are defined as "*apply[ing] dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*".

- The Appellant argues that, however, no sufficient transparency is exerted by FIFA in its application of Article 64 of the FDC, as the provision does not provide FIFA members with any clear parameters whatsoever regarding the level of sanctions over clubs or players, leaving it to the FIFA DC to develop jurisprudence under which the application of Article 64 of the FDC becomes sufficiently predictable. The Appellant further asserts that FIFA Circular Letter No. 1628, which was published on 9 May 2018 and which contains information about the FIFA DC's future sanctioning policy in overdue payables cases, does not substitute or supersede the stipulations of Article 64 of the FDC, leaving it to the decision-making practice of the FIFA DC to develop a predictable and consistent jurisprudence. However, as the FIFA DC's decisions so far have not been published, there has not been sufficient transparency, demonstrating a failure to comply with the principle of proportionality and the principle *nulla poena sine lege scripta.*

- In light of the aforementioned, the Appellant thus argues that the Appealed Decision contained a disproportionate financial sanction.

- In relation to the fine imposed by the FIFA DC, the Appellant argues that such fine of CHF 30,000 is disproportionate in amount, given that FIFA awarded fines of the same or a lower amount in five other cases, in which the outstanding amounts were sometimes significantly higher than in the case-at-hand. At the same time, in its deliberations on the sanctioned amount, the FIFA DC only stated the following in paragraph 12 of the reasons of the Appealed Decision:

  > "*In view of all the circumstances pertaining to the present case and by taking into account the outstanding amount due, the member of the Committee regards a fine amounting to CHF 30,000 as appropriate. This amount complies with the Committee's established practice.*"

- In line with the quote above, the Appellant continues, it is apparent that the outstanding amount due was a key element in the determination of the fine, whereas there was no clue as to how exactly the FIFA DC used the aforementioned factors in arriving at the CHF 30,000 sanction.

- By not providing any according explanation whatsoever, the FIFA DC clearly

violated, amongst others, Article 94 of the FDC and the ECHR, as well as due process and the Appellant's right to be heard.

- In light of the FIFA DC's jurisprudence in other cases, with the sanction depending on the amount due and taking into account the FIFA DC's established practice, the fine imposed on the Appellant should at most be CHF 8,040. The stipulated amount of CHF 30,000 is excessive, constituting an application of dissimilar conditions to equivalent transactions, which is an abuse of power in the meaning of Article 101 f. of the TFEU.

- While the Appellant admits that a CAS panel should only review and amend a decision of a FIFA disciplinary body in cases of arbitrariness, the Appellant insists that this current case is one of the cases in which such sanction was indeed imposed in an arbitrary manner.

- With regards to the ban from registering players, the Appellant argues that the FIFA DC failed to attend the prerequisites inherent of the principle of proportionality.

- To demonstrate this, the Appellant refers to the outstanding significance of revenue streams from player transfers for clubs in South America, and in particular for clubs in Brazil. With revenues much lower, compared to the revenues of European clubs, from broadcasting rights, sponsorship or ticket sales, South American clubs rely to a much bigger extent than European clubs on generating income from selling players to other clubs, preferably to Europe. While the Appellant concedes that the Appealed Decision does not prevent the Appellant from transferring players, the Appellant maintains that in order to be able to sell a player to another club, a club must have the opportunity to replace such player with another player, resulting in a massive sporting loss and the inability to recruit new youngsters who can be developed into quality players, and subsequently into transfer revenues.

- The Appellant argues that the goal pursued by the sanctioning system applied by the FIFA DC is and should not only be punitive, but should also be to permit the creditors to receive the outstanding amounts from the debtors. Within such circumstances, there is no point in imposing sanctions that will financially suffocate the debtors and sportively smash all of their objectives.

- Such a harsh sanction constitutes a violation of the personal right to economic development, as part of the Appellant's personality rights, and therefore is a violation of Article 27 of the SCO.

- Furthermore, the Appellant argues that the FIFA DC should have made use of the available option to impose a points deduction as a milder sanction, which would, at least as a first step, be as effective to ensure payment, if not more, in light of South American clubs' dependency of transfer revenues. To illustrate this argument, the Appellant points to five previous cases in which the FIFA DC only issued points deductions in cases of overdue payables, even though the

outstanding amounts exceeded the outstanding amount in the case-at-hand.

- Finally, the Appellant argues that it should have been considered that the Appellant has never had to be sanctioned before by the FIFA DC and that in close timely proximity, the Appellant had settled other debts with other creditors, demonstrating the Appellant's general willingness to comply with all of its obligations within the scope of its economic powers.

- In relation to paragraph 5 of the operative part of the Appealed Decision, the Appellant argues that this part of the Appealed Decision violates the principle of legality, namely the legal principles of *nulla poena sine lege scripta*, *nulla poena sine lege stricta* and *ne bis in idem.*

- In support of the aforementioned, the Appellant argues that, in line with established CAS jurisprudence, disciplinary sanctions must be based on a proper legal or regulatory basis, enacted beforehand, and that such sanctions must be predictable.

- The Appellant argues that such prerequisites are violated in the Appealed Decision, as in the respective part it renders the power to the creditor to demand the imposition of further sanctions on the Appellant, a right not foreseen in Article 64 of the FDC.

- The Appellant further argues that the imposition of a further sanction in line with para. 5 of the operative part of the Appealed Decision would violate the principle of *ne bis in idem*, as it would be a second sanction for the same offence, whereas such principle would not be violated if the Appealed Decision had from the outset contained a provision that a new and harsher sanction would apply in case of failure to pay the outstanding amount.

41. The Appellant submitted the following requests for relief:

"FIRST – To set aside, partially, the Appealed Decision;

SECOND – To confirm that the Appellant shall not pay a fine higher than CHF 6,410;

THIRD – To set aside in full the terms and conditions set out in paragraph 4 of item III of the Appealed Decision and replace it as follows:

> *'4. If payment is not made to the Debtor and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the Brazilian Football Association by this deadline, the (2) points will be deducted automatically by the Brazilian football association without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat.'*

FOURTH - To set aside in full the terms and conditions of paragraph 5, item III of the Appealed Decision and replace it as follows:

'If the Debtor fails to pay the amount due to the Creditor even after the complete serving of the transfer ban in accordance with paragraph 4 of item III above, the FIFA Disciplinary Committee, upon request of the Creditor shall ban the Debtor from registering new players, either nationally or internationally for two (2) entire and consecutive registration periods will be imposed on the Debtor as from the first day of the next registration period following the request made by the Creditor. Once the request is made through the FIFA Disciplinary Committee, the transfer ban will be implemented at national and international level by the Brazilian Football Association and FIFA respectively. The transfer ban shall cover all men eleven-a-side teams of the Debtor – first team and youth categories. The Debtor shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the transfer ban or upon the payment to the Creditor of the total outstanding amount, if this occurs before the full serving of the transfer ban. In particular, the Debtor may not make use of the exception and the provisional measures stipulated in article 6 of the Regulations on the Status and Transfer of Players in order to register players at an earlier stage.'

FIFTH – To confirm the terms and condition set out in paragraphs 6, 7 and 8 of the Appealed Decision;

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 advanceof 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)."

42. The Respondent's submissions, in essence, may be summarised as follows:

- The jurisdiction of the CAS to decide upon the present matter is not contested.
- As to the applicable law, the Respondent asserts that mainly the 2017 version of the FDC shall be applicable, with Swiss law applied subsidiarily. The Respondent however denies that the TFEU is applicable, as the matter neither affected an entity based within a member state of the EU nor issues which are related to competition law.
- The Respondent agrees that, per Article 57 par. 2 of the FIFA Statutes and Article R58 of the CAS Code, the regulations of FIFA, namely the FDC and subsidiarily Swiss law shall apply. The Respondent however opposes the applicability of EU law. The Respondent points out that none of the parties reside in the European Union and asserts that there is no close connection between the Appealed Decision and the TFEU. Finally, the Respondent argues that the matter is in no way related to competition law.
- The Respondent states that the "enforcement" mechanism created by FIFA in Article 64 of the FDC has been repeatedly confirmed by the CAS and the SFT, and that the Appellant was guilty of not respecting the PSC Tigres Decision, as

confirmed in *CAS 2017/A/5279*, even though it had recently received a total of USD 4,000,000 more from player transfers than it spent.

- Contrary to the Club's allegations, the Club has been pursuing its dilatory approach by appealing to CAS against sanctions imposed on the Club by the FIFA DC for failing to respect decisions in favour of other creditors several times. The current appeal is therefore only a bad faith attempt to delay the delivery of justice.

- The Respondent asserts that the FIFA DC did not violate the "predictability test" or the principle of legality.

- The Respondent agrees that at least to some extent the legal principle of *nulla poene sine lege* is applicable to disciplinary provisions and proceedings of sports associations. It further refers to previous CAS jurisprudence in which a so-called "predictability test" was applied, however without concretely specifying the requirements for such test.

- The Respondent argues that for the principles of predictability and legality to be respected, it is not necessary that the sanctioned stakeholder should know in advance the exact sanction that will be imposed. The Respondent further argues that it is not a violation of either the principle of transparency or predictability when the Respondent refers to the amount overdue as a criterion for the determination of a sanction and to the "*Committee's well-established practice*". Instead, by clearly stating a range of the amount of a possible fine and by mentioning the other sanctions that can be imposed additionally or alternatively, Article 64 of the FDC sufficiently alerts any offender of the possible sanction for a violation.

- Regarding the principle of transparency, the Respondent is of the opinion that such principle does not require the Respondent to publish all of the decisions taken by the FIFA DC, while at the same time pointing out that in addition to the decisions already available to the Appellant, further decisions were presented in the Respondent's Answer and that all decisions of the FIFA DC taken since January 2019 are now available to the public on the Respondent's website.

- Regarding the Appellant's claim that its right to be heard was violated by the Appealed Decision for insufficiently justifying the amount of the fine, the Respondent argues that such right does not comprise protection against a insufficient motivation of a decision, but rather being granted the opportunity to present one's case to the respective judicial body, which was by all means possible for the Appellant in the case-at-hand.

- The Respondent further pleads that the application of FIFA Circular No. 1628 also does not render the Appealed Decision illegal. The Respondent points out that FIFA Circular No. 1628 by no means contravened the previously existing content of Article 64 of the FDC, but that its content was rather to alert all stakeholders to a change in the sanctioning policy of the Respondent that would

apply shortly after the publication of the circular letter.

- The Respondent takes the position that, in accordance with long-standing CAS practice, a disciplinary decision of a private association shall be amended only in cases in which the relevant judicial body is found to have exceeded the margin of discretion accorded to it, i.e. only in cases in which the decision was taken arbitrarily.

- The Respondent pleads that the decision was not only taken in a non-arbitrary way, but that the sanctions imposed on the Appellant were proportionate.

- Regarding the imposed fine, the Respondent argues that the most important criterion for its determination must be the amount overdue. At the same time the Respondent acknowledges that the fine may not put too much of a burden on the offender in order not to yield counterproductive effects on the debtor's ability to settle its debt to the creditor.

- Regarding the specific amount of the fine, the Respondent firstly contradicts the statement of fact concerning the amounts overdue in the cases presented by the Appellant, namely that the amounts overdue were significantly lower in the cases in which a CHF 25,000 fine was imposed, and secondly tried to substantiate its claim that the imposition of a CHF 30,000 fine was well in line with the FIFA DC's well-established practice by presenting a range of further cases in which a CHF 30,000 fine was imposed and in which the amounts overdue were mostly lower than in the case-at-hand.

- Regarding the proportionality of the transfer ban, the Respondent first points to the wording of Article 64 of the FDC which allows for a transfer ban to be imposed additionally or alternatively to a fine or a points deduction.

- The Respondent further points to its usual sanctioning practice, under which, in line with the previous notice in FIFA Circular No. 1628, it is common that a transfer ban is imposed on top of a fine in case of debts in the amount-at-hand. The Respondent argues that the publication of a circular letter was sufficient to announce the change in the sanctioning policy of the FIFA DC as it occurred in 2018.

- The Respondent further provides examples of FIFA DC decisions in other cases in which a transfer ban for two registration periods was since imposed in cases in which the amount overdue was comparable or lower.

- Next, the Respondent argues that a transfer ban is a sanction with a close material connection to the breach committed by the Appellant, which signed players without paying for them, thereby affecting the integrity of the competition vis-à-vis other clubs who did not strengthen their teams with players they were unable to afford. This was even more true when taking into account that the ban would only apply if the overdue amount remained unpaid and lifted immediately as soon as it was paid.

- Finally, in view of the Appellant's claim of a violation of the legal principle *ne bis in idem*, the Respondent argues that such principle is not violated as – contrary to the Appellant's understanding of the respective provision in the operative part of the Appealed Decision – it is not in the power of the creditor to impose a further sanction on the Appellant and that such power remains with the FIFA DC instead, which has not yet rendered an according decision anyway, leaving the entire issue moot in this case.

43. The Respondent submitted the following requests for relief:

"a. To reject the Appellant's appeal in its entirety;

b. To confirm the decision 190310 PST BRA ZH rendered by the member of the FIFA Disciplinary Committee on 28 May 2019;

c. To order the Appellant to bear all costs incurred with the present procedure and to cover all the legal expenses of FIFA related to the present procedure."

VI. JURISDICTION

44. 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 the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*"

45. The jurisdiction of CAS derives from Article 58 (1) of the FIFA Statutes (2019 edition) which reads:

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

46. The FIFA DC is a legal body of FIFA. The jurisdiction of the CAS is not contested by either Party and is also confirmed by the Parties' signing of the Order of Procedure.

47. It follows that CAS has jurisdiction to decide on the present dispute.

VII. ADMISSIBILITY

48. Article R49 of the CAS Code provides as follows:

"*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The*

Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Sole Arbitrator, if a Sole Arbitrator has already been constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Sole Arbitrator renders her/his decision after considering any submission made by the other parties."

49. Article 58.1 of the FIFA Statutes states:

> *"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."*

50. Further, Article 64.5 of the FDC states:

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

51. The grounds of the Appealed Decision were notified to the Parties on 4 July 2019. The Statement of Appeal was filed on 25 July 2019 and, thus, within the deadline of twenty-one days set in Article 58.1 of the FIFA Statutes referred to in the Appealed Decision itself.

52. Therefore, the appeal was timely submitted and is admissible.

VIII. APPLICABLE LAW

53. Article R58 of the CAS Code provides as folows:

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

54. The matter-at-stake relates to an appeal against a FIFA decision and reference must hence be made to Article 57.2 of the FIFA Statutes, which provides that:

> "*The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the dispute has the closest connection.*"

55. Therefore, the FIFA rules and regulations shall be applied primarily. Swiss law applies subsidiarily to the merits of the dispute.

56. In the present case, the "*applicable regulations*" for the purposes of Article R58 of the CAS Code are the FDC. More precisely, the Sole Arbitrator agrees that the regulations

concerned are particularly the 2017 edition of the FDC, considering that the matter was brought to the FIFA DC on 14 May 2019.

57. With regards to the Appellant's submissions regarding the applicability of the TFEU and other sources of EU law, the Sole Arbitrator notes that neither Party is domiciled in the European Union and that the Appellant failed to demonstrate any kind of close proximity between the case and EU law or the subject of competition law. The Sole Arbitrator therefore deems EU law to be of no relevance for the case-at-hand.

58. The Sole Arbitrator however wishes to clarify that the legal principles of *nulla poena sine lege, ne bis in idem* or *audiatur et altera pars*, being derived from the Swiss Federal Constitution or the ECHR, do form a part of the Swiss public policy and shall therefore be considered by the Sole Arbitrator.

IX. MERITS

59. The Sole Arbitrator first notices that the following facts and legal circumstances are not disputed between the Parties:

- That the CAS award *CAS 2017/A/5279* has become final and binding and that the Club in accordance with this award owes an amount of USD 1,000,000 plus interest to the Creditor.
- That the Club did not make any payments to the Creditor on the aforementioned liability.
- That the non-payment of the owed amounts constitutes a violation of Article 64 para. 1 of the FDC.

60. The Sole Arbitrator further takes note of the existence of recent CAS awards between the same Parties on very similar subject matters, notably the awards *CAS 2018/A/6239*, *CAS 2019/A/6278* and *CAS 2019/A/6287*, in addition to of course *CAS 2019/A/6393* and *CAS 2019/A/6504*.

61. The Sole Arbitrator, upon his analysis of the facts and the legal arguments presented by the Parties reached the conclusion that the main issues to be resolved by the Sole Arbitrator are:

A. Is Article 64 of the FDC a sufficient legal basis for the imposition of the sanctions imposed in the case-at-hand?

B. Were the sanctions imposed in line with the requirements stipulated in the FDC?

C. Were the sanctions imposed in line with all other legally applicable requirements?

A. **Is Article 64 of the FDC a sufficient legal basis for the imposition of the sanctions imposed in the case-at-hand?**

62. Article 64 of the FDC reads as follows:

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

63. Further, Article 15.2 of the FDC reads as follows:

> *"The fine shall not be less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than CHF 1,000,000."*

64. While it is not insinuated by the Appellant that the FDC might in any way be enacted illegally, by an incompetent body or by incorrect means, or that the FDC for whatever reason does not apply to the Appellant, the Appellant appears to argue that the wording of Article 64 of the FDC violates the 'predictability test' and therefore the principle of legality, *nulla poena sine lege*, because the regulation does not foresee a specific sanction which shall be imposed on a party whose debt to another club is overdue.

65. The Sole Arbitrator cannot concur with such argument.

66. Firstly, the Sole Arbitrator recalls that the principle of *nulla poena sine lege* does not require a penal, or disciplinary, provision to contain a specific sanction for every specific violation. A prudent and appropriate treatment of each individual case, to the contrary, requires the deciding body to have a scope of discretion, which enables it to take into account all relevant circumstances of the specific case.

67. The same applies under the predictability test as established by previous CAS jurisprudence, which is endorsed by the Sole Arbitrator:

> "*It is not necessary for the principles of predictability and legality to be respected that the football player should know, in advance of his infringement, the exact rule he may infringe,*

as well as the measure and kind of sanction he is liable to incur because of the infringement. The principles of predictability and legality are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction. The fact that the competent body applying the FIFA DC has the discretion to adjust the sanction mentioned in the rules deemed applicable to the individual behaviour of a player breaching such rules is not inconsistent with those principles and with the general principle nulla poena sine lege certa" (*CAS 2014/A/3665, 3666 & 3667*).

68. Secondly, the Sole Arbitrator recalls that according to constant CAS jurisprudence:

"*Article 64 of the FIFA Disciplinary Code (FDC) provides FIFA with a clear legal basis to sanction a club that failed to pay another club a sum of money following an instruction to do so. Article 64 para. 1 FDC clearly sets out the legal framework applicable in the event of a club's failure to comply with payment obligations set by a body of FIFA. It therefore enables the club to foresee the potential consequences of failing to comply with a FIFA decision. It is clear that under Article 64 FDC, a club that is obliged to comply with a FIFA decision may be subject to a number of measures, such as fines, point deductions, transfer bans, etc., in the event it disregards a decision ordering it to pay an amount of money to another club: in other words, the FIFA statutes clearly indicate not only the existence of a violation, but also the kinds of sanctions*" (*CAS 2018/A/5900*).

69. More concretely, the Sole Arbitrator considers it evident that in accordance with the provisions of Article 64 of the FDC, FIFA members and the other stakeholders that fail to comply with a decision by a FIFA body and/or CAS under which such stakeholder is ordered to pay a certain amount of money to another club will have the consequences foreseen under this provision. Furthermore, the Sole Arbitrator considers it perfectly comprehensible that such consequences are: a) the imposition of a fine, whose potential amounts are defined in Article 15.2 of the FDC; b) the defaulting party shall be granted a final deadline to comply with the relevant order; and c) if the defaulting party is a club, it shall be warned that, in case of persistent failure to comply with the relevant order within the granted period, points shall be deducted or relegation to a lower division shall be imposed and a transfer ban may also be pronounced.

70. Therefore, the Sole Arbitrator holds that the FIFA DC's system of sanctions, and its proceedings, is in general lawful (see also the SFT, decision 4P.240/2006, dated 5 January 2007).

B. Were the sanctions imposed in line with the requirements stipulated in the FDC*?*

71. The Sole Arbitrator recalls that the CAS Award in *CAS 2017/A/5279*, confirming the FIFA PSC Tigres Decision that the Appellant is liable to pay to the Creditor an amount of USD 1,000,000, has become final and binding and that no such payment was effected to the Creditor by the Appellant.

72. The Sole Arbitrator further notes that the imposition of a fine is foreseen in Article 64.1 lit. a) of the FDC, that the fine imposed on the Appellant falls within the scope of Article 15.2 of the FDC and that the possibility of the imposition of a transfer ban is foreseen in Article 64.1 lit. c) of the FDC.

73. Further, the Sole Arbitrator notes that, under provisions 3 and 4 of the operative part of the Appealed Decision, the FIFA DC complied with the requirements in Article 64.1 lit. b) and c) of the FDC to grant the Appellant a further deadline to settle the overdue amounts and to warn the Appellant that, in case of failure to pay within the granted deadline, the Appellant would be subject to the further sanction foreseen in the Appealed Decision.

74. The Sole Arbitrator further notes that section B. i. of FIFA Circular No. 1628, published on 9 May 2018, contains the following information on a change of the sanctioning policy of the FIFA DC:

> *"1. The FIFA Disciplinary Committee will continue to apply par. 1 a) in the same way; pronouncing a sanction against the debtor, by means of which it will inter alia be ordered to pay a fine and granted a final deadline to settle its debt to the creditor. In addition to the fine, the FIFA Disciplinary Committee will impose a point deduction and/or a transfer ban that will be effective only as from expiry of the final deadline. Consequently, the debtor club will be entitled to avoid said additional sanctions if it settles its debt to the creditor by such final deadline."* (emphasis added)

75. The Sole Arbitrator asserts that the sanctions imposed in the Appealed Decision are in line with the approach announced in the information cited above. Furthermore the Sole Arbitrator notes that the combination of a fine and a transfer ban as an additional sanction, as foreseen in the circular letter, is well in line with the wording of Article 64.1 of the FDC, which foresees the addition of a sporting sanction to the fine, if the overdue amount is not paid within the granted deadline.

76. The Sole Arbitrator therefore concludes that the Appealed Decision was rendered within the legal requirements stipulated in the FDC, in particular in Articles 64.1 and 15.2 of the FDC.

C. Were the sanctions imposed in line with all other legally applicable requirements*?*

77. The Appellant raises reservations against the validity of the imposition of the fine, the transfer ban and the indication that further sanctions may be applied on request of the Creditor.

78. In view of the scope of the judicial scrutiny, the Sole Arbitrator recalls that the autonomy of private associations is protected by the law, including their freedom to control their internal affairs, which includes a margin of discretion in disciplinary matters. Such margin of discretion means that a sanction can only be lifted or amended, if such margin

was clearly and obviously exceeded, i.e. if the decision was taken in an arbitrary manner (see also *CAS 2019/A/6278*, para. 55).

79. Previous panels confirmed such view, stating as follows:

> "*While reviewing disciplinary sanctions, a CAS panel shall give a 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*; see also *CAS 2018/A/5864*; *CAS 2017/A/5117*).

80. Also the Appellant concedes that such margin of discretion exists, despite maintaining that in the case-at-hand such margin was exceeded.

81. The Sole Arbitrator further notes that in disciplinary matters, each case must be evaluated on an individual basis, taking into account all specific circumstances-at-hand, like the kind and degree of the offence, the behaviour and degree of responsibility of the offending party, any possible aggravating or mitigating factors, as well as the main interests-at-stake and the principle of proportionality.

82. This view is consistent with well-established CAS jurisprudence:

> "*In disciplinary matters, each situation must be evaluated on a case-by-case basis and interests at stake have to be balanced in respect of the principle of proportionality. Account must be taken of the seriousness of the facts and other related circumstances as well as of the damage that the penalised conduct entails for the parties involved, for the federation in question and for its sport. In the same way, disciplinary bodies may evaluate any aggravating and/or extenuating circumstances that might be related to the infringement*" (*CAS 2017/A/5496*; see also *CAS 2013/A/3358*, also quoted in *CAS 2016/A/4595*; *CAS 2017/A/5117*).

i. The Fine

83. With respect to the fine of CHF 30,000 that was imposed on the Appellant, the Appellant in essence argues that the concrete determination of the fine violates the principles of proportionality and legality. The Appellant sees the alleged lack of sufficient transparency in the reasoning of the Appealed Decision and the lack of transparency regarding other decisions of the FIFA DC as a violation of such principles. Furthermore, the amount of the fine is considered disproportionate, in particular in comparison to other cases, in which the same fine amount was imposed even though the outstanding amount was significantly higher.

84. The Sole Arbitrator does not share this view.

85. The Sole Arbitrator considers the Appealed Decision to be sufficiently motivated by the deciding body. The reasons clearly indicated that the amount overdue played an important role in the determination of the amount of the fine. Further, it was stated that

such amount was also in line with the well-established practice of the FIFA DC, i.e. the amount of the fine was also put into the context of other decisions taken by the FIFA DC. The Sole Arbitrator does not deem it necessary that such well-established practice is expounded upon at length in each individual decision, as long as it exists and as it is sufficiently possible to retrieve information on such jurisprudence, which the Sole Arbitrator considers to be case, as also indicated by the further examples which the Appellant was able to provide. The Sole Arbitrator further does not deem the quality of a decision's motivation as directly relevant for the evaluation of the proportionality of a sanction *in casu*.

86. The Sole Arbitrator considers that a lack in the motivation of a decision would in any way not lead to the annulment of the Appealed Decision due to the *de novo* principle arising from Article R57 of the CAS Code. According to such principle, the Sole Arbitrator has full power to review the facts and the law of the case, which means that he shall examine the proportionality of the imposed sanction irrespective of the elaborateness of the reasons given in the Appealed Decision. Even if such lack of elaborateness would constitute a procedural error, such error would be healed by the legal review of CAS (see Mavromati & Reeb, The Code of the Court of Arbitration for Sport, nos. 23ff. on Article R57 of the CAS Code). The same would even apply if such lack constituted a violation of the right to be heard, which in view of the Sole Arbitrator is however not the case.

87. The legal scrutiny of the imposed fine must therefore be aimed at the fine itself and its legality and proportionality.

88. While the legality of the general framework was already examined and confirmed above, the Sole Arbitrator holds that the Appellant also failed to prove that the application of such framework *in casu* was legally objectionable.

89. As properly summarized by the Appellant, the legal requirements for the proportionality of the sanction are that it must be adequate, necessary and proportionate in the narrower sense.

90. In view of the fine, the only reservation raised by the Appellant is that the fine amount is disproportionate in relation to other decisions taken by the FIFA DC. The Sole Arbitrator, when analysing this argument, holds that such claim is less directed at the issue of the proportionality of the fine, against which no substantial argument was brought forward, but rather at the allegation of unequal treatment.

91. When analysing the information provided by the Appellant and the Respondent, the Sole Arbitrator observes that the FIFA DC's policy is to award a fine in the amount of CHF 25,000 in cases in which the overdue amount is between CHF 608,000 and CHF 714,000, and a fine of CHF 30,000 in cases from that threshold on until at least an overdue amount of CHF 3,900,000. The Sole Arbitrator therefore finds consistency in the application of Article 64.1 of the FDC by the FIFA DC, and notes that the present

case was treated fully in line with the aforementioned sanctioning policy, which means that no legal violation can derive from a possible deviation from such policy.

92. The Sole Arbitrator further notes that FIFA argues that the FIFA DC applies a degressive approach regarding the amounts of fines imposed in order not to defeat the purpose of the fines, which is to admonish the debtor to pay his debts, and not to cause further economic damage which further jeopardises future payments. The Sole Arbitrator acknowledges that also the Appellant considers this goal to be vital. Furthermore, the Sole Arbitrator is aware that a degressive approach is common in many areas of disciplinary nature, including criminal law.

93. Therefore, the Sole Arbitrator holds that the degressive fine approach taken by the FIFA DC is reasonable and appropriate. In the present case, the Appellant profits from such approach, as he is not being fined twice as much as clubs which only had payments overdue in half the amount of what the Appellant owes to the Creditor. At the same time, the Sole Arbitrator does not consider it as excessive or arbitrary if the amount of t the fine imposed on debtors like the Appellant is not raised even in cases in which the debtor owes close to four times than the amount the Appellant owes. Such approach does not evidently exceed the margin of discretion which must be attributed to the deciding body.

94. Finally, the Sole Arbitrator considers that the amount of the fine only constitutes an amount of just over 3 percent of an amount, which has now been overdue for more than 4 years. Such fine is by no means disproportionate in relation to the amount overdue.

ii. The Transfer Ban

95. Regarding the transfer ban, the Appellant argues that such sanction is not necessary, because a deduction of points would have been an available milder alternative of equal effectivity, and not proportionate, because the transfer ban would deprive the Appellant of the basis of its business model, which is buying and developing players and selling them for a profit.

96. The Appellant, however, neither provided sufficient evidence that a points deduction would have had a less negative effect on it, nor that such sanction would have been equally effective.

97. Regarding the argument that a points deduction would be a milder alternative to a transfer ban, the Sole Arbitrator considers, first, that both sanctions are of great effect and constitute severe sanctions. The Sole Arbitrator further considers that the effect of a points deduction depends on the amounts of points deducted and more specifically on the sporting situation of the club affected. Namely, such deduction might be of comparatively little effect on a club that is well ahead of the entire league, in mid-table obscurity or far behind at the end of the league table. It may however also be a decisive factor in the determination of the champion, the participants in international

competitions or relegation. Depending on the circumstances, a points deduction may lead to immense sporting and economic loss.

98. The Sole Arbitrator further considers that a transfer ban is a sanction which does not deprive a club of the opportunity to obtain income from player transfers, as such ban does not prohibit the "sale" of players. The effect of the ban is, however, that such players can only be replaced by the players who were already at the club before the ban took effect. While such sanction is very grave in effect, affected clubs still have the opportunity to prepare for such sanction within the time provided by an appeal.

99. In recognition of the above, the Sole Arbitrator holds that neither a points deduction nor a transfer ban is *per se* a heavier sanction than the other. It would therefore have been on the Appellant to demonstrate how and why in his specific case a points deduction would have been of milder effect. The Appellant however only presented abstract arguments on the economic situation in South American and Brazilian football, that was neither supported by concrete numbers nor by evidence.

100. In any event, the Appellant also failed to demonstrate that a points deduction would have been equally effective. To the contrary, in light of the cases in which recently point deductions were imposed on the Appellant (see *CAS 2018/A/6239*, *CAS 2019/A/6278* and *CAS 2019/A/6287*), it may appear that the prospect of such sanction did not put sufficient pressure on the Appellant to pay its debt.

101. Regarding the proportionality in the narrower sense, the Appellant points to the devastating effect a transfer ban would allegedly have on its business. Due to its reliance on transfer revenues, it would be required to sell its best players without being able to replace them, thereby causing a big loss of sporting competitiveness.

102. The Sole Arbitrator acknowledges that a transfer ban puts a club in a very difficult situation. Part of the business model of professional football clubs, with the exception of very few top clubs, is to generate income from a constant turnover of players. Such turnover is substantially disturbed if a club is unable for a certain period of time to recruit any new players. Not only can a required income stream be maintained only at the expense of sporting competitiveness (which remains the main purpose of sporting clubs in traditional sports), but also the future income stream is endangered by depriving the affected club of the opportunity to recruit new players who may be transferred to other clubs in the future. Such effect can only be mitigated by reverting to one's youth academy, whose recruitment is furthermore also affected even though such recruitment has little functional link to the purpose of the sanction.

103. Furthermore, a pending or effective transfer ban puts great pressure on a club not to lose the services of those players whose contracts expire just before or during such ban. This further worsens the bargaining position of the club in any negotiations for contract extensions with its current players, whose demands will likely reflect the certainty that the club can only either keep this player or have no replacement player.

104. The Sole Arbitrator therefore regards it evident that a transfer ban, even more one that applies for two consecutive transfer windows, is a very harsh sanction that can apply only in cases of severe offences and that must be applied with great care.

105. However, the Sole Arbitrator considers the offence committed by the Appellant was sufficiently grave to warrant the application of the sanction. An amount of USD 1,000,000 is – in any context of club football – a substantial amount of money which a candid creditor should be able to rely on receiving in due time.

106. The Appellant is not the only one that relies on being able to obtain income from player transfers. The same is true for all other clubs, most notably those whose players the Appellant signed to improve its squad and to improve its chances of generating future transfer income. And unlike the transfer ban at hand, which notably does *not* prevent the Appellant from creating such income from transferring the players it signed in the past, the Appellant's failure to pay its debt leads to another club being deprived of exactly such income despite already having lost the services of the Player to the Appellant. The Appellant, at the same time, remains in the position of having those players and gaining sport and economic benefit from them.

107. *Pacta sunt servanda* is a legal principle that also forms a part of Swiss public policy, as the Appellant himself pointed out.

108. The Sole Arbitrator considers the goal of ensuring the payment of due transfer compensation claims as a substantial and vital element of the sporting and economic integrity of football competitions. The act of not paying due transfer compensation not only harms the respective creditor, but the entire competition. If it was possible for a club to sign players without paying for them without facing a sanction that is grave enough to ensure compliance, this would distort the competition in many ways: (i) the buying club would receive sporting and subsequently economic advantage without duly paying for it; (ii) all other clubs which stay within their economic means would suffer a sporting disadvantage *vis-à-vis* such buying club; and (iii) the selling clubs whose players were taken away but not compensated would suffer both sporting and economic damage.

109. The sanction of a transfer ban therefore possesses close proximity to the damage caused by the offending behaviour, letting the violator suffer from a comparable harm it inflicted on others.

110. The Sole Arbitrator further notes that the transfer ban would automatically be lifted as soon as the full outstanding amount is paid to the Creditor. The avoidance and/or premature removal of the imposed sanction therefore lies entirely within the power of the Appellant.

111. The Sole Arbitrator therefore holds that the imposition of the transfer ban is proportionate in the present case and does not evidently exceed the discretionary room due to the FIFA DC.

iii. The threat of further sanctions

112. The Appellant finally considers the legal principle of *ne bis in idem* breached by paragraph 5 of the operative part of the Appealed Decision and strongly opposes that in its understanding, it would be on the Creditor to decide on the imposition of further sanctions.

113. The Appellant's argument is however based on a misunderstanding of the relevant part of the Appealed Decision, which does not by any means give the Creditor the power to decide on further sanctions. The only role played by the Creditor in such case would be that it would be the Creditor who would make the FIFA DC aware that the outstanding amount was still not settled after the complete serving of the transfer ban, requesting the FIFA DC to impose further sanctions on the Appellant. It would however still be the FIFA DC, and only the FIFA DC, that would be competent to take further action if appropriate.

114. The Sole Arbitrator further notes that no such decision has yet been taken by the FIFA DC. Therefore, the question of whether or not the legal principle of *ne bis in idem* may be violated if a further sanction were imposed on the Appellant in the future does not need to be discussed until such sanctions is imposed on the Appellant.

115. Based on the foregoing, the Sole Arbitrator finds that the Appealed Decision was entirely correct and that accordingly the Appeal shall be dismissed.

X. COSTS

116. Article R64.4 of the CAS Code, which is appliable to this proceeding, provides as follows:

> "*At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs.*"

117. Article R64.5 of the CAS Code provides the following:

> "*In the arbitral award, the Sole Arbitrator shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Sole Arbitrator has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such a contribution, the Sole Arbitrator*

shall take into account the outcome of the proceedings, as well as the conduct and financial resources of the parties."

118. Having taken into account the outcome of the present arbitration proceedings, in particular the fact that the appeal by the Appellant has been rejected, the Sole Arbitrator finds that the costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be born by the Appellant.

119. In addition, pursuant to Article R64.5 of the CAS Code and in consideration of the outcome of the proceedings, the financial position of the Parties and the fact that no hearing was held, the Sole Arbitrator rules that FIFA, who was not represented by an external counsel, shall bear its own costs incurred in connection with the present proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Cruzeiro Esporte Club against the Fédération Internationale de Football on 25 July 2019 with respect to the decision rendered by the FIFA Disciplinary Committee on 28 May 2019 is dismissed.

2. The decision issued on 28 May 2019 by the FIFA Disciplinary Committee is upheld.

3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne by Cruzeiro Esporte Club.

4. Each Party shall bear its legal costs and expenses incurred in connection with these arbitration proceedings.

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

Seat of Arbitration: Lausanne, Switzerland
Date: 19 April 2021

THE COURT OF ARBITRATION FOR SPORT

Jan Räker
Sole Arbitrator