**Arbitration CAS 2013/A/3380 Club Atlético Independiente v. Fédération Internationale de Football Association (FIFA), award of 27 May 2014**

Panel: Mr José Maria Alonso Puig (Spain), President; Mr Hernán Jorge Ferrari (Argentina); Mr Rui Botica Santos (Portugal)

*Football*
*Disciplinary proceedings for failing to comply with a previous FIFA decision*
*Scope of FIFA disciplinary proceedings*
*Applicability of national insolvency law in the context of pending CAS proceedings*
*Appealable decision*
*Prerequisites for a communication to qualify as decision*
*Prerequisites for a FIFA decision to qualify as final decision*
*Principle of res judicata*
*Prohibition of retroactivity*

1. **Proceedings before the FIFA Disciplinary Committee constitute disciplinary proceedings in which the FIFA Disciplinary Committee is not allowed to review or to modify the substance of any previous decision. Therefore, the FIFA Disciplinary Committee only verifies whether or not a final and binding decision issued by the previous instance has been complied with.**

2. **According to established CAS jurisprudence, in case one of the parties involved in CAS proceedings is placed under insolvency proceedings, those insolvency proceedings are not governed by the various regulations of FIFA otherwise applicable to the case, but are solely governed by the law of the country where the insolvency is established. The application of the country's national law is nevertheless strictly limited to the insolvency proceedings of the party in question. Thus, the national insolvency law is not of application to the pending CAS proceedings and – even if it was to be applied subsidiarily – it would only be of use at a national level and within the limits of the ongoing insolvency proceedings.**

3. **An appealable decision is a communication of the relevant decision making body directed to the parties to a dispute by which a ruling or resolution is adopted as regards to the situation between the parties.**

4. **In principle, for a communication to be a decision, the communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. The form of communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal. What is decisive is whether there is a ruling, –**

**or, in case of a denial of justice, an absence of ruling where should have been a ruling – in the communication.**

5. **FIFA's statutes and regulations do not contain a general definition of what must be considered a 'final' decision. However, various provisions of the regulations specify which body's decisions are subject to an appeal in front of CAS. Thus, for a FIFA decision to be final, the parties involved in it should have no other recourse within FIFA to appeal or to modify such decision, but only be able to appeal it before the CAS.**

6. **For a ruling or resolution to have the force of *res judicata*, two preliminary requirements shall be met: (a) the decision making body shall be competent to pass the relevant ruling or resolution; (b) the relevant ruling or resolution shall be passed after following the appropriate contradictory procedure. Furthermore, for a ruling or resolution to have the force of *res judicata*, it has to meet the "triple identity check" which consists of the verification of (i) the identity between the parties to the first decision and to the subsequent one, i.e. the parties were the same in both cases; (ii) the identity of objects between the two decisions; and (iii) the identity of the basis (*causa petendi*) on which the claim is submitted. All three elements of *res judicata* are of equal fundamental importance and relevance and have to be concurrently present. The plea of *res judicata* – founded on the principle of public interest – eliminates the possibility of pending disputes prejudicing the rights which have already been established by a judgement. The principle of *res judicata* ensures that whenever a dispute has been defined and decided upon, it becomes irrevocable, confirmed and deemed to be just. The classification of the *res judicata* principle as part of public policy indicates that it is to be analysed *ex officio* by the decision making body.**

7. **The rule prohibiting retroactive application of new rules and regulations only forbids the retroactive application of regulations which are detrimental for one of the parties; this rule is not violated in cases where merely a different interpretation of a rule is introduced as a result of, for example, CAS jurisprudence.**

## I. THE PARTIES

1. The Club Atlético Independiente – also known as Independiente de Avellaneda – (the "Appellant" or "Independiente") is a professional football club affiliated to the Asociación del Fútbol Argentino (the "AFA") and a member of the Fedération Internationale de Football Association.

2. The Fédération Internationale de Football Association ("FIFA" or the "Respondent") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football.

3. The Club Atlético Independiente and the FIFA will be together referred to hereinafter as the "Parties".

## II. THE FACTS

4. This appeal was filed on 7 November 2013 by Independiente against the decision rendered by the FIFA Disciplinary Committee on 24 July 2013 (the "Appealed Decision").

5. A summary of the most relevant facts and the background giving rise to the present dispute will be developed below on the basis of the Parties' submissions and the evidence adduced during the hearing. Additional factual background may also be mentioned in the legal considerations of the present award. In this award, the Panel only refers to the submissions and evidence it considers necessary to explain its reasoning.

### 1. The facts leading to the decision rendered by the FIFA Players' Status Committee on 18 May 2011

6. On 15 July 2008, Olympiacos Football Club ("Olympiacos") and "Independiente" entered into a contract for the transfer of the rights of the professional football player L. from Olympiacos to Independiente (the "Transfer Contract").

7. In exchange for said transfer, Independiente was contractually obliged to pay Olympiacos the amount of USD 3,000,000 as transfer fee, which both parties agreed would be disbursed by Independiente in three equal instalments of USD 1,000,000, to be settled on 25 July 2008, and on that same date of 2009 and 2010, respectively.

8. On 2 October 2009, after Independiente had failed to meet its obligation to pay the second instalment, Olympiacos filed a formal claim before the FIFA Dispute Resolution Chamber wherein Olympiacos requested FIFA to order Independiente to pay the amount due of USD 1,000,000.

9. The proceedings were substantiated before the Players' Status Committee as the competent Standing Committee in accordance with Article 54 of the FIFA Statutes (the "FIFA Statutes" or the "Statutes").

10. By letter dated 4 November 2010, Olympiacos informed FIFA that on 26 August 2010, Independiente had deposited USD 350,000 but that no guarantee had been given for the outstanding amounts of USD 650,000 – which was due under the second instalment –, and USD 1,000,000 – which was due under the third instalment. As a result, Olympiacos requested FIFA to order Independiente to pay USD 1,650,000, plus interest.

11. By letter dated 17 May 2011, the AFA informed FIFA that Independiente had provided them with an answer to the claim filed by Olympiacos, dated 16 May 2011, and enclosed therein.

12. According to the letter sent by Independiente to the AFA, although the debt was real and Olympiacos' claim was justified, Independiente had always shown its willingness to negotiate by offering either to transfer L. back to Olympiacos or to transfer another one of Independiente's football players in exchange for the cancellation of its debt. Additionally, Independiente explained that it was under serious financial distress which had led to its insolvency proceedings.

13. On 18 May 2011, the Single Judge of the FIFA Players' Status Committee issued his decision (the "2011 Decision"), which partially accepted the claim of Olympiacos. The 2011 Decision was notified to Olympiacos and Independiente on 10 June 2011.

14. According to the findings of the 2011 Decision:

*"The Respondent, Club Atlético Independiente, has to pay to the claimant, Olympiacos FC, the amount of USD 1,650,000* ***within 30 days****, as from the date of notification of this decision.*

*Within the same time limit, the Respondent, Club Atlético Independiente, has to pay to the Claimant, Olympiacos FC, default interest of 5% p.a. on the following partial amounts until the effective date of payment as follows:*

*- on USD 650,000, as from 26 July 2009; and*
*- on USD 1,000,000, as from 26 July 2009.*

*Any further claims lodged by the Claimant, Olympiacos FC, are rejected".*

## 2. The facts leading to the decision rendered by the FIFA Disciplinary Committee on 24 July 2013

15. By letter dated 21 June 2011, the AFA informed FIFA that Independiente had provided them with additional information in respect of Independiente's ongoing reorganization insolvency proceedings. Enclosed with the AFA correspondence dated 21 June 2011 was a document dated 15 June 2011, and signed by Julio A. Comparada (the CEO of Independiente) and by Emilio F. Cristian Mattera (the Secretary General of Independiente), stating, *inter alia*, the following:

*"As already indicated in our previous letter, Independiente has requested the opening of voluntary insolvency proceedings in accordance with Law 24.522.*

*(…)*

*1) The most relevant legal effect of the opening of voluntary insolvency proceedings is the stay of all individual enforcement proceedings against the debtor, which are to be dealt with within the insolvency proceedings (Article 21 Law 24.522).*

*2) All creditors' claims must therefore be checked and verified within the insolvency proceedings and, once these claims have been duly recognized, they must be paid in accordance with the settlement procedure set forth by the insolvency judge for each credit classification (Article 32 Law 24.522).*

*(…)*

*6) The latter (acts of payment subject to judicial authorization) are, in general terms, all those which are connected with the normal course of the debtor's trade (e. g., for a football club, the transfer of the rights of a player).*

*7) A forbidden act of payment or an act of payment without due judicial authorization are considered to be ineffective (Art. 17 Law 24.522). (…)".*

(The above text is a free translation of the Spanish original).

16. On 30 June 2011, FIFA Players' Status Committee requested Independiente to provide additional information, including, *inter alia*:

*"1. [A] copy of the court order by which the reorganization insolvency proceedings* [concurso preventivo] *was initiated.*

*2. [i]nformation in respect to the legal effects of said reorganization insolvency proceedings as well as the scope of said effects.*

*3. [i]nformation regarding whether the club is allowed to freely manage its own assets and liabilities or if it is subject to the approval of a third party appointed by the insolvency judge.*

*4. [i]nformation in respect to the ongoing participation of the club in the* [Argentinian Football] *Association in the championships organized by said Association".*

(The above text is a free translation from the Spanish original).

17. By letter dated 4 July 2011, the AFA informed FIFA that Independiente had provided them with the additional information in respect to the ongoing reorganization insolvency proceedings, as requested by FIFA Players' Status Committee. Enclosed with the AFA correspondence dated 4 July 2011 was a legal opinion signed by Mario Adolfo (Legal Counsel of AFA) and a copy of the court order passed by the "Juzgado Civil y Comercial n.º 5, Lomas de Zamora, Provincia de Buenos Aires", according to which Independiente was placed under the reorganization insolvency proceedings.

18. The legal opinion signed by Mario Adolfo stated, *inter alia*, the following:

*"(…)*

*2. The legal effects of the reorganization insolvency proceedings is the freeze-up of all credits as wells as interruption in the accrual of interests for all debts which are of a previous date to the reorganization insolvency proceedings.*

*From that date, both disposal of assets and execution of contracts by the debtor are subject to review and approval by a receiver appointed by the competent insolvency Judge. The reorganization insolvency proceedings are meant to help the debtor avert straight bankruptcy by means of the restructuring all debts through a payment plan (ordinarily with quotas and a mandatory waiting period of several years). If the debt payment plan is approved by the insolvency judge and the creditors, the reorganization insolvency proceedings shall finalize once all included debts have been paid.*

*3. The club* [Independiente] *is still allowed to manage its own assets and liabilities, within the limits of the reorganization insolvency proceedings (…).*

*4. The 'Club Atlético Independiente' is still affiliated to the AFA and its first team participates in the domestic championship".*

(The above text is a free translation from the Spanish original).

19. On 14 December 2011, upon request, the AFA informed the Players' Status and Governance Department of FIFA that Independiente was still under reorganization insolvency proceedings.

20. On 20 January 2012, Olympiacos sent a letter to the Players' Status and Governance Department of FIFA, by means of which it requested FIFA, *inter alia*, the following:

*"(…) we kindly urge you to proceed with disciplinary actions not allowing further delay of the Respondent to fulfil its obligations which already successfully has done for a period of almost three (3) years".*

21. By letter dated 2 February 2012, and signed by Marco Villiger (Director of Legal Affairs) and Omar Ongaro (Head of Players' Status and Governance), FIFA informed Olympiacos and Independiente – via the AFA – that, in view of the fact that the "Club Atletico Independiente" had been put under reorganization insolvency proceedings, FIFA's decision making bodies did not appear to be in a position to further continue with the proceedings (the "Closure Letter").

22. By letter dated 19 November 2012, Olympiacos informed FIFA that it had become aware of the award rendered in CAS 2012/A/2750, and that said award stated, *inter alia*, the following (§ 132):

*"Although the Panel thus finds that FIFA is in general entitled to close disciplinary proceedings if a club is involved in insolvency proceedings, the Panel finds that the word "may" in article 107 (b) FIFA Disciplinary Code, implies that the FIFA Disciplinary Committee has a discretion to close proceedings, but no obligation to do so. If this were the intention of FIFA by adopting article 107(b) in the FIFA Disciplinary Code, the wording of such provision would have to have been formulated in more restrictive terms. The fact that a party has been declared subject to insolvency proceedings by a national court does therefore not necessarily imply that proceedings must be closed. Accordingly, other factors must also be taken into account in deciding whether or not to close the proceedings".*

23. On 14 December 2012, upon request, the AFA informed the Players' Status and Governance Department of FIFA that Independiente was still under reorganization insolvency proceedings.

24. On 11 January 2013, FIFA Players' Status and Governance Department informed Olympiacos and Independiente – via the AFA – that, in view of the letter dated 19 November 2012 and of the findings of the decision passed by the Single Judge of the Players' Status Committee, the controversy between Olympiacos and Independiente was being reported to the FIFA Disciplinary Committee for its consideration and decision.

25. On 26 March 2013, the Secretariat to the FIFA Disciplinary Committee informed Olympiacos and Independiente – via the AFA –, that they were opening disciplinary proceedings against Independiente, due to the fact that the amount owed to Olympiacos had not been paid, thus Independiente had failed to respect the decision passed by the Single Judge of the Players' Status Committee, and could be in violation of article 64 of the FIFA Disciplinary Code ("FDC").

26. On that same day, the AFA acknowledged receipt of the letter from the Secretariat to the FIFA Disciplinary Committee dated 26 March 2013, forwarded a copy to Independiente, and insisted on the reasoning included in the FIFA letter dated 2 February 2012, according to which since "Club Atletico Independiente" had been put under reorganization insolvency proceedings, the FIFA decision making bodies were unable to further the disciplinary proceedings. Additionally, the AFA reiterated that it remained under reorganization insolvency proceedings.

27. By letter dated 4 July 2013, the Secretariat to the FIFA Disciplinary Committee urged Independiente to pay the outstanding amount no later than 18 July 2013, or else the case would be submitted to the FIFA Disciplinary Committee on 24 July 2013. Additionally, Independiente was informed that if it did not submit a statement to the FIFA Disciplinary Committee, it would render its decision based solely on the documents in its possession (cf. Art. 110 par. 4 FDC).

28. By letter dated 24 July 2013, signed by Javier Cantero (CEO) and Pedro Larralde (Secretary General), Independiente informed the FIFA Disciplinary Committee, *inter alia*, of the following:

*"Nonetheless, as will be specified in due course, the Club remains under the ongoing reorganization insolvency proceedings, which has not yet been lifted, the administration of the company is still being carried out by the appointed receiver and no payment may be made except under authorization of the insolvency Judge (…)".*

(The above text is a free translation from the Spanish original).

29. On 24 July 2013, the FIFA Disciplinary Committee passed Decision No. 130186 PST ARG ZH, which decided, *inter alia*, the following:

*"1. The "Club Atlético Independiente" is pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 64 of the FIFA Disciplinary Code;*

*2. The "Club Atlético Independiente" is ordered to pay a fine to the amount of CHF 30,000 to FIFA within 90 days as from notification of the FIFA Disciplinary Committee's decision (…);*

*3. The "Club Atlético Independiente" is granted a final period of grace of 90 days as from notification of the FIFA Disciplinary Committee decision in which to settle its debt to the creditor;*

*4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that six (6) points be deducted from the debtor's first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points' deduction will be issued on the association concerned by the Secretariat to the FIFA Disciplinary Committee.*

*5. If the "Club Atlético Independiente" still fails to pay the amount due even after deduction of the points (…), the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.*

*(…)*

*7. The costs of these proceedings amounting to CHF 3,000 are to be borne by the "Club Atlético Independiente" (…)".*

30. On 18 October 2013, the decision of the FIFA Disciplinary Committee dated 24 July 2013 was duly communicated by fax to Olympiacos and Independiente – via the AFA.

## III. THE ARBITRAL PROCEEDING

31. On 7 November 2013, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2013 edition) (the "Code"), the Club Atlético Independiente filed its statement of appeal with the Court of Arbitration for Sport (the "CAS"). The Appellant nominated Mr. Hernán Jorge Ferrari, attorney-at-law in Buenos Aires, Argentina, as arbitrator. Furthermore, the Appellant requested that Spanish be the language of the proceedings.

32. By letter dated 14 November 2013, signed by Marco Villiger (Director of Legal Affairs) and Marc Cavaliero (Head of Disciplinary and Governance), FIFA stated its disagreement with the whole procedure being conducted in Spanish and asked for the present arbitration proceedings to be conducted in English.

33. On 18 November 2013, the Appellant filed its Appeal Brief whereby it requested CAS to rule as follows:

*"a) To revoke the decision of the FIFA Disciplinary Commission in its entirety.*

*b) To revoke the fine and the point deduction warning and to close the Disciplinary proceedings against Independiente.*

*c) Subsidiary, to revoke the fine and the point deduction warning and to suspend the disciplinary proceedings against Independiente until the argentine government authorizes the transfer of funds abroad and the impossibility of performance is lifted.*

*d) Subsidiary, if CAS confirms the FIFA decision, to declare that the 90-day period of grace starts counting from the date of the CAS award and not from the date of the FIFA decision.*

*e) Finally, to allocate the costs of this procedure to FIFA and to revoke the imposition of cost to the appellant in the FIFA disciplinary procedures (point 7 of the decision CHF 3,000)".*

34. Moreover, the Appellant requested the following additional evidentiary measures ("A.1." and "A.2." shall hereinafter be referred to as "FIFA File"):

*"A.1.- We ask the court to request F.I.F.A. the complete file of the case before the Disciplinary Committee leading to the current appeal, reference 130186 PST ARG ZH.*

*A.2.- We ask the court to request F.I.F.A. the complete file of the original determination case before the Players' Status Committee, reference 10-00987 MDO.*

*A.3.- We ask the court to request F.I.F.A. T.M.S. to report in relation to payments overdue by Argentine clubs to foreign clubs for player's transfer in the last 18 months:*

*1.- Details of the transfer (Clubs and player involved, amount overdue)*

*2.- Reasons given by the clubs for its failure to pay.*

*(…)*

*B.- We ask the court to request ARGENTINE FOOTBALL ASSOCIATION AFA the following information:*

*1.- If Olympiacos FC contacted AFA after February 2012 when it was mandated by FIFA.*

*2.- In the affirmative, date and form of the contact (by phone, email, letter, fax) providing evidence of the communication.*

*3.- AFA's answer and directions issued".*

35. Finally, the Appellant offered the following two witness statements for the hearing:

*"1.- Diego LENNON, lawyer, Leading Counsel for more than 10 years in the club's administration process.*

*His expected testimony will be related to the situation of the club under administration and the debt enforcement possibilities at national level of a credit subsequent to the administration declaration, like the one of Olympiacos FC.*

*2.- Mr. Federico VALCARCE, lawyer.*

*His expected testimony will be related to the current situation and restrictions in relation to the international transfer of funds from and to Argentina and the currency exchange controls established by the National Central Bank and the Argentine Fiscal Authorities".*

36. By letter dated 25 November 2013, the Respondent acknowledged receipt of the Appeal Brief, and informed the CAS Court Office that "Annex 5" of the latter appeared to be missing, and asked to be provided with it. Additionally, the Respondent nominated Mr. Pedro Tomás Marqués, attorney-at-law in Spain, as arbitrator.

37. By letter also dated 25 November 2013, the CAS Court Office acknowledged receipt of the Respondent's letter of that same date, and, in view of the fact that "Annex 5" to the Appeal Brief was also missing from the copies received at the CAS Court Office, it requested the Appellant to provide such exhibit without delay.

38. By letter dated 28 November 2013, the Appellant enclosed the missing "Annex 5".

39. By letter dated 2 December 2013, the Respondent nominated Mr. Rui Botica Santos, attorney-at-law in Lisbon, Portugal, as arbitrator in lieu of Mr. Pedro Tomás Marqués following the withdrawal of the latter in view of the challenge filed by the Appellant against his nomination.

40. On 12 December 2013, in accordance with Article R55 of the Code, the Respondent filed its Answer to the Appeal whereby it requested CAS to decide the following:

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

*2. To reject the Appellant's request that the disciplinary proceedings be closed.*

*3. To reject the Appellant's subsidiary request to declare the disciplinary proceedings suspended.*

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

*5. To order the Appellant to bear all costs incurred in connection with these proceedings and to cover all legal expenses of the Respondent in connection with these proceedings".*

41. By letter dated 7 January 2013, the CAS Court Office, pursuant to Article R54 of the Code, informed the Appellant and the Respondent of the following:

*"[That] the Panel appointed to decide [CAS 2013/A/3380] is constituted as follows:*

| | |
|---|---|
| *President:* | *Mr. José María Alonso Puig, attorney-at-law in Madrid, Spain.* |
| *Arbitrators:* | *Mr. Hernán Ferrari, attorney-at-law in Buenos Aires, Argentina.* |
| | *Mr. Rui Botica Santos, attorney-at-law in Lisbon, Portugal".* |

42. By letter dated 23 January 2014, the CAS Court Office invited the Respondent to comment, by 30 January 2014, on the Appellant's requests for disclosure (evidentiary measures requested in its Appeal Brief).

43. By letter dated 29 January 2014, the Respondent, with regard to the Appellant's requests for disclosure considered "A.1." to be redundant, "A.2." to be already enclosed to the Respondent's answer to the appeal, "A.3" to be rejected as this request concerned other Argentinian clubs, and "B" to be against the burden of proof which lies with the Appellant.

44. By letter dated 13 February 2014, the CAS Court Office, on behalf of the Panel, invited FIFA to provide the "FIFA File" no later than 26 February 2014. Additionally, the CAS Court Office informed the parties that the Panel had decided to reject all further Appellant's requests for disclosure.

45. By letter dated 19 February 2014, the Respondent produced a copy of the FIFA files relating to the FIFA PSC and the FIFA DC decisions.

46. By letter dated 21 February 2014, the Respondent returned a signed copy of the Order of Procedure for the present proceedings.

47. By fax dated 21 February 2014, the Appellant returned a signed copy of the same Order of Procedure.

48. On 28 March 2014, a hearing was held at the Hotel Lausanne Palace in Lausanne, Switzerland. The Panel was assisted by Mr. William Sternheimer, Managing Counsel & Head of Arbitration at CAS. The Appellant was represented by Mr. Ariel N. Reck. The Respondent was represented by Ms. Christine Fariña.

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

## IV. OVERVIEW OF THE PARTIES' POSITIONS

50. The following is a brief summary of the Parties' submissions and does not purport to include every contention put forth by the Parties. However, the Panel has thoroughly considered in its discussion and deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in the following outline of their positions and in the ensuing discussion.

### 1. The Appellant's position and request for relief

51. The Appellant's arguments for the appeal can be summarised as follows:

- The Appellant first states that the Appealed Decision should be revoked because it is against the *res iudicata* principle, as it was issued after the Closure Letter which, according to Independiente, shall be considered a FIFA decision with the force of *res iudicata*. The Appellant justifies this conclusion based on the assertion that, in accordance with several previous Arbitration CAS awards, any communication issued by FIFA, including the Closure Letter hereby analysed, constitutes a FIFA decision irrespective of its legal form. Additionally, Independiente also claims that the Closure Letter should have the force of *res iudicata* in view of the fact that it was rendered by the FIFA decision making bodies and of its particular wording, which expressly lays down that no further recourse to FIFA was available to Olympiacos. Consequently, Independiente concludes that the disciplinary proceeding has been closed (or, rather, not even started) by virtue of the force of *res iudicata* associated to the Closure Letter. The Appellant therefore requests for the Appealed Decision to be revoked, for it is considered to go against the Closure Letter which, as stated, has the force of *res iudicata* principle.

- Second, the Appellant is of the opinion that, if the Closure Letter was not a FIFA decision with the force of *res iudicata*, the decision by the FIFA Disciplinary Committee to initiate and move forward with the disciplinary proceeding would arise from a so-called "new practice" for the interpretation of Article 107 (b) FDC. The Appellant states that this new practice would have been unduly applied by the FIFA in this case to the disadvantage of Independiente and against a different and well-established customary practice (the so-called "old practice"). In summary, the new practice considers that Article 107 (b) FDC does not automatically require the FIFA to close any and all disciplinary proceedings whenever a party declares bankruptcy. On the opposite, FIFA is granted the power to do so as long as it made its decision on a case-by-case basis, after analysing whether the closure of disciplinary proceedings is considered to be appropriate, or not. Additionally, the Appellant notes certain CAS awards (ct. CAS 2012/A/2750 and CAS 2012/A/2754) and, in view of them, insists that there is a well-established customary practice as to the application of the so-called old practice – on which Independiente would have relied in this case. Coincidentally, the Appellant also alleges the infringement of the estoppel principle, based on the assertion that it had *bona fide* acted in accordance with the previous decisions issued by the FIFA in similar cases.

- According to the Appellant, Olympiacos would have conducted itself with passiveness after the Closure Letter was issued, because it (i) did not dispute during the next eight months – that is, until November 2012, when it requested for the disciplinary proceeding to be opened against Independiente –, and (ii) failed to contact the AFA or to file a claim for the amount due before the Argentinian Courts, although the Closure Letter had instructed Olympiacos to do so. Consequently, regardless of the qualification of the Appealed Decision as a FIFA decision with the force of *res iudicata*, the Appellant argues that, even if the Panel were to dismiss its requests, the Appealed Decision should nonetheless be revoked as a result of Olympiacos' conduct after the Closure Letter was issued, at which time Olympiacos would have acted with passiveness and lack of diligence with regard to its claim against Independiente. The Appellant also refers to CAS 2011/A/2641, which is brought up as a way to strengthen its position.

- Subsidiarily, the Appellant claims that, if the Panel were to dismiss its requests and to conclude that Independiente shall pay the amounts due in accordance with the 2011 Decision, the Appealed Decision should nonetheless be at least suspended, because Independiente remains unable to pay due to the controls and limitations that the Argentinian Government has introduced on foreign exchange (USD or other foreign currency) transactions, of which the amounts due to Olympiacos would be part.

- Finally, the Appellant submits one last subsidiary claim, for the event that CAS were to uphold the Respondent's requests and rule that the Appealed Decision did not infringe on the *res iudicata* principle and that the amount due to Olympiacos shall be paid in accordance with the 2011 Decision. Should that be the case, the Appellant requests that the ninety (90) days grace period, which was granted to it by virtue of the Appealed Decision, shall start again from the date the Panel renders its award in the present case.

52. In sum, the Appellant requests CAS to (i) revoke the Appealed Decision in its entirety and the fine and point deduction warning; (ii) subsidiarily, to revoke the fine and the point deduction and to suspend the disciplinary proceedings until foreign exchange controls are lifted; and (iii) subsidiarily, to declare that the ninety (90) days grace period granted to the Appellant shall in any case start again from the date the CAS issues its decision.

## 2. The Respondent's position and request for relief

53. The Respondent first refers to the applicable Law and, in particular, to Article 64 FDC, which reads as follows:

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

*a) will be fined for failing to comply with a decision;*

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

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

54. In this respect, the Respondent states that the Appealed Decision was issued pursuant to Article 64 FDC, which provides for the enforcement of final and binding decisions issued by the FIFA, or the CAS, and for the protection of creditors and enforcement of debtors to pay their debts. Thus, Article 64 FDC constitutes a valuable legal tool, which is used by the FIFA to enforce its

rules and regulations and to guarantee, up to a certain extent, that a creditor's rights will finally be respected and that the debtor will meet its obligations.

55. According to the Respondent, under Article 64 FDC, the FIFA Disciplinary Committee proceeding is an enforcement proceeding, and the FIFA Disciplinary Committee is, in this regard, an enforcement authority. Consequently, the FIFA Disciplinary Committee cannot review or modify as to the substance of the previous decision, which is the object of the enforcement proceeding, as it shall be considered final and binding. Therefore, the Appealed Decision was passed by the FIFA Disciplinary Committee only in respect to whether the debtor had complied or not with the final and binding 2011 Decision that had been issued by the Single Judge of the FIFA Players' Status Committee and, as a result, the FIFA Disciplinary Committee could only analyse the relevant facts arising after the date the 2011 Decision was rendered.

56. Moreover, the Respondent notes that the present appeal refers only to the decision rendered by the FIFA Disciplinary Committee on 24 July 2013 and to the penalty therein imposed to Independiente, but it does not – and cannot – affect any previous decision. Consequently, the validity and appropriateness of the previous 2011 Decision shall not in any way become part of the present proceeding, as it had already become final and binding and, as stated, the Appealed Decision could not in any way review the contents of the 2011 Decision.

57. With regard to the *res iudicata* principle, the Respondent indicates that this principle was in no way infringed by the Appealed Decision because the Closure Letter cannot be considered as a final decision, passed by one of FIFA's legal bodies. According to the Respondent, the Closure Letter is neither (i) a FIFA decision of its form and contents, as it only directed to inform Olympiacos that, as per the current practice at that time, the FIFA appeared to no longer be able to intervene in any way in order to make Independiente pay its debt; (ii) nor issued by the same deciding FIFA body, as it was signed by another department of the Legal Affairs Division of the FIFA, rather than by the Disciplinary & Governance Department of the FIFA; nor (iii) should it in any case be seen as a final and binding FIFA decision with the force of *res iudicata*.

58. The Respondent also refers to the Appellant's assertion that the Appealed Decision should be revoked as a result of the FIFA having retroactively applied the so-called new practice to this case.

59. According to the Respondent, any potential review of the decision of the Single Judge of the Players' Status Committee could only correspond to the CAS, as per FIFA's regulations. Additionally, because the Appellant chose not to initiate an appeal proceeding before the CAS against the 2011 Decision, it became final and binding without any further possibility for the parties to appeal it or to review its merits.

60. Therefore, once Olympiacos had made its request to FIFA to open disciplinary proceedings (by way of its letter dated 20 January 2012), the FIFA Disciplinary Committee could not review the 2011 Decision, and had a duty to only analyse whether or not the Appellant had complied with such decision and had already paid the amount of USD 1,650,000 plus interests.

61. Given the above, the Respondent is of the opinion that the FIFA Disciplinary and Governance Department was right to impose a penalty to Olympiacos based only on its review of the file, as a result of the request filed by Olympiacos' and because the FIFA Disciplinary Committee must act within the strict terms of Article 64 FDC, which does not allow for the reviewing of the previous 2011 Decision.

62. Moreover, the Respondent states that Article 107 (b) FDC grants FIFA the discretion to close, or not, disciplinary proceedings if a party "declares bankruptcy". Furthermore, the literal wording used by Article 107 (b) FDC has been interpreted by the CAS in such a way that there is no automatic obligation to close disciplinary proceedings in case of insolvency, as this prevents the FIFA from indiscriminately closing proceedings which could move forward regardless of the economic circumstances of the debtor. As a result, this interpretation emphasises that the FIFA Disciplinary Committee shall decide on a case-by-case basis, depending on the specific circumstances of each case.

63. Regardless of these considerations, the Respondent acknowledges that there have been similar letters (signed by the Director of Legal Affairs and the Head of the Disciplinary & Governance Department) which have often been sent to the parties in disciplinary proceedings, as a result of one of the parties being placed under insolvency proceedings. Nevertheless, the Respondent contests that a reorganization insolvency proceedings – the situation under which the Appellant was placed in 2005 – is not the same as a bankruptcy proceeding, because the latter is supposed to end with the liquidation of the debtor, whereas a reorganization insolvency proceeding would serve to allow the debtor to avoid straight bankruptcy *"(…) by means of the restructuring all debts through a payment plan"*.

64. Furthermore, in the present case, the reorganization insolvency proceedings were officially opened by a Court order of 2005 (three years before the debt was born). As a result, Olympiacos' credit should be classified as *"(…) a normal debt brought about by the Appellant's day-to-day administration operations"*. Moreover, the Appellant is still affiliated to the Argentinian Football Association, and is also participating in the Argentinian championship.

65. The Respondent contests the allegation made by the Appellant as to Olympiacos' conduct after the Closure Letter was issued. According to the Respondent, no reproach can be made to Olympiacos because it did not act with passiveness and CAS 2011/A/2641, referred to by the Appellant, should not be applicable to the present case. To this end, the Respondent remarks that CAS 2011/A/2641 and the present case are clearly dissimilar because: (i) in CAS 2011/A/2641, insolvency proceedings were ongoing whereas in this case insolvency proceedings have not been initiated as the Appellant has merely been placed under reorganization insolvency proceedings; (ii) in the present case, Olympiacos has no intention to revert to Argentinian courts, whereas in CAS 2011/A/2641, the creditor had announced his intention to file a claim for his labour debt in the insolvency proceedings; and (iii) in the present case the claim amounts to USD 1,650,000, plus interest, whereas in CAS 2011/A/2641, the claim amounted to USD 21,000, plus interest.

66. The Respondent further analyses the alleged impossibility for Independiente to fulfil its obligations as a consequence of the controls and limitations that the Argentinian Government has introduced on foreign exchange (USD or other foreign currency) transactions. The Respondent remarks that the burden of proof is up to Independiente to be lifted and that no adequate proof (laws, orders, regulations, etc.) for such impossibility has been submitted by the Appellant. To the contrary, the information and data pertaining to the Appellant, which has been uploaded in the Transfer Matching System ("TMS"), show that Club Atlético Independiente was not barred from transferring and acquiring foreign currency, as it had in fact made certain operations in foreign currency as a result of the transfers of players. This evidence is pertinent although the information provided by the FIFA TMS GmbH is currently limited due to the Swiss Data Protection Laws, and does not provide all the details regarding the operations carried out

67. Consequently, the Respondent argues that, in view of the lack of evidence to the contrary, the information provided by TMS should be considered proof enough that the Appellant is not – or at least, not completely – unable to pay the outstanding amount, or at least a part of it, to the club Olympiacos FC.

68. The Respondent also refers to the application of the general principle of law known as *ne eat iudex ultra petita partium*. According to this principle, the Panel cannot go beyond the requests made and the conclusions drawn by the parties and shall limit its analysis to the specific claims which have been laid down by the parties, and to the legal reasoning contained therein. Therefore, the Panel shall only address the issues concerning whether the 2011 Decision hereby appealed against should be considered lawful or not. Additionally, the Panel should in any case refrain from considering new facts or evidence, or ruling on their fairness and proportionality.

69. Finally, with regard to the Appellant's subsidiary request as to the calculation of the period of grace of 90 days, should the CAS confirm the decision hereby appealed against, the Respondent does not oppose the request made by the Appellant so as to make the 90-day grace period start counting as from notification of the CAS award.

70. The Respondent therefore requests that the Appellant's appeal be rejected and that the Appealed Decision be confirmed in its entirety.

## V. LEGAL ANALYSIS

### 1. Jurisdiction

71. The Panel notes that the jurisdiction of the CAS in the matter at hand, which is not contested by the Parties, derives from Article R47 of the Code, and Article 67 of the FIFA Statutes. It has been confirmed by the signature of the Order of Procedure by both Parties.

72. The Panel also wishes to note that there has been discussion, both within the legal doctrine and the case law, as to whether the exception of *res iudicata* implies the lack of jurisdiction of the Panel or the inadmissibility of the claim (ct. CAS 2010/A/2091). Nevertheless, the Panel will

not issue an opinion on this point, as the practical consequences of both interpretations would be the same in the present case and none of the parties have disputed the procedural or admissibility effects of the *res iudicata* principle.

## 2. Admissibility

73. In accordance with Article 67.1 of the FIFA Statutes, *"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"*.

74. The Appealed Decision was notified to the Appellant on 18 October 2013 and the Statement of Appeal was filed on 7 November 2013 (i.e. within the required twenty one days).

75. It follows that the appeal is admissible. Furthermore, no objection has been raised by the Respondent in this respect.

## 3. Applicable law

### *(a) General considerations as to the applicable law*

76. Article R58 of the Code provides the following:

> *"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

77. Article 66.2 of the FIFA Statutes provides:

> *"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA (…) and, additionally, Swiss law"*.

78. The Panel remarks that the *"applicable regulations"* are the FIFA rules and regulations which are material to the dispute at stake and, in particular, the FDC. Additionally, if necessary, Swiss law shall apply.

### *(b) Brief reference to the requested subsidiary application of Argentinian insolvency law*

79. According to the submission by Club Atlético Independiente, Argentinian Insolvency law should be applicable to the present case in as much as the Appellant is under insolvency proceedings.

80. To the contrary, the Panel is of the opinion that Argentinian insolvency law should not be applied to the present case because: (i) the Appealed Decision is the direct result of the strict

application of the FIFA disciplinary rules and regulations to Independiente; and (ii) Independiente is not technically placed under insolvency proceedings, but is merely under reorganization insolvency proceedings.

81. The proceedings before the FIFA Disciplinary Committee – which led to the Appealed Decision – constitutes a disciplinary proceeding wherein the FIFA Disciplinary Committee is not allowed to review or to modify as to the substance of any previous decision. Therefore, the Appealed Decision was passed by the FIFA Disciplinary Committee only in respect to whether or not the debtor had complied with the final and binding decision that had been issued by the Single Judge of the FIFA Players' Status Committee, but in no way could the 2011 Decision be reviewed or affected. Consequently, the position of Independiente remained unchanged as a result of the Appealed Decision, given that the penalties imposed on Independiente were the necessary result of the strict application of the FIFA disciplinary rules and regulations, to which Independiente is bound because it is still affiliated to the AFA and actively participating in competitions organised by the AFA, *"(…) thereby being under FIFA's jurisdiction having as a consequence that the debtor has to comply with the FIFA regulations (cf. art. 3 lit. b) of the FDC)"*.

82. Given the above, the penalties imposed on Independiente by the Appealed Decision are in no way affected by the reorganization insolvency proceedings under which Independiente has been placed.

83. In respect to the second issue, the Panel agrees with Independiente that in CAS 2012/A/2750 it was concluded that Article R58 of the Code allowed for the application of the national insolvency legislation (which, in that case, was Spanish insolvency law) to the proceedings. However, the application of Spanish insolvency law was in that case circumscribed to the insolvency proceedings under which Real Zaragoza was placed.

84. According to CAS 2012/A/2750, *"(…) insolvency proceedings are not governed by the various regulations of FIFA, but are solely governed by the law of the country where the insolvency is established, i.e. Spain. The application of Spanish law is nevertheless strictly limited to the insolvency proceedings of Real Zaragoza insofar as Spanish law contravenes the application of the various regulations of FIFA"*.

85. Thus, the Argentinian Insolvency Law should not be of application to the present case and, even if Argentinian insolvency law was to be subsidiarily applied, it would only be of use at a national level and within the limits of the ongoing Argentinian insolvency proceedings, as per the doctrine of CAS 2012/A/2750.

86. Regardless of the above, it is clear that the Appellant is not under insolvency proceedings, but merely under reorganization insolvency proceedings, as has been recognised by the legal opinion signed by Mr. Mario Adolfo, and enclosed by the Appellant itself with its letter dated 4 July 2011, wherein it is expressly recognised that the Appellant is not completely unable to pay its debts as a result of the reorganization insolvency proceedings, as it *"(…) is still allowed to manage its own assets and liabilities, within the limits of the reorganization insolvency proceedings"*. Therefore, should a payment be agreed upon, the sole limitation – if at all – would consist of the request of a previous authorization to the insolvency judge.

87. It is important to note that the reorganization insolvency proceedings under which Independiente has been put since 2005 are subject to Argentinian Insolvency Law (in particular, Law 24.255) and are thus beyond the scope of the present proceedings as the Panel shall not issue an opinion as to Argentinian Law.

88. Finally, the Panel wishes to indicate that, in respect to the effectiveness of Olympiacos' credit within the insolvency proceedings, it is of the same opinion as the Respondent. Olympiacos' credit should be considered as a normal debt of Independiente, because (i) it is the result of its ordinary activity; and (ii) it was born after Independiente was placed under the reorganization insolvency proceedings. Therefore, Olympiacos' credit does not require to be classified alongside the pending creditors list.

## 4. Merits

89. The main issues to be discussed and decided upon hereinafter by the Panel, are:

- Whether or not the Closure Letter is a FIFA decision.
- Whether or not the Closure Letter has the force of *res iudicata*.
- Whether or not the decision issued by the FIFA Disciplinary Committee on 24 July 2013 could be considered as a retroactive application of the so-called "New Practice" regarding Article 107 (b) FDC.
- Whether or not the so-called passive conduct of Olympiacos after the Closure Letter was received should merit some – if any – reproach.
- Subsidiarily, (i) if there were international transfer of funds restrictions in Argentina such that the Appellant could not pay the amount due in the agreed currency; and (ii) if the grace-period granted by the Appealed Decision should start counting as from notification of the CAS Award to be rendered in this case.

## 5. Discussion

### *(a) Facts undisputed by the Parties*

90. It is undisputed that Club Atlético Independiente owes Olympiacos the sum of USD 1,650,000 as a result of the second and third tranches agreed upon for the transfer of the rights of the professional football player L. from Olympiacos to Club Atlético Independiente.

91. The Appellant does not question either FIFA's discretion to impose sanctions under Article 64 FDC for failing to comply with the decision issued on 18 May 2011 by the Single Judge of the Players' Status Committee, or the proportionality of the sanctions imposed in the Appealed

Decision. The Appellant only contests the legal possibility to be sanctioned, pursuant to Article 64 FIFA Disciplinary Code, after the Closure Letter had been issued, as it considers such disciplinary penalty to be against the *res iudicata*, as well as the prohibition against the retroactive application of new laws or criteria when detrimental to one of the parties.

### *(b) Arguments submitted by the Appellant*

92. As stated the Appellant disputes the legality of the Appealed Decision based on the following: (i) that the Closure Letter dated 2 February 2012 is, in accordance with CAS jurisprudence, to be considered a decision; (ii) that the Closure Letter had been rendered by the same body that issued the Appealed Decision; and (iii) that such decision should be considered to be final and binding to the FIFA and, as such, having force of *res iudicata*.

### *(c) The Closure Letter is a FIFA decision*

93. It is undisputed by the Appellant and the Respondent that a decision is a *"(…) an act of individual sovereignty addressed to an individual by which a relation of concrete administrative law, forming or starting a legal situation is resolved in an obligatory and constraining manner. The effects must be directly binding both with respect to the authority and to the party who receives the decision"*.

94. Furthermore, the Panel considers that both parties are in agreement as to the definition of an appealable decision, which is normally a communication of the relevant decision making body directed to a party and by which a ruling or resolution is adopted as regards to the situation between the parties.

95. Notwithstanding the parties' agreement as to the relevant concepts and definitions, given the disagreement as to their effects in this case, the Panel considers necessary to clarify whether or not the Closure Letter is to be considered a FIFA decision.

96. In this respect, the Appellant states, *inter alia*, the following:

*"The main and principal argument to revoke the decision of the FIFA disciplinary committee is that it contradicts a previous and settled decision taken by the very same body one year before and is therefore barred by res iudicata.*

*(…)*

*The general principles which were summarized in the case CAS 2008/A/1633 and which can be extracted from CAS jurisprudence in this respect are the following:*

*a.- The existence of a decision does not depend on the form in which it has been issued (CAS 2005/A/899 & CAS 2007/A/1251 & CAS 2008/A/1633).*

*b.- A communication, intended to be considered a decision shall contain a ruling which aims to affect the legal situation of its addressee or other parties (CAS 2005/A/899 & CAS 2007/A/1251 & CAS 2004/A/659 & CAS 2008/A/1633).*

*c.- A ruling issued by a sports related body refusing to deal with a request can be considered a decision under certain circumstances (CAS 2005/A/994 & CAS 2005/A/899 & CAS 2008/A/1633)".*

97. The Respondent counterclaims that the Closure Letter should not be considered a FIFA decision, because:

- It *"(…) had solely an informative purpose".*

- Indeed, the Closure Letter merely informs of the general rule which was applied at that time, that implied FIFA not being, apparently, in a position to open disciplinary proceedings in relation to clubs that were under insolvency proceedings. This initial interpretation was rectified as a result of several subsequent Arbitration CAS awards, which gave a different interpretation to Article 107 (b) FDC. Although the Panel shall thoroughly examine this issue later on, it should already be noted that this new interpretation of Article 107 (b) and its application to the present case did not contravene a previous well-established customary practice.

98. The Panel wishes to note that, for the Closure Letter to be a FIFA decision, it should meet the following requirements (ct. CAS 2005/A/899):

- it should be qualified as a formal decision;

- it should be passed by a FIFA legal body; and

- it should be a final decision.

*(ca) Qualification of the Closure Letter as a formal decision*

99. As stated, the first question to be answered by the Panel is whether or not the Closure Letter should be considered as a decision passed by the FIFA pursuant to Article R47 of the Code and Article 63 of the FIFA Statutes.

100. Consequently, the Panel refers to CAS 2005/A/899 (cf., also, CAS 2008/A/1658), wherein the CAS made, *inter alia*, the following considerations:

*"9. The applicable FIFA regulations, in particular the FIFA Statutes do not provide for the term 'decision'. Thus, in accordance with article R58 of the Code and Article 59 CAS paragraph 2 of the FIFA Statutes, the issue must be examined under Swiss law. According to Swiss case law related to administrative procedure, cited in Award CAS 2004/A/659, the decision is an act of individual sovereignty addressed to an individual, by which a relation of concrete administrative law, forming or stating a legal situation is resolved in an obligatory and constraining manner. This effect must be directly binding both with respect to the authority as to the party who receives the decision.*

*11. Although administrative procedural rules are not directly applicable to decisions issued by private associations, the Panel considers that the principles set out in the above mentioned CAS precedent correctly define the characteristic features of a decision. In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. (…).*

*14. The panel considers that the form of communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal. (…) . What is decisive is whether there is a ruling, – or, in case of a denial of justice, an absence of ruling where should have been a ruling – in the communication".*

101. This same interpretation was later confirmed by the CAS in the award rendered in CAS 2007/A/1251, wherein the Panel stated, *inter alia*, the following:

*"5. The Panel finds that in determining, (…) , whether or not FIFA's letter of 16 March 2006 must be deemed a decision rather than a mere written communication, the following circumstances are relevant:*

*- Aris FC's initial application to FIFA of 30 November 2006 was not addressed to FIFA as a request for information. On the contrary, it contained arguments, prayers for relief and exhibits and was addressed to FIFA Players' Status Committee, i.e. was formulated as a form of claim or appeal requesting FIFA to make a new decision on the merits of the employment-related dispute between Aris FC and its player, which the Greek Sports Court had adjudicated in its decision of 27 July 2006.*

*- In its letter of 16 March 2007, with reference to the Greek Sports Court's decision and after stating that it understood Aris FC was applying to FIFA for relief, FIFA enumerated several reasons for which it deemed FIFA's decision-making bodies lacked competence to entertain Aris FC's request and invited the latter to seek relief in front of the "competent Greek authorities".*

*6. The Panel finds that by responding in such manner to Aris FC's request for relief, FIFA clearly manifested it would not entertain the request, thereby making a ruling on the admissibility of the request and directly affecting Aris FC's legal situation. Thus, despite being formulated in a letter, FIFA's refusal to entertain Aris FC's request was, in substance, a decision".*

102. In light of the above mentioned precedents, the Panel is of the opinion that the Closure Letter shall be qualified as a formal FIFA decision for all intents and purposes, regardless of its form, as it was issued as an answer to a previous request by Olympiacos, dated 20 January 2012, wherein immediate disciplinary action was requested to be taken against Independiente. Thus, the Closure Letter contained a ruling as to Olympiacos' request, which FIFA was not in a position to grant, as the general rule at that time was that the FIFA services and decision making bodies could not deal with cases of clubs under insolvency proceedings.

*(cb) Qualification of the Closure Letter as a decision passed by a FIFA legal body*

103. The second requirement for the Closure Letter to be a FIFA decision consists of it being passed by a FIFA legal body. In this respect, the Panel wishes to note that the CAS has on several

occasions (CAS 2007/A/1251 and CAS 2012/A/2754) analysed whether or not letters similar to this one – all signed by Mr. Marco Villiger, Director of Legal Affairs and Mr. Omar Ongaro, Head of FIFA Players' Status and Governance – should be considered as having been passed by a FIFA legal body.

104. According to the above mentioned CAS awards, a letter signed by Mr. Marco Villiger and Mr. Omar Ongaro – acting in those same capacities – should be understood as if passed by FIFA. In particular, the Panel wishes to quote the following considerations, which were made by the CAS in CAS 2012/A/2754:

*"49. The letter was signed in the name of FIFA by Mr Marco Villiger, FIFA Director of Legal Affairs and by Mr Omar Ongaro, Head of FIFA Players' Status and Governance. There is no doubt that FIFA is validly bound by the signature of those two persons, who actually signed the answer filed in the present proceedings. The Panel finds that any FIFA decision which is intended to be made on behalf of FIFA's 'services and decision making bodies (i.e. the Players' Status Committee and Dispute Resolution Chamber as well as the Disciplinary Committee)' and which is formulated as a final decision must be deemed subject to an appeal in front of CAS".*

105. Thus, the Panel is of the opinion that, in the present case, the Closure Letter meets the second requirement, as it was passed by a FIFA legal body, represented by Mr. Marco Villiger and Mr. Omar Ongaro.

*(cc) Qualification of the Closure Letter as a final decision*

106. With respect to the characterization of the Closure Letter as a final FIFA decision, the Panel agrees with the criteria laid down by CAS 2007/A/1251, wherein the CAS made, *inter alia*, the following considerations:

*"8. FIFA's statutes and regulations contain no general definition of what must be considered a 'final' decision. However, various provisions of the regulations specify which body's decisions are subject to an appeal in front of CAS. Thus, for example, according to Article 24§2 of FIFA's Regulations for the Status and Transfer of Players ('FIFA's regulations'): 'Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport'".*

107. Thus, for a FIFA decision to be final, the parties involved in it should have no other recourse within FIFA to appeal or to modify such decision, but only be able to appeal it before the CAS. The Closure Letter has to be considered a final decision since it could not be made the object of any challenge internally within FIFA, but only could be subject to an appeal before CAS.

*(cd) Conclusion*

108. As a result of the foregoing considerations, the Panel concludes that the Closure Letter shall be considered to be a FIFA final decision.

109. Nevertheless, the Panel also wishes to remark that this conclusion does not automatically imply that the Closure Letter shall also have the force of *res iudicata* with regard to the Appealed Decision, as will be explained below.

### *(d) The alleged force of res iudicata of the Closure Letter*

110. In the following pages, the Panel shall explain the considerations pertaining to the lack of force of *res iudicata* of the Closure Letter.

*(da) Position of the parties in respect to the res iudicata principle*

111. The Panel considers necessary to make specific reference to the statements submitted by the parties in this respect.

112. On the one hand, the Appellant states in its Appeal Brief, in sum, the following:

> *"The FIFA letter did not leave any open door to the parties for remedying the situation before one of FIFA's bodies. FIFA's·letter of February 2012 explains in unequivocal terms that it can no longer intervene in the procedure.*
>
> *In practical terms, with the letter of February 2012, FIFA closed the case and refused to open disciplinary proceedings communicating the decision to all the parties involved in the procedure.*
>
> *As explained by CAS in previous decisions the mere inclusion at the end of the letter of the sentence 'Finally, we would like to add that our statements made above are based on the information we received from the Argentinean Football Association only and hence are of a general nature and thus without prejudice whatsoever' is not enough to change the qualification of the letter as a decision".*

113. Additionally, the Appellant quotes several previous CAS decisions (CAS 2005/A/899, CAS 2004/A/748, CAS 2007/A/1251, and CAS 2008/A/1633, CAS 2012/A/2854, among others) in order to provide support for its conclusion.

114. On the other hand, the Respondent counterclaims by stating, *inter alia*, the following:

> *"We would like to go through the contents of the FIFA letter in question with a view to applying the CAS general principles to them. In our opinion, the letter dated 2 February 2012 had solely an informative purpose. Indeed, FIFA informed all the parties involved in the proceedings (more precisely, the letter was addressed to the club Olympiacos FC with copy to the Appellant) about the following points:*
>
> - *the answer received by the Argentinian Football Association;*
> - *the legal situation of the Appellant, namely that it was put under administration;*

- *the general rule that FIFA's services and decision making bodies cannot deal with cases of clubs which are in an insolvency proceeding, i.e. inter alia under administration;*

- *FIFA does not appear to be in a position to further continue with the proceedings in the present case;*

- *inviting the club Olympiacos FC to refer itself to the Argentinian Football Association so as to receive indications with regard to the competent authorities to address in order to have its alleged rights preserved".*

115. Thus, according to the Respondent, the Closure Letter was a communication directed solely to inform the claimant, Olympiacos FC, that the debtor was – apparently – under insolvency proceedings and that – according to the relevant practice at that time – the FIFA appeared to no longer be able to intervene.

*(db) Reference to the case law quoted by the Appellant*

116. Additionally, the Panel considers necessary to make specific reference to the CAS jurisprudence quoted by the Appellant in order to analyse the extent to which such case law should be applicable to the present case.

117. In general terms, the Panel agrees with the fact that some of the CAS jurisprudence quoted by the Appellant did indeed declare several similar FIFA letters to be final FIFA decisions. Nonetheless, all the case law made this declaration only to the extent that it was necessary to clarify the CAS' jurisdiction, as the parties disputed whether or not such letters were appealable. In line with the above, such case law refers to this issue only in the "Jurisdiction" part of the award and it contains no broad pronouncements as to the effects of such letters in general.

118. In particular, it is of interest to cite CAS 2004/A/659, wherein the panel stated, *inter alia*, the following:

*"13. FIFA has clearly informed Galatasaray, through the Turkish football federation, that it considered to have no competence to make criminal investigations and therefore in effect has rejected its request.*

*14. By so doing, FIFA has rendered a decision depriving Galatasaray of the object of its request and resolving in an obligatory manner the issue raised by the Club.*

*15. Such decision is further a definitive decision since it cannot be made the object of any challenge internally within FIFA.*

*16. The Panel thus holds that the letter of 5 July 2004 is a decision by which FIFA declined its jurisdiction to address Galatasaray's request. Such a decision can be made the object of an appeal to the CAS.*

*17. Consequently, the Panel has jurisdiction to rule on the appeal to the extent at least it bears on the issue of the refusal of FIFA to address the request of the Club".*

119. As is evidenced by the CAS awards rendered in the cases mentioned by the Appellant (CAS 2005/A/899, CAS 2007/A/1251, as well as CAS 2004/A/659, CAS 2007/A/1251, CAS 2008/A/1633), no decision has yet been issued by CAS as to whether or not the Closure Letter – or other similar FIFA letters – should have the force of *res iudicata* with respect to further disciplinary proceedings to be opened by FIFA. As stated, the CAS jurisprudence quoted by the Appellant refers solely to whether or not such FIFA letters should be considered to be final FIFA decisions in order to allow the affected party to appeal before the CAS.

120. In conclusion, the Panel believes that the previous cases quoted by the Appellant do not provide a general rule as to the effects that should ordinarily be associated with FIFA communications such as the Closure Letter.

*(dc) There is no valid point of comparison between the Closure Letter and the Appealed Decision because the Closure Letter was not issued by the competent body and was not passed after the appropriate contradictory procedure*

121. The Panel wishes to remark its conclusion that even if the Closure Letter is considered to be a final FIFA decision for the purposes of an appeal before the CAS, this does not immediately imply that such communication should have the force of *res iudicata*. To the contrary, for a ruling or resolution to have the force of *res iudicata* two preliminary requirements shall be met:

- The decision making body shall be competent to pass the relevant ruling or resolution.
- The relevant ruling or resolution shall be passed after following the appropriate contradictory procedure.

122. The Panel wishes to note that both are preliminary requirements because they are necessary in order to have a valid ruling, whether or not it should also have the force of *res iudicata*.

123. The first of these requirements has been analysed by the legal doctrine (ct. International Law Association, Berlin Conference, 2004, International Commercial Arbitration, Interim Report: *"Res judicata"* and Arbitration; "ILA 2004") and the general consensus is that it is an essential requirement under Common Law (ct. page 6 of ILA 2004) and under Civil Law (ct. pages 13 and 14 of ILA 2004). In both cases, in order for a decision to have the force of *res iudicata*, it must be pronounced by a decision making body of competent jurisdiction, and the decision shall be final and conclusive and on the merits.

124. This is also the criteria that has been followed in international arbitration, wherein the ICSID Tribunal in "Amco Asia Corp. v. Indonesia" (ICSID, 89 ILR 552 at 560) stated, *inter alia*, the following:

*"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground for recovery, cannot be disputed".*

125. The relevance of the second of these requirements is also evidenced by the fact that one of the causes for the annulment of an arbitral award is the lack of an appropriate contradictory procedure, as per Article 190.II d) of the Federal Statute on Private International Law:

*"The award may only be annulled:*

*(…)*

*d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated; (…)".*

126. In view of the above, for the Closure Letter to have the force of *res iudicata* with respect to the Appealed Decision, both decisions would need to have been issued by the competent decision making body, after following the appropriate contradictory procedure.

127. In this respect, and regardless of the characterization of the Closure Letter as a final FIFA decision in order to open the possibility to file an appeal before the CAS, there is no valid point of comparison between the Closure Letter and the Appealed Decision because the former was not passed by the competent decision making body nor did it follow the appropriate contradictory procedure, whereas the latter was issued by the competent decision making body after the appropriate contradictory procedure.

128. In particular, the Panel wishes to note the following differences between the Closure Letter and the Appealed Decision, which prevent the former from having the force of *res iudicata*.

129. With regard to the first preliminary requirement, the Closure Letter was signed by Marco Villiger (Director of Legal Affairs) and Omar Ongaro (Head of Players' Status and Governance), whereas the Appealed Decision was passed by the FIFA Disciplinary Committee (sitting Mr. Claudio Sulser, chairman; and Mr. Michael Edwards, Mr. Hamid Haddadj and Mr. Syed Nayyer Hasnain Haider, all of them members). On the one hand, according to CAS jurisprudence, the Closure Letter is only considered to be a FIFA decision with regard to the possibility of an appeal before the CAS. On the other hand, the Appealed Decision was passed by the FIFA decision making body with jurisdiction over disciplinary proceedings as provided by Article 76 FDC:

*"The FIFA Disciplinary Committee is authorised to sanction any breach of FIFA regulations which does not come under the jurisdiction of another body".*

130. Thus, the Appealed Decision was issued by the competent FIFA body whereas the Closure Letter was issued by FIFA representatives who lacked any capacity to render a decision as to the disciplinary proceedings.

131. As a result, only the Appealed Decision should have the force of *res iudicata* as, in this case, it was the only ruling that was passed by the competent FIFA decision making body.

132. With regard to the second preliminary requirement, the Panel also wishes to note that the Closure Letter was issued as an answer to Olympiacos' previous request – which had been submitted by letter dated 20 January 2012 – whereas the Appealed Decision was passed, pursuant to Articles 108 et seq. FDC, after the appropriate contradictory proceeding had taken place and both Olympiacos and Independiente had been given the opportunity to be heard.

133. Only if the Closure Letter had been issued after the procedure set forth in Articles 90 et seq. FDC had been followed, the second preliminary requirement could be considered satisfied. This procedure comprises, among other formalities, the following:

- an initial report, in writing, of the offending conduct;
- further investigation by the Disciplinary Committee secretariat, which shall be carried under the chairman's guidance;
- although the rules is for no oral statements to take place, these may be arranged at the request of one of the parties;
- deliberation before a final decision is passed by a simple majority of the members of the Disciplinary Committee present at that time.

134. In the present case, it is evident that these formalities were only satisfied by the Appealed Decision rendered by the FIFA Disciplinary Committee, but not by the Closure Letter.

135. In view of the above, only the Appealed Decision may be considered to have been passed in accordance with the second preliminary requirement.

136. In conclusion, the Panel concludes that the Closure Letter shall not have the force of *res iudicata* with regard to the Appealed Decision, because the Closure Letter does not meet the minimum requirements to have the force of *res iudicata* effect, whereas the Appealed Decision meets them all.

*(dd) The triple identity test and its application to the present case*

137. Notwithstanding the above, even if the Closure Letter was deemed to have been issued by the competent FIFA decision making body and after the appropriate contradictory procedure, it would not meet the "triple identity check" to have the force of *res iudicata*.

138. The triple identity check consists of the verification of (i) the identity between the parties to the first decision and to the subsequent one, so that if the parties were the same in both cases, the *res iudicata* may come into play; (ii) the identity of objects between the two decisions; and (iii) the identity of the basis (*causa petendi*) on which the claim is submitted.

139. By way of example, the Panel wishes to quote the decision rendered in CAS 2006/A/1029, which refers to the triple identity check and is thus applicable to the present case:

*"This Panel notes that the issue to be decided in the present dispute is not whether a Judgement has legal force as soon as it is rendered but whether it has legal force only between the parties in the dispute before the Courts or also in relation to third parties not involved in the dispute. Legal jurisprudence establishes the three elements of a res judicata, namely:*

*- The same persons – eadem personae;*

*- The same object – eadem res;*

*- The same cause – eadem causa petendi.*

*14. For the exceptio res judicata to be successfully admissible, it is necessary that all three elements be concurrently present. In the absence of one of these elements, it cannot be said that the object is the same – nisi omnia concurrunt, alia res est. The plea of res judicata is founded on the principle of public interest – interest rei publicae ut sit finis litium. It was founded to safeguard the certainty of rights which have already been adjudicated upon and defined by a judgement. Res judicata eliminates the possibility of pending disputes prejudicing the rights which have already been established by a judgement. The principle of res judicata ensures that whenever a dispute has been defined and decided upon, it becomes irrevocable, confirmed and deemed to be just – res judicata pro veritate habetur.*

*15. The three elements of res judicata are of equal fundamental importance and relevance. The element of the same persons (eadem personae) is therefore as important as the other two elements. Its absence is enough to exclude the plea of res judicata since who was not present in the judicial proceedings, could not be considered as bound by a sentence which has been rendered res judicata".*

140. Additionally, the Panel also considers of interest the decision of the Swiss Federal Tribunal, dated 13 April 2010, wherein the Federal Tribunal set aside for the first time an international arbitral award as a consequence of the violation of public policy, which in that case consisted precisely on the violation of the res *iudicata* principle.

141. Thus, the *res iudicata* principle shall be considered mandatory for the parties and the decision making body. Moreover, the classification of the *res iudicata* principle as part of public policy indicates that it is to be analysed *ex officio* by the decision making body. In the present case, in view of the Panel it is essential to analyse whether or not the *res iudicata* principle was infringed upon by the Appealed Decision.

142. In the present case, the Panel is of the opinion that the first identity test is met by the Closure Letter, as the parties are the same (Olympiacos and Independiente) as those of the Appealed Decision. In this respect, the Respondent has provided with its Answer to the Appeal and in the FIFA file a copy of the Closure Letter which includes the communications that were made by telefax to both parties (FIFA and Independiente).

143. With regard to the second identity test, it requires that the relevant decisions have been rendered based on the same object – that is, the matter at issue in both proceedings ought to be identical.

In the present case, for the Closure Letter to have force of *res iudicata*, it and the Appealed Decision should have identical objects. In the opinion of the Panel, this is not the case, *inter alia*, for the following reasons:

- The Closure Letter is directed to inform the parties of the situation of the Olympiacos proceedings before the Players' Status Committee, whereas the Appealed Decision is directed to immediately and by itself impose a sanction on one of the parties.

- The Closure Letter contains information and recommendations to one of the parties, to which it is expressly directed, whereas the Appealed Decision imposes a sanction to the other party.

144. In respect to the third test, the Panel notes that this last requirement would only be met if the "cause" or "grounds" or "causa petendi" of the two claims were also the same. As has been examined in the present case it is evident that the Closure Letter was not passed after the appropriate disciplinary procedure was followed, but as a result of an autonomous FIFA decision, which was meant to answer the petition filed by Olympiacos to initiate disciplinary proceedings. Additionally, the Appellant was not heard before the Closure Letter was passed. On the opposite, the Appealed Decision was passed by the competent body after both parties were heard and the *causa petendi* had therefore been properly determined.

145. Thus, the Panel is of the opinion that the cause for the Closure Letter was to answer Olympiacos' letter dated 20 January 2012 and to provide it with information that FIFA considered to be of relevance, whereas the cause for the Appealed Decision was only to apply Article 64 FDC.

*(de) Closure of proceedings shall only be decided after a case-by-case examination of the specific circumstances of each case*

146. Finally, the Panel wishes to make reference to the fact that the CAS jurisprudence (e. g., CAS 2005/A/899, among others) has on several occasions concluded that all FIFA letters – similar or not to the one at issue here – shall be thoroughly examined before a conclusion may be reached as to whether or not they shall have the force of *res iudicata*.

147. By way of example, the Panel considers of interest to cite CAS 2008/A/1633, wherein the panel stated, *inter alia*, the following:

*"17. In other words, the Panel understands that in the mentioned letters, FIFA is not stating that there is no further recourse for the Club within FIFA to deal with the consequences derived from the Player having left his Club to join his national team in Beijing, or that the Club must submit its claims and petitions arising from it before another body or institution. If this were the case, it could be possibly contended that a ruling affecting the legal situation of the Club (i.e. a decision, or rather a "non-decision") exists. In the Panel's opinion, what FIFA is actually stating in these letters is that it is not in a position to intervene in the matter submitted by the Club in the way it has been submitted, but leaves the door open to deal with the case if appropriately filed before its*

*bodies. And this, in the Panel's view, makes the difference with a situation of strict and final denial of justice eventually challengeable before CAS.*

*18. The above mentioned grounds lead the Panel to consider that the letter of FIFA dated 12 August 2008:*

*i) is not a ruling materially affecting the legal situation of the parties (i.e. a decision), and*

*ii) does not constitute an absence of ruling where there should have been a ruling (i.e. denial of justice)".*

148. Therefore, it is also necessary to thoroughly examine the contents of the Closure Letter, regardless of whether or not it has the force of *res iudicata.*

149. In the present case, it looks clear to the Panel that the Closure Letter has a very limited scope, as is evidenced by the following:

- The Closure Letter explicitly states that it is meant to *"(…) inform [Olympiacos] that (…) Club Atlético Independiente appears to have been put under administration and that, consequently, the administration by the club of its actives and passives might be subject to the intervention of a judicial appointed authority".*

- Furthermore, the Closure Letter also states that *"[FIFA] do not appear to be in a position to further continue with the proceedings in the present case".*

- The Closure Letter *"(…) kindly* [invited Olympiacos] *to contact the Argentinian Football Association directly and immediately, so as to receive indications with regard to the competent authorities to address in order to have your alleged rights preserved".*

- Finally, the Closure Letter expressly states that the *"(…) statements made above are based on the information (…) received from the Argentinian Football Association only and hence are of a general nature and thus without prejudice whatsoever".*

150. Consequently, regardless of the already dismissed *res iudicata* claim, the effects of the Closure Letter should be limited to its intentions and wording, which in the view of the Panel is only intended to inform Olympiacos of the circumstances at that date.

### *(e) The alleged infringement of the prohibition of retroactivity*

151. In the present case, the Appellant has also claimed that the opening of disciplinary proceedings by the FIFA Disciplinary Committee after the Closure Letter was against the rule that prohibits retroactive application of new criteria.

152. In this respect, the alleged breach of the rule that prohibits retroactive application of new rules and regulations only forbids the retroactive application of regulations which are detrimental for one of the parties, whereas in the present case no new rule or regulation has been applied, as CAS 2012/A/2750 (which was issued after the Closure Letter and right before the second

Olympiacos request to open disciplinary proceedings) merely introduced a different interpretation of Article 107 b) as a result of CAS jurisprudence, to which FIFA was necessarily bound.

153. Moreover, there were several CAS awards, wherein FIFA was advised to change its approach regarding insolvency proceedings. According to the so-called old practice, as soon as a debtor filed for insolvency, FIFA would inform the parties that its decision making bodies considered themselves unable to move forward with the proceedings, whereas the so-called new practice required FIFA to analyse each situation in order to determine whether or not it was appropriate to close the proceedings. This new practice was the result of a literal interpretation of Article 107 (b) FDC, which states that *"[p]roceedings may be closed if: (…) b) a party declares insolvency (…)"*. As a result, given that FIFA does not have an obligation to close proceedings, but is merely allowed to do so, it was necessary to previously examine each case in detail.

154. Furthermore, as stated, CAS 2012/A/2750, which provided for the new interpretation, was rendered after the Closure Letter was issued, but before Olympiacos filed its second request for the opening of the disciplinary proceedings (dated 19 November 2012). Therefore, in as much as the so-called new practice was applied to a subsequent petition by Olympiacos, no retroactivity can be predicated of the FIFA decision to open disciplinary proceedings after CAS 2012/A/2750 and Olympiacos filing for disciplinary proceedings.

155. Moreover, the Panel wishes to note that in CAS 2012/A/2754, which was quoted by the Appellant, FIFA claimed that the immediate closure of ordinary proceedings was the result of the declaration of insolvency of the debtor and in application of a longstanding customary law which required it to do so. In that case, FIFA alleged that its position was supported by a constant, consistent, long-lasting and undisputed practice.

156. However, the panel in CAS 2012/A/2754 concluded that FIFA had been unable to adduce any evidence as to the existence of such a longstanding practice and, as a result, in the absence of any evidence of the existence of the alleged widespread practice, the panel concluded that the objective element of a practice (i.e. *longa consuetudo*) was missing and had not been satisfied.

157. In the present case, the Panel agrees with CAS 2012/A/2754 as no adequate proof of such a longstanding practice has been provided by the Appellant. Nonetheless, even if there was such a customary law, the application of the so-called new practice by FIFA in this case would merely be the result of FIFA acting in compliance with CAS jurisprudence and a literal interpretation of Article 107 (b) FDC.

158. Finally, the Panel agrees with the Respondent with regard to the estoppel principle, which should not have application in this case as it is a Common law principle.

### *(f) The alleged passive conduct of Olympiacos*

159. Furthermore, the Appellant alleges that the passive conduct of Olympiacos after the Closure Letter should merit the revocation of the Appealed Decision and the closure of the disciplinary proceedings.

160. In this respect, the Panel is of the opinion that there has been no passive conduct of Olympiacos but merely a compliance situation by Olympiacos, which, given the fact that the Closure Letter is a final FIFA Decision, Olympiacos' only recourse would have been to appeal against it before the CAS, if in disagreement. Lack of appeal should in no way be considered as a passive conduct.

161. Consequently, there was no such passive conduct, for the creditor was invited to file a claim before Argentina national courts, but neither did FIFA indicate that it were closing any further proceedings as per Article 107 (b) FDC, nor that Olympiacos' credit would perish if it did not take any immediate action.

162. Furthermore, the Panel agrees with the Respondent as to the lack of correspondence with this case and the award rendered in CAS 2011/A/2646.

### *(g) The alleged impossibility of the Appellant to pay its debt as a result of the controls and regulations set forth under Argentinian law for international transfer of funds*

163. Subsidiarily, the Appellant claimed that, in any event, Independiente would not be able to pay its debt to Olympiacos, as a result of the controls and regulations set forth under Argentinian law for international transfer of funds. Accordingly, the Appellant also claimed the following:

> *"(…) even if CAS confirms Independiente shall be condemned for non-fulfilment of a decision of a pecuniary nature, the Panel shall consider the actual situation in Argentina and admit there is a temporary impossibility of performance that impedes compliance".*

164. The Respondent objected the following:

> *"(…) in application of Art. R57 par. 3 of the Code (…) the Appellant's allegation of 'impossibility of performance' as well as all documents submitted in relation thereto (i.e. Annexes 9 - 11 of the Appeal Brief) should not be considered by the Panel".*
>
> Additionally, the Respondent objected that, *"(…) even if the Panel decided to consider the allegation in question as well as all documents submitted in relation thereto, the argument brought forward by the Appellant is not convincing and has to be dismissed (…)* [because] *there does not exist an absolute, insurmountable 'impossibility of performance' for the Appellant to comply with the decision subject to enforcement".*

165. In this respect, the Respondent expressly referred to the memo dated 6 December 2013 submitted by the Head of Integrity & Compliance of the FIFA Transfer Matching System GmbH, wherein there is proof that the Appellant has been able, in other cases, to circumvent the alleged legal restrictions of the Argentinian government.

166. The Panel wishes to note that the burden of proof is on the claimant (in this case, the Appellant), and that no proof has been submitted, except for the opinion of an expert witness.

167. In this respect, only if the Appellant had submitted appropriate proof as to (i) the existence of laws or regulations with the limitative effects over international transactions on foreign exchange (USD or other foreign currency), or (ii) their previous application to the Appellant in other cases, the Panel could have considered that there was enough proof of such alleged impossibility for Independiente to fulfil its payment obligation to Olympiacos.

168. Additionally, the FIFA Transfer Matching System GmbH provided the Panel – within the constraints of Swiss data protection laws – with several cases wherein the Appellant was able to perform payments in exchange currencies, some of them for the transfer of players.

169. Thus, the Panel finds there is enough proof that the alleged impossibility to make payment of the amount due to Olympiacos is without merit.

***(h) The request to start counting the period of grace of 90 days granted to the Appellant in which to settle its debt to the Club Olympiacos FC as from the date of this award***

170. Finally, the Appellant requests that if the Panel finds the appellation without merit and confirms the Decision Appealed hereby, the period of grace of 90 days granted to the Appellant in which to settle its debt to the club Olympiacos FC should start counting as from the notification of such CAS award to be rendered in the present matter. The Respondent does not oppose this request.

171. Consequently, the Panel upholds the abovementioned request by the Appellant and agrees that the period of grace of 90 days granted to the Appellant in which to settle its debt to the club Olympiacos FC shall start counting as from the notification of the CAS award in the present proceedings.

## ON THESE GROUNDS

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

1. The appeal filed by Club Atlético Independiente against the decision of the FIFA Disciplinary Committee dated 7 November 2013 is dismissed.

2. The decision of the FIFA Disciplinary Committee dated 24 July 2013 is confirmed.

3. The period of grace of 90 days granted to the Appellant in the decision of the FIFA Disciplinary Committee in order to settle its debt to the club Olympiacos FC shall start counting as from the date of notification of this CAS Award.

(…)

6. Any other or further claims are dismissed.