



**Arbitration CAS 2012/A/2850 Ipatinga FC v. Fédération Internationale de Football Association (FIFA), award of 23 January 2013**

Panel: Mr. Lars Hilliger (Denmark), President; Mr. Rui Botica Santos (Portugal); Mr. Emilio García Silvero (Spain)

*Football*

*Disciplinary proceedings for failure to comply with a FIFA decision*

*Scope of the appeal*

*Tasks of the FIFA Disciplinary Committee under Article 64 of the FIFA Disciplinary Code*

*Burden of proving that the conditions for implementing a set-off exist*

1. **The object of an appeal to CAS against a decision issued by the FIFA Disciplinary Committee (FDC) cannot extend beyond the limits of a review of the disciplinary sanction imposed by the FDC. As a result, only submissions relating to the fine imposed by the FDC, such as its legal basis and quantum, can be heard.**
2. **Under Article 64 of the DC, the main task of the FDC is to analyse whether a debtor has complied with a legal and binding decision rendered by a competent body. When a legal relationship has been regulated by Swiss law and when, as is the case, statutory authority exists under current Swiss law, subject to certain conditions, for fulfilling a payment obligation by way of a set-off, then the FDC is obliged, if this right is invoked, to analyse whether such a set-off must be deemed to have been validly made in compliance with the existing conditions.**
3. **According to the general legal principle of burden of proof, in line with Article 8 of the Swiss Civil Code, any party claiming a right on the basis of an alleged fact must carry the burden of proving that the alleged fact is as claimed.**

**1. THE PARTIES**

- 1.1 Ipatinga FC (the “Appellant”) is a Brazilian football club affiliated with the Confederação Brasileira de Futebol, which in turn is affiliated with FIFA.
- 1.2 The Fédération Internationale de Football Association (“FIFA”) is the world governing body of Football, whose headquarters are located in Zurich.

## 2. FACTUAL BACKGROUND

- 2.1 The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the decision rendered by the FIFA Disciplinary Committee (the “FDC”) on 29 May 2012 and notified to the Appellant on 15 June 2012 (the “Decision”), the written submissions of the Parties and the exhibits filed. Additional facts may be set out, where relevant, in the legal considerations of the present Award.
- 2.2 On 14 June 2011, the Single Judge of the FIFA Players’ Status Committee (the “PSC”) decided (the “PSC Decision”) that the Appellant had to pay to the Portuguese football club Desportivo Nacional de Madeira (“Nacional”) the sum of EUR 180,000 within 30 days as from the date of the notification of the decision and interest of 5% p.a. as of 31 May 2006. Furthermore, the Appellant had to pay the total costs of proceedings in the amount of CHF 9,000, of which CHF 4,000 has to be paid to Nacional and CHF 5,000 to FIFA (the “FIFA costs”).
- 2.3 The terms of the PSC Decision were notified on 17 June 2011. The Appellant then requested the grounds of the decision, which were notified on 8 September 2011.
- 2.4 On 28 November 2011, the Appellant informed the Respondent that Nacional had a debit with the Appellant, *“in the amount of EUR 150,000 plus monetary restatement”* and that the Appellant intended to *“proceed with payment via reciprocal compensation of debts and any remaining amount under our responsibility”*.
- 2.5 By letter of 30 November 2011 from the FIFA Players’ Status Department, the Appellant was reminded of its obligations with regard to the PSC Decision, and Nacional was requested to inform the FIFA Player’s Status Department whether the Appellant had paid the outstanding amount. Furthermore, the Appellant was informed that, on receipt of a request from Nacional, the case would be transferred to the Secretariat of the FDC.
- 2.6 By letter of 8 December 2011 the Appellant requested the PSC to extend the deadline for payment of the procedural costs. The Respondent then received the FIFA costs on 29 December 2011.
- 2.7 On 10 January 2012, the Appellant wrote to the Players’ Status Department of the Respondent, asking the Respondent *“to consider and accept the reciprocal compensation of debts as the way of payment to the decision passed on 14 June 2011...”*.
- 2.8 At the request of Nacional, the Players’ Status Department of the Respondent transferred the case to the Secretariat of the FDC on 28 February 2012.
- 2.9 On 1 March 2012, the Appellant proposed to Nacional *“to proceed with the set-off between reciprocal debts”*.
- 2.10 On 23 March 2012, the Secretariat of the FDC opened disciplinary proceedings against the Appellant as it had failed to comply with the PSC Decision.

- 2.11 On 13 April 2012, the Secretariat of the FDC urged the Appellant to pay the outstanding amount by 26 April 2012 and informed the Appellant that the case would otherwise be submitted to the FDC on 9 May 2012.
- 2.12 On 2 May 2012, the Appellant was informed that the meeting of the FDC was deferred to 29 May 2012. Furthermore, the Appellant was urged again for the last time to pay the outstanding amount by 14 May 2012.
- 2.13 By letter of 11 May 2012 to the FDC, the Appellant reinforced its desire to set off debits, also emphasising that it was making all efforts in order to achieve the best solution to duly comply with the PSC Decision. Moreover, the Appellant requested, alternatively, a reasonable time limit in order to raise funds and, thereby, settle the debt.
- 2.14 By letter dated 14 May 2012, the Secretariat of the FDC informed the Appellant that the PSC Decision does not provide for a payment plan and, therefore, a possible payment plan had to be agreed directly with the creditor. The Appellant and Nacional were further requested to inform the Secretariat by 21 May 2012 whether a payment plan had been agreed.
- 2.15 By letter dated 15 May 2012, Nacional informed the Secretariat that it would not agree on a payment plan or extend the deadline for the outstanding payment.
- 2.16 On 18 May 2012, the Appellant was informed that the case would be submitted to the FDC for a final decision on 29 May 2012 unless the Appellant forwarded proof of the payment by 24 May 2012.
- 2.17 By letter dated 24 May 2012, the Appellant requested an additional deadline of 90 days to fulfil its duties to pay according to the PSC Decision. The Appellant was then informed that its request would be presented to the FDC on 29 May 2012, which would take it into consideration.
- 2.18 Against the background of these circumstances, the FDC concluded as follows:
- 2.19 According to art. 64 par. 1 of the FIFA Disciplinary Code (the “DC”) 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 CAS:
- 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;
  - c) will, if it is a club, be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.

If the club disregards the final time limit, the relevant association will be requested to implement the sanctions threatened according to art. 64 par. 2 of the DC.

- 2.20 The FDC emphasised that equal to the competence of any enforcement authority, it cannot review or modify as to the substance a previous decision, which is final and binding and, thus, has become enforceable. The FDC then noted that the PSC Decision had become final and binding and, therefore, enforceable.
- 2.21 Since the Appellant had ignored the PSC Decision and is, therefore, withholding money from Nacional, the Appellant was considered guilty under the terms of art. 64 of the DC.
- 2.22 Based on the above, the FDC decided, in particular, as follows in the Decision:
1. *The Appellant is pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 64 of the DC;*
  2. *The Appellant is ordered to pay a fine to the amount of CHF 15,000 to FIFA within 30 days as from the notification of the decision;*
  3. *The Appellant is granted a final period of grace of 30 days as from notification of the decision in which to settle its debts to Nacional and to FIFA;*
  4. *If payment is not made by this deadline, Nacional may demand in writing from FIFA that six points be deducted from the Appellant's first team in the domestic league;*
  5. *If the Appellant still fails to pay the amount due even after deduction of the points in accordance with the above, the FDC will decide on a possible relegation of the Appellant's first team to the next lower division;*
  6. *The costs of the FIFA proceedings amounting to CHF 2,000 are to be borne by the Appellant and must be paid within 30 days as from the notification of the decision.*
- 2.23 On 15 June 2012, Nacional informed the Secretariat of the FDC that the due amount was not paid by the Appellant and requested a deduction of six points from the Appellant's first team in the domestic league championship.
- 2.24 On 20 June 2012, the Secretariat informed Nacional and the Appellant that according to the Decision, the Appellant is granted a final period of grace of 30 days from the notification of the Decision in which to settle its debts to Nacional. If the payment is not made by this deadline, Nacional may demand in writing that six points be deducted from the Appellant's first team in the domestic league championship.
- 2.25 By correspondence of 13 July 2012 from the CAS Court Office, FIFA was informed that the Appellant had lodged an appeal against the Decision.
- 2.26 On 16 July 2012, Nacional reiterated its request to deduct six points from the Appellant's first team in the domestic league championship.
- 2.27 Also on 16 July 2012, the Appellant and Nacional were informed by the Secretariat of the FDC that the disciplinary proceedings were suspended for the duration of the proceedings before the CAS.

### 3. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE CAS

- 3.1 On 6 July 2012, the Appellant filed a Statement of Appeal with the CAS, challenging the Decision, which had been notified to the Appellant with its grounds on 15 June 2012.
- 3.2 On 16 July 2012, the Appellant filed its Appeal Brief, which was forwarded by the CAS to the Respondent by registered letter and received by the Respondent on 30 July 2012.
- 3.3 On 20 August 2012, the Respondent filed its Answer.
- 3.4 By letter of 15 August 2012, the Parties were informed by the CAS Court Office that the Panel had been constituted as follows: Mr Lars Hilliger, attorney-at-law, Copenhagen, Denmark (President of the Panel), Mr Rui Botica Santos, attorney-at-law, Lisbon, Portugal, (appointed by the Appellant) and Mr Emilio García Silvero, Madrid, Spain (appointed by the Respondent).
- 3.5 By letter of 21 August 2012, the Parties were invited to inform the CAS by 28 August 2012 whether their preference was for a hearing to be held in this matter or for the Panel to issue an award based on the Parties' written submissions.
- 3.6 On 24 and 29 August 2012, the Respondent and the Appellant respectively indicated their wish to have the matter decided on the basis of the Parties' written submissions.
- 3.7 On 21 September 2012, the CAS forwarded the Order of Procedure to the Parties, which the Parties signed and returned to CAS. Furthermore, by signing the Order of Procedure, the Parties confirmed that their right to be heard had been respected.
- 3.8 On 21 September 2012, the Parties were also advised that the Panel deemed itself to be sufficiently well informed and, therefore, decided not to hold a hearing, pursuant to Article R57 of the Code of Sports-related Arbitration (the "Code").
- 3.9 By letter of 2 October 2012, on behalf of the Panel and pursuant to Article R56 of the Code, the Appellant was requested to provide the CAS Court Office with the following documents and evidence:
- “- *Evidence that Desportivo Nacional da Madeira does in fact owe EUR 150,000,- to Cruzeiro Esporte Clube concerning the partial transfer of the athlete Anderson Miguel da Silva;*
  - *Evidence that Desportivo Nacional de Madeira has not yet paid this said amount or any part hereof to Cruzeiro Esporte Clube in any event;*
  - *Information regarding whether the Appellant in fact transferred three athletes to Cruzeiro Esporte Clube in exchange for the ceded credit of EUR 150,000,-, as provided for by the cession contract”.*
- 3.10 By the same letter, the Respondent was requested to contact the club Desportivo Nacional da Madeira in order to provide the CAS Court Office with the following documents and evidence:
- “- *Evidence that Desportivo Nacional de Madeira does in fact owe or owed EUR 150,000,- to Cruzeiro Esporte Club, concerning the partial transfer of the athlete Anderson Miguel da Silva,*

- *And, in the affirmative, a statement from the club Desportivo Nacional de Madeira stating whether Desportivo Nacional de Madeira has already paid this said amount or any part hereof to Cruzeiro Esporte Clube in any event, together with the relevant documentation regarding any such payment made by the club Desportivo Nacional de Madeira”.*

- 3.11 On 11 October 2012 the Appellant filed its reply to the CAS letter dated 2 October 2012 together with exhibits.
- 3.12 On the same date, the Respondent filed its reply to the CAS letter dated 2 October 2012 including a letter from the legal representative of Nacional.
- 3.13 By letter of 12 October 2012 from the CAS Court Office, both Parties were granted a deadline until 18 October 2012 to comment on the material provided by the other party.
- 3.14 By letters of 17 October 2012 and 18 October 2012, the Respondent and the Appellant submitted their final comments.
- 3.15 All written material has been duly taken into consideration by the Panel in its decision-making process.

#### **4. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL**

- 4.1 Article R47 of the Code states as follows: *“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.*
- 4.2 With respect to the Decision, the jurisdiction of CAS derives from art. 64 par. 5 of the FIFA Disciplinary Code and art. 63 of the FIFA Statutes. In addition, neither the Appellant nor the Respondent objected to the jurisdiction of the CAS, and both Parties confirmed the CAS’ jurisdiction when signing the Order of Procedure.
- 4.3 The Decision with its grounds was notified to the Appellant on 15 June, and the Appellant’s Statement of Appeal was lodged on 6 July 2012, i.e. within the statutory time limit set forth by the FIFA Statutes, which is not disputed. Furthermore, the Statement of Appeal and the Appeal Brief complied with all the requirements of Articles R48 and R51 of the Code.
- 4.4 It follows that CAS has jurisdiction to decide on the present Appeal and that the Appeal is admissible.
- 4.5 Under Article R57 of the Code, the Panel has full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the decision appealed against.

## 5. APPLICABLE LAW

- 5.1 Art. 62 par. 2 of the FIFA Statutes states as follows: *“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”*.
- 5.2 Article R58 of the Code states as follows: *“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”*.
- 5.3 The Panel notes that in the present matter the Parties have not agreed on the application of any specific national law. The applicable law in this case will consequently be the regulations of FIFA and, additionally, Swiss law.

## 6. THE PARTIES' REQUESTS FOR RELIEF AND POSITIONS

6.1 The following outline of the Parties' requests for reliefs and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to those submissions or evidence in the following summary.

### 6.2. *The Appellant:*

6.2.1. In its Statement of Appeal of 6 July 2012 and in its Appeal Brief of 16 July 2012, the Appellant requested the following from the CAS:

- 1) To accept the present Appeal against the Decision;
- 2) To set aside the Decision;
- 3) To rule that the set-off of the debt is valid and must be accepted as a way of settling the debit with Nacional through a reduction of its amount, establishing a final deadline for the payment of the remaining amount;
- 4) If it is the case, to establish that the costs of the arbitration procedure must be borne by the Respondent.

Alternatively, and only in the event that the above is rejected:

- 5) To accept the present Appeal against the Decision;
- 6) To set aside the Decision;
- 7) To grant a final period of grace of 90 days as from the notification of the final decision;
- 8) To reduce the fine imposed by the Respondent;

- 9) If it is the case, to establish that the costs of the arbitration procedure must be borne by the Respondent.

6.2.2. In support of its request for relief, the Appellant submitted as follows:

- a) The Appellant starts by recognising its obligation in accordance with the PSC Decision to pay to the Nacional the sum of EUR 180,000 within 30 days as from the date of the notification of the Decision and interest of 5% p.a. as of 31 May 2006. Furthermore, the Appellant recognises that it has been ordered to pay the total costs of proceedings in the amount of CHF 9,000, of which 4,000 is payable to Nacional and CHF 5,000 to FIFA. The FIFA costs were paid on 29 December 2011.
- b) Under Swiss law, as well as under Brazilian and Portuguese law, a debtor of one claim, however, is entitled to full or partial fulfillment of its payment obligation to its creditor by setting off the claim in whole or in part against any other claim of the same kind, which the debtor in question has against the same creditor.
- c) By agreement between the Appellant and the Brazilian club Cruzeiro Esporte Clube (“Cruzeiro”) of 19 September 2011, the Appellant took over a claim against Nacional in the amount of EUR 150,000.00 with addition of interest. In consideration for this claim against Nacional, Cruzeiro was assigned the right *“at any time to choose 3 athletes from the Appellant’s roster of athletes, to be transferred permanently to Cruzeiro, who will then sign with the athletes a work contract”*.
- d) Such an assignment of a claim may be effected under Swiss law without the debtor’s approval and is therefore valid against the debtor offhand.
- e) As a result of this assignment, the Appellant thus acquired a valid financial claim against Nacional in the amount of EUR 150,000.00, which means that the Appellant and Nacional are mutually debtor and creditor to one another.
- f) Article 120(1) of the Swiss Code of Obligations (the “CO”) provides as follows:  
*“Where two persons owe each other sums of money or performance of identical obligations, and provided that both claims have fallen due, each party may set off his debt against his claim”*.
- g) As both the Appellant’s claim against Nacional and Nacional’s claim against the Appellant are liquid and due and payable, the conditions for set-off have been fulfilled. The claims in question are for instance not required to be of the same size.
- h) It further follows from Article 124 of the Swiss Code of Obligations that: *“A set-off takes place only if the debtor notifies the creditor of his intention to exercise his right of set-off”*.
- i) In addition, a set-off may be applied by bringing it up in any procedure regarding the claims.

- j) Accordingly, the Appellant repeatedly submitted to the Respondent that it wanted to set off the debt to Nacional, and on 1 March 2012 Nacional was notified of this directly by the Appellant.
- k) The Appellant has therefore met all formal conditions for satisfying Nacional's claims against the Appellant by way of a set-off.
- l) However, a difference exists between Nacional's claim against the Appellant and the Appellant's claim against Nacional for EUR 30,000.00, the difference being to Nacional's credit.
- m) Regardless of the set-off that has been carried into effect, the Appellant therefore owes Nacional an amount of EUR 30,000.00, which the Appellant intends to pay to Nacional as soon as possible.
- n) Article 64 of the DC applies only in cases where someone fails to pay a sum of money even when instructed to do so by a committee.
- o) Considering that the Appellant, as a result of the set-off, did not fail to pay the amount of money due to Nacional, the Decision is unreasonable and arbitrary.
- p) Against that background, the Panel is encouraged to accept the set-off and, subsequently, establish a deadline for payment of the remaining amount, and the other elements of the Decision must be set aside.
- q) In case the Panel cannot accept the set-off, the Panel should grant a final period of grace of 90 days of the notification of the Panel's decision for the Appellant to fulfil its duties arising from the PSC Decision.
- r) It follows from Article 64 of the DC that the Appellant is entitled to be granted such a final period of grace.
- s) Although the Appellant, throughout the proceedings, has accentuated its intention to pay the outstanding amount to Nacional, the period of grace previously granted by the Appellant is much shorter than the period requested by the Appellant and should therefore be extended.
- t) The Respondent fixed the period of grace relating to the payment to Nacional at 30 days, corresponding to the same length of period of grace that was granted to the Appellant with a view to payment of the FIFA costs.
- u) This means that the period of grace granted violates the rules of proportionality, as the amount due to Nacional (EUR 180,000.00) is much higher than the FIFA costs (EUR 5,000.00).

- v) Furthermore, no documentary evidence has been produced to show that a period of grace of 90 days could cause considerable financial difficulty to Nacional.
- w) Against the background of these facts, the Decision should be reviewed, regardless of whether or not the Panel accepts the set-off, as the Decision in all circumstances fails to comply with the principle of proportionality and as the Respondent, in the Decision, has not taken into account the circumstances of the case of the financial situation of the Appellant.
- x) When it comes to the fine imposed in the Decision to the amount of CHF 15,000.00, it is submitted that the fine is disproportionately high and, therefore, should be reduced substantially.
- y) It follows from Article 15(2) of the DC that *“The fine shall be no less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than CHF 1,000,000”*.
- z) Considering the Appellant’s maintenance of its intention to pay, and considering the obligation, in connection with the imposition of a sanction, to take into account all factors and the degree of the offender’s guilt, the fine imposed is clearly disproportionate.
- aa) The Panel is therefore requested to reduce the fine imposed by the Respondent to close to the minimum, in the amount that the Panel deems appropriate.

### 6.3 ***The Respondent:***

6.3.1 In its Answer of 20 August 2012, the Respondent presented the following requests for relief:

- 1) To reject the Appellant’s request to set aside the Decision;
- 2) To confirm the Decision;
- 3) To disregard the Appellant’s request concerning set-off;
- 4) To order the Appellant to bear all costs incurred with the present procedure and to cover all legal expenses of the Respondent related to the present procedure.

6.3.2 In support of its requests for relief, the Respondent submitted as follows:

- a) First and foremost, it is undisputed that the Appellant is a Brazilian football club affiliated with the Brazilian Football Federation, which is the reason why the Appellant is subject to the FDC.
- b) It is also undisputed the Appellant is obligated in accordance with the PSC Decision to pay to the Nacional the sum of EUR 180,000 within 30 days as from the date of the notification of the Decision and interest of 5% p.a. as of 31 May 2006. Furthermore, the Appellant has recognised that it has been ordered to pay the total costs of proceedings in

the amount of CHF 9,000, of which CHF 4,000 is payable to Nacional and CHF 5,000 to FIFA. The FIFA costs were paid on 29 December 2011.

- c) According to art. 64 par. 1 of the DC 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 CAS:
- 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;
  - c) if it is a club, it will be warned and notified that, in case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.

If the club disregards the final time limit, the relevant association will be requested to implement the sanctions threatened under art. 64 par. 2 of the DC.

- d) The possible sanctions stipulated in this article and threatened to be imposed are designed to put the debtor under pressure to finally comply with the decision rendered by the competent body. This article provides FIFA with a legal tool enabling at a certain extent to have the rights of the creditor finally respected.
- e) In view of the foregoing, the particular proceedings provided for under art. 64 of the DC should be compared to enforcement proceedings pursuant to Swiss law, and consequently the FDC should be regarded as acting along the lines of an “enforcement authority”.
- f) The FDC, equal to the competence of any enforcement authority, cannot review or modify as to the substance a previous decision, which is final and binding and thus has become enforceable. The FDC has as a sole task to analyze if the debtor complied with the final and binding decision of the relevant body.
- g) Therefore, in order to impose on a natural and/or a legal person any possible disciplinary sanction as provided for under art. 64 of the DC, the main question to be answered by the FDC remains in fact whether or not the financial amount as defined in the final and binding decision has been paid to the party claiming it, or – as the case may be - for a certain reason the outstanding amount is not due anymore.
- h) If the FDC is not provided with evidence that the payment has been executed or the parties have agreed on a payment plan, it will render a decision imposing a fine on the debtor for failing to comply with the decision and will grant the debtor a final period of grace as from the notification of the decision in which to settle its debt to the creditor and/or to FIFA.
- i) In this specific case, it is undisputed that, at the time when the case was before the FDC, no cash payment of the amount the Appellant is obligated to pay to Nacional had been effected, either in whole or in part.

- j) In regard to the alleged partial payment by way of a set-off on the basis of the cash claim against Nacional which, according to the Appellants own information, has been acquired by the Appellant, the Appellant submits that the FDC never considered this in its Decision.
- k) Article 120(1) of the CO provides as follows:  
*“Where two persons owe each other sums of money or performance of identical obligations, and provided that both claims have fallen due, each party may set off his debt against his claim”.*
- l) According to Article 124 para. 1 of the CO, *“a set-off takes place only if the debtor notifies the creditor of his intention to exercise his right to set-off”.*
- m) The burden of proof regarding the fulfillment of the conditions set out in Article 120 of the CO lies on the debtor.
- n) Furthermore, according to art. 81 para. 1 of the Swiss federal debt enforcement and bankruptcy act (the “DEBA”):  
*“if the claim is based on an enforceable decision rendered by a court if as Swiss administrative authority, the judge order the definite removal of the objection, unless the opponent proves with documentary evidence that the debt has been settled or suspended subsequently to the decision or he claims the statute of limitation”.*
- o) According to the doctrine and the jurisprudence of the Swiss Federal Court, the objection of set-off can only be made within the enforcement proceedings if the documentary evidence can be brought by the debtor. In this case, the level of the documentary evidence has to be equal to the claim of the creditor hence, a decision of a civil court or a payment summons.
- p) The conditions and the legal effect of the set-off are only subject to the CO and therefore, are considered as subject to the substantive law.
- q) In this respect, the question whether the amount due to Nacional which was decided by a FIFA judicial body can be compensated by the Appellant with a claim against Nacional resulting from an assignment of credits, is a question to the substance which does not fall under the competence of the FDC.
- r) Therefore, the FDC is not in a position to execute a mere contract between the Appellant and Cruzeiro and to set off a claim deriving from a contract with a claim deriving from a final and binding decision rendered by a FIFA judicial body.
- s) Furthermore, it has to be noted that the Appellant never sent a substantiated request to the Secretariat of the FDC that it wishes to set off the debt with a credit by proving the fulfillment of the conditions of Article 120 of the CO and above all providing the Secretariat with documentary evidence.

- t) Therefore, the FDC was not obliged to take into account the alleged set-off and correctly considered that the Appellant failed to comply with the Decision and thus sanctioned the Appellant according to art. 64 of the DC.
- u) Also, it has to be noted that even if the Appellant would have successfully set off its debt with Nacional, it would still owe EUR 30,000.00 plus the costs of the proceedings to Nacional and, thus, would still fail to comply with the Decision.
- v) Therefore, the alleged set-off would not have changed the fact that the Appellant still failed to comply with the Decision, which is the reason why the FDC – even in this case – correctly applied art. 64 of the DC and fined the Appellant for failing to comply with the Decision.
- w) The combined application of art. 64 1 a) and art. 15 par. 2 of the DC entails that the fine will range between CHF 300 and CHF 1,000,000.
- x) FIFA's attempts to urge the Appellant to fulfill its financial obligation failed to induce it to pay, and the Appellant thus withheld the amount unlawfully from the creditor.
- y) In view of the circumstances, and in particular also taking into account the high outstanding amount due, the FDC decided to impose a fine amounting to CHF 15,000, which amount is in line with the FDC's well-established practice.
- z) Furthermore, and in application of art. 64 par. 1 lit. b) of the DC, the FDC considered a final deadline of 30 days as appropriate for the amount to be paid to Nacional.
- aa) Moreover, and in accordance with art. 64 par. 1c) of the DC, the Appellant was warned and notified that, in the case of default within the period stipulated, points would be deducted or demotion to a lower division be ordered.
- bb) The Appellant claims that the sanctions imposed by the FDC are disproportionate to the Appellant's offence, which is not the case.
- cc) As already stated, the FDC took into account the seriousness of the infringement, in particular the intentional non-payment and unlawful withholding of the amount due by the Appellant and therefore considered, based on the principle of proportionality which also derives from that, a fine of CHF 15,000 is appropriate in the light of the importance of the outstanding debt of EUR 180,000. A lower fine would not be appropriate and would not serve its dissuasive effect inherent to the purpose of any sanction. Furthermore, a lower fine would contradict the longstanding and stable jurisdiction of the FDC.

- dd) With regard to the final deadline according to art. 64 par. 1 b) of the DC, it is at the FDC's discretion to decide which deadline is appropriate for the amount to be paid to the creditor, and the FDC does not have to base its decision on a party's request.
- ee) In this respect, the FDC took into consideration that the Appellant was well aware of the amount due to Nacional since at least the notification of the grounds of the decision rendered by the Single Judge of the PSC on 8 September 2011.
- ff) Furthermore, the Appellant was given many chances and deadlines to settle its debt before the passing of the Decision. The Appellant was even informed that should it pay the outstanding amount by 24 May 2012, the case would not be submitted to the FDC.
- gg) Considering the above, the FDC noted that the Appellant had enough time to settle its debt and was granted several deadlines to do so before the rendering of the Decision. Therefore, it decided to grant the Appellant a final deadline of 30 days to settle its debt to Nacional and to FIFA, which is in line with the longstanding and stable jurisprudence of the FDC confirmed by CAS.

## 7. DISCUSSION ON THE MERITS

- 7.1 Initially, the Panel notes that it is not disputed between the Parties that the Appellant, according to the PSC Decision, is obligated to pay to Nacional the sum of EUR 180,000 within 30 days as from the date of the notification of the Decision and interest of 5% p.a. as of 31 May 2006. Furthermore, it is undisputed that the Appellant has been ordered to pay the total costs of proceedings in the amount of CHF 9,000, CHF 4,000 of which has to be paid to Nacional and CHF 5,000 to FIFA. The FIFA costs were paid on 29 December 2011.
- 7.2 Furthermore, it is undisputed that the Appellant has only made a cash payment of CHF 5,000 to FIFA to meet the FIFA costs. Hence, it is undisputed that no cash payment of any amount has been made from the Appellant to Nacional, including any payment of costs of the proceedings to Nacional.
- 7.3 The Appellant submits, on the other hand, that EUR 150,000.00 of the outstanding amount was paid in connection with the set-off, contending that the claim acquired from Cruzeiro against Nacional fully and completely meets the formal conditions for a set-off under Swiss law. The FDC therefore should have based its Decision on this payment by way of a set-off.
- 7.4 In all circumstances, the Appellant requests that CAS recognises that the set-off is a valid method of payment of – at least a part of – the outstanding amount.
- 7.5 The Panel notes that Article 120(1) of the CO provides as follows:

*“Where two persons owe each other sums of money or performance of identical obligations, and provided that both claims have fallen due, each party may set off his debt against his claim”.*

- 7.6 Furthermore, according to Article 124 para 1 of the CO *“a set-off takes place only if the debtor notifies the creditor of his intention to exercise his right to set-off”*.
- 7.7 In support of the Decision, the Respondent submits that the FDC, equal to the competence of any enforcement authority, cannot review or modify the substance of a previous decision, which is final and binding and, thus, has become enforceable. The conditions and the legal effect of the alleged set-off are only subject to the CO and are therefore considered subject to the substantive law which does not fall under the competence of the FDC.
- 7.8 Moreover, the Respondent refers to article 81 para. 1 of the DEBA, according to which:  
*“if the claim is based on an enforceable decision rendered by a court or as Swiss administrative authority, the judge order the definite removal of the objection, unless the opponent proves with documentary evidence that the debt has been settled or suspended subsequently to the decision or he claims the statute of limitation”*.
- 7.9 In that connection, the Respondent further submits that according to the doctrine and the jurisprudence of the Swiss Federal Court, the objection of set-off can only be made within the enforcement proceedings if the documentary evidence can be brought by the debtor. In this case, the level of the documentary evidence has to be equal to the claim of the creditor, hence a decision of a civil court or a payment summons. As no such equal documentary evidence is available, the FDC was under no circumstances capable of taking into account the alleged set-off in its Decision.
- 7.10 The Panel recognizes that the sole task for the FDC in the present case was to analyze if the debtor complied with the final and binding PSC Decision. In the line of previous CAS awards (CAS 2004/A/1008; CAS 2008/A/1610) the Panel underlines that the object of this appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the FDC. As a result, only submissions relating to the fine imposed by the FDC, such as its legal basis and quantum, can be heard. If the FDC was not provided with sufficient proof that the payment has been executed or the parties agreed upon a payment plan, it should render a decision imposing a fine on the debtor for failing to comply with the decision and should grant the Appellant a final period of grace as from the notification of the decision in which to settle its debt to Nacional.
- 7.11 However, the Panel does not agree that the conditions and the legal effect of the alleged set-off does not fall under the competence of the FDC.
- 7.12 Under Article 64 of the DC, the main task of the FDC is to analyse whether a debtor has complied with a legal and binding decision rendered by a competent body. When a legal relationship has been regulated by Swiss law and when, as is the case, statutory authority exists under current Swiss law, subject to certain conditions, for fulfilling a payment obligation by way of a set-off, then the FDC is obliged, if this right is invoked, to analyse whether such a set-off must be deemed to have been validly made in compliance with the existing conditions.

- 7.13 The question is, however, who carries the burden of proof showing that the conditions for implementing a set-off are present and whether this specific burden of proof must be deemed to have been discharged in connection with the FDC's investigation of the case?
- 7.14 The Panel refers to the general legal principle of burden of proof, according to which any party claiming a right on the basis of an alleged fact must carry the burden of proof, proving that the alleged fact is as claimed.
- 7.15 The Panel notes that this is in line with Article 8 of the Swiss Civil Code ("Swiss CC"), which stipulates as follows:  
*"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit".*  
In free translation  
*"Each party must, if the law does not provide for the contrary, prove the facts it alleges and from which it derives its rights".*
- 7.16 As a result, the Panel reaffirms the principle established by CAS jurisprudence that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them .... The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (cf. CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff).
- 7.17 In these circumstances, it was therefore up to the Appellant to prove that Ipatinga, at the time when the case was before the FDC, possessed the alleged overdue claim of EUR 150,000.00 against Nacional and that all other formal requirements had been met, the effect of which would be that payment of EUR 150,000.00 could be deemed to have been made by way of a set-off.
- 7.18 According to the Appellant, on 19 September 2011 the Appellant acquired a claim against Nacional in the amount of EUR 150,000.00 with addition of interest. According to the information available, this claim was assigned from Cruzeiro to the Appellant through the conclusion of a "Contractual instrument for the assignment of credit and other agreements" (the "Contractual Instrument"), in which connection Cruzeiro acquired various financial rights to some of the Appellant's players.
- 7.19 In the period between this date and the FDC's investigation of the case, the Appellant repeatedly requested the Respondent *"to consider and accept the reciprocal compensation of debts as the way of payment to the decision passed on 14 June 2011"*.
- 7.20 However, the Appellant never provided the FDC with sufficient evidence that it actually possessed the alleged claim against Nacional and that the other conditions for a valid set-off had been fulfilled. Hence, the FDC did not receive a copy of the Contractual Instrument, which document has been produced to CAS during these proceedings, though. Alternatively, the

Appellant could have filed proceedings against Nacional before the PSC with a view to enforcing the debt owed to it by Nacional or accepted to have Nacional enjoined as a party in this CAS appeal.

7.21 Although the Panel, as already mentioned, does not agree with the FDC that the FDC was not competent to consider the question of set-off and the possible legal effects hereof, the Panel is of the opinion that the conclusion in the Decision is correct and establishes that it cannot be deemed, at the time of the Decision, to have been sufficiently proved that payment has been made in compliance with the PSC Decision.

7.22 As already stated in para. 4.5, the Panel has full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the decision appealed against.

7.23 Against this background, and with a view to analyzing whether the Appellant, irrespective of the failure to present the FDC with sufficient proof, must be deemed to have fulfilled part of its payment obligation to Nacional, by letter of 2 October 2012 the Appellant was requested to provide the CAS Court Office with the following documents and evidence:

- “- *Evidence that Desportivo Nacional da Madeira does in fact owe EUR 150,000,- to Cruzeiro Esporte Clube concerning the partial transfer of the athlete Anderson Miguel da Silva;*
- *Evidence that Desportivo Nacional de Madeira has not yet paid this said amount or any part hereof to Cruzeiro Esporte Clube in any event;*
- *Information regarding whether the Appellant in fact transferred three athletes to Cruzeiro Esporte Clube in exchange for the ceded credit of EUR 150,000,-, as provided for by the cession contract”.*

7.24 By the same letter, the Respondent was requested to contact Nacional in order to provide the CAS Court Office with the following documents and evidence:

- “- *Evidence that Desportivo Nacional de Madeira does in fact owe or owed EUR 150,000,- to Cruzeiro Esporte Club, concerning the partial transfer of the athlete Anderson Miguel da Silva,*
- *And, in the affirmative, a statement from the club Desportivo Nacional de Madeira stating whether Desportivo Nacional de Madeira has already paid this said amount or any part hereof to Cruzeiro Esporte Clube in any event, together with the relevant documentations regarding any such payment made by the club Desportivo Nacional de Madeira”.*

7.25 Given these circumstances, the CAS Court Office received from the Appellant, among other things, a copy of a letter from the president of Cruzeiro to Nacional, who requested payment of an amount of EUR 150,000.00, and the CAS Court Office also received copies of three agreements between the Appellant and Cruzeiro concerning the transfer of financial rights to three of the Appellant’s players.

7.26 From the Respondent the CAS Court Office received a letter from Nacional’s legal representative, which read as follows:

*“In this respect, we wish to start by stating that Clube Desportivo Nacional absolutely denies having any debt towards Ipatinga Futebol Clube.*

*Under such context, please note that there is no final and binding decision of whatever nature condemning Clube Desportivo Nacional to pay any amount to Ipatinga Futebol Clube and less over any legal procedure in that regard currently pending either before FIFA's Jurisdictional Bodies, CAS or Common Courts, the reason why we must underline our utmost surprise towards the raising of such unfounded argument".*

- 7.27 The Panel subsequently made an analysis of the submissions and statements during the course of proceedings and all documents received to be in a position to determine whether the Appellant must be deemed to have discharged the burden of proof showing that the conditions for a set-off had been fulfilled.
- 7.28 Against the background of the type and contents of the documentary evidence produced, including not least the statements by Nacional, the Panel finds that it is not comfortably satisfied that the conditions for proving that the Appellant had been able to fulfill part of its payment obligation to Nacional by way of a set-off based on the specified claim against Nacional in the amount of EUR 150,000.00 have been fulfilled.
- 7.29 The Panel thus finds that the Appellant has not, in a sufficiently satisfactory manner, discharged the burden of proof to establish the existence, formal assignment and continued existence of the alleged set-off claim.
- 7.30 As the Panel is therefore unable to assume that the PSC Decision has been complied with, either in whole or in part, by way of a set-off, and as it is moreover an undisputed fact that no cash payment has been made from the Appellant to Nacional, the Panel concludes that the Appellant still fails to fulfill its payment obligation to Nacional in compliance with the PSC Decision.
- 7.31 The question is now whether the fine imposed in the Decision of CHF 15,000.00 must be deemed to be disproportionately high and, as such, should be reduced and whether the Appellant should be granted an extended period of grace compared with the 30 day period of grace set out in the Decision?
- 7.32 When imposing the sanctions, the FDC must take into account all relevant factors in the case and the degree of the offender's guilt.
- 7.33 Considering the size of the outstanding amount, the circumstance that the Appellant has repeatedly been requested to pay the outstanding amount and the fact that the size of the fine imposed is seen to be in line with the FDC's well-established practice, the Panel finds that the fine imposed cannot be deemed to be disproportionate, and the Panel therefore finds no grounds for reviewing its size.
- 7.34 Similarly, and especially considering the fact that the Appellant, over a long period of time, has been requested to and granted a payment extension to pay the outstanding amount, the Panel finds no grounds for granting an extended period of grace compared with the period already set out in the Decision.

- 7.35 Given these circumstances, the Panel can therefore fully and completely accept and endorse the contents of the Decision, and the Appeal made by the Appellant is consequently dismissed.
- 7.36 It is important for the Panel to emphasise, however, that the Panel in this Award has not decided whether the alleged claim against Nacional has actually been assigned to the Appellant from Cruzeiro, whether such a claim still exists in full or in part and whether the formal conditions for being allowed to apply this claim in connection with a future set-off have already been fulfilled or can be fulfilled. Accordingly, the Panel merely concludes in this Award that no evidence of these circumstances has been presented to either the FDC or CAS in such a sufficient manner that the fulfilment of these conditions, in the circumstances of the present case, could be taken into account in the two decisions.

## **8. SUMMARY**

- 8.1 Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Panel finds that documentary evidence has not been produced to show that the Appellant, either in full or in part, has fulfilled its payment obligation to the Portuguese football club Desportivo Nacional de Madeira in compliance with the Decision rendered by the FIFA Disciplinary Committee on 29 May 2012.
- 8.2 The Appeal is therefore dismissed.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport hereby rules:**

1. The Appeal filed on 6 July 2012 by Ipatinga FC against FIFA regarding the decision pronounced by the FIFA Disciplinary Committee on 29 May 2012 is dismissed.
  2. The decision of the FIFA Disciplinary Committee on 29 May 2012 is confirmed.
- (...)
5. All further and other requests for relief are dismissed.