Arbitration CAS 2013/A/3049 Club Atlético Colón v. Fédération Internationale de Football Association (FIFA), award of 5 July 2013

Panel: Mr Rui Botica Santos (Portugal), President; Mr Juan Pablo Arriagada Aljaro (Chile); Mr Pedro Tomás Marques (Spain)

Football
Disciplinary sanction imposed by FIFA on a club
Article 107 (b) FDC and "concurso preventivo" proceedings under Argentinean law
Article 21 of the Ley de Concursos y Quiebras and opening of reorganisation proceedings under Argentinean law
Closing of "concurso preventivo" proceedings and Article 107 (b) FDC

1. **Bankruptcy declarations under Article 107 (b) of the FIFA Disciplinary Code (FDC) should be distinguished from the "*concurso preventivo*" proceedings, which do not fall under the FDC. Furthermore, cases related to enforcement proceedings should be distinguished from the recognition of a debt in pending bankruptcy proceedings.**

2. **Article 21 of the Ley de Concursos y Quiebras states as follows: "The opening of a reorganisation proceeding leads, upon the publication of the judicial order, to the suspension of all patrimonial judicial proceedings against the insolvent, for cause or title before the opening of the insolvency judicial order". Pursuant to Article 21 of the Ley de Concursos y Quiebras, it is therefore legally incorrect for the appellant club to argue that they cannot pay another club a debt which matured after the appellant club went into the *concurso preventivo*.**

3. **If the *concurso preventivo* proceedings have already been closed and the creditors determined, the only aspect pending is the payment of the creditors under the *concurso preventivo* proceedings. Article 107 (b) FDC on the non-enforcement of the appealed decision can therefore not be applicable to such a case. The non-enforcement of the appealed decision could lead to an unfair precedent where the financial fair play rules and accounts of selling clubs can be destabilised if buying clubs were allowed to unjustly enrich themselves out of a *concurso preventivo* by holding themselves out to selling clubs as being financially able to pay a transfer fee for acquiring a player, and only to later justify a failure to pay for these acquisitions by invoking restrictions related to the payment of outstanding credits brought about by a creditor's agreement, and which outstanding credits do not include the credit in question.**

I. THE PARTIES

1. Club Atlético Colón (the "Appellant" or "Colón") is an Argentine 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 Zürich, Switzerland. FIFA is the governing body of international football.

II. THE FACTS

3. This appeal was filed by Colón against the decision rendered by the FIFA Disciplinary Committee on 20 November 2012 and notified to the Appellant on 13 December 2012 (the "Appealed Decision").

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

II.1. The Appellant's legal status

5. On 20 July 2006, the first instance civil and commercial district court of Santa Fé, Argentina, issued an order declaring Colón in *concurso preventivo* (the "*Concurso Preventivo* Proceedings") and placed the Appellant under administration with certain restrictions in relation to its activity (the "Administration Order").

6. The *Concurso Preventivo* Proceedings is a judicial procedure in which all the creditors are summoned to present their claims and to set out a programme for having the said claims settled. Together with the court, the creditors appointed an administrator (*sindico*) to supervise the management of Colón's outstanding credits. Colón was never under bankruptcy proceedings.

7. Pursuant to the Administration Order and in accordance with Article 15 of the Argentina Law no. 24.522 (the "Ley de Concurso y Quiebras"), Colón's assets were immediately placed under the administrator's supervision.

8. The *Concurso Preventivo* Proceedings came up with an established list of the *creditos verificados o admitidos* (the "Verified and Admitted Credits").

9. On 3 December 2006, Colón entered into an agreement with Mexican club Club de Fútbol Atlante ("Atlante") under which Atlante agreed to transfer 50% of the economic rights of the player J. (the "Player") to Colón in exchange for USD 600,000 (the "Transfer Agreement").

Pursuant to clause 3 of the Transfer Agreement, Colón had the option to buy the remaining 50% of the Player's economic rights in exchange for another USD 600,000. This option could be exercised not later than 30 June 2008.

10. On 9 December 2006, the Appellant's administrators filed a report regarding the credits done in relation to Colón.

11. On 24 July 2007, the Argentinean courts issued a resolution regarding Colón's credits.

12. On 9 October 2007, Colón exercised the option to buy 50% of the Player's economic rights.

13. On 31 March 2008, Colón filed an application before the Argentinean court, proposing to pay the Verified and Admitted Credits.

14. On 30 June 2008, Colón's obligation to pay Atlante USD 600,000 for 50% of the Player's economic rights ("Atlante's Credit") fell due.

15. Atlante's Credit was not part of the Verified and Admitted Credits.

16. On 23 October 2008, the Argentinean courts issued a resolution in relation to the creditors and decided among other things, to *"(…) maintain the general restrictions on Colón's ability to access immovable property during the administration period (…) and to allow Colón free access to the rest of its assets (…) lifting the registration restrictions imposed by the Argentinean football association and the national registry of automobile property (…)"*.

II.2. The FIFA Players' Status Committee Proceedings

17. On 14 November 2008, Atlante filed a claim against Colón before the FIFA Players' Status Committee (the "PSC"), claiming that Colón had breached its contractual obligation under the Transfer Agreement.

18. On 16 November 2010, the Single Judge of the PSC rendered his decision (the "PSC Decision") and held as follows:

    a) Colón was ordered to pay Atlante USD 600,000 within thirty days of notification of the PSC Decision plus a 5% annual interest from 1 January 2008.

    b) Colón was ordered to pay a total of CHF 20,000 as procedural costs, CHF 15,000 to FIFA and CHF 5,000 to Atlante.

II.3. The Appellant's CAS Appeal against the PSC Decision

19. On 7 October 2011, Colón filed an appeal against the PSC Decision before the Court of Arbitration for Sport (the "CAS"). Colón did not file any defence in relation with its state under *"concurso preventivo"*.

20. On 5 June 2012, the CAS issued its decision and upheld the PSC Decision. It also ordered Colón to pay Atlante CHF 10,000 as costs related to the CAS proceedings.

II.4. The FIFA Disciplinary Committee Proceedings

21. By the end of August 2012, Colón was yet to pay Atlante the amount ordered in the PSC Decision and confirmed by the CAS, and on 31 August 2012, the FIFA Disciplinary Committee opened disciplinary proceedings against Colón.

22. On 11 September and 17 October 2012, Atlante sought the FIFA Disciplinary Committee's intervention, stating that the Appellant had not paid the amounts ordered in the PSC Decision.

23. On 23 October 2012, the FIFA Disciplinary Committee Secretariat informed Colón and Atlante that the matter would be submitted to the FIFA Disciplinary Committee on 20 November 2012. It urged the Appellant to pay the outstanding amount and asked it to state its final position on the payment of this amount, failure to which the FIFA Disciplinary Committee would decide the matter based on the documents before it.

24. Colón did not file any position or defence, and on 20 November 2012, the FIFA Disciplinary Committee issued the Appealed Decision and:

    a) Found Colón guilty of failing to comply with Article 64 of the FIFA Disciplinary Code 2012 (the "FIFA Disciplinary Code") and ordered it to pay a fine of CHF 25,000 within thirty days of notification of the Appealed Decision;

    b) Granted Colón a grace period of thirty days to pay Atlante in accordance with the PSC Decision. Failure by Colón to pay Atlante the amount due within the aforementioned grace period would entitle Atlante to send a written notice to the FIFA Disciplinary Committee requesting it to deduct six points from the Appellant's national league competition;

    c) Informed the Appellant that the FIFA Disciplinary Committee would consider Colon's possible relegation to the immediate lower league in case it failed to pay the amount ordered in the PSC Decision even after the six points had been deducted; and

    d) Pursuant to Article 105.1 of the FIFA Disciplinary Code, Colón was ordered to pay CHF 2,000 as the legal costs related to the FIFA Disciplinary Committee proceedings.

25. The Appealed Decision was based on the following grounds:

a) Colón had breached Article 64 of the FIFA Disciplinary Code by failing to comply with the PSC Decision, which had been upheld by the CAS.

b) Failure by Colón to pay the amount ordered in the PSC Decision may cause financial problems to Atlante.

c) Pursuant to Article 64.1 (a) and Article 15.2 of the FIFA Disciplinary Code, the fine imposable for failing to comply with a decision which has the nature of the PSC Decision ranges between CHF 300 and CHF 1,000,000.

d) Pursuant to Article 64.1 (c) of the FIFA Disciplinary Code, failure by a club to comply with the PSC Decision within the thirty days grace period provides for the deduction of points or relegation to the immediate lower league.

e) Pursuant to Article 64.3 of the FIFA Disciplinary Code, the number of points to be deducted depends on the amount due and outstanding from the PSC Decision. The FIFA Disciplinary Committee's practice is to deduct six points.

f) Therefore, should Colón fail to comply with the PSC Decision after the thirty days grace period, Atlante may send a written notice to the FIFA Disciplinary Committee requesting the deduction of six points. These points shall automatically be deducted once Atlante makes a written request to this effect.

III. THE ARBITRAL PROCEEDINGS

26. On 3 January 2013, the Appellant filed its Statement of Appeal before the CAS in English, and requested that the proceedings be conducted in Spanish. The Appellant requested a stay of the execution of the Appealed Decision, and nominated Mr. Juan Pablo Arriagada Aljaro as arbitrator.

27. In a letter received by the CAS Court Office on 14 January 2013, the Appellant withdrew its request for a stay and filed its Appeal Brief along with documents and evidence it intended to rely on. The Appellant offered to adduce, if the Panel deemed necessary:

a) A witness statement prepared by Mr. Raul Alberto Dadea ("Dr. Dadea") on the bankruptcy issues from the Argentinean legal perspective.

b) A statement prepared by Dr. Oscar Radkievich as an expert witness.

c) All the files/documents before the Argentinean courts in relation to the bankruptcy proceedings. The Appellant claimed to have been unable to adduce these together with the Answer due to the judicial holiday season in Argentina, which ends in February, and that it will be in a position to adduce these documents around 22 February 2013, when the courts re-open.

28. On 15 January 2013, the CAS Court Office granted the Appellant until 17 January 2013 to state whether it consented to the Respondent's proposal to have the overall proceedings conducted in English, with the Respondent being allowed to file its submissions and annexes in Spanish.

29. On 15 January 2013, the Appellant consented to the Respondent's proposal to have the overall proceedings conducted in English, with the Respondent being allowed to file its submissions and annexes in Spanish. The CAS Court Office thus informed the Parties that the Respondent could file its submissions and annexes in Spanish, and that pursuant to Article R29 of the Code of Sports-related and Arbitration (the "CAS Code"), this would be ratified by the Panel upon constitution.

30. On 5 February 2013, the Respondent filed its Answer, together with documents and evidence it intended to rely on. The Respondent objected to the Appellant's offer to adduce all the files/documents before the Argentinean courts in relation to the bankruptcy proceedings, saying that since the Appellant claimed to have started bankruptcy proceedings in 2006, it should therefore have access to at least all, if not some of the documents. The Respondent informed the CAS Court Office that it did not object to the Appellant's request for a stay.

31. By communication dated 6 February 2013, the CAS Court Office informed the Parties that the Panel had been constituted as follows:

- President: Mr. Rui Botica Santos, Attorney-at-law, Lisbon, Portugal
- Mr. Juan Pablo Arriagada Aljaro, Attorney-at-law, Santiago de Chile, Chile, appointed by the Appellant.
- Mr. Pedro Tomás Marques, Attorney-at-law, Barcelona, Spain, appointed by the Respondent.

32. On 6 February 2013, the CAS Court Office invited the Parties to state whether they preferred a hearing or to have the matter decided on written submissions.

33. On 7 February 2013, the Respondent indicated its wish to have the matter decided on written submissions.

34. On 20 February 2013, the CAS Court Office informed the Parties as follows:

a) The Appellant was invited to state on or before 25 February 2013 whether or not it wanted a hearing or preferred the matter to be decided on the basis of the Parties' written submissions.

b) The Appellant was informed that in case it preferred the matter to be decided on the basis of written submissions, then the Panel might not consider the relevance of the witnesses and the witness statements proposed. Should the Appellant prefer a hearing to be held, it was to summon the following witnesses as well as adduce their written statements:

- Dr. Oscar Radkievich; and

- Dr. Dadea and his written statement on the bankruptcy issues he will develop from the Argentinean legal perspective.

c) The Appellant was invited to adduce the relevant files/documents currently pending before the Argentinean courts in relation to the bankruptcy proceedings or before 25 February 2013, on condition that it provided evidence proving that the Argentinian court was on holiday at the time the Appeal Brief was filed.

35. On 22 February 2013, the Respondent objected the Panel's decision to invite the Appellant to adduce documents related to the *Concurso Preventivo* Proceedings before the Argentinean courts. The Respondent stated that the PSC proceedings were held from 17 November 2008 to 6 August 2012, with the FIFA Disciplinary Committee proceedings taking place from 31 August 2012 to 13 December 2012, and that the Appellant never mentioned the existence of the *Concurso Preventivo* Proceedings during this time.

36. On 22 February 2013, the CAS Court Office granted the Appellant a deadline of 25 February 2013 to reply to the Respondent's letter dated 22 February 2013.

37. In a letter received by the CAS Court Office on 25 February 2013, the Appellant filed the documents requested in the CAS Court Office letter dated 20 February 2013. It also requested a hearing and asked the CAS Court Office whether it wanted an additional statement from Dr. Dadea. The Appellant stated that the Respondent's objection to the production of documents should be dismissed because:

a) The Appellant complied with Article R51 of the CAS Code, which allows a party to specify all evidence it intends to rely on, and also explained the reasons as to why it was unable to file the relevant files/documents currently pending before the Argentinean courts in relation to the bankruptcy proceedings at the time of filing the Appeal Brief; and

b) Although Article R56 of the CAS Code prohibits a party from adducing evidence filed after the close of the submissions phase, it does not prohibit the production of evidence which was specified at the time of filing the Appeal Brief.

38. On 28 February 2013, the CAS Court Office responded to the Parties' respective letters which were filed on 22 and 25 February 2013 as follows:

a) The Panel's decision to invite the Appellant to adduce the files/documents related to the Argentinean court proceedings was arrived after an appreciation of the facts and arguments filed by the parties in their submissions, including the grounds invoked by the Respondent in objecting the Appellant's request;

b) Pursuant to Article R57 of the CAS Code, the Panel has full power to review the facts and the law. The Appellant's failure to adduce the files/documents related to the Argentinean court proceedings during the FIFA proceedings is therefore irrelevant;

c) Having analysed the facts and the case as a whole, the Panel is of the view that the files/documents related to the Argentinean court proceedings are relevant in determining the subject matter of the case. The said files/documents may therefore be admitted on exceptional grounds under Article R56 of the CAS Code, on condition that the Appellant proves that the Argentinean courts were on holiday at the time it filed the Appeal Brief;

d) The Respondent is granted fifteen days to comment on the files/documents received from the Appellant in relation to the Argentinean court proceedings; and

e) It is upon the Appellant to determine what kind of evidence it considers relevant. Pursuant to Article R56 of the CAS Code and the terms of the CAS Court Office letter dated 20 February 2013, the submissions phase had closed, and the Panel did not require any additional statement from Dr. Dadea.

39. On 22 March 2013, the Respondent filed its reply to the files/documents received from the Appellant in relation to the Argentinean court proceedings.

40. On 28 March 2013 the Order of Procedure was sent to the Parties, which was signed without any remarks.

41. After having consulted the parties, the Panel deemed that a hearing was necessary and it was held on 29 May 2013 in Lausanne, Switzerland. The Panel was assisted at the hearing by Mr. Pedro Fida, Counsel to the CAS. The Appellant was represented by Mr. Ariel Reck and the Respondent by Ms. Wilma Ritter.

42. During the hearing, the Panel heard Dr. Dadea's oral testimony.

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

IV. THE PARTIES' POSITIONS

IV.1 The Appellant's position

i. The law applicable

44. Pursuant to Article R58 of the CAS Code and Article 62 of the FIFA Statutes, the laws applicable are the FIFA regulations supplemented by Swiss law, with reference being made to Argentinean law on specific issues related to bankruptcy and insolvency.

ii. The Appellant's concurso

45. The Appellant is under a *concurso preventivo*. Colón requested an Administration Order before the first instance civil and commercial district court of Santa Fé, Argentina in the *Concurso Preventivo* Proceedings.

46. The *Concurso Preventivo* Proceedings are yet to be concluded. The Appellant expects them to come to a close within the next two years, which will thereby bring an end to the legal restrictions currently facing Colón in accordance with the Argentinian law on bankruptcy and insolvency proceedings.

47. The *Concurso Preventivo* Proceedings mean that no disciplinary action or prosecutions can be instituted against Colón. This is clear from the FIFA Disciplinary Code and is also recognised by FIFA as "customary law". Specific reference is made to CAS 2012/A/2754, CAS 2011/A/2343, CAS 2012/A/2750 and CAS 2011/A/2646.

48. Article 107 (b) of the FIFA Disciplinary Code is clear that *"[p]roceedings may be closed if a party declares bankruptcy"*. This is a mandatory obligation on FIFA's part.

49. FIFA was aware of Colón's *concurso preventivo* situation, and FIFA has in other cases requested the AFA to expedite Colón's *Concurso Preventivo* Proceedings while at the same time suspending the FIFA disciplinary proceedings.

50. The above-mentioned cases relate to the references 08-00650 and 10-02890 between Colón and Mexican club Pumas de la UANL where FIFA suspended the disciplinary proceedings after requesting further information from Colón on 11 July 2011, and from the AFA on 14 July 2011 in relation to the Appellant's *concurso preventivo* status.

51. It is worth noting that Colón was the claimant in the FIFA case involving Pumas de la UANL, in which FIFA proceeded to suspend the proceedings notwithstanding the fact that Colón's claim against Pumas de la UANL was USD 2,500,000. Colón would the fact that it was in a position to comply with the PSC Decision had FIFA not suspended its case against Pumas de la UANL.

52. Given its past precedent of suspending cases in bankruptcy and administration situations, it is unfair for FIFA to decline to suspend the disciplinary proceedings which led to the Appealed Decision, and especially to suspend proceedings in which Colón was the claimant and decline to suspend proceedings in which Colón is the respondent.

53. Indeed, FIFA stressed in its answer in another CAS matter CAS 2012/A/2754 that *"(…) the closure of the procedures in front of FIFA's deciding bodies is by no means only in favour of the club under administration; when the FIFA administration proceeds to close the procedures concerned, it obviously also closes all those cases in which the relevant club appears as claimant"*.

54. FIFA has since 2004 terminated all disciplinary cases involving clubs under administration or bankruptcy, regardless of whether such club was a claimant or respondent in disciplinary proceedings.

55. FIFA also recognizes that such termination has until 2011 been accepted by the parties involved, since said parties knew that such matters fell under the jurisdiction of the national courts where the *concurso preventivo* proceedings have been filed.

56. FIFA's decision to refrain from enforcing decisions where a club is under *concurso preventivo* or facing administration is based on the principle of public order. This principle does not prohibit the creditor from claiming its debt before the national courts of the country where the debtor club is domiciled.

57. The jurisdictional law requires all the parties to submit themselves to the national courts of the country where the debtor club is domiciled. It prohibits any other tribunal from asserting its jurisdiction. Therefore, a danger of having two different decisions exists should FIFA render disciplinary decisions over clubs which are already facing *concurso preventivo* proceedings. It is also unlikely for such decisions to be enforced.

58. Article 21 of the *Ley de Concursos y Quiebras* states as follows:

> *"La apertura del concurso produce, a partir de la publicación de edictos, la suspensión del trámite de los juicios de contenido patrimonial contra el concursado por causa o título anterior a su presentación, y su radicación en el juzgado del concurso".*
>
> Free English translation:
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> The opening of a reorganization proceeding leads, upon the publication of the judicial order, to the suspension of all patrimonial judicial proceedings against the insolvent, for cause or title before the opening of the insolvency judicial order.

59. Doctrines, such as one titled *"Arbitration and Insolvency – Selected conflict of laws problems by Stefan Kröll"* states that the judicial opening of insolvencies or bankruptcies always leads to the restriction of the debtor's capacity to administer and avail its assets.

60. The need to safeguard equity among all creditors also prohibits courts from hearing a case filed by a creditor in his individual capacity. The merger of all credit claims in one single court, inter alia, the *Concurso Preventivo* Proceedings is therefore an essential principle aimed at safeguarding the creditors' identity and distribution of the assets.

61. It is impossible, like the case before hand, for a club to comply with a disciplinary decision if the national courts prevent it from paying any monies as a result of judicial administration and control.

62. The principle which prevents a club from paying any sums owed to debtors during the course of *Concurso Preventivo* Proceedings is universal, and exists for the sole purpose of ensuring the application of the fundamental principles of insolvency. It is therefore impossible for FIFA to treat each case different from another.

63. The Swiss Federal Tribunal (the "SFT") has also regarded FIFA's stance as unreasonable and held that the national laws of each country must be taken into account, as seen in the SFT's judgments 4A_50/2012 and 4A_428/2008.

64. These legal hurdles therefore prevent Colón from complying with the PSC Decision, and should thus lead to the setting aside of the Appealed Decision.

iii. The enforcement proceedings should be terminated until the Concurso Preventivo Proceedings come to an end

65. In subsidiary, Colón requests the CAS to suspend the enforcement proceedings until the Argentinean courts close the *Concurso Preventivo* Proceedings. This was the case in CAS 2012/A/2750, where the panel held that Article 107 (b) of the FIFA Disciplinary Code is an exception to the general application of Article 64 of the FIFA Disciplinary Code, and also stated that the mandatory order of the national courts prevail over the FIFA disciplinary committee decisions.

66. FIFA also declined to open disciplinary proceedings in CAS 2012/A/2754 because the debtor therein, Club San Lorenzo de Almagro had been declared bankrupt by the Argentinean courts.

67. The relevant Argentinean law to be taken into account until the conclusion of the *Concurso Preventivo* Proceedings is Article 59 of the *Ley de Concursos y Quiebras*, which states that until the judge declares the *concurso* finalised the general restrictions attached to the debtor's assets shall remain for the period during which the administration is being fulfilled.

68. It is therefore apparent under Argentinean law that Colón remains under *concurso preventivo* until the conclusion of the *Concurso Preventivo* Proceedings, and such control also brings with it some prohibitions and restriction in as far as Colón is concerned.

69. The *Concurso Preventivo* Proceedings shall only come to a close once a proposal and/or guarantee for paying the debts due is made and the Argentinean judge officially closes the *Concurso Preventivo* Proceedings by publishing his judgment in the official bulletin, thereby lifting any legal restrictions facing the Club.

iv. Prayers and requests

70. Colón concludes its submissions by requesting the CAS to:

"1. Dismiss the FIFA Disciplinary Committee decision in its entirety.

2. Find that the fine imposed in the FIFA Disciplinary Committee decision together with the threat of deducting points be declared as having no effect.

3. Close the FIFA Disciplinary Committee proceedings given Colón's bankruptcy situation.

4. Alternatively set aside the FIFA Disciplinary Committee decision, and find that the fine imposed therein together with the threat of deducting points be declared as having no effect, and to suspend the disciplinary proceedings until the bankruptcy proceedings before the Argentinean courts come to a conclusion.

5. To order FIFA to bear all costs incurred with the present procedure and to find that the amount of CHF 2,000 which Colón was ordered to pay as costs has no effect".

IV.2 The Respondent's position

i. The Appellant did not comply with Article 64 of the FIFA Disciplinary Code

71. The Appealed Decision was issued pursuant to Article 64 of the FIFA Disciplinary Code, whose spirit is aimed at enforcing final and binding decisions issued by FIFA or the CAS so that FIFA can protect creditors and force debtors to pay their debts.

72. The sanctions and/or threats contained in Article 64 of the FIFA Disciplinary Code are meant to put the Club under pressure to comply with the Appealed Decision.

73. The FIFA Disciplinary Committee proceedings should be compared to enforcement proceedings pursuant to Swiss law, and the FIFA Disciplinary Committee be regarded as an enforcement authority.

74. The FIFA Disciplinary Committee only considers the facts arising after the date of the PSC Decision in deciding whether a creditor, or Colón has paid the debt due.

75. It is not in dispute that Colón neither paid the amount ordered in the PSC Decision nor entered into any payment agreement with Atlante.

76. Colón was notified of the FIFA Disciplinary Committee proceedings and invited to pay the amount ordered in the PSC Decision or issue a statement to the effect that the said amounts were no longer due. It however preferred not to participate in the disciplinary proceedings.

ii. The alleged concurso preventivo

77. The Argentinean courts placed Colón under administration on 20 July 2006. This was long before they signed the Transfer Agreement and long before Atlante filed its claim before the PSC.

78. The deadline for all creditors to submit their credits for verification expired on 14 September 2006. By this time, Atlante's Credit did not exist. The administrators filed their final report on

all the outstanding credits on 12 February 2008 and a proposal to pay the debts was filed at the Argentinean courts on 31 March 2008.

79. By the time Atlante filed its claim before the PSC on 13 November 2008, the Argentinean courts had already issued a resolution on 23 October 2008 in relation to the agreement with the creditors.

80. Therefore, the credit which led to the PSC Decision, and subsequently to the Appealed Decision is not part of the *Concurso Preventivo* Proceedings.

81. Colón has adduced no evidence proving that Atlante's Credit was taken into consideration in the *Concurso Preventivo* Proceedings.

82. Paragraph two of the Argentinean court resolution in relation to the agreement with the creditors also decided to *"habilitar la libre disponibilidad de sus restantes"*, i.e to enable Colón to freely administer its assets with the exception of the immovable property "bienes inmuebles". This means that the Argentinean courts gave Colón the freedom to decide on its assets.

83. There is no procedure pending before any national court regarding the execution of the CAS award, which was issued on 5 June 2012 at a time when Colón had full control of the administration of its assets. Colón is still affiliated to the AFA and FIFA, takes part in the national championship, has regular activity as a club and has full control in the administration of its assets. Colón is free to sign players and engage in transfer agreements. It would be contrary to the principle of contractual stability if Colón were to invoke "bankruptcy" or "administration" in order to avoid complying with its obligations.

84. Colón is currently under *concurso preventivo* only because they have to pay the amounts stipulated in the agreement reached with the creditors, which was accepted by the Argentinean courts. These amounts came about long before the courts placed Colón under *concurso preventivo.*

85. Colón's legal situation does not therefore justify the closure or suspension of the disciplinary proceedings.

86. The Appealed Decision was rightfully issued in accordance with Article 64 of the FIFA Disciplinary Code for failing to comply with the CAS decision dated 5 June 2012. Colón only intents to delay the execution of the Appealed Decision and the payment of the amounts ordered in the PSC Decision.

87. FIFA was never aware of the Appellant's alleged administration. The FIFA letter dated 11 June 2011 only points towards a request for information from the Appellant and the AFA. At no point did FIFA declare the disciplinary proceedings closed or suspended.

88. There is also an internal memo sent by the FIFA PSC to the FIFA Head of Disciplinary and Governance confirming that there has been no suspension of any FIFA proceedings involving the Appellant either as a claimant or respondent. There is also a copy of the claim filed by Colón

before the FIFA PSC in October 2011 against club Necaxa of Mexico wherein Colón does not mention any administration procedure, notwithstanding the fact that Colón claims to have submitted itself to administration proceedings in 2006.

89. The Appellant failed to discharge its burden of proving that it was under administration or *Concurso Preventivo* Proceedings, and even failed to do this in its Statement of Appeal and Appeal Brief.

90. The statement adduced by Dr. Dadea, who claims to be Colón's lawyer in the *Concurso Preventivo* Proceedings does not constitute documentary evidence and should not be considered.

91. In order to determine whether a club is under administration or bankruptcy, the following official documents are required by the FIFA deciding bodies:

a) A copy of the judicial order that approved the *concurso preventivo*;

b) Information regarding the legal consequence of this situation;

c) Information on whether or not the club has retained control of the administration of its assets; and

d) Information on whether the club is still affiliated to the Football Association.

92. Even if Colón adduces an Administration Order from the national court proving it is under administration, it is the FIFA Disciplinary Committee's discretion to decide whether or not to close the disciplinary proceedings. Article 107 (b) of the FIFA Disciplinary Code is clear that proceedings may be closed if a party declares bankruptcy.

93. The FIFA Disciplinary Committee always decides on a case by case basis before deciding to close such proceedings. Some of the aspects taken into consideration before closing disciplinary proceedings are:

a) Whether the club is still in control of its assets;

b) Whether the national court considered the amount of credit ordered in the PSC Decision; and

c) National law

94. The Administration Order placing Colón under *concurso preventivo* was made before the debt was born. Colón went under administration on 20 July 2006 and the Transfer Agreement was signed on 3 December 2006. The Administration Order issued by the Argentinean courts placing Colón under administration did not take into account Atlante's Credit against Colón. Therefore, the Appealed Decision did not contravene public order since the debt was not subject to any agreement between Colón and creditors who had been accepted by the Argentine court.

iii. Prayers and requests

95. FIFA concludes its submissions by requesting the CAS:

> *"1. To reject the Appellant's appeal in its entirety.*
>
> *2. To confirm the decision hereby appealed against.*
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> *3. To finally, to order the Appellant to bear all costs incurred in the present proceedings and to recover all the Respondent's legal expenses relating to the present proceedings".*

V. LEGAL ANALYSIS

V.1 Jurisdiction of the CAS

96. The jurisdiction of the CAS, which is not disputed, derives from Article R47 of the CAS Code and Article 67.1 of the FIFA Statutes 2012 ("FIFA Statutes") as read together with Article 64.5 of the FIFA Disciplinary Code.

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

V.2 Admissibility

98. In accordance with Article 67.1 of the FIFA Statutes, *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question*".

99. The Appealed Decision was notified to the Appellant on 13 December 2012 and the Statement of Appeal filed on 3 January 2013. This was within the required twenty one days.

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

V.3 Law Applicable

101. Article R58 of the CAS Code provides the following:

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

102. 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".

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

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

105. Given the specific nature of *concurso preventivo* and bankruptcy proceedings, which are governed by the national laws, the Panel also takes into consideration the Argentinean law governing these matters: *Ley de Concursos y Quiebras.*

VI. MERITS OF THE APPEAL

i. What is the object of the appeal?

106. It is clear from the facts and submissions adduced that Colón does not contest Atlante's Credit. Neither does it question FIFA's discretion to impose sanctions under Article 64 of the FIFA Disciplinary Code for failing to comply with the PSC Decision and the CAS award dated 5 June 2012, nor the proportionality of the sanctions imposed in the Appealed Decision. What the Appellant questions is whether Colón's legal status falls under article 107 (b) of the FIFA Disciplinary Code and causes FIFA to stay or terminate the enforcement of the PSC Decision which was also upheld by the CAS.

ii. The Appellant's legal status

107. The Appellant invokes Article 21 of the *Ley de Concursos y Quiebras* and states that pursuant to this provision, no new cases of a financial nature can be filed against Colón once the bankruptcy proceedings have been filed, and that the act of filing a bankruptcy proceeding leads to the suspension of the initiation of cases of a financial nature against the bankrupt. In support of its allegations, the Appellant also invokes Article 132 of the *Ley de Concursos y Quiebras*, which states as follows:

"La declaración de quiebra atrae al juzgado en el que ella tramita, todas las acciones judiciales iniciadas contra el fallido por las que se reclamen derechos patrimoniales. (…)".

Free English translation:

The bankruptcy declaration has the effect that any pending patrimonial judicial claim should be discussed and decided within the bankruptcy proceedings.

108. Colón asserts that the *concurso preventivo* prevents it from paying any monies as a result of the *Concurso Preventivo* Proceedings and that the merger of all credit claims involving *concurso preventivo*

in one single court is therefore an essential principle aimed at safeguarding the creditors' identity and distribution of the assets.

109. It is the Appellant's submission that the FIFA disciplinary proceedings should be closed or suspended pursuant to Article 107(b) of the FIFA Disciplinary Code until the Argentinean courts close the *Concurso Preventivo* Proceedings. It also cites CAS 2012/A/2750, CAS 2011/A/2343, and CAS 2011/A/2646 and FIFA case references 08-00650 and 10-02890 between Colón and Mexican club Pumas de la UANL in which FIFA suspended the disciplinary proceedings.

110. Colón summoned its lawyer Dr. Dadea, who led the Panel through the *Concurso Preventivo* Proceedings explaining the status of these proceedings and the involvement of the court, the administrator and the creditors in the execution of the Transfer Agreement.

111. On the grounds detailed in section IV.2 above, FIFA argues that Colón has not been legally impeded from executing the PSC Decision. FIFA avers that it is the FIFA Disciplinary Committee's discretion to decide whether or not to close the disciplinary proceedings on a case by case basis, by considering: (i) whether the club is still in control of its assets; (ii) whether the national court considered the amount of credit ordered in the PSC Decision; and (iii) national law.

112. In order to determine this issue, the Panel will consider the facts and evidence adduced by the Parties. To establish Colón's legal status, the Panel takes into particular consideration the documents produced by the Appellant in relation to the Argentinean court proceedings and the relevant provisions of the *Ley de Concursos y Quiebras*.

113. It is undisputed that Colón is under a *Concurso Preventivo* Proceedings and these proceedings were ordered on 20 July 2006. FIFA's allegation that they were not aware of the *concurso preventivo*, is, in the Panel's opinion, irrelevant given the fact that the Panel has power to review the facts and the law in accordance with Article R57 of the CAS Code.

iii. CAS jurisprudence

114. In support of its defence, the Appellant invokes the case laws referred in section IV.1 above.

115. It is the Panel's understanding that the cases referred are irrelevant to this case.

116. The facts and circumstances behind the precedents invoked by the Appellant (CAS 2012/A/2750, CAS 2011/A/2343, CAS 2011/A/2646, FIFA case references 08-00650 and 10-02890) in requesting a suspension and/or termination of the disciplinary proceedings until the *Concurso Preventivo* Proceedings come to a close are different in nature and substance from those behind this appeal in that they were issued in relation to debts which had arisen before the debtor had been declared bankrupt. In addition, they related to bankruptcy declarations as envisaged under Article 107 (b) of the FIFA Disciplinary Code and not to *concurso preventivos,* which do not fall under the FIFA Disciplinary Code.

117. In specific assessment of CAS 2012/A/2754, the Panel notes that FIFA did not open any formal proceedings to determine whether or not the appellant owed any credit. In addition, CAS 2012/A/2754 was not related to any enforcement proceedings, but rather to the recognition of a debt in a pending bankruptcy proceeding in Argentina. The Panel has also not had the benefit of accessing the entire facts and details regarding the legal status of the Argentinean bankruptcy proceedings which faced the respondent club in CAS 2012/A/2754 and finally, the Panel notes that the award was issued in the respondent club's absence at the hearing, and that the respondent's submissions were only based on the inadmissibility of the appeal because FIFA had failed to render a decision in relation to the debt allegedly due from the respondent club.

118. The facts behind this appeal present a completely new case which neither FIFA nor the CAS has previously had to analyse.

iv. Should FIFA suspend and/or terminate the enforcement proceedings under Article 107 (b) of the FIFA Disciplinary Code?

119. Following the Panel's establishment of the Appellant's legal status and that of the *Concurso Preventivo* Proceedings, it must be decided whether there exists grounds to stay and/or terminate the FIFA enforcement proceedings under Argentinean law and/or the FIFA regulations.

120. Looking at the facts, it has been proven and/or undisputed that:

a) Colón is under *Concurso Preventivo* Proceedings and was never under bankruptcy proceedings.

b) The Argentinean courts issued an Administration Order against Colón on 20 July 2006. The debt owed to Atlante was not yet born.

c) Atlante's Credit was born when Colón exercised the option to buy the remaining 50% of the Player's economic rights on 9 October 2007, in accordance with clause 3 of the Transfer Agreement.

d) The Transfer Agreement was signed during the *Concurso Preventivo* Proceedings. Neither the Argentinean court, the Administrator, Colón's creditors nor the AFA raised any issue, objection or challenge in relation to the execution of the Transfer Agreement.

e) On 31 March 2008, Colón filed an application before the Argentinean court, proposing to pay the outstanding debts to the Verified and Admitted Credits. The amount owed to Atlante was not part of such debts.

f) Atlante's Credit was not part of the list of Verified and Admitted Credits confirmed by the Argentinean courts in the *Concurso Preventivo* Proceedings.

g) Colón recognises Atlante's Credit, which was confirmed by the CAS Award dated 5 June 2012.

h) Apart from being prohibited from accessing immovable property, Colón has no other legal restriction in relation to its activities and assets. Colón can proceed with its sporting and commercial activities by signing and transferring players, and taking part in official football competitions. Colón also informed the Panel during the hearing that they were in a position to pay the fine imposed in the Appealed Decision and to bear any CAS arbitration costs.

i) Colón remains a member of the AFA and enjoys all the resultant rights and obligations attached to such membership.

j) Colón has not reopened the pending *Concuso Preventivo* Proceedings or filed any new *concurso preventivo* under the *Ley de Concurso y Quiebras* for purposes of including Atlante's Credit.

121. The Appellant's argument that Article 21 of the *Ley de Concursos y Quiebras* is applicable is incorrect, since Atlante's Credit was born after the judicial order of the *Concurso Preventivo* Proceedings.

Article 21 states as follows:

"La apertura del concurso produce, a partir de la publicación de edictos, la suspensión del trámite de los juicios de contenido patrimonial contra el concursado por causa o título anterior a su presentación, y su radicación en el juzgado del concurso".

Free English translation:

The opening of an reorganisation proceeding leads, upon the publication of the judicial order, to the suspension of all patrimonial judicial proceedings against the insolvent, for cause or title before the opening of the insolvency judicial order.

122. The abovementioned provision is clear that the prohibition from filing new cases against the insolvent only applies to debts which arose prior to the insolvency judicial order, which is not the case at hand, since Atlante's Credit was generated by the time Colón exercised the option to buy the remaining 50% of the Player's economic rights, i.e. on 30 June 2008.

123. The Panel reiterates the fact that Atlante's Credit arose after Colón had been placed under the *Concurso Preventivo* Proceedings and that the said credit was brought about by Colón's administrators in the performance of their managerial duties and in the best interest of bringing Colón's financial status back to normalcy so that the creditors listed in the Verified and Admitted Credits could be paid off.

124. Pursuant to Article 21 of the *Ley de Concursos y Quiebras*, it is therefore legally incorrect for Colón to argue that they cannot pay Atlante a debt which matured after the Appellant went into the *concurso preventivo*.

125. The Panel also finds Dr. Dadea's statement and oral testimony to be irrelevant given the fact that he stated that he was not an expert on Argentinean law of bankruptcy and insolvency, but

rather an expert on labour law. In addition to this, Dr. Dadea, who testified not as an expert but as a witness and a lawyer who had acted on behalf of Colón, also failed to identify the exact provision in the *Ley de Concursos y Quiebras* which prevents the filing of new cases against a club placed under a *concurso preventivo* for debts which arise after the club has been placed under judicial administration. Nevertheless, the Panel took into consideration the statement of Dr. Dadea that the Player's transfer to Colón was approved by the committee of creditors and the Argentinean court, with the acknowledgement of the administrator.

126. It is therefore the Panel's view that Atlante's Credit is a normal debt brought about by Colón's day-to-day administration operations. Atlante's Credit is therefore a priority debt *vis-a-vis* the Verified and Admitted Credits and cannot be classified alongside the pending creditors list.

127. Corroborating the above is the fact that with a view to resuscitating its finances in the best interest of its creditors, Colón freely and voluntarily entered into the Transfer Agreement with the formal approval and backing of the creditors, the Argentinean court and the administrators. In accordance with the principle of good faith, Colón paid Atlante the first installment due from the Transfer Agreement, and for this reason, agreed to exercise the option of buying the remaining 50% of the Player's economic rights, which they did voluntarily and without having to request any formal approval. Colón's failure to pay Atlante's Credit cannot therefore be linked to any legal restriction.

128. The Panel's understanding of Atlante's Credit as a priority debt is further supported by Article 192 (3) of the *Ley de Concursos y Quiebras*, which states that:

"De acuerdo a lo que se haya resuelto el juez, el síndico, (…) actuarán de acuerdo al siguiente régimen: (…)

3) Las obligaciones legalmente contraídas por el responsable de la explotación gozan de la preferencia de los acreedores del concurso".

Free English translation:

In accordance with the determination of the judge, the Administrator may, (…) act as follows:

3) The obligations which have been legally assumed by the representative of company's activity shall take preference over the creditors of the reorganisation proceeding.

129. Although the abovementioned provision relates to bankruptcy proceedings, and considering the lack of any positive law governing this particular issue, it is the Panel's understanding that this provision must apply to the *Concurso Preventivo* Proceedings by analogy.

130. If the Panel was to concur with Colón's argument that no cases can be filed against a party placed under *concurso preventivo* for debts incurred after an Administration Order, it would be difficult for third parties to enter into binding and enforceable agreements with clubs under a *concurso preventivo*, and this would encourage the said clubs to indiscriminately enter into transfer agreements with other clubs knowing too well that FIFA would not impose any sanctions upon them in case of failure to fulfil their contractual obligations. This understanding is also corroborated by Article 59 of the *Ley de Concursos y Quiebras,* which provides that once the judge

homologates the creditors agreement and the fulfilment of such agreement is secured, the judge declares the case concluded and brings an end to the intervention of the administrator, thereby releasing the club from any restrictions, with certain exceptions which are irrelevant for this present appeal.

131. In relation to the Appellant's allegation that Article 132 of the *Ley de Concursos y Quiebras* is applicable, the Panel clarifies that this argument would be valid in situations where a club is under bankruptcy proceedings and not to clubs under a *concurso preventivo,* which is the case at hand.

132. In view of all the foregoing, Colón cannot claim to be legally impeded by the Argentinean courts from executing the PSC Decision.

133. It also follows that the Panel finds no grounds to terminate and/or close the FIFA enforcement proceedings pursuant to Article 107(b) of the FIFA Disciplinary Code, which states that *"[p]roceedings may be closed if: (a) the parties reach an agreement;* ***(b) a party declares bankruptcy;*** *(c) they become baseless"* until the *Concurso Preventivo* Proceedings come to a close.

134. Looking at the facts of this case, it is worth noting that the *Concurso Preventivo* Proceedings have already been closed and the creditors determined. The only aspect pending from the *Concurso Preventivo* Proceedings is the payment of the creditors under the *Concurso Preventivo* Proceedings. Article 107 (b) of the FIFA Disciplinary Code would therefore not be applicable to this case.

135. To date, the Appellant has made no effort to settle Atlante's Credit, notwithstanding the fact that it was partially discharged from its *concurso preventivo* on 28 October 2008 and can generate income as a result of the full control it has over its assets, with the exception of immovable assets.

136. The non-enforcement of the Appealed decision could lead to an unfair precedent where the financial fair play rules and accounts of selling clubs can be destabilised if buying clubs were allowed to unjustly enrich themselves out of a *concurso preventivo* by holding themselves out to selling clubs as being financially able to pay a transfer fee for acquiring a player, and only to later justify a failure to pay for these acquisitions by invoking restrictions related to the payment of outstanding credits brought about by a creditor's agreement, and which outstanding credits do not include the credit in question.

137. The Panel is also comforted by the fact that enforcing the Appealed Decision will not contravene any Argentinean public policy principles or State sovereignty, given the fact that the *Concurso Preventivo* Proceedings are only confined to paying the Verified and Admitted Credits, and Atlante's Credit was only born after the *Concurso Preventivo* Proceedings.

138. Having found that the Appellant faces no legal impediments which would stop it from executing the debt ordered by the PSC Decision, and which debt arose after Colón had been placed under a *concurso preventivo*, it is the Panel's view that the only legal means which Atlante could use to prompt the Appellant to comply with the PSC Decision is by requesting the FIFA Disciplinary

Committee to impose disciplinary sanctions on Colón, even if the latter is still under administration.

139. The Panel therefore dismisses the Appellant's request to suspend or terminate the FIFA enforcement proceedings until the *Concurso Preventivo* Proceedings are concluded.

Conclusion

140. In view of all the above, the Panel finds that there exist no legal restrictions which impede FIFA from enforcing the PSC Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Club Atlético Colón against the FIFA Disciplinary Committee Decision dated 20 November 2012 is dismissed.

2. The FIFA Disciplinary Committee Decision dated 20 November 2012 is confirmed.

3. (…).

4. (…).

5. Any other or further claims are dismissed.