



**Arbitration CAS 2012/A/2730 RCD La Coruña v. Fédération Internationale de Football Association (FIFA), award of 20 August 2012**

Panel: Mr Rui Botica Santos (Portugal), President; Mr Pedro Tomás Marques (Spain); Mrs Margarita Echeverria (Costa Rica)

*Football*

*Disciplinary sanction imposed on a club*

*Admissibility of a request made for the first time with the appeal brief*

*FIFA Procedures on notices to clubs and CAS appeals requirements*

*FIFA's right to render a FIFA DC Decision and CAS statement of appeal against the PSC Decision*

*Aim and scope of the FIFA Disciplinary Code*

1. According to Article R56 of the CAS Code, Parties may supplement or adduce further evidence and/or submissions, including prayers and requests, provided that the deadline for filing their appeal and answer have not respectively expired.
2. The practical and legal effect of Article 63.1 of the FIFA Statutes 2011 and Article 15.2 of the FIFA Procedural Rules is that an appellant has to file its CAS appeal against a FIFA decision within 21 days counting from the date the grounds of the said decision were sent to the appellant. Pursuant to Article R51 of the CAS Code, the appeal brief must be filed within 10 days following the expiry of the time limit for appeal, failure to which the appeal shall be considered withdrawn. Under Articles 102.2 and 90 of the FIFA Disciplinary Code, the communication is through the national association and the said communication is assumed to have reached the club four days after it has been sent to the association.
3. FIFA Disciplinary Committee's right to render a decision is not jeopardised or suspended by the mere fact that a CAS statement of appeal against the PSC Decision has been filed a few days before the FIFA Disciplinary Committee renders a decision. It would be considered an abuse of rights if a party files a statement of appeal clearly out of time with the purpose of preventing the FIFA Disciplinary Committee from imposing sanctions by claiming that the said committee lacks competence or powers.
4. The FIFA Disciplinary Committee has the discretion to impose a wide range of sanctions on parties which fail to comply with final decisions. The aim of Article 64 of the FIFA Disciplinary Code is to ensure that parties subject to FIFA's jurisdiction comply with decisions issued by FIFA's judicial bodies, failure to which they shall be compelled to do so. FIFA has the discretion to impose any or all the sanctions stipulated in Article 64.1 of the FIFA Disciplinary Code based on the debtor's conduct, the amount due and any other aspect it considers relevant. The sanctions imposed do not amount to double punishment because they are cumulative.

## **I. THE PARTIES**

1. Real Club Deportivo de La Coruña, S.A.D. (hereinafter also referred to as the “Appellant”) is a Spanish professional football club affiliated to the Real Federación Española de Fútbol (hereinafter also referred to as the “RFEF”) and a member of the Fédération Internationale de Football Association.
2. The Fédération Internationale de Football Association (hereinafter referred to as “FIFA” or the “Respondent”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football.

## **II. THE FACTS**

3. This appeal was filed by the Appellant against the decision rendered by the FIFA Disciplinary Committee on 30 November 2011 and notified to the Appellant on 3 February 2012 (hereinafter referred to as the “FIFA DC Decision”).
4. A summary of the most relevant facts and the background giving rise to the present dispute will be developed on the basis of the Parties’ submissions and the evidence adduced during the hearing. Additional factual background may also be mentioned in the legal considerations of the present award. In this award, the Panel only refers to the submissions and evidence it considers necessary to explain its reasoning.

### **II.1. The contractual relationship between Uruguayan club Nacional de Football and the Appellant**

5. On 18 July 2004, the Appellant entered into an agreement (hereinafter referred to as the “Transfer Agreement”) with the Uruguayan club Nacional de Football (hereinafter referred to as “Nacional”) for the acquisition of the player Gustavo Munúa (hereinafter referred as the “Player”).
6. Nacional and the Appellant agreed on a fee (hereinafter referred to as the “Transfer Fee”) to be paid in instalments based on the number of official matches the Player played for the Appellant for the seasons 2004-2005 to 2008-2009.

### **II.2 The FIFA Player Status Committee Proceedings**

7. On 3 March 2009, Nacional filed a claim before the FIFA Players’ Status Committee (hereinafter referred to as the “PSC”), claiming that the Appellant had failed to pay the Transfer Fee of EUR 537,190, which was due for the months of January, June and July 2008, and January 2009.
8. On 28 January 2010, Nacional amended its claim, requesting EUR 959,596 unpaid Transfer Fee from 15 January 2008 to 15 January 2010, plus 5% interest.

9. On 18 February 2010, the Appellant filed its defence, stating that EUR 459,136 should be debited from the EUR 959,596 requested because the said amount had already been paid.
10. On 5 March 2010, Nacional maintained its request and contested the Appellant's allegations that EUR 459,136 be debited from its claim for EUR 959,596. It argued that the Appellant had not adduced any document proving its request for the said debit.
11. On 22 March 2010, the Appellant amended its defence, requesting the PSC to deduct EUR 688,706.00 from the amount requested by Nacional.
12. On 10 August 2010, the Single Judge of the PSC rendered his decision (hereinafter referred to as the "PSC Decision"), holding as follows:
  - a. *The claim filed by Nacional is upheld.*
  - b. *The Appellant is condemned to pay Nacional EUR 959,596.00 in three instalments:*
    - i. *EUR 300,000,00 plus a 5% annual interest from 10 August 2010 until the effective date of payment, within 30 days from the notification of the decision;*
    - ii. *EUR 300,000,00 plus a 5% annual interest from 10 August 2010 until the effective date of payment, within 60 days from the notification of the decision; and*
    - iii. *EUR 359,596,00 plus a 5% annual interest from 10 August 2010 until the effective date of payment, within 90 days from the notification of the decision.*
  - c. *Failure by the Appellant to pay any of the above amounts meant that the remaining amounts would immediately become due and Nacional would be entitled to request the FIFA Disciplinary Committee to impose disciplinary sanctions on the Appellant.*
  - d. *The Appellant was ordered to pay the costs of the proceedings, CHF 15,000.*
13. On 3 September 2010, via the RFEF, the Appellant asked FIFA to send the grounds of the PSC Decision.
14. On 23 June 2011, FIFA notified the grounds of the PSC Decision to the RFEF.

### **II.3 The FIFA Disciplinary Committee Proceedings**

15. On 29 September 2011, through the RFEF, FIFA informed the Appellant of its duty to abide by the PSC Decision.
16. On 6 October 2011, through the RFEF, the Appellant paid FIFA the costs of the proceedings ordered in the PSC Decision, CHF 15,000.

17. On 10 October 2011, Nacional informed FIFA that the Appellant had failed to comply with the PSC Decision. It requested the PSC to transfer the matter to the FIFA Disciplinary Committee.
18. On 13 October 2011, the PSC informed the Appellant and Nacional that the matter had been transferred to the FIFA Disciplinary Committee.
19. On 31 October 2011, the FIFA Disciplinary Committee opened disciplinary proceedings against the Appellant.
20. On 9 November 2011, the FIFA Disciplinary Committee urged the Appellant to pay the outstanding amounts by 21 November 2011, failure to which the matter would be submitted to the FIFA Disciplinary Committee for decision on 30 November 2011.
21. On 23 November 2011, through the RFEF, the Appellant informed the FIFA Disciplinary Committee that it was facing financial problems and that several third parties were indebted to it. It proposed a transfer of the credits due from the third parties in favour of Nacional as a payment solution.
22. On 25 November 2011, the FIFA Disciplinary Committee Secretariat informed the parties that the disciplinary proceedings were limited to the enforcement of the PSC Decision, and that the said proceedings would continue unless Nacional and the Appellant reached a settlement agreement.
23. On 30 November 2011, the FIFA Disciplinary Committee issued the FIFA DC Decision and held as follows:
  - a) *The Appellant was guilty of failing to comply with the PSC Decision, contrary to Article 64 of the FIFA Disciplinary Code 2011 (hereinafter referred to as the "FIFA Disciplinary Code").*
  - b) *The Appellant was ordered to pay FIFA a fine of CHF 30,000 within 30 days of notification of the FIFA DC Decision.*
  - c) *The Appellant was granted a final grace period of 30 days within which to settle its debts to Nacional.*
  - d) *Failure by the Appellant to settle its debt to Nacional within the aforementioned 30 days would entitle Nacional to ask FIFA to deduct 6 points from the Appellant's first team in the domestic league championship.*
  - e) *If the Appellant still failed to pay the debt due to Nacional after the deduction of 6 points, the FIFA Disciplinary Committee would decide on a possible relegation of the Appellant's first team to the next lower division.*

24. The FIFA DC Decision was based on the following grounds:
- a) The Appellant had failed to comply with the PSC Decision, breached Article 64 of the FIFA Disciplinary Code, and had not appealed against the PSC Decision before the Court of Arbitration for Sport (hereinafter referred to as the “CAS”).
  - b) Pursuant to Articles 64.1 and 15 of the FIFA Disciplinary Code, the fine imposable for failing to comply with a decision which has the nature of the PSC Decision ranges between CHF 300 and 1,000,000. The Appellant illegally failed to pay Nacional the amount due from the Transfer Fee, and even FIFA’s efforts to ensure the Appellant fulfilled its contractual obligation yielded no fruits. The Appellant was hence fined CHF 30,000, which was deemed to be in line with FIFA Disciplinary Committee jurisprudence.
  - c) Article 64.1 of the FIFA Disciplinary Code provides for relegation to the lower division or deduction of points in case of clubs failing to comply with decisions of the nature such as the PSC Decision upon receipt of notice by FIFA from Nacional that the Appellant had failed to comply with the PSC Decision.
  - d) Pursuant to Article 64.3 of the FIFA Disciplinary Code, the points deducted must be proportional to the debt due. In accordance with FIFA Disciplinary Committee jurisprudence, the deduction of 6 points was deemed just and proportional.

#### **II.4 The Appellant’s CAS Appeal against the PSC Decision**

25. On 25 November 2011, the Appellant filed its statement of appeal against the PSC Decision before the CAS.
26. On 28 November 2011, the CAS Court Office informed the Appellant to file its appeal brief within 10 days following the expiry of the time limit for appeal, as required under Article R51 of the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”).
27. On 20 December 2011, the CAS Court Office requested FIFA to provide a copy of the cover fax and fax report indicating the date of notification of the PSC Decision.
28. On 16 January 2012, upon the communication by the CAS Court Office that an appeal against the PSC Decision had been filed by the Appellant, FIFA notified Nacional, the Appellant and the RFEF that the FIFA Disciplinary Committee proceedings had been suspended pending the CAS decision in relation to the appeal. A similar fax was sent to the said recipients on 8 February 2012.
29. On 17 January 2012, FIFA sent a copy of the fax report to the CAS Court Office indicating the date of notification of the PSC Decision. The said reports confirmed that FIFA notified twice the PSC Decision to the RFEF, so that the latter would inform the Appellant.

30. On 19 January 2012, the CAS Court Office informed the Appellant that its appeal against the PSC Decision had been filed outside the time limit, and that pursuant to Article R48 of the CAS Code, the CAS could no longer continue with the appeal proceedings.
31. On 24 January 2012, the Appellant informed the CAS Court Office that it only received notice of the PSC Decision on 4 November 2011 and therefore the appeal had been filed on time. It also claimed that FIFA used the RFEF's fax number, and not the Appellant's to notify the grounds of the PSC Decision.
32. On 13 February 2012, FIFA informed the CAS Court Office that:
  - a) The PSC Decision was twice notified to the RFEF.
  - b) It is established practice for FIFA to notify clubs of its decisions via their respective associations. It is the duty of the association to immediately forward the decision to its affiliated club.
  - c) The operative part of the PSC Decision had earlier been notified to the Appellant, via the RFEF, on 10 August 2010.
  - d) Nine days later, the Appellant asked FIFA to provide a copy of the grounds of the PSC Decision. This means the RFEF did forward a copy of the grounds of the PSC Decision to the Appellant.
  - e) The burden was the Appellant's to prove that it received the grounds of the decision from the RFEF much later. In the absence of evidence, it should be assumed that the RFEF forwarded the grounds of the PSC Decision a few days after it was received. On 29 September 2011, the Appellant received FIFA's notice to immediately pay the costs related to the PSC proceedings, and proceeded to pay the same on 6 October 2011 without any objection. It is strange that the Appellant paid these costs without having had access to the grounds of the PSC Decision.
33. On 22 February 2012, the CAS Court Office informed the Appellant that:
  - a) It was evident that the PSC Decision was notified to the RFEF on 23 June 2011.
  - b) There was no evidence of a fax from the RFEF to the Appellant on 4 November 2011.
  - c) The Appellant had not enclosed any evidence in its letter dated 24 January 2012, proving that the PSC Decision was transmitted on 4 November 2011.
  - d) Since the PSC Decision was transmitted by the RFEF to the Appellant more than 4 months after the RFEF received the said decision, it was unlikely that the Appellant had respected the time limit for appealing as established in Article R51 of the CAS Code.
  - e) In the absence of an Appeal Brief, the CAS considered the appeal withdrawn, and the CAS would consequently not proceed with the matter.

### III. THE ARBITRAL PROCEEDINGS

34. On 23 February 2012, the Appellant filed its statement of appeal before the CAS. It nominated Mr. Pedro Tomás Marques as arbitrator and proposed that the proceedings be conducted in Spanish.
35. On 2 March 2012, the CAS Court Office granted the Respondent 20 days to file its Answer, and 7 days to nominate its arbitrator and state whether it agreed with the proceedings being conducted in Spanish.
36. On 7 March 2012, the Respondent objected to having the proceedings in Spanish, and proposed English as the language. It however did not object to the Appellant filing its submissions in Spanish. It requested the CAS Court Office to suspend its deadline for filing the Answer until a ruling had been made in relation to the language of the proceedings. The Respondent nominated Ms. Margarita Echeverria as arbitrator.
37. On 8 March 2012, the CAS Court Office invited the Appellant to respond to the Respondent's letter dated 7 March 2012. Meanwhile, the Respondents deadline for filing its Answer remained suspended.
38. On 9 March 2012, the Appellant informed the CAS Court Office of its wish to have the proceedings conducted in Spanish. In subsidiary, and in case the CAS Court Office decided to conduct the proceedings in English, the Appellant requested that it be allowed to file its submissions and correspondence in Spanish.
39. On 14 March 2012, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had ruled that the proceedings would be conducted in English. The Appellant was however allowed to file its submissions and correspondence in Spanish. The Respondent was granted 20 days to file its Answer.
40. On 2 April 2012, the Respondent filed its Answer, together with documents and evidence it intended to rely on. On the same day, the CAS Court Office invited the Parties to state, on or before 10 April 2012, whether they preferred a hearing or to have the matter decided on written submissions.
41. On 5 April 2012, the Respondent indicated its wish to have the matter decided on written submissions.
42. On 4 May 2012, the Appellant indicated its wish for a hearing.
43. On 7 May 2012, the CAS Court Office informed the Parties that Ms. Echeverria had accepted her nomination in the Panel and disclosed the following information, which was transmitted to the parties: *"I am an external consultant of FIFA in America regarding statutes governance and management of the federations"*. In the same letter and pursuant to Article R34 of the CAS Code, the CAS Court Office informed that in the event the parties had an objection to the appointment of Ms Echeverria, they could request her challenge within a deadline of seven days after the grounds for the challenge had become known.

44. By communication dated 22 May 2012, the CAS Court Office informed the Parties that the Panel had been constituted as follows:
  - President: Mr. Rui Botica Santos, Attorney-at-law, Lisbon, Portugal
  - Mr. Pedro Tomás, Attorney-at-law, Barcelona, Spain, appointed by the Appellant
  - Ms. Margarita Echeverría, Attorney-at-law, San José, Costa Rica, appointed by the Respondent.
45. On 28 May 2012, the Appellant challenged the nomination of Ms. Margarita Echeverría, based on her declaration that she was “*FIFA’s external consultant for America*”.
46. On 31 May 2012, the CAS Court Office invited the Respondent to comment, on or before 7 June 2012, in relation to the Appellant’s challenge of Ms. Margarita Echeverría as arbitrator.
47. On 6 June 2012, the Respondent informed the CAS Court office that there was no valid reason for challenging Ms. Margarita Echeverría’s nomination. It stated that the Appellant had not adduced any argument questioning her impartiality and independence. Alternatively, in case the CAS decided to uphold the Appellant’s challenge, the Respondent proposed to nominate Mr. José Juan Pintó, attorney-at-law, in Barcelona, Spain, as arbitrator.
48. On 7 June 2012, Ms. Margarita Echeverría informed the CAS Court office of her impartiality and independence. She stated that her role as FIFA’s external consultant in America was purely academic and strategic in relation to the statutes of the federations in America, which she has been doing over the years while acting as a CAS arbitrator.
49. On 8 June 2012, the CAS Court Office informed the Parties that the Appellant’s request to challenge Ms. Margarita Echeverría as arbitrator would be transmitted to the Board of the International Council of Arbitration for Sport (hereinafter referred to as the “ICAS”).
50. On 3 July 2012, the ICAS issued its ruling, dismissing the Appellant’s challenge of Ms. Margarita Echeverría’s nomination on the following grounds:
  - a) Article R34 of the CAS Code provides that “[a]n arbitrator may be challenged if the circumstances give rise to legitimate doubts over his independence. The challenge shall be brought within 7 days after the ground for the challenge has become known”.
  - b) Ms. Margarita Echeverría disclosed the information related to her impartiality and independence to the Parties on 7 May 2012.
  - c) The Appellant raised its objection to Ms. Margarita Echeverría’s nomination on 28 May 2012. This was 21 days after the grounds for challenging had become known to the Parties.

- d) The Appellant's challenge was hence filed out of the time limit set in Article R34 of the CAS Code and was inadmissible.
51. On 3 July 2012 the Order of Procedure was sent to the Parties, who both signed the same.
52. On 9 July 2012, the hearing was held in Lausanne, Switzerland. The Panel was assisted at the hearing by Mr. Pedro Fida, Counsel to the CAS. The Appellant was represented by Mr. Agustín Amorós Martínez. The Respondent was represented Ms. Wilmer Ritter and Mr. José Rodríguez.
53. During the hearing, the Appellant stated that it had requested the CAS to produce a copy of the FIFA file related to the PSC Decision, but that the said file was yet to be adduced. It therefore claimed that its right to be heard had not been respected.
54. FIFA informed the Panel that they were yet to provide a copy of the FIFA file related to the PSC Decision because they were still waiting for instructions to do so from the Panel. In any case, it was FIFA's position that the Appellant had access to all the relevant documents related to the PSC proceedings because the said documents had already been adduced in FIFA's submissions.
55. Ruling on this issue, the Panel stated that the Appellant's right to be heard had not been violated because:
- a) A copy of the FIFA file related to the PSC Decision requested by the Appellant was not ordered because it did not have any direct relationship with this appeal, but was rather related to the PSC proceedings.
  - b) The Appellant was already in possession of the relevant documents related to the PSC proceedings.
  - c) The Panel informed the Appellant that in case it had any relevant document related to the PSC proceedings, it was free to adduce the same at the hearing.
56. During the hearing, the Appellant requested the admission of two new documents not related to the PSC proceedings:
- a) A certificate dated 23 February 2012 which states that the RFEF had never notified the grounds of the FIFA DC Decision to the Appellant; and
  - b) A fax dated 15 December 2011 containing a copy of an email dated 4 November 2011 from the RFEF to the Appellant. It is through this email that the Appellant contends that the RFEF sent the grounds of the FIFA DC Decision on 4 November 2011.
57. Ruling on the admissibility of the aforementioned documents, the Panel held that they were both inadmissible because:
- a) They amounted to a supplementation of evidence and contrary to the requirements of Article R56 of the CAS Code. The Appellant did not demonstrate the existence of any

exceptional circumstances warranting their late admission. The Appellant was in possession of the said documents at the time it filed its statement of appeal and Appeal Brief but did not include them in either of the aforementioned submissions.

- b) The documents relate to the filing of an appeal before the CAS against the PSC Decision, which decision the CAS has already ruled inadmissible and withdrawn in view of the fact that an appeal brief was never filed and the Appellant neither informed the CAS Court Office in writing that the statement of appeal should be considered as the appeal brief. .
- c) The documents contradicted each other. Whereas the Appellant tried to prove with the certificate issued by RFEF that it was never notified of the grounds of the PSC Decision, with the email dated 4 November 2011 it tries to prove that RFEF notified the grounds on this date.
- d) The email dated 4 November 2011 was not complete because it contained six attachments whose relationship with the appeal of PSC Decision the Panel could not establish. Corroborating this is the fact that it contained misleading information, which the Panel did not understand. The said information stated as follows: “(...) *confirmarte además que ya ha sido remitida la documentación de Colotto a FIFA*”.

58. At the conclusion of the hearing, the Parties confirmed that they had no objection in respect to the manner in which the hearing had been conducted, in particular the principles of the right to be heard and to be treated equally in the arbitration proceedings.

#### IV. THE PARTIES' POSITIONS

##### IV.1 The Appellant's position

*i. The PSC Decision is not final and binding*

- 59. It is the Appellant's submission that the FIFA DC Decision ought not to have been issued because an appeal against the PSC Decision had been filed before the CAS. The PSC Decision was not final and binding but rather *sub judice*.
- 60. This is corroborated by the FIFA Disciplinary Committee's decision to suspend the disciplinary proceedings on 8 February 2012 upon gaining knowledge of the appeal filed before the CAS.
- 61. The PSC Decision was based on incorrect facts. The Appellant was not indebted to Nacional to the amount ordered in the PSC Decision, and it was the Appellant's specific prayer before the CAS that a finding be made that the Appellant had indeed paid part of the amount ordered in the PSC Decision.
- 62. During the hearing, it was the Appellant's view that the CAS letter dated 22 February 2012 has no final and binding effect because the CAS never replied to the Appellant's fax dated 23 February 2012, enclosing the certificate in which the RFEF states that it did not notify the grounds of the FIFA DC Decision to the Appellant.

*ii. The sanctions*

63. In view of the aforementioned, the sanctions imposed by the FIFA DC Decision should be set aside, as they would not have been imposed in the first place.
64. In issuing the sanctions, the FIFA DC Decision violated the international law principles of sanctions. The Appellant was sanctioned on the basis of incorrect facts, and on the basis of acts which it had not committed because a final decision from the PSC Decision is still pending following the CAS appeal.
65. Should the CAS rule that the present appeal proceedings should continue, the Appellant requests the CAS to set aside the 6 points deduction on grounds that it is excessive and disproportionate to the debt due. It amounts to a double punishment because the Appellant has also been ordered to pay the outstanding debt. This contravenes the international criminal laws (*non bis in idem*).

## **IV.2 The Respondent's Position**

*i. Inadmissibility of the Appellant's request to set aside the 6 points deduction*

66. FIFA claims that the Appellant's request in its Appeal Brief to set aside the 6 points deduction ordered in case of failure to pay the outstanding debt is inadmissible because:
  - a) It was not made together with the requests in the statement of appeal as required under Article R48 of the CAS Code.
  - b) The spirit of Article 64 of the FIFA Disciplinary Code aims at enforcing decisions, and the FIFA Disciplinary Committee cannot review or modify the substance of any final and binding decision. The task of the FIFA Disciplinary Committee is to decide whether a debtor has complied with a final and binding FIFA decision (CAS 2006/A/1008, CAS 2008/A/1610).

*ii. The PSC Decision is enforceable*

67. Contrary to the Appellant's position, the PSC Decision is final and binding. The grounds of the said decision were communicated to the Appellant via the RFEF on 23 June 2011, and the Appellant was fully aware of the FIFA Disciplinary Committee proceedings.
68. FIFA had not received any information from the Appellant of an appeal pending before the CAS against the PSC Decision on or before 31 October 2011, when disciplinary proceedings were opened under Article 64 of the FIFA Disciplinary Code.
69. FIFA repeatedly urged the Appellant to comply with the PSC Decision, and on 9 November 2011, the FIFA Disciplinary Committee informed the Appellant that the matter would be submitted to the Disciplinary Committee on 30 November 2011, informing the Appellant that

if it failed to take a position or provide any other statement, a decision would be rendered on the basis of the file in FIFA's possession.

70. On 23 November 2011, the Appellant sent a notice to the FIFA Disciplinary Committee without providing any information in relation to the CAS appeal, since there was actually no appeal pending before the CAS.
  71. Since 4 months had lapsed following the notification of the grounds of the PSC Decision without any notice of an appeal to the CAS, the FIFA Disciplinary Committee considered the said decision final and binding.
  72. The Appellant only filed an appeal against the PSC Decision before the CAS on 25 November 2011, and the FIFA Disciplinary Committee Secretariat only received notice of this appeal from the CAS on 20 December 2011.
  73. FIFA alleges that on 22 February 2012, the CAS informed the Appellant that its appeal against the PSC Decision had been withdrawn because it was filed out of time. The CAS did not pass any decision as to the substance, and consequently did not determine whether any amount had been paid by the Appellant, as claimed in the Appeal Brief.
  74. During the FIFA Disciplinary Committee proceedings, the Appellant neither denied owing Nacional EUR 956,596 nor did it claim to have fulfilled at least part of its obligations.
  75. The FIFA DC Decision is correct, as evidenced in the Appellant's admission in the Appeal Brief that all the conditions set out in Article 64 of the FIFA Disciplinary Code were fulfilled at the time the FIFA DC Decision was issued.
  76. FIFA's suspension of the disciplinary committee proceedings following the Appellant's CAS appeal against the PSC Decision should not be deemed as recognition by FIFA, of the CAS appeal filed by the Appellant. The Appellant's CAS appeal against the PSC Decision was merely aimed at delaying the fulfilment of its obligations.
  77. In short, the Appellant received four notifications to comply with the PSC Decision and appealed against the PSC Decision to the CAS out of time. The FIFA DC Decision and enforcement proceedings should therefore not be affected.
- iii. The FIFA DC Decision sanction is proportionate*
78. The disciplinary sanctions, in particular the deduction of points or demotion to the next lower division have explicitly been provided for under Article 64 of the FIFA Disciplinary Code.
  79. The PSC Decision was clear that failure by the Appellant to comply with its obligations within the stipulated deadline would entitle Nacional to request the FIFA Disciplinary Committee to deduct 6 points from the Appellant's first team in the domestic league championship, and if the Appellant still failed to honour the PSC Decision, it would be relegated to the immediate lower league.

80. The absence of disciplinary sanctions would compromise FIFA's and the CAS' objective of ensuring the enforcement of decisions and correct application of the FIFA regulations (CAS 2005/A/1001).
81. The 6 points were deemed reasonable based on the fact that the Appellant owed Nacional EUR 959,596. The FIFA Disciplinary Committee also took into account the Appellant's failure to pay even a portion of this amount after the delivery of the PSC Decision.
82. The deduction of points is the most suitable sanction for compelling the debtor to pay its debt. The Appellant has its destiny in its own hands, and the 6 points will not be deducted if it pays the outstanding debt within the 30 days. The FIFA Disciplinary Committee also has power to suspend the disciplinary proceedings if the Appellant and Nacional reach a settlement agreement for payment in instalments.
83. The fine and the deduction of 6 points purely took into account the amount due. The sanctions do not contravene the principle of *ne bis in idem* (CAS 2005/A/1001). The Appellant's request to set aside the sanctions must hence be dismissed.

*iv. Prayers and requests*

84. FIFA concludes its submissions by requesting the CAS:

*"1. To reject the Appellant's request to set aside the decision hereby appealed against.*

*2. To confirm the decision hereby appealed against in its entirety.*

*3. To disregard the Appellant's request concerning that the right of the club Nacional de Football (hereinafter: Nacional) to request that six (6) points be deducted from the Appellant's first team in the domestic league championship be revoked in as much it is inadmissible.*

*4. Alternatively to point 3 – should the Panel decide to declare the Appellant's request admissible – to confirm the sanctions imposed by the FIFA Disciplinary Committee and therefore to reject the Appellant's request as detailed in point 3 above.*

*5. 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".*

## **V. LEGAL ANALYSIS**

### **V.1 Jurisdiction of the CAS**

85. The jurisdiction of the CAS, which is not disputed, derives from Article R47 of the CAS Code and Article 63.1 of the FIFA Statutes 2011 (hereinafter referred to as "FIFA Statutes") as read together with Article 64.5 of the FIFA Disciplinary Code.

86. The Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure. It therefore follows that the CAS has jurisdiction to decide the dispute.

## V.2 Admissibility

87. In accordance with Article 63.1 of the FIFA Statutes, “[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.

88. The FIFA DC Decision was notified to the Appellant on 3 February 2012 and the Statement of appeal filed on 23 February 2012. This was within the required 21 days.

89. It follows that the appeal is admissible. Furthermore, no objection has been raised by the Respondent.

## V.3 Scope of the Panel’s review

90. According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law but, under this provision, the Panel’s scope of review is limited to the issues related to the appealed decision, *in casu* the FIFA DC Decision.

## V.4 Law Applicable

91. 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”.*

92. Article 62.2 of the FIFA Statutes provides:

*“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”.*

93. The Panel remarks that the “*applicable regulations*” are indeed all applicable FIFA rules and regulations material to the dispute at stake, and in particular the FIFA Disciplinary Code.

94. Therefore, the Panel holds that the dispute must be decided according to the FIFA regulations and, complementarily, if necessary, Swiss law.

## VI. MERITS OF THE APPEAL

95. Based on the Parties’ submissions and the background behind the appeal, the issues for determination are:

- a. Whether the Appellant's request to set aside the 6 points deduction is admissible
- b. Whether the PSC Decision is final and binding
- c. Whether the sanctions imposed in the FIFA DC Decision are proportionate

**a. The (in)admissibility of the Appellant's request to set aside the 6 points deduction**

96. FIFA avers that the Appellant's request in its Appeal Brief to set aside the 6 points deduction is inadmissible because it did not form part of the requests in statement of appeal as required under Article R48 of the CAS Code and the PSC Decision is final and binding and cannot be reviewed or modified.
97. According to Article R56 of the CAS Code, "[u]nless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer".
98. It is clear from the aforementioned provision that Parties may supplement or adduce further evidence and/or submissions, including prayers and requests, provided that the deadline for filing their appeal and answer have not respectively expired.
99. It therefore follows that the Appellant's request to set aside the 6 points deduction ordered in the FIFA DC Decision is admissible, having been made in the Appeal Brief (CAS 2010/A/2144).

**b. Whether the PSC Decision is final and binding**

*b.1. Main arguments raised by the Parties to be addressed*

100. The Appellant avers that the PSC Decision is not final and binding because it had filed an appeal before the CAS. Consequently, FIFA ought not to have issued the FIFA DC Decision because the Appellant was not bound to comply with the PSC Decision.
101. The Appellant states that it only received the grounds of the PSC Decision on 4 November 2011, and by filing the statement of appeal before the CAS on 25 November 2011, did so within the time limit.
102. The Appellant claims not to have been indebted to Nacional to the amount ordered in the PSC Decision until final decision from CAS in relation to the appeal filed had been issued. According to the Appellant, this is corroborated by the fact that the FIFA Disciplinary Committee suspended the disciplinary proceedings on 8 February 2012.
103. The Appellant avers that its statement of appeal in relation to the PSC Decision suspended and impeded the FIFA Disciplinary Committee's competence to render the FIFA DC Decision,

and that in suspending the disciplinary proceedings on 8 February 2012 FIFA jeopardised the enforcement of the PSC Decision until a final decision had been issued by the CAS.

104. In relation to the CAS letter dated 22 February 2012, the Appellant states that it has no final and binding effect because the CAS never replied to the Appellant's fax dated 23 February 2012, enclosing the certificate in which the RFEF states that it did not notify the grounds of the PSC Decision to the Appellant. In the Appellant's view, the issue related to the admissibility of the appeal against the PSC Decision is yet to be decided by the CAS.

105. FIFA claims that the PSC Decision is final, binding and enforceable. It avers that the grounds of the said decision were communicated to the Appellant via the RFEF on 23 June 2011, and the Appellant had not appealed on time against the PSC Decision. It is constant practice for FIFA to forward decisions to clubs through their member associations. It must therefore be assumed that the RFEF forwarded the PSC Decision to the Appellant on 23 June 2011 or within a mere few days, because the Appellant had received all previous correspondence sent via the RFEF.

*b.2. FIFA Procedures on notices to clubs and CAS appeals requirements*

106. Although the appeal is related to the FIFA Disciplinary Committee proceedings, the Panel must address the Appellant's arguments on whether the PSC Decision was the subject matter of an appeal before the CAS, and whether the said appeal has any effect on the FIFA Disciplinary Committee proceedings or suspended the said proceedings.

107. The Panel refers to Article 63.1 of the FIFA Statutes 2011, which states that “[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.

108. The grounds of the PSC Decision contained a note informing the parties that “(...) the decision may be directly appealed to the CAS within 21 days following notification of the decision (...) the appellant has 10 days following the expiry of the time limit for appealing within which to file its appeal brief, containing the facts and arguments before the CAS” (Unofficial English translation by the Panel of the PSC Decision).

109. Under Article 15.2 of the FIFA Procedural Rules, “[i]f a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision”.

110. The practical and legal effect of the aforementioned provisions is that the Appellant was to file its CAS appeal against the PSC Decision within 21 days counting from the date the grounds of the said decision were sent to the Appellant. Pursuant to Article R51 of the CAS Code, the appeal brief must be filed within 10 days following the expiry of the time limit for appeal, failure to which the appeal shall be considered withdrawn.

111. The Panel also notes that under Articles 102.2 and 90 of the FIFA Disciplinary Code, the communication is through the national association and the said communication is assumed to have reached the club four days after it has been sent to the association.

*b.3. The rules related to the burden of proof and the notification of the PSC Decision to the Appellant*

112. Under Article 12.3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber 2010 (hereinafter referred to as the "FIFA Procedural Rules"), any party deriving a right from an alleged fact carries the burden of proof. The standard of proof required from the said party is to the comfortable satisfaction of the Panel.

113. FIFA communicated the grounds of the PSC Decision to the RFEF on 23 June 2011 in accordance with the procedures stipulated in Article 102.2 of the FIFA Disciplinary Code. This fact is not contested by the Appellant.

114. The Appellant has not provided any satisfactory evidence that it was notified of the grounds of the PSC Decision on 4 November 2011 as required by the rules related to discharging the burden of proof.

115. To the contrary, from the chronological sequence of events and evidence available to the Panel from the date the PSC Decision was issued to the date the Appellant paid the procedural costs related to the PSC Decision, it is probable that the Appellant received all the notices sent by FIFA to the RFEF in a timely manner. The said events, as highlighted in paragraph 118 below prove that the Appellant was all along in contact and up to date communication with the RFEF in relation to the PSC Decision.

116. The Appellant has hence failed to prove to the Panel's comfortable satisfaction that it received the grounds of the FIFA DC Decision on 4 November 2011.

117. In the absence of evidence to the contrary, and pursuant to Article 90 of the FIFA Disciplinary Code, the Appellant was considered to have received notice of the grounds of the PSC Decision four days after it was sent to the RFEF, meaning it received the same on 27 June 2011. Corroborating this is Article 102.2 of the FIFA Disciplinary code which states that decisions "(...) are considered to have been communicated properly to the ultimate addressee four days after communication of the documents to the association".

118. In effect, the PSC Decision became enforceable starting from 27 June 2011.

*b.4. The legal effects of the PSC Decision*

119. From the facts and evidence adduced, the Panel highlights the following:

- a) FIFA's constant practice has been to communicate its decisions to clubs through their affiliate member associations. This is regulated under Article 102.2 of the FIFA Disciplinary Code which states that "[d]ecisions and other documents intended for players, clubs

*and officials are addressed to the association concerned on condition that it forwards the documents to the parties concerned. In the event that the documents were not also or solely sent to the party concerned, these documents are considered to have been communicated properly to the ultimate addressee four days after communication of the documents to the association (cf. art. 90)". Article 90.2 of the FIFA Disciplinary Code states that "[t]ime limits to which other persons shall adhere commence four days after receipt of the document by the association responsible for forwarding it (...)"*

- b) The PSC Decision was rendered on 10 August 2010 and communicated to the Appellant on 25 August 2010, via the RFEF, the association under which the Appellant is registered as a member.
  - c) On 3 September 2010, the Appellant requested the grounds of the said decision via the RFEF.
  - d) On 23 June 2011, FIFA twice communicated the grounds of the PSC Decision to the RFEF by fax pursuant to Articles 102.2 and 90 of the FIFA Disciplinary Code. This means that the decision is considered communicated as at 27 June 2011.
  - e) On 29 September 2011, via the RFEF, FIFA reminded the Appellant to pay the procedural costs related to the PSC proceedings, and the Appellant proceeded to pay the said costs on 6 October 2011 via the RFEF. The Appellant did not inform FIFA that it contested the PSC Decision or that it was yet to receive the grounds of the said decision.
  - f) The Appellant filed its statement of appeal against the PSC Decision before the CAS on 25 November 2011.
  - g) The Appellant did not file its appeal brief against the PSC Decision within the time limit required under Article R51 of the CAS Code, and for this reason the appeal was never complete and in place.
120. In light of the above, the Appellant's CAS statement of appeal against the PSC Decision filed on 25 November 2011 did not suspend the FIFA disciplinary committee proceedings or jeopardise FIFA's right to issue the FIFA DC Decision because it was clearly filed out of time. In addition to this, the Panel also underlines the fact that the Appellant never filed the Appeal Brief.
121. Corroborating the untimely nature of the Appellant's appeal against the PSC Decision is the CAS Court Office letter dated 22 February 2012, in which the CAS considered the Appellant's appeal withdrawn by stating as follows:

"(...)

*In your letter, you have stated that (...) La Coruna did not receive a copy of the FIFA decision from the Spanish Football Federation before 4 November 2011. (...) it appears that such decision has indeed been transmitted by FIFA to the Spanish Football Federation on 23 June 2011 at 8.43am (...). There is no evidence of a transmission by fax from the Spanish Football Federation to RCD La Coruna on 4 November*

2011. Furthermore, in your letter of 24 January 2012, you have not attached any evidence of transmission of the decision on 4 November 2011.

*Given the very unusual situation that the challenged decision would have been transmitted by the Spanish Football Federation to the RCD La Coruna more than four months after receipt of such decision by the Spanish Football Federation, it seems very unlikely that the time limit for appeal has been respected in this case. It would be however for the Appellant to establish that the FIFA decision was communicated to it on 4 November 2011 only, either by presenting a fax report, a mail receipt or a statement provided by the Spanish Football Federation.*

*In any event, this question may remain undecided considering that RDC La Coruna did not file its appeal brief within the time limit provided by Article R51 of the Code of Sports-related Arbitration (Code), despite the reminder sent by the CAS by letter of 28 November 2011.*

*In the absence of any appeal brief, the CAS has to consider that the appeal is deemed withdrawn. As a consequence, the CAS will not proceed in this matter.*

(...)"

122. The Appellant cannot therefore argue that the CAS statement of appeal dated 25 November 2011 against the PSC Decision suspended the FIFA disciplinary committee's competence to render the FIFA DC Decision.
123. The Panel finds that FIFA's right to render the FIFA DC Decision was not jeopardised or suspended by the mere fact that a CAS statement of appeal against the PSC Decision had been filed on 25 November 2011.
124. It would be considered an abuse of rights if, a few days before the FIFA Disciplinary Committee renders a decision, a party files a statement of appeal clearly out of time with the purpose of preventing the FIFA Disciplinary Committee from imposing sanctions by claiming that the said committee lacks competence or powers.
125. In relation to the Appellant's claim that the CAS letter dated 22 February 2012 was not final since the CAS did not reply to the contents of the RFEF certificate dated 23 February 2012, the Panel remarks that there was no need for the CAS to reply to the RFEF certificate sent on 23 February 2012 by the Appellant since the contents of the CAS letter dated 22 February 2012 were clear and amounted to a final and binding decision withdrawing the CAS appeal filed against the PSC Decision.
126. In view of the foregoing, the Panel finds that the PSC Decision is final and binding.

**c. Are the sanctions imposed in the FIFA DC Decision valid and proportionate?**

127. The Appellant avers that the FIFA DC Decision violated the international law principles of sanctions. It claims to have been sanctioned on the basis of incorrect facts, and on the basis of

acts which it had not committed because a final decision from the PSC Decision is still pending following the CAS appeal.

128. Should the CAS rule that the present appeal proceedings should continue, the Appellant requests the CAS to set aside the 6 points deduction on grounds that it is excessive and disproportionate to the debt due. According to the Appellant, the 6 point deduction amounts to a double punishment because the Appellant has also been ordered to pay the outstanding debt. This contravenes the international criminal laws (*non bis in idem*).
129. FIFA claims that the deduction of points or relegation to the lower division have explicitly been provided for under Article 64 of the FIFA Disciplinary Code, and was ordered as a result of the Appellant's failure to comply with its obligations.
130. According to FIFA, the absence of disciplinary sanctions would compromise its objective of ensuring the enforcement of decisions. It adds that the fine and the deduction of 6 points purely took into account the amount due. The sanctions do not contravene the principle of *ne bis in idem* (CAS 2005/A/1001).
131. It is not in dispute that the PSC Decision ordered the Appellant to pay Nacional EUR 959,596.00 in three instalments of EUR 300,000, EUR 300,000 and EUR 359, 596, 00 with each amount attracting an annual interest rate of 5%.
132. Despite several notices and reminders from the FIFA Disciplinary Committee to pay Nacional the amount ordered, the Appellant failed to do so.
133. Under Article 64.1 of the FIFA Disciplinary Code, “[a]nyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (nonfinancial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision)
  - a) will be fined for failing to comply with a decision;
  - b) (...);
  - c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced (...).”
134. In view of the aforementioned, the FIFA DC was entitled to impose disciplinary sanctions on the Appellant.
135. It is also clear from Article 64.1 of the FIFA Disciplinary Code that the FIFA Disciplinary Committee has the discretion to impose a wide range of sanctions on parties which fail to comply with final decisions. In view of Article 64.1 of the FIFA Disciplinary Code, and also given the fact that the laws applicable to these proceedings are the FIFA regulations

supplemented by Swiss law, if necessary, the Panel dismisses the Appellant's arguments that the FIFA DC Decision violated the international law principles of sanctions.

136. In relation to whether the said sanctions are proportionate, the Panel notes that the Appellant has only challenged the 6 points deduction, and not the fine of CHF 30,000. The Panel will hence only determine whether the 6 points deduction is proportional.
137. The criteria for deduction of points as a sanction is stipulated in Article 64.3 of the FIFA Disciplinary Code, which states that “[i]f points are deducted, they shall be proportionate to the amount owed”.
138. The amount owed to Nacional is EUR 959,596.00. This amount was payable with effect from 15 January 2008 to 15 January 2010. The Appellant has however failed to pay this sum, despite efforts from Nacional to twice seek legal redress before FIFA's judicial bodies; the PSC and the FIFA Disciplinary Committee. The Panel also highlights that given the substantial amount owed, and the time which has passed without the Appellant paying the same, Nacional continues to be harmed in as far as its financial situation and club budget is concerned.
139. Furthermore, the FIFA Disciplinary Code does not establish the minimum and maximum points which can be deducted *vis-à-vis* the amount in debt. It is therefore within the discretion of the FIFA Disciplinary Committee.
140. Notwithstanding the above, the Appellant has neither made any effort or proposal to Nacional to pay the said amount, but rather argues that this amount was incorrectly assessed by the PSC. The Panel however outlines that the object of this appeal is not related to the correctness or incorrectness of the actual amount payable to Nacional under the PSC Decision, but limited to whether the FIFA DC Decision should be reviewed.
141. Moreover, the 6 points can only be deducted if Nacional requests the FIFA Disciplinary Committee to do so. No such request has been made, despite the 30 days grace period granted to the Appellant to pay the amount owed having elapsed. The Appellant can still proceed and pay the amount owed and avoid the 6 points deduction.
142. In relation to whether the sanctions ordered in the FIFA DC Decision violate the principle of *non bis in idem*, the Panel highlights that the aim of Article 64 of the FIFA Disciplinary Code is to ensure that parties subject to FIFA's jurisdiction comply with decisions issued by FIFA's judicial bodies, failure to which they shall be compelled to do so.
143. The sanctions imposed in the FIFA DC Decision do not amount to double punishment because they are cumulative, and FIFA has the discretion to impose any or all the sanctions stipulated in Article 64.1 of the FIFA Disciplinary Code based on the debtor's conduct, the amount due and any other aspect it considers relevant.
144. Furthermore, the Panel reiterates that the Appellant can still pay the outstanding amount and avoid the sanctions, or alleged double punishment. The Appellants' behaviour in the entire proceedings has not been in good faith since it is trying to invoke all legal and administrative

means to avoid and delay the payment. The debt, which has been due since January 2008 is yet to be paid and in still attempting to challenge its payment, the Appellant has displayed an unfair and unacceptable attitude.

145. In view of the foregoing, the Panel finds that the 6 points deduction ordered in the FIFA DC Decision is just and proportional and the sanctions imposed in the said decision are valid.

**d. Conclusion**

146. Considering all the facts, evidence and arguments adduced, the appeal is dismissed and the FIFA DC Decision is confirmed.

## **ON THESE GROUNDS**

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

1. The appeal filed by Real Club Deportivo de La Coruña, S.A.D. against the FIFA Disciplinary Committee Decision dated 30 November 2011 is dismissed.
2. The FIFA Disciplinary Committee Decision dated 30 November 2011 is confirmed.
3. (...).
4. (...).
5. Any other or further claims are dismissed.