Arbitration CAS 2018/A/5959 Club Al Kharaitiyat v. Fédération Internationale de Football Association (FIFA), award of 11 June 2019

Panel: Mr Hendrik Kesler (The Netherlands), Sole Arbitrator

Football
Disciplinary sanction under Article 64 FIFA FDC
"Outstanding amounts due" as decisive element for imposition of sanctions
Predictability of sanctions provided for by the FDC
Applicability of the TFEU in CAS proceedings
Proportionality of a fine imposed on a club
Aggravating factors in the determination of an adequate sanction
Grace period as prerequisite for further sanctions
Ne bis in idem and multiple sanctions under Article 64 FDC
Prerequisites to amend common practice

1. **Under Article 64 FIFA Disciplinary Code (FDC), the "outstanding amounts due" constitutes the most logical nexus between the severity of the violation committed and the sanctions to be imposed. Accordingly, it is the most important element in deciding what sanctions are to be imposed on a club for violating Article 64 FDC, and the reference to the "outstanding amounts due" is sufficient to corroborate the sanctions imposed.**

2. **Article 64 FDC clearly sets out the potential sanctions for failure to respect FIFA decisions (*i.e.* a combination of a fine, points deduction and a transfer ban). Publication of the FIFA Disciplinary Committee decisions is not *per se* required in order for the FIFA Disciplinary Committee to lawfully impose sanctions for violations of Article 64 FDC.**

3. **In order for a party to CAS proceedings to convince a CAS panel of the (direct) applicability of the Treaty on the Functioning of the European Union (TFEU) to the case, the party has to prove that the provisions of the TFEU relied upon are directly applicable by establishing *e.g.* if and how a decision appealed against or the conduct of the first instance judicial body has any impact on the European internal market or would otherwise violate EU Competition Law.**

4. **A fine amounting to approximately 3,6% of the outstanding amount does not seriously limit the club's abilities to pay the player the amount due plus interest. It has already been determined in CAS jurisprudence that a fine of 4.37% for a violation of Article 64 FDC is not disproportionate.**

5. **In circumstances where a club had been ordered by a decision of the FIFA Dispute**

Resolution Chamber (DRC) to pay a certain amount to a player it may be considered as an aggravating factor if the club, after issuance of the FIFA DRC decision, concluded a settlement agreement and a payment plan with the player, and nevertheless does not (or only partially) comply with any of the obligations set out in the settlement agreement and the payment plan.

6. **According to Article 64(1)(b) and (c) FDC, the only mandatory aspect for the FIFA Disciplinary Committee to impose further sanctions is to grant a grace period. A club cannot contest a grace period as unreasonable without providing any argument as to why an additional period of grace would make any difference.**

7. **The principle of *ne bis in idem* prevents an individual from being sanctioned twice for the same violation. This does not mean that a court cannot impose multiple sanctions for the same violation, but it prevents a court from imposing additional sanctions on the perpetrator for the same violation once he has already been sanctioned for such violation by the same court. Accordingly, the joint imposition of *e.g.* a transfer ban as well as a point deduction does not constitute a violation of the principle of *ne bis in idem*.**

8. **A common practice may be terminated or amended. In order to terminate a common practice similar principles apply as for the amendment of rules and regulations. Articles 60 *et seq.* of the Swiss Civil Code do not explicitly regulate the question at what point in time a change of rules becomes binding upon the members of an association. However, in order for a change of rules to become binding upon the association's members it does not suffice that the competent (legislative) body within the association adopts the amendments. Instead, the new rules only take effect once the members of the association had a chance to obtain knowledge of the contents of the new rules. Accordingly, to be valid a change in practice has to be adopted by the competent body of the association and – in addition – the termination of the past practice has to be properly communicated to the relevant stakeholders.**

I. PARTIES

1. Club Al Kharaitiyat (the "Appellant" or the "Club") is a football club with its registered office in Al Khor, Qatar. The Club is registered with the Qatar Football Association (the "QFA"), which in turn is affiliated to the Fédération Internationale de Football Association.

2. The Fédération Internationale de Football Association (the "Respondent" or "FIFA") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeals arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

A. Proceedings before the FIFA Dispute Resolution Chamber

4. On 13 October 2016, following a contractual dispute that ensued between the Club and the French professional football player Mr Issiar Dia (the "Player"), the latter lodged a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting that the Club be ordered to pay him remuneration in the amount of USD 1,500,000, plus default interest.

5. The Club disputed the Player's claim.

6. On 13 October 2016, the FIFA DRC rendered its decision (the "FIFA DRC Decision"), with the following operative part:

> *"1. The claim of* [the Player] *is partially accepted.*
>
> *2. The* [Club] *has to pay to* [the Player] ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of USD 1,330,000 plus 5% interest p.a. as from 12 June 2016 until the date of effective payment.*
>
> *3. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claim lodged by the* [Player] *is rejected.*
>
> *5. The* [Player] *is directed to inform the* [Club] *immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".* (emphasis in original).

7. On 9 December 2016, further to a request from the Club in this regard, the grounds of the FIFA DRC Decision were communicated to the parties.

8. On 12 January 2017, the Club filed an appeal against the FIFA DRC Decision with the Court of Arbitration for Sport ("CAS").

9. On 10 March 2017, CAS issued a termination order (the "CAS Termination Order") with the following operative part:

> *"1. The procedure CAS 2017/A/4952 Al Kharaitiyat S.C. v. Issiar Dia is terminated and removed from the CAS roll.*

2. *The present order is rendered without costs, except for the Court Office fee of CHF 1,000 paid by Al Kharaitiyat S.C. which is retained by the Court of Arbitration for Sport".*

10. On 10 April 2017, the Player requested the FIFA Players' Status Department to submit the case to the FIFA Disciplinary Committee.

11. On 5 May 2017, the Player provided the FIFA Players' Status Department and the QFA with a settlement agreement (the "Settlement Agreement") concluded between the Player and the Club, determining, *inter alia*, as follows:

> *"1. The Club shall pay irrevocably to the Player* ***$ 1,130,000.00 i.e. one million one hundred thirty thousand USD) NET*** *as compensation for breach of contract of employment and interests for the final settlement of the above-mentioned dispute (FIFA DRC decision). This payment of compensation shall be wire transferred by the Club to the Player which ventilation* [sic] *as follows:*
>
> ***$ 530,000.00 (i.e. five hundred thirty thousand USD) NET*** *at last on the day of the signature of the Settlement Agreement;*
>
> ***$ 600,000.00 (i.e. six hundred thousand USD) NET*** *at last on 31 July 2017.*
>
> […]
>
> *If the Club doesn't pay one of the instalments within the prescribed above mentioned deadlines, for some reason that it is and without prior formal notice from the Player, the Club is indebted without delay of the total sum due on basis of the FIFA DRC decision (i.e. $ 1,330,000 NET increased by an interest at 5% per annum from 12 June 2016 until the date of effective payment) and with a supplementary fix penalty amounting to € 30,000 (i.e. thirty thousand EUR).*
>
> […]
>
> *In case of no respect of the obligation of payment (as set out in clause 1 above), the Player shall inform without delay the FIFA Disciplinary Committee to open the disciplinary proceedings".*

12. On 19 and 31 May and 9 June 2017, following reminders sent to the Player by the Club on 11 and 13 May 2017 about its payment obligation pursuant to the Settlement Agreement, the Player requested the FIFA Players' Status Department to submit the case to the FIFA Disciplinary Department.

13. On 12 June 2017, the FIFA Players' Status Department requested the Club to pay the relevant amount to the Player until 22 June 2017 at the latest.

14. On 20 July 2017, the Player requested the FIFA Players' Status Department again to submit the case to the FIFA Disciplinary Department.

15. On 4 August 2017, the FIFA Players' Status Department once more requested the Club to pay the relevant amount to the Player until 14 August 2017 at the latest.

16. On 16 August 2017, the Player requested the FIFA Players' Status Department once again to submit the case to the FIFA Disciplinary Department.

17. On 22 August 2017, the FIFA Players' Status Department informed the parties that the case would be forwarded to the FIFA Disciplinary Committee for consideration and a formal decision.

18. On 30 October 2017, the Player informed the Secretariat to the FIFA Disciplinary Committee (the "Secretariat") that the Club had not paid the amount due and requested the case to be submitted to the FIFA Disciplinary Committee.

19. On 15 February 2018, the Player requested an update on the case.

20. On 8 March 2018, the Player again requested the FIFA Disciplinary Committee to submit the case to the FIFA Disciplinary Committee.

B. Proceedings before the FIFA Disciplinary Committee

21. On 8 March 2018, the Secretariat opened disciplinary proceedings against the Club due to its failure to respect the final and binding FIFA DRC Decision. The Club was urged to pay the amount due to the Player by 22 March 2018 at the latest and was informed that the FIFA Disciplinary Committee would take a decision based on the documents in its possession, should the Club fail to submit any statement or pay the outstanding amount by the specified deadline.

22. On 21 March 2018, the QFA forwarded a letter from the Club to the Secretariat requesting the Secretariat to postpone the date of payment, proposing to pay *"the due amount in two instalments"*.

23. On 23 March 2018, the Player requested the Secretariat to submit the case to the FIFA Disciplinary Committee, as the Club had not paid the relevant amount.

24. On 27 March 2018, the Secretariat requested the Player whether a payment plan had been concluded with the Club.

25. On 27 March 2018, the Player informed the Secretariat that he would accept to conclude a payment plan only if a partial amount of USD 778,630 would be paid by no later than 29 March 2018 and if the second instalment of USD 675,313 would be paid by no later than 29 May 2018.

26. On 30 March 2018, the Club informed the Secretariat that it was willing to pay the first instalment on 5 April 2018.

27. On 1 April 2018, the Club and the Player reached an agreement regarding a payment plan (the "Payment Plan"), with, *inter alia*, the following terms:

> *"**After discussion with** **[the Player]**, **the latter takes note that** **[the Player]** **agrees formally to pay the sums due (in conformity with the** **[FIFA DRC Decision]** **as follows:***

1.

Payment of the sum amounting to $ 778,630 at the latest on 5 April 2018 (taking into account that [the Club] *should take all the banking measures to ensure the payment of the first instalment before 4 April 2018)*

2.

Payment of the sum amounting to $ 675,877 no later than 29 May 2018 (at midnight)

** i.e.*

$ 551,370 (outstanding principal balance)

+

$ 120,428.50 as interest at 5% p.a. on the sum of $ 1,330,000 between 12 June 2016 and 4 April 2018

+

$ 4,078.50 as interest at 5% p.a. on the sum of $ 551,370 between 4 April 2018 and 29 may 2018

As consequence and acting again with good faith,* [the Player] *would accept to suspend the disciplinary proceedings (ref. 171358 cgu) if and only if* [the Club] *respects strictu sensu the terms and conditions above-mentioned.

[…].

Failing to [the Club] *to run (in full) within each time limits, if any, the disciplinary proceedings will be immediately re-opened (by written request of* [the Player]*) in accordance with the correspondence of the FIFA Disciplinary Committee dated on 8 March 2018, according to which it had been established that:*

> *(…) Should [the Club] fail to submit a statement or pay the outstanding amount by the specified deadline, this matter will be submitted to a member of the FIFA Disciplinary Committee for consideration and a formal decision within the week following the expiry of the aforementioned time limit. The decision will be passed based on the file in the member's possession (cf. art. 110 par. 4 of the FDC. (…)*

In other words, taking into account of the initial delay expired on 22 March 2018 (FIFA Disciplinary Committee), as a consequence, a disciplinary sentence shall be notified immediately to [the Club] *if the last doesn't respect the terms and conditions above-mentioned.*

Regarding that [the Club] *had not respected the Settlement Agreement entered on 5 May 2017, it goes without saying that the above terms and conditions agreement worth if and only if* [the Club] *fulfil pays the first instalment ($ 778,630) by no later than 5 April 2018 (taking into account that* [the Club] *should take all the banking measures to ensure the payment of the first installment before 4 April 2018).*

To be complete, regarding the email of [the Club] *dated on 30 March 2018 (which the Qatari club indicated that it was ready to pay the first installment on First April 2018), no report or any delay (for any reason) should be accepted concerning the two installments duly mentioned above because* [the Club] *has now the time to do the payment of the sums due to* [the Player].

The FIFA Disciplinary Committee, the QFA and the QSL read us in copy" (emphasis in original).

28. Before 5 April 2018, the Club paid the Player the first instalment of the Payment Plan in an amount of USD 778,630.

29. On 24 May 2018, the Player forwarded to the Secretariat a letter sent on the same day to the Club by means of which the latter was reminded of the need to pay the second instalment of USD 675,877 by 29 May 2018.

30. On 28 May 2018 (received on 30 May 2018), the Club requested to be granted an extension of the time limit to settle its debt.

31. On 31 May 2018, the Player informed the Club that, considering FIFA Circular no. 1628, he could not agree to a payment plan.

32. On 8 June 2018, the Player requested the Secretariat to pursue disciplinary proceedings against the Club as the outstanding amount had not been paid.

33. On 19 June 2018, the Secretariat urged the Club to pay the remaining amount due to the Player by 3 July 2018 at the latest.

34. On 3 July 2018, the Club, now represented by new counsel, filed a response in respect of the charge, submitting the following requests for relief:

"a) To confirm that the ongoing dispute has complex issues and such, it shall be considered and decided by a panel of at least 3 members of the FIFA Disciplinary Committee.

b) To confirm that there is no factual nor legal basis whatsoever to the CLUB pay any fine higher than CHF 5,000 (five thousand Swiss Francs);

c) To grant the CLUB a reasonable period of grace to pay the referenced outstanding amount to the PLAYER as from the notification of any decision issued by this judicial body of FIFA regarding the matter at hand;

d) To confirm that there is no factual nor legal basis to impose any sanction whatsoever, which deducts from the CLUB any points (or relegation to a lower division) in the domestic Qatari National League;

e) To waive the CLUB to pay any costs whatsoever relating the ongoing proceedings; and

f) To from now onwards address any notification regarding the ongoing matter to the email of undersigned, i.e. […]*".*

35. On 4 July 2018, the Player requested the case to be submitted to the FIFA Disciplinary Committee.

36. On 13 July 2018, the FIFA Disciplinary Committee rendered its decision (the "Appealed Decision"), with the following operative part:

> *"1. The* [Club] *is found to have infringed art. 64 of the FIFA Disciplinary Code as it is guilty of failing to comply in full with the* [FIFA DRC Decision] *according to which it was ordered to pay to the* [Player] *USD 1,330,000 plus 5% interest p.a. as from 12 June 2016 until the date of effective payment. In particular, the* [Club] *only paid a partial amount of USD 778,630 to the* [Player].
>
> *2. The* [Club] *is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 60 days of notification of the present decision. Payment can be made either in Swiss Francs (CHF) to account no* […] *or in US Dollars (USD) to account no.* […].
>
> *3. The* [Club] *is granted a final deadline of 60 days as from notification of the present decision in which to settle its debt to the* [Player].
>
> *4. If payment is not made to the* [Player] *and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the* [QFA] *by this deadline, six (6) points will be deducted automatically by the* [QFA] *without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat.*
>
> *5. In addition, if payment is not made to the* [Player] *and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and the* [QFA] *by the aforementioned deadline, a ban from registering new players, either nationally or internationally, for two (2) entire and consecutive registration periods will be imposed on the* [Club] *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* [QFA] *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. The transfer ban shall cover all men eleven-a-side teams of the* [Club] *– first team and youth categories –. The* [Club] *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* [Player] *of the total outstanding amount, if this occurs before the full serving of the transfer ban. In particular, the* [Club] *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.*
>
> *6. If the* [Club] *still fails to pay the amount due to the* [Player] *even after the deduction of points and the complete serving of the transfer ban in accordance with points III./4 and III./5 above, the FIFA Disciplinary Committee, upon request of the* [Player]*, will decide on a possible relegation of the* [Club's] *first team to the next lower division.*
>
> *7. As a member of FIFA, the* [QFA] *is reminded of its duty to implement this decision and provide FIFA with proof that the points have been deducted in due course and that the transfer ban has been implemented at national level. If the* [QFA] *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.

8. The costs of these proceedings amounting to CHF 2,000 are to be borne by the [Club] *and shall be paid according to the modalities stipulated under point 2. above.*

9. The [Club] *is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the* [QFA] *of every payment made and to provide the relevant proof of payment.*

10. The [Player] *is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the* [QFA] *of every payment received".*

37. On 17 July 2018, the Player requested an update about the proceedings.

38. On 19 July 2018, the operative part of the FIFA DC was communicated to the parties.

39. On 17 September 2018, the Player again requested an update about the proceedings.

40. On 20 September 2018, the grounds of the Appealed Decision were communicated to the Club, determining, *inter alia*, as follows:

- *"*[…] *[T]he Committee notes that the findings of the* [FIFA DRC Decision] *had been duly communicated on 28 October 2016, amongst others to the parties, and that the grounds had been requested by the* [Club] *and duly communicated on 9 December 2016 to the parties. Furthermore, the Committee notes that an appeal was lodged before CAS that passed a Termination Order on 10 March 2017. Therefore, and as no agreement has been reached between the parties, the* [FIFA DRC Decision] *became final and binding.*

- *In view of what has been explained under paragraph II./3. above, the Committee is not allowed to analyse the case decided by the Dispute Resolution Chamber 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* [Club] *complied with the final and binding* [FIFA DRC Decision].

- *As the* [Club] *did not fully comply with the* [FIFA DRC Decision] *and is consequently withholding money from the* [Player]*, it is considered guilty under the terms of art. 64 of the FDC.*

- *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* [Club] *withheld the amount unlawfully from the* [Player]. *Even FIFA's attempts to urge the* [Club] *to fulfil its financial obligations failed to induce it to pay the total amount due. In view of all the circumstances pertaining to the present case and by taking into account the outstanding amount due, the Committee regards a fine amounting to CHF 25,000 as appropriate. This amount complies with the Committee's established practice.*

- *In application of art. 64 par. 1 b) of the FDC, the Committee considers a final deadline of 60 days as appropriate for the amount due to be paid to the* [Player].

- *In accordance with art. 64 par. 1 c) of the FDC and with the Circular no. 1628, the* [Club] *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.*

- *A deduction of points from the* [Club's] *first team in the national league will be automatically implemented by the* [QFA] *in case of non-payment within the stipulated deadline. Thus, once the deadline has expired, the points will be deducted automatically by the* [QFA] *without a further formal decision having to be taken nor any order having to be issued by the Committee or its secretariat.*

- *With regard to the amount of points to be deducted, art. 64 par. 3 of the FDC is applicable, whereby the number of points deducted must be proportionate to the amount owed. In the light of the foregoing criteria, regarding the amount of the fine to be imposed and in keeping with the Committee's well-established practice, a deduction of six (6) points is considered appropriate.*

- *Additionally, in case of non-compliance with the* [FIFA DRC Decision], *a ban from registering any new players, either nationally or internationally will be automatically imposed on the* [Club] *as from the first day of the next registration period following the expiry of the granted deadline.*

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

- *The* [QFA] *is hereby reminded of its obligation to automatically implement the abovementioned point deduction and transfer ban upon expiry of the final deadline without having received any proof of payment from the* [Club]. *In this respect, and for the sake of clarity, the* [QFA] *is referred to arts. 90 to 92 of the FDC in what concerns the calculation of time limits. Should the* [QFA] *fail to automatically implement said sanctions and provide the secretariat to the FIFA Disciplinary Committee with the relevant proof of point deduction and 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.*

- *The Committee decides based on art. 105 par. 1 of the FDC that the costs and expenses of these proceedings amounting to CHF 2,000 shall be borne by the* [Club]*".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

41. On 11 October 2018, the Club lodged an appeal against the Appealed Decision, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2017) (the "CAS Code"), naming FIFA as the sole respondent. In this Statement of Appeal, the Club requested a sole arbitrator to be appointed and applied for a stay of execution of the Appealed Decision.

42. On 22 October 2018, FIFA requested that any document in French belonging to the case file would not have to be translated. FIFA objected to the appointment of a sole arbitrator as it

preferred a panel of three arbitrators. Furthermore, taking into account its financial nature, FIFA noted that the Appealed Decision is not enforceable while under appeal and that such application should therefore be dismissed.

43. Also on 22 October 2018, the CAS Court Office informed the parties that, in view of their disagreement, the President of the CAS Appeals Arbitration Division, or her Deputy, would decide on the number of arbitrators.

44. On 25 October 2018, the Club informed the CAS Court Office that its application for a stay of execution of the Appealed Decision should not be considered in light of FIFA's response. Furthermore, the Club objected to FIFA's request that any document in French would not have to be translated.

45. On 29 October 2018, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the present case to a sole arbitrator.

46. On 29 October 2018, the Club filed its Appeal Brief, pursuant to Article R51 CAS Code. This document contained a statement of the facts and legal arguments giving rise to the appeal. On the basis of Article R44.3 CAS Code, the Club requested FIFA to permit the former to have access to the database of the decisions rendered by the FIFA Disciplinary Committee, at least of those rendered by the referenced judicial body between the years of 2014 and 2018.

47. On 8 November 2018, pursuant to Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the parties were informed that the arbitral tribunal appointed to decide the present matter was constituted by:

- Mr Hendrik Willem Kesler, Attorney-at-Law in Enschede, the Netherlands, as Sole Arbitrator.

48. On 15 November 2018, the CAS Court Office advised the parties that Mr Dennis Koolaard, attorney-at-law in Arnhem, The Netherlands, had been appointed as *ad hoc* Clerk.

49. On 28 November 2018, FIFA filed its Answer, pursuant to Article R55 CAS Code.

50. On 29 November and 6 December 2018 respectively, further to an enquiry from the CAS Court Office in this regard, FIFA indicated that it did not require a hearing to be held and would agree that the Sole Arbitrator would issue an award on the sole basis of the written submissions, whereas the Club requested a hearing to be held.

51. On 7 December 2018, the CAS Court Office informed the parties that the Sole Arbitrator had decided to hold a hearing.

52. On 14 December 2018, the CAS Court Office informed the parties that the Sole Arbitrator, having considered the parties' positions on this issue, had decided to dismiss the evidentiary request made by the Club at paras. 224 and 225 of its Appeal Brief and that the reasons for such decision would be indicated at the hearing or in the award.

53. On 28 January and 1 February 2019 respectively, FIFA and the Club returned duly signed copies of the Order of Procedure to the CAS Court Office.

54. On 7 February 2019, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed not to have any objection as to the constitution and composition of the arbitral tribunal.

55. In addition to the Sole Arbitrator, Mr Daniele Boccucci, Counsel to the CAS, and the *Ad hoc* Clerk, the following persons attended the hearing:

    a) For the Club:

        1) Mr André Ribeiro, Counsel

    b) For FIFA:

        1) Ms Alejandra Salmerón García, Legal Counsel FIFA Disciplinary Department;
        2) Ms Clara Gug, Legal Counsel FIFA Disciplinary Department.

56. At the outset of the hearing, the Sole Arbitrator informed the Club that its evidentiary request was dismissed because it was too broad. The Club accepted this decision and did not make any further procedural requests.

57. Although the Club initially called to be heard as witnesses Mr Fadi Douaidari, in-house lawyer of the Club, and Mr Hazem Mohamed Abouelela, General Supervisor of the Club, by video-conference, at the start of the hearing the Club informed the Sole Arbitrator that it did not deem it necessary to hear such persons.

58. Both parties were afforded full opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

59. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

60. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Club

61. In its Appeal Brief, the Club submitted the following requests for relief:

"FIRST – To confirm that the Appealed Decision is null;

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 (if applicable) 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 an amount to be duly established at discretion of the Panel.

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

FOURTH – To confirm that the Appellant shall pay a fine never higher than CHF 5,000;

FIFTH – To grant a final period of grace of 90 days to the Appellant paid the outstanding amount;

SIXTH – To set aside the imposition of any points whatsoever, as well as any transfer ban whatsoever;

SEVENTH – 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 (if applicable) paid to the CAS; and

EIGHTH – To order the Respondent to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in an amount to be duly established at discretion of the Panel".

62. The Club's Appeal Brief, in essence, may be summarised as follows:

- Pursuant to the FIFA Disciplinary Code ("FDC"), the FIFA Disciplinary Committee shall respect, among others, the principles of due process, the right to be heard, equality of treatment, legality, transparency, etc. A decision shall contain the reasons for the findings, as well as take into account important allegations and/or arguments submitted.

- A CAS panel has the authority to amend or set aside a decision rendered by the FIFA Disciplinary Committee whenever it is evidently and grossly disproportionate to the offence. This is exactly the case in the matter at hand. As to Article 64 FDC, the FIFA legislator did not establish a clear parameter regarding the dosimetry of such sanctions, except that whenever such sanction shall be applied, it has to be proportional to the outstanding amount.

- The proportionality of a sanction is to be assessed based on three components: i) the adequacy of the measure; ii) the necessity thereof; and iii) the proportionality *strictu sensu*. A certain long-standing practice may also be taken into account, but only when such decisions are in the public domain or at least accessible to the actors in the football scene. Such transparency is required under Article 15 of the Treaty on the Functioning of the European Union ("TFEU") and based on the Pechstein-decision of the European Court of Human Rights (the "ECtHR"). For the European Commission (the "EC"), transparency entails not only that proceedings before sports

governing bodies are accessible and clean, but also that the rules relating to sanctions are clear in their application and which violations would fall under minor, heavy, medium serious or very serious levels of infringement. However, in contrast to the disciplinary decisions of the IAAF, and decisions of the FIFA DRC and the FIFA Players' Status Committee, decisions of the FIFA Disciplinary Committee are not published.

- In order to impose a fine of CHF 25,000 and a six point deduction on the Club, the FIFA Disciplinary Committee alleged that *"[t]his amount complies with the Committee's established practice"*. First of all, it is not clear in which competition such points shall be deducted. It is not clear why, if the Club fails to pay the referenced amount within 60 days, a deduction of points and a transfer ban are to be imposed simultaneously. Although reference is made to the FIFA Disciplinary Committee's established practice, no reference is made to any proper decision rendered by the FIFA Disciplinary Committee in the past. This lack of transparency is inadmissible. The FIFA Disciplinary Committee also failed to argue why a transfer ban of two instead of one transfer period was imposed. FIFA uses the jurisprudence of the FIFA Disciplinary Committee only to its own and exclusive benefit. By making use of evidences or sources not available to both parties, the FIFA Disciplinary Committee unquestionably breaches its due process obligations and, in particular, the fundamental principle of equal treatment. In line with the above, any subsequent argument that may be eventually submitted by FIFA in its Answer and which rests on decisions from said database, with a view to demonstrate supposedly that the Appealed Decision complied with the *"Committee's well-established practice"* shall be fully disregarded by the Sole Arbitrator.

- The Appealed Decision is null since it clearly disrespects mandatory provisions determined by the FDC, as well as mandatory premises and principles of law, which are also mandatory in accordance with Swiss law and based upon the rules of the EC.

- With respect to the proportionality of the Appealed Decision, the Club refers to Article 101 and 102 TFEU and the Meca-Medina case in arguing that in assessing whether a sporting rule is compatible with the European Union ("EU") Competition law, one needs to make this assessment on a case-by-case basis and to take into account the individual features of each case. Since the FIFA Disciplinary Committee does not publish its decision, it is impossible to know whether such parameters are respected and thus whether the Appealed Decision complies with EU Competition law.

- In assessing the proportionality, it is also necessary to bear in mind that the outstanding amount is currently USD 675,313, since it is undisputed that the Club already paid the Player an amount of USD 778,630. The Club therefore already paid more than 55% of the amount awarded to the Player in the FIFA DRC Decision.

- As to the proportionality of the fine, the Club submits that it is unknown whether it was taken into account as a mitigating factor that the Club concluded the Payment Plan with the Player and that a reasonable part of the debt is already paid. In light of

the FIFA Disciplinary Committee's reference to the *"circumstances pertaining to the present case"* these issues are relevant and deserve a detailed clarification. The FIFA Disciplinary Committee's failure to address these issues in the Appealed Decision has bearing on the outcome of the present dispute. The Club further refers to five previous decisions of the FIFA Disciplinary Committee, on the basis of which it submits that there is no proportionality between the outstanding amount in the matter at hand and the sanction imposed because in these decisions identical or slightly higher fines of CHF 30,000 were imposed for outstanding amounts ranging from between USD 3,900,000 to USD 1,330,000, whereas the outstanding amount in the matter at hand is only USD 675,313. In the present matter the fine constitutes 3,69% of the outstanding amount, whereas this ranges from 0,64% to 1,87% in the decisions provided.

- As to the legality of the points deduction and the transfer ban, the Club submits that this has no factual or legal basis. Again, it is also not clear to what competition the 6-point deduction should apply, which is already enough to set aside the point deduction. With reference to the same five decisions of the FIFA Disciplinary Committee as mentioned above, a 6-point deduction was always imposed, whereas the outstanding amount in the present matter is much lower.

- The simultaneous sanction of deducting points and imposing a transfer ban for the same violation, amounts to a violation of the fundamental principle of *ne bis in idem*. It derives from the wording of Article 64 FDC that the imposition of a transfer ban is an alternative to the other sanctions mentioned, but cannot be imposed together with such other measures. Additionally, with reference again to the other five decisions of the FIFA Disciplinary Committee, such double sanction was not imposed on any of these clubs.

- As to the period of grace of 60-days granted to the Club before the points deduction and transfer ban is to be imposed, the FIFA Disciplinary Committee failed to provide any commentary or grounds to limit this period to 60 days only. One of the exceptional circumstances that is usually taken into account by the FIFA Disciplinary Committee is the undertaking of the debtor to pay the outstanding amount through payment of instalments with a reasonable concrete time period. Indeed, the Club paid more than half of its debt and made efforts to reach an amicable agreement with the Player. The Player ultimately only refused to negotiate a new payment plan because of the content of FIFA Circular no. 1628. Since the Club unquestionably fulfils one of the "exceptional circumstances", it deserves a period of grace of at least 90 days to pay the remaining portion of the outstanding amount to the Player.

B. FIFA

63. In its Answer, FIFA submitted the following requests for relief:

> *"1. To reject the Appellant's appeal in its entirety.*

2. *To confirm the decision 171358 PST QAT MOW rendered by the FIFA Disciplinary Committee on 13 July 2018 hereby appealed against.*

3. *To order the Appellant to bear all costs and expenses related to the present procedure".*

64. FIFA's Answer, in essence, may be summarised as follows:

- The Club's appeal primarily revolves around the idea that the elements and criteria used by the FIFA Disciplinary Committee to impose the disciplinary measures were not duly determined and thus, such procedure does not comply with the "predictability test" as a consequence of which the Appealed Decision violates the FIFA regulations and general principles of law. This test however only requested that the stakeholders subject to such provision and proceedings must know or must be able to know that a certain conduct is wrong in order for a disciplinary sanction to be validly imposed. In order 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. Reference is made to CAS jurisprudence confirming that the approach of the FIFA Disciplinary Committee in general complies with the principles mentioned above.

- The Club's argument that the principle of good governance was violated must be dismissed. This principle refers to the separation of powers, the appointment of independent members and the publication of certain reports. The Club did not bring any element which could demonstrate that the FIFA Disciplinary Committee violated any of the above principles and the Club's argument is therefore to be rejected.

- As to the transparency of the FIFA Disciplinary Committee, FIFA submits that the EU Transparency Register is irrelevant as this register has been created with purposes that are unrelated to any of the matters surrounding the present procedure. Moreover, FIFA has transparently informed in both a proactive and reactive manner about relevant decisions passed by its judicial bodies, as has been the case of the currently Appealed Decision.

- The Club's reference to the Pechstein-decision of the ECtHR is to be considered as a populist and opportunistic argument. The Pechstein-decision concerned the right of a public hearing, but the Club failed to explain the possible connection with the present case as the circumstances are completely different.

- As to the publication of jurisprudence concerning Article 64 FDC, CAS has dealt with more than 100 cases, the awards of which can be accessed in the CAS database.

- As to the Club's claims of a violation of its right to be heard and denial of justice, FIFA refers to CAS jurisprudence and argues that the Club was able to defend itself in the proceedings before the FIFA Disciplinary Committee and that an appeal for denial of justice is only possible when the authority refuses without reason to make a ruling, to inform about its lack of jurisdiction or to delay a ruling beyond a reasonable period.

- In view of the above, it is clear that the FIFA regulations have not been violated, nor any provision of Swiss law.

- The system of sanctions used by FIFA in the event of non-compliance with its decisions or those of CAS is considered lawful by the Swiss Federal Tribunal (the "SFT"). If the FIFA Disciplinary Committee is not provided with proof that the payment has been executed or that a payment plan was agreed upon, it will render a decision imposing a fine on the debtor. In this respect, the FIFA Disciplinary Committee can only take into consideration all possible facts arising after the date on which the initial decision (the FIFA DRC Decision in the matter at hand) was issued.

- The Club was ordered to pay the Player an amount of USD 1,330,000 plus interest by means of the FIFA DRC Decision that was passed on 13 October 2016. On 25 April 2017, a payment plan was reached that was not respected by the Club. Despite several reminders from FIFA, the Club still refused to pay the Player. The second payment plan agreed upon was only partially respected. The Club paid the Player an amount of USD 778,630. Since the Club failed to pay the remaining amount, it failed to comply with its obligations towards the Player. Consequently, the FIFA Disciplinary Committee imposed disciplinary measures on the Club.

- The sanctions imposed on the Club by means of the Appealed Decision are proportionate. First, the Club failed to explain the relevance of its references to Articles 101 and 102 TFEU. It is evident that EU competition law is not applicable to the present matter. Second, CAS shall only amend a disciplinary decision of a FIFA judicial body if it finds that the relevant body exceeded the margin of discretion afforded to it, which is only the case if the sanction concerned is evidently and grossly disproportionate to the offence.

- As to the proportionality of the fine, and with respect to the Club's reference to five previous decisions of the FIFA Disciplinary Committee, FIFA submits that this information has been purposely misrepresented by the Club. When these inaccuracies are taken into account, the references to the decisions where a fine of CHF 25,000 are comparable to the Appealed Decision, whereas the decisions where fines of CHF 30,000 were imposed indeed concerned much higher outstanding amounts, which confirms the proportionality and the practice of the FIFA Disciplinary Committee. In the matter at hand, the FIFA Disciplinary Committee took into account the Club's debt of USD 608,308. The fine of CHF 25,000 therefore represents 4,1% of the total amount owed. A higher fine may not have been proportionate in light of the amount of the debt, while a meagre fine would contradict the principle of repression and prevention and would fail to encourage the prompt fulfilment of obligations. FIFA refers to 10 other decisions of the FIFA Disciplinary Committee where similar outstanding amounts as in the present matter were at stake and where a fine of CHF 25,000 was imposed on all these clubs. The fine is therefore in full compliance with the FIFA Disciplinary Committee's established practice.

- As to the period of grace, FIFA submits that the Club's attempts to reach an amicable agreement cannot be taken into account. The Club also does not prove what difference an additional period of 30 days would make on its duty to pay its debts. FIFA refers to CAS jurisprudence in this respect. It was also taken into account in the Appealed Decision that the amount of USD 778,630 was only paid to the Player after 538 days. In the following 237 additional days no remaining payment was made. In light of this lengthy period, it is remarkable that the Club claims that the period of grace would only be proportionate if 30 additional days would be granted. In addition, in the 10 decisions of the FIFA Disciplinary Committee, it always only imposed 30 or 60-day periods of grace. A longer period of grace in the matter at hand would not be fair towards the Player.

- As to the point deduction, Article 64(1)(c) FDC constitutes a clear legal basis for the deduction of points. A six points deduction was considered to be an appropriate sanction in line with the practice of the FIFA Disciplinary Committee and CAS. Again with reference to the ten decisions of the FIFA Disciplinary Committee in other cases, in all these cases a six points deduction was imposed. This sanction was also not considered disproportionate by CAS in appeals filed in cases where such points deduction was imposed. Finally, any deduction of points has to be applied to *"the* [Club's] *first team in the national league"* as clearly mentioned in para. 11 of the Appealed Decision.

- As to the transfer ban, FIFA refers to FIFA Circular no. 1628, in accordance with which FIFA explained that in case of a violation of Article 64 FDC, the FIFA Disciplinary Committee would *"pronounc[e] 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 points deduction and/or a transfer ban that will be effective only as from expiry of the final deadline"*. The Club's reference to the *ne bis in idem* principle is incorrect and does not stand. This principle precludes that two different decisions may sanction the same offence, it does not affect the FIFA Disciplinary Committee's discretion to impose several sanctions in the same decision. Due to the nature of the Club's violation; a failure to fulfil its financial obligations that are ultimately derived from the international transfer of players, it is evident that a ban on such type of transactions is pertinent and appropriate, especially taking into account that such sanction can be avoided once the debt is paid in full. One could even argue that not imposing sporting sanctions in such cases is disruptive to the integrity of competitions, as a club – like the Club – which breaches its obligations towards players by not paying the respective agreed remuneration without a sanction imposed would have a competitive advantage in comparison to a club that complies with its obligations to players all the time. With reference to the CAS award issued in the proceedings referenced as *CAS 2017/A/5011*, FIFA submits that a transfer ban only prohibits a club from registering new players (and thus from spending money) but not from transferring players to other clubs (and thus not from earning money), and that such ban therefore most likely, at least on the short-term, does not negatively affect the club's balance sheets, but rather its competitiveness on the field of play. As a result of the above, FIFA is of the opinion that the transfer ban imposed on the Club – which

will only be implemented after the 60 day deadline elapses and may be lifted as soon as the full debt is paid – meets the proportionality criteria set by CAS in previous awards.

V. JURISDICTION

65. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) FIFA Statutes (2018 edition), providing that *"[a]ppeals 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"* and Article R47 CAS Code.

66. Article 64(5) of the FIFA Disciplinary Code (2017 edition – the "FDC") determines as follows:

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

67. In view of Article 64(5) FDC and because the Appealed Decision was based on the application of Article 64 FDC, the Club was not required to file an appeal with the FIFA Appeals Committee before challenging the Appealed Decision before CAS. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties.

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

VI. ADMISSIBILITY

69. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

70. It follows that the appeal is admissible.

VII. APPLICABLE LAW

71. The Club submits that, according to Article R58 CAS Code and Article 57(2) FIFA Statutes, the Sole Arbitrator shall apply the FDC and, alternatively, where necessary, Swiss law. Bearing in mind that the current version of the FDC entered into force on 9 May 2017, the *"former version of the referenced Code shall apply to the facts and the ongoing one shall apply to the proceedings of this Appeal".*

72. The Club also argues that, additionally, considering that the matter at hand involves the issue of *"specificity of sport"* and triggers issues covered and recognised under the TFEU by the EC, it is of the utmost importance to apply also these rules.

73. FIFA argues that, according to Article 57(2) FIFA Statutes, the provisions of the CAS Code shall apply to the proceedings. Pursuant to the same article, CAS shall primarily apply the

various regulations of FIFA and, additionally, Swiss law. FIFA therefore submits that the applicable law should consequently be the FIFA regulations and additionally Swiss law.

74. FIFA does not agree with the Club's position that the TFEU would constitute an applicable law in the present case. Not only does the Club fail to demonstrate and argue why EU competition law would be applicable to the present matter, but it has also disregarded the fact that Switzerland is not a member of the EU and, as a result, the Sole Arbitrator does not have the need or obligation to analyse the TFEU. FIFA submits that, in any event, the cumulative conditions under which foreign law should be applied are not met. In particular, it cannot be established that there is a close connection between the subject matter of the dispute and the territory where the mandatory provisions of foreign law are in force. Moreover, despite the fact that EU competition law may be generally considered to be binding on EU courts, the present matter does not concern any European stakeholder nor is it in any way related to competition law issues. FIFA further submits that the Club failed to prove how the mentioned provisions of the TFEU would have been violated.

75. Article R58 CAS Code provides the following:

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

76. Article 57(2) FIFA Statutes stipulates 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".*

77. The Sole Arbitrator is satisfied that primarily the various regulations of FIFA are applicable to the substance of the case, in particular the FDC, and additionally Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

78. As to the application of the TFEU, the Sole Arbitrator will address the applicability thereof in the merits of the present arbitral award below where the Club specifically relies on the TFEU.

VIII. MERITS

A. The Main Issues

79. The main issues to be resolved by the Sole Arbitrator are:

i. Is the Appealed Decision to be declared null and void?

ii. If not, is the combination of sanctions imposed on the Club by means of the Appealed Decision disproportionate?

i. Is the Appealed Decision to be declared null and void?

80. Article 64 FDC determines the following:

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

81. The Sole Arbitrator observes that the violation committed by the Club as such is not disputed, i.e. the Club does not contest that it failed to fully comply with the FIFA DRC Decision of 13 October 2016 and that it still owes the Player an amount of USD 675,877, plus interest.

82. Insofar the Club submits that the FIFA Disciplinary Committee shall respect principles of due process, right to be heard, equality of treatment, legality, transparency, mandatory provisions of Swiss law and the FDC, the Club is of course entirely correct. Any adjudicatory body should comply with such principles and the rules applicable to it. The Sole Arbitrator however finds that the Club failed to specify (and indeed prove) which of these principles were violated by the FIFA Disciplinary Committee and why.

83. The Sole Arbitrator finds that the Appealed Decision is sufficiently reasoned. Indeed, the most important element in deciding what sanctions are to be imposed on a club for violating Article 64 FDC is the outstanding amount.

84. The Sole Arbitrator feels himself comforted in this conclusion by CAS jurisprudence:

> *"*[…] *[T]he reference to the "outstanding amounts due" is sufficient to corroborate the sanctions imposed. Indeed, the Panel finds that the "outstanding amounts due" constitutes the most logical nexus between the severity of the violation committed and the sanctions to be imposed"* (CAS 2018/A/5551, para. 78).

85. The Sole Arbitrator also finds that the Club's argument that the Appealed Decision must be annulled, because it was not clear to the Club what sanction could be imposed on it for violating Article 64 FDC, must be dismissed.

86. The Sole Arbitrator finds that it was sufficiently clear from the wording of Article 64 FDC what sanctions the Club could more or less expect, i.e. a combination of a fine, a deduction of points and a transfer ban. Furthermore, FIFA provided more transparency about the procedure to be followed in case of a violation of Article 64 FDC by publishing FIFA Circular no. 1628 on 9 May 2018.

87. The Sole Arbitrator agrees with the Club that it would be more transparent if the FIFA Disciplinary Committee would publish its decisions, in particular if the FIFA Disciplinary Committee wishes to refer in its decisions to its "established practice". The Sole Arbitrator however finds that this is not *per se* required in order for the FIFA Disciplinary Committee to lawfully impose sanctions on the Club for violating Article 64 FDC. Accordingly, the Sole Arbitrator does not find that the Club was unequally treated by the FIFA Disciplinary Committee or that the FIFA Disciplinary Committee did not act transparently.

88. Insofar the Club submits that the FIFA Disciplinary Committee violated Article 15 TFEU and Article 101 and 102 TFEU, the Sole Arbitrator finds that such arguments must be dismissed.

89. Article 15 TFEU determines as follows :

> *"1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.*
>
> *2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.*
>
> *3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure. Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph".*

90. Article 101 TFEU determines the following:

> *"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development, or investment;*
>
> *(c) share markets or sources of supply;*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*
>
> *3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
>
> *- any agreement or category of agreements between undertakings,*
>
> *- any decision or category of decisions by associations of undertakings,*
>
> *- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
>
> *(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
>
> *(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".*

91. Article 102 TFEU determines the following:

> *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
>
> *Such abuse may, in particular, consist in:*
>
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

92. The Sole Arbitrator has serious doubts about the direct applicability of such provision to the proceedings before the FIFA Disciplinary Committee and the present proceedings before CAS. Indeed, the Sole Arbitrator finds that such applicability is not obvious and the Club failed to prove that any such provisions would be directly applicable in the matter at hand. For instance, the Club failed to establish if and how the Appealed Decision or the conduct of the FIFA Disciplinary Committee has any impact on the European internal market or would otherwise violate EU Competition Law. In fact, the Club did not invoke the provisions paraphrased above anymore during the hearing. The Sole Arbitrator finds that the Club cannot simply mention a provision of any set of international or European legislation out of the blue, without any legal analysis whatsoever and expect the Sole Arbitrator to do so on his own initiative.

93. Be it as it may, the Sole Arbitrator in any event does not deem it necessary to determine this issue in a conclusive manner, because he finds that the Club failed to establish that the FIFA Disciplinary Committee did not act in accordance with Article 15 TFEU and the EU Transparency Register by failing to publish its decisions publicly. The Sole Arbitrator finds that, based on the decisions of the FIFA Disciplinary Committee that were publicly available (through arbitral awards issued by CAS in appeal or otherwise), the Club could reasonably anticipate that sanctions, such as the ones imposed on it by means of the Appealed Decision, would be imposed on it. The Sole Arbitrator has no doubt in confirming that the Club could reasonably have anticipated the imposition of such sanctions based on a reading of Article 64 FDC.

94. Indeed, the Club itself submitted five decisions of the FIFA Disciplinary Committee as evidence in the present appeal arbitration proceedings in which fines of CHF 25,000 or CHF 30,000 were imposed on clubs and where six points were deducted. It must be understood from the Club's reliance on such decisions that it was aware that it was not uncommon for the FIFA Disciplinary Committee to impose fines of around CHF 25,000 or CHF 30,000 on clubs for violating Article 64 FDC.

95. Although the proportionality of the sanctions imposed on the Club by means of the Appealed Decision will be addressed in more detail below, the Sole Arbitrator concludes that such sanctions were not imposed so unexpectedly that the Appealed Decision would have to be declared null and void.

96. Consequently, the Appealed Decision is not to be declared null and void.

ii. If not, is the combination of sanctions imposed on the Club by means of the Appealed Decision disproportionate?

97. The Sole Arbitrator observes that, in case its primary request for relief that the Appealed Decision be declared null and void is dismissed, the Club, on a subsidiary basis, seeks to have the sanctions imposed on it by the FIFA Disciplinary Committee reduced, because it considers such sanctions to be disproportionate.

98. The Sole Arbitrator will therefore embark on assessing the proportionality of the sanctions imposed on the Club, i.e. a fine of CHF 25,000, a potential 6-point deduction and a potential transfer ban of two registration periods. The Sole Arbitrator will address the proportionality of each of these sanctions individually and collectively, commencing with an individual analysis.

a) The proportionality of the fine of CHF 25,000

99. The Sole Arbitrator notes that the Club maintains that the fine of CHF 25,000 imposed on it was disproportionate, in particular because identical fines were imposed on other clubs that had much higher outstanding amounts.

100. Although each case needs to be assessed on its own merits, the Sole Arbitrator finds that if such contention would be true, this could potentially indeed make the fine imposed on the Club disproportionate.

101. The Club submitted the following combined overview:

Case number	Outstanding amount	Fine	Percentage of Fine	Points Deducted
180196 PST BRA ZH	USD 3,400,000	CHF 30,000	0.88%	6 points
171358 PST QAT MOW	USD 1,330,000	CHF 25,000	1.87%	6 points
170342 PST XXX ZH	USD 2,500,000	CHF 30,000	1.2%	6 points
160475 PST XX TKY	USD 2,500,000	CHF 30,000	1.2%	6 points
150324 PST XXX ZH	USD 3,900,000	CHF 25,000	0.64%	6 points

102. However, after having studied FIFA's reservations about the Club's contentions in this regard, the Sole Arbitrator finds that the Club's reliance on other decisions of the FIFA Disciplinary Committee is factually incorrect and that the inferences drawn from such comparison by the Club are therefore flawed.

103. Indeed, in particular the facts as submitted by the Club underlying the cases where a fine of CHF 25,000 was imposed are wrong. It is strange in the first place that the Club relies on the

decision referenced as 171358 PST QAT MOW, because this is the Appealed Decision, and still "forgot" to take into account that a partial payment was made due to which the outstanding amount of USD 1,330,000 was reduced significantly. Such decision can therefore not serve as a reference to compare the Appealed Decision.

104. Also the Club's analysis of the decision referenced as 150324 is flawed. The Club based itself on the amount that was initially outstanding, while it appears from the decisions rendered that the FIFA Disciplinary Committee took into account that partial payments in a total of about USD 3,400,000 were made, by means of which the outstanding amount was significantly reduced. The correct facts would lead to the following correction:

Case number	Outstanding amount[1]	Fine	Percentage of Fine	Points Deducted
150324 PST XXX ZH	CHF 500,792	CHF 25,000	4.99%	6 points

105. In view of such corrected comparison, the Sole Arbitrator finds that it cannot be said that the fine of CHF 25,000 that was imposed on the Club was disproportionally high in comparison with other cases if one looks at the outstanding amount. Indeed, the outstanding amount in the present case is approximately USD 675,877, which amounts to approximately CHF 677,837 at the exchange rate of the date of the Appealed Decision, which means that the fine amounted to approximately 3.69%, i.e. lower than the fine imposed in the decision mentioned above.

106. The fact that fines of CHF 30,000 were imposed on clubs that had much higher outstanding amounts is not considered relevant by the Sole Arbitrator, because FIFA clarified that it is careful in not imposing high fines, because high fines may end up to be counterproductive.

107. In addition, FIFA referred to a range of other decisions of the FIFA Disciplinary Committee, showing that the fine and point deduction imposed on the Club was fully in line with its practice in cases where similar amounts were outstanding:

Case number	Outstanding amount[2]	Fine	Percentage of Fine	Points Deducted
110441 PST ZH	CHF 586,000	CHF 25,000	4.27%	6 points
120510 PST ZH	CHF 598,663	CHF 25,000	4.18%	6 points
150324 PST ZH	CHF 500,792	CHF 25,000	4.99%	6 points
150470 PST ZH	CHF 682,988	CHF 25,000	3.66%	6 points

1 Converted to the outstanding amount in CHF.
2 Converted to the outstanding amount in CHF.

170151 PST ZH	CHF 506,650	CHF 25,000	4.93%	6 points
170192 PST ZH	CHF 555,445	CHF 25,000	4.50%	6 points
170953 PST ZH	CHF 579,300	CHF 25,000	4.32%	6 points
171086 PST ZH	CHF 536,538	CHF 25,000	4.66%	6 points
171396 PST ZH	CHF 537,311	CHF 25,000	4.65%	6 points
180293 PST ZH	CHF 586,784	CHF 25,000	4.26%	6 points

108. Accordingly, also considering that the calculations were not disputed by the Club, the Sole Arbitrator finds that the fine of CHF 25,000 is not disproportionate in comparison with such other decisions.

109. The Sole Arbitrator took note of the fact that the Club paid an amount of USD 778,630 to the Player after issuance of the FIFA DRC Decision, but before the Appealed Decision was pronounced. The Sole Arbitrator finds that this aspect should obviously be taken into account in determining the appropriate fine. However, as appears from the Appealed Decision (see para. I.17 of the Appealed Decision), this aspect was indeed duly considered by the FIFA Disciplinary Committee. Based on the decisions of the FIFA Disciplinary Committee provided by the Club itself, it appears likely that the FIFA Disciplinary Committee would have imposed a higher fine of CHF 30,000 on the Club if it had not partially paid off its debt towards the Player.

110. The Sole Arbitrator does not find that a partial payment of the total outstanding amount *per se* warrants a reduction of the fine that would normally be imposed, because the amount owed to the Player is still significant.

111. In fact, the Sole Arbitrator considers it to be an aggravating factor that the Club concluded a Settlement Agreement and a Payment Plan with the Player after issuance of the FIFA DRC Decision, while it did not comply with any of the obligations set out in the Settlement Agreement and only partially complied with its obligations under the Payment Plan. Accordingly, the Club breached three subsequent agreements with the Player.

112. Finally, the fine of CHF 25,000 amounts to approximately 3,6% of the outstanding amount, whereas, as mentioned by FIFA, it has already been determined in CAS jurisprudence that a fine of 4.37% for a violation of Article 64 FDC was not disproportionate (CAS 2018/A/5663).

113. Indeed, the Sole Arbitrator finds that the FIFA Disciplinary Committee was careful in not imposing a fine that was too high, because, as stated by FIFA itself, high fines may indeed end up to be counterproductive. The Sole Arbitrator however finds that a fine of CHF 25,000 does not seriously limit the Club's abilities to pay the Player the amount of USD 675,877, plus interest.

114. Consequently, the Sole Arbitrator finds that the fine of CHF 25,000 that was imposed on the Club by means of the Appealed Decision is not disproportionate.

b) The proportionality of the 60-day period of grace

115. The Sole Arbitrator does not find a period of grace of 60 days to pay its debt to the Player before imposing additional sanctions on the Club to be unreasonable. No specific reasoning in this regard from the FIFA Disciplinary Committee was required.

116. The only mandatory aspect for the FIFA Disciplinary Committee was that, in accordance with Article 64(1)(b) and (c) FDC, a period of grace had to be granted before further sanctions could be pronounced against the Club. This aspect was duly complied with in the Appealed Decision.

117. Also, the Sole Arbitrator notes that in the cases relied upon by FIFA in para. 105 above, the FIFA Disciplinary Committee applied periods of grace of 30 or 60 days, but never more. Accordingly, also in comparison with other decisions, the period of grace granted to the Club in the Appealed Decision does not seem disproportionally short at all.

118. In any event, the Sole Arbitrator finds it quite hypocrite from the Club to demand an additional 30-day period of grace, while it already failed to comply with its obligations since 13 October 2016 (i.e. the date the FIFA DRC Decision was pronounced). The Club did not bring forward any argument why an additional period of grace of 30 days would make any difference.

119. Consequently, the Sole Arbitrator finds that a period of grace of 60 days is not disproportionate.

c) The proportionality of the 6 point deduction

120. As to the proportionality of the points deduction, it should first of all be clarified that no points deduction has been imposed on the Club yet. Such sanction will only follow automatically if the Club fails to comply with its obligations within the additional period of grace of 60 days. Accordingly, the Club can still avoid a points deduction by fully complying with the FIFA DRC Decision.

121. Insofar the Club submits that there is no legal basis for the imposition of a points deduction, the Club is wrong. Article 64(1)(c) FDC determines 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"*. Accordingly, on the basis of this provision, the FIFA Disciplinary Committee does not even have discretion to decide on whether or not points are to be deducted, but the imposition of a points deduction or relegation is mandatory. The imposition of a points deduction can therefore certainly not come as a surprise for the Club.

122. The Sole Arbitrator finds that it is sufficiently clear from the content of the Appealed Decision that 6 points should be deducted from the points total of the Club's first team in the relevant domestic league in Qatar. The Sole Arbitrator finds that such inference can easily be drawn from the fact that the QFA is responsible to implement such points deduction, if necessary. If points were to be deducted from the Club in an international competition, the QFA would not

have been order to implement it. It is also not feasible that the FIFA Disciplinary Committee could have referred to the domestic cup tournament, because such competition is played on a knock-out basis, as opposed to a league structure on the basis of points.

123. As to the comparison made by the Club between the Appealed Decision and other decisions of the FIFA Disciplinary Committee regarding the points deduction, the Sole Arbitrator observes that it appears both from the decisions provided by the Club as well as from the decisions provided by FIFA, that the FIFA Disciplinary Committee appears to always deduct six points when the outstanding amount if similar to the one in the matter at hand.

124. The Sole Arbitrator finds that there is in principle nothing wrong with such consistent practice and does not consider a deduction of 6 points in the matter at hand to be disproportionate.

125. Consequently, the Sole Arbitrator finds that a potential 6-point deduction is not disproportionate.

d) The proportionality of the two-period transfer ban

126. Also in respect of the transfer ban it should be clarified that such sanction has not been imposed on the Club yet. Such sanction will only follow automatically if the Club fails to comply with its obligations within the additional period of grace of 60 days. Accordingly, the Club can still avoid the imposition of a transfer ban by fully complying with the FIFA DRC Decision.

127. Insofar the Club submits that the simultaneous imposition of a points deduction and a transfer ban for the same violation is a violation of the legal principle of *ne bis in idem*, the Sole Arbitrator finds that such argument must also be dismissed.

128. The principle of *ne bis in idem* prevents one from being sanctioned twice for the same violation. This does not mean that a court cannot impose multiple sanctions for the same violation, but it prevents a court from imposing additional sanctions on the perpetrator for the same violation once he has already been sanctioned for such violation by the same court. Accordingly, the joint imposition of a transfer ban as well as a point deduction does not constitute a violation of the principle of *ne bis in idem*.

129. Insofar the Club submits that in none of the decisions referred to by the Club and FIFA such triple sanction was pronounced, the Club is correct. In that sense, it must be accepted that the FIFA Disciplinary Committee deviated from its previous common practice. The Club described this argument as its main argument during the hearing.

130. The Sole Arbitrator finds that a common practice may also be terminated or amended. In this respect, the Sole Arbitrator fully agrees with the reasoning of the sole arbitrator in CAS 2017/A/A/5063, an award mentioned in the Club's submissions:

> *"The Sole Arbitrator finds that in order to terminate a common practice similar principles apply as for the amendment of rules and regulations, since the effect following from a termination of a common practice is similar to a change of rules or regulations. At what point in time a change of rules becomes binding upon the*

members of an association is questionable at first sight, since the Articles 60 et seq. of the Swiss Civil Code do not explicitly regulate this issue. However, in order for a change of rules to become binding upon the association's members it does not suffice that the competent (legislative) body within the association adopts the amendments. Instead, the new rules only take effect once the members of the association had a chance to obtain knowledge of the contents of the new rules. This follows from the fact that the rules and regulations of an association are comparable – at least with respect to their effects – to general terms and conditions in a contract (cf. BK-ZGB/RIEMER, 1990, ST n° 346 "Da Vereinsstatuten […] durchaus mit solchen AGB vergleichen lassen, muss ein unerfahrenes Vereinsmitglied vor ungewöhnlichen Klauseln […] geschützt werden können […]"; Verwaltungsgericht Bern causa sport 2006, 50, 56: "Da Vereinsstatuten und –reglemente sich mit Allgemeinen Geschäftsbedingungen vergleichen lassen […]"; THALER D., Athletenvereinbarungen und Athletenerklärungen, in: Sport und Recht, 4. Tagungsband 2007, S. 19, 32: "Soweit der regelanerkennungs-Vertragsteil in Frage steht … können aber (im Einzelfall sachgerechte) vereinsrechtliche Überlegungen … mit berücksichtigt werden, sowie insbesondere die Grundsätze über allgemeine Geschäftsbedingungen").

This view is supported now by the jurisprudence of state courts:

> *["Da Vereinsstatuten und – Reglemente sich mit Allgemeinen Geschäftsbedingungen vergleichen lassen, muss ein Schutz vor ungewöhnlichen Klauseln gewährt werden …" (cf. Gerichtskreis X Thun, causa sport 2006, 50, 56)].*

and by CAS jurisprudence (cf. TAS 2012/A/2720, no. 10.9 et seq.). The question, thus, not only is whether the change in practice was adopted by the competent body of the association, but whether – in addition – the termination of the past practice was properly communicated to the relevant stakeholders" (CAS 2017/A/5063, para. 72-73 of the abstract published on the CAS website).

131. Applying such legal background to the matter at hand, the Sole Arbitrator observes that, on 9 May 2018, FIFA informed its members by means of FIFA Circular no. 1628 that it would change its policy in respect of violations of Article 64 FDC. This circular makes a distinction between the "Current procedure" and the "New procedure" that would be implemented as from 23 May 2018.

132. Under the "Current procedure", the FIFA Disciplinary Committee *"pronounced a sanction against the debtor, by means of which the latter was ordered to pay a fine and granted a final period of grace to settle its debt to the creditor. In addition, the debtor club was inter alia informed that, should the payment not be made by the stipulated deadline,* ***a point deduction*** *would be imposed upon the creditor's request".* (emphasis added by the Sole Arbitrator)

133. Whereas under the "New procedure", 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"* (emphasis added by the Sole Arbitrator).

134. Accordingly, whereas under the old policy solely a points deduction would be imposed on the perpetrator of Article 64 FDC, under the new policy it was possible to impose a points deduction and/or a transfer ban.

135. In the matter at hand, the FIFA Disciplinary Committee indeed used its discretion under the new policy and imposed a point deduction as well as a transfer ban on the Club. The Sole Arbitrator finds that the issuance of FIFA Circular no. 1628 was sufficient to justify a deviation from its previous policy.

136. It further appears that the FIFA Disciplinary Committee indeed applied such new practice in general, and not only on the Club, because FIFA issued a press release on its website on 19 July 2018, indicating that, following the publication of FIFA Circular 1628 in May 2018, transfer bans had been imposed on six clubs (including the Club) for violating Article 64 FDC.

137. Furthermore, the legal basis for imposing a transfer ban was already there before issuing FIFA Circular 1628 since Article 64(1)(c) FIFA Disciplinary Code determines as follows: *"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"*. It was therefore not necessary for FIFA to change its rules in order to implement a **change in its policy**, as indicated in FIFA Circular 1628.

138. The Sole Arbitrator finds the imposition of a two-period transfer ban also not unreasonable. In fact, the Sole Arbitrator considers the imposition of a transfer ban to be an appropriate sanction in the context of a violation of Article 64 FDC because, as already determined by another CAS panel in CAS 2017/A/5011, *"a transfer ban only prohibits a club from registering new players (and thus from spending money) but not from transferring players to other clubs (and thus not from earning money), and therefore most likely, at least on the short-term, does not negatively affect the Club's balance sheets, but rather its competitiveness on the field of play"*.

139. Indeed, while the Club does not comply with its payment obligations, its competitors do. To a certain extent, this may create an unfair advantage for the Club, and this unfair disadvantage is justifiably corrected by means of the imposition of sporting sanctions.

140. Finally, the Sole Arbitrator does not find it to be disproportionate that a two-period transfer ban may be imposed, as a one-period transfer ban, in particular if this would be a mid-season transfer period, could legitimately be considered as having a too small deterrent effect on the Club to encourage it to finally settle its debts towards the Player.

141. Consequently, the Sole Arbitrator finds that the two-period transfer ban imposed on the Club is not disproportionate.

e) The collective proportionality of the sanctions imposed on the Club

142. The Sole Arbitrator is fully aware that the combination of sanctions and possible future sanctions imposed by means of the Appealed Decision in case of continued non-compliance with the FIFA DRC Decision is severe.

143. However, the Club also committed a serious infringement by continuously failing to comply with the FIFA DRC Decision and thereby breaching Article 64 FDC.

144. The Sole Arbitrator took note of the Club's argument that it is currently encountering financial difficulties and that it is therefore currently not in a position to pay its debts. However, the Sole Arbitrator does not deem it necessary to address this argument.

145. The Sole Arbitrator also notes that the only sanction that is currently imposed on the Club is a fine of CHF 25,000. The points deduction and transfer ban will only be imposed in case on continued non-compliance of the Club. In any event, Article 64 FDC clearly indicates that a violation of such provision could result in a combination of a fine, a points deduction or relegation and a transfer ban.

146. Taking into account such gradual increase in the severity of sanctions imposed on the Club, the Sole Arbitrator finds that the combination of sanctions imposed on the Club by means of the Appealed Decision is not disproportionate.

B. Conclusion

147. Based on the foregoing, the Sole Arbitrator holds that:

i. The Appealed Decision is not to be declared null and void.

ii. The combination of sanctions imposed on the Club by means of the Appealed Decision is not disproportionate.

148. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 11 October 2018 by Club Al Kharaitiyat against the decision issued on 13 July 2018 by the Disciplinary Committee of the Fédération Internationale de Football Association is dismissed.

2. The decision issued on 13 July 2018 by the Disciplinary Committee of the Fédération Internationale de Football Association is confirmed.

(…)

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