Arbitration CAS 2015/A/4162 Liga Deportiva Alajuelense v. Fédération Internationale de Football Association (FIFA), award of 3 February 2016

Panel: Prof. Ulrich Haas (Germany), President; Mr José Juan Pintó (Spain); Mr Ricardo de Buen Rodríguez (Mexico)

Football
Request of disciplinary sanction for non-compliance with a FIFA decision
Qualification of a letter as a decision
Exhaustion of all internal remedies
Standing to sue and standing to appeal
Nature of enforcement proceedings according to Art. 64 FIFA Disciplinary Code
Relevance of foreign insolvency proceedings in the context of Art. 64 FIFA Disciplinary Code
Exceptions to the prohibition of enforcement proceedings once insolvency proceedings have been initiated

1. **Whether or not a letter qualifies as a "decision" depends on its contents. The form of the communication has no relevance for the determination whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal. As to the issue of the *animus decidendi* in the letter, what is relevant is the objective effect of a decision on its addressee, and not the subjective intent of the authority which renders the decision. The decisive criteria, thus, is whether or not the act in question impacts upon the legal situation of the appellant. If that is the case (independent of what the intentions of the relevant sports organisation were), there must be access to justice for the person concerned.**

2. **Once the proceedings set in motion in the case of failure to pay another person or FIFA a sum of money in full or part, even though instructed to do so by a body of FIFA, are initiated, they may not necessarily end up with the imposition of a sanction, for example when the FIFA Disciplinary Committee (DC) refuses to entertain the request filed by a party on the basis of the lack of jurisdiction or lack of authority to further deal with the case. Such decisions, even though they do not impose a sanction and may not formally be issued by the FIFA DC, qualify as decisions *"passed in accordance with Article 64"* pursuant to Article 64 (5) of the FIFA Disciplinary Code (FDC). They must therefore be considered as a "final decision" issued by the FIFA DC within the meaning of Article R47 of the CAS Code, against which no further internal remedies are available.**

3. **The term "standing to *sue*" describes the entitlement of a party to avail itself of a claim. In general, it suffices for the standing to sue that a party invokes a right of its own. However, regarding the "standing to *appeal*", additional requirements apply. In particular, the appealing party must be affected by the decision it appeals. A party has standing to appeal if it can show sufficient legal interest in the matter being appealed.**

In this respect the appealing party must show that it is aggrieved, *i.e.* that it has something at stake. Although normally one member of the FIFA family does not have a claim against FIFA to have a sanction imposed on a fellow member, in the case of Article 64 FDC, the prevailing opinion appears to grant the creditor a right to *"assistance with enforcement"*, *i.e.* a right to institute disciplinary proceedings against the judgment debtor. This follows from the fact that the enforcement procedure according to Article 64 FDC is a (natural) continuation of the procedure before the FIFA DRC. Thus, the right of access to justice does not only cover a party's right to bring a case for the determination of the parties' rights and obligation before the FIFA DRC, but also before the competent organs of enforcement of FIFA. Therefore, the creditor, in principle, has a right to request FIFA to initiate enforcement proceedings against the judgment debtor.

4. Both the CAS jurisprudence and the Swiss Federal Tribunal have defined the nature of the proceedings contemplated by Article 64 FDC to be mainly disciplinary. As a further confirmation it is to be noted that under Article 64 FDC the fine for the failure to comply with an award is to be paid to FIFA: in other words, compliance is first due to FIFA. Furthermore, the criterion to determine the amount of the fine is not what is necessary for the judgment debtor to succumb but rather how serious the failure to comply with the order to make payment or effect performance is. It is therefore the seriousness of the breach of the respective obligation which decides the extent of the (disciplinary) fine.

5. Foreign insolvency proceedings are not irrelevant in the context of enforcement proceedings according to Article 64 FDC. Article 107 (b) FDC, in principle, assumes the recognition of foreign insolvency proceedings. It is within the autonomy of FIFA to recognize or take into account foreign insolvency proceedings independently of whether or not a special recognition procedure has been initiated before Swiss courts in respect of foreign insolvency decisions, as Article 166 et seq. of the Swiss Federal Code on Private International Law (PILA) which provides for that particular recognition procedure is directed at domestic state courts and authorities only and does not, therefore, conflict with the (automatic) recognition of foreign insolvency proceedings by FIFA. The underlying rationale of Article 107 (b) FDC is that if the insolvency debtor can no longer manage or dispose of his assets as of the opening of insolvency, then it is not possible for fault to be attributed to him and therefore a sanction for non-compliance with the payment obligation cannot be imposed on him.

6. Article 107 (b) FDC does not totally forbid enforcement proceedings according to Article 64 FDC in case insolvency proceedings have been initiated. Instead, Article 107 (b) FDC provides that the closing of the disciplinary proceedings is at the discretion of the FIFA DC. The question thus is under what conditions the FIFA DC may continue the enforcement proceedings despite the opening of insolvency proceedings and is a matter of balance of interests. Under national law, only creditors who acquired their claim prior to the opening of insolvency are subject to the (enforcement) restrictions. If, on the other hand, the case concerns the enforcement of a claim that arises after the

insolvency proceedings were opened, *i.e.* if the debt is incumbent on the estate, no restrictions under insolvency law usually apply with respect to the enforcement of the claim. There is, therefore, no reason not to make the FIFA enforcement system available for obligations incumbent on the estate, since these debts are preferential debts, which under national law can as a general rule be pursued against the bankrupt's estate because they are not subject to the principle of equal treatment of creditors.

I. THE PARTIES

1. Liga Deportiva Alajuelense (hereinafter also "LDA" or the "Appellant") is a Costa Rican football club based in Alajuela, and affiliated with the Federación Costarricense de Fútbol, which is, in turn, a member of the Fédération Internationale de Football Association.

2. The Fédération Internationale de Football Association (hereinafter also "FIFA" or the "Respondent") is the governing body of football worldwide, dealing with all matters relating thereto and exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players belonging to its affiliated. The Respondent has its seat in Zurich (Switzerland) and enjoys legal personality under Swiss law.

II. BACKGROUND FACTS

3. The background facts stated herein are a summary of the main relevant facts, as established on the basis of the Parties' written submissions and of the evidence examined in the course of the proceedings. Additional facts will be set out, where material, in connection with the discussion of the Parties' factual and legal submissions.

4. On 14 February 2011, the Spanish football club Real Zaragoza S.A.D. (hereinafter "RZ") entered into an employment contract with the player D. (hereinafter the "Player").

5. On 7 June 2011, the Appellant filed a claim against RZ for the payment of the amount of EUR 580,000.00 for training compensation relating to the transfer of the Player to RZ with the FIFA Dispute Resolution Chamber (hereinafter the "FIFA DRC").

6. With judgment dated 13 June 2011, the Commercial Court of Zaragoza (hereinafter the "Insolvency Court") declared RZ to be in voluntary insolvency proceedings and, as a consequence, opened the insolvency proceedings over RZ's assets.

7. On 24 August 2011, FIFA informed the Appellant about the decision issued by the Insolvency Court on 13 June 2011. Furthermore, FIFA advised the Appellant that it had, in principle, no authority to interfere with the insolvency/administration procedure – including voluntary administration procedure – over the estate of a club and that, as a consequence, FIFA was not

in a position to further deal with the request for training compensation filed by the Appellant.

8. With judgment dated 9 May 2012, the Insolvency Court approved the early creditor's arrangement proposal filed by RZ, setting out the terms and the conditions for the payment of the credits admitted. By the same judgment, furthermore, the Insolvency Court lifted the administration of RZ's estate.

9. On 4 June 2012, the Appellant filed with the FIFA DRC a further claim against RZ for the payment of the amount of EUR 580,000.00 for training compensation for the transfer of the Player to RZ.

10. On 25 April 2014, the FIFA DRC passed a decision (hereinafter referred to as the "First Decision") by means of which RZ was ordered to pay in favour of the Appellant the amount of EUR 487,500.00 within the time-limit of thirty-day, plus an annual interest of 5% to be only paid in the case in which RZ would fail to comply with its obligation to pay the amount of EUR 487,500.00 within the mentioned time-limit. Furthermore, the First Decision advised RZ that a failure to comply with the obligation at stake would entail, upon the Appellant's request, that the case be submitted to the FIFA Disciplinary Commission (hereinafter the "FIFA DC").

11. The terms of the First Decision were notified on 15 May 2014 to – inter alia –RZ and the Appellant.

12. On 27 May 2014, RZ informed the FIFA DRC that it had requested the Insolvency Court to modify the list of creditors admitted in its insolvency procedure and to include the amount owed to the Appellant in the list of creditors.

13. On 30 July 2014, the Appellant sent a letter to the FIFA Player's Status & Governance Department (hereinafter the "FIFA PSD") and to the FIFA DRC, informing them that as of that date the First Decision had not been complied with. The Appellant requested that a final deadline for the payment of the amount be set pursuant to Article 64 (1) (b) of the FIFA Disciplinary Code.

14. On 8 August 2014, the FIFA PSD, on behalf of the FIFA DRC, informed RZ of the Appellant's communication dated 30 July 2014 and urged RZ to immediately pay the amounts due to the Appellant. Furthermore the FIFA PSD advised RZ that in the absence of such payment, the case would be submitted to the FIFA DC for consideration.

15. On 14 August 2014, the Real Federación Española de Fútbol (the "RFEF") forwarded, on behalf of RZ, a letter to the FIFA PSD. The letter explained that the insolvency administrators had agreed to include the Appellant's claim in the list of creditors and that judicial approval of such decision by the Insolvency Court was outstanding, but expected to be granted.

16. On 25 August 2014, LDA informed FIFA of the persisting lack of payment by RZ and requested FIFA to submit the matter to the FIFA DC.

17. On 22 September 2014, the FIFA PSD informed LDA and RZ that the matter had been submitted to the FIFA DC for consideration and decision.

18. On 24 September 2014, RZ – via the RFEF – informed FIFA of the decision issued by the Insolvency Court on 23 September 2014, in which the latter authorized the inclusion of the Appellant's claim in the list of creditors as "ordinary and subordinate" creditor.

19. On 21 October 2014, 21 January 2015, 24 April 2015 and 8 July 2015, LDA requested the FIFA DC to issue a disciplinary decision against RZ.

20. On 8 July 2015, the Deputy Secretary of the FIFA DC sent a letter to the Parties informing them that in view of the Insolvency Court's decision dated 23 September 2014 to include the Appellant's claim in the list of creditors, the FIFA bodies were not, "in principle", in a position to further deal with the case (hereinafter the "Appealed Decision"). The communication at issue reads, for its relevant part, as follows:

"(…) nos referimos a la carta de fecha 24 septiembre 2014, enviada por el club Real Zaragoza a través de la Real Federación Española de Fútbol (...), mediante la cual se adjuntaba una providencia del Juzgado de lo Mercantil n° 2 de Zaragoza, de fecha 23 septiembre 2014, relativa al procedimiento concursal en el que se encuentra inmerso el club.

En virtud de dicho documento, parece ser que los importes establecidos en la decisión de la Cámara de Resolución de Disputas de fecha 25 abril 2014, han sido reconocidos como créditos de naturaleza concursal, incluyéndose en la lista de acreedores concursales.

En vista de dicha situación, les informamos de que, como regla general, nuestros servicios y órganos jurisdiccionales (ej. Comisión del estatuto del Jugador, Cámara de Resolución de Disputas, Comisión Disciplinaria, etc.) no están en posición de seguir tratando estos casos en los que un tribunal ordinario ha intervenido al respecto.

Por lo tanto, en nombre del Presidente de la Comisión Disciplinaria de la FIFA, lamentamos tener que informarle de que no nos encontramos en posición de seguir tratando este caso …".

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 4 August 2015, the Court of Arbitration for Sport (hereinafter the "CAS") acknowledged receipt of a Statement of Appeal filed on 29 July 2015 by LDA against the Appealed Decision. In its Statement of Appeal, which also serves as an Appeal Brief, LDA requested that the arbitration proceedings be conducted in Spanish pursuant to Article R29 of the Code of Sports-related Arbitration and Mediation Rules (hereinafter the "CAS Code").

22. On the same day, the CAS Court Office communicated to FIFA that an appeal had been filed by LDA against the Appealed Decision and invited FIFA to inform the CAS whether it agreed that the proceedings be conducted in Spanish pursuant to Article R29 of the CAS Code.

23. On 7 August 2015, FIFA sent a communication to the CAS Court Office, by means of which it informed the CAS that while the Respondent had no objection that documents (including the Parties' briefs) may be filed in Spanish, it did not agree that the proceedings to be conducted in Spanish. By the same communication, furthermore, FIFA also requested a three-day extension of the time-limit to file its Answer.

24. On 7 August 2015, the CAS Court Office informed the Parties that English had been determined as the language of the proceedings pursuant to Article R29 of the CAS Code and that the extension of the time-limit for the filing of the Respondent's Answer requested by FIFA had been granted.

25. On 31 August 2015, the CAS Court Office acknowledged receipt of the Respondent's Answer filed on 28 August 2015 and advised the Parties that, in accordance with Article R56 of the Code, they shall, in principle, not be authorized to supplement their arguments, produce new exhibits or specify further evidence. By the same communication, the Parties were also invited to inform the CAS as to their preference for a hearing to be held.

26. On 7 September 2015, FIFA requested the CAS to issue an award on the sole basis of the Parties' written submissions.

27. On 8 September 2015, LDA informed the CAS that it did not consider, in principle, a hearing to be necessary. However, LDA requested that a second round of written submissions be allowed.

28. On the same day, the CAS Court Office invited FIFA to comment LDA's request for a second round of written submissions.

29. On 9 September 2015, FIFA informed the CAS Court Office that it did not agreed with the filing of a second round of written submission.

30. On the same day, the CAS Court Office acknowledged receipt of the communication sent by FIFA and informed the Parties that, pursuant Article R56 of the CAS Code it was up for the President of the Panel to decide on this procedural matter.

31. On 14 September 2015, the CAS Court Office informed the Parties that the President of the Panel had ordered a second exchange of written submissions and invited the Appellant to file its Reply on or before 28 September 2015.

32. On 23 September 2015, the CAS Court Office acknowledged receipt of the Appellant's request for an extension of the time-limit for the filing of its Reply until 12 October 2015 and invited FIFA to comment upon Appellant's request.

33. On 24 September 2015, FIFA informed the CAS that it had no objection to Appellant's request, provided that the same extension would be granted also to FIFA.

34. On the same day, the CAS Court office informed the Parties that Appellant's request had been granted by the Panel.

35. On 12 October 2015, the CAS Court Office acknowledged receipt of the Appellant's Reply.

36. On 5 November 2015, the CAS Court Office acknowledged receipt of the Respondent's Rejoinder filed on 4 November 2015.

37. On 20 November 2015, the CAS Court Office informed the Parties of the Panel's decision to issue an award on the sole basis of their written submissions and provided the Parties with an Order of Procedure, which was duly signed and returned to the CAS Court Office by both Parties on the same day.

38. The Parties did not raise any procedural objections throughout the whole proceedings, also with reference to their right to be heard and to be equally treated, as they had been given ample opportunity to present their cases and to submit their arguments.

IV. OUTLINE OF THE PARTIES' REQUESTS FOR RELIEF AND SUBMISSIONS

39. The following summaries of the Parties' positions are only roughly illustrative and do not purport to include every contention put forward by the Parties. However, the Panel has carefully considered and taken into account in its discussion and subsequent deliberation all of the evidence and arguments submitted by the Parties, even if there is no specific reference to those arguments in the following outline of their positions or in the ensuing analysis.

1. The Appellant

40. In the Appeal Brief the Appellant requested the Panel:

- *to "admit" the appeal filed by LDA against the Appealed Decision;*

- *to "annul" the Appealed Decision and to issue a new decision pursuant to Article 64 of the FIFA Disciplinary Code granting RZ a final deadline for the payment of the amounts indicated in the First Decision and warning RZ that, in case of non-compliance, deduction of points, relegation to a lower division or a transfer ban would be applied;*

- *subsidiarily, only in case the requests above would not be granted, to admit the appeal against the Appealed Decision, to "annul" it and refer the case back to the FIFA DC to conduct disciplinary proceedings against RZ;*

- *in any case, to order the Respondent to bear all costs of these proceedings and to pay all of the legal expenses and costs incurred by LDA in the proceedings.*

41. The arguments submitted by the Appellant may be summarized as follows.

(a) The Appealed Decision must be qualified as an appealable decision within the meaning of Article R47 et seq. of the CAS Code. This follows from constant CAS jurisprudence (*e.g.* CAS 2007/A/1251 and CAS 2005/A/994). According thereto a resolution adopted by a sports association by which the latter refuses to deal with a claim filed by a party must be considered an appealable decision.

(b) The Appealed Decision was rendered in breach of several procedural principles. In particular, FIFA has breached the principle of procedural equality. This follows from the fact that the Respondent has based the Appealed Decision solely on evidence submitted to the FIFA DC by RZ, without giving the Appellant any opportunity to express its position on the evidence submitted. Thus, according to the Appellant, *"FIFA assumed as theirs the reasons given by the debtor, using them as the basis for its decision, depriving … [the Appellant] to discuss those reasons"*. Furthermore, the Appellant submits that the Appealed Decision was rendered in breach of the obligation to state reasons. This breach of the duty to state reasons deprived the Appellant of the opportunity to *"permit the adequate comprehension and understanding"* of the Appealed Decision. Thereby, the Respondent deprived the Appellant of *"the chances to discuss the challenged decision, injuring [its] … right of defense and causing an evident defenselessness"*. Moreover, the latter was rendered in breach of the principle of good faith, since it is based on an expert opinion on Spanish law provided by a Spanish law firm on which the Appellant had no opportunity to comment. In this respect the Appellant refers to Swiss jurisprudence according to which *"it is contrary to good faith and an abuse of rights for a party to keep a ground of appeal in reserve, only to postpone it in case of a disadvantageous outcome in the proceedings or a foreseeable loss of the case"*.

(c) The claim arising from the First Decision is not affected by the insolvency proceedings. Any effects flowing from such proceedings ceased to exist following the order of the Insolvency Court issued on 9 May 2012 by which the creditors' agreement was approved. This follows from the decision of the Insolvency Court which provides in its operative part as follows: *"To be agreed and agreed to approve the creditors' arrangement proposal filed by … [RZ] whose content it is considered as reproduced, ceasing all effects of the insolvency, without prejudice to the general duties to the debtor required by article 42. It terminates the common phase of the insolvency proceedings"*. The First Decision was issued a long time after the effects of the insolvency proceedings ceased to exist, *i.e.* on 24 April 2014. It is only at this moment in time that the claim came into "legal existence".

(d) Contrary to what FIFA submits, the Appellant's credit did not arise at the time of the transfer of the Player (*i.e.* February 2011). Instead, the Appellant submits that *"the decision of the Dispute Resolution Chamber has constitutive procedural effects and it is at that moment when the credit declared by the Dispute Resolution Chamber is born to legal life"*. Consequently, the Appellant's credit only came into "legal existence" once the First Decision was issued. According to the Appellant the *"nature of the proceedings conducted before the Dispute Resolution Chamber is declaratory"*. The Appellant insofar makes reference to CAS jurisprudence (CAS 2012/A/2754). It follows from this jurisprudence – according to the Appellant – that *"from the decision of the DRC, an individual rule is created which from this moment will constitute the*

source to solve the controversy between the parties and as a transcendent manifestation of quasi-judicial role played by FIFA, which must be accepted by the parties and respected by others. The natural effect of any decision is therefore its binding and mandatory nature from the moment in which it was issued". That the issuance of the First Decision is the decisive moment in time also follows from the fact that Appellant's claim was contested by RZ in the course of the proceedings before the FIFA DRC and that the inclusion of the credit in the list of the insolvency credits was only requested by RZ once the First Decision had been rendered. The Appellant submits that its view is further backed by the fact that in the First Decision RZ was ordered to pay an interest rate of 5% p.a. only as from RZ's failure to comply with its obligation to pay EUR 487,500.00 within the time limit indicated in said decision. No interests were awarded for past periods, i.e. for any time periods preceding the First Decision. This is – according to the Appellant – further proof that the debt only came into existence once the First Decision was issued. In view of the above, the Appellant submits that the insolvency proceedings, the effects of which had ceased in May 2012, have no influence whatsoever on its claim against RZ.

(e) In addition, the Appellant submits that the insolvency proceedings cannot affect the Appellant's claim, since the Appellant was not informed of these proceedings and never intervened in the bankruptcy proceedings in Spain. In addition, the inclusion of the credit at stake in the list of insolvency credits was made by the Insolvency Court (upon request of RZ) without any prior communication to the Appellant. The latter had no opportunity to state its position on such inclusion. According to the Appellant the *"inclusion and qualification of the credit by the Commercial Court is made inaudita parte creditoris, in a fraud maeuver (sic!) to submit the credit to the insolvency regime without … [the Appellant] having had the chance to argue against the said situation"*. Based on these considerations any recognition in Switzerland of the decision issued by the Insolvency Court pursuant to the provision of Article 27 of the Swiss Act on Private International Law (hereinafter referred to as the "PILA") must be denied.

(f) In any case, in consideration of the Swiss private international law, the relationships between FIFA and its members/affiliates should be exclusively governed by FIFA Regulations and Swiss law without reference to the laws at the place of the individual members and/or affiliates. Thus, in a case, in which a Costa Rican club is claiming a credit arising from regulations issued by a Swiss sports organisation, there is no room for the application of Spanish insolvency law. Furthermore, the Appealed Decision forces the Appellant *"to go before the Spanish Jurisdiction"* in order to enforce its claim. However, such obligation is *"in manifest contradiction with the prohibition set out in the FIFA Statutes to go before ordinary courts"*.

(g) FIFA acted grossly negligent when managing the case and issuing the Appealed Decision. The Appellant was deprived of an opportunity to state its case before the FIFA DC. If the FIFA DC would have conducted the proceedings properly, it could have avoided the mistakes made and could, thereby, have avoided the present arbitration proceeding. Such negligence must lead – according to the Appellant – to the imposition of all of costs of the present proceedings, legal fees and other expenses on FIFA.

2. The Respondent

42. In its Answer FIFA requested the Panel:

> *"1. To reject the Appellant's appeal in its entirety.*
>
> *2. To confirm the content of the letter sent by the deputy secretary to the FIFA Disciplinary Committee on 8 July 2015 hereby appealed against.*
>
> *3. To order the Appellant to bear all costs incurred with the present procedure and to cover all the Respondent's legal expenses related to the present procedure".*

43. The arguments submitted by the Respondent may be summarized as follows:

(a) The Appealed Decision is merely a letter from the FIFA administration and does not constitute an appealable decision under the CAS Code. It must be also noted that the Appellant did not react to such communication in any way. In particular, the Appellant did not request the opening of formal disciplinary proceedings, did not ask for additional explanations or requested that it be admitted to file (further) submissions. Instead, the Appellant decided to directly file an appeal with the CAS. The FIFA DC is an enforcement authority that has no authority to review decisions issued by FIFA's adjudicating bodies or national courts. As a consequence, any challenge directed against the contents of a decision issued by the Insolvency court must be addressed to the latter and not to the FIFA DC or to the CAS. All of the Appellant's arguments regarding the nature of its claim / credit and on the (non-)inclusion of the same in the list of creditors of the insolvency proceedings are, therefore, irrelevant for the scope of the present proceedings.

(b) FIFA did not breach any duty to provide grounds, since the Appealed Decision does not qualify as an appealable decision within the applicable rules. In addition, the Appellant never requested the FIFA DC to provide the grounds for the Appealed Decision. In addition, the Appellant never requested to be granted with an opportunity to make further submissions, nor did the Appellant request any explanation with respect to the procedure followed by the FIFA DC. In conclusion, the Respondent finds that the appeal filed by LDA is inadmissible.

(c) As established by the CAS jurisprudence, FIFA is obliged to take into consideration and respect State laws on insolvency proceedings as well as the decision of State courts based thereupon when enforcing money claims. In this context Respondent refers to the jurisprudence in CAS 2013/A/3321. It follows from the above that the FIFA DC cannot overrule or ignore the decision issued by the Insolvency Court, to include the credit in the list of creditors of the insolvency proceedings of RZ. In any case, RZ would not be in a position to comply with an enforcement order by the FIFA DC, because in doing so

it would breach the decision of the Insolvency Court. The latter would result in the dissolution of RZ.

(d) The Appellant's credit came into existence at the time of the transfer of the Player and, therefore, prior to the opening of the insolvency proceedings. It is at this moment that the claim and the dispute arose. This view held by the Respondent is not contradicted by the contents of the First Decision. In particular, the fact that the Appellant was not granted interests for the periods in time preceding the issuance of the First Decision is immaterial. The Appellant did not request any interests for past periods, thus, the FIFA DRC was bound by the requests filed by the Appellant and could not award interests *ultra petita*.

(e) The First Decision did not create a (new) obligation of RZ, but determined that the latter was under a payment obligation in favour of the Appellant. The CAS case law, moreover, recognizes that insolvency proceedings have a *lis pendens* effect on disciplinary proceedings (the aim of which is to enforce final and binding decisions). The Respondent refers insofar to CAS jurisprudence, in particular to CAS 2012/A/2754. As a consequence, the Respondent finds that the Appellant's credit was correctly included in the list of the credits of the insolvency proceedings over the estate of RZ.

(f) In any case, any objections against such inclusion should have been brought by the Appellant before the Insolvency Court and not before the FIFA DC or the CAS. This is all the more true in view of the fact that – contrarily to what the Appellant holds – according to Spanish law RZ still is in insolvency proceedings, which will be terminated only once RZ has complied with the payment scheme approved by the Insolvency Court. The approval of RZ's payment plan by the Insolvency Court lifted only some, but not all of the effects of the insolvency proceedings. Thus, in the present case, RZ is currently in a position to manage and dispose of its assets without the interference or consent of an administrator / receiver. However, RZ must abide to the decision (and the payment schedule contained therein) of Insolvency Court. Any breach by RZ of the approved payment plan would cause the Club to be liquidated. Thus, the FIFA DC is not in a position to enforce the First Decision.

V. JURISDICTION OF THE CAS

44. Article R47, par. 1, of the CAS Code reads as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement …".

45. In the case at hand the CAS jurisdiction follows from the Appellant's acceptance of the FIFA Regulations through his affiliation with the Federación Costarricense de Fútbol which is, in turn, a member of FIFA. The FIFA Regulations provide an arbitration clause in favour of the

CAS. In particular, Article 74 of the FIFA Disciplinary Code provides that *"[c]ertain decisions passed by the Disciplinary (…)* [Committee] *may be appealed against before the Court for Arbitration for Sport"*. Furthermore, Article 67 (1) of the FIFA Statutes provides as follows:

"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".

46. The jurisdiction of the CAS to rule on the present dispute can also be inferred from the Order of Procedure that has been duly signed by the Parties. Finally, the Panel notes that the jurisdiction of the CAS has not been contested by any of the Parties to this proceeding. In light of the above, it must be concluded that the Panel enjoys jurisdiction to decide the present dispute.

VI. ADMISSIBILITY

47. In order for an appeal to be admissible, Article R47 of the CAS Code requires that there is a decision that forms the object of the appeal. The second prerequisite stipulated by Article R47 of the CAS Code is that all the internal remedies available to the parties must be exhausted before filing an appeal to the CAS. Finally, the time limits for appeal must be observed for an appeal to be admissible.

1. The nature of the Appealed Decision

48. The Parties disagree on the nature of the Appealed Decision, i.e. whether the communication sent by the FIFA constitutes a "decision" within the meaning of Article R47 of the CAS Code. In particular, the Respondent submits that the FIFA letter has a purely informative character and, thus, cannot be qualified as an appealable decision.

49. The Panel, firstly, refers to the CAS case-law (CAS 2005/A/899, confirmed in CAS 2007/A/1251) according to which *"the form of the communication has no relevance … [for the determination] whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal".*

50. Whether or not a letter qualifies as a "decision" depends on its contents. This is undisputed in CAS jurisprudence. However, there is divergence within the CAS jurisprudence whether the decisive criteria is subjective or objective. Some CAS panels have held that the decisive criteria is the subjective will (*animus decidendi*) of the entity that issued the decision (CAS 2008/A/1633, para. 1):

"Based on the above, the Panel believes that an appealable decision of a sport association or federation "is normally a communication of the association directed to a party and based on an „animus decidendi", i.e. an intention of a body of the association to decide on a matter […]. A simple information, which does not contain any „ruling", cannot be considered a decision" (BERNASCONI M., When is a „decision" an appealable decision?, in: RIGOZZI/BERNASCONI (eds.), The Proceedings before the CAS, Bern 2007, p. 273)".

51. Other panels have rightly disagreed with the above view and stated as follows (CAS 2012/A/2854, para. 69):

"As to the issue whether there is an animus decidendi in the FIFA Letter, the Panel agrees with the Appellant who considers that what is relevant is the objective effect of a decision on its addressee, and not the subjective intent of the authority which renders the decision. Contrary thus to the Second Respondent's position, the Panel considers that the FIFA Letter had affected the legal situation of the Appellant, and therefore should be considered a decision, irrespective whether FIFA had animus decidendi when issuing the FIFA Letter".

52. The decisive criteria, thus, is whether or not the act in question impacts upon the legal situation of the Appellant. If that is the case (independent of what the intentions of the relevant sports organisation were), there must be access to justice for the person concerned.

53. In the case at hand the Appealed Decision stated that FIFA was not in a position to further deal with the case (*"no nos encontramos en posición de seguir tratando este caso"*). In view of the above, therefore, the Appealed Decision clearly ruled on the admissibility of the Appellant's request for relief, denying such admissibility and thus, objectively affecting the Appellant's legal position with regard to the right of the latter to pursue the enforcement of its claim against RZ. It must be concluded, therefore, that notwithstanding the fact that the Appealed Decision was dressed in the form of a letter it is in substance an appealable decision within the meaning of Article R47 of the CAS Code.

2. The exhaustion of all the internal remedies available to the parties for contesting the Appealed Decision

54. As indicated above, the second prerequisite for the admissibility of the appeal is the exhaustion of all the internal remedies available to the Parties. The prerequisite at issue is also indicated in Article 67 (2) of the FIFA Statutes, which provides that *"[r]ecourse may only be made to CAS after all other internal channels have been exhausted"*. In this respect, FIFA contends that the Appellant did not react to the Appealed Decision in any way (*e.g.* requesting the opening of formal disciplinary proceedings, requesting additional explanations for the letter or filing further submissions) but rather decided to directly file an appeal with the CAS. The Panel notes, however, that FIFA failed to concretely indicate the legal basis on which a corresponding duty/faculty of the Appellant may be inferred.

55. The Panel finds that the following provisions reported in the FIFA Statutes and in the FIFA Disciplinary Code shall be referred to for the analysis of the case. A first reference must be made to Article 62 (2) of the FIFA Statutes, according to which *"[t]he Disciplinary Committee may pronounce the sanctions described in the (…) FIFA Disciplinary Code on (…) Clubs…"*. From such provision, therefore, it follows that the Disciplinary Committee is the competent body to decide and (possibly) impose sanctions indicated in the FIFA Disciplinary Code on clubs. Among those sanctions there are those set forth in Article 64 (*"Failure to respect decisions"*) of the FIFA Disciplinary Code which – *inter alia* – reads as follows:

> *"**1.** Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision):*
>
> ***a)** will be fined for failing to comply with a decision;*
>
> ***b)** will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
>
> ***c)** (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced;*
>
> ***d)** (only for associations) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, further disciplinary measures will be imposed. An expulsion from a FIFA competition may also be pronounced.*
>
> ***2.** If a club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.*
>
> ***(…)***
>
> ***5.** Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly"* (emphasis added).

56. The Panel holds that the proceeding at the outcome of which the Appealed Decision was issued is covered and contemplated by Article 64 of the FIFA Disciplinary Code, *i.e.* the proceedings set in motion in the case of failure *"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"*. It is also clear that, once such proceedings are initiated, they may not necessarily end up with the imposition of a sanction, when the necessary prerequisites for such imposition are not fulfilled, as it may be the case in which the FIFA DC refuses to entertain the request filed by a party on the basis of the lack of jurisdiction or lack of authority to further deal with the case. Such decisions, even though they do not impose a sanction, qualify as decisions *"passed in accordance with Article 64"* pursuant to Article 64 (5) of the FIFA Disciplinary Code. This reading here is also backed by the (wide) wording of said provision, which provides that *"[a]ny appeal against* [such decisions] *(…) shall be lodged with CAS directly"*.

57. The view held by the Panel is not contradicted by the fact that it was not – formally – the FIFA DC that issued the decision. First, Article 64 (5) of the FIFA Disciplinary Code merely indicates which kind of decision *rationae materiae* may be appealed to CAS (without specifying the competent FIFA body responsible for issuing the decision). Secondly, in the present case the Appealed Decision was signed by the Deputy Secretary of the FIFA DC on behalf of the latter.

58. To conclude, therefore, the Panel holds that the Appealed Decision must be considered as a "final decision" issued by the FIFA DC within the meaning of Article R47 of the CAS Code, against which no further internal remedies are available to the Appellant pursuant to Article 64 (5) of the FIFA Disciplinary Code.

3. The time limit according to Art. R49 of the CAS Code

59. Article R49 of the CAS Code reads, *inter alia*, as follows:

> *"[i]n the absence of a time limit set in the statutes or regulation of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

60. The above-reported provision of the CAS Code, therefore, allows that the time-limit of twenty-one (21) days for the filing of the appeal may be derogated by the statutes or regulation of the association concerned. In this regard, it must be noted that Article 67 (1) of the FIFA Statutes confirms the referred time-limit by providing that:

> *"[a]ppeals against final decisions passed by the FIFA legal bodies (…) shall be lodged with CAS within 21 days of notification of the decision in question".*

61. Article R51 of the CAS Code reads, *inter alia*, as follows:

> *"[w]ithin ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal (…). Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief".*

62. The Appealed Decision was communicated to the Appellant on 9 July 2015.

63. On 29 July 2015 the Appellant filed with the CAS Court Office his Statement of Appeal, also serving as an Appeal Brief, against the Appealed Decision.

64. Thus, the Appellant complied with the time-limits prescribed by the FIFA Statutes and by the CAS Code. The appeal is, therefore, admissible.

VII. MISSION OF THE PANEL

65. According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

VIII. APPLICABLE LAW

66. Article R58 of the CAS Code reads as follows:

> *"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".*

67. The matter discussed in the present proceedings concerns a decision issued by a FIFA body on a request submitted by the Appellant aimed at enforcing the First Decision pursuant to Article 64 of the FIFA Disciplinary Code. For the resolution of the disputes between the Parties, therefore, the rules enshrined in the FIFA Disciplinary Code and in the other FIFA Regulations and by-laws must be primarily applied by the Panel.

68. Furthermore, Article 66 (2) of the FIFA Statutes provides that the *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. Swiss law shall, therefore, subsidiarily apply in the present proceedings.

69. The Parties are in dispute whether the Panel has to take account of Spanish insolvency law in the case at hand. The Panel notes that Article 66 (2) of the FIFA Statutes does not refer to the law of the country of its affiliates. Such law, therefore, may become relevant only in the event in which other provisions reported in the FIFA Regulations refer to state laws other than Swiss law or, where the application of foreign state law is mandatory for other principles of law.

IX. THE MERITS OF THE DISPUTE

70. The Appellant submits that the Appealed Decision is flawed for procedural and substantive reasons. With respect to the procedural aspects of the Appealed Decision the Panel notes that the mandate of this Panel in these proceedings is very broad (see *supra*). The Panel examines the facts and the law *de novo*, in accordance with the power bestowed on the Panel by Article R57 of the CAS Code and is, thus, not limited to facts and the legal arguments of the previous instance. In relation to issues raised by the Appellant regarding the procedure at the lower instance, it is well established in CAS case law that procedural defects before the lower instances can be cured through the *de novo* hearing before CAS. The virtue of a *de novo* hearing is that issues about procedural irregularities in the bodies from whose decisions an appeal is brought *"fade to the periphery"* (CAS 98/208, para. 10). In view of the above the Panel holds that any alleged procedural flaws in the procedure before the FIFA DC are cured in these *de novo* arbitration proceedings.

71. As for the substantive flaws with regard to the Appealed Decision the Panel finds as follows:

1. Standing to sue

72. The term "standing to sue" describes the entitlement of a party to avail itself of a claim. In general, it suffices for the standing to sue that a party invokes a right of its own. However, regarding the standing to *appeal*, additional requirements apply. In particular, the appealing party must be affected by the decision it appeals.

73. According to settled CAS jurisprudence a party has standing to appeal if it can show sufficient legal interest in the matter being appealed (CAS 2008/A/1674.; see also CAS 2014/A/3744 & 3766, para. 175). In this respect the appealing party must show that it is aggrieved, *i.e.* that it has

something at stake (CAS 2009/A/1880-1881, at para. 29).

74. Whether in the case at stake the Appellant can request CAS to order the FIFA DC to institute or impose sanctions against the judgment debtor appears – at first glance – to be questionable for Article 64 of the FIFA Disciplinary Code primarily provides for a disciplinary measure. However, normally one member of the FIFA family does not have a claim against FIFA to have a sanction imposed on a fellow member (CAS 2012/A/3047, para. 51). In the case of Article 64 of the FIFA Disciplinary Code the prevailing opinion appears to grant the creditor a right to *"assistance with enforcement"*, *i.e.* a right to institute disciplinary proceedings against the judgment debtor. This follows (directly) from a number of CAS awards, which deal with decisions by FIFA, in which enforcement proceedings were instituted belated or not at all and which were appealed by the creditor to the CAS. In all these cases the CAS accepted the creditor's standing to sue (cf. CAS 2011/A/2343, para. 8; CAS 2012/A/2750, para. 34; CAS 2012/A/2817, para. 47). The Panel follows this jurisprudence. Even though disciplinary in nature (see below) the enforcement procedure according to Article 64 of the FIFA Disciplinary Code is a (natural) continuation of the procedure before the FIFA DRC. Thus, the right of access to justice does not only cover a party's right to bring a case for the determination of the parties' rights and obligation before the FIFA DRC, but also before the competent organs of enforcement of FIFA. In conclusion, the Panel holds that the creditor, in principle, has a right to request FIFA to initiate enforcement proceedings against the judgment debtor.

2. The nature of the enforcement proceedings according to Article 64 of the FIFA Disciplinary Code

75. The CAS already had the opportunity to decide on the legal nature of Article 64 of the FIFA Disciplinary Code (cf. CAS 2012/A/2817). The said decision the panel concluded as follows (para 90 *et seq.*):

"Before such examination, however, a point is to be made with respect to the nature of the proceedings contemplated by Article 64 FDC … In that respect, it is to be noted that the CAS jurisprudence and the Swiss Federal Tribunal defined it to be mainly disciplinary. For instance:

i. in CAS 2006/A/1008, it was held (at para. 43) that Article 68 FDC, 2005 edition allowed "a sanction to be imposed on a club that has failed to pay entirely its debts to another subject" and that "it is a disciplinary duty of clubs to fully comply with the decisions of the body of FIFA;

ii. in a number of CAS awards (e.g., CAS 2006/A/1206, 2007/A/1329&1330, CAS 2007/A/1367, CAS 2008/A/1620, CAS 2012/A/2981), various CAS Panels concluded that, in the event measures adopted by FIFA under (the provisions corresponding to) Article 64 FDC are challenged, the creditor of the unpaid amount has no standing to be sued, since "the proceedings before the DC … intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision, and of the appeal brought in these proceedings against it, regards only the existence of a disciplinary infringement by … and the power of FIFA to sanction it;

iii. the Swiss Federal Tribunal, in the judgment of 5 January 2007 (4P.240/2006, at consid. 4.2), rendered on appeal against the (above mentioned) award in CAS 2006/A/1008, examined the nature of the power exercised by FIFA on the affiliates (such as clubs and players) to its member federations in order to sanction the failure to comply with financial obligations following the instructions given by a FIFA body. The Federal Tribunal came to the conclusion that the exercise of such power does not amount to the use of an enforcement power: it simply consists in a reaction to the failure by an associate to comply with the rules of the association. In this respect, the Federal Tribunal confirmed that Swiss law allows an association to sanction the associates for their breach of the association rules".

76. This Panel concurs with this view, and notes, as a further confirmation in respect of the main disciplinary purpose that under Article 64 of the FIFA Disciplinary Code the fine for the failure to comply with an award is to be paid to FIFA: in other words, compliance is first due, under Article 64 of the FIFA Disciplinary Code, to FIFA. Furthermore, also the manner in which the fine is determined speaks in favor of the view supported here. For the criterion to determine the amount of the fine is not what is necessary for the judgment debtor to succumb but rather how serious the failure to comply with the order to make payment or effect performance is. It is therefore the seriousness of the breach of the respective obligation which decides the extent of the (disciplinary) fine (cf. Decision of the FIFA Disciplinary Committee (10.4.2013 – 13004 PST CYP ZH) Nikolosi v/ Club Paphos Athletic Union FC , para. 7; (10.4.2013 – 130051 PST ENG ZH) Columbian Football Association v/ Andrew Augustus, para. 8).

3. The relevance of foreign insolvency proceedings in the context of disciplinary proceedings according to Article 64 of the FIFA Disciplinary Code

77. Foreign insolvency proceedings are not irrelevant in the context of enforcement proceedings according to Article 64 of the FIFA Disciplinary Code. This follows from Article 107 of the FIFA Disciplinary Code that provides as follows:

"Proceedings may be closed if:

a) …

b) a party declares bankruptcy; …".

78. The provision, in principle, assumes the recognition of foreign insolvency proceedings. FIFA is not prevented from such recognition by Article 166 et seq. of the Swiss Federal Code on Private International Law (PILA). Unlike the EU Insolvency Regulation (EIR), Switzerland does not allow for an automatic recognition of foreign insolvency decisions, since Switzerland follows territoriality principle with respect to insolvency proceedings (Swiss Federal Tribunal, decision of 18 February 2013 – 4A_380/12, consideration 4.2; decision of 26 October 2011 – 4A_389/2011, consideration 2.3.1). Under the territoriality principle foreign insolvency proceedings only produce any effects domestically once a particular recognition procedure has been undergone in accordance with Article 166 et seq. of the PILA. The underlying rationale for this legal concept is sovereignty aspects, which prevent the automatic recognition of foreign insolvency proceedings in Switzerland. The obligation to safeguard the same is, however, directed at domestic state courts and authorities only and does not, therefore, conflict with the

(automatic) recognition of foreign insolvency proceedings by FIFA according to Article 107 (b) of the FIFA Disciplinary Code. Hence, it is within the autonomy of FIFA to determine and require conditions for the recognition of foreign insolvency proceedings that are different from the ones provided for in Article 166 et seq. of the PILA. In particular, FIFA may recognize or take into account foreign insolvency proceedings independently of whether or not a special recognition procedure has been initiated before Swiss courts in respect of foreign insolvency decisions.

79. The underlying rationale of Article 107 (b) of the FIFA Disciplinary Code is not so much that FIFA wants to safeguard the purpose and goals of the foreign insolvency proceeding (*e.g.* the equal treatment of creditors principle, which – most likely – do not form part of the Swiss international public policy)[1]. Instead, the central aspect of the consideration lies with the punitive nature of the enforcement procedure according to Article 64 of the FIFA Disciplinary Code. According thereto the very purpose of the sanction is to put pressure on the debtor so that he will comply with his (payment) obligation. However, the very purpose of such disciplinary sanction becomes moot, if the debtor is under some impossibility to comply with the obligation from the outset. In such case the disciplinary measure according to Article 64 of the FIFA Disciplinary Code is deprived of any meaning. Thus, a debtor cannot be sanctioned for not complying with a payment order if he – *e.g.* – is not in possession of the estate because of the appointment of an administrator. A measure, which is punitive in nature, requires not only fault on the part of the judgment debtor but also that the non-payment (*i.e.* the infraction of the respective obligation) is in fact attributable to him. If, however, the insolvency debtor can no longer manage or dispose of his assets as of the opening of insolvency, then it is not possible for fault to be attributed to him and therefore a sanction for non-compliance with the payment obligation cannot be imposed on him. This underlying rationale of Article 107 (b) of the FIFA Disciplinary Code has been recognized by a CAS decision, which states – *inter alia* – as follows (CAS 2012/A/2750, para. 121):

"The objective of administration proceedings is to rescue a company and for this purpose governments have established two measures: the company's assets are protected and the company does not have control of payment. In this context, it would not be correct for FIFA to sanction a club if the club can, in reality and due to a decision of an ordinary court, not make any payments without the authorization of an administrator nominated by the court. There is clearly a lis pendens in favour of national courts".

4. Exceptions to the above principles

80. Article 107 (b) of the FIFA Disciplinary Code does not totally forbid enforcement proceedings according to Article 64 of the FIFA Disciplinary Code in case insolvency proceedings have been initiated. Instead, Article 107 (b) of the FIFA Disciplinary Code provides that the closing of the disciplinary proceedings is at the discretion of the FIFA DC. The question thus is under what conditions the FIFA DC may continue the enforcement proceedings despite the opening of

[1] As regards the very narrow concept under Swiss international public policy (ordre public), BG [Swiss Federal Tribunal] (13.11.1999) ASA Bull 1999, 529, 532; "chose rarissime"; see also BGE [Decisions of the Swiss Federal Tribunal] 132 III 389; BG [Swiss Federal Tribunal] 21.2.2008 – 4A_370/2007, consideration 5.1.

insolvency proceedings. Ultimately, Article 107 (b) of the FIFA Disciplinary Code demands that a balance of interest takes place between the rationale of Article 107 (b) of the Disciplinary Code and the scope of the FIFA Regulations on training compensation (*i.e.* to *"*[improve] *the game of football constantly and* [to promote] *it globally"* – Article 2 lit. (a) of the FIFA Statutes; to establish the *"basic principles that guarantee a uniform and equal treatment of all participants in the football world"* – cf. paragraph 1.2 of the Commentary to Article 1 of the Regulations for the Status and Transfer of Players and to establish a level play field among all stakeholders). The balance tips in favour of the scope of the FIFA Regulations where the opening of the insolvency proceedings does not prevent the debtor from complying with his payment obligations.

81. Under national law only those insolvency creditors, *i.e.* those creditors, who acquired their claim prior to the opening of insolvency, are subject to the (enforcement) restrictions. If, on the other hand, the case concerns the enforcement of a claim that arises after the insolvency proceedings were opened, *i.e.* if the debt is incumbent on the estate no restrictions under insolvency law usually apply with respect to the enforcement of the claim. There is, therefore, no reason not to make the FIFA enforcement system available for obligations incumbent on the estate, since these debts are preferential debts, which under national law can as a general rule be pursued against the bankrupt's estate because they are not subject to the principle of equal treatment of creditors. The view held here is also supported by the CAS jurisprudence in the matter (CAS 2013/A/3049), in which the Panel held as follows (paras. 123, 126):

"The Panel reiterates the fact that Atlante's credit arose after Colon had been placed under the Concurso Preventivo Proceedings and that the said credit was brought about by Colon's administrators in the performance of their managerial duties and in the best interest of bringing Colon's financial status back to normalcy so that the creditors listed in the Verified and Admitted Credits could be paid off. Pursuant to Article 21 of the Ley de Concursos y Quiebras, it is therefore legally incorrect for Colon to argue that they cannot pay Atlante a debt which matured after the Appellant went into the concurso preventive. … It is therefore the Panel's view that Atlante's credit is a normal debt brought about by Colon's day-today administration operations. Atlante's credit is therefore a priority debt vis-à-vis the Verified and Admitted Credits and cannot be classified alongside the pending creditors list".

5. The particularities of this case

82. In the case at hand it is undisputed that the *"propuesta anticipada de convenio"* takes places within the scope of a bankruptcy / insolvency proceeding within the meaning of Article 107 (b) of the FIFA Disciplinary Code. Thus, in principle, the effects flowing from such insolvency proceedings and decisions of foreign insolvency courts can be taken into account by the FIFA DC. In doing so the FIFA DC is not bound by Articles 166 et seq. of the PILA, which regulate the conditions for the recognition of foreign insolvency proceedings in Switzerland. Instead, the basis for (non-)recognition of the effects of a foreign insolvency proceeding is to be found solely in Article 107 (b) of the FIFA Disciplinary Code.

83. While some of the effects of the foreign insolvency proceedings in Spain have expired with the decision of the Insolvency Court dated 9 May 2012, others have not. It is undisputed between the Parties that with the approval of the creditor's arrangement by the Insolvency Court on 9

May 2012, the administration of RZ's estate has been lifted and RZ is again entitled to dispose and manage its property. Thus, these effects attached to the opening of the insolvency proceedings have ceased. However, it is equally true that some effects of the insolvency proceedings still persist. With the exception of those privileged credits whose holders did not vote in favour of the "convenio", the approval of the creditors' arrangement results in the novation (Article 1156 Codigo Civil, Article 136 Spanish Insolvency Act – hereinafter referred to as "IA") of the claims contained therein (FRIES/STEINMETZ, in KINDLER/NACHMANN (Ed) Handbuch Insolvenzrecht in Europa, Spanien, no. 29). Consequently, the debtor and the creditors are bound to the contents of the creditors' arrangement. In the creditors' arrangement the Appellant has been qualified as "ordinary and subordinate" creditor. Furthermore, RZ is under an obligation to comply with the obligations in the creditors' arrangement. Compliance with these obligations is being monitored. According to Article 138 IA the debtor is under a duty to regularly inform the Insolvency Court on the status of his compliance with the creditors' arrangement. Furthermore, also the administrator issues regular reports on the debtor's compliance. The debtor remains – according to Article 133 (2) IA – also after the approval of the creditors' arrangement – under a duty of cooperation and information vis-à-vis the Insolvency Court and the administrator. In case of non-compliance with the creditors' arrangement the Insolvency Court may establish such breach (*"declaración de incumplimiento"*). Such declaration will terminate all effects of the creditors' arrangement and – without further request of a stakeholder – result in the opening of the liquidation phase over the debtor's estate (Articles 140 and 143 IA).

84. Whether or not these effects of the insolvency proceeding in Spain affect the disciplinary proceeding in Article 64 of the FIFA Disciplinary Code is a matter of a balance of interests, since Art. 107 (b) of the FIFA Disciplinary Code accords discretion to the FIFA DC when taking the effects of foreign insolvency proceeding into account ("may close"). The question, thus, is whether the FIFA DC exceeded the margin of discretion when issuing the Appealed Decision. The Panel is of the view that this is not the case:

- In particular, the Panel holds that there is no (sporting or other) reason why the Appellant should be treated preferentially in the case at hand. Contrary to what the Appellant holds, it has acquired the claim prior to the opening of the insolvency proceedings. The claim for training compensation arose once the transfer of the Player to RZ was completed. Thus, the Insolvency Court was right in qualifying the Appellant as an ordinary creditor. That ordinary creditors are affected by an insolvency proceeding and suffer considerable discounts on their unsecured debts is not a special feature of Spanish insolvency law, but a common feature of most insolvency laws around the globe. The same is true for the collective nature of these proceedings, *i.e.* that effects may be imposed on the creditors in the course of insolvency proceedings without or even against their will. However, it must be noted that some possibility of recourse exists also for ordinary creditors under the IA. In the case at hand, the Appellant chose not to use such recourse available to it. The proceedings before CAS are not the appropriate forum to amend decisions of the Insolvency Court that the Appellant chose not to challenge.
- The reason why insolvency laws interfere with the creditors' substantive and procedural rights is to ensure distributive justice in cases where a debtor is no longer in a position to

autonomously manage his estate. In doing so the insolvency laws allow for an economically sound reallocation of resources in order for them to be productive again for the benefit of all stakeholders involved. It is for exactly this reason that the Financial Stability Board with its seat in Basel[2] qualified insolvency law as one of the 12 Key Standards for Sound Financial Systems[3]. The Spanish *"propuesta anticipada de convenio"* must be seen in light of the foregoing. To torpedo the *"propuesta anticipada de convenio"* by enforcing the First Decision (through disciplinary measures) in breach of the creditors' arrangement and regardless of the consequences is neither economically reasonable nor legally justifiable. In particular Appellant has not brought forward any reasons why his claims are worthy a better protection than those of other unsecured creditors. This being said, the Panel does not underestimate the importance and the need of training compensation in the context of international transfers in general.

- It is a common feature of all insolvency laws that creditors must be protected from a misuse of insolvency proceedings (and the encroachment of creditors' rights that follow such proceedings) by the debtor. This is all the more true in light of the importance for claims relating to training compensation. Thus, the Panel notes that it would perform the balance of interest test differently, if there were indications on file that the Respondent had acted in bad faith when initiating insolvency proceedings in Spain. However, no such evidence can be found on file. To conclude, therefore, the Panel finds that in this case and given the specific circumstances surrounding it, FIFA was correct in closing the procedure, *i.e.* to discontinue the enforcement of the First Decision according to Article 64 of the FIFA Disciplinary Code. Consequently, the Panel dismisses the Appellant's appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules as follows:

1. The appeal filed by Liga Deportiva Alajuelense on 9 July 2015 against the decision issued by the FIFA on 8 July 2015 is dismissed.

2. (…).

3. (…).

[2] Cf. for further information, http://www.fsb.org/about/history/.
[3] http://www.fsb.org/what-we-do/about-the-compendium-of-standards/key_standards/.