

# Overdue Payables under Article 12bis RSTP and Recent Published Jurisprudence of the FIFA DRC



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→ **Overdue payables - FIFA Dispute Resolution Chamber (FIFA DRC) - FIFA RSTP - FIFA proceedings - Salaries - Failure to comply - Financial sanctions - Financia sanctions - Fine - Sporting sanctions**

In this article, the authors will give an overview and analysis of all the published decisions of the FIFA DRC in 2020 and 2021, in relation to Article 12bis RSTP and provide the reader with insights and background information in relation to the requirements of Article 12bis.

## Introduction

It is already seven years ago that FIFA introduced the inclusion of Article 12bis to the FIFA Regulations on the Status and Transfer of Players ([FIFA RSTP](#)). The aim of Article 12bis was to establish a stronger system with regard to overdue payables (towards players and clubs).<sup>3</sup> The provision aims at protecting contractual stability between professional players and clubs. It grants players an alternate mechanism by means of which the player can claim outstanding remuneration from their clubs or for clubs to claim outstanding amounts from other clubs.<sup>4</sup> The provision also provided the FIFA Dispute Resolution Chamber (FIFA DRC) and the FIFA Players' Status Committee with a wide scope of discretion when imposing sporting sanctions.

Although Article 12bis is a provision that was quite often used by players and clubs in order to claim overdue payables, one might have noticed that there seems to be a severe drop in the published decisions of the FIFA DRC in relation to overdue payables.

Year	Number of decisions <sup>5</sup>
2016	71
2017	127
2018	237
2019	164
2020	10
2021 <sup>6</sup>	45

The drop in decisions in 2020 could have been the consequence of several factors. First, Article 12bis has several cumulative requirements and if a claim does not fulfil the requirements, it will be treated as a standard claim for outstanding remuneration instead of an overdue payable matter. Second, the drop in decisions could have been be

a consequence of a change in interpretation of the respective provision.

## Background

One of the unfortunate issues in the football transfer system is clubs failing to comply with their financial obligations, whether in relation to unpaid remuneration to players or coaches or unpaid transfer compensation and training rewards to other clubs. The frustration felt by individuals being made to wait for their salaries and other financial benefits and by clubs having to chase outstanding payments from other clubs is entirely understandable. Complaints from clubs about their competitors gaining an unjustified competitive advantage by promising to make payments for which they lack the necessary financial means became more vociferous. To avoid such situations of hardship, FIFA introduced Article 12bis in 2015, aiming to ensure that clubs comply with their contractual financial obligations. Article 12bis

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<sup>3</sup> [FIFA Circular no. 1468, 23 January 2015](#).

<sup>4</sup> [FIFA Commentary 2021, p. 93](#).

<sup>5</sup> Published decisions on the website of FIFA on 3 May 2022.

<sup>6</sup> *Putsila* is not referring to Article 12bis.

was drafted aiming to establish a stronger system to ensure that clubs properly comply with their financial contractual obligations.<sup>7</sup> Article 12bis is designed to serve as a deterrent for clubs that ignore their financial commitments.

### The Scope of Article 12bis

The wording of paragraph 1 of Article 12bis is quite straightforward.

*“Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements.”<sup>8</sup>*

As follows from the wording of this first paragraph of the provision, it is exclusively aimed at clubs as far as debtors are concerned. As for creditors, the provision may be cited by both creditor clubs and players.<sup>9</sup> From paragraph 2 of Article 12bis, it further follows that the payments must have been delayed for more than 30 days without a *prima facie* contractual basis.<sup>10</sup> Any club found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis may be sanctioned by the Football Tribunal.<sup>11</sup> In order for a club to be considered to have overdue payables in the sense of Article 12bis, the creditor (player or club) must have put the debtor club in default in writing and have granted a deadline of at least ten

days for the debtor club to comply with its financial obligation(s).<sup>12</sup>

Thus, from the wording of Article 12bis and the corresponding jurisprudence, it follows that, in essence, four prerequisites must be met to establish that an overdue payable exists under Article 12bis. First, the club must have delayed a due payment for more than 30 days. Second, such delay must be without a *“prima facie contractual basis”*. Third, the creditor (which is the player or club) must have put the debtor club in default in writing, and finally, the creditor must have granted the debtor a deadline of at least 10 days to comply with its financial obligation.<sup>13</sup> Based on these prerequisites, the FIFA DRC has to establish the following points before deciding upon the imposition of a sanction(s):

- a contractually agreed payment remained outstanding for at least 30 days after its contractual due date;
- the creditor (club or player) served the debtor club written notice that the club was in default;
- an extended deadline of at least 10 days from the date of the default notice was granted to the debtor club in order for it to remedy the situation; and
- the debtor club was unable to provide any evidence or substantiated indications which would, *prima facie*, justify the delay in payment. In the following paragraphs of the article, the authors will discuss these prerequisites in more details.<sup>14</sup>

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### A delayed payment

The payment involved must have been overdue for at least 30 days.<sup>15</sup> When a payment is delayed for more than 30 days, it is considered a delayed payment in the sense of Article 12bis. This is irrespective of whether other payments are not yet due for at least 30 days. Such payments can be claimed as well; however, these payments will not be considered as delayed payments in the sense of Article 12bis and, therefore, will not be taken into consideration when imposing sanctions on the debtor club. What is more, even amounts which are not due at the date on which a claim is lodged can be awarded by the FIFA DRC.<sup>16</sup> The fact that the right to claim sums that became collectible while the proceeding is pending follows from procedural economy and is in line with the longstanding jurisprudence of the Football Tribunal in order not to oblige the creditor to start a new redundant procedure on the basis of the same contractual obligations previously recognized.<sup>17</sup>

In relation to the outstanding payment, it must be mentioned that Article 12bis does not apply to all outstanding payments

7 [CAS 2018/A/5838 Clube Atlético Mineiro v. Huachipato SADP & FIFA](#), par. 52, award of 30 April 2019.

8 Article 12bis par. 1 RSTP. This includes termination agreements: see, for example, [FIFA DRC, 16 June 2021, Linus Hallenius](#) and [FIFA DRC, 14 July 2021, Sadiku](#).

9 Coaches cannot invoke Article 12bis to claim outstanding remuneration. However, an identical provision governing coaches can be found in Annexe 2 to the RSTP.

10 Art. 12bis par. 2 RSTP.

11 Art. 12bis par. 2 RSTP.

12 Art. 12bis par. 3 RSTP.

13 See also [CAS 2018/A/5838 Clube Atlético Mineiro v. Huachipato SADP & FIFA](#), par. 52, award of 30 April 2019. Please note that, in this award, it is established that three prerequisites are met.

14 [FIFA Commentary 2021](#), p. 96.

15 It must be taken into account that, in accordance with Article 23 par. 3 RSTP, the FIFA Football Tribunal shall not hear any disputes if more than two years have elapsed since the event giving rise to the dispute. In the event of outstanding payments, the due date of such payment is considered the event giving rise to the dispute. See in this regard for example [FIFA DRC, 21 February 2020, Mendes Da Graca](#).

16 See [FIFA DRC, 27 January 2021, Attamah](#). Although the amounts were not due at the date on which the claim was lodged, due to the fact that the respondent club replied to the claim after the due date for payment of the reimbursement of the amounts, the club thereby acknowledged not having complied with its financial obligations regarding the outstanding remuneration of the player.

17 See also [FIFA DRC, 12 November 2021, Otero Vasquez](#).

which are overdue for at least 30 days. For example, Article 12bis does not apply to outstanding payments which are not based on a contractual agreement, such as any regulatory obligations to pay training compensation or solidarity mechanism.<sup>18</sup> On the other hand, from the jurisprudence, it follows that Article 12bis does apply to payments such as relegation bonuses,<sup>19</sup> performance bonuses,<sup>20</sup> royalties for portrait rights<sup>21</sup> and image rights agreements.<sup>22</sup>

Although the payment must, in principle, follow from a contractual agreement, this does not necessarily mean that a claim can only be based on a signed agreement. It follows from recent jurisprudence that a player can claim outstanding financial obligations based on the principle of the primacy of reality as well. This principle, which is following the FIFA DRC applicable in the majority, if not in all, labour law systems, dictates that facts must be given preference over what parties state in legal texts, documents and agreements. Put differently, whenever the facts clearly contradict the parties' statements in the documents at the basis of their relationship, the former shall prevail and a party can legitimately claim such amounts.<sup>23</sup> Hence, the contractual agreement follows from the facts as stated by the claiming party. However, it must be mentioned that it is not certain that the FIFA DRC will follow this line in all its jurisprudence. In several other decisions, the FIFA DRC clearly indicated that only documents with the signature of both parties to the contract could be considered as valid and binding upon the parties.<sup>24</sup>

For the sake of completeness, it must be mentioned that in relation to outstanding payments deriving from image rights agreements or payments such as royalties, the FIFA DRC will, for formal reasons, first verify whether it is competent to deal with these specific components or not. As a general rule, if there are separate agreements, the FIFA DRC tends to consider the agreement on image rights as such and does not have the competence to deal with it. However, such a conclusion might be different if specific elements of the separate agreement suggest that it was, in fact, meant to be part of the actual employment relationship, which follows from established jurisprudence.<sup>25</sup>

When a party claims certain expenses, the party should meet the burden of proof in this regard and provide the FIFA DRC with the payment details and evidence that such an amount was actually paid.<sup>26</sup> In the event that the club made a payment, it was constant jurisprudence that, in accordance with Article 12 par. 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, it is up to the club to prove this fact.<sup>27</sup> However, it must be mentioned that in the current Procedural Rules Governing the Football Tribunal ([Procedural Rules](#)), this provision is no longer incorporated. In the opinion of the authors, however, and in line with Swiss Law, it will still be the debtor club that should prove the fact that it paid the claimed amount(s), as the existence of an alleged fact shall rest on the person who derives rights from that fact.<sup>28</sup>

In case the club made payments in a local currency, the FIFA DRC deems it appropriate to consider the exchange rate of the date of the payment.<sup>29</sup>

### **Written default notice**

Once the 30 days period has elapsed and, therefore, a delayed payment in the sense of Article 12bis exists, the creditor must proceed to provide the debtor club with written notice that it is in default. The only requirements pertaining to this notice are that the payment must be 30 days overdue before it can be issued and that the notice must set a deadline of at least a further 10 days for the debtor club to comply with its financial obligations.<sup>30</sup>

If the creditor provides documentary evidence that the default notice was properly sent, either physically or electronically, to a destination controlled by the debtor club (*i.e.* to a correct postal address, fax number or email address), and the debtor club claims not to have received the notification, it will be up to the debtor club to establish that the default notice did not reach the club.<sup>31</sup> When sending the default notice, a player can legitimately expect that the contact details of the club, as mentioned in the employment contract, are the official means of communication.<sup>32</sup> The same goes for the email address on the club's website<sup>33</sup> and email addresses provided in TMS.<sup>34</sup> This might be different in case there are documents on file that evidence that the club informed the player that its official contact

<sup>18</sup> [FIFA Commentary 2021](#), p. 94.

<sup>19</sup> [FIFA DRC, 11 March 2021, Rivas Boada](#).

<sup>20</sup> [FIFA DRC, 13 January 2022, Bradley](#).

<sup>21</sup> [FIFA DRC, 6 May 2021, Tosic](#).

<sup>22</sup> [FIFA DRC, 23 February 2022, Campasol](#); [FIFA DRC, 19 November 2020, Kleyman](#) and [FIFA DRC, 13 October 2021, no. 102161](#).

<sup>23</sup> [FIFA DRC, 13 October 2021, no. 102161](#).

<sup>24</sup> [FIFA DRC, 8 May 2020, Mengolo Justin Jr.](#) and [FIFA DRC, 18 February 2021, Da Costa Ruela](#).

<sup>25</sup> See also A.L. Al, 'Image rights agreements in light of the football jurisprudence', Sports Law & Taxation, September 2020.

<sup>26</sup> [FIFA DRC, 14 October 2021, Konate](#). In this decision the player claimed an amount due to the payment of an electricity bill, but filed no evidence of having in fact paid such amount.

<sup>27</sup> [FIFA DRC, 16 February 2021, Orellana](#). See also [FIFA DRC, 28 January 2021, Rodrigues da Silva](#).

<sup>28</sup> Article 8 of the Swiss Civil Code. See also [CAS 2020/A/6679, Bursaspor Kulübü Derneği v. Christian Chagas Tarouco](#), par. 79, award of 3 August 2020.

<sup>29</sup> [FIFA DRC, 9 November 2021, Takudzwa](#).

<sup>30</sup> [CAS 2015/A/4232, Al-Gharafa SC v. FC Steaua Bucuresti & FIFA](#). See also [FIFA Commentary 2021](#), p. 94.

<sup>31</sup> [CAS 2016/A/4718 & 4719, Club Atlético Mineiro v. Udinese Calcio & FIFA](#). See also [FIFA Commentary 2021](#), p. 94.

<sup>32</sup> See also Art. 10 par. 4 Procedural Rules. See also [FIFA DRC, 13 August 2020, Abdennour](#) and [FIFA DRC, 29 September 2020, Lopez Martinez](#).

<sup>33</sup> [FIFA DRC, 13 November 2020, Poplatnik](#).

<sup>34</sup> [FIFA DRC, 22 October 2020, Ruiz Torre](#).

details changed during the course of the contractual relationship, which follows from the case-law.<sup>35</sup> Moreover, in a decision in which the club argued that the default notice was sent by the player to a non-recognized email address, the FIFA DRC pointed out that the effective delivery of the notice was not of relevance since - apart from the good faith that is shown when a party puts the other in default before lodging a claim - the default notice did not affect either the degree of acceptance of the claim or the material consequences, considering that Article 12bis was not applicable in that matter, in view of the fact that the contractual obligation on the club is not triggered *prima facie*, but rather required a factual and legal analysis of the circumstances surrounding the dispute.<sup>36</sup> As such, in the event that the creditor cannot prove that it complied with the prerequisites in relation to the default notice, this does not necessarily mean that the claim will be rejected.

### 10-day deadline

The 10-day deadline in Article 12bis par. 3 applies to a determination as to whether a club is in arrears of its payment obligations for purposes of seeking sanctions against it before FIFA. It presumably exists as a safeguard to ensure that debtor clubs are put on notice of their payment obligations before sanctions can be sought on this basis.<sup>37</sup> From the jurisprudence in relation to Article 14bis of the FIFA RSTP,<sup>38</sup> it seems to follow that the prerequisite of granting a certain deadline<sup>39</sup> does not mean that, in the default notice,

the deadline should be explicitly mentioned, but rather that the player *de facto* should have granted the debtor club the regulatory stated deadline to remedy its default, *i.e.* more than the regulatory deadline should have elapsed between the default notice and the termination of the employment contract by the player. The authors believe that it is not unfair to say that this line of '*de facto*' reasoning should also be applied in analogy to the deadline as required in Article 12bis. In other words, the authors think it is fair to say that, in case the creditor provided the debtor club with a default notice without mentioning explicitly a deadline of 10 days, but files the claim 10 days after providing the default notice to the debtor club, it *de facto* granted a deadline of 10 days and, therefore, complied with this prerequisite.

Effectively, taking the 10-day deadline into consideration, the debt must ultimately be at least 40 days (30 days overdue plus the 10 day-deadline for compliance) overdue before an "Article 12bis claim" can be lodged.<sup>40</sup>

### Prima facie basis

If a club is accused of not having paid overdue payables due to a player or another club based on a contractual agreement, the debtor club will have to demonstrate that it has a clear and evident contractual justification for the non-payment of the relevant amount due.<sup>41</sup> In all analysed decisions, the claim of the claimant was (partially) accepted.<sup>42</sup>

It is well-established jurisprudence of the FIFA DRC and the Court of Arbitration for Sport (CAS) that a club's financial difficulties cannot be considered as a valid justification for non-compliance with its essential contractual obligations deriving from a binding agreement.<sup>43</sup> Supposed difficulty in executing a payment due to banking restrictions or governmental constraints are also not accepted as a *prima facie* justification for late payment.<sup>44</sup> Also, fines or any other available financial sanction in general may not be used to set off outstanding amounts, especially when there is no provision for this in the contract.<sup>45</sup> When invoking a *force majeure* as a reason for the non-payment, the club must establish the existence of said event under the applicable law/rules as well as the consequences that derive in connection thereto. The analysis of whether a situation of *force majeure* existed has to be considered on a case-by-case basis, taking into account all the relevant circumstances.<sup>46</sup> The threshold for meeting a *prima facie* basis is quite high.<sup>47</sup>

### Non applicability Article 12bis RSTP

If we take a further look into the jurisprudence of the FIFA DRC, it seems that Article 12bis is not

43 [FIFA DRC, 28 January 2021, Rodrigues da Silva and FIFA DRC, 14 October 2020, Stallone Limbombe](#). See also [CAS 2018/A/5838 Clube Atlético Mineiro v. Huachipato SADP & FIFA](#), award of 30 April 2019, par. 95 referring to [CAS 2016/A/4402 Panthrakikos FC v. FIFA](#), par. 40; [CAS 2006/A/1008 Rayo Vallecano de Madrid SAD v. FIFA](#), par. 19. See also: [CAS 2016/A/4387 Delfino Pescara 1936 v. Royal Standard Liège & FIFA](#), award of 8 July 2016, par. 118.

44 [FIFA DRC, 5 May 2020, Pereyra](#); [FIFA DRC, 15 April 2020, no. 04202215](#); [FIFA DRC, 19 May 2020, Svydkov](#).

45 [FIFA DRC, 3 November 2021, Marchuh](#); [FIFA DRC, 11 March 2021, Bengoa Díez and FIFA DRC, 25 February 2021, Obayan Sunday](#).

46 [FIFA DRC, 28 April 2021, Sanogo](#).

47 This was again confirmed in the extensive jurisprudence in relation to the COVID-19 outbreak. See also [F.M. DE WEGER & A.L. AL, 'COVID-19: a legal perspective on FIFA's guiding principles for national football associations'](#), *LawInSport*, 10 April 2020.

35 [FIFA DRC, 18 June 2020, Sankoh](#).

36 [FIFA DRC, 28 July 2021, Mesanovic](#).

37 [CAS 2016/A/4874 Club Africain v. Seidu Salifu](#), par. 58, award of 22 August 2017.

38 See for example [FIFA DRC, 10 February 2020, Bubablo](#); [FIFA DRC, 21 February 2020, Brown](#); [FIFA DRC, 25 February 2020, Akaminko](#); [FIFA DRC, 27 February 2020, William](#) and [FIFA DRC, 23 April 2020, Issah](#).

39 Under Article 14bis RSTP, a deadline of 15 days must be provided.

40 See also [FIFA Commentary 2021](#), p. 94.

41 [FIFA Commentary 2021](#), p. 95.

42 The same conclusion was reached when analysing the decisions between 1 April 2015 and 1 September 2018. See [F.M. DE WEGER & T. DOCHY, 'Overdue payables in action: FIFA jurisprudence on the 12bis procedure'](#), *Football Legal* # 10 (December 2018), p. 179. The reason for this may be that when a "*prima facie contractual basis*" does exist for the respondent party, which would justify non-compliance with the original contract, the matter will be handled as a 'normal' matter instead of an overdue payable matter.

applied in all cases in which the FIFA DRC could have applied Article 12bis.<sup>48</sup> In the opinion of the authors, the FIFA DRC may apply Article 12bis *ex officio* if the prerequisites of the article are met, even if the party claiming the outstanding amount is not specifically referring to Article 12bis or requesting to apply said provision. Application of Article 12bis does not require a relevant request from the interested party.<sup>49</sup> The authors believe that it is also fair to say that in all cases in which the prerequisites of Article 12bis are met, the FIFA DRC should apply, where necessary, even *ex officio*, the respective provision and impose sanctions upon the debtor club.

However, the contrary follows from the analysed jurisprudence. In a decision in which the player complied with the prerequisites of Article 12bis and explicitly requested that the club “*should face sanctions in accordance with art. 12bis RSTP*”, the respective Article was not applied by the FIFA DRC, nor did the FIFA DRC set out its reasons why it did not apply Article 12bis.<sup>50</sup> In another decision, the FIFA DRC did elaborate its reasoning why Article 12bis was not applicable, stating that, “*even though there is a valid default notice on file in compliance with art. 12bis, the payment of the requested amounts was not a prima facie obligation but rather needed a detailed analysis of the*

*situation given the exceptional constellation of events produced by the Covid-19 pandemic.*”<sup>51</sup>

” ***In certain matters, especially when the matter is not considered a straightforward matter, the definition of “a prima facie basis” is broader interpreted in order to avoid applying Article 12bis*** “

In another decision of the FIFA DRC, the Chamber also entered into the reasons why the matter was not considered as an overdue payable case in the sense of Article 12bis even though the FIFA DRC established that the player provided a default notice in compliance with the requirements of Article 12bis. The FIFA DRC came to this conclusion on the grounds that the entitlement of the player to the amounts required an analysis of the documentary evidence provided, it not being a straightforward matter, but rather the outcome reached upon the interpretation of the evidence on file. The FIFA DRC further argued that the amounts requested by the player in his default notice referred to the gross amounts indicated in the contract and the amounts awarded were granted not only as per the contract but also as per the offer and the payment proof provided by the club and, therefore, there actually existed a *prima facie* contractual basis not to pay the gross amounts requested by the player. Moreover, the player requested a bonus, which payment was not fixed but rather required the occurrence of an event.<sup>52</sup>

Based on this jurisprudence, it seems to follow that in certain matters, especially when the

matter is considered not a straightforward matter, the definition of “*a prima facie basis*” is broader interpreted in order to avoid applying Article 12bis and imposing sanctions on a club due to the fact that it was not crystal clear whether the amounts were outstanding and rightfully claimed.

### **Consequences of Breaching Article 12bis**

Any club found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis may be sanctioned in accordance with Article 12bis paragraph 4. The Football Tribunal has the competence to impose sanctions on the club by virtue of paragraph 4 of Article 12bis. In cases of clubs failing to meet their contractual financial obligations, a wide discretion regarding the choice of the sanction to be imposed exists, in order to preserve and uphold the main goal of Article 12bis, *i.e.* to ensure that clubs properly comply with their financial contractual obligations.<sup>53</sup> Said sanctions are to be imposed in view of the special circumstances of each case and the conduct of the parties.<sup>54</sup> The jurisprudence in relation to Article 12bis shows that sanctions are imposed *ex officio* by the FIFA Football Tribunal and not per request of the claimant.<sup>55</sup> The Football Tribunal may impose the following sanctions:

- a warning;
- a reprimand;

48 See for example [FIFA DRC, 27 October 2021, Shengelia](#); [FIFA DRC, 11 August 2021, De Araujo Alves](#); [FIFA DRC, 29 July 2021, Riascos Barhona](#); [FIFA DRC, 25 March 2021, Hamdi](#) and [FIFA DRC, 11 March 2021, Mehler Carvalho](#).

49 [CAS 2015/A/4232 Al-Gharafa S.C. v. F.C. Steaua Bucuresti & FIFA](#), award of 14 June 2016, par. 75. See also [CAS 2016/A/4719 Club Atlético Mineiro v. Udinese Calcio S.p.A & FIFA](#), award of 31 March 2017, par. 80.

50 [FIFA DRC, 28 July 2021, Flores](#). See also [FIFA DRC, 25 February 2021, Scuk](#). In this matter, the player indicated that he “*had correctly put the club in default in accordance with art. 12bis of the Regulations on the Status and Transfer of Players*” and [FIFA DRC, November 2020, Nkoudou Mbida](#) in which the player “*considered that art. 12bis is applicable in the matter.*”

51 [FIFA DRC, 3 June 2021, Negredo](#).

52 [FIFA DRC, 29 July 2021, Santos da Silva Junior](#).

53 [CAS 2016/A/4718 Club Atlético Mineiro v. Udinese Calcio S.p.A & FIFA](#), award of 31 March 2017, par. 83 and [CAS 2016/A/4675 Sporting Club Olhanense v. Gonzalo Mathias Borges Mastriani & FIFA](#), award of 7 August 2017, par. 111.

54 [CAS 2015/A/4232 Al-Gharafa S.C. v. F.C. Steaua Bucuresti & FIFA](#), award of 14 June 2016, par. 76.

55 See also [CAS 2016/A/4718 Club Atlético Mineiro v. Udinese Calcio S.p.A & FIFA](#), award of 31 March 2017, par. 74.

- a fine;
- a ban from registering any new players, either nationally or internationally, for one or two entire and consecutive registration periods.

Sanctions imposed by FIFA find a clear legal basis in Article 12bis, thus satisfying the “*principle of legality*”. The sanctions may be applied cumulatively<sup>56</sup> and Article 24 RSTP will be applicable as well.

The absence of a reply to the claim will, in general, result in a more severe penalty for the defaulting club. Moreover, a repeated offence will be considered an aggravating circumstance and lead to a more severe penalty.<sup>57</sup> A party is considered a repeated offender in the event that it is established that the said party had overdue payables within a time period of two years. The imposition of more severe sanctions on repeated offenders has been confirmed by the CAS on several occasions.<sup>58</sup> Each additional offence by the same club is equally considered a “*repeated offence*”, and a more severe penalty may be imposed compared to the previous offence, always taking into consideration the specific circumstances of the case. Moreover, according to CAS jurisprudence,<sup>59</sup> the sanction resulting from the repeated failure of a club is equally predictable as Article 12bis par. 6 of the RSTP clearly foresees - and FIFA members are duly warned - that “*a repeated offence will be considered an aggravating circumstance and lead to a more severe penalty.*” As such, there is

a clear connection between the incriminated conduct and the imposed sanction.<sup>60</sup>

In general, a warning will be imposed when it is the club’s first offence and a reprimand in case of a second offence of the club.<sup>61</sup> However, there is no proof that a first-time offender should be sanctioned exclusively with a warning or a reprimand and FIFA should reserve more serious forms of sanctions for repeated offenders only.<sup>62</sup> A fine will, in general, be imposed at the third offence of the club and with each additional offence within a term of two years the fine will be multiplied by an additional 0.5 of the fine.<sup>63</sup>

The calculation of a fine always depends on the specific circumstances of each matter, such as, but not limited to, the actual overdue amount, but also the specific circumstances surrounding the particular case, such as the behavior of the club during the investigation, the amount awarded, the seriousness of the infringement, or whether the club has been previously sanctioned for having overdue payables, may be taken into consideration.<sup>64</sup>

In a decision in which it was established that the club was a repeated offender and was found to have owed overdue payables on eight different occasions, the FIFA DRC decided to impose a fine on the club in the amount of EUR 52,500;<sup>65</sup> in another decision in which it was

established that the club was found to have owed overdue payables on six different occasions, the FIFA DRC decided to impose a fine on the club in the amount of CHF 45,000.<sup>66</sup> Regarding the proportionality of the sanction, the consistent jurisprudence of CAS has stated that CAS panels shall give a degree of deference to decisions of sports governing bodies in respect of the proportionality of sanctions and shall only review the decision if it is considered evidently and grossly disproportionate to the committed offence.<sup>67</sup>

The CAS would normally have a wide scope of review according to Article R57 of the CAS Code. However, in cases where the CAS is asked to review sanctions enforced by an international federation like FIFA, the scope of review is more narrow and limited, which has been acknowledged in a number of CAS awards.<sup>68</sup> Sanctions imposed on the debtor can only be reviewed if they are considered to be evidently and grossly disproportionate to the offence.<sup>69</sup>

### Final Remarks

Article 12bis was drafted aiming to establish a stronger system to ensure that clubs properly comply with their financial contractual obligations. Article 12bis is

<sup>66</sup> [FIFA DRC, 11 March 2021, Rivas Boada.](#)

<sup>67</sup> [CAS 2018/A/5838 Clube Atlético Mineiro v. Huachipato SADP & FIFA](#), award of 30 April 2019, par. 90. Reference is made to [CAS 2016/A/4595 Al Ittihad Saudi v. FIFA](#), [CAS 2009/A/1817 WADA & FIFA v. Cyprus Football Association \(CFA\)](#), [C. Marques, L. Medeiros, E. Eranosian, A.Efthymiou, Y. Sfakianakis, D. Mykhailenko, S. Bengeloun, B. Vasconç & CAS 2009/A/1844 FIFA v. CFA and E. Eranosian](#). See also, [CAS 2018/A/5838 Clube Atlético Mineiro v. Huachipato SADP & FIFA](#), award of 30 April 2019, par. 90.

<sup>68</sup> See for example [CAS 2018/A/5683 Juventus Football Club S.p.A. v. Envigado Football Club S.A. & FIFA](#), award of 4 December 2018, par. 63; [CAS 2016/A/4718 Club Atlético Mineiro v. Udinese Calcio S.p.A & FIFA](#), award of 31 March 2017, par. 81, referring to CAS 2015/A/4291.

<sup>69</sup> [CAS 2018/A/5588 Kayserispor Kulübü v. FIFA](#), award of 10 September 2018, par. 103.

<sup>60</sup> [CAS 2018/A/5838 Clube Atlético Mineiro v. Huachipato SADP & FIFA](#), award of 30 April 2019, par. 85.

<sup>61</sup> See for example [FIFA DRC, 13 October 2021, Mesanovic.](#)

<sup>62</sup> [CAS 2015/A/4232 Al-Gharafa SC v. FC Steaua Bucuresti & FIFA](#), award of 14 June 2016, par. 81.

<sup>63</sup> Fourth offence x1.5; fifth offence x2; sixth offence x2.5, etc.

<sup>64</sup> [CAS 2016/A/4718 Club Atlético Mineiro v. Udinese Calcio S.p.A & FIFA](#), award of 31 March 2017, par. 85 and [CAS 2018/A/5588 Kayserispor Kulübü v. FIFA](#), award of 10 September 2018, par. 102.

<sup>65</sup> It was established that the club had overdue payables in the amount of EUR 133,500. See [FIFA DRC, 24 March 2021, Michalak.](#)

<sup>56</sup> Art. 12bis par. 5 FIFA RSTP.

<sup>57</sup> Art. 12bis par. 6 FIFA RSTP.

<sup>58</sup> [CAS 2018/A/5838 Clube Atlético Mineiro v. Huachipato SADP & FIFA](#), award of 30 April 2019, par. 53. Referring to [CAS 2016/A/4675 Sporting Club Olhanense v. Gonzalo Mathias Borges Mastriani & FIFA](#) and [CAS 2016/A/4719 Club Atlético Mineiro v. Udinese Calcio S.p.A & FIFA](#).

<sup>59</sup> [CAS 2014/A/3765 Club X. v. D. & FIFA.](#)

designed to serve as a deterrent for clubs that ignore their financial commitments. In essence, four prerequisites must be met to establish that an overdue payable exists under Article 12bis.

As follows from the analysis of the jurisprudence of Article 12bis, the noticed drop in decisions by the FIFA DRC seems to follow from the fact that the FIFA DRC did not apply Article 12bis *ex officio* in all matters. Moreover, even if the prerequisites were met, the FIFA DRC still decided in some cases not to apply Article 12bis, but to treat it as a standard claim when the matter is not considered a straightforward matter.

Unfortunately, the trend in the football transfer system that clubs fail to comply with their financial obligations, whether in relation to unpaid remuneration to players or coaches or unpaid transfer compensation and training rewards to other clubs, was not entirely resolved with the introduction of Article 12bis. Therefore, the authors suggest that Article 12bis should be applied *ex officio* in all matters.

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