Arbitration CAS 2018/A/5864 Cruzeiro E.C. v. Fédération Internationale de Football Association (FIFA), award of 13 February 2019

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Disciplinary sanctions for failure to comply with a CAS decision
CAS power of review according to Article R57 of the CAS Code
No proof of exceptional circumstances justifying a more lenient sanction
No need for FIFA to define "well established practice"
Predictability of sanctions provided for by the FIFA Disciplinary Code (FDC)
Proportionality of the sanction imposed on the club

1. **According to the wording of Article R57 of the CAS Code, the CAS Panel has full power to review the facts and the law. It is empowered to deal with the matter *de novo*. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. A panel may decide not to send the matter back to the first instance decision maker especially where no special circumstances warrant such referring back and the referral would only delay proceedings further and ask the FIFA DC to perform a task that the panel itself is entitled, fully able and willing to perform.**

2. **Pursuant to Article 8 of the Swiss Civil Code, a person or entity has the burden of proof in establishing exceptional circumstances justifying more lenient sanctions. A fall in the value of the national currency cannot be a justification for non-payment, or amounts to *"exceptional circumstances"*. The fluctuations of foreign currency are a standard risk in business dealings. Likewise, exceptional circumstances are not proven where a club fails to submit any evidence that there are government imposed restrictions on making payments. A lack of financial means does not justify failure to meet financial obligations. Lastly, a club should not deserve any credit for not using any *"subterfuge"* such as entering into bankruptcy proceedings to avoid paying its creditor especially where that club has entered into a long, drawn out legal dispute through the CAS and FIFA which has resulted in a significant delay in paying the debt it undoubtedly owes to its creditor.**

3. **There is no need for FIFA to define the term *"well established practice"*. The term is plainly a reference to FIFA Disciplinary Committee (FIFA DC) jurisprudence in similar cases. It is, in that sense, akin to consistent CAS jurisprudence that CAS panels rely on. There is nothing controversial with that term, nor does the FIFA DC's reliance on it automatically result in sanctions being disproportionate or challengeable. The sanctions are ultimately decided by the FIFA DC on a case by case basis, with reference to the outcomes in similar matters where debtors failed to pay a similar**

amount of debt. Parties have the right to appeal those decisions to the CAS. The CAS panel in the appeal proceedings then assesses the sanctions imposed by the FIFA DC to determine if they were disproportionate or not.

4. In order for disciplinary provisions and sports organisations to be compliant with the principle of *nulla poena sine lege*, the stakeholders subject to such provisions and proceedings must know or be able to know that a certain conduct is wrong. In this respect, the FIFA Disciplinary Code (FDC), and the sanctions that can be imposed under the FDC, clearly satisfy the *"predictability test"*. Firstly, the Swiss Federal Tribunal has deemed the system of sanctions used by FIFA in the event of non-compliance with its decisions or those of CAS as lawful. Secondly, it is not necessary for the principles of predictability and legality to be respected that one 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. Fundamental principles 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 has the discretion to adjust the sanction applicable to the individual behaviour is not inconsistent with those principles.

5. The sanctions imposed by the FIFA DC can only be amended by a CAS panel if the sanction(s) concerned is (are) evidently and grossly disproportionate to the offence. A club's position that a more lenient approach than in the appealed decision would be appropriate is severely undermined by the fact that more than 2 years have elapsed since the FIFA decision and over 18 months have passed since the CAS award was issued without any payment being made whatsoever. The club's failure to agree a payment plan or make any payment whatsoever to its creditor to date significantly weakens its position regarding proportionality.

I. PARTIES

1. Cruzeiro E.C. (the "Club" or the "Appellant") is a professional football club with its registered office in Belo Horizonte, Brazil. The Club is an affiliated member of the Confederação Brasileira de Futebol (the "CBF"), which in turn is affiliated to Fédération Internationale de Football Association.

2. Fédération Internationale de Football Association ("FIFA" or the "Respondent") is the governing body of world football and has its registered office in Zurich, Switzerland.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and

allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. Proceedings before the FIFA Players' Status Committee

4. On 22 November 2016, the Single Judge of the FIFA Players' Status Committee (the "PSC") decided on the dispute between the club Atlético Atenas ("Atenas") and the Club as follows (the "FIFA PSC Decision"):

> *"1. The claim of* [Atenas]*, is partially accepted.*
>
> *2. The* [Club], *has to pay to* [Atenas]*,* ***within 30 days*** *as from the date of notification of this decision, the amount of USD 3,400,000 plus 5% interest p.a. on said amount as from 11 July 2015 until the date of effective payment.*
>
> *3. If the aforementioned sums, plus interest are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claims lodged by* [Atenas]*, are rejected.*
>
> *5. The final costs of the proceedings, amounting to CHF 20,000, are to be paid by the* [Club] ***within 30 days*** *of notification of the present decision as follows:*
>
> *5.1 The amount of CHF 15,000 has to be paid to FIFA to the following bank account* (…)
>
> *5.2 The amount of CHF 5,000 has to be paid directly to* [Atenas].
>
> *6.* [Atenas] *is directed to inform the* [Club] *directly and immediately of the account number to which the remittances are to be made in accordance with the above points 2. and 5.2. and to notify the Single Judge of the Players' Status Committee of every payment received".*

B. First proceedings before the Court of Arbitration for Sport

5. On 13 February 2017, the Club filed an appeal at the Court of Arbitration for Sport (the "CAS") against Atenas in relation to the FIFA PSC Decision.

6. On 11 July 2017, the CAS ruled as follows (the "CAS Award"):

> *"1. The appeal filed by* [the Club] *on 3 February 2016 against the* [FIFA PSC Decision] *is dismissed.*
>
> *2.* [The FIFA PSC Decision] *is confirmed.*

3. *The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be paid in full by* [the Club].

4. [The Club] *is ordered to pay an amount of CHF 4,000 to* [Atenas] *as contribution towards the costs and legal and other expenses incurred in connection with these arbitration proceedings.*

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

7. On 31 August 2017, Atenas informed the FIFA PSC of the Club's failure to comply with the CAS Award.

8. On 4 October 2017, Atenas requested the case be forwarded to the FIFA Disciplinary Committee (the "FIFA DC") in view of the failure of the Club to fulfil its debt towards Atenas.

9. On 14 November 2017, Atenas was informed that it could not be established that it effectively remitted its bank details to the Club in order for the latter to proceed with the payment of the amounts due and therefore was informed that the FIFA PSC would only be able to forward the matter to the FIFA DC once it had received the requested documentation.

10. On 21 November 2017, Atenas forwarded the requested information to the FIFA PSC.

11. On 28 November 2017, the Club was urged to pay the outstanding amounts to both Atenas and FIFA before 18 December 2017.

12. On 19 December 2017, the parties were informed by the FIFA PSC that the matter was being forwarded to the FIFA DC for consideration and a formal decision.

13. On the same day and on 8 March 2018, Atenas confirmed that the amount due was still outstanding.

C. Proceedings before the FIFA Disciplinary Committee

14. On 26 April 2018, as the amounts due were not paid to Atenas nor to FIFA, the FIFA DC opened disciplinary proceedings against the Club due to its failure to respect the CAS Award. By means of that correspondence, the Club was urged to pay the amount due to Atenas by 10 May 2018 at the latest and was informed that the case would be submitted to a member of the FIFA DC once the time limit had expired. Moreover, the Club was informed that the FIFA DC would take a decision based on the documents in its possession, should it fail to submit any statement or pay the outstanding amount by the specified deadline.

15. On 10 May 2018, the Club informed the FIFA DC that, due to a *"monetary financial turbulence"* caused by the Brazilian economic crisis, it could not comply with its financial obligations with regard to the transfer agreement. Moreover, the Club asked that these *"special circumstances"* be taken into account in the disciplinary proceedings. It also requested confirmation that *"there is no factual nor legal basis to CRUZEIRO pays any fine […] there is no factual nor legal basis to impose any sanction whatsoever, which deducts from CRUZEIRO any points (or relegation to a lower division) in the*

domestic Brazilian National Championship". Additionally, the Club requested to be granted a *"period of grace of 150 days as from the notification of any decision"* to comply with the payment of the outstanding amount due to Atenas.

16. On 17 May 2018, Atenas informed the FIFA DC that the amount due was still outstanding.

17. On 22 May 2018, the FIFA DC urged the Club for the final time to pay by 1 June 2018 at the latest the outstanding amounts due and to provide any copy of the relevant proof of payment. Additionally, the parties were informed that any possible payment plan and/or extension of the deadline to pay the amounts due had to be agreed together with Atenas.

18. On 4 June 2018, Atenas informed the FIFA DC that the amount due was still outstanding.

19. On 6 June 2018, the FIFA DC passed a decision as follows (the "Appealed Decision"):

> *"1. The* [Club] *is found to have infringed art. 64 of the FIFA Disciplinary Code as it is guilty of failing to comply with the decision passed by the Court of Arbitration for Sport on 11 July 2017, which confirmed the decision issued by the Single Judge of the Players' Status Committee on 22 November 2016, and according to which it was ordered to pay:*
>
> *a. To* [Atenas]*;*
>
> *i. EUR 3,400,000 plus 5% interest p.a. on the said amount from 1 January 2016 until the date of effective payment;*
>
> *ii. CHF 5,000 as costs of the proceedings;*
>
> *iii CHF 4,000 as contribution of the costs and legal fees incurred in connection with the arbitration proceedings;*
>
> *b. To FIFA: CHF 15,000 as costs of the proceedings.*
>
> *2. The* [Club] *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* [Club] *is granted a final period of grace of 90 days as from notification of the present decision in which to settle its debt to* [Atenas] *and to FIFA.*
>
> *4. If payment is not made to* [Atenas] *and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the* [CBF] *by the abovementioned deadline, six (6) points will be deducted automatically by the* [CBF] *without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat.*
>
> *5. If the* [Club] *still fails to pay the amounts due to* [Atenas] *even after the deduction of points in accordance with point 4 above, the FIFA Disciplinary Committee, upon request of* [Atenas]*, will decide on a possible relegation of the* [Club's] *first team to the next lower division.*
>
> *6. As a member of FIFA, the* [CBF] *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* [CBF] *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 costs of these proceedings amounting to CHF 3,000 are to be borne by the [Club] *and shall be paid according to the modalities stipulated under point 2. above.*

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

9. [Atenas] *is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the* [CBF] *of every payment received".*

20. On 11 June 2018, the findings of the Appealed Decision were duly communicated to the Club.

21. On 23 July 2018, the grounds of the Appealed Decision were duly communicated to the Club.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 13 August 2018, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), the Club filed a Statement of Appeal at the CAS against FIFA challenging the Appealed Decision. The Club requested the following prayers for relief:

"On the merits:

FIRST — To dismiss in full the Appealed Decision;

SECOND — To accept the present appeal;

At any rate:

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

FOURTH — To order the Respondent to pay to the Appellant and 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".

23. In its Statement of Appeal, the Club requested that Mr. Mark A. Hovell, Solicitor, Manchester, United Kingdom be appointed as a sole arbitrator.

24. On 20 August 2018, FIFA wrote to the CAS Court Office confirming its acceptance of the Club's proposal for Mr. Mark A. Hovell to be appointed as a sole arbitrator.

25. On 21 August 2018, the parties were informed that the disciplinary proceedings were suspended for the duration of the present proceedings before CAS.

26. On 28 August 2018, pursuant to Article R51 of the CAS Code, the Club submitted its Appeal Brief with the CAS Court Office. The Appeal Brief contained the following prayers for relief:

"FIRST — To confirm that the sanction imposed by the Commissioner of the FIFA Disciplinary Committee on the Appellant in the Appealed Decision is arbitrary and, consequently, shall be fully dismissed;

SECOND — To revert the case back to FIFA to issue proportionate disciplinary measure on the Appellant;

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

FOURTH — 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".

27. On 3 September 2018, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Arbitral Tribunal appointed to this case was constituted as follows:

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28. On 24 September 2018, pursuant to Article R55 of the CAS Code, FIFA submitted its Answer to the CAS Court Office. The Answer contained the following prayers for relief:

"Finally, we would like to request CAS:

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

2. To confirm the [Appealed Decision] *hereby appealed against.*

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

29. On 26 September 2018, FIFA confirmed to the CAS Court Office that it wished for the Sole Arbitrator to render an award solely on the written submissions, without the need for a hearing.

30. On 2 October 2018, the Club wrote to the CAS Court Office stating its preference for a hearing to be held in this matter.

31. On the same date, on behalf of the Sole Arbitrator, the CAS Court Office invited the Club to confirm whether it would agree to waive its request for a hearing if it was permitted to file written witness statements.

32. On 5 October 2018, the Club wrote to the CAS Court Office confirming that it *"has no objection on sending the written submission"*, however the Club reiterated its request for a hearing to be held.

33. On 7 November 2018, on behalf of the Sole Arbitrator, the CAS Court Office informed the parties that pursuant to Article R57 of the CAS Code, the Sole Arbitrator had decided not to hold a hearing in this matter and that he would be issuing an award on the written submissions.

Further, the CAS Court Office invited the Club to file written witness statements for any witnesses cited in its written submissions.

34. On 9 November 2018, FIFA submitted a signed copy of the Order of Procedure.

35. On 14 November 2018, the Club submitted a signed copy of the Order of Procedure, together with witness statements of Mr. Benecy Queiroz and Mr. Marcelo Kiremitdjian.

IV. THE PARTIES' SUBMISSIONS

36. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

A. The Club's Submissions

In summary, the Club submitted the following in support of its Appeal:

a) Preliminary Considerations

37. The Club submitted that the intention of the current Appeal was not to question the facts of the Appealed Decision but to highlight the merits and wrongful approach taken by FIFA while rendering the Appealed Decision.

38. Further the Club submitted that it accepted that failure to meet its financial obligations means that it is liable to face disciplinary sanctions imposed by FIFA. The Club also pointed out that they had never previously received a sanction for failing to comply with a decision of FIFA or the CAS.

39. The Club cited Article 64 of the FIFA Disciplinary Code (the "FDC") to make the point that the terms and conditions set out within Article 64 of the FDC do not mean that the FIFA DC shall not consider the specificities of each case before rendering a decision and imposing sanctions.

b) Matter of Exceptional Circumstances/Financial Disability

40. The Club argued that the FIFA DC *"usually takes into account"* exceptional circumstances such as the impossibility to pay within a deadline due to ongoing exchange or financial restrictions imposed on a country, or the ongoing armed conflicts in a country. The Club submitted that it had exceptional circumstances in the present case which the FIFA DC failed to take into account.

41. The Club submitted that it never denied that it owed Atenas an outstanding transfer fee and it fully intended to meet this obligation but the economic and political crisis in Brazil at that

time severely inhibited its ability to follow through on this. The Club also pointed to the significant devaluation of the Brazilian currency (the exchange rate dropped from USD 1 to R$3.1 to USD 1 to R$4.023) making the payment of the first instalment *"impossible and impracticable"*.

42. The Club further submitted that FIFA absolutely failed to recognise this major economic crisis and rather chose not to comment on this at all. The Club acknowledged that a *"lack of financial means cannot be invoked as a justification for the non-compliance with an obligation"* (*CAS 2006/A/1110* and *CAS 2014/A/3840*), however, this did not mean that FIFA could take into account the referenced exceptional circumstances when imposing sanctions.

43. The Club noted the discrepancy between the treatment of clubs undergoing bankruptcy and those which were not; as clubs undergoing bankruptcy were able to avoid payments until the end of the bankruptcy proceedings, whereas other clubs had to pay their debts (*CAS 2011/A/2646*). In that regard, the Club submitted that *"as an incontestable demonstration of good faith"* of the Club, it did not *"use any sort of subterfuge based upon Brazilian law (i.e. Bankruptcy or under Administrative procedures)"* to deny Atenas its right to receive the money. The Club submitted that FIFA failed to recognise the Club's *"good faith and gesture of honesty"*.

44. The Club also noted that Article 5 of the FIFA Statutes states that FIFA is required to *"promote friendly relations"* between its members, but FIFA failed to find a balance between imposing a fair sanction and consideration of the referenced *"exceptional circumstances"*.

45. Further in this regard the Club cited *CAS 99/A/246,* which stated:

> *"The severity of a penalty must* [sic] *in proportion with the seriousness of the infringement. The penalties imposed by an international federation can be overturned when the penalties provided by the rules can be deemed excessive or unfair"*.

c) Unexplained – The notion of the termed "well-established practice"

46. The Club submitted that despite repeatedly referring to *"well-established practice"* throughout the Appealed Decision, FIFA failed to ever provide any explanation of this *"absolutely vague and confusing term"*. Further, FIFA's implication that the Club unlawfully withheld funds was *"baseless and false"*.

47. The Club also took issue with the period of grace given to pay the outstanding amount due to Atenas, saying that 90 days was not a reasonable or proportional period to pay such a high amount. They contrast this decision with the decision taken in a case involving Clube Atletico Mineiro where the sum due was much lower at EUR 2,500,000, plus 12% interest per annum. The Club submitted that as their debt is much higher at EUR 3,400,000 plus 5% interest they too should have been granted 150 days grace to settle the amount. The Club argued that it was *"absolutely disproportionate to grant a similar time of grace, considering the financial situation of the* [Club] *as well as the high amount in default at this case"*.

48. The Club submitted that it was becoming "the norm" for sanctions to be imposed by FIFA without explanation and to cover this, the catch all term *"well established practice"* being put forward instead. Furthermore the Club submitted that *"since the files of the cases are kept confidential and not once the reasoning or explanation for the use of the term "well-established practice" it has become next to impossible for the aggrieved parties to challenge the same"*.

d) Disproportional and Biased Decision

da) Procedural Issues

49. The Club submitted that there were a number of Legal and Regulatory provisions that FIFA had to adhere to including the Swiss Civil Code ("CC"), the FIFA Statutes, the FDC and CAS jurisprudence in particular. It cited *CAS 2007/A/1298-1300*, which stated as follows:

"Several mandatory principles of Swiss law limit the regulatory and decisional freedom of an association in order to protect its members. One such principle is that an association must correctly apply its own regulations, another being that its regulations must be applied, and its decision made in a predictable and cognisable manner, notably to ensure equality of treatment and due process".

50. The Club also submitted that under Article 60 of the CC, FIFA has an obligation to comply with its own Statutes. Further, pursuant to Articles 94 and 115(1) of the FDC, parties in a dispute are entitled to *"obtain a reasoned decision",* however FIFA failed to provide a reasoned decision.

51. Further, the Club submitted that CAS jurisprudence has also formulated and applied what has been termed the *"predictability test"* so that arbitrary decisions without proper legal or regulatory basis are less likely (*CAS OG 98/002*, *CAS 2001/A/330*, *CAS 2007/A/1363*). For example, *CAS 2007/A/1363* stated:

"[…] the principle of legality and predictability of sanctions which requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision".

52. The Club submitted that this notion was not considered in this case and that FIFA *"absolutely and completely"* failed to apply it. Further, the Club stated that the maximum and minimum amounts governing the imposition of a fine under Articles 15(2) and (3) of the FDC were wide parameters such that it fails the *"predictability test"*.

53. Finally, the Club submitted that *"by not rendering a decision with the necessary grounds/explanation and within a predictable manner* [sic] *is undisputed that the Appealed Decision violated mandatory rules set out in the FIFA Statutes and the FIFA Disciplinary Code, as well as principles of Swiss law, i.e. the equality of treatment and due process"*.

db) The Violation of the Principle of Proportionality

54. The Club submitted that under Article 190(2)(e) of the Federal Act on Private International Law ("PILA"), an award can be set aside where such an award is incompatible with public

policy. Further it is a well-known international notion of arbitration, which is also followed by Swiss law, that one of the principles of *"public policy"* is the principle of proportionality.

55. The Club submitted that this principle has been *"severely hampered"* by the Respondent. The Club identified three components within this proportionality principle, namely:

- Adequacy – the imposition of severe monetary sanctions would never be able to achieve the goal of the case. The Club argued that by imposing an additional fine and not providing with the proper reasoning for the said additional monetary sanctions, *"the Appealed decision did not achieve its goal"*.
- Necessity – the Club maintained that in line with CAS jurisprudence this test denotes *"whether there was no other meaningful weapon to be used against the said claim"*. The Club submitted that the deduction of 6 points was a severe sanction and because it leads to serious financial and sporting consequences this mitigates against the Club's ability to generate income through additional bonuses based on league ranking. The Club also pointed to the fact that the Appealed Decision failed to provide at least one similar case to demonstrate the FIFA DC's *"well established practice"*. In essence, the Club took the view that the imposition of severe monetary sanctions in various forms was not justified and other more lenient sanctions could have been imposed instead to achieve the same result.
- Proportionality *stricto sensu* - The Club submitted that this criterion was abused by FIFA with no rationale given for the sanctions imposed. It again made the point that the deduction of 6 points *"does not serve as an activating component towards the payment of the default amount, rather as a punishment making the collection of funds even impossible"*. Here the Club submitted that a different sanction such as a 1 year transfer ban would have acted as *"a much more activating factor"* towards the payment of the outstanding amount. Further, the Club submitted that the principle of proportionality, *"in essence, provides a reasoning criterion, which an adjudicating body needs to fulfil, in order to balance the rights and liabilities of both opposing parties in the proceedings, which has not been done in this case"*.

56. The Club argued that the Appealed Decision violated all of the above principles, which leads to the conclusion that the sanctions were evidently and grossly disproportionate (*CAS 2016/A/4719*).

57. The Club concluded its submissions by citing *CAS 2015/A/4291* to make the point that if the sanction imposed is evidently and grossly disproportionate to the offence, the Panel will have the authority to amend or set aside the decision. In the light of this it stated that there had indeed in this case been *"an evident display of disproportionality"* on behalf of the Club and not only had FIFA grossly and unambiguously violated the principle of proportionality but also the *"predictability test"*. On this basis the arbitrary nature of the Appealed Decision, it should be fully dismissed by CAS.

e) Summary of the written witness statements

58. The Club submitted two witness statements, and their statements have been very briefly summarised below.

59. Mr. Benecy Queiroz, the Club's former Deputy General Director stated as follows:

- He was part of the Club for 40 years in a variety of roles.
- At the time the agreement which led to the present dispute was signed in 2015, the Club did not have a General Manager, so he assisted the Club in drafting/agreeing the relevant agreement.
- In his experience, he had never *"witnessed the kind of catastrophically known financial crisis"* like the one in 2015 in Brazil.
- He *"intensely"* challenged the 90 day grace period provided under the Appealed Decision because, *inter alia*, the payment transaction involved tedious paper work for the exchange and the Club had not yet completely recovered from the 2015 financial crisis.

60. Mr. Marcelo Kiremitdjian, the Club's General Manager stated as follows:

- He had been the General Manager of the Club since 2018. There was no General Manager before him, especially during 2015 when the relevant agreement in dispute was entered into.
- The Club was *"struggling to conclude the outstanding payments relating to not just the current case, but also various other contracts of all kinds being signed during the year of 2015 and start of the year 2016"*.
- The grace period of 90 days in the Appealed Decision was an *"unrealistic and highly unreasonable time frame"* to complete a payment of USD 3.4m.

B. FIFA's Submissions

In summary, FIFA submitted the following in its Answer to the Appeal of the Club.

a) Validity of the Appealed Decision

61. FIFA observed that the Appeal Brief mainly revolved around the idea that the elements and criteria used by the FIFA DC to impose disciplinary measures were not duly determined and thus, such procedure does not comply with the *"predictability test"* and as a consequence the Appealed Decision violated the FIFA Statutes, the FDC and Swiss law.

62. FIFA noted that pursuant to CAS jurisprudence, under Swiss law the right of associations to impose sanctions or disciplinary measures on clubs is not the exercise of a power delegated by the State, rather it is the expression of the freedom of associations and federations to

regulate themselves (*CAS 2008/A/1583*, *CAS 2008/A/1584*). Further, this CAS jurisprudence has confirmed that:

"the analogous application of criminal principles to limit the powers of sports organizations is therefore only a possibility if the principle in question is an expression of a fundamental value system that penetrates all areas of the law. Even if a principle of criminal law is the expression of this fundamental value system (across all areas of the law), it does not follow that the principle applies without exception and irrefutably in the relationship between a sports association and the athlete/club".

63. FIFA submitted that there is a general consensus that certain contents of the *nulla poena sine lege* principle which is an emanation of the legality principle are also applicable to disciplinary provisions and proceedings in the context of sports organisations. It further submitted that the CAS in particular has adopted certain contents of this principle with regard to disciplinary proceedings and regulations of sports organisations by establishing a so-called *"predictability test"*. The approach that the CAS has taken in this regard has not led to them specifying the exact contents and requirements of such a *"test" (CAS 2008/A/1545)*. Rather, the CAS evidently takes the approach that, in order for disciplinary provisions and sports organisations to be in line with the principle of *nulla poena sine lege*, the stakeholder subject to such provisions and proceedings must know or must be able to know that a certain conduct is wrong.

64. In this sense, CAS jurisprudence (*CAS 94/129*; *CAS 2007/A/1363*) appears to indicate that the CAS considers disciplinary provisions and proceedings of sports organisations to be in line with the principle of *nulla poena sine lege* if:

- The relevant regulations and provisions emanate from duly authorized bodies;
- The relevant regulations and provisions have been adopted in constitutionally proper ways;
- The relevant regulations and provisions are not the product of an obscure process of accretion;
- The relevant regulations and provisions are not mutually qualifying or contradictory;
- The relevant regulations and provisions are not able to be understood only on the basis of the de facto practice over the course of many years of a small group of insiders;
- There is a clear connection between the incriminated behaviour and the sanction imposed.

65. FIFA pointed out that in the matter at stake, the Club at no point has contested that the FDC emanates from a duly authorized body and was adopted in a fair manner and in a transparent way complying with the rules of the association (Article 60 *et seq*. of the CC). The Club has neither claimed that the FDC cannot be understood generally or that such rules are contradictory. FIFA considers that it was clear for the Club that not fulfilling its financial obligations towards Atenas was wrong, that it was breaching the disciplinary regulations and that an appropriate sanction would therefore be imposed. Therefore, all the points mentioned above have been met in the present case.

66. FIFA further submitted that 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. On the contrary, CAS has clearly explained that *"Such fundamental principles 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"* (*CAS 2014/A/3665, 3666 & 3667*, par. 73).

67. FIFA went on to say that in this respect, it wished to underline that the Club, although it contested that the sanctions imposed against it were not predictable, seemed to be quite aware of the possible sanctions it would have faced even before the Appealed Decision was pronounced. Indeed, by means of its letter dated 11 May 2018 (nearly a month prior to the Appealed Decision), the Club requested FIFA *"to confirm that there is no factual nor legal basis to CRUZEIRO pays any fine to grant CRUZEIRO a period of grace of 150 days as from the notification of any decision to the latter comply with the payment in full of the outstanding amount to* [Atenas] *to confirm that there is no factual nor legal basis to impose any sanction whatsoever, which deducts from CRUZEIRO any points (or relegation to a lower division) in the domestic Brazilian National Championship […]"*. In FIFA's opinion, the sanctions the Club incurred were well known and well predictable (as a matter of fact, well predicted) by the Club itself when it requested the FIFA DC not to impose such sanctions against it.

68. FIFA also submitted that it is worth noting that the Swiss Federal Tribunal ("SFT") had deemed as lawful the system of sanctions used by FIFA in the event of non-compliance with its decisions or those of CAS which has been applied in the present case (decision 4P.240/2006 of the SFT dated 5 January 2007, X. S.A.D. v. FIFA and CAS).

69. FIFA argued that it was clear that the FIFA DC had not violated the FIFA Statutes, the FDC nor any provision of Swiss law since the system and procedure concerning the application of Article 64 of the FDC is solid and lawful. Thus the main argument of the Club could already be dismissed and, in FIFA's opinion, should not be taken into consideration by the Sole Arbitrator.

b) Breach of Article 64 of the FDC by the Club

70. FIFA submitted that pursuant to Article 64(1) of the FDC, anyone who fails to pay another person - such as a player, a coach, or a club or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS (subsequent appeal decision):

- will be fined for failing to comply with a decision;
- will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;

- 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.

71. FIFA further submitted that the FIFA DC cannot review or modify the substance of a previous decision, which is final and binding and thus has become enforceable. Consequently, the FIFA DC is not allowed to analyse a case decided by the relevant body, but has as a sole task to analyse if the debtor complied with the final and binding decision of the relevant body (*CAS 2006/A/1008*; *CAS 2008/A/1610*; *CAS 2013/A/3323, CAS 2013/A/3380* as well as *CAS 2015/A/4271*). Moreover, the CAS should only address the question whether the Club respected and fulfilled that decision, but no longer its content (*CAS 2012/A/3032*).

72. FIFA pointed out therefore, that in order to impose any possible disciplinary sanction as provided for under Article 64 of the FDC, the main question to be answered by the FIFA DC remains whether or not the financial amounts as defined in the final and binding decision have been paid to the party claiming it.

73. Furthermore, FIFA added that if the FIFA DC is not provided with proof that the payment of the whole amount due has been paid or that a payment plan has been agreed, it will render a decision imposing a fine on the debtor for failing to comply. They will also grant the debtor a final period of grace from the notification of the decision to settle its debt to the creditor as clearly foreseen under Article 64(1) of the FDC.

74. FIFA also submitted that as a general principle, in order to be able to assess the issue of whether or not the financial amounts as stated in the decision have been paid to the creditor, or the reason the outstanding amount is not due anymore, the FIFA DC can only take into consideration all possible facts arising after the date on which the decision has been rendered. Any other consideration would fall out of the scope of the disciplinary proceedings under Article 64 of the FDC.

75. FIFA pointed out in this respect that it is clear and uncontested that the Club was ordered to pay a sum of money to Atenas (USD 3,400,000 plus interest, CHF 4,000 as a contribution towards legal fees and expenses in connection with the arbitration proceedings and CHF 5,000 as costs of proceedings) and to FIFA (CHF 15,000 as costs of the proceedings) by means of a final and binding decision passed by the CAS (confirming the FIFA PSC Decision). It is equally undisputed that at that time no payment, not even a partial amount was paid by the Club and no agreement on a payment plan was reached with Atenas.

76. FIFA noted that after disciplinary proceedings were opened, the Club were provided a deadline to either pay the amounts due or explain why it did not. It was only on the final day of the deadline provided when the Club finally participated in the proceedings, when it stated that due to the economic difficulties faced by Brazil that it could not make the payment. Further, the Club stated that due to the exceptional circumstances, a final grace period of 150 days should be granted. In that regard, FIFA noted that the Club had attempted to give the impression that 150 days would be sufficient in order for it to pay its debts. However, FIFA noted that at the date of its Answer in these CAS proceedings, 440 days had elapsed since the

CAS Award was passed (11 July 2017) and 136 days passed since the Club requested the period of grace to be set at 150 days (11 May 2018). To the date of FIFA's submissions, the totality of the outstanding debt remained unpaid and no agreement to pay had been entered into.

77. FIFA submitted that the Club was adopting the same delaying tactics at the CAS by using far-fetched, unfounded and false arguments to support its allegations. In support of this view, FIFA referenced the Club's false assertion in its Appeal Brief that they have *"never ever received any sanction whatsoever before having eventually disrespected a decision passed by one of the referenced decision-making bodies of FIFA or CAS nor does it intend doing so now"*. In fact, the FIFA DC had recently sanctioned the Club for a breach of Article 64 of the FDC in a separate matter.

78. FIFA concluded its submissions under this heading and were unequivocal in its position, by stating that *"it is without doubt that the FDC correctly applied Art. 64 of the FDC to the facts at its disposal in the case at stake"*.

c) Inexistence of exceptional circumstances in the present case

79. FIFA submitted that the Club argued in its Appeal Brief at some considerable length about the failure of the FIFA DC to take into account the *"exceptional circumstances"* prevalent in Brazil during this period. In response, FIFA submitted that the arguments put forward do not fall into that category and therefore cannot be taken into account as they are not comparable to the conditions experienced previously in Argentina and Greece (exchange and financial restrictions imposed on the country making payment an impossibility) or Ukraine and Libya (ongoing armed conflicts).

80. Further, FIFA pointed out that at no point did the Club provide any factual or documentary evidence of the *"financial turbulence"* that they were allegedly subjected to and the recipient of. The Club blamed the economic and political crisis in the country at the time for its inability to meet its financial obligations but FIFA pointed out that from the date the FIFA PSC Decision (November 2016) was passed to the date of the Appealed Decision (June 2018), the Club engaged 16 new players and released 26. In terms of the released players the Club received EUR 4,300,000 and USD 11,230,000 in exchange for their transfers. FIFA concluded that in the light of the above, the failure to pay their outstanding debts appeared to be a choice by the Club rather than the impossibility that they frequently maintained.

81. Finally, FIFA submitted that the Club had a duty to be aware of its financial strength and cut its cloth accordingly in line with the principle of *pacta sunt servanda*. FIFA also cited Article 2 of the CC according to which *"every person is bound to exercise his rights and fulfil his obligations according to the principle of good faith"* (*CAS 2010/A/2144*). Thus the sole fact that the Club may be undergoing financial problems does not exonerate it from its obligations to pay the outstanding amounts owed to Atenas.

82. To that end, referring to its *"constant jurisprudence (CAS 2005/A/957; CAS 2004/A/1008, confirmed by the judgement of the Swiss Federal Tribunal 4P.240/2006/Ien of 5 January 2007)"*, the CAS has held that *"the difficult financial situation alleged by the Appellant is not a justification for its failure to pay its debt to the club (…). Lack of financial means to satisfy an obligation of payment, or risk of*

bankruptcy, does not excuse the failure to make the required payment" (*CAS 2013/A/3358; CAS 2018/A/5622*).

83. FIFA submitted that *"in the present case there are no circumstances that can be considered "exceptional" and therefore that the Committee rendered a well-founded decision taking into account the facts pertaining and surrounding the case".*

d) The sanctions imposed on the Club were proportionate

84. FIFA submitted that, notwithstanding its *de novo* powers under Article R57 of the CAS Code, the Panel could only amend the disciplinary decision of a FIFA judicial body if it considered that it acted arbitrarily and it exceeded the margin of discretion afforded to it by the principle of association autonomy (cf. RIEMER H. M., Berner Kommentar, no. 230 on art. 70). That is to say, even if the Sole Arbitrator disagreed with a specific sanction, he should only amend it *"if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence".* (FIFA cited*, inter alia, CAS 2014/A/3562; CAS 2009/A/1817; CAS 2009/A/1844; CAS 2015/A/4271).*

85. Moreover, FIFA submitted that Article 75 of the CC states that only grossly disproportionate decisions constitute violations of relevant laws and/or an association's own statutes and regulations. Only those alleged violations can be claimed in the context of challenges under Article 75 of the CC.

86. Further, FIFA argued that it has always dealt with cases on case-by-case basis taking into account the relevant circumstances pursuant to Article 39(4) of the FDC and as confirmed by the CAS, *"similar cases must be treated similarly, but dissimilar cases could be treated differently"* (*CAS 2012/A/2750*).

87. FIFA noted that when deciding on the appropriate sanctions to be imposed, the FIFA DC always takes into account the amount outstanding, pursuant to longstanding jurisprudence which has been confirmed by the CAS (*CAS 2012/A/2730*). When the FIFA DC considered the amounts outstanding in this case, it considered that a meagre fine would have contradicted the principle of repression and prevention and would have failed to encourage prompt payment. The purpose of the fine is to serve as a deterrent to parties who wish to not comply with their financial obligations (*CAS 2010/A/2148*).

88. In support of its view that the sanctions imposed on the Club were indeed proportionate and justified, FIFA provided a table highlighting similar levels of amounts outstanding with the attendant sanctions levied.

Case Number	Outstanding amount	Fine	Grace period	Deduction
140293 PST ZH	3,977,870	30,000	90 Days	6 points
160475 PST ZH	2,967,980	30,000	90 Days	6 points
170342 PST ZH	3,132,806	30,000	90 Days	6 points
171068 PST ZH	2,692,814	30,000	90 Days	6 points

89. FIFA further submitted that although the table only represents a small sample of cases, it clearly demonstrates that the Appealed Decision was passed in accordance with the overriding principle of proportionality, it was in line with the FIFA DC's longstanding practice and all the specific circumstances of each case are always taken into account by the FIFA DC. Further, the CAS has confirmed that a fine imposed on a club which *"is equal to fines imposed on other clubs for very similar violations"* cannot be *"disproportionate in view of the* [FIFA DC's] *longstanding practice"* (*CAS 2016/A/4594*).

90. Further, FIFA submitted that the proportionality of the fine (CHF 30,000) is demonstrated by the fact that this amount represents less than 3% of the total amount due. Moreover, in keeping with the table above, the fine is inherently proportionate and consistent with the other cases set out. FIFA also submitted that under Article 39(1) of the FIFA DC there is also a discretion in relation to the establishment of the conditions under which such sanctions are to be served. Here, the 90 day period of grace comes under this discretion and is again proportionate. A longer period of grace would certainly not be proportionate or fair to Atenas in this case.

91. In relation to the 6 point deduction, again FIFA rejected the Club's claim that it is unreasonable. FIFA submitted that in line with longstanding practice and the contents of the table, the amount outstanding is taken into account and is proportionate. Additionally, FIFA also pointed out that this sanction will not be triggered if the outstanding amount is settled within the period of grace. Finally on this point, FIFA submitted that the Club failed to prove that *"the deduction of points has undisputed serious financial and sporting consequences"*.

92. FIFA also submitted that it would like also to underline the fact that the CAS has regularly confirmed the legality and the proportionality of the enforcement system created by FIFA and the related sanctions, in particular the points deductions. In this sense, it should be noted that the CAS has regularly confirmed that the wording of Article 64 of the FDC provides for a clear statutory basis and precisely reflects the principle of proportionality. A first decision may only include a fine and the deduction of points since it is the less severe and therefore proportionate sanction for a first infringement. However, in case of continued failure to comply with the decision, a more severe sanction must be possible, in order to take account of the continued failure to comply and the consequential disrespect of the judicial authority of both FIFA and the CAS (cf. *inter alia CAS 2005/A/944*; *CAS 2011/A/2646, CAS 2012/A/3032*; and *CAS 2018/A/5622*).

93. Finally, FIFA submitted that the Appealed Decision was proportionate in relation to the offence committed and was correctly imposed in compliance with the FDC and the FIFA DC's longstanding jurisprudence. For these reasons the Club's arguments on proportionality or lack of it in the Appealed Decision are to be firmly rejected.

94. To conclude and to summarise its position, FIFA submitted that:

- The procedure established under Article 64 of the FDC is lawful and meets all the requirements of the *"predictability test"*;

- The Club did breach Article 64 of the FDC in the present case since it unlawfully withheld a considerable amount of money from Atenas and FIFA;
- There are no exceptional circumstances in the present case that may allow the departure from the procedure and sanctions foreseen in Article 64(1) of the FDC, and
- The Appealed Decision is perfectly proportionate and in line with the FIFA DC's longstanding practice that has been corroborated by CAS on numerous occasions.

V. JURISDICTION

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

"An appeal against a decision of a federation, association or sports related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or regulations of that body".

96. The jurisdiction of the CAS, which was not disputed, derives from Article 58(1) of the FIFA Statutes (2016 edition) as it determines that:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".

97. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by the parties.

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

VI. ADMISSIBILITY

99. The Statement of Appeal, which was filed on 13 August 2018, complied with the requirements of Articles R47, R48, R49 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

100. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

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

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

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

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

103. Further, the parties unanimously submitted that the various regulations of FIFA should apply, with Swiss law applying on a subsidiary basis.

104. In light of the above, the Sole Arbitrator is satisfied that the various regulations of FIFA are applicable, with Swiss law applying to fill in any gaps or *lacuna* within those regulations.

VIII. MERITS

A. The Main Issues

105. The Sole Arbitrator notes that this is an Appeal against a decision by the FIFA DC, and it was undisputed between the parties that the underlying CAS Award which the Club failed to comply with was final and binding. Accordingly, the Sole Arbitrator observes that the only issues to be resolved in this Appeal are:

a) Should this matter be sent back to FIFA?

b) If not, should the Appealed Decision be amended for any reason?

The Sole Arbitrator will consider those issues in turn.

a) Should this matter be sent back to the FIFA DC?

106. The Sole Arbitrator notes that the first two requests for relief by the Club were:

"FIRST — To confirm that the sanction imposed by the Commissioner of the FIFA Disciplinary Committee on the Appellant in the Appealed Decision is arbitrary and, consequently, shall be fully dismissed;

SECOND — To revert the case back to FIFA to issue proportionate disciplinary measure on the Appellant".

107. As such, the Sole Arbitrator needs to first consider whether he should send this matter back to the FIFA DC, or whether he can render a decision on the merits himself.

108. At the outset, the Sole Arbitrator wishes to point out that the wording in Article R57 of the CAS Code clearly states that:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".

109. Further, in *CAS 2008/A/1718-1724*, that CAS panel stated:

"… not only can the Panel review the facts and the law contained in the Decisions but it can as well replace those Decision if the Panel finds that the facts were not correctly assessed or the law was not properly applied leading to an erroneous decision".

110. Moreover, in *CAS 2008/A/1700 & CAS 2008/A/1710*, that CAS panel stated:

"Under Article R57 of the CAS Code, the Panel's scope of review is fundamentally unrestricted. It has full power to review the facts and the law…".

111. The Sole Arbitrator concludes that there are no special circumstances in this case which warrant sending this matter back to the first instance decision maker. The Sole Arbitrator notes that to send this matter back to the FIFA DC would only delay proceedings further and ask the FIFA DC to perform the task that the Sole Arbitrator himself is entitled, fully able and willing to do. Thus, the Sole Arbitrator concludes that he will not send this matter back to the FIFA DC and he can, and will, deal with this matter *de novo* as Article R57 of the CAS Code clearly empowers him to do.

b) Should the Appealed Decision be amended for any reason?

112. The Sole Arbitrator noted that the sanctions imposed on the Club in the Appealed Decision were:

- a fine of CHF 30,000;
- a final period of grace of 90 days to pay the amounts due to Atenas and FIFA;
- if the Club still failed to pay the amounts due to Atenas, after the 90 day grace period, a 6 point deduction would be automatically imposed; and
- if the Club still failed to pay the amounts due to Atenas after the 6 point deduction, then the FIFA DC would decide on the possible relegation of the Club to the next lower decision.

113. The Club's arguments as to why the sanctions in the Appealed Decision were challengeable were, in essence:

- there were exceptional circumstances (i.e. *"financial disability"*) justifying the non-payment of their debt to Atenas;
- FIFA repeatedly referred to its *"well-established practice"* when deciding the sanctions, but failed to justify or explain what this was exactly;
- The procedure followed by the FIFA DC failed the *"predictability test"*; and
- The sanctions imposed violated the principle of proportionality.

114. The Sole Arbitrator will consider these arguments in turn.

ba) Alleged exceptional circumstances / "financial disability"

115. The Club argued that there were exceptional circumstances in this case that the FIFA DC failed to take into account. The Club cited the economic and political crisis in Brazil as the primary reason for why it could make the payment to Atenas. The Club also noted that the value of the Brazilian currency significantly dropped, which made the payment of the transfer fees to Atenas (which was denominated in USD) *"impossible and impractical"*. The Club acknowledged that a lack of financial means cannot be invoked as a justification for the non-compliance of financial obligations (*CAS 2006/A/1110* and CAS *2014/A/3840),* but argued that this did not mean that the FIFA DC could not take this into account. Further, the Club stated that *"as an incontestable demonstration of good faith"*, it did not use any form of *"subterfuge"* such as bankruptcy in order to deprive Atenas of its money, unlike other clubs might have done.

116. Conversely, FIFA rejected this argument and stated there were no exceptional circumstances. It noted that the situation in Brazil was not similar to that experienced by Greece / Argentina in the past (where financial restrictions imposed meant that payment was an impossibility) or Ukraine / Libya (where there were ongoing armed conflicts). Moreover, FIFA noted that no evidence was submitted to substantiate the alleged financial difficulties.

117. In summary, the Sole Arbitrator agrees with FIFA on this issue. Firstly, despite the broad allegations of *"financial turbulence"* and the like in Brazil, the Club failed to submit a single piece of evidence substantiating how this has placed the Club in severe financial difficulty. Pursuant to Article 8 of the CC, the Club had the burden of proof in establishing this assertion and the Sole Arbitrator considers that it failed to meet its burden.

118. Secondly, 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 - as the Club were when dealing with Atenas - 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 and *"cut its cloth accordingly"*, as FIFA put it. The Club's failure to do so cannot be to the detriment of Atenas.

119. Thirdly, despite the allegations by the Club that it was *"impossible"* to pay Atenas, the Club failed to submit any evidence that there were government imposed restrictions on making payments (as FIFA noted had occurred in the past in Greece for example). In fact, FIFA submitted that in the period between the FIFA PSC Decision (November 2016) and the Appealed Decision (June 2018), the Club had engaged 16 new players and released 26. In relation to the released players, the Club received more than EUR 4m and USD 11m in transfer fees. The devaluation of the Brazilian currency did not appear to prevent the Club from completing those transfers. Accordingly, based on the evidence available to the Sole Arbitrator, it appears that not only was it not *"impossible"* to pay Atenas as the Club alleged, but the failure to pay Atenas was a conscious choice made by the Club.

120. Fourthly, as FIFA noted, Article 2 of the CC states that *"every person is bound to exercise his rights and fulfil his obligations according to the principle of good faith"*. The fact that the Club may have had financial difficulties, which may have been exacerbated by the devalued currency, did not exonerate it from meeting its financial obligations to its creditors. There is a clear line of CAS jurisprudence confirming that a lack of financial means does not justify failure to meet financial obligations (see *inter alia*, *CAS 2013/A/3358* and *CAS 2018/A/5622*).

121. Lastly, the Sole Arbitrator does not consider that the Club deserves any credit for not using any *"subterfuge"* such as entering into bankruptcy proceedings to avoid paying Atenas. The Club may not have entered into bankruptcy proceedings, but it has entered into a long, drawn out legal dispute through the CAS (twice) and FIFA (PSC and FIFA DC) which has resulted in a significant delay in paying the debt it undoubtedly owes to Atenas – a debt which was final and binding over 18 months ago when the CAS Award was issued.

122. In summary, for the reasons outlined above the Sole Arbitrator did not consider that there were any exceptional circumstances in the present case justifying more lenient sanctions.

bb) FIFA's alleged failure to explain its "well established practice"

123. The Club submitted that FIFA repeatedly referred to its *"well established practice"* in the Appealed Decision, but it failed to ever provide any explanation of what this *"absolutely vague and confusing term"* was. The Club alleged that *"it was becoming the norm"* that FIFA would impose sanctions without justification or explanation and hide behind this term, making it *"next to impossible"* for aggrieved parties to challenge this. Conversely, in very brief summary, FIFA argued that the Appealed Decision was in line with the FIFA DC's longstanding practice which has been corroborated by the CAS on numerous occasions.

124. The Sole Arbitrator does not see the need to define the term *"well established practice"* nor does he take any issue with FIFA's use of the term. It is plainly a reference to FIFA DC jurisprudence in similar cases. It is, in that sense, akin to consistent CAS jurisprudence that CAS panels rely on. There is nothing controversial with that term, nor does the FIFA DC's reliance on it automatically result in sanctions being disproportionate or challengeable. The sanctions are ultimately decided by the FIFA DC on a case by case basis, with reference to the outcomes in similar matters where debtors failed to pay a similar amount of debt. Parties have the right to appeal those decisions to the CAS, as the Club have done here. The CAS panel in the appeal proceedings then assesses the sanctions imposed by the FIFA DC to determine if they were disproportionate or not.

125. Even if the FIFA DC failed to set out what its *"well established practice"* was in the Appealed Decision, the Sole Arbitrator notes that during the present Appeal proceedings, FIFA submitted a table of precedents (see above §88) to set out what sanctions were imposed on other debtor clubs which had similar amounts of outstanding debts to those of the Club. These precedents have been taken into consideration by the Sole Arbitrator in this Award.

126. The Club's claims regarding any illegality of the Appealed Decision due to FIFA's reliance on its *"well established practice"*, is therefore rejected by the Sole Arbitrator.

bc) The alleged failure by the FIFA DC to follow the "predictability test"

127. The Club argued that FIFA failed what has been established by CAS jurisprudence as the *"predictability test"*. The Club cited *CAS 2007/A/1363*, which stated that the principle of legality and predictability of sanctions requires *"a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision"*. The Club alleged that FIFA failed to apply this test, and further, the wide parameters in Articles 15(2) and (3) of the FDC also failed the predictability test. Further, the Club argued that by not rendering a decision with the *"necessary grounds/explanation and within a predictable manner"* the Appealed Decision violated the *"mandatory rules set out in the FIFA Statutes and the FIFA Disciplinary Code, as well as principles of Swiss law, i.e. the equality of treatment and due process"*.

128. Conversely, FIFA argued, in very brief summary, that in order for disciplinary provisions and sports organisations to be compliant with the principle of *nulla poena sine lege* (i.e. one cannot be punished for doing something that is not prohibited by law), the stakeholders subject to such provisions and proceedings must know or be able to know that a certain conduct is wrong. FIFA argued that the FDC, and the sanctions that could be imposed under the FDC, clearly satisfied the *"predictability test"*.

129. In summary, the Sole Arbitrator agreed with FIFA's position.

130. Firstly, to the extent that the Club were challenging the legality of the sanctioning system adopted by the FIFA DC in the FDC, the Sole Arbitrator notes that the SFT has deemed the system of sanctions used by FIFA in the event of non-compliance with its decisions or those of CAS as lawful (decision of the SFT dated 5 January 2007, X. S.A.D. v. FIFA and CAS, 4P.240/2006). The Sole Arbitrator considers that the sanctions imposed (or threatened to be imposed) on the Club in the Appealed Decision fall within the scope of Article 64 of the FDC.

131. Secondly, in relation to the 'predictability test' the Sole Arbitrator also notes that the CAS panel in *CAS 2014/A/3665, 3666 & 3667* stated:

> *"However, 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. Such fundamental principles 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* [FDC] *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"*.

132. The Sole Arbitrator fully concurs with the above reasoning. The Sole Arbitrator notes that the Club were not challenging that the FDC emanates from a duly authorised body and was adopted in a fair manner and in a transparent way complying with the rules of an association (Article 60 of the CC). The Club has also not claimed that the FDC cannot be understood generally or that its provisions were contradictory. The complaint by the Club was, in essence, that the FDC does not specify what factors the FIFA DC must take into account when determining sanctions and the range of potential fines applicable under Article 15 of the FDC

(i.e. between CHF 300 and CHF 1m) are too broad – with those two factors combining to fail the 'predictability test'.

133. However, in the case at hand, the Sole Arbitrator considers that it was clear to the Club that failing to pay its debt to Atenas was a breach of the FDC and that an appropriate sanction would be applied by the FIFA DC. There was no disagreement between the parties that the Club violated Article 64 of the FDC. The Club itself admitted that it was *"undisputed"* that any member of the 'football family' who fails to comply with its financial debts to another member is subject to disciplinary sanctions. Article 64 of the FDC clearly sets out what those potential sanctions could be (i.e. a fine, a final deadline, potential points deduction and/or relegation). Indeed, FIFA observed that by way of letter dated 11 May 2018 (a month before the Appealed Decision had been issued), the Club had written to the FIFA DC requesting confirmation that no fine would be issued, a grace period of 150 days would be granted, and that no points deduction would occur. Based on the evidence available to the Sole Arbitrator, it appeared to be clear that the potential sanctions for the non-payment of its debt to Atenas were, in fact, clear and predictable to the Club.

134. The Sole Arbitrator does not consider that the 'predictability test' is failed because the FDC does not explicitly set out the factors which the FIFA DC must consider in each individual case. The factors to take into account are clearly the specific circumstances of the case, as each case is determined on a case by case basis, and the sanctions to be imposed (as set out in Articles 15 and 64 of the FDC) must be proportionate to the offence committed and the circumstances of the case. Similarly, the Sole Arbitrator does not consider that having a range of potential fines in Article 15 of the FDC (i.e. between CHF 300 and CHF 1m) violates the 'predictability test'. As noted by the panel in *CAS 2014/A/3665, 3666 & 3667:*

> *"…The fact that the competent body applying the* [FDC] *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".*

135. The Sole Arbitrator therefore finds that the *"predictability test"* and the general principle *nulla poena sine lege certa* – to the extent applicable for sanctions under the Swiss law of associations – were not breached by the Appealed Decision.

bd) The alleged violation of the principle of proportionality

136. The Club submitted that the Appealed Decision violated the principle of proportionality and would therefore be incompatible with Swiss public policy, which is one of the grounds for awards to be set aside under Article 190 of the PILA. The Club then claimed that the Appealed Decision violated three components of the proportionality principle, i.e. adequacy, necessity and proportionality. Conversely, FIFA maintained that the sanctions imposed in the Appealed Decision were proportionate.

137. At the outset, the Sole Arbitrator notes that there is an established line of CAS jurisprudence which states that the sanctions imposed by the FIFA DC can only be amended by a CAS panel if the sanction(s) concerned is (are) evidently and grossly disproportionate to the

offence. Accordingly, the Sole Arbitrator considered that it could only amend the sanctions above if he considered them to be 'evidently and grossly disproportionate to the offence'.

138. In summary, the Sole Arbitrator rejects the Clubs arguments in their entirety. The Club's submissions on this issue broadly contended that a more lenient approach would be as effective and more appropriate than the one undertaken by the FIFA DC in the Appealed Decision. However, whilst the Sole Arbitrator notes this argument, he considers that the Club's position is severely undermined by the fact that more than 2 years have elapsed since the FIFA PSC Decision and over 18 months have passed since the CAS Award was issued without any payment being made whatsoever. The Sole Arbitrator considers that the Club's failure to agree a payment plan or make any payment whatsoever to Atenas to date significantly weakens its position regarding proportionality.

139. Further, the Sole Arbitrator notes that it is the case with any disciplinary regime that a failure to comply with the sanctions imposed has to contain a mechanism for increasing those sanctions to bring about compliance. This is built into the FIFA rules with greater sanctions only being engaged after failure to settle payment in the first instance. As noted previously, the legality and validity of the sanctions set out in Article 64 of the FDC have been considered and confirmed by the SFT (Decision of the SFT 4P.240/2006 dated 5 January 2007). Moreover, it has been applied by numerous CAS panels.

140. In the case at hand, the potential imposition of a 6 point deduction, and relegation after that in the event of continued failure to comply, would only occur if the Club continued to avoid paying its debt to Atenas. The Club can easily avoid the 6 point deduction (and relegation) if it simply paid its debts. The Sole Arbitrator does not consider the inclusion of the threat of these sanctions to amount to a violation of the principle of proportionality.

141. The Sole Arbitrator also rejects the Club's arguments that FIFA failed to *"provide at least one similar case"* to demonstrate its well established practice. FIFA submitted a table of precedents in these appeal proceedings (see above §88) setting out the sanctions imposed in similar cases, and it confirmed the proportionality of the sanctions imposed in the Appealed Decision.

142. Despite reaching the conclusion that the sanctions imposed in the Appealed Decision broadly did not violate the principle of proportionality, for the sake of completeness the Sole Arbitrator will consider the individual sanctions imposed to determine their proportionality. In particular, the Club argued that a grace period of 90 days was not reasonable, and that a period of 150 days would have been a more proportionate period given the amount due. The Club cited the example of Clube Atletico Mineiro, which were given the same grace period as the Club despite having a debt of EUR 2.5m (compared to the Club's debt of EUR 3.4m).

143. The Sole Arbitrator finds this to be a curious argument. Specifically, the Sole Arbitrator finds it contradictory that on one hand the Club claimed to be in a difficult financial position due to the financial crisis in Brazil which has made it *"impossible"* to pay its debt of EUR 3.4m to Atenas even with a grace period of 90 days, but then on the other hand it simultaneously argued than an extra 60 days would be proportionate in order to pay this large sum of money. This contradiction is only exacerbated by the fact that the money owed to Atenas was due

almost 3½ years ago (on 11 July 2015 pursuant to the FIFA PSC Decision). In those circumstances, the Sole Arbitrator does not believe that an additional 60 days grace period is warranted.

144. The Club has entirely disregarded its financial obligations towards Atenas for almost 3½ years. At the very least, the Club has known for almost 18 months (since the notification of the CAS Award) that it owed this money to Atenas, as the CAS Award was final and binding. Moreover, by entering into these Appeal proceedings at the CAS, the Club has, in effect, obtained even more time to pay its debt. Accordingly, the Sole Arbitrator was left with the impression that this request for an extra 60 days' grace period was made solely for the purposes of further delaying the Club's financial obligations towards Atenas.

145. The Sole Arbitrator also rejects the Club's claim that it should be granted 150 days on the basis that other debtors (like Clube Atletico Mineiro as per the example the Club cited) had been granted 90 days in the past for a smaller debt. The Sole Arbitrator notes that FIFA demonstrated in the table of precedents (see above §88) that a 90 day grace period is in line with its practice in cases related to clubs where amounts due were comparable or even lower. Just because other debtors had been granted 90 days to make their payment of a smaller amount does not mean that a 90 day period was unfair or disproportionate in these circumstances. Each matter can, and should, be considered on a case by case basis. Indeed, as evident in the table of precedents (above §88), a debtor who had an outstanding amount of EUR 3.9m (higher than the Club's debt of EUR 3.4m) was also provided a grace period of 90 days.

146. Ultimately, the Sole Arbitrator concludes that the granting of a 90 day period, instead of a 150 day period, was not 'evidently and grossly disproportionate to the offence'. The Club's claim to extend the grace period by 60 days is therefore rejected.

147. Similarly, the Sole Arbitrator does not consider the fine of CHF 30,000 to be disproportionate either. The fine amounted to less than 3% of the amount due to Atenas. As noted in FIFA's table of precedents (see above §88), this is consistent with the fines levied on other clubs with similar debts. Given the amount which is overdue (EUR 3.4m) and how long it has been overdue (almost 3½ years), the Sole Arbitrator does not consider the fine to be 'evidently or grossly disproportionate'.

148. As such, and in summary, the Sole Arbitrator does not consider the Appealed Decision to be evidently or grossly disproportionate in any way.

B. Conclusion

149. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Sole Arbitrator dismisses the Appeal by the Club in its entirety and upholds the Appealed Decision.

150. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed on 13 August 2018 by Cruzeiro E.C. against the decision issued on 6 June 2018 by the FIFA Disciplinary Committee is dismissed.

2. The decision issued on 6 June 2018 by the FIFA Disciplinary Committee is confirmed.

3. (…).

4. (…).

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