



**Arbitration CAS 2012/A/2817 Fenerbahçe Spor Kulübü v. Fédération Internationale de Football Association (FIFA) & Roberto Carlos Da Silva Rocha, award of 21 June 2013**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr José Juan Pintó Sala (Spain); Prof. Ulrich Haas (Germany)

*Football*

*Request for the enforcement of a CAS award*

*Lis pendens*

*Application of the tempus regit actum and lex mitior principles*

*Nature of the proceedings contemplated by art. 64 FDC*

*Interpretation of the statutes and regulations of a Swiss sports association*

*Extension of the scope of art. 64 FDC to CAS awards issued in ordinary arbitration proceedings*

*Effect of the CAS de novo power of review on a decision wrong in its reasoning but correct in its outcome*

*Lex mitior*

*Nature of the dispute*

1. **No *lis pendens* exists if no evidence has been given by the party which raised the *lis pendens* objection to prove that prior enforcement proceedings are actually pending before any State court, if court proceedings, as compared with arbitration, have a different object and if no noteworthy reasons have adduced that would exceptionally allow a CAS panel to take account of a legal action already pending before a State court and stay the arbitral proceedings.**
2. **Applicable substantive disciplinary rules are identified by reference to the principle “*tempus regit actum*”: in order to determine whether an act constitutes a disciplinary violation, CAS panels apply the law in force at the time the act was committed. In other words, new regulations do not apply retroactively to facts that occurred prior to their entry into force, but only for the future. The principle of non-retroactivity is however mitigated by the application of the *lex mitior* principle.**
3. **The CAS jurisprudence and the Swiss Federal Tribunal defined the proceedings contemplated by Article 64 of the FIFA Disciplinary Code, both in the 2009 and the 2011 versions (and in the corresponding provisions of the preceding editions of the FDC) to be mainly disciplinary. As a further confirmation, under Article 64 FDC the fine for the failure to comply with an award is to be paid to FIFA.**
4. **Under Swiss law, the interpretation of the statutes and rules of a Swiss sports association has to be objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body has to consider the meaning of the rule looking at the language used and the appropriate grammar and syntax. In its search, the adjudicating body has further to identify the intentions (objectively construed) of the**

association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located.

5. Article 64 FDC 2009 refers to proceedings against the subject who failed to pay a sum of money *“even though instructed to do so by (...) CAS”*. The simple wording of this provision does not allow any distinction based on the kind of proceedings leading to the CAS award. Its broad language, therefore, is suitable to extend the scope of the provision also to CAS awards issued in ordinary arbitration proceedings. In fact, the possibility that the provision covers also ordinary CAS awards is not explicitly excluded. As a result, it should be deemed to be included: *“ubi lex voluit dixit, ubi tacuit noluit”*. On the basis of the same principles, it is not possible to include in the scope of application of Article 64 FDC 2011 the failure to enforce CAS awards rendered in the framework of ordinary proceedings: Article 64 FDC 2011 makes it clear that it covers only situations in which a person fails to pay a sum of money *“even though instructed to do so by (...) a subsequent CAS appeal decision”*. The exclusion contained in the rule is clear and allows no different interpretation.
6. The *de novo* power of review of CAS panels implies that a decision, wrong in its reasoning, needs not be annulled, if its outcome is correct.
7. The *lex mitior* principle is recognized also in the FIFA system. It has a general meaning, as it expresses a fundamental principle, protected at international level; it covers not only the measure of the sanction, but also the definition of the infringement: a subject cannot be held liable of a disciplinary offence on account of any act which no longer constitutes an offence under a new law. The application of the *lex mitior* principle cannot be excluded by the agreement of the parties when no specific and express consent was given by the defendant subject to the sanction who would benefit therefrom.
8. The mere fact that a claim is addressed to FIFA requesting the opening of disciplinary proceedings against another party is not sufficient to establish that the dispute is of a disciplinary nature. A simple allegation of a party cannot constitute a material element able to influence the decision as to the existence of a dispute of exclusive disciplinary nature. The examination of the issue of the nature of the dispute before the CAS in a specific case is to be made by reference to the specific question brought in the appeal, defined by the object of the decision appealed against and the relief requested by the appellant. A decision is not of *“exclusively of a disciplinary nature”* for the purposes of Article 65.1 of the CAS Code when it concerns the possibility of the international federation to start disciplinary proceedings, as it involves in essence a question of competence, as well as in a case where a financial interest is pursued.

## 1. BACKGROUND

### 1.1 The Parties

1. Fenerbahçe Spor Kulübü (hereinafter referred to as the “Club” or the “Appellant”) is a Turkish football club, with seat in Istanbul, Turkey, affiliated to the Turkish Football Federation, which in turn is a member of the Fédération Internationale de Football Association.
2. The Fédération Internationale de Football Association (hereinafter referred to as “FIFA” or the “First Respondent”) is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich (Switzerland).
3. Mr Roberto Carlos Da Silva Rocha (hereinafter referred to as the “Player” or the “Second Respondent”) is a professional football player of Brazilian nationality.
4. FIFA and the Player are hereinafter jointly referred to as the “Respondents”.

### 1.2 The Dispute between the Parties

5. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
6. On 8 June 2011, the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) issued an award in a dispute between the Club and the Player (hereinafter referred to as the “CAS Award”) as follows:

- “1. *The claim filed by Fenerbahçe Spor Kulübü is upheld.*
2. *Mr Roberto Carlos da Silva Rocha is ordered to pay to Fenerbahçe Spor Kulübü the amount of Euro [...], plus 5% of interest per annum to be applied from the expiration date of each payment instalment until the date of effective payment, [...]*
3. *All further claims of the parties are rejected.*
4. *The costs of the arbitration, to be determined and communicated to the parties by the CAS Court Office, shall be borne by Mr Roberto Carlos da Silva Rocha.*
5. *Mr Roberto Carlos da Silva Rocha is ordered to pay a contribution towards the legal fees and other expenses incurred by Fenerbahçe Spor Kulübü in connection with the proceedings, in the amount of [...] CHF”.*

7. The arbitration proceedings (registered as CAS 2010/O/2276) that led to the CAS Award were “ordinary arbitration proceedings” pursuant to, and within the meaning of, the Code of Sports-related Arbitration (hereinafter also referred to as the “Code”), as they were based on an arbitration clause contained in Article 2 of the agreement signed by the Club and the Player on 15 December 2009.
8. On 26 June 2011, the Club requested from the Player the payment ordered by the CAS Award.
9. Failing an answer, by letter dated 20 July 2011, the Club informed FIFA that the Player had not complied with the CAS Award and requested the Disciplinary Committee of FIFA (hereinafter also referred to as the “Disciplinary Committee”):  
*“to immediately commence disciplinary proceedings against the Player for his disrespect of the Award and, as a consequence, to impose on the Player appropriate disciplinary sanction(s) pursuant to Article 64 of the FIFA Disciplinary Code. ...”*
10. In a letter dated 28 July 2011, the CAS Secretary General indicated the costs of the CAS 2010/O/2276 arbitration proceedings for the purposes of § 4 of the operative part of the CAS Award (§ 6 above).
11. On 15 August 2011, the Club requested from the Player also the reimbursement of the costs of the CAS 2010/O/2276 arbitration proceedings, to be borne by the Player pursuant to the CAS Award.
12. In a letter dated 30 January 2012, FIFA informed the Club that:  
*“as a general rule the FIFA Disciplinary Committee is not in a position to enforce a decision rendered by the CAS in an ordinary arbitration procedure, i.e. as a first instance. In other terms, the FIFA Disciplinary Committee is in a position to enforce CAS awards, which were passed within an appeal procedure following a decision of a first instance taken by one of the FIFA’s deciding bodies.*  
*In view of the foregoing, ... we do not appear to be in a position to deal with the present matter”*.
13. On 1 February 2012, the Club insisted with FIFA that an “official decision” be taken on its request to enforce the CAS Award.
14. On 9 March 2012, the Disciplinary Committee issued a decision (hereinafter referred to as the “Decision”) holding that:  
*“1. The request of the club, Fenerbahçe Spor Kulübü, is not admissible”*.
15. In support of the Decision, the Disciplinary Committee specified the following:  
*“2. In the case at stake, the Committee notes that the Award passed by CAS on 9 June 2011 with regard to the case CAS 2010/O/2276 Fenerbahçe Spor Kulübü v. Roberto Carlos Silva Rocha was rendered in an ordinary arbitration procedure and that the request for execution was remitted on 20 July 2011.*

*Therefore the relevant applicable regulations are the FIFA Statutes edition 2010 and the Disciplinary Code edition 2009.*

3. *The Committee emphasises that the present matter is limited to analyse the admissibility of the request to enforce the award CAS 2010/O/2276 Fenerbahçe Spor Kulübü v. Roberto Carlos Silva Rocha, without examining at this stage if the debtor complied with it.*
4. *The Committee took note of the arguments brought forward by the club in its correspondence from 1 February 2011.*
5. *The Committee recalls art. 62 of the FIFA Statutes, whereby FIFA recognises the independent Court of Arbitration for Sport (CAS) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and Licensed match agents and players' agents. Furthermore, the Committee underlines that the Confederations, Members and Leagues shall agree to recognize CAS as independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS and that the same obligation shall apply to licenced match and players' agents as per art. 64 par. 1 of the FIFA Statutes. Thus, it is undoubted that FIFA recognises the CAS.*
6. *Equally, the Committee considered the contents of art. 64 of the FDC, edition 2009, which indicates that 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 at least CHF 5,000 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 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 shall be requested to implement the sanctions threatened (art. 64 par. 2 of the FDC).*

7. *In this respect, the Committee considered that FIFA's deciding bodies shall be involved in the creation of a jurisprudence related to the FIFA regulations, in particular in cases of employment related disputes. Thus FIFA's deciding bodies shall participate in the determination of the pertinent jurisprudence in order to safeguard in particular the basic principles of the Regulations on the Transfer and Status of Players, to guarantee the equal treatment of all football stakeholders and to provide further legal certainty for the benefit of all stakeholders involved. In view of the foregoing, the committee deemed that the FIFA Disciplinary Committee shall enforce decisions taken on the basis of the FIFA regulations in which FIFA's deciding bodies shall have passed a first instance decision.*
8. *In continuation, the Committee deemed it appropriate to recall that the FIFA Disciplinary Code (edition 2011), came into force on 1 August 2011, presented an amendment of art. 64 which can be read as follows as far as decisions of the CAS are concerned "Anyone who fails to pay another person (...) a*

*sum of money in full or part even though instructed to do so by a body, a committee of an instance of FIFA or a subsequent CAS appeal decision (...)*

9. *In this respect, the Committee wished to emphasise that the amendments brought to art. 64 of FIFA Disciplinary Code codified the long standing stance and opinion of the Committee, in accordance with which it would declare itself competent to only execute decisions in relation with disputes decided, as a first instance, by a competent body of FIFA”.*
16. As a result, the Disciplinary Committee concluded that it was *“not in a position to enforce CAS awards passed in ordinary proceedings in view of the fact that the decision at stake was not rendered in an appeal proceeding”.*
17. The Decision was notified to the Club on 7 May 2012.

## **2. THE ARBITRAL PROCEEDINGS**

### **2.1 The CAS Proceedings**

18. On 28 May 2012, the Club filed a statement of appeal with the CAS to challenge the Decision. Pursuant to Article R48 of the Code, the Appellant indicated the address of the Brazilian counsel that had assisted the Player in the CAS 2010/O/2276 arbitration proceedings to be the address of the Second Respondent.
19. The statement of appeal filed by the Club had 14 exhibits attached and contained the appointment of Mr José Juan Pintó Sala as arbitrator, as well as the following *“preliminary procedural request”*:
- “To order the Second Respondent to immediately provide to the CAS for the Appellant’s attention with the respective information on his present employment situation with Anzhi Makhachkala (position, foreseen duration, income, etc.) and/ or any other football related activity presently carried out as well as to provide to the CAS with copy of the respective documentation in confirmation of the provided information (employment contract concerned or any similar documentation) (...).”*
20. In a letter dated 5 June 2012, the Appellant insisted on its procedural request.
21. In a letter of 5 June 2012, the Brazilian counsel that had assisted the Player in the CAS 2010/O/2276 arbitration proceedings informed the CAS Court Office that he had not been instructed with respect to the new case and that he had no power to represent the Player.
22. In a letter of 5 June 2012, FIFA appointed Prof. Ulrich Haas as arbitrator. In addition, the First Respondent noted that the Appellant’s evidentiary request, mentioned above, was directed to the Second Respondent.
23. On 7 June 2012, the Appellant filed its appeal brief in accordance with Article R51 of the Code, together with 2 exhibits.

24. In the appeal brief the Appellant reiterated its (slightly modified) “*preliminary procedural request*” as follows:

*“To order the Second Respondent to immediately provide to the CAS for the Appellant’s attention with the respective information on his present employment situation with Anzhi Makhachkala (position, foreseen duration, income, etc.) and/or any other football related activity presently carried out and/or any license the Second Respondent would have obtained related to any football related activity as well as to provide to the CAS with copy of the respective documentation in confirmation of the provided information (employment contract concerned or any similar documentation, copy of such relevant license, etc.)”.*

25. In a letter of 21 June 2012, the former Brazilian counsel of the Player confirmed that he was not in a position to represent the Second Respondent in this arbitration. As a result, on 22 June 2012, the CAS Court Office requested the Appellant to provide a “*full and valid address for the Second Respondent*”.
26. On 26 June 2012, the Appellant provided the CAS Court Office with a new address for the Second Respondent, indicating that he appeared to be employed as “team manager” with Football Club Anji, a club affiliated to the Russian Football Association.
27. On 29 June 2012, the CAS Court Office transmitted by DHL to the Second Respondent at his address at Football Club Anji, as provided by the Appellant, copy of the statement of appeal and of the appeal brief, as well as the correspondence already exchanged between the parties, inviting him, inter alia, to indicate whether he agreed with the nomination of Prof. Haas as arbitrator for the Respondents.
28. On 6 July 2012, the First Respondent filed an answer to the appeal, with 13 exhibits, seeking its dismissal. In its answer, the First Respondent also raised a preliminary issue, requesting the “*suspension of the arbitral proceedings on ground of an apparent lis pendens on the execution of the CAS award (CAS 2010/O/2276)*”.
29. Failing an answer by the Second Respondent, on 27 July 2012, the Deputy President of the CAS Appeal Arbitration Division appointed Prof. Haas as arbitrator in lieu of the Respondents.
30. In a letter of 8 August 2012, the CAS Court Office noted that the Second Respondent had failed to lodge an answer to the statement of appeal, and that the arbitration would proceed pursuant to Article R55 of the Code.
31. By communication dated 29 August 2012, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr José Juan Pintó Sala and Prof. Ulrich Haas, arbitrators.
32. In a letter of 20 September 2012, the Panel, “*in view of the written submissions filed by the Appellant and the preliminary objections raised by the First Respondent*”, allowed a second round of written submissions, setting the relevant deadlines for the filings.

33. On 15 October 2012, the Appellant filed its second written submission, with 1 exhibit, requesting, inter alia, the CAS:

*“not to declare any suspension of the present proceedings due to the fact that, obviously, there does not exist any alleged lis pendens”.*

34. On 5 November 2012, the First Respondent lodged with the CAS Court Office its second submission, confirming its requests.

35. In a letter dated 29 November 2012, the CAS Court Office informed the parties of the following:

*“(i) the First Respondent’s request to suspend the arbitration proceedings, on the basis of lis pendens, is denied; and*

*(ii) the Appellant’s request for production of documents, as stated in item 1, page 30 of its Appeal Brief (namely “information related to the employment situation of Mr Da Silva with Anzhi Makhachkala and/or any other football related activity presently carried out and/or any license Mr Da Silva would have obtained related to any football-related activity as well as to provide to the CAS with copy of the respective documentation in confirmation of the provided information”), is also denied.*

*The reasons for these decisions will be developed in the final award.*

*At the same time, the Panel requests the parties to submit to the CAS Court Office ... their comments on any transitional rule and/or principle coordinating the application of the FIFA Disciplinary Code which entered into effect on 11 August 2011 (as indicated in the FIFA Circular No. 1270) and of the previous edition of the FIFA Disciplinary Code, including (but not limited to), for instance, on the relevance in this case of the lex mitior principle developed in the CAS jurisprudence with respect to disciplinary infringements.*

*Finally, the Panel reserves, pursuant to Article R57 of the CAS Code and after receipt of the new additional written submissions, its right decide whether to hold a hearing in the present matter”.*

36. On 8 January 2013, the Appellant and the First Respondent filed their written observations on the point mentioned in the Panel’s letter of 29 November 2012. The Appellant, together with its submission, filed 2 exhibits.

37. In a letter dated 23 January 2013, the First Respondent noted that in its opinion the Appellant, in the written observations filed on 8 January 2013, had *“surpassed the exact boundaries established by the Panel”* in the letter of 29 November 2012, and had *“taken the opportunity to present new elements of consideration, despite the clear scope given by the Panel”*. As a result, FIFA requested the Panel to *“disregard any and all statements presented by the Appellant which exceeded the parameters defined by the CAS ..., and to omit ... their consideration, when rendering the respective CAS award”*.

38. On 1 February 2013, the parties were informed that the Panel had decided, in light of the First Respondent’s comments, to disregard any submission and argument contained in the parties’ submissions of 8 January 2013 that surpassed the scope established by the Panel in the letter of 29 November 2012.



39. In a letter dated 4 February 2013, the Appellant, noting the letter of the First Respondent of 23 January 2013 and the CAS letter of 1 February 2013, emphasized that in its submission of 8 January 2013 it had remained within the scope established by the Panel in the letter of 29 November 2012. Therefore, the Appellant requested the Panel to take into account any and all considerations contained in the Appellant's submission, or, in the alternative, to specify "exactly" the passages of said submission that the Panel intends to disregard.
40. On 28 March 2013, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the "Order of Procedure"), which was accepted and countersigned by FIFA. Amended versions of the Order of Procedure were issued on 3 April 2013, following an Appellant's letter with comments dated 2 April 2013, and on 5 April 2013, following the comments of FIFA of 4 April 2013. The amended version of the Order of Procedure dated 5 April 2013 was accepted and countersigned by the Appellant and the First Respondent.
41. A hearing was held on 5 April 2013 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 13 February 2013. The Panel was assisted at the hearing by Mr Pedro Fida, Counsel to the CAS. The following persons attended the hearing:
  - i. for the Appellant: Mr Martin Cockburn and Mr Ettore Mazzilli, counsel;
  - ii. for the First Respondent: Mr José Rodriguez, FIFA Disciplinary;
  - iii. for the Second Respondent: nobody.
42. At the hearing, the parties made submissions in support of their respective cases. As requested by the Panel, the Appellant and the First Respondent stated their positions also on the nature, scope and purpose of the proceedings contemplated by Article 64 FDC. At the conclusion of the hearing, the parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings and that they had been given the opportunity to fully present their cases.
43. As directed by the Panel at the hearing and in a letter dated 5 April 2013, on 17 April 2013 the First Respondent filed with the CAS a submission concerning the practice with respect to the enforcement of awards rendered in CAS ordinary arbitration proceedings, together with some exhibits. On 24 April 2013, the Appellant filed its comments on the First Respondent's submission of 17 April 2013.
44. At the same time, on 17 April 2013, the Appellant lodged its costs claim.
45. In these proceedings, Second Respondent has not filed any written submission and neither replied to any of the letters duly notified to him. Indeed, Second Respondent has failed to take any part in these proceedings whatsoever, despite repeatedly receiving information and copies of all submissions, procedural orders, and letters from the Panel, the CAS Court Office, and the other parties.

## 2.2 The Position of the Parties

46. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

*a. The Position of the Appellant*

47. In its appeal brief the Appellant indicated the following prayers for relief (slightly amending those mentioned in the statement of appeal), by requesting the Panel:

- “1. *To fully accept the present Appeal.*
2. *As consequence, to fully set aside the appealed Decision of the FIFA Disciplinary Committee (Decision 120044 TUR ZH) passed on 9 March 2012 in Zurich, Switzerland.*
3. *In the light of the above, to refer the present matter back to the FIFA Disciplinary Committee establishing that:*
  - a. The request of Fenerbahçe to enforce the Award is admissible and the FIFA Disciplinary Committee is in a position to enforce the Award through the “enforcement system” provided in the relevant rules and regulations of FIFA and, in particular, the FIFA Disciplinary Code (edition 2009) respectively the FIFA Statutes (Edition 2010);*
  - b. The FIFA Disciplinary Committee shall immediately comply with the Appellant's request to enforce the Award and, therefore, shall commence disciplinary proceedings against the Second Respondent for non-compliance with the Award pursuant to Article 64 of the FIFA Disciplinary Code (edition 2009) and to impose appropriate disciplinary sanctions until the Second Respondent has fully complied with the Award's rulings;*
  - c. The First Respondent/ Second Respondent shall carry jointly and/ or individually any and all costs related to the relevant proceedings in front of the FIFA Disciplinary Committee, if any, related to the Award's enforcement.*
4. *For the effect of the above, to state that the First Respondent / Second Respondent shall be condemned jointly and/ or individually to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fees as well as any eventual further costs and expenses for witnesses and experts. ...*

### IN THE ALTERNATIVE

5. *To partially accept the present Appeal.*
6. *As consequence, to fully set aside the appealed Decision of the FIFA Disciplinary Committee (Decision 120044 TUR ZH) passed on 9 March 2012 in Zurich, Switzerland.*

7. *To establish that the ruling of the FIFA Disciplinary Committee within the aforesaid Decision according to which the request of the Appellant to enforce the Award was deemed inadmissible was wrong at that time and in violation of the relevant rules and regulations of FIFA and, in particular, the FIFA Disciplinary Code (edition 2009) respectively the FIFA Statutes (edition 2010) whereas, in fact, at the time of the Appellant's request to enforce the Award such request was admissible and the FIFA Disciplinary Committee in a position to enforce the Award.*
  8. *To oblige the Second Respondent to inform the FIFA Disciplinary Committee for the Appellant's attention in writing immediately and without any delay on any football related activity of whatsoever kind he should perform as of the present date until the date of effective payment of any and all amounts to the Appellant under the Award's terms as well as to provide insofar copy of the respective documentary proof in confirmation of the provided information.*
  9. *To oblige the FIFA Disciplinary Committee or any other Body of FIFA that will be competent for such matters at that time to immediately and without any further decision to enforce the Award – as long as the Second Respondent at that time has not yet fully complied with the Award – as soon as the Second Respondent will perform any football related activity of whatsoever kind falling under the scope of application of the FIFA Disciplinary code.*
  10. *To establish that FIFA shall be fully responsible to pay to the Appellant any and all damages which may occur related to the fact that the FIFA Disciplinary Committee wrongly did not enforce the Award upon the Appellant's respective request as long as it would have been enforceable. In this context, the Appellant expressly reserves its right to exactly quantify the exact damages within its "Appeal Brief" and/or a later stage during the present proceedings to the CAS. The First Respondent/Second Respondent shall be condemned jointly and/or individually to carry any and all costs related to the relevant proceedings in front of the FIFA Disciplinary Committee, if any, related to the Award's enforcement.*
  11. *For the effect of the above, to state that the First Respondent / Second Respondent shall be condemned jointly and / or individually to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts".*
48. Such requests were again modified in the second written submission of 15 October 2012 (§ 33 above) as follows:
1. *To fully accept the present Appeal.*
  2. *As consequence, to fully set aside the appealed Decision of the FIFA Disciplinary Committee (Decision 120044 TUR ZH) passed on 9 March 2012 in Zurich, Switzerland.*
  3. *In the light of the above, to refer the present matter back to the FIFA Disciplinary Committee ordering / establishing that:*
    - a. *The request of the Appellant to enforce the Award is admissible and the FIFA Disciplinary Committee is in a position to enforce the Award through the "enforcement system" provided in the*

*relevant rules and regulations of FIFA and, in particular, the FIFA Disciplinary Code (edition 2009) respectively the FIFA Statues (Edition 2010; and*

- b. The FIFA Disciplinary Committee shall immediately comply with the Appellant's request to enforce the Award and, therefore, shall commence disciplinary proceedings against the Second Respondent for non-compliance with the Award pursuant to Article 64 of the FIFA Disciplinary Code (edition 2009; and*
- c. In order to ensure the Award's enforcement as soon as possible, the FIFA Disciplinary Committee is ordered to comply with the schedule for enforcing the Awards as demonstrated within II.4.4. of the present Statement above;*

*or in the alternative to lit. c)*

- d. To impose appropriate disciplinary sanctions until the Second Respondent has fully complied with the Award's rulings;*

*and*

- e. The First Respondent / Second Respondent shall carry jointly and/or individually any and all costs related to the relevant proceedings in front of the FIFA Disciplinary Committee, if any, related to the Award's enforcement.*
4. *For the effect of the above, to state that the First Respondent / Second Respondent shall be condemned jointly and/or individually to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fees as well as any eventual further costs and expenses for witnesses and experts. ...*

#### IN THE ALTERNATIVE

- 5. *To partially accept the present Appeal.*
- 6. *As consequence, to fully set aside the appealed Decision of the FIFA Disciplinary Committee (Decision 120044 TUR ZH) passed on 9 March 2012 in Zurich, Switzerland.*
- 7. *To establish that the ruling of the FIFA Disciplinary Committee within the aforesaid Decision according to which the request of the Appellant to enforce the Award was deemed inadmissible was wrong at that time and in violation of the relevant rules and regulations of FIFA and, in particular, the FIFA Disciplinary Code (edition 2009) respectively the FIFA Statues (Edition 2010 whereas, in fact, at the time of the Appellant's request to enforce the Award such request was admissible and the FIFA Disciplinary Committee in a position to enforce the Award.*
- 8. *To oblige the First Respondent and the Second Respondent to inform the FIFA Disciplinary Committee for the Appellant's attention in writing immediately and without any delay on any football related activity of whatsoever kind the Second Respondent should perform as of the present date until the date of effective payment of any and all amounts to the Appellant under the Award's terms as well as to provide insofar copy of the respective documentary proof in confirmation of the provided information.*

9. *To oblige the FIFA Disciplinary Committee or any other Body of FIFA that will be competent for such matters at that time to immediately and without any further decision to enforce the Award – as long as the Second Respondent at that time has not yet fully complied with the Award – as soon as the Second Respondent will perform any football related activity of whatsoever kind falling under the scope of application of the FIFA Disciplinary Code.*
  10. *The First Respondent/Second Respondent shall be condemned jointly and/or individually to carry any and all costs related to the relevant proceedings in front of the FIFA Disciplinary Committee, if any, related to the Award's enforcement.*
  11. *For the effect of the above, to state that the First Respondent / Second Respondent shall be condemned jointly and / or individually to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts ...”.*
49. In the third written submission of 8 January 2013 (§ 36 above) the Appellant's requests for relief (slightly modifying the preceding texts) read as follows:
- “1. *To fully accept the present Appeal.*
  2. *As consequence, to fully set aside the appealed Decision of the FIFA Disciplinary Committee (Decision 120044 TUR ZH) passed on 9 March 2012 in Zurich, Switzerland.*
  3. *In the light of the above, to refer the present matter back to the FIFA Disciplinary Committee ordering / establishing that:*
    - a. *The request of the Appellant to enforce the Award is admissible and the FIFA Disciplinary Committee is in a position to enforce the Award through the “enforcement system” provided in the relevant rules and regulations of FIFA; and*
    - b. *The FIFA Disciplinary Committee shall immediately comply with the Appellant's request to enforce the Award and, therefore, shall commence disciplinary proceedings against the Second Respondent for non-compliance with the Award pursuant to Article 64 of the FIFA Disciplinary Code (edition 2009) or in the alternative the FIFA Disciplinary code (edition 2011) as demonstrated above; and*
    - c. *In order to ensure the Award's enforcement as soon as possible, the FIFA Disciplinary Committee is ordered to comply with the schedule for enforcing the Awards as demonstrated within II.4.4. of the Second Written Submission;*

*or in the alternative to lit. c)*

  - d. *To impose appropriate disciplinary sanctions until the Second Respondent has fully complied with the Award's rulings;*
- and*

*e. The First Respondent / Second Respondent shall carry jointly and/or individually any and all costs related to the relevant proceedings in front of the FIFA Disciplinary Committee, if any, related to the Award's enforcement.*

4. *For the effect of the above, to state that the First Respondent / Second Respondent shall be condemned jointly and/or individually to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fees as well as any eventual further costs and expenses for witnesses and experts. ...*

#### IN THE ALTERNATIVE

5. *To partially accept the present Appeal.*

6. *As consequence, to fully set aside the appealed Decision of the FIFA Disciplinary Committee (Decision 120044 TUR ZH) passed on 9 March 2012 in Zurich, Switzerland.*

7. *To establish that the ruling of the FIFA Disciplinary Committee within the aforesaid Decision according to which the request of the Appellant to enforce the Award was deemed inadmissible was wrong at that time and in violation of the relevant rules and regulations of FIFA whereas, in fact, at the time of the Appellant's request to enforce the Award such request was admissible and the FIFA Disciplinary Committee in a position to enforce the Award.*

8. *To oblige the First Respondent and the Second Respondent to inform the FIFA Disciplinary Committee for the Appellant's attention in writing immediately and without any delay on any football related activity of whatsoever kind the Second Respondent should perform as of the present date until the date of effective payment of any and all amounts to the Appellant under the Award's terms as well as to provide insofar copy of the respective documentary proof in confirmation of the provided information.*

9. *To oblige the FIFA Disciplinary Committee or any other Body of FIFA that will be competent for such matters at that time to immediately and without any further decision to enforce the Award – as long as the Second Respondent at that time has not yet fully complied with the Award – as soon as the Second Respondent will perform any football related activity of whatsoever kind falling under the scope of application of the FIFA Disciplinary Code.*

10. *The First Respondent/ Second Respondent shall be condemned jointly and/or individually to carry any and all costs related to the relevant proceedings in front of the FIFA Disciplinary Committee, if any, related to the Award's enforcement.*

11. *For the effect of the above, to state that the First Respondent / Second Respondent shall be condemned jointly and / or individually to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts ...”.*

50. In other words, the Appellant challenges the Decision, which it asks the Panel to set aside, and submits alternative requests for relief with regard to the consequences of the setting aside of the Decision, depending on different scenarios, i.e. whether the Player is currently performing football related activity (primary request) or not (alternative request):

- i. the primary request is that the case is referred back to the Disciplinary Committee with instructions to enforce the CAS Award, through the opening of disciplinary proceedings against the Second Respondent and the adoption of disciplinary measures, according to a suggested schedule (§ 51 below) or as found appropriate by the Disciplinary Committee;
  - ii. the alternative relief requested from the Panel consists in (a) a declaration that the Disciplinary Committee was, at the time the Decision was rendered, in a position to enforce the CAS Award, (b) an order that the Disciplinary Committee be informed of any football related activity that the Second Respondent might perform before full payment is made under the CAS Award, and (c) an order to the First Respondent to enforce the CAS Award as soon as the Second Respondent resumes any football related activity falling within the disciplinary jurisdiction of FIFA.
51. The suggested schedule of disciplinary measures (mentioned above) is detailed by the Appellant as follows:
  - i. disciplinary proceedings are to be opened by the Disciplinary Committee within 2 weeks of the receipt of this Panel's instructions, leading to the imposition on the Player of a fine of at least CHF 5,000 and the granting of a final deadline of no more than 10 calendar days to fully comply with the CAS Award;
  - ii. in the event the Player does not fully comply with the CAS Award within the mentioned deadline, a ban on any football related activity is imposed on the Player until full and final settlement of the amounts due under the CAS Award.
52. In addition to the above, the Appellant requests the reimbursement of the costs and fees sustained in connection with the proceedings before FIFA and this Panel. In that respect, in addition to the mentioned relief, the Appellant is specifically requesting (in the second submission dated 15 October 2012, as confirmed in the third submission of 8 January 2013) the CAS:

*“to return back to the Appellant ..., due to the purely disciplinary nature of the present matter, the advance of costs equal to CHF [...] paid by the Appellant”.*
53. In fact, the Appellant, as a result of the modified request for relief contained in its second submission dated 15 October 2012, is no longer claiming compensation for the damages allegedly caused by the Decision (previously requested at point 10 of the relief sought in the appeal brief), even though *“the Appellant reserves its right to claim any such damages, if any, against FIFA in separate proceedings, if necessary”*. Therefore, the Appellant submits that the present proceedings have a purely disciplinary nature.
54. Preliminarily, however, the Appellant requests the Panel *“not to declare any suspension of the present proceedings [as requested by the First Respondent] due to the fact that, obviously, there does not exist any alleged lis pendens”*. In the Appellant's opinion, in fact, the current arbitration proceedings, contrary to the First Respondent's objection, are not precluded by other parallel proceedings. In that respect, the Appellant indicates that no other proceedings are pending before any State

court to enforce the CAS Award, on the basis of the New York Convention of 1958, against the Player and his assets. In any event, even conceding the existence of such enforcement proceedings (strongly denied), they would not prevent the CAS from rendering an award on the present appeal, since the parallel proceedings would have different objects and Article 186 para. 1bis of the Swiss Private International Law Act excludes in any case the relevance of *lis pendens* in the context of arbitration proceedings.

55. In its submissions as to the merits, the Appellant criticizes the Decision, defined to be “*incorrect concerning the representation of the facts and ... to great extent wrong and incomplete in its juridical considerations*” or “*in severe violation of the applicable FIFA Statutes and Regulations*”. In the Appellant’s opinion, “*the stance of the FIFA Disciplinary Committee may even be considered to be equivalent to the denial of justice*”.
56. In this respect the Appellant underlines that the provisions that the Disciplinary Committee had (and this Panel has) to apply in evaluating its request to “*enforce*” the CAS Award are to be found in the FIFA Disciplinary Code that had entered into force on 1 January 2009 (hereinafter referred to as the “FDC 2009”), and not in the version of the FIFA Disciplinary Code that took effect on 1 August 2011 (hereinafter referred to as the “FDC 2011”).
57. More specifically, it is the Appellant’s contention that under Article 64 of FDC 2009 the Disciplinary Committee is in a position to deal with the Appellant’s request “*to enforce*” the CAS Award, i.e. to start disciplinary proceedings against the Player and impose on him sanctions for his failure to comply with the CAS Award. The Decision, which held otherwise, should be set aside in this arbitration.
58. The application of the provisions of the FDC 2009 in the case at stake is, in the Appellant’s opinion, justified by several reasons, including the following:
  - i. the FDC 2009 was in force “*when the Award was rendered (9 June 2011) and became legally binding, all the relevant facts had arisen as well as Fenerbahçe had submitted its request to the FIFA Disciplinary Committee to commence disciplinary proceedings against the Player*”;
  - ii. the FDC 2009 applies because the parties so agreed, and the Panel is bound by such agreement;
  - iii. FDC 2009 applies “*in accordance with general legal principles*”: therefore, even failing transitional rules within the subsequent editions of the FDC, the cases pending before the disciplinary bodies of FIFA prior to the entry into force of new regulations have to be dealt with according to the old rules;
  - iv. the *lex mitior* principle, as codified by Article 4 of FDC 2011, and expressed in the CAS jurisprudence, cannot lead to a different conclusion, since:
    - a. such principle “*shall not be applied with regards to the establishment to the fact whether or not an offense is at stake. Rather, its application already requires the existence of an offense. Consequently, the establishment whether an offense is at stake ... must be examined pursuant to*



*Article 64*” of FDC 2009, and FDC 2001 has to be applied only with respect to the sanction if more favourable. The sanctions set by Article 64 FDC 2011, though, “are nearly the same” as those established by FDC 2009, and “do not have an impact on the enforceability” of the CAS Award; and

- b. contrary to the ordinary purpose of the *lex mitior* principle, as applied in purely disciplinary proceedings, there is no reason in the case at stake justifying the protection of the Second Respondent, in a situation where the measures to be adopted in his respect do not have punitive nature, but serve the purpose of safeguarding the force of CAS awards. Well to the contrary, its application would deprive the Appellant of its right to seek enforcement of the CAS Award. Therefore, the CAS jurisprudence developed with respect to the *lex mitior* principle is of no relevance;
  - c. the general principle of legal security requires that new regulations cannot deprive a party of the right to seek enforcement of a CAS award they had under the rules in force at the time the award was rendered.
59. In the Appellant’s opinion, FIFA failed to correctly apply Article 64 para. 1 of the FDC 2009, which defines to be a disciplinary violation the failure by anyone to pay another person even though “*instructed to do so ... by CAS*”. The Appellant contends that such provision is very important also for reasons of natural justice and does not distinguish between instructions given by CAS in ordinary or appeals proceedings. Indeed, the recognition of CAS as a dispute resolution body contained in the Statutes of FIFA covers all disputes, and not only those heard on appeal. Therefore, only an interpretation of Article 64 para. 1 of the FDC 2009 to include awards rendered by CAS as a first instance body would, in the Appellant’s opinion, be consistent with the purpose set by the FIFA Statutes.
60. Such conclusion, the Appellant submits, is confirmed by the text of Article 64 of the FDC 2011, and the Circular Letter No. 1270 of 21 July 2011 (hereinafter the “Circular Letter No. 1270”), which underlines the amendments therein contained and emphasizes that “*the range of application of art. 64 of the FDC ... is now limited to those cases that had previously dealt with by a body or committee of FIFA*”. As a result of the express, new limitation, it may be argued that the preceding version of the FDC (the FDC 2009) covered the situation (CAS awards rendered in ordinary arbitration proceedings) “*now*” excluded.
61. Finally, the Appellant underlines that the Player was within the personal scope of jurisdiction of FIFA at the time the CAS Award was rendered and the Decision was adopted, being a player and/or technical director of Anji Makhachkala. Should the Player now be no longer carrying out any football related activity, this would be a prejudice caused to the Appellant by the wrong Decision. In addition, disciplinary proceedings could be started again against the Player should he resume any football related activity before finally and entirely settling the payment owed under the CAS Award.

b. *The Position of the Respondents*

i. The Position of the First Respondent

62. In its answer, FIFA requested the CAS to:

- “1. *To disregard the appellant’s request inasmuch as there is an existing lis pendens.*
2. *Alternatively, to reject the Appellant’s request to set aside the decision hereby appealed against, so as the alternative requests made by the Appellant.*
3. *To confirm the decision hereby appealed against.*
4. *Alternatively to points 1 and 2 – should the Panel decide to consider the Appellant’s alternate requests – to reject the existence of liability from FIFA with regard to any possible damages generated as a result of the decision hereby appealed against.*
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”.*

63. In its second written submission (§ 34 above), then, FIFA modified the relief sought and requested the CAS:

- “1. *To disregard the appellant’s request inasmuch as there is an existing lis pendens.*
2. *Alternatively, to reject the Appellant’s request to set aside the decision hereby appealed against, so as the alternative requests made by the Appellant.*
3. *To confirm the decision hereby appealed against.*
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”.*

64. In support of its request to have the appeal dismissed, or the arbitration suspended “*until a decision ... is taken within the frame of the proceedings initiated by the Appellant in Brazil*”, the First Respondent preliminarily raises a “*lis pendens*” objection. The First Respondent, in fact, refers to some proceedings apparently started by the Appellant before the Brazilian courts to enforce the CAS Award: such proceedings, in the FIFA’s opinion, concern the same parties (the Club and the Player), have the same object (the CAS Award) and seek the same relief (the enforcement of the CAS Award) as the proceedings conducted before the Disciplinary Committee. Said parallel proceedings are the effect of an admissible “*forum shopping*” and appear suitable to cause serious, disproportionate and irreparable harm to the Second Respondent. In addition, the fact that the Club started court proceedings to enforce the CAS Award implies that the Appellant itself recognizes that enforcement cannot be sought through FIFA.

65. In the merits, then, FIFA contends that in the Decision the Disciplinary Committee correctly dismissed the Appellant’s claim to have the CAS Award enforced through the FIFA disciplinary

system, as only CAS decisions rendered on appeal fall within the scope of the applicable FDC provisions.

66. In such latter respect, FIFA notes that the Decision was rendered on the basis of the FDC 2009, which applies *ratione temporis* in the case at stake, and maintains that also under Article 64 of the FDC 2009 the Disciplinary Committee was not in a position to enforce the CAS Award.
67. FIFA, indeed, acknowledges the different texts of Article 64 in the FDC 2009 and in the FDC 2011. However, it alleges that the amendments contained in the FDC 2011, which make explicit reference to CAS as an appeal body only, are the result of a mere codification of “*long-standing practice and unanimous opinion*” of the Disciplinary Committee, that also in the context of the FDC 2009 considered that it could enforce awards rendered by CAS in appeal proceedings only – even failing an express limitation on the point. Such opinion was based on the consideration that the bodies of FIFA had to participate, as a first instance, in “*designing the application of its own regulations*”, and “*in the determination of the pertinent jurisprudence in order to safeguard the basic principles of the regulations ... , to guarantee the equal treatment of all football stakeholders and to provide further legal certainty ...*”. A modification was deemed not to be necessary, considering the minimal amount of requests of this kind, and became only later appropriate, considering the increase in the number of cases handled by the CAS.
68. Contrary to such conclusion, it is not possible for the Appellant to refer to Article 62 of the FIFA Statutes, in force at the time the Decision was rendered. Such provision had the only purpose of recognizing CAS as an arbitral body for the settlement of disputes between football entities: it did not make any reference to the execution of CAS awards, and did not impose on FIFA any obligation to enforce all kinds of awards that CAS panels might render. Indeed, the recognition of CAS “*should, by no means, be understood ... as an attempt to replace the role of the FIFA’s judicial bodies*”.
69. With regard to the *lex mitior* principle, FIFA acknowledges that its application can mitigate the principle of non-retroactivity of rules in disciplinary matters. However, FIFA submits that said principle is not applicable in the case at stake, “*since at no moment the [Disciplinary] Committee has overlooked the principle of “tempus regit actum”, thus, always holding that the deeds concerning the present matter have to be regulated in accordance with the law in force at the time they occurred*”, i.e., the FDC 2009.
70. Finally, FIFA, answering an alternative request filed by the Appellant, notes that “*it is not in the capabilities of FIFA to keep track of the status of all players involved in disciplinary cases and currently retired. In any case, it should be up to the Appellant to inform us [FIFA] if the Second Respondent is involved again in football related matters. In this case, once informed, ... the FIFA Disciplinary Committee can declare the reopening of the investigation and continue the enforcement proceedings*”.
71. At the same time, the First Respondent, while noting that the Appellant has withdrawn in the course of these proceedings the request of damages contained in the statement of appeal and in the appeal brief, confirms that no legal basis would however be given for such petition, as the prerequisites for liability (unlawfulness, damage, causal link and fault) are not met in this case.

ii. The Position of the Second Respondent

72. The Player did not submit any answer to the appeal filed by the Club, despite of the fact he was successfully notified by DHL of all submissions sent by the parties.

### 3. LEGAL ANALYSIS

#### 3.1 Jurisdiction

73. Article R47 of the Code provides 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.*

74. CAS has jurisdiction to decide the present dispute between the parties.

75. The jurisdiction of CAS, confirmed by the Order of Procedure, invoked by the Appellant, is disputed by the First Respondent only on the basis of a “lis pendens” objection.

76. The CAS jurisdiction is contemplated by the Statutes of FIFA and the FDC in force at the time the Decision was rendered and the appeal to CAS was lodged. Such provisions, in the pertinent portions, read as follows:

#### **Article 62 of the Statutes**

1. *FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.*
2. *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.*

#### **Article 63 of the Statutes**

1. *Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.*
2. *Recourse may only be made to CAS after all other internal channels have been exhausted. [...]*

**Article 64 of the Statutes**

1. *The Confederations, Members and Leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to licensed match and players' agents.*
2. *Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.*
3. *The Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS.*

*The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law.*

**Article 64 of the FDC 2011** (such provision literally corresponds to Article 64.5 of FDC 2009)

5. *Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly.*
77. The mentioned provisions, therefore, grant this CAS Panel jurisdiction to hear the appeal brought by the Club against the Decision, rendered by a FIFA body on the basis of the FDC.
78. The First Respondent, however, requested, in its written submissions, this Panel to deny, or to stay, the exercise of the jurisdiction granted by the FIFA Statutes and the FDC, by alleging the existence of a *lis pendens* created by prior proceedings started by the Club against the Player before Brazilian courts for the enforcement of the CAS Award.
79. In a letter dated 29 November 2012 (§ 35 above), the parties were advised of the Panel's decision to dismiss the First Respondent's motion to stay the arbitration on ground of *lis pendens* and of the instructions for the continuation of the proceedings.
80. The Panel confirms such decision. The Panel finds, in fact, that no *lis pendens* exists preventing it from exercising the jurisdiction granted by the relevant FIFA rules. In fact:
- i. no evidence has been given by the First Respondent, which raised the *lis pendens* objection, to prove that prior enforcement proceedings for the CAS Award, started by the Club against the Player, are actually pending before any State (Brazilian or other) court. FIFA based indeed its request on some declarations made by the Appellant, that has however strongly denied that State court proceedings have been instituted;

- ii. if existing, such court proceedings, as compared with this arbitration, would have in any case a different object. Before this Panel, in fact, the main issue relates to the exercise by FIFA of its disciplinary powers with regard to the Player's failure to comply with the CAS Award (on the point see also below, § 101): any decision rendered by this Panel would in any case not entitle the Appellant to seize the Second Respondent's assets on the basis of the CAS Award, or to take any other measure in order to forcibly satisfy its credit under the final payment order contained in the CAS Award; and in any case
- iii. no "noteworthy" ("sérieux") reasons have been adduced that would exceptionally allow this Panel, under Article 185.1*bis*<sup>1</sup> of the Swiss Private International Law Act, to take account of a legal action already pending before a State court and stay the arbitral proceedings (CAS 2009/A/1881; CAS 2010/A/2141 & 2142).

81. As a result, this Panel is allowed to exercise the jurisdiction granted it by the FIFA Statutes and the FDC to hear the appeal against the Decision.

### 3.2 Appeal Proceedings

82. As these proceedings involve an appeal against a decision rendered by an international federation (FIFA), brought on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings, in the meaning and for the purposes of the Code.

### 3.3 Admissibility of the Appeal

83. The admissibility of the appeal is not challenged. The statement of appeal was filed within the deadline set in Article 63 para. 1 of the FIFA Statutes. No further internal recourse against the Decision is available to the Appellant within the structure of FIFA. Accordingly, the appeal is admissible.

### 3.4 Scope of the Panel's Review<sup>2</sup>

85. According to Article R57 of the Code,

*"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance..."*

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<sup>1</sup> [*recte*: 186.1*bis*].

<sup>2</sup> [NB: In the original award, this subtitle was mistakenly numbered "84.". In order to abide by the original numbering, paragraph 84 is therefore omitted in the present transcription].

### 3.5 Applicable Law

86. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

87. Pursuant to Article R58 of the Code, the Panel is required to 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”.*

88. As a result of the foregoing, the Panel considers the FIFA rules and regulations to be the applicable regulations for the purposes of Article R58 of the Code, and that Swiss law applies subsidiarily.

89. The provisions set in the FIFA rules and regulations whose relevance is discussed in this arbitration include the following:

i. in the FDC 2009:

#### **Article 64**

1. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:*

a) *will be fined at least CHF 5,000 for failing to comply with a decision;*

b) *will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*

c) *(only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.*

2. *If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.*

3. *If points are deducted, they shall be proportionate to the amount owed.*

4. *A ban on any football-related activity may also be imposed against natural persons.*

5. *Any appeal against a decision passed in accordance with this article shall immediately be lodged with CAS.*

ii. in the FDC 2011:

**Article 64**

1. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (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) *will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
    - c) *(only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced;*
    - d) *(only for associations) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, further disciplinary measures will be imposed. An expulsion from a FIFA competition may also be pronounced.*
  2. *If a club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.*
  3. *If points are deducted, they shall be proportionate to the amount owed.*
  4. *A ban on any football-related activity may also be imposed against natural persons.*
  5. *Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly.*
  6. *Any financial or non-financial decision that has been pronounced against a club by a court of arbitration within the relevant association or National Dispute Resolution Chamber (NDRC), both duly recognised by FIFA, shall be enforced by the association of the deciding body that has pronounced the decision in accordance with the principles established in this article and in compliance with the applicable disciplinary regulations.*
  7. *Any financial or non-financial decision that has been pronounced against a natural person by a court of arbitration within the relevant association or NDRC, both duly recognised by FIFA, shall be enforced by the association of the deciding body that has pronounced the decision or by the natural person's new association if the natural person has in the meantime registered (or otherwise signed a contract in the case of a coach) with a club affiliated to another association, in accordance with the principles established in this article and in compliance with the applicable disciplinary regulations.*
90. With regard to the above, the Panel notes that both the Appellant and the First Respondent submit that only the provisions set in Article 64 of the FDC 2009 directly apply in this case,



being the rules in force at the time the CAS Award was rendered and the Appellant requested FIFA to open disciplinary proceedings against the Second Respondent. At the same time, the Appellant and the First Respondent agree that the *lex mitior* principle, as applied by the CAS in disciplinary (mainly doping related) matters, has no role to play in this case.

91. The CAS Panels, in fact, have identified the applicable substantive disciplinary rules by reference to the principle "*tempus regit actum*": in order to determine whether an act constitutes a disciplinary (anti-doping rule) violation, the CAS Panels have applied the law in force at the time the act was committed. In other words, new regulations have been held not to apply retroactively to facts that occurred prior to their entry into force, but only for the future (CAS 2000/A/274; CAS 2008/A/1545).
92. The principle of non-retroactivity has however been mitigated in the CAS jurisprudence by the application of the *lex mitior* principle (*ex multis* CAS 200/A/274; CAS 2001/A/330; CAS 2001/A/318; CAS 2002/A/378; CAS 2009/A/1817 & 1844; CAS 2009/A/1879). In this respect, the advisory opinion CAS 94/128 reads (in the English translation of the pertinent portions: Digest of CAS Awards (1986-1998), p. 477 at 491) as follows:

*"The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime. It is established, for example, by Swiss law (art. 2 para. 2 of the Penal Code [...]). This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. This must be true, in the Panel's opinion, not only when the penalty has not yet been pronounced or appealed, but also when a penalty has become res judicata, provided that it has not yet been fully executed.*

*The Panel considers that [...] the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions".*

93. As a result of the foregoing, this Panel has to consider whether, in light of the evolution of Article 64 FDC (from the 2009 to the 2011 edition), the *lex mitior* principle is relevant and applies in the present case. Such examination will be conducted (§§ 120-123 below) in the context of the discussion of the merits of the dispute, as it implies, inter alia, a general assessment of the nature and purpose of the proceedings and measures contemplated by Article 64 of the FDC (in the 2009 and 2011 versions). In addition, said principle could be relevant only to the extent the Panel finds that the failure to comply with a CAS award (rendered in the framework of ordinary arbitration proceedings) was indeed a disciplinary infringement under Article 64 of the FDC 2009 (and it is not under Article 64 of the FDC 2011).

### 3.6 Appellant's Procedural Motion

94. As mentioned above (§§ 19 and 24), the Appellant specified in this arbitration a procedural request, seeking from the Panel an order compelling the Player to provide information and documents with regard to *"his present employment situation with Anzhi Makhachkala (position, foreseen duration, income, etc.) and/or any other football related activity presently carried out and/or any license the Second Respondent would have obtained related to any football related activity"*.
95. In a letter dated 29 November 2012 (§ 35 above), the parties were advised of the Panel's decision to dismiss the Appellant's procedural motion, with reasons to be developed in the final award.
96. The Panel in fact is satisfied, on the basis of the information provided by the Appellant, which was not denied by any of the Respondents, that the Second Respondent currently holds a football-related position with Football Club Anji, a club affiliated to the Russian Football Association. This point is linked to the relief requested by the Appellant (see § 50 above). At the same time, however, the Panel finds that the additional information and documents sought by the Appellant, such as regarding position, term of employment, income, are not relevant in the context of this arbitration, where the exercise of a power of the First Respondent on the Second Respondent is discussed.
97. The Appellant's procedural motion, therefore, cannot be granted.

### 3.7 The Merits of the Dispute

98. On the basis of the relief requested by the parties, the object of these proceedings is the Decision, which the Appellant criticises as wrong and contrary to the applicable rules.
99. The dispute, indeed, as made clear by the lengthy written submissions, is defined by the Appellant and the First Respondent to concern a single, specific legal issue, i.e. whether the Disciplinary Committee was in a position to start proceedings under the FDC against the Player and to impose on him a sanction for his failure to comply with the CAS Award: the Decision, which denied the point, is challenged by the Club, and defended by FIFA. The Player, on his side, did not file with this Panel any submission on the disputed issues.
100. The question that the Panel has therefore to examine is whether, under Article 64 FDC (2009 and 2011 editions), proceedings could be opened, and measures taken, against a subject, in the event of failure to comply with a CAS award rendered in the context of ordinary arbitration proceedings, as defined by the Code, i.e. not on appeal brought against a decision rendered by a body of FIFA. Then, depending on the findings on this point, the Panel has to draw the consequences thereof, within the limits defined by the parties' requests for relief.
101. Before such examination, however, a point is to be made with respect to the nature of the proceedings contemplated by Article 64 FDC, both in the 2009 and the 2011 versions (and in the corresponding provisions of the preceding editions of the FDC).

102. In that respect, it is to be noted that the CAS jurisprudence and the Swiss Federal Tribunal defined it to be mainly disciplinary. For instance:
- i. in CAS 2006/A/1008, it was held (at para. 43) that Article 68 FDC, 2005 edition allowed *“a sanction to be imposed on a club that has failed to pay entirely its debts to another subject”* and that *“it is a disciplinary duty of clubs to fully comply with the decisions of the body of FIFA”*;
  - ii. in a number of CAS awards (e.g., CAS 2006/A/1206, CAS 2007/A/1329 & 1330, CAS 2007/A/1367, CAS 2008/A/1620, CAS 2012/A/2981), various CAS Panels concluded that, in the event measures adopted by FIFA under (the provisions corresponding to) Article 64 FDC are challenged, the creditor of the unpaid amount has no standing to be sued, since *“the proceedings before the DC ... intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision, and of the appeal brought in these proceedings against it, regards only the existence of a disciplinary infringement by ... and the power of FIFA to sanction it”*;
  - iii. the Swiss Federal Tribunal, in the judgment of 5 January 2007 (4P.240/2006, at consid. 4.2), rendered on appeal against the (above mentioned) award in CAS 2006/A/1008, examined the nature of the power exercised by FIFA on the affiliates (such as clubs and players) to its member federations in order to sanction the failure to comply with financial obligations following the instructions given by a FIFA body. The Federal Tribunal came to the conclusion that the exercise of such power does not amount to the use of an enforcement power: it simply consists in a reaction to the failure by an associate to comply with the rules of the association. In this respect, the Federal Tribunal confirmed that Swiss law allows an association to sanction the associates for their breach of the association rules.
103. This Panel concurs with such jurisprudence, and notes, as a further confirmation in respect of the main disciplinary purpose, that under Article 64 FDC the fine for the failure to comply with an award is to be paid to FIFA: in other words, compliance is first due, under Article 64 FDC, to FIFA.
104. The primarily disciplinary nature of the proceedings under Article 64 of the FDC is not contradicted by the fact that they indirectly serve an interest of the subject to which the payment is owed, which is entitled to request the imposition of disciplinary measures in order to “compel” the debtor to comply. Indeed, the Federal Tribunal, in its decision of 5 January 2007 (referred to above), acknowledged that the imposition of a sanction has the purpose to secure the observance of the rules of the association, deterring an associate from breaching them, and therefore constitutes an element of pressure on the associate to comply with its financial obligation towards the other affiliates (in the similar way, see the decision of the Federal Tribunal of 27 March 2012, 4A\_558/2011): such effect, however, does not put the power of the association to sanction in conflict with the State monopoly on enforcement procedures, provided that sufficient grounds are offered by the rules of the association for the exercise of that power (and provided that the sanction imposed does not severely infringe the personality right of a player: decision of 27 March 2012). In any case, the imposition of a sanction does not directly imply the satisfaction of the creditor’s claim. In fact, should the creditor wish to obtain

a payment owed by the debtor, affiliated to the association, it should in any case have to resort to the State judicial system for its forcible assistance.

105. The question, then, turns to be whether disciplinary proceedings under the FDC can be opened for failure to comply with a CAS award rendered in the context of an ordinary arbitration.
  
106. As noted above (§ 89), Article 64 FDC 2009 refers to proceedings against the subject who failed to pay a sum of money *“even though instructed to do so by a body, a committee or an instance of FIFA or CAS”*. Such wording marks indeed a patent difference with respect to the corresponding portion of Article 64 FDC 2011, subsequently adopted by FIFA, which makes it clear that it covers only situations in which a person fails to pay a sum of money *“even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision”*. In other words, while the FDC 2011 qualifies CAS awards by referring to “appeal” proceedings, no such indication can be found in the FDC 2009, which simply mentions CAS. The question, therefore, is whether it is possible to read in Article 64 FDC 2009 a limitation corresponding to that inserted in the FDC 2011 text, or in the alternative to interpret Article 64 FDC 2011 as including the enforcement of ordinary awards.
  
107. Preliminarily, the Panel notes that, under Swiss law, the interpretation of the statutes and rules of a Swiss sports association (such as FIFA) has to be objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body – in this instance the Panel – has to consider the meaning of the rule looking at the language used and the appropriate grammar and syntax. In its search, the adjudicating body has further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located (CAS 2008/A/1673; CAS 2009/A/1810; CAS 2009/A/1811; CAS 2010/A/2071; CAS 2011/A/2563; see also ATF 87 II 95 consid. 3; ATF 114 II 193, p. 197, consid. 5.a; decision of the Swiss Federal Tribunal of 3 May 2005, 7B.10/2005, consid. 2.3; decision of the Swiss Federal Tribunal of 25 February 2003, consid. 3.2; and ZEN-RUFFINEN P., *Droit du Sport*, 2002, par. 168, p. 63).
  
108. In light of such principles, the Panel remarks that the simple wording of Article 64 FDC 2009 does not allow any distinction based on the kind of proceedings leading to the CAS award which contains *“instructions to pay a sum of money”*, whose disregard opens the way to the proceedings therein contemplated. Its broad language, therefore, is suitable to extend the scope of the provision also to CAS awards issued in ordinary arbitration proceedings. In fact, the possibility that the provision covers also ordinary CAS awards is not explicitly excluded, as it is in FDC 2011. As a result, it should be deemed to be included: *“ubi lex voluit dixit, ubi tacuit noluit”*. On the basis of the same principles, the Panel underlines that it is not possible to include in the scope of application of Article 64 FDC 2011 the failure to enforce CAS awards rendered in the framework of ordinary proceedings: the exclusion contained in the rule (whose validity is not challenged) is clear and allows no different interpretation.
  
109. At the same time, the Panel acknowledges that reasons have been offered to support the exclusion of CAS ordinary awards from the scope of Article 64 FDC 2009, so that, in the end, it would have the same scope, notwithstanding the different wording, as Article 64 FDC 2011.

110. The Disciplinary Committee, in that regard, justified in the Decision (at para. 7 thereof) the conclusion that the failure of the Player to comply with the CAS Award (an ordinary award) did not call for the opening of the Article 64 FDC proceedings because *“FIFA’s deciding bodies shall be involved in the creation of a jurisprudence related to the FIFA regulations, in particular in cases of employment related disputes ... in order to safeguard ... the basic principles of the Regulations on the Transfer and Status of Players, to guarantee the equal treatment of all football stakeholders and to provide further legal certainty for the benefit of all stakeholders involved”*. On such basis, the Disciplinary Committee concluded that only *“decisions taken on the basis of the FIFA regulations in which FIFA’s deciding bodies shall have passed a first instance decision”* can be “enforced” pursuant to Article 64 FDC 2009. In support of that conclusion, a reference to the long-standing practice of FIFA is offered.
111. Such reasoning appears questionable to the Panel. It is doubtful whether there is an exclusive link between the *“creation of a jurisprudence related to the FIFA regulations”* and the involvement of FIFA’s bodies in the capacity as first instance adjudication “tribunals”. Indeed, the Panel notes that, on one hand, FIFA’s bodies may be called to apply not only FIFA regulations but to take into consideration also domestic legislation (Article 17.1 of the Regulations on the Status and Transfer of Players; CAS 2009/A/1880 & 1881). On the other hand, while it is true that FIFA rules are not mandatorily applied in CAS ordinary arbitration proceedings, FIFA rules may be applied, as the law chosen by the parties or as a “content” of contractual arrangements. In other words, it is perfectly possible that *“the basic principles of the Regulations on the Transfer and Status of Players, ... the equal treatment of all football stakeholders and ... legal certainty for the benefit of all stakeholders involved”* are – depending on the mandate given to the Panel by the parties – guaranteed by a CAS Panel in ordinary proceedings.
112. The Panel indeed understands the importance put by FIFA on the involvement of its “judicial” bodies in the settlement of international football related disputes, deemed by FIFA necessary to uphold the application of FIFA rules. The Panel, however, sees it more as a reason of policy which could justify (and actually justified in the FDC 2011) the adoption of provisions restricting the scope of the disciplinary proceedings contemplated by Article 64 FDC 2009, more than a principle underlying the FDC 2009 which would allow its interpretation beyond its literal meaning.
113. In that connection, the Panel notes that the intention of FIFA rule-makers to change the preceding rule when the FDC 2011 was adopted is patent. Indeed, Circular Letter No. 1270 underlined the amendments introduced by the new version of the FDC and emphasized that only as a result of the text *“the range of application of art. 64 of the FDC”* was *“limited to those cases that had previously dealt with by a body or committee of FIFA”*, i.e., when the CAS hears a case on appeal: therefore, the preceding version of the FDC (the FDC 2009) covered also the situation (CAS awards rendered in ordinary arbitration proceedings) excluded as a result of the new rule. As it was noted in CAS 2004/A/594, in fact, *“although ... Circular Letters are not regulations in a strict legal sense, they reflect the understanding of FIFA and the general practice of the federations and associations belonging thereto. Thus, the Panel considers these Circular Letters to be relevant for the interpretation of the FIFA Regulations (see also CAS 2003/O/527 para 7.3.1)”*.
114. At the same time, the Panel notes that a different conclusion might not be justified by the disciplinary nature of the proceedings started under Article 64 FDC 2009, which for that reason

would be opened only against CAS awards that followed a prior FIFA decision, or by the FIFA practice, suitable to create a sort of “customary” rule departing from a written provision.

115. As to the first point, the Panel notes that the definition of a disciplinary infringement precedes, and does not follow, the characterization of the proceedings intended to draw consequences therefrom. In other words, even though associations can only “enforce” their own rules (or the rules applicable within the association to which the members are subject for the achievement of the association purposes: BADDELEY M., *L’association sportive face au droit. Les limites de son autonomie*, Bâle 1994, 197, 217-218), it does not seem to the Panel possible to deduct from the disciplinary nature of the proceedings contemplated by Article 64 FDC the conclusion that only CAS awards which considered on appeal a FIFA decision can be their object. It is in fact perfectly possible to assert that within the FDC 2009 it was (as its plain wording confirms) a disciplinary duty of all the football subjects to comply with the CAS awards binding them, irrespective of the nature (appellate or ordinary) of the proceedings that led to them.
  
116. As to the second point, in fact, FIFA, requested at the hearing to provide details of its “long-standing” practice, could not submit to the Panel satisfactory indications to prove a consistent line of interpretation and application of Article 64 FDC 2009 showing that the Disciplinary Committee denied the opening of disciplinary proceedings for the failure to comply with CAS awards rendered in ordinary arbitration proceedings before the FDC 2001 was adopted. On the contrary, FIFA mentioned (in the submission referred to at § 43 above) for such period only two cases in which disciplinary proceedings were indeed opened, and indicated that when the opening of disciplinary proceedings was denied, the requests fell within the scope of the FDC 2011.
  
117. In conclusion, the Panel holds that Article 64 FDC 2009 covered also CAS awards rendered in ordinary arbitration proceedings. The wording of such provision does not allow a different conclusion. The reasoning of the Decision, which held otherwise, is not correct.
  
118. This conclusion, however, does not necessarily lead to the setting aside of the Decision. The *de novo* power of review of CAS Panels, in fact, implies that a decision, wrong in its reasoning, needs not be annulled, if its outcome is correct.
  
119. The Panel indeed notes, on the basis of the foregoing, that the failure to comply with a CAS award rendered in ordinary arbitration proceedings was a disciplinary infringement under the FDC 2009; however, such failure ceased to be a disciplinary infringement under FDC 2011, which clearly limits the possibility to open disciplinary proceedings only to non compliance with appeal CAS awards. Therefore, the Player’s failure to comply with the CAS Award was an infringement under the FDC 2009; it is not under the FDC 2011.
  
120. The question is then whether the *lex mitior* principle (referred to above: § 92) comes into play.
  
121. The Appellant and the First Respondent agree that the *lex mitior* principle does not apply. As a result, the Appellant submits that the Panel would be bound by the agreement and therefore could not apply the *lex mitior* principle in the case at hand. The Appellant further contends that additional reasons justify the same conclusion.

122. The Panel is not convinced by the above submissions and sees no reason to exclude the application of the *lex mitior* principle. More specifically, the Panel notes that:
- i. the *lex mitior* principle, as restated in the CAS jurisprudence (§ 92 above), is recognized also in the FIFA system. Article 4 of FDC 2011 (an identical provision was contained in Article 4 FDC 2009) in fact provides that:

*“This code applies to facts that have arisen after it has come into force. It also applies to previous facts if it is equally favourable or more favourable for the perpetrator of the facts and if the judicial bodies of FIFA are deciding on these facts after the code has come into force. By contrast, rules governing procedure apply immediately upon the coming into force of this code”;*
  - ii. it has a general meaning, as it expresses a fundamental principle, protected at the international level (expressly by Article 15.1 of the International Covenant on Civil and Political Rights of 16 December 1966; and by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as interpreted by the European Court of Human Rights in its judgment of 17 September 2009, *Scoppola v. Italy* (No. 2), par. 108-109), to the benefit of a defendant;
  - iii. as such, the possibility that the application of the *lex mitior* principle be excluded by the agreement of the parties can be doubted; it certainly cannot when, as in the present case, no specific and express consent was given by the Player, the defendant subject to the sanction who would benefit therefrom;
  - iv. it covers not only the measure of the sanction, but also the definition of the infringement: a subject cannot be held liable of a disciplinary offence on account of any act which no longer constitutes an offence under a new law;
  - v. it follows the disciplinary nature of the proceedings under Article 64 FDC (2009 or 2011 version) and the disciplinary nature of the consequences that might be imposed on the Player;
  - vi. it is dictated by the “permanent” nature of the Player’s infringement, which started when the CAS Award was issued (at a time the FDC 2009 was in force), but extends to a period (the present time) when it ceased to be a disciplinary offence (under the FDC 2011 currently in force).
123. The Panel, indeed, notes that football related subjects (clubs, players, coaches, etc.) might have included in their contractual arrangements, before the FDC 2011 was adopted, arbitration clauses directly referring a dispute to CAS ordinary proceedings, having in mind the possibility that disciplinary proceedings be opened by FIFA in the event of non-compliance with the ordinary CAS award. Such possibility was lost as a result of the change in the scope of Article 64 in the FDC 2011, which left those entities without the “protection” they expected, and, in the end, in a different, arguably less favourable, situation, if compared to the position they had before the FDC 2011 was adopted. The respect of the *lex mitior* principle, however, takes precedence, in light of its fundamental bearing, over the expectations (otherwise legitimate) that

a party might have had with respect to the FIFA's "assistance" in securing compliance with ordinary CAS awards. Indeed, the creditor's interest in enforcement, even no longer through FIFA, can be satisfied only by other means, which include the resort to State court proceedings. Actually, resort to those means, even though less readily available, was necessary also before the FDC 2011 entered into force, in the event the sanctions adopted on the basis of Article 64 FDC 2009 did not have the effect of securing compliance with the ordinary CAS award.

124. In light of the foregoing, the Panel concludes that the Player should benefit from the *lex mitior* entered into force on 1 August 2011. His failure to comply with the CAS Award, an infringement under the FDC 2009, cannot be sanctioned under the FDC 2011. As a result, the conclusion reached by the Disciplinary Committee in the Decision is correct and should stand: the Panel confirms that disciplinary proceedings cannot be opened against the Player for the failure to comply with the CAS Award.

### 3.8 Conclusion

125. In light of the foregoing, the Panel holds that the appeal brought by the Club against the Decision is to be dismissed, and the Decision is to be confirmed.

## 4. COSTS

126. Pursuant to Article R64.5 of the Code, *"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties"*.
127. Having withdrawn its claim for damages against FIFA in its submission dated 15 October 2012, the Appellant alleged that the present matter concerns a decision of a disciplinary nature and shall be free of charge pursuant to Article R65.1 of the Code. Article R65.1 of the Code *"is applicable to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body or by a national federation or sports-body acting by delegation of powers of an international federation or sports-body"*.
128. However, the mere fact that a claim is addressed to FIFA requesting the opening of disciplinary proceedings against another party is not sufficient to establish that the dispute is of a disciplinary nature. A simple allegation of a party cannot constitute a material element able to influence the decision as to the existence of a dispute of exclusive disciplinary nature.
129. *In casu*, the Panel notes that (i) no disciplinary sanctions have been ordered in this case, and (ii) the Disciplinary Committee decided that it was not in a position to start disciplinary proceedings against the Second Respondent, a decision which has been confirmed by the present award.



130. In that respect, the Panel underlines that the examination of the issue of the nature of the dispute before the CAS in a specific case is to be made by reference to the specific question brought in the appeal, defined by the object of the decision appealed against and the relief requested by the appellant. Indeed, it is the Panel's view that a decision is not of "*exclusively of a disciplinary nature*" for the purposes of Article 65.1 of the Code when the question to be decided by the Panel concerns the possibility of the international federation to start disciplinary proceedings, as it involves in essence a question of competence, as well as in a case where a financial interest is pursued. This is, according to this Panel, the right interpretation and application of the words contained in Article 65.1 of the Code (a conclusion in the same direction was reached by another Panel in the CAS award 2012/A/2473).
131. In light of the foregoing, the Panel notes that the essential dispute to be resolved in this arbitration (regarding the Decision appealed against) is – at this stage – limited to the possibility to start proceedings against the Second Respondent and is not related to any disciplinary measure or sanction that the Disciplinary Committee could adopt (or had adopted) *in concreto*. As a result, the Panel concludes that the present dispute is not of disciplinary nature. Indeed, even though the Decision has been delivered by the Disciplinary Committee, it was limited to an issue of competence. What could have been, in theory, a disciplinary case (§§ 101-104 above) if the Disciplinary Committee had upheld the request of the Appellant and, following the opening of proceedings, imposed sanctions on the Player, is at the current stage nothing else than a dispute concerning the competence of an organ of FIFA, due to the fact that the request was declared inadmissible.
132. In addition, the Panel notes that the appeal brought by the Club, even though it concerned the opening by FIFA of disciplinary proceedings against the Player, was not intended to protect a disciplinary interest of the Appellant (which does not exist), but only to serve its indirect, financial expectations, the only reason of the Appellant's standing to sue: i.e. to obtain, through the disciplinary measures, the enforcement of the CAS Award and therefore a payment from the Player.
133. Finally, the Panel remarks that it is undisputed that at the time this arbitration was started and the Panel was appointed, it did not have a purely disciplinary nature, since the relief requested by the Appellant in its appeal brief included compensation for damages, a request that was dropped only at a later stage.
134. On these grounds, the Panel comes to the conclusion that the present appeal is not of a disciplinary nature [...].
135. [...].

## ON THESE GROUNDS

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

1. The appeal filed by Fenerbahçe SK on 28 May 2012 against the decision taken by the Disciplinary Committee of the Fédération Internationale de Football Association (FIFA) on 9 March 2012 is dismissed.
  2. The decision taken by the Disciplinary Committee of the Fédération Internationale de Football Association (FIFA) on 9 March 2012 is confirmed.
- (...)
5. All other prayers for relief and/or requests filed by the parties are dismissed.