Arbitration CAS 2018/A/5657 Al Arabi SC v. Houssine Kharja & Fédération Internationale de Football Association (FIFA), award of 5 October 2018

Panel: Mr Mark Hovell (United Kingdom), President; Mr Jacopo Tognon (Italy); Mr Peter van Minnen (The Netherlands)

Football
Disciplinary sanction for failing to comply with a previous CAS award
Standing to be sued
Review of proportionality and individualisation of a disciplinary sanction
Circumstance not justifying a club's failure to pay a debt

1. **A party has standing to be sued ("légitimation passive") in CAS proceedings only if it has some stake in the dispute because something is sought against it. FIFA disciplinary proceedings are primarily meant to protect an essential interest of FIFA and of FIFA's (direct and indirect) members, *i.e.* the full compliance with the rules of the association and with the decisions rendered by FIFA and/or by CAS. Consequently, in an appeal against a decision of FIFA by means of which disciplinary sanctions have been imposed on a party for failing to comply with a previous FIFA decision, only FIFA has standing to be sued, and not the (previously) opposing party in the original dispute before FIFA.**

2. **Sanctions imposed by FIFA's Disciplinary Committee can only be amended by a CAS panel if the sanction(s) is/are evidently and grossly disproportionate to the offence. Each matter has to be considered on a case by case basis.**

3. **A difficult financial situation is not a valid justification for a club to fail to pay its debts.**

I. PARTIES

1. Al Arabi SC (the "Club" or the "Appellant") is a football club with its registered office in Doha, Qatar. The Club is a member of the Qatari Football Federation (the "QFF"), which in turn is affiliated to Fédération Internationale de Football Association.

2. Houssine Kharja (the "Player" or the "First Respondent") is a professional football player, born in Poissy, France on 9 November 1982.

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

II. FACTUAL BACKGROUND

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

5. On 14 March 2014, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), regarding a breach of contract and unjustified termination of his employment relationship suffered during July 2013.

6. On 1 December 2015, the FIFA DRC issued a decision in this case partially accepting the claim of the Player (the "FIFA DRC Decision") as follows (emphasis in original):

> *"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, the outstanding amount of EUR 459,404 plus 5% interest p.a. as from 16 July 2013 until the date of effective payment.*
>
> *3. 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 EUR 2,218,750 plus 5% interest p.a. on said amount as from 14 March 2014 until the date of effective payment.*
>
> *4. In the event that the amounts due to the* [Player] *in accordance with the above-mentioned numbers 2. and 3. are not paid by the* [Club] *within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *5. Any further claim lodged by the* [Player] *is rejected".*

7. On 21 April 2016, FIFA notified the grounds of the FIFA DRC Decision to the Parties.

8. On 11 May 2016, the Club filed an appeal against the FIFA DRC Decision at the Court of Arbitration for Sport (the "CAS").

9. On 22 March 2017, the CAS issued a decision as follows (the "CAS Award"):

> *"1. The appeal filed by* [the Club] *against* [the FIFA DRC Decision] *is partially upheld.*
>
> *2. The items 2 and 3 of the* [FIFA DRC Decision] *are replaced by the following paragraphs:*
>
> - [The Club] *is ordered to pay to* [the Player] *the amount of EUR 451,704 plus interest at the rate of 5% p.a. as follows:*

a. As of 1 June 2013 until the date of effective payment, on the amount of EUR 170,454;

b. As of 1 July 2013 until the date of effective payment, on the amount of EUR 281,250.

- [The Club] *is ordered to pay to* [the Player] *the amount of EUR 12,700 plus interest at 5% p.a. as of 30 July 2013 until the date of effective payment.*

- [The Club] *is ordered to pay to* [the Player] *compensation for the breach of contract in the amount of EUR 2,048,296, plus 5% interest p.a. as of 14 March 2014 until the date of effective payment.*

3. The costs of the arbitration (…) shall be borne by [the Club] *in 90% and by* [the Player] *in 10%.*

4. [The Club] *is ordered to pay a contribution towards the legal fees and other expenses incurred by* [the Player] *in connection with the proceedings, in the amount of CHF 4,000 (Four thousands Swiss Francs).*

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

10. On 5 April 2017, the Player sent a notice of payment to the Club to pay EUR 2,914,067.25 within 10 days from receipt of the letter into the Player's bank account.

11. On 28 April 2017, the Player sent a letter to FIFA informing it that no payment had subsequently been made and requested the enforcement of the CAS Award in accordance with Article 64 of the FIFA Disciplinary Code (the "FDC").

12. On 9 June 2017, the Player sent a reminder to FIFA to open disciplinary proceedings against the Club.

13. On 11 January 2018, following several reminders in the intervening months from the Player to FIFA to proceed with this matter, FIFA sent a communication to the Club and the QFF urging payment to be made by 25 January 2018 and warning them that failure to comply would result in the matter being submitted to a member of the FIFA Disciplinary Committee (the "FIFA DisCo") for consideration and a formal decision.

14. On 30 January 2018, the Player informed FIFA that the Club had not paid any amount this far and asked for an immediate formal decision from the FIFA DisCo.

15. On 31 January 2018, a decision on this matter was issued by the FIFA DisCo (the "Appealed Decision"), as follows:

"1. The [Club] *is pronounced guilty of failing to comply with the* [CAS Award] *and is, therefore, in violation of art. 64 of the* [FDC].

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. Payment can be made either in Swiss francs (…) or in US dollars (…).*

3. *The* [Club] *is granted a final period of grace of 90 days as from the notification of the present decision in which to settle its debt to the* [Player].

4. *If payment is not made by this deadline, the* [Player] *may demand in writing from the secretariat to the FIFA Disciplinary Committee that six (6) points be deducted from the* [Club's] *first team in the domestic league championship. Once the* [Player] *has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*

5. *If the* [Club] *still fails to pay the amount due even after deduction of the points in accordance with point 4 above, the FIFA Disciplinary Committee will decide on a possible relegation of the* [Club's] *first team to the next lower division.*

6. *As a member of FIFA, the* [QFF] *is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the* [QFF] *does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all 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* [Player] *is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received".*

16. On 8 February 2018, FIFA notified the Parties of the findings of the Appealed Decision.

17. On 12 March 2018, following requests from the Parties, the grounds of the Appealed Decision were communicated to the Parties by email.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 31 March 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 the Player and FIFA challenging the Appealed Decision. The Statement of Appeal requested the Panel to apply Article R57 of the CAS Code and hear the case "*de novo*", and contained the following prayers for relief:

"(a) to the present appeal to be admissible;

(b) To change the sanction imposed by the FIFA Disciplinary Committee from 90 days to a minimum of 120 days to pay the amount owed;

(c) To change the consequence for the non-payment to only 3 (three) points initially to be deducted in the national league, instead of 6 (six);

(d) an order for the Respondents to bear the entire costs of these arbitration proceedings;

(e) an order for the Respondents to bear the entire costs of the Appellant's legal costs and expenses with the present arbitration proceedings".

19. On 9 April 2018, pursuant to Article R51 of the CAS Code, the Club submitted its Appeal Brief with the CAS Court Office. The Club stated that the matter should be capable of being determined without the need for an oral hearing. The Appeal Brief contained the following prayers for relief:

"(a) to the present appeal to be admissible;

(b) to uphold the Appeal, set aside and replace the [Appealed Decision] *by sanctioning the Club to pay the outstanding amounts within 120 days instead of 90;*

(c) to set aside and replace the [Appealed Decision] *by sanctioning the non-payment by the Club to only 3 (three) points initially to be deduced* [sic] *in the national league, instead of 6 (six);*

(d) an order for the Respondents to bear the entire costs of these arbitration proceedings;

(e) an order for the Respondents to bear the entire costs of the Appellant's legal costs and expenses with the present arbitration proceedings in an amount to be determined when requested by the CAS".

20. On 27 April 2018, pursuant to Article R55 of the CAS Code, FIFA submitted its Answer to the CAS Court Office requesting the following prayers for relief:

"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 incurred by the Second Respondent and to cover all legal expenses related to the present procedure".

21. On 7 May 2018, pursuant to Article R55 of the CAS Code, the Player submitted his Answer to the CAS Court Office. The Player requested that the Panel issue its award before 1 July 2018 (as the new season in Qatar begins on that date) thereby requiring an expedited procedure. The Answer contained the following prayers for relief:

"On a preliminary or prejudicial basis:

I. Houssine Kharja lacks standing to be sued in the present proceeding.

II. Accordingly, the appeal filed by Al Arabi SC is inadmissible and/or dismissed.

Should the Panel consider the Appeal admissible, on the merits:

III. The appeal filed by Al Arabi SC is dismissed.

IV. The decision issued by the FIFA Disciplinary Committee on 31 January 2018 (Challenged Decision) is confirmed.

In any case:

V. Al Arabi SC shall bear all the costs of this arbitration procedure.

VI. Al Arabi SC shall compensate Houssine Kharja for all the legal and other costs incurred in connection with the entire enforcement procedure of the CAS Award before FIFA as well as with this arbitration procedure in an amount to be determined at the discretion of the Panel but, in any case, not less than CHF 25,000 (twenty-five thousand Swiss francs)".

22. On 8 May 2018, the CAS Court Office wrote to the Parties inviting them to confirm whether they wished for a hearing to be held in this matter or whether they wished for an Award to be issued solely based on the written papers. Further, pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to these cases was constituted as follows:

President: Mr Mark Hovell, Solicitor, Manchester, United Kingdom;

Arbitrators: Mr Jacopo Tognon, Attorney-at-law, Padova, Italy;

Mr Peter van Minnen, Attorney-at-law, Schoonhoven, The Netherlands.

23. On 8 May 2018, both the Player and the Club confirmed to the CAS Court Office that they did not consider a hearing to be necessary in this matter.

24. On 9 May 2018, FIFA also confirmed to the CAS Court Office that it did not consider a hearing to be necessary in this matter.

25. On 22 May 2018, the Club wrote to the CAS Court Office objecting to an expedited procedure applying in the case at hand. FIFA wrote to the CAS Court Office agreeing to the Player's request for an award to be issued before 1 July 2018.

26. On 24 May 2018, the CAS Court Office informed the Parties that in light of the Club's objection to an expedited procedure in this case and in line with Article R52 of the CAS Code, no such expedited procedure would be initiated. Further, the CAS Court Office confirmed that the Panel would dispense with the need for a hearing and issue an Award based solely on the written submissions.

27. On 24 May 2018, the CAS Court Office sent the Order of Procedure to the Parties for signature.

28. On 31 May 2018, the CAS Court Office wrote to the Parties informing them that all Parties had duly signed the Order of Procedure.

IV. THE PARTIES' SUBMISSIONS

29. 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 Panel 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

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

31. In the imposition of the sanctions on the Club, the FIFA DisCo failed to sufficiently apply the principle of proportionality in contravention of the FDC and Swiss law.

32. The Club submitted that there must be a reasonable balance between the sanction and the kind of misconduct. In pursuit of this, CAS jurisprudence has established that *"the sanction must not exceed that which is reasonably required in the search of the justifiable aim"* (CAS Advisory Opinion CAS 2005/C/976 & 986). Further, the Club submitted that *"considering that it is a first sanction and that the Appellant has already been imposed an original fine on top of the one imposed by the DC, plus the amount owed, a 3-point deduction sanction would be appropriate"*. In support of this the Club cited CAS 2015/A/3903.

33. In this regard, the Club submitted that to impose both a fine and a potential deduction of points and the further potential sanction of relegation is excessive. The Club maintained that either one of the sanctions alone is enough to compel them to pay their debts. Moreover, the Swiss Federal Tribunal ("SFT") has decided that, in cases where the likelihood of the debtor to comply with the sanction is not realistic, establishing a third, complementary sanction (*i.e.* relegation) must be considered as excessive (Decision of the SFT 4A_558/2011 dated 27 March 2012).

34. The Club also submitted that the 90 day deadline for payment is similarly disproportionate. In this regard, the Club submitted that a 120 day deadline provided more scope and was more appropriate than the 90 day deadline actually imposed in achieving the necessary objective (*i.e.* payment to the Player). The Club noted that the FIFA DisCo granted a period of 120 days to the debtor in CAS 2014/A/3803, so the Club's request was *"within the practice"* of the FIFA

DisCo. As the Club was *"trying to settle its debts and* [was] *working on a general recovery plan"*, the Club submitted that an extra 30 days grace period would *"contribute immensely"* in the Club's effort to comply with its debts.

35. Further, the Club submitted that the sanctions in the Appealed Decision put the Club at risk of going out of business and therefore *"do not justify the overall interest in achieving the envisaged goal"*.

36. The Club submitted that pursuant to Articles 42-44 of the Swiss Code of Obligations (the "CO"), the Panel has the discretion to estimate the damage and compensation to a party, so can *"scale down the penalties imposed by the* [FIFA DisCo] *taking into account the particular circumstances of the case in hand"*.

B. The Player's submissions

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

38. More than four years have passed since the Player filed his claim with the FIFA DRC and more than a year has elapsed from the notification of the CAS Award but to date, no payment whatsoever has been paid.

39. The Player submitted that he rejected the Club's appeal on three main grounds as follows:

I. The Player lacks standing to be sued;

II. The Appealed Decision is fully proportionate; and

III. The Club is acting in a vexatious manner and must be sanctioned accordingly.

I. Standing to be sued

40. The Player submitted that in order for him to have standing to be sued, the Appeal filed against him must satisfy Article 75 of the Swiss Civil Code (the "CC") and the Player must have some stake in the dispute because something is sought against him.

41. The Player submitted that Article 75 of the CC reads as follows:

> *"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month from the day on which he became cognizant of such resolution"*.

42. The Player submitted that such provision effectively excludes the Player from being part of these current proceedings as the Appealed Decision is one relating to a FIFA DisCo decision for non-compliance with decisions issued by the FIFA DRC and the CAS, and not a dispute between the Player and the Club where something is sought against him.

43. In this regard, the Player noted the difference between a *"vertical dispute"* (being a dispute between an association and one of its members) and a *"horizontal dispute"* (being a dispute between two members of an association). The Player argued that the Appeal against FIFA in the present proceedings constitutes a *"vertical dispute"* which falls under Article 75 of the CC. However, the Appeal against the Player in these proceedings is a *"horizontal dispute"*, which does not fall within the scope of Article 75 of the CC, meaning that the Player did not have standing to be sued in this Appeal.

44. The Player also submitted that pursuant to CAS jurisprudence, a party can only have standing to be sued if something is sought against it, meaning that the defending party must be *"personally obliged by the disputed right at stake"* (CAS 2006/A/1189; CAS 2006/A/1192; CAS 2008/A/1517).

45. In support of the above, the Player cited CAS 2015/A/4310, which stated as follows:

> *"63. (…) in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party for failing to comply with a previous FIFA decision, only FIFA has standing to be sued, and not the (previously) opposing party in the original dispute before the competent FIFA bodies such as the FIFA Dispute Resolution Chamber.*
>
> *(…)*
>
> *65. (…) The Player who launched the proceedings before the FIFA DRC cannot be the proper respondent.*
>
> *66. (…) the Respondent in this appeal cannot be Mr Abdou Kader Mangane. It should have been FIFA itself".*

46. The Player stated that several other CAS panels (including, *inter alia*, CAS 2012/A/2981; CAS 2015/A/4179; CAS 2014/A/3831) confirmed the lack of standing of players who were wrongly called as respondents in disciplinary disputes, as nothing could have been sought against them.

47. Further, the Player submitted that the Appealed Decision has a purely disciplinary nature, the Player is effectively a bystander and the stage has now been reached where the present dispute is between an association (FIFA) and its member (the Club) and does not involve the Player in any procedural sense.

48. Accordingly, the Player requested the CAS to declare the Appeal as either inadmissible and/or to reject it due to the Player's lack of standing to be sued.

II. The Appealed Decision is fully proportionate

49. The Player rejected the Club's argument that the Appealed Decision consisted of two primary decisions (fine and deduction of points) and a complementary one (relegation). The Player submitted that the only sanction effective at this time is the fine of CHF 30,000 as the threat of the points deduction or relegation can be discharged if the outstanding debt to the Player is

settled. The other sanctions have not yet taken effect and are there merely to try to precipitate payment after such a protracted period without compliance by the Club.

50. Moreover, the fine of CHF 30,000 corresponds to less than 1% of the amount owed to the Player, so it *"cannot obviously affect any alleged bad solvency capacity of the* [Club]*"*. In light of the above, and especially given the *"excessive slowness of all the FIFA procedures"*, the Player argued that any further arguments submitted by the Club were *"baseless"* and *"blatantly absurd"*.

51. Further, the Player submitted that given that payment has been outstanding for over a year following the CAS Award, it is not unreasonable to have expected the Club to put monies aside during that time to cover payment pending the outcome of arbitral proceedings or at least seek to pay some amounts to reduce the debt to the Player. As such, the Player stated that the Club's request for an additional 30 days was also *"absurd"*.

52. The Player also submitted that the Club's allegedly poor financial position is an unproven allegation and inconsistent with its request for thirty more days to pay the entire amount. Further, pursuant to CAS jurisprudence, the lack of financial means to satisfy an obligation of payment or even the risk of bankruptcy does not excuse the failure to make the required payment (CAS 2015/A/4097; CAS 2013/A/3358; CAS 2006/A/1008).

53. The Player rejected the Club's arguments regarding the *Matuzalem* case at the SFT (Decision of the SFT 4A_558/2011 dated 27 March 2012), as in that case the player was threatened with an *"unlimited occupational ban"* which amounted to a violation of his fundamental rights. In this case, the sanctioned party is a football club, not a player. The Player also rejected the Club's arguments regarding Articles 42-44 of the CO, as they related to compensation as a result of damage or loss, and was not applicable to determine the value of a disciplinary sanction.

III. The Club is acting in a vexatious manner and must be sanctioned accordingly

54. The Player submitted that *"this appeal procedure is so groundless to amount to a vexatious litigation"* and *"*[t]*he Appellant is even acting in bad faith not only to the Player but towards FIFA and CAS itself"*.

55. Further and in support of the above, the Player submitted that *"the Appellant's unique goal in filing its appeal was to obtain the suspension of the FIFA disciplinary proceeding in order to complete the present sporting season, avoiding to pay its huge debt and suffering any points of deduction"*. This was evidenced by the Club's failure to even contact the Player after the CAS Award was issued.

56. The Player noted that the SFT has accepted that a party can be ordered to pay the costs in a cost-free procedure (SFT 120 III 107; Decision of the SFT 6B_446/2015 dated 10 June 2015), and clarified that litigation is vexatious when the party *"in violation of his duty to act in good faith, file a claim without having a concrete interest which deserves protection and when the factual and legal situation is clear"* purely to delay the main procedure (Decision of the SFT 7B.216/2004 dated 16 December 2004; SFT 127 III 178).

57. Finally, the Player submitted that due to the Club's *"procedural and substantial behaviour"* the Club should be made to pay the costs of the present procedure and no less an amount than CHF 25,000 of the Player's legal fees in connection with all the enforcement phase of the Appealed Decision.

C. FIFA's submissions

58. In summary, FIFA submitted the following in its Answer to the Club's Appeal.

I. Breach of Article 64 of the FDC by the Club

59. Firstly, FIFA submitted that the system of sanctions used by the FIFA DisCo has been confirmed by the SFT as being lawful (Decision of the SFT 4P.240/2006 dated 5 January 2007*)* and proceedings under Article 64 of the FDC are *"to be considered not as enforcement but rather as the imposition of a sanction for breach of the association's regulations and under the terms of association law"*. FIFA noted that the CAS Award was final and binding. The sole task for the FIFA DisCo was therefore to analyse if the debtor (*i.e.* the Club) had complied with the CAS Award (FIFA cited, *inter alia*, CAS 2006/A/1008; CAS 2013/A/3323). Similarly, the task of the Panel here was to analyse the same (CAS 2012/A/3032).

60. Moreover, FIFA noted that despite the FIFA DRC Decision being passed in December 2015 and disciplinary proceedings being opened in January 2018, at no point during that period did the Club show any willingness to pay the amounts due. The Club did not even attempt to participate in the disciplinary proceedings at the FIFA DisCo which lead to the Appealed Decision.

II. The sanctions imposed on the Club are proportionate

61. Secondly, FIFA argued that the sanctions imposed on the Club were proportionate. In support of this, FIFA submitted that the imposition of a fine of CHF 30,000 is well within the range set out in Article 15 of the FDC (the maximum being CHF 1,000,000) and hardly at the level that can create additional financial difficulties for the Club.

62. 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 Panel disagreed with a specific sanction, it 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).

63. 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.

64. FIFA further submitted that as the Club had not at any time produced any evidence of financial difficulties despite claiming that the *"financial situation of the Club really is precarious"* the Panel should not give consideration to this argument in advance of the Club's claims on proportionality. FIFA noted that pursuant to Article 8 of the CC, the Club bore the burden of proof in establishing its allegedly precarious financial situation. FIFA also requested the Panel to disregard the Club's claim that it was trying to solve its alleged financial problems for the same reasons.

65. FIFA argued that the principle of *pacta sunt servanda* is of paramount importance for FIFA and a key issue to be protected by the FIFA Regulations on the Status and Transfer of Players ("RSTP"). Accordingly, clubs have a duty to be aware of its financial situation and only conclude contracts that can be fulfilled. In this respect, FIFA referred to Article 2 of the CC, according to which *"[e]very person is bound to exercise his rights and fulfil his obligations according to the principle of good faith"* (CAS 2010/A/2144). CAS jurisprudence has also made it clear that difficult financial situations are not a justification for failing to pay ones debts (CAS 2013/A/3358).

66. Further, FIFA submitted that in line with longstanding jurisprudence of the FIFA DisCo which has been repeatedly confirmed by the CAS (for example CAS 2012/A/2730), the FIFA DisCo always has regard to the amount outstanding when deciding on the level of sanctions to be imposed.

67. FIFA maintained that in the present case the FIFA DisCo acted in accordance with the overriding principle of proportionality as well as in line with the FIFA DisCo's established practice in setting the fine at the said level. In support of these arguments FIFA submitted a table showing a small sample of cases detailing amounts outstanding with the corresponding sanctions. This table is set out below:

Case number	Outstanding amount	Fine	Period of grace	Deduction
130394PST ZH	CHF 1,173,040	CHF 30,000	90 days	6 points
150890PST ZH	CHF 1,818,618	CHF 30,000	90 days	6 points
160018PST ZH	CHF 1,381,160	CHF 30,000	90 days	6 points
160475PSTTKY	CHF 2,992,658	CHF 30,000	90 days	6 points
160730PST ZH	CHF 1,741,074	CHF 30,000	90 days	6 points
170318PST ZH	CHF 1,505,787	CHF 30,000	90 days	6 points

68. Given the above, FIFA submitted that the Appealed Decision was clearly passed in accordance with the principle of proportionality and in line with the FIFA DisCo's practice.

69. FIFA also submitted that the Club has *"unfoundedly attempted to give the impression that 120 days would suffice in order for it to pay the amounts due, this being just a way to continue circumventing its financial obligations towards the* [Player]*"*.

70. Further, FIFA submitted that the FIFA DC considered that a 90 day period is sufficient time to finally pay the due amounts and such a period of grace does not deviate from the Committee's practice in cases where the amounts due were similar or even lower. FIFA rejected the Club's arguments regarding CAS 2014/A/3803, arguing that those were different circumstances given that Mr Eboué was a natural person (unlike the Club) and that those particular circumstances warranted the granting of a final grace period of 120 days. In any event, the granting of 120 days in that case did not mean that the granting of 90 days in the present proceedings was unfair or disproportionate.

71. Moreover, FIFA noted that the Club had 401 additional days (at the date of submission of FIFA's Answer) as of the notification of the CAS Award to pay the outstanding amounts but still failed to do so. In light of this lengthy period, it was *"remarkable"* that the Club were claiming that an extra 30 days would *"contribute immensely to the Club to comply"*.

72. FIFA rejected the Club's arguments in relation to the imposition of a 6 point deduction on the basis that CAS 2015/A/3903 was not analogous to the present case as the amount due by the debtor was CHF 26,848, which is 100 times lower than in the case at hand.

73. FIFA also rejected the Club's argument that one sanction alone is enough to bring about payment, but submitted that if the Club settled the debt to the Player it will indeed only be subjected to the one sanction - that being the fine totalling CHF 30,000. The sporting sanctions in the Appealed Decision were only applicable if the Club continued to fail to make the required payments. At this stage, as no such sporting sanction has been imposed, it cannot be contested.

74. FIFA submitted that the Appealed Decision *"is in line with the longstanding jurisprudence of the Committee and confirmed by the CAS (cf. inter alia CAS 2012/A/3032, CAS 2013/A/3358 and CAS 2017/A/5031). Indeed the fine set is neither oppressive nor disproportionate and it is justified by the Appellant's attitude, which never even made an effort to settle its debt. The possible deduction of points as well as the granted period of grace is also proper and consistent with both CAS awards and judgements of the Swiss Federal Tribunal (4P.240/2006 of 5 January 2007)"*.

75. Finally, FIFA also submitted that *"the CAS has regularly confirmed the legality and the proportionality of the enforcement system created by FIFA and the sanctions related thereto, in particular the deduction of points. Especially it should be noted that the CAS has persistently confirmed that the wording of art. 64 of the FDC provided with a clear statutory basis and precisely reflects the principle of proportionality: the first sanctions may be a fine and deduction of points, since is they are the less severe and therefore proportionate sanctions for a first infringement of the obligation to comply with a decision of FIFA or CAS, however, in case of continued failure to comply with said decision, a more severe sanction must be possible, in order to take account of the continued disrespect of FIFA's judicial authority (cf. inter alia CAS 2005/A/944, CAS 2011/A/2646 and CAS 2012/A/3032)"*.

V. JURISDICTION

76. 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 it prior to the appeal, in accordance with the statutes or regulations of that body".

77. The jurisdiction of the CAS, which is not disputed, derives from Article 67.1 of the FIFA Statutes (2015 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".

78. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

VI. ADMISSIBILITY

80. The Statement of Appeal, which was filed on 31 March 2018, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

81. The Panel notes that the Player requested that the Appeal be considered inadmissible due to his alleged lack of standing to be sued in this matter. However, under Swiss law and as established by the consistent jurisprudence of the CAS, standing to be sued ("légitimation passive") is to be treated as an issue of merits, and not as a question for the admissibility of the appeal (for example, see CAS 2008/A/1639; CAS 2012/A/3032; and CAS 2015/A/4310). Accordingly, the issue of the Player's standing to be sued will be considered in the merits below.

82. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

83. 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".

84. 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".

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

86. In light of the above, the Panel 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

87. The Panel notes that this is an Appeal against a decision by the FIFA DisCo, 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 Panel observes that the main issues to be resolved are:

a) Does the Player have standing to be sued (*légitimation passive*) in these Appeal proceedings?

b) Should the Appealed Decision be amended for being disproportionate?

The Panel will consider these issues in turn.

a) Does the Player have standing to be sued (légitimation passive) in these Appeal proceedings?

88. As a preliminary issue, the Panel must address the question as to whether the Player has standing to be sued in these proceedings.

89. The Panel notes that, as outlined by the Player in his written submissions, this issue has been considered by various CAS panels previously. In CAS 2012/A/3032, the sole arbitrator stated the following regarding this issue (emphasis added by the Panel):

"42. As a principle, and as it has already been established in CAS jurisprudence, a party has standing to be sued ("légitimation passive") in CAS proceedings only if it has some stake in the dispute because something is sought against it in front of CAS (cf. CAS 2008/A/1620, para. 4.1.; CAS 2007/A/1367, para. 37.). FIFA disciplinary proceedings, like basically all disciplinary proceedings of a sport association, are primarily meant to protect an essential interest of FIFA and FIFA's (direct and indirect) members, i.e. the full compliance with the rules of the association and, as here, with the decisions rendered by FIFA's decision-making bodies and/or by CAS (cf. CAS 2008/A/1620, para. 4.6.).

43. As a consequence, ***in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party, only FIFA has standing to be sued, but not the (previously) opposing party in, e.g., a financial dispute before the competent FIFA bodies*** *(cf. CAS 2008/A/1620, para. 4.7.; CAS 2007/A/1367, para. 43. et seq.). In other words, only FIFA can be the correct Respondent having standing to be sued".*

90. Further, the sole arbitrator in CAS 2015/A/4310 stated the following (emphasis added by the Panel):

"63. Pursuant to the jurisprudence of the CAS, a party has standing to be sued ("légitimation passive") in CAS proceedings only if it has a stake in the dispute, because, for example, something is sought from it (e.g. CAS 2014/A/3831; CAS 2014/A/3850). Nothing can be requested from Mr. Mangane in the present dispute, and indeed there is nothing Mr. Mangane can do in order to alleviate the burden of the Appellant. The only body that would have the authority to withdraw the sanction in the present case, assuming successful complaint, would be the FIFA. CAS jurisprudence has established that FIFA disciplinary proceedings are primarily meant to protect an essential interest of FIFA and FIFA's (direct and indirect) members, i.e. the full compliance with the rules of the association and/or with the decisions rendered by FIFA's decision-making bodies. ***As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party for failing to comply with a previous FIFA decision, only FIFA has standing to be sued, and not the (previously) opposing party in the original dispute before the competent FIFA bodies such as the FIFA Dispute Resolution Chamber.*** *Consequently, it is well established that* ***an appeal against a sporting sanction inflicted by a FIFA decision-making body must be directed against FIFA*** *(and the decision-making body), that is, the body that has the power to impose and enforce disciplinary sanctions on clubs that have contravened, for example, Article 12bis of the FIFA RSTP or, more frequently, Article 64 of the FIFA Disciplinary Code (e.g. CAS 2007/A/1367; CAS 2012/A/3032).*

64. In casu, the Appealed Decision imposes a sanction against the Appellant, i.e. Al Hilal Saudi Club. It goes without saying of course, that the Respondent does not have the power to directly affect the legal situation of the Appellant in this respect, even if the Appellant were to prevail in the present dispute. Indeed, the Respondent simply submitted a complaint before the FIFA DRC in order to claim payments relating to the contractual obligations that the Appellant had assumed vis-à-vis him by signing the Termination Agreement. Had the Appellant honoured its obligations set forth in the aforementioned Termination Agreement, the proceedings before FIFA DRC would have never been entertained by the Respondent.

65. In addition, the present appeal is lodged only in the context of a sporting sanction and must thus be directed against the federation as the proper respondent, which had rendered the challenged decision, which constitutes the subject of the present appeal (i.e. FIFA). ***The Player who launched the proceedings before the FIFA DRC cannot be the proper respondent****".*

91. The Panel fully concurs with the reasoning of the sole arbitrators in both the above cited CAS cases.

92. *In casu*, the Panel notes that the Appealed Decision essentially contained four elements:

    a) a fine of CHF 30,000 issued on the Club by the FIFA DisCo;

    b) a potential 6 point deduction on the Club if it continued to fail to pay its debts;

    c) a potential relegation for the Club if it continued to fail to pay its debts even after the points deduction; and

    d) an order for the Club to pay procedural costs of CHF 3,000 to the FIFA DisCo.

93. None of the above four elements concerned the Player. Nothing can be requested of the Player and indeed there is nothing the Player could do to alleviate the burden of the Club. Only FIFA would have the authority to withdraw the sanctions imposed in the Appealed Decision if the Panel deemed it appropriate. It is clear that the Player does not have any stake in these particular proceedings.

94. As the Player submitted, the appeal of sanctions imposed by the FIFA DisCo is a *"vertical dispute"* between a member (which was sanctioned) and FIFA (who issued the sanctions). A dispute between the Club and the Player would be a *"horizontal dispute"* between two members of FIFA. That dispute has been finally determined by the CAS Award. The Panel concurs with the Player's argument that whilst FIFA has standing to be sued in this matter, the Player does not.

95. Accordingly, the Panel concluded that the Player did not have standing to be sued (*"légitimation passive")* in this Appeal, and any claims made by the Club against the Player are therefore rejected without further consideration.

96. For completeness, the Panel notes that the Player's lack of standing is largely academic as nothing was, in fact, claimed by the Club against the Player in its requests for relief, save for a request for the Player to contribute to the costs of these arbitration proceedings incurred by the Club. The issue of costs in considered below in section IX of this Award.

b) Should the Appealed Decision be amended for being disproportionate?

97. The Panel notes that the two requests for relief by the Club in relation to amending the Appealed Decision were as follows:

    "(b) to uphold the Appeal, set aside and replace the [Appealed Decision] *by sanctioning the Club to pay the outstanding amounts within 120 days instead of 90;*

    (c) to set aside and replace the [Appealed Decision] *by sanctioning the non-payment by the Club to only 3 (three) points initially to be deduced* [sic] *in the national league, instead of 6 (six)".*

98. The Panel notes that there was no request by the Club to reduce the amount of the fine issued. Accordingly, the Panel will not consider that element of the Appealed Decision and will limit its discussion to the issue of the grace period and the points deduction.

99. At the outset, the Panel notes that there is an established line of CAS jurisprudence which states that the sanctions imposed by the FIFA DisCo can only be amended by a CAS panel if the sanction(s) concerned are evidently and grossly disproportionate to the offence. Accordingly, the Panel considered that it could only grant the Club the requests for relief quoted above if it considered the sanctions imposed by the FIFA DisCo in the Appealed Decision to be 'evidently and grossly disproportionate to the offence'.

100. The Club's submissions focussed on the proportionality of the sanctions imposed by the FIFA DisCo and contended that a more lenient approach would be as effective and more appropriate. Whilst the Panel notes this argument, it considers that the Club's position is severely undermined by the fact that more than 4 years elapsed since the initial claim was lodged at FIFA and over a year passed since the CAS Award was issued without any payment being made at all. The Panel considers that the Club's failure to agree a payment plan or make any payment to the Player to date significantly weakens its arguments on proportionality.

101. 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 FIFA noted, *"the possible sanctions stipulated in* [Article 64 of the FDC] *and threatened to be imposed are designed to put the debtor under pressure to finally comply with the decision. This article provides FIFA with a legal tool enabling at a certain extent (through the application of sanctions) to have the rights of the creditor and FIFA finally respected"*. 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). Broadly, the Panel 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.

102. In relation to the Club's specific requests for relief in lowering the sanctions, firstly, the Club requested that the grace period allowed to make the required payment be increased from 90 days to 120 days. The Panel notes the Club has submitted that given its significant financial difficulties, an additional 30 days would *"contribute immensely"* to the Club's ability to comply with the Appealed Decision. Without more evidence, the Panel finds this to be a curious argument.

103. The Club repeatedly claimed that it was in a *"precarious"* financial situation, but did not submit a single piece of evidence to support this assertion. Pursuant to Article 8 of the CC, the Club bore the burden of proof in establishing its allegedly precarious financial situation. Similarly, the Club also alleged that it was attempting to settle its debts and was *"working on a general recovery plan"* but failed to submit any evidence to support this statement either. The Panel takes the view that in the absence of any evidence, the Club's claims regarding its financial position must be

disregarded. In any event, CAS jurisprudence (see for example, CAS 2013/A/3358) is clear that a difficult financial situation is not a valid justification for a club to fail to pay its debts.

104. Moreover, the Panel finds it contradictory that on one hand the Club claims to be in a *"precarious"* financial position and would be unable to pay its debt of over EUR 2,000,000 within 90 days, but simultaneously also states that an extra 30 days would greatly assist it to pay this large sum of money. This contradiction is only exacerbated by the fact that the Player first filed a claim at FIFA against the Club more than 4 years ago. In those circumstances, the Panel does not believe that an additional 30 days grace period is warranted. The Club has entirely disregarded its financial obligations towards the Player for over 4 years. At the very least, the Club has known for a year (since the notification of the CAS Award) that it owed this money to the Player. The Panel were left with the impression that this request for an extra 30 days' grace period was made solely for the purposes of further delaying the Club's financial obligations towards the Player.

105. The Panel also rejects the Club's claim that it should be granted 120 days on the basis that other debtors (like the one in CAS 2014/A/3803) had been granted that period in the past. As FIFA noted, just because other debtors had been granted 120 days to make their payment 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. Ultimately, the Panel concludes that the granting of a 90 day period, instead of a 120 day period, was not 'evidently and grossly disproportionate to the offence'. The Club's claim to extend the grace period by 30 days is therefore rejected.

106. The Club also requested the Panel to reduce the points deduction in the Appealed Decision from 6 points to 3 points. The Club cited CAS 2015/A/3903 and argued that a 3 point deduction was more appropriate.

107. Firstly, the Panel did not consider that since a 3 point deduction was appropriate in one case that it would also be appropriate in this case. Moreover, as FIFA pointed out in its submissions, the Club owes the Player an amount more than 100 times the amount owed by the debtor in CAS 2015/A/3903. The Panel does not consider the circumstances in the two cases to be analogous. If a 3 point deduction was appropriate in CAS 2015/A/3903, it does not stand to reason that the same sanction should be imposed on the Club when it owed 100 times more. The Panel also takes note of the table of precedents which FIFA submitted (see above para. 67). Whilst the Panel did not consider this to be entirely definitive as it was just a small sample of cases selected by FIFA, it was nevertheless useful.

108. On balance, given the amount of money which is overdue (over EUR 2m) and the length of time it has been overdue (4 years) the Panel was not convinced that a 6 point deduction was grossly disproportionate. Once again, the Club bore the burden of proof in this regard, and the Panel concluded the Club failed to meet its burden. Accordingly, the Player's request for the points deduction to be reduced from 6 points to 3 points is rejected.

109. In summary, the Panel considers that the sanctions imposed by the FIFA DisCo in the Appealed Decision were proportionate and found no reason to amend or reduce them in any way.

B. Conclusion

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

111. 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 31 March 2018 by Al Arabi SC against the decision issued on 31 January 2018 by the Member of the FIFA Disciplinary Committee is dismissed.

2. The decision issued on 31 January 2018 by the Member of the FIFA Disciplinary Committee is confirmed.

3. (…).

4. (…).

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