



Arbitration CAS 2013/A/3273 Club Deportivo Social y Cultural Cruz Azul v. Federación de Fútbol de Chile & Fédération Internationale de Football Association (FIFA), award of 2 September 2014

Panel: Mr Mark Hovell (United Kingdom), President; Mr Rui Botica Santos (Portugal); Mr Michele Bernasconi (Switzerland)

Football

Compensation for damages resulting from players' injuries

Assignment of the arbitration proceedings to the appropriate Division

Allocation of risks resulting from players' injuries suffered whilst on international duty

Burden of proof of an alleged damage suffered by a club resulting from a player's injury

Liability of FIFA as the organiser of the competition

1. Once an arbitration is commenced at the CAS, it is for the CAS Court Office to determine which Division shall be charged with it. The respective decision by the CAS Court Office cannot be contested and is final. However it would be possible for the parties or the Panel to suggest that a case be attributed to the other CAS Division in case of a change of circumstances, for example if during the proceedings it becomes clear that the matter at stake shall rather lead to an ordinary than to an appeal procedure.
3. Under Article 1 of Annex 1 to the RSTP, clubs are obliged to release their players to their national associations or federations for international competitive matches, such as qualifying matches for the World Cup. Furthermore, whereas the RSTP is silent as to any express liability the association or federation will bear in the event a player gets injured whilst on international duty, under Article 2 of Annex 1 of the RSTP the clubs are obliged to insure against this risk.
4. A club intending to hold the national federation of a player liable for negligent behaviour in the context of the player's injury resulting from the player's participation in an international match has to first provide a legal basis for such a claim; the club further has to provide evidence regarding the specific circumstances of the injury. Normally the medical records of the player and his own testimony are key evidence for respective claims.
5. Failing any provision within the RSTP or other Statutes or regulations, FIFA as the organiser of the competition has no contractual, equitable or legal obligation to compensate a club for any losses it may have suffered as a result of players' injuries occurred during the competition and must bear no liability for it.

I. PARTIES

- 1 Club Deportivo Social y Cultural Cruz Azul, A.C. (hereinafter referred to as the “Appellant” or the “Club” or “Cruz Azul”), is a professional football club affiliated to the Mexican Football Federation and competes in the Mexican First Division.
- 2 Federación de Fútbol de Chile (hereinafter referred to as the “First Respondent” or the “Federation” or “FFCh”) is the sport association in charge of the football development in Chile and is a member of FIFA.
- 3 Fédération Internationale de Football Association (hereinafter referred to as the “Second Respondent” or “FIFA”) is the international world governing body of association football with its headquarters in Zurich, Switzerland.

II. FACTUAL BACKGROUND

- 4 Below is a summary of the main relevant facts, as established on the basis of the written and oral submissions of the parties and the evidence examined in the course of the proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
- 5 On 28 December 2010, the Club entered into a professional services agreement (subsequently amended by agreement on 25 July 2012) with the Chilean player W. (hereinafter referred to as the “Player”) with a three year term from 28 December 2010 through to 28 December 2013 (hereinafter referred to as the “Contract”).
- 6 In the Apertura 2011 tournament of the Mexican First Division, the Player played for the full 90 minutes in 14 of the 16 tournament matches.
- 7 On 5 November 2011, the Player participated in the last of those games for the Club against team America, in which the Player played the full 90 minutes.
- 8 On 11 November 2011, the Player was called up by the Federation to play in an official qualifying game for the 2014 Brazil World Cup against Uruguay. At the end of the game, the Player informed the Federation’s medical staff about pain in both his Achilles tendons (hereinafter referred to as the “Original Injury”).
- 9 On 15 November 2011, the Player played in the next game for the Chilean football team against Paraguay. The Club alleges that the participation of the Player in this game aggravated the Original Injury resulting in further injury (hereinafter referred to as the “Consequential Injury”).
- 10 On return from international duty, the Player took no further part in the playoff games in the Mexican First Division, which matches were definitive for the Championship, and the Club was eliminated.

- 11 On 20 December 2011, the Club received a medical report from Dr. Alfonso Jimenez Vega (hereinafter referred to as “Dr. Jimenez”), along with the results of an MRI scan, in which Dr. Jimenez concluded *“currently his condition has improved, persisting discomfort in left tendon”*.
- 12 On 27 February 2012, the Player was ultimately admitted to the Chiron Clinic in Barcelona, Spain for surgery on his left ankle.
- 13 On 25 July 2012, the Club entered into a loan agreement regarding the Player with Universidad de Chile until 27 December 2012.
- 14 In September 2012, the Player made his debut with his loan team in a cup match against Santiago Morning. However, the Player retired after 45 minutes with an alleged recurrence of the Consequential Injury.
- 15 In October 2012, as a result of the relapse of the Player in the September 2012 game, the Player underwent further surgery on his left ankle.
- 16 On 7 November 2012, the Club sent a payment request to the Federation and FIFA for damages caused to the Club for the injury sustained by the Player during the qualifying matches with the Chilean team for the 2014 Brazil World Cup. The Club’s request was for USD 950,000 representing the salary costs and medical costs incurred by the Club since the date of the Consequential Injury.
- 17 On 20 November 2012, FIFA responded to the Club’s letter of 7 November 2012 stating “... *FIFA, expressly, rejects and denies any legal claim or allegation in its correspondence ...*”. FIFA expressed its view that pursuant to Article 2 paragraph 3 of Annex 1 of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the “RSTP”), the Club should have insured the Player against any illness or accident. The Federation never replied.
- 18 On 24 January 2013, the Club and Player entered into the sports termination agreement and release (hereinafter referred to as the “Termination Agreement”) that ended the employment relationship between those parties upon payment by the Club of USD 450,000 to the Player.
- 19 On 14 March 2013, the Club filed a complaint with FIFA’s Players’ Status Committee (hereinafter referred to as the “PSC”) against the Federation and FIFA. The Club’s claim was increased to USD 1,650,000 representing the salary costs, the settlement monies paid pursuant to the Termination Agreement and medical costs incurred by the Club since the date of the Consequential Injury.
- 20 On 3 April 2013, FIFA acknowledged receipt of the complaint by the Club and referred the Club to the correspondence dated 20 November 2012. The letter stated *“we take this opportunity to state again that FIFA expressly rejects and denies any legal claim or allegation in its correspondence mentioned above”*. Again, it appears the Federation never replied.

21 On 5 June 2013, the Club sent a further letter to FIFA stating “*we again formally insist to the Players’ Status Committee to commence proceedings to thoroughly review the merits of the case in light of the applicable rules and regulations*”. The Club stated that it expected a proceeding to be initiated by FIFA in order for the PSC to determine (1) whether it has jurisdiction to decide on to the claim filed and finally (2) whether the claim of the Club was backed by the applicable law and standards.

22 On 8 July 2013, FIFA informed the Club that:

“...neither the Regulations on the Status and Transfer of Players and the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber of FIFA establish the jurisdiction of the Players’ Status Committee to address this type of litigation. Notwithstanding and on the other hand, we wish to emphasize that according to the Article 68 paragraph 3 of the FIFA Statutes, disputes between direct and indirect members of FIFA must be resolved through arbitration proceedings.

Therefore, we advise you to refer the matter to the Court of Arbitration for Sport (CAS)”.

(hereinafter referred to as the “FIFA Letter”).

23 On 25 October 2013, the Club executed an application form with FIFA relating to the 2014 FIFA World Cup Brazil (hereinafter referred to as the “FIFA Form”).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24 On 29 October 2013, the Club filed an English translated Statement of Appeal with the CAS, against the Federation and FIFA (hereinafter referred to as the “Respondents”) with respect to the FIFA Letter, having filed a Spanish version on 5 August 2013, which FIFA contested, as Spanish was not an official language of the CAS. The Club submitted the following prayers for relief:

- “1. *Accept the present appeal against the decision issued by FIFA on 9 July 2013.*
2. *Annul the decision issued by FIFA on 9 July 2013 and adopt a new decision establishing that:*
 - a. *The Football Federation of Chile must pay USD 1.650.000 in compensation to Cruz Azul for damages suffered as a result of player W.’s injury.*
 - b. *FIFA is jointly and severally liable for the payment of the above mentioned compensation.*
 - c. *The Respondents shall pay all costs associated with the present arbitration proceeding.*
 - d. *The Respondents shall pay all legal fees and other expenses incurred by the Appellant associated with the present arbitration proceeding”.*

- 25 On 8 August 2013, the Club requested an extension of the time limit to file its Appeal Brief in light of FIFA's request that the proceeding be conducted in English.
- 26 On 12 August 2013, FIFA agreed to the request of the Club in relation to the extension of the deadline to file the Appeal Brief.
- 27 On 14 August 2013, the CAS Court Office confirmed that the deadline for the Club's Appeal Brief was extended until 26 August 2013.
- 28 On 22 August 2013, the Club filed its Appeal Brief. The Appeal Brief reiterated the Club's prayers for relief.
- 29 On 9 September 2013, the CAS Court Office confirmed receipt of the Club's payment of the totality of the advance of costs. Subsequently, in accordance with R55 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code"), the CAS Court Office directed the Respondents to submit their Answers within twenty days.
- 30 On 18 September 2013, the Federation made a request for a Preliminary Award on the admissibility of the Appeal and the jurisdiction of the CAS to rule as an appeals body, with the following request for relief:

"For all of the above exposed FFCh respectfully requests the Panel to issue a Preliminary Award establishing that:-

- 1. This appeal lodged by Cruz Azul is inadmissible.*
- 2. That Cruz Azul shall bear all court costs related to the current proceedings.*
- 3. That Cruz Azul must pay a contribution towards Federación de Fútbol de Chile's legal fees and other expenses in the amount of 5.000 EUR.*

In the alternative,

In the case that the Panel considers the appeal lodged by Cruz Azul is admissible, FFCh respectfully request the Panel to rule:-

- 1. that the PSC was not competent to hear of the claim lodged by Cruz Azul against FFCh.*
- 2. that the present appeal must be dismissed, without any decision on the merits being adopted.*
- 3. that Cruz Azul shall bear all Court costs related to the current proceedings.*
- 4. that Cruz Azul must pay a contribution towards Federación de Fútbol de Chile's legal fees and other expenses in the amount of 5.000 EUR.*

In the case that the Panel considers the appeal lodged by Cruz Azul is admissible and that a formal decision of the PSC on jurisdiction was required in the dispute between Cruz Azul, FFCh and FIFA, FFCh respectfully request the Panel to rule:-

1. *that the dispute is referred to the PSC for a formal decision on jurisdiction.*
2. *that the present appeal must be dismissed, without any decision on the merits being adopted.*
3. *that Cruz Azul shall bear all Court costs related to the current proceedings.*
4. *that Cruz Azul must pay a contribution towards Federación de Fútbol de Chile's legal fees and other expenses in the amount of 5.000 EUR".*

The Federation also requested that the current arbitration proceedings, including the deadline for the Federation to file its Answer to the Appeal Brief on the merits, be suspended until the Panel made a decision regarding the request for a Preliminary Award.

- 31 On 18 September 2013, the CAS Court Office acknowledged the Federation's request and granted the Club and FIFA a deadline until 24 September 2013 to comment on the Federation's request.
- 32 On 23 September 2013, FIFA confirmed its agreement with the Federation's request with the following request for relief:

"FIFA hereby respectfully requests the CAS to render a decision:-

1. *terminating the present proceedings in accordance with Article R49 of the CAS Code and condemning the Appellant to pay the entirety of the arbitration costs and an equitable contribution towards FIFA's costs.*

or alternatively,

2. *setting a time limit for the Respondents to file a comprehensive answer limited to the admissibility of the appeal and the jurisdiction of the CAS".*

- 33 On 24 September 2013, the Club requested that the Panel dismiss the Federation's request for bifurcation of the arbitration proceedings. In addition, the Club provided the CAS Court Office with its submissions on the issues of admissibility and jurisdiction.
- 34 On 9 October 2013, the CAS Court Office issued a notice to the parties that the Panel was constituted in the following composition: Mr. Mark A. Hovell as President, Mr. Rui Botica Santos as Arbitrator nominated by the Appellant and Mr. Michele A. R. Bernasconi as Arbitrator nominated jointly by the Respondents.

35 On 22 October 2013, the CAS Court Office granted the Respondents the opportunity to file any additional submissions in relation to the issues of admissibility and jurisdiction. In addition, the CAS Court Office provided the Respondents with the Club's submissions on the issues of admissibility and jurisdiction.

36 On 5 November 2013, FIFA submitted its additional submissions on admissibility and jurisdiction with the following requests for relief:

"FIFA hereby respectfully restates its request to the CAS that it render a decision:

1. *terminating the present proceedings in accordance with Article R49 of the CAS code and condemning the Appellant to pay the entirety of the arbitration costs and an equitable contribution towards FIFA's costs.*

Or, alternatively

2. *issuing an Award declaring the Appellant's Claims against FIFA inadmissible and condemning the Appellant to pay the entirety of the arbitration costs and an equitable contribution towards FIFA's costs.*

Or, alternatively

3. *issuing an Award declining jurisdiction on the Appellant's claims against FIFA and condemning the Appellant to pay the entirety of the arbitration costs in an equitable contribution towards FIFA's costs".*

37 On 5 November 2013, the Federation submitted its additional submissions on admissibility and jurisdiction with the following request:

"FFCh kindly asks that the Panel bifurcate the present arbitral proceedings and issue a preliminary award on the issues of admissibility and jurisdiction within the terms of the request for a preliminary award made on 18 September 2013".

38 On 6 November 2013, the CAS Court Office acknowledged receipt of the Respondents' submissions and granted the Club a deadline of fourteen days from receipt of the correspondence to file a final reply.

39 On 20 November 2013, the Club filed its additional submissions in relation to admissibility and jurisdiction.

40 On 18 December 2013, the CAS Court Office informed the parties that the Panel had determined that the CAS had jurisdiction to hear the matter and that the reasons would be included in this final award. The correspondence explained that, in light of the above, the Panel decided that the procedure should not be bifurcated and that the Respondents should file their Answers by 20 January 2014.

- 41 On 20 January 2014, the Respondents filed their respective Answers. The Federation submitted the following requests for relief:

“For all of the reasons put forth above and in the Preliminary Submissions, FFCh respectfully request the Panel to issue an award establishing that:-

- 1. This appeal lodged by Cruz Azul is inadmissible.*
- 2. That Cruz Azul should bear all court costs related to the current proceedings.*
- 3. That Cruz Azul must pay a contribution towards Federación de Fútbol de Chile’s legal fees and other expenses in an amount of no less than 5.000 EUR.*

In the alternative,

In the case that the Panel considers the appeal lodged by Cruz Azul is admissible, FFCh respectfully requests the Panel to rule:

- 1. That the PSC was not competent to hear of the claim lodged by Cruz Azul against FFCh.*
- 2. That the present appeal must be dismissed, without any further decision on the merits being adopted.*
- 3. That Cruz Azul shall bear all court costs related to the current proceedings.*
- 4. That Cruz Azul must pay a contribution towards Federación de Fútbol de Chile’s legal fees and other expenses in an amount of no less than 5.000 EUR.*

In the case that the Panel considers the appeal lodged by Cruz Azul is admissible and that a ruling on the merits of the dispute can be taken in the present matter by the Panel, FFCh respectfully request the Panel to rule:

- 1. That the appeal lodged by Cruz Azul is rejected in the merits.*
- 2. That Cruz Azul shall bear all court costs related to the current proceedings.*
- 3. That Cruz Azul must pay a contribution towards Federación de Fútbol de Chile’s legal fees and other expenses in an amount of no less than 5.000 EUR”.*

- 42 In its Answers FIFA submitted the following requests for relief:

“...the Second Respondent respectfully requests the CAS to:-

- i) Issue an award declaring the Appellant’s claims against FIFA inadmissible.*

or, alternatively,

ii) *Reject the reliefs sought by the Appellant.*

and, in any event,

iii) *Order the Appellant to bear the arbitration costs and to pay a substantial contribution towards the legal cost expenses of FIFA in connection with these proceedings”.*

- 43 On 29 January 2014, FIFA confirmed that it did not wish for a hearing to be held.
- 44 On 3 February 2014, the Federation requested that the Panel issued an award based solely on the parties’ written submissions.
- 45 On 4 February 2014, the Club confirmed that it wished for a hearing to be held.
- 46 On 5 February 2014, the CAS Court office informed the parties that the Panel had determined to convene a hearing.
- 47 On 12 February 2014, pursuant to an order of the Panel, the Club provided the Player’s social security documentation to the CAS Court office.
- 48 A hearing was held on 9 May 2014 at the CAS premises in Lausanne, Switzerland. The parties did not raise any objection as to the constitution and composition of the Panel. The Panel was assisted by Mr. William Sternheimer, Counsel to CAS. The following persons attended the hearing:
- i. Appellant: Mr. Ignacio Lopez Medina, Chief Operating Officer, along with Lucas Ferrer, Mr. Eugenio Macouzet and Mr. Francisco J. Ibáñez, counsel, and with Dr. Jimenez present by telephone;
 - ii. First Respondent: Mr. Oscar Fuentes, Executive Secretary, along with Mr. Gorka Villar Bollain, and Mr. Miguel Liétard Fernández-Palacios, counsel;
 - iii. Second Respondent: Mr. Oliver Jaberg, Head of Corporate Legal and Mr. Antonio Rigozzi, counsel.
- 49 The parties were given the opportunity to present their cases and make their submissions and arguments. In the case of the Club, its witness was given the opportunity to answer questions posed by the Respondents and the Panel. After the parties’ final closing submissions, the hearing was closed and the Panel reserved its detailed decision to this written award.
- 50 Upon closing the hearing, the parties expressly stated that they had no objections in relation to their right to be heard and had been treated equally in these arbitration proceedings. The

Panel had carefully taken into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties, both in their written submissions and at the hearing, even if they had not been summarised in the present award.

IV. SUBMISSIONS OF THE PARTIES

1. The Club

51 The submissions of the Club, in essence, may be summarised as follows:

a) The Federation's liability

52 The Federation's physicians acknowledged that the Player finished the first match against Uruguay with discomfort in his Achilles tendons, however he was not ruled out, as minimum care required, of the line up in the following game against Paraguay which took place 4 days after. The Club relied upon the statement the Player had given recently that he was injured after the first game. The Federation's negligence was to allow him to play in the next game. He needed rest and if the pain remained, then further investigation. Instead the Federation played the Player again and the result is he has never played a full game since. Their doctors took a risk in disregarding his Ongoing Injury and clearing him to play, for the sole benefit of the Federation.

53 During the hearing, Dr. Jimenez, a doctor with 27 years' experience in this area, confirmed the proper treatment was rest, anti-inflammatory medicine, cryotherapy and hydrotherapy. This was the treatment the Player received once back with the Club. The Club distinguished Dr. Jimenez's testimony from the internet based evidence the Federation sought to rely on in its Answer.

54 Following his release from the Federation, the Club's doctors obtained two MRI scans that confirmed tendinitis in both Achilles tendons, with the left ankle being the most severe that ultimately underwent surgery.

55 Until his return from the Federation, the Player had never expressed the existence of any pain in that area and had not required any medical treatment in his Achilles tendons. The Federation acted negligently by allowing the Player to participate in the game against Paraguay and that caused serious financial damage to the Club as it had to continue to pay the Player his salary despite his absence from its team and it had to cover the payment of all medical expenses. Therefore, due to the Federation's negligence, it should be ordered to pay compensation to the Club.

56 The Club submitted that it had provided the Panel with sufficient evidence. It was self-evident that the Player was injured as a result of the Federation's negligence. Copies of the Player's contract, wage slips and his Termination Agreement confirmed how much the Club had lost as a result of this negligence.

b) *FIFA's liability*

57 FIFA, as well as having since altered its rules to make payments to clubs in the event of a player's injury whilst on release to national associations, has also paid out significant monies to other clubs in such an event, including the case in relation to Michael Owen. Therefore, FIFA should be bound by its public statements and its own actions (*venire contra factum proprium*) because based on that doctrine, it cannot over reach and deny the Club the same treatment it awarded to Newcastle United, amongst others.

58 Further, the regulatory framework existing at the time of the Player's injury, which was the result of an abuse of the dominant position of FIFA, was completely unfair and arbitrary and therefore should not be applied by the Panel.

59 The Swiss Federal Court has repeatedly stated that the judge, applying the rules of law and equity, must objectively assess all relevant factors and find the adequate solution to the specific case. Equity is a guiding principle that proclaims the pre-eminence of the justice in the particular case. If FIFA's standards are automatically applied to the facts of the case, this would lead to an absurd and unfair result. Therefore, the Panel, based on the old principle *in dubio pro equitate*, should choose to ignore the rule and seek justice of the case. That, de facto, is what FIFA has ultimately been applying after the creation of the recent Club Protection Program (hereinafter referred to as the "CPP") dealing with payments to clubs in relation to players who are injured whilst on international duty. The Panel should find a solution in equity.

60 The Club noted that FIFA sought to rely upon the FIFA Form as some sort of release or exemption from any liability, however the Club noted it did not have any express retrospective effect. Further, in relation to any arguments regarding a possible one year time limit under Swiss Law to bring a claim against the Respondents, the Club submitted that this time limit should run from the date that it could assess the damages, not from the date of the Consequential Injury.

61 Finally, the Club submitted that FIFA, as the organisers of the World Cup, should bear joint and several liability with the Federation for its negligence.

62 In conclusion, the Club therefore requested the Federation and FIFA to be ordered to pay the following compensation: the payment of wages under the Contract that the Club paid to the Player from November 2011 to January 2013 which, including the amounts paid under the Termination Agreement, amount to a total of USD 1,600,000. Further, the payment of all expenses associated with the treatment of the injury amounting to a total of USD 50,000.

2. The Federation

63 The submissions of the Federation, in essence, may be summarised as follows:

a) *Nature of the Player's injury and treatment administered by the Federation*

64 As stated in the report from the Federation's national team doctors, dated 8 November 2011, the Player received exactly the treatment recommended for this type of injury in order to

reduce inflammation and pain, as stated on the US National Institute of Health's MedlinePlus website.

- 65 The Player had in fact suffered Achilles tendonitis in early 2011. Dr. Jimenez could only testify that he was not aware of any previous injury and conceded that he was not aware of the Player's history other than at club level. Although the Player suffered similar pain earlier in 2011, the Player continued to participate for both the Club and the Federation. Therefore, the Player's injury did not begin at the time that the Club asserts (the November 2011 international matches) and the Federation can therefore not be held liable for an injury which was not new to the Player.
- 66 The Federation's doctors have therefore not been negligent at any time in the treatment of the Player, nor in allowing him to participate in the following match because: a) he had already been able to play in the past with slight pain in the same area, a pain that the Club failed to acknowledged in its own submissions, b) the pain did not prevent the Player from participating in the second match, and the Player himself agreed to play, and c) the treatment applied by the national team doctors was the usual recommended treatment for such injuries. The Federation cannot be ordered to pay any compensation to the Club for the Player's Original or Consequential Injury, as the First Respondent has not acted negligently.
- 67 The Player's injury was not a serious one but one that is common for football players and easily treatable. As can be seen from the medical report of Dr. Jimenez dated 20 December 2011, disclosed by the Club, the Player's condition, at the very least, improved after being released by the Federation. This is further evidenced by the fact that the Player underwent a surgical procedure in February 2012, managed to successfully recover from his injury, even being loaned to another club in July 2012 and participating in a match for that club. The Federation noted that the Club had not provided the MRI scans, despite referring to them.
- b) *The Club's duty under the applicable regulations*
- 68 In accordance with Article 2 paragraph 3 of Annex 1 of the RSTP in force at the time of the Player's injury, it was the Club's duty to provide him with medical insurance sufficient to cover any injury or accident sustained during the time that he was released to play for the national team. The Club was well aware of this obligation and had in fact obtained insurance cover for the Player in the amount of 500,000 Mexican Pesos. It was for the Club to decide upon the level of insurance cover and the Club could have selected more cover.
- 69 Whilst the Club may feel that the RSTP in force at the time were unjust, this cannot be used by the Club to request compensation from the Federation who merely complied with the RSTP. Under the new CPP system, FIFA's member associations are not liable to pay any compensation for the injuries sustained by footballers during matches played with their national team. The Federation would therefore not have any liability under the CPP that the Club itself considers more just.

c) Actions of third parties

70 The Federation submitted that it cannot be held liable to pay compensation because of the alleged previous actions of FIFA or other national associations. If FIFA had decided to pay other clubs or national associations, then that was no concern of the Federation.

d) Termination Agreement

71 The Player was loaned by the Club to another club in July 2012. Therefore, it can only be assumed that the Player passed the medical examination to join that club. In September 2012, the Player was able to participate in a match for the new club and apparently suffered a relapse of his injury or a similar one during that match. The Player participated in the match with the approval of that club's medical staff, by a decision of the coach and voluntarily.

72 The Federation cannot be held liable for the Player's new injury which caused him to undergo another surgery after recovering from the Consequential Injury. The Player's injury sustained in September 2012 was not caused by the matches that he had played with the Federation's national team. Further, the Club has not provided any evidence that the injuries sustained by the Player whilst on loan was the same as the one suffered with the national team.

73 The Player and the Club agreed to terminate the Contract because of the injuries sustained by the Player whilst on loan and not due to the Original Injury or the Consequential Injury. Therefore there is no sufficient legal basis for the Club to claim monies from the Federation and FIFA in relation to the termination fee paid to the Player.

e) Payment of compensation

74 The Federation did not act negligently when the Player was diagnosed with a mild injury which he had previously experienced and in any case the Player managed to fully recover by the summer of 2012, even being loaned to a Chilean club at that time.

75 After the match played on 11 November 2011, the Player had mild pain in his Achilles tendons and was treated accordingly by the national team doctor. The Player's pain was not so great to preclude him from participating in the following match 4 days later. The Player was therefore fit to play against Paraguay on 15 November 2011 and he, indeed, did not consider that he should not participate in the match. Further, the Player's Original Injury did not require surgical intervention.

76 The Federation cannot be held liable for the fact that the Player had to undergo surgery as the injury was not so serious at the time it occurred and secondly because it was the Club's duty to insure the Player against such contingencies. Further, it cannot be held against the Federation that the Club loaned the Player to another club instead of using his services from July 2012. Had the Player not recovered from the Original Injury and the Consequential Injury, he would not have been able to be loaned to a further club.

3. FIFA

77 The submissions of FIFA, in essence, may be summarised as follows:

a) *Relevant rules*

78 FIFA noted that the Club's claim is counter to the RSTP. Further, that this is not disputed by the Club. It was noted that Article 2 paragraph 1 of Annex 1 of the RSTP provides that clubs releasing a player are not entitled to "financial compensation". The Club, being a club which is a member of the Federation, which in turn is affiliated to FIFA, has by virtue of its membership and of its activities confirmed its willingness to be bound by the basic rules that underpin football.

79 The RSTP are valid and fair and therefore, it would appear that the Club's claim is based upon Swiss law. It was noted that the Club did not even attempt to establish any basis under Swiss law which would demonstrate that the RSTP are not valid or unfair.

80 Neither the European Court nor the Belgian Court in relation to the Charleroi claim ruled upon whether the RSTP contravene EU Law. The RSTP do not violate EU Competition Laws. To prevail with such a claim, the Club must establish its allegations that the relevant RSTP are illegal so they constitute a violation of EU Competition Law. The RSTP are entirely valid, fair and can in no way be interpreted as an abuse of a dominant position. From a Swiss law point of view, this means that the Club cannot rely on any wrongful act within the meaning of Article 41 of the Swiss Code of Obligations (hereinafter referred to as the "CO") as the basis for its claim for damages.

81 Pursuant to the RSTP, the Club was to insure against injury to the Player whilst on international duty. Further, clause 9 of the Contract provided that the Player authorised the Club to purchase an insurance policy covering the risk of death and disability of the Player. FIFA noted that the Club obtained an insurance policy but that this was inadequate to cover the amount required for the Player.

b) *No violation of non-venire contra factum proprium*

82 The suggested violation of equal treatment has nothing to do with the prohibition of *venire contra factum proprium*, which is an aspect of abuse of rights under Swiss law. The fact that FIFA allegedly participated in a settlement with Newcastle United and the Football Association in the Michael Owen case does not mean that it should apply the same standards to the present case. To assert an infringement of the prohibition of *venire contra factum proprium*, the Club would have to establish that it released the Player based on a legitimate expectation created by the Owen case. FIFA submitted that "this is simply absurd".

83 The Club's submission that the Panel should follow Article 41 of the CO is misconceived. Article 41 would allow the Panel to fill legislative gaps in situations that are not directly governed by the law. By definition a violation of Article 41 cannot constitute a cause of action. Moreover, it does not allow the Panel to simply ignore the rules, be it the RSTP excluding financial compensation or Article 41 of the CO ruling out any claim for damages.

c) *The hurdles*

84 FIFA denied any liability to the Club whatsoever. It submitted there were 6 hurdles that the Club must get over and argued that it failed to clear any of them:

aa) The Club waived its claim

85 FIFA noted that the Club had signed the FIFA Form with FIFA and had signed a similar one in relation to the 2010 FIFA World Cup South Africa, which included obligations in relation to not commencing legal proceedings against FIFA in relation to the RSTP and FIFA Statutes, and also not to make any claims against FIFA in relation to the costs of insurance of players. This waiver did not just cover the group stages of the World Cup, it was drafted wider than that to cover claims “in general”.

86 Whilst the Club might seek to argue it had no choice but to sign the FIFA Form and the previous one, it could have sought to exclude the current matter or indeed not signed at all.

bb) Statute of limitations

87 Article 60(1) of the CO mandates that a claim for damages or satisfaction becomes time barred one year from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it. According to the Club’s own case, the “*importance of the injuries*” was clearly exposed and became known to the Club with the medical report of 16 November 2011. The Statement of Appeal being filed on 29 July 2013 is time barred as a matter of Swiss law.

cc) Establishing a wrong doing

88 The Player suffered numerous injuries before signing for the Club and made minimal appearances in 2010. Further, the Player had already reportedly suffered discomfort in his Achilles tendon in July 2011 before the game in which the Club states caused the injury. The Player successfully completed the full 90 minutes of the game with the Federation on 15 November 2011. The Club had not provided the necessary evidence in relation to the medical treatment by the Club for the Player after he had participated with the national team. It was also noted that the Club alleged the Player suffered a recurrence of the injuries of September 2012 whilst on loan; however no evidence had been provided to support this allegation.

89 As far as FIFA is concerned, it cannot be liable for any negligence on the part of the Federation’s doctors, if there was any. There is no legal basis for “solidarity” liability – Article 50 of the CO does not apply.

dd) Establishing damage

90 Irrespective of the fact that there is no entitlement to any compensation, even if such an entitlement arose, the Club has failed to satisfy the requirements of making a damages claim under Swiss law. No attempt had been made to demonstrate how the figure of USD 1,150,000 had been arrived at. No payment records, receipts or invoices are exhibited which would evidence the amount of USD 50,000 that the Club claims to have incurred in respect of

medical expenses. The RSTP place an obligation on the Club to insure, so the only damage could be the premiums, but these have not been claimed by the Club.

ee) Causal nexus

91 As a matter of Swiss law, damages are only due if the claimant can prove the existence of causality nexus between the alleged wrongful act and the alleged damage. The existence of such a link is not even alleged in the Appeal Brief, let alone proven. FIFA, like the Federation, queried where the MRI scans were.

ff) Fault

92 The Club had clearly neglected to make provisions for adequate insurance cover in relation to the Player as is provided by the RSTP. The Club did this despite the fact that the Contract provided that the Club would obtain appropriate insurance cover. Any fault lies with the Club.

93 In summary, FIFA submitted that the Club has not proven its case under the applicable FIFA Regulations to which it is bound by way of its membership of the Federation and by virtue of its additional express voluntary and unreserved commitment.

V. JURISDICTION

94 As Switzerland is the seat of this arbitration, the provisions of the Swiss Private International Law Act (hereinafter referred to as the “PILA”) apply pursuant to its Article 176, paragraph 1. According to Article 186 of the PILA, the CAS has the power to decide on its own jurisdiction.

95 Furthermore, according to Swiss legal scholars, this provision “*is the embodiment of the widely recognized principle in international arbitration of ‘Kompetenz-Kompetenz’*. This principle is also regarded as a corollary to the principle of the autonomy of the arbitration agreement” [ABDULLA Z., The Arbitration Agreement, in: KAUFMANN-KOHLER/STUCKI (eds.), International Arbitration in Switzerland – A Handbook for Practitioners, The Hague 2004, p. 29].

96 “*Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it [...]. It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement*” [MÜLLER C., International Arbitration – A Guide to the Complete Swiss Law, Zurich et al. 2004, p. 115-116].

97 Article 186 of the PILA has been held to be applicable in CAS proceedings as well [RIGOZZI A., L’arbitrage international en matière de sport, thesis Geneva, Basel 2005, p.524].

98 Furthermore, none of the parties have denied that CAS has the competence to rule on its own jurisdiction in the present case. Thus, under the principles of Swiss law the Panel has competence to rule on its own jurisdiction. In fact, the jurisdiction of the Panel to rule on the merits was contested by the parties:

1. The Federation's submissions

- 99 The Federation submitted that the PSC was not competent to rule upon the merits of the case. As was explained in the FIFA Letter, neither Article 22 to 24 of the RSTP nor Article 9 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter referred to as the "Procedural Rules"), establish the competence of either the PSC or the Dispute Resolution Chamber (hereinafter referred to as the "DRC") to resolve disputes of an international dimension between a club, an association of FIFA and FIFA itself.
- 100 The consequence of the PSC's lack of competence is that the CAS cannot enter into the merits of the Club's claim.
- 101 The Federation also noted that FIFA (in Article 68 of the Statutes) indeed recognised the competence of the CAS to deal with these disputes because its own jurisdictional bodies do not have such competence, but that the jurisdiction of the CAS is only acknowledged in relation to ordinary arbitration.
- 102 As such, the Federation submitted that the CAS should either refer the Club to the correct legal forum or refer the matter to the PSC to rule on its own jurisdiction, as in the case of CAS 2007/A/1251.

2. FIFA's submissions

- 103 FIFA maintained that there was no jurisdiction pursuant to which the present matter could be heard by the CAS. In relation to the Club's argument that the CAS had jurisdiction as the PSC would have had jurisdiction to hear the substance of the Club's claim, FIFA countered that it was clear from reading Article 22 to 24 of the RSTP and Article 3 of the Procedural Rules that no such jurisdiction exists.
- 104 In response to the Club's argument that the FIFA Letter expressly accepted the jurisdiction of the CAS, FIFA reiterated that the FIFA Letter "advised" the Club to consider referring the matter to the CAS. This new suggestion was made purely in reference to Article 63(3) of the FIFA Statutes in the context of the possibility of ordinary arbitration between direct and indirect members of FIFA (and not FIFA itself).

3. The Club's submissions

- 105 In its Appeal Brief, the Club submitted that the jurisdiction of the CAS derives from Article 66 of the FIFA Statutes:

"FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players' agents".

As this case includes a dispute between a club against another member of FIFA and FIFA itself, the Club submitted “the formal requirement are met to the jurisdiction of the CAS”.

106 In addition, the Club noted the position of FIFA, as expressed in the FIFA Letter:

“We advise you to refer the matter to the Court of Arbitration for Sport (CAS)”.

107 The Club stated that it was clear that FIFA had competence to deal with disputes between clubs and national associations. The Club explained that both are its members (even if clubs are considered indirect members) and accordingly, as seen in Article 66 of the FIFA Statutes, FIFA recognises the jurisdiction of the CAS.

108 The Club submitted that the Panel was only examining its own jurisdiction to entertain the present appeal and in order to do so, the Panel’s task was to establish whether or not the requirements under Article R47 of the CAS Code were met that is “*an appeal against a decision of a Federation, association or sports-related body may be filed with CAS if the statutes or regulations of that said body so provide ...*”. The Club maintained that the FIFA Letter should be considered as a final decision of FIFA.

109 The Club concluded that it could easily be established that the conditions required for the CAS to accept jurisdiction on the present dispute were fully met and therefore the CAS had jurisdiction to hear this matter.

4. Decision

110 The Panel determined that it did indeed have jurisdiction to deal with the matter in hand and communicated this decision to the parties on 18 December 2013.

111 The Panel notes the Respondents’ position that the CAS would only be able to claim jurisdiction through an ordinary procedure, however, determines that both Respondents, and indeed the Club, have correctly referred to Article 66 of the FIFA Statutes. The dispute between the parties relates solely as to which Division of the CAS should take jurisdiction. The Respondents argue it would be the Ordinary Division (and the Federation stated it hadn’t agreed to go there), yet the Club applied to the Appeals Division. The Panel, however, notes that under the CAS Code, this is not a matter for the determination of the parties, nor for the Panel, but for the CAS Court Office itself. Article S20 of the CAS Code states:

“The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.

...

Arbitration proceedings submitted to CAS are assigned by the CAS Court Office to the appropriate Division. Such assignment may not be contested by the parties nor be raised by them as a cause of irregularity. In the event of a change of circumstances during the proceedings, the CAS Court Office, after consultation with the

Panel, may assign the arbitration to another Division. Such re-assignment shall not affect the constitution of the Panel or the validity of any proceedings, decisions or orders prior to such re-assignment. ...”.

112 The Panel notes that the dispute at hand is one between a club, a federation and FIFA. Article 66 of the FIFA Statutes clearly gives the jurisdiction of such matters to the CAS. The Federation is obliged to uphold the Statutes of FIFA and is bound by these Statutes that give jurisdiction of such disputes to CAS, rather than to ordinary national courts. Once the arbitration is commenced at the CAS, it is for the CAS Court Office to determine which Division shall be charged with it. In the case at hand, the CAS Court Office has assigned it to the Appeals Division. The CAS Code is clear – this cannot be contested and is final. The decision of the CAS Court Office cannot be changed but it would be possible for the parties or the Panel to suggest that a case be attributed to the other CAS Division in case of a change of circumstances, namely if during the proceedings it becomes clear that the matter at stake shall rather lead to an ordinary than to an appeal procedure. This did not occur *in casu*. As such, the Panel confirms it has jurisdiction to deal with the matter at hand, bearing in mind that the attribution of a particular case to one CAS Division or the other, even erroneous, does not have any effects on the CAS jurisdiction. Since the case has been designated to the Appeals Division at the CAS, the appropriate parts of the CAS Code shall apply.

113 Finally, the Panel also notes the contents of the FIFA Form that the Second Respondent relied upon as a waiver from any claims by the Club. The 10th bullet point states:

“We [the Club] agree and confirm:

...

- *to recognise the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland) as the sole competent body to decide on disputes (including this club application form) between our club and FIFA and/or the confederations (and their members), as stipulated in the FIFA Statutes...”.*

VI. ADMISSIBILITY

114 The Panel notes that the admissibility of the Appeal is also contested by the parties:

1. The Federation’s submissions

115 The Federation explained that the FIFA Letter was in fact just a referral by FIFA to the ordinary arbitration procedure at the CAS and did not constitute a “decision” of the PSC, appealable to the CAS.

116 Further, the Federation maintained that the FIFA Letter did not constitute a formal decision passed by a legal body of FIFA under Article 67 of its Statutes. The Federation explained that the FIFA Letter was signed by FIFA’s Head of Legal Affairs and Head of the Player’s Status Department who are not members of FIFA’s jurisdictional bodies. The FIFA Letter was not sent on behalf of either the DRC or the PSC but by the individuals themselves. The FIFA

Letter was not a decision but “an informative notification” that is often sent out by FIFA without prejudice of a formal decision taken by the PSC or the DRC.

- 117 Upon receipt of the FIFA Letter, the Club never requested that the PSC formally decide on the matter in question and therefore rule upon its own jurisdiction which ruling may then be appealable to the CAS, which, the Federation submitted, the Club could (and should) have done. The Federation highlighted the difference between asking for a procedure to be initiated by FIFA from asking the PSC to rule on its own jurisdiction.
- 118 The Federation also noted that the FIFA Letter did not contain the main element of a decision as defined in Swiss law, in that the FIFA Letter did not constitute an obligatory or constraining resolution to the claim lodged by the Club before FIFA. The Federation cited the jurisdiction of the Swiss Federal Tribunal in ATF 101 Ia 73 in that regard.
- 119 The Federation also explained that FIFA only advised the Club to take the matter to the CAS as an ordinary procedure and that this was in no way a formal statement of FIFA that the proceedings would be closed or that the PSC would not adopt a decision in due course.
- 120 The Federation noted that the letter referred to in the case of CAS 2012/A/2754 (submitted by the Club) differed vastly from the FIFA Letter in that the letter in the CAS jurisprudence closed the case and refused to enter judgment on the matter at hand, and such decision was apparently made on behalf of FIFA. This was not the case with the FIFA Letter.
- 121 Further, the Federation also noted that the Club had not requested to FIFA that a formal decision be taken by the PSC, that FIFA had not refused to initiate the proceedings, and that FIFA only rejected the Club’s claim in its letter of 20 November 2012, but not in the FIFA Letter. The Federation also referred to the case of CAS 2008/A/1633 in which it was held that a letter from FIFA that informed a party that it did not seem to be in a position to intervene any claim lodged before it, did not close the possibility of its bodies dealing with the matter. Subsequently in that case, the appeal was considered inadmissible.

2. FIFA’s submissions

- 122 FIFA also submitted that the claim was not admissible before the CAS. This was due to a number of reasons including (1) the FIFA Letter was not an appealable decision, (2) that the only appealable decision was the FIFA letter of 20 November 2012, (3) that the appeal was therefore belated, and (4) that the Club’s letters addressed to a FIFA decision making body after the 20 November 2012 letter which sought to reiterate the claim do not and cannot resuscitate the time limit to appeal the original decision to reject the formal claim of 7 November 2012.
- 123 According to Article R47 of the CAS Code the most fundamental criteria of admissibility of an appeal is that it is made against “*a decision of a federation, association or sports-related body*”. In the case of CAS 2005/A/899, a communication must contain “*a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee ...*”. In this case the FIFA Letter had no

independent bearing as it merely followed a series of correspondence from the FIFA administration.

124 Further, the 20 November 2012 letter was the only possible appealable “decision” by FIFA. The letter of 20 November 2012 clearly fulfilled what the Club itself called the requirements set by the CAS in Swiss law to be considered a “decision”. However, if the appealable decision was that of the 20 November 2012, the Appeal to the CAS was out of time.

125 With regards to the Club’s submissions that it had requested the PSC to rule on its own jurisdiction by virtue of its letters to FIFA dated 14 March and 5 June 2013, these letters were to lodge the Club’s claim. Neither letter considered the question of the PSC’s jurisdiction.

3. The Club’s submissions

126 The Club submitted that the reasons put forward by the Federation to challenge the admissibility of the present arbitration proceedings were completely unfounded and incorrect. The Club maintained that as the FIFA Letter was signed by FIFA’s Head of Legal Affairs and the Head of Player’s Department it was not a reason for it not to be considered a decision. The Club referred to CAS jurisprudence, in the case of CAS 2012/A/2754, in which it was confirmed that the signature of FIFA’s Head of Legal and Player Status and Governance is binding on FIFA and therefore a letter where such signatures are contained, can be subject to appeal.

127 The Club also stated that contrary to the Federation’s arguments, the Club actually requested a formal decision by the PSC on two occasions on 14 March 2012 and 5 June 2013.

128 The Club’s requisition for payment dated 7 November 2012 could not in any way be construed as a formal claim submitted to FIFA because it bears none of the hallmarks of the petition required under Article 9 of the Procedural Rules. It was only after the Federation’s silence and FIFA’s rejection of the requisition for payment that the Club made a conscious decision to present a formal claim before FIFA on 14 March 2013 requesting the PSC to condemn FIFA and the Federation to be jointly and severally liable for indemnifying the Club. FIFA cannot now interpret the Club’s requisition for payment to be an initiation of legal action. The formal claim was made on 14 March 2013.

129 The Club maintained that the FIFA Letter was FIFA’s dismissal of the Club’s claim and therefore constituted a decision by FIFA pursuant to Article R47 of the CAS Code and Article 68.3 of the FIFA Statutes. The fact that the letter constituted a decision is supported by CAS jurisprudence.

130 The Club maintained that the letter from FIFA dated 20 November 2012 could not be a decision because it was sent before the Club ever submitted its formal claim.

131 The Club maintains the FIFA Letter was an appealable decision pursuant to Article R47 of the CAS Code and as the Appeal was within the 21 day deadline, it was admissible.

4. Decision

132 The Panel has above noted that the matter at hand has been assigned to the Appeals Division and that all parties submit that Article R47 of the CAS Code is applicable. The Club refers to the FIFA Letter as an appealable decision. However, the CAS is acting as a first instance court *in casu*. As noted at para 113 above, the Club agreed to the CAS jurisdiction by signing the FIFA form, and Article 66 of the FIFA Statutes also gives jurisdiction to the CAS to resolve this dispute generally. The CAS “classification” of the type of proceedings does not jeopardize the admissibility of the case, independently of whether there is or not an “appealable decision”. In any event, assuming that the FIFA Letter would constitute an “appealable decision”, the time limit for appeal would have been respected. Accordingly, the issue of the nature of the FIFA Letter can be left open.

133 It follows that the Appeal is admissible, independently of the fact that, by its nature, it may not be considered a true “appeal” directed against a final decision of FIFA.

VII. APPLICABLE LAW

134 Article R58 of the CAS Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

135 The Panel notes that Article 66(2) of the FIFA Statutes stipulates the following:

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

136 The parties agreed to the application of the various regulations of FIFA (in particular the RSTP) and subsidiary to the application of Swiss law.

137 The Panel is therefore satisfied to accept the subsidiary application of Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

1. The main issues

138 The Panel must address the following:

- a) The legal conditions that must be met for a claim of negligence against the Federation.
- b) Were those conditions met and, if so, what is the position of the Federation?

- c) The legal conditions that must be met for a claim against FIFA.
- d) Were those conditions met and, if so, what is the position of FIFA?

a) *Negligence of the Federation?*

139 The Panel notes that under the provisions of the RSTP there is, at Article 1 of Annex 1, an obligation upon the Club to release its players to their national associations or federations for international competitive matches, such as qualifying matches for the World Cup. However, the RSTP is silent as to any express liability the association or federation will bear, in the event that a player gets injured whilst on international duty. Article 2 of Annex 1 of the RSTP does, however, stipulate that:

“2.1 Clubs releasing a player in accordance with the provisions of the annexe are not entitled to financial compensation.

...

2.3 The club with which the player concerned is registered shall be responsible for his insurance cover against illness and accident during the entire period of his release. This cover must also extend to any injuries sustained by the player during his international match(es) for which he was released”.

140 This wording of the RSTP does, in the opinion of the Panel, foresee the possibility of players getting injured whilst on international duty and places a responsibility upon the club to insure against this. The Panel notes that the Club did so insure, but at a level of cover that was insufficient to meet the remaining wages under the Contract. The Panel also notes the apparent exclusion of any claim for *“financial compensation”* by the Club under the RSTP, but can leave as moot whether that is compensation for the services of its Player (i.e. whether national federations or associations should pay clubs for the services of their registered players) or compensation for any injury to the Player.

141 The Club merely alleges negligence on the behalf of the Federation, without referencing the claim to any legal framework. However, the Panel notes that the RSTP does not place any express contractual liability on the Club. The Panel therefore turns to Swiss Law to understand the position of the Federation that did call for the Player to participate in its World Cup qualifiers against Uruguay and Paraguay in November 2011.

142 It is FIFA that helpfully sets out the position under Articles 41 *et seq.* of the CO, in its Answer:

“41.1 Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation”.

“42.1 A person claiming damages must prove that loss or damage occurred.

42.2 Where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party...”.

“44.1 Where the injured party consented to the action which caused the loss or damage or circumstances attributable to him helped give rise to or compound the loss or damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely.

44.2 The court may also reduce the compensation award in cases in which the loss or damage was caused neither wilfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship”.

“60.1 A claim for damages or satisfaction becomes time-barred one year from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it but in any event ten years after the date on which the loss or damage was caused”.

143 The Panel notes that the burden of proof falls upon the Club.

b) *Have the conditions for negligence been met?*

144 The Panel notes that the Club claims it is “self-evident” that the Federation’s doctors acted negligently by clearing the Player to play in the second international game on 15 November 2011, after he had suffered the Original Injury. This resulted in the Player suffering the Consequential Injury, from which he never recovered to play a full match again. The Club relies upon a press interview the Player gave to say he was injured in the first game on 11 November 2011, along with a certificate from the Federation’s Assistant Manager, that *“On November 11th after the Uruguay-Chile match, the player indicated pain in his Achilles tendons, hurting that is maintained during the process. The injuries were treated with cryotherapy and kinesiology. Re-evaluation is recommended”.*

145 The Club also relies upon the medical evidence of Dr. Jimenez dated 20 December 2011, that on his return the Player was injured and could not play in the games on 19 and 26 November, that he had an MRI scan and was continuing to receive treatment, including ankle braces to sleep in. There are then submissions from the Club that the Player underwent surgery on his left tendon in Barcelona on 27 February 2012.

146 The Panel notes the Club submits that the Player was eventually, on 25 July 2012, transferred on loan, at his request, to a Chilean club, Club Universidad de Chile. In September 2012 he played 45 minutes in a match there, before suffering a relapse of the Consequential Injury. Eventually, on 24 January 2013, the Club and the Player terminate the Contract by way of the Termination Agreement.

147 The Panel notes on the other hand, that the Federation had produced media reports that the Player had suffered from Achilles problems in the past (although the Panel notes the Club produced a report from Dr. Jimenez to say he was not aware of any pre-existing problems and he confirmed this as part of his testimony at the hearing, albeit also confirming he was not aware of the Player’s medical record whilst on international duty) and it could not be liable for any injury relating to a pre-existing condition. The Federation also submitted that the Player was prepared to play in the second game – he was not forced. It was also noted by the

Respondents that the Player was not called to testify, much as within the Termination Agreement was a contractual obligation upon the Player to assist the Club in these proceedings against the Respondents. Further, the Federation noted that in Dr. Jimenez's report of 20 December 2011, the Player's "*condition ha[d] improved*".

- 148 Both Respondents noted the clear duty of the Club to insure the Player against injury on international duty. Whilst it did so, it took out cover at an insufficient level. The Respondents submit that in accordance with Article 44 of the CO, the Panel should take this contributory negligence on the part of the Club into account.
- 149 The Panel notes that the Club has not provided any medical records for the Player, nor the MRI scans nor his medical history. There is no evidence before the Panel concerning the operation in Barcelona, nothing to indicate whether the Player had recovered before his loan to Club Universidad de Chile, no copy of a medical undertaken by that loan club (or evidence that there wasn't a medical), nothing to establish exactly what the injury was that he suffered whilst playing for them, nor why his Contract was ultimately terminated. The Club could have called the Player to testify (Did he have a pre-existing condition? Was he forced to play on 15 November? What treatment did the Federation's Doctors give him? Did he ever recover fully? Was his later injury whilst on loan a recurrence? etc etc). Whilst a copy of the Contract, the Termination Agreement and some wage slips were produced, the Panel notes there were no invoices for medical treatment provided either.
- 150 With this lack of evidence (and the Panel notes the consistent CAS jurisprudence that places the burden of proof on the party seeking to bring such claims) the Panel notes what is before it. There is no dispute that the Player played on 11 and 15 November 2011, there is no dispute that he returned injured (the Federation's letter of 11 November 2011 confirms this, as does Dr. Jimenez's report of 20 December 2011). The Panel has to decide whether the Federation's Doctors were negligent in allowing the Player to play in the match on 15 November 2011 whilst suffering from the Original Injury.
- 151 The Panel concludes that the Club has failed to discharge its burden of proof in the matter at hand. The Panel were not provided with enough evidence to determine what treatment was given to the Player, whose decision it was to play in the second game, what the Player's condition was on return from international duty and what happened in the next months after his condition was apparently improving that resulted in an apparent operation, could it be the treatment by the Club that resulted in an operation, did he recover before he went on loan, when did he start training again, did anything happen at those training sessions, etc. The list goes on. The key evidence, in the Panel's opinion for a claim of this nature is normally the medical records of the player and his own testimony. Both were unavailable to the Panel in the matter at hand. The Panel understands that the Club may have had difficulties in collecting such evidence. However, this cannot lead to a shift of the burden of proof to the care of Respondents.

c) *The position of FIFA*

- 152 The Panel notes the 6 hurdle test that FIFA advances in this matter. Whilst the Panel can leave aside the procedural arguments of the first 2 hurdles (as the Panel has doubts as to whether the FIFA Form was intended to have retrospective effect and should be interpreted as widely as FIFA submit; and whether the Club could fully assess the loss or damage it claimed until it and the Club had finally given up on treating him and terminated the Contract), as it determines the Club has failed to “clear” the substantive hurdles within Article 41 of the CO as regards FIFA. Notwithstanding the foregoing, and in specific response to FIFA’s allegation that Article 60(1) of the CO renders the Club’s claim time barred, the Panel remarks that even assuming that the Club was able to fully assess the loss or damage it claimed before it had given up on treating the player and/or terminated the Contract, the claim as filed by the Club is not time barred. This is because reference must first be made to the FIFA regulations on the issue of the admissibility of the Club’s claim, with Swiss law only being referred to in case the FIFA regulations are silent on a specific issue. In this particular case, Article 25.5 of the RSTP grants a party 2 years following the event giving rise to the dispute within which to file a claim. Given that the Club became aware of the “importance of the injuries” on 16 November 2011 and filed its Statement of Appeal on 29 July 2013, it follows that its claim was within the 2 year limit and is therefore not time barred. In any case, as it has been determined above that the Club has not proven such negligence to the Panel, then FIFA could not be liable either. Even if there had been negligence on the part of the Federation’s doctors, the Panel are satisfied that it was not FIFA’s doctors that treated the Player and that FIFA cannot be held vicariously liable for the actions or omissions of the medical staff at any federation or association including the Federation.
- 153 The Club claims that FIFA must bear some responsibility as the organiser of the World Cup, however the Panel notes there was no such contractual responsibility within the RSTP nor other Statutes nor regulations of FIFA. Whilst the CPP are applicable now, they weren’t at the time of the Consequential Injury. The Club sought to argue that there was some form of common practice that FIFA had adopted in the past for clubs such as Newcastle United in England, when Michael Owen was injured whilst on international duty. The Club submitted the Charleroi agreement demonstrated FIFA’s underlying responsibility here.
- 154 FIFA submitted that any payments it made to other clubs pre-CPP were merely goodwill gestures and created no legal obligation on FIFA. The Charleroi claim was withdrawn by agreement with that club. For it to have succeeded, the Belgian Court confirmed the club would have needed to show FIFA’s regulations contravened EU Competition Law. FIFA questioned how EU Law could be of any relevance in a dispute between a Mexican club, a federation from Chile and itself, based in Switzerland. Further, FIFA argued against any application of *non-venire contra factum proprium* – the circumstances were different, as Michael Owen was injured in the World Cup tournament in 2006, not in qualifying; and any payment was made without any admission of liability on a goodwill basis.
- 155 Weighing these positions up, the Panel does not overlook a certain sporting misfortune of the Club. However, the Panel failed to be convinced by the arguments of the Club that FIFA had any contractual, equitable or legal obligation to compensate the Club for any losses it may

have suffered as a result of the Player's injuries and accepted the submissions of FIFA in that regard.

2. Conclusion

156 In conclusion, the Appeal of the Club and all other prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by Club Deportivo Social y Cultural Cruz Azul on 29 October 2013 against the FIFA Letter dated 8 July 2013 is dismissed.

(...)

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