



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2012/A/2750 Shakhtar Donetsk v. FIFA & Real Zaragoza S.A.D.**

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Hendrik Willem **Kesler**, attorney-at-law in Enschede, the Netherlands  
Arbitrators: Mr Stuart C. **McInnes**, attorney-at-law in London, United Kingdom  
Mr José Juan **Pintó**, attorney-at-law in Barcelona, Spain  
Ad hoc clerk: Mr Dennis **Koolaard**, Broek op Langedijk, the Netherlands

in the arbitration between

**FC SHAKHTAR DONETSK**, Donetsk, Ukraine

Represented by Mr Juan de Dios **Crespo Pérez**, Mr Adam **Whyte** and Mr José Agustín **Amoros Martínez**, attorneys-at-law in Valencia, Spain and Mr Andrey **Kharitonchuk**, Head of FC Shakhtar Donetsk's Legal Department in Donetsk, Ukraine

**-Appellant-**

**and**

**FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (FIFA)**, Zurich, Switzerland

Represented by Mr Marc **Cavaliere**, FIFA Head of Disciplinary & Governance, Mr Marco **Villiger**, FIFA Director of Legal Affairs and Mrs Wilma **Ritter**, FIFA Deputy Head of Disciplinary & Governance in Zurich, Switzerland

**-First Respondent-**

**and**

**REAL ZARAGOZA S.A.D.**, Zaragoza, Spain

Represented by Mr Alfredo **Garzón Vicente**, Mr Iñigo de Lacalle **Baigorri** and Mr Juan **Valdés Escalona**, attorneys-at-law in Madrid, Spain and Mr Javier **Porquera Pérez**, representative of Real Zaragoza S.A.D. in Zaragoza, Spain

**-Second Respondent-**

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## **I. THE PARTIES**

1. FC Shakhtar Donetsk (hereinafter: the “Appellant” or “Shakhtar Donetsk”) is a football club with its registered office in Donetsk, Ukraine. Shakhtar Donetsk is registered with the Football Federation of Ukraine, which in turn is affiliated to the Fédération Internationale de Football Association.
2. The Fédération Internationale de Football Association (hereinafter: the “First Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.
3. Real Zaragoza S.A.D. (hereinafter the “Second Respondent” or “Real Zaragoza”) is a football club with its registered office in Zaragoza, Spain. Real Zaragoza is registered with the Royal Spanish Football Federation (*Real Federación Española de Fútbol* - hereinafter: the “RFEF”), which in turn is affiliated to FIFA.

## **II. FACTUAL BACKGROUND**

4. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
5. In June 2004, Mr Matuzalem Francelino da Silva (hereinafter: the “Player”), a professional football player of Brazilian nationality, signed an employment contract with Shakhtar Donetsk for a fixed-term of five years, effective from 1 July 2004 until 1 July 2009.
6. On 2 July 2007, the Player notified Shakhtar Donetsk in writing of the fact that he was putting an end to their contractual engagement with immediate effect. It is undisputed that the Player unilaterally and prematurely terminated his employment contract without just cause or sporting just cause and, on 19 July 2007, signed a new employment contract with Real Zaragoza.

### **A. THE FACTS LEADING TO THE DECISION RENDERED BY THE FIFA DISPUTE RESOLUTION CHAMBER ON 2 NOVEMBER 2007**

7. On 25 July 2007, Shakhtar Donetsk submitted a claim with the FIFA Dispute Resolution Chamber (hereinafter: the “FIFA DRC”) requesting it to order the Player to

pay damages to Shakhtar Donetsk for terminating his employment contract with Shakhtar Donetsk without just cause and to hold Real Zaragoza jointly and severally liable for the payment of such compensation.

8. On 2 November 2007, the FIFA DRC decided, *inter alia*, that:

*"[the Player] had to pay to [Shakhtar Donetsk] the amount of EUR 6,800,000 within 30 days as from the date of notification of the decision. Furthermore, the decision stipulated that an interest rate of 5% p.a. would apply as of expiry of the 30 days' time limit. Finally, the decision stated that [Real Zaragoza] was jointly and severally liable for the aforementioned payment."*<sup>1</sup>

**B. THE FACTS LEADING TO THE DECISION RENDERED BY THE COURT OF ARBITRATION FOR SPORT ON 19 MAY 2009 – CAS 2008/A/1519-1520**

9. All three involved parties, Shakhtar Donetsk, the Player and Real Zaragoza, filed appeals against the FIFA DRC decision of 2 November 2007 with the Court of Arbitration for Sport.
10. By decision of 19 May 2009 (hereinafter: the "2009 CAS Award"), CAS decided, *inter alia*, that:

*"the relevant decision of the FIFA DRC was partially reformed in the sense that the [Player] had to pay to [Shakhtar Donetsk] the amount of EUR 11,858,934 plus 5% of interest p.a. starting on 5 July 2007 until the effective date of payment. Furthermore, the decision stated that [Real Zaragoza] was jointly and severally liable for the payment of the above-mentioned amount."*<sup>2</sup>

**C. THE FACTS LEADING TO THE DECISION RENDERED BY THE SWISS FEDERAL SUPREME COURT ON 2 JUNE 2010 – JUDGMENT 4A\_320/2009**

11. On 18 June 2009, the Player and Real Zaragoza filed appeals against the 2009 CAS Award with the Swiss Federal Supreme Court.
12. On 2 June 2010, the Swiss Federal Supreme Court dismissed the appeals filed by the Player and Real Zaragoza.

<sup>1</sup> Inferred from the decision of the FIFA Disciplinary Committee dated 31 August 2011.

<sup>2</sup> Inferred from the decision of the FIFA Disciplinary Committee dated 31 August 2011.

**D. THE FACTS LEADING TO THE DECISION RENDERED BY THE FIFA DISCIPLINARY COMMITTEE ON 31 AUGUST 2010 – DECISION 100233 PST BRA ZH**

13. On 14 July 2010, as the aforementioned amounts remained unpaid, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against both the Player and Real Zaragoza for failing to comply with the 2009 CAS Award and thereby acting contrary to article 64 FIFA Disciplinary Code.
14. On 31 August 2010, the FIFA Disciplinary Committee rendered “Decision 100233 PST BRA ZH” (hereinafter: the “FIFA Disciplinary Committee Decision”) in the matter between Shakhtar Donetsk versus the Player and Real Zaragoza regarding “*failure to comply with a decision passed by a FIFA body or CAS (Art. 64 of the FIFA Disciplinary Code)*” and held the following:

*“1. The [Player] and [Real Zaragoza] are pronounced guilty of failing to comply with a decision of CAS in accordance with art. 64 of the FDC.*

*2. The [Player] and [Real Zaragoza] are jointly ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 30 days of notification of the decision. (...)*

*3. The [Player] and [Real Zaragoza] are granted a final period of grace for 90 days as from notification of this decision in which to settle their debt to Shakhtar Donetsk.*

*4. If payment is not made by this deadline, Shakhtar Donetsk may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the [Player] and/or six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship. Once Shakhtar Donetsk has filed this/these request(s), the ban on taking part in any football-related activity will be imposed on the [Player] and/or the points will be deducted automatically from the first team of [Real Zaragoza] without further formal decisions having to be taken by the FIFA Disciplinary Committee. The association(s) concerned will be informed of the ban on taking part in any football-related activity. Such ban will apply until the total outstanding amount has been fully paid. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*

*5. If [Real Zaragoza] still fails to pay the amount due even after deduction of the points in accordance with point III/4 above, the FIFA Disciplinary Committee will decide on a possible relegation of the first team of [Real Zaragoza] to the next lower division.*

6. *In regard to its affiliated [Real Zaragoza], the [RFEF], as a member of FIFA, is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the [RFEF] does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.*
7. *The costs of these proceedings of CHF 3,000 are to be borne by [the Player] and [Real Zaragoza] jointly. (...)*
8. *[Shakhtar Donetsk] is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received."*
15. On 6 October 2010, the FIFA Disciplinary Committee Decision was notified to the Parties.
- E. THE FACTS LEADING TO THE DECISION RENDERED BY THE COURT OF ARBITRATION FOR SPORT ON 29 JUNE 2011 – CAS 2010/A/2261 & 2263**
16. Both the Player and Real Zaragoza filed an appeal with the CAS against the FIFA Disciplinary Committee Decision.
17. On 16 June 2011, during the course of the proceedings at CAS, but after the hearing had already taken place on 26 April 2011, Real Zaragoza provided a copy of a decision of the *Juzgado de lo Mercantil No. 2 de Zaragoza* (hereinafter: the "Zaragoza Commercial Court") by which, according to Real Zaragoza, *"the voluntary bankruptcy request by the club is admitted and, therefore, [Real Zaragoza] is officially involved in a bankruptcy proceeding and subject to Bankruptcy Legal Administration"*.
18. On 23 June 2011, the CAS Panel decided not to accept the new documents since it was of the opinion that *"the exceptional circumstances required under article R56 of the CAS Code are not met in the present case"*.
19. By decision of 29 June 2011 (hereinafter: the "2011 CAS Award"), the CAS decided, *inter alia*, that:
- "1. The appeal filed by [Real Zaragoza] against the decision issued on 31 August 2010 by the FIFA Disciplinary Committee is dismissed.*
- 2. The appeal filed by [the Player] against the decision issued on 31 August 2010 by the FIFA Disciplinary Committee is dismissed.*

**F. THE FACTS LEADING TO THE CORRESPONDENCE OF THE SECRETARIAT TO THE  
FIFA DISCIPLINARY COMMITTEE OF 27 SEPTEMBER 2011**

20. Although the Player filed an Appeal against the 2011 CAS Award with the Swiss Federal Supreme Court, Real Zaragoza abstained from filing any appeal against the 2011 CAS Award with the Swiss Federal Supreme Court. The 2011 CAS Award therefore became final and binding in respect of Real Zaragoza.
21. On 13 July 2011, Shakhtar Donetsk requested the FIFA Disciplinary Committee to enforce the Disciplinary Committee Decision, as Real Zaragoza had not fulfilled its obligation of payment towards Shakhtar Donetsk and requested it to send to the RFEF *"a decision in that sense, which shall include the deduction of points or relegation as it has been surely stated in the FIFA Disciplinary Committee decision of 31.08.10. Insolvency procedure initiated by Real Zaragoza does not matter in this case and we ask for a request to be made by FIFA to the Spanish FA and not just stop any action because of that insolvency. [sic]"*
22. As no answer was received from FIFA to its correspondence of 13 July 2011, by letters dated 27 July and 15 September 2011 respectively, Shakhtar Donetsk, by its CEO Mr Sergei Palkin, urged the FIFA Disciplinary Committee and the FIFA President to act urgently in accordance with the 2011 CAS Award and the FIFA Disciplinary Committee Decision.
23. On 27 September 2011, the secretariat to the FIFA Disciplinary Committee issued a letter (hereinafter: the "FIFA Disciplinary Committee Order") to the RFEF with the following content:

*"We have been informed that your affiliated club [Real Zaragoza] did not comply with the decision taken by the FIFA Disciplinary Committee on 31 August 2010 confirmed by the Court of Arbitration for Sport on 29 June 2011. Consequently, we ask your association to immediately execute the decision and to send us proof that the six (6) points have been deducted from the club's first team.*

*As a Member of FIFA, your association is responsible for implementing the decision, as stated in the decision. Please let us remind you that in case your association fails to send us immediately the said proof, the FIFA Disciplinary Committee will pronounce an appropriate sanction against it. This can lead to expulsion from all FIFA competitions.*

*We ask the [RFEF] to forward this letter to [Real Zaragoza], immediately."*

**G. THE FACTS LEADING TO THE DECISIONS RENDERED BY THE *JUZGADO DE LO MERCANTIL No. 2 DE ZARAGOZA* ON 13 JUNE AND 7 JULY 2011 – DECLARATION OF INSOLVENCY 0000207/2011 SECTION B**

24. By letters dated 11 and 25 October 2011, Shakhtar Donetsk, by its CEO, Mr Sergei Palkin, informed FIFA that the RFEF had not abided the FIFA Disciplinary Committee Order concerning the deduction of six (6) points from Real Zaragoza's first team and urged FIFA to act immediately in this regard.

25. On 19 October 2011, the RFEF informed the secretariat to the FIFA Disciplinary Committee about the instructions given by the Zaragoza Commercial Court in respect of proceedings regarding Real Zaragoza. Enclosed with this correspondence of 19 October 2011 was a copy of the decision of the Zaragoza Commercial Court, dated 13 June 2011, deciding, *inter alia*, the following:

*"1. Declare [Real Zaragoza] (...) in insolvency proceedings, given that its current state of insolvency has been substantiated. (...)*

*3. Consider the insolvency proceedings to be voluntary. (...)*

*19. This ruling will take effect immediately and will be enforceable even if the decision is not final. (...)*

*20. With respect to the interim measure requested, it is not necessary; nevertheless, if any sanction of any kind derived from internal regulations or the regulations of the bodies of which the insolvent is a member is imposed, this will be notified to this court for appropriate action. The declaration of insolvency proceedings is to be expressly communicated to the SPANISH FOOTBALL ASSOCIATION and THE NATIONAL PROFESSIONAL FOOTBALL LEAGUE. (...)"*

26. Also enclosed with RFEF's correspondence of 19 October 2011 was a copy of the decision of the Zaragoza Commercial Court dated 7 July 2011, with the following operative part:

*"It is agreed to admit the request formulated by the insolvent, [Real Zaragoza] and the insolvency administrators, ordering the [RFEF] to abstain from enforcing any sanction derived from possible non-payment of sums by [Real Zaragoza] to [Shakhtar Donetsk] or in general, as a consequence of the [FIFA Disciplinary Committee Decision] or the [2011 CAS Award] or any other ruling implementing or fulfilling any of the above, so that in future, and until [Real Zaragoza's] insolvency proceedings have concluded, it abstains from adopting any decision or imposing or enforcing any sanction of any kind derived from its internal regulations or the regulations of the*

*bodies of which it is a member, including FIFA, in respect of the insolvent or its players as a consequence of the insolvency debt of this sporting body towards its players.*

*To be notified to the insolvent and the insolvency administrators.*

*This injunction to be forwarded to the [RFEF] together with a copy of this decision.*

*This decision may be appealed, nevertheless the agreement will be implemented.*

#### **H. THE FACTS LEADING TO THE CORRESPONDENCE OF THE SECRETARIAT TO THE FIFA DISCIPLINARY COMMITTEE OF 24 FEBRUARY 2012**

27. On 18 November 2011, the Deputy Secretary to the FIFA Disciplinary Committee acknowledged receipt of RFEF's correspondence of 19 October 2011. By this letter FIFA also invited the RFEF to "*present us your position in the context of the Spanish legislation regarding the executions of decisions taken by the FIFA Disciplinary Committee against clubs that are under "administración concursal", and any other information which you can find useful in this respect.*" A copy of this letter was also sent to Shakhtar Donetsk.
28. On 11 January 2012, Shakhtar Donetsk, by its CEO Mr Sergei Palkin, sent a letter addressed to the FIFA President, maintaining that FIFA was refusing to enforce CAS decisions.
29. By letter dated 13 January 2012, FIFA provided information about the situation of the proceedings to Shakhtar Donetsk.
30. On 17 January 2012, the RFEF submitted its answer to the Deputy Secretary to the FIFA Disciplinary Committee's request of 18 November 2011. The substance of RFEF's answer is set out below:

*"We acknowledge receipt of your letter dated 18 November in which you requested our views with regard to the implementation of the decisions of the FIFA Disciplinary Committee in respect of clubs that have declared themselves insolvent under Spanish legislation.*

*As FIFA is aware, the application of Spanish insolvency legislation, specifically Act 22/2003, in our sport establishes a number of particular features in respect of the claims arrangements of football clubs.*



*Furthermore, in most cases, and Real Zaragoza SAD is no exception, the [RFEF] receives specific instructions from the Commercial Courts before which the insolvency proceedings are conducted to abstain from adopting any measures or imposing sanctions as a result of the non-payment of amounts owed, including those derived from the application of the regulations of the international organisations of which the RFEF is a member.*

*Specifically, in a ruling of 22 July 2011 (attached as Annexe 1), [the Zaragoza Commercial Court] established the following:*

*"... orders the [RFEF] and the Professional Football League to abstain from adopting any decision or imposing or implementing any sanction against Real Zaragoza SAD as a result of non-payment to the players of the amounts that may be owing (...) abstain from adopting any new decision or imposing or implementing any sanction or any kind arising from its internal regulations or the regulations of those bodies of which it is a member, including FIFA, as a result of the insolvency debts that this sporting body may have towards its players, other clubs or sports companies or its training staff (...) all in compliance with article 43.1 of the Insolvency Act with respect to the conservation and management of the assets of the insolvent as well as the continuation of its activity as per article 44 of the same act".*

*Notwithstanding the foregoing, which in our view might not undermine the application of the FIFA regulations to the RFEF, at least in terms of the private relations between both organisations, it is standard practice for the FIFA Disciplinary Committee to close and archive the disciplinary files in respect of insolvent Spanish clubs and to invite the creditor clubs to contact the [RFEF] for directions and to preserve their right within the insolvency procedure itself.*

*Thus, for instance, the [RFEF] received a letter from FIFA (ref. 110.136) on 16 January 2012 in relation to the Spanish club Real Valladolid SAD, which stated the following:*

*"In view of the legal situation of the club Real Valladolid, we regret to inform you that, as a general rule, our services and judicial bodies (e.g. Players' Status Committee, Dispute Resolution Chamber, Disciplinary Committee, etc.) are not in a position to continue dealing with this case and these proceedings are declared closed.*

*We therefore invite you to directly contact the Spanish Football Association immediately in order to receive directions with respect to the competent authorities to preserve your rights in the case in question."*

*On the basis of the above, the [RFEF] believes, with all due respect, that when taking a final decision on this case, the FIFA Disciplinary Committee should take account of the applicable legal framework as well as the continued and reiterated conduct of the FIFA bodies themselves in cases that are substantially the same as this one."*

31. By letter dated 8 February 2012, Shakhtar Donetsk, by its acting CEO, Mr Aleksandr Cherkasov, again requested FIFA to compel the RFEF to deduct six points from Real Zaragoza's first team.
32. On 24 February 2012, the Deputy Secretary to the Disciplinary Committee issued a letter (hereinafter: the "Appealed Decision") to Shakhtar Donetsk, the Football Federation of Ukraine, the RFEF and the Player, determining the following about the present matter:

*"We acknowledge receipt of the letter dated 17 January 2012 sent by the [RFEF] which is attached to the present for the knowledge of all the parties involved in the present disciplinary proceedings.*

(...)

*Regarding [Real Zaragoza], FIFA requested on 27 September 2011 the deduction of points decided by the FIFA Disciplinary Committee and confirmed by the Court of Arbitration for Sport on 29 June 2011.*

*[Real Zaragoza] initiated insolvency proceedings and in the context of these proceedings, the [Zaragoza Commercial Court] ordered the [RFEF] to abstain itself to execute any decision of FIFA, CAS or to take any sanction against [Real Zaragoza] in respect of the specific case of the debt with [Shakhtar Donetsk].*

*Upon request of the secretariat to the Disciplinary Committee, the [RFEF] replied on 17 January 2012 and confirmed that the [Zaragoza Commercial Court] ordered the [RFEF] to abstain itself to execute any decision of FIFA, CAS or to take any sanction against [Real Zaragoza] as a consequence of outstanding amounts.*

*Taking into account all the above mentioned circumstances and in view of the legal situation of [Real Zaragoza], we are not in a position to request to the [RFEF] to execute the [FIFA Disciplinary Committee Decision] against [Real Zaragoza] and we declare the present proceedings, in respect to [Real Zaragoza], closed.*

*Finally, for the sake of good order, we kindly invite [Shakhtar Donetsk] to contact the [RFEF] so as to receive indication with regard to the competent authorities to address in Spain in order to have its rights preserved."*

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

33. On 15 March 2012, Shakhtar Donetsk filed a statement of appeal together with 3 exhibits with the CAS. The Appellant nominated Mr José María Cruz Andrés, attorney-at-law in Seville, Spain, as arbitrator.
34. On 26 March 2012, the Appellant filed its appeal brief. This document contained a statement of the facts and legal arguments and was accompanied by 5 exhibits. The Appellant challenged the "decision" taken by FIFA on 24 February 2012, submitting the following requests for relief:

*"1. To accept this appeal against the decision of FIFA dated 24 February 2012.*

*2. To adopt an award annulling the decision of FIFA dated 24 February 2012.*

*3. To adopt a new decision*

- ordering the Respondent to proceed with the proceedings no 100233 wri against the club Real Zaragoza; and*
- ordering the Respondent to honour the request of the Appellant dated 27 September 2011 for the deduction of points from Real Zaragoza decided by the FIFA Disciplinary Committee on 31 August 2010 and confirmed by the CAS on 29 June 2011; and*
- ordering the Respondent to ensure that the RFEF complies with its obligations as a member of FIFA.*

*4. Subsidiary to request no. 3*

- ordering the Respondent to suspend the proceedings no. 100233 wri against the club Real Zaragoza until further notice; and*
- ordering the Respondent that the Appellant shall have the right to file, at any time (i.e. once the insolvency proceedings is terminated), a request to Respondent for the reopening of the proceedings no. 100233 wri against the club Real Zaragoza.*

*5. To fix a sum of 15,000 CHF to be paid by the Respondent to the Appellant to aid the Appellant in the payment of its defence fees and costs.*

*6. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees."*

35. On 27 March 2012, the First Respondent nominated Mr Pedro Tomás Marqués, attorney-at-law in Barcelona, Spain, as arbitrator.
36. On the same date, Real Zaragoza filed a request for intervention in the context of the present proceedings.
37. On 28 March 2012, the CAS Court Office, in accordance with Articles R41.3 and R41.4 of the CAS Code of Sports-Related Arbitration (hereinafter: the "CAS Code"), invited the Parties to file their positions on such request for intervention. The Parties were informed that in case a party would object such request, it would be for the Panel, once constituted, to decide on this issue.
38. Also on 28 March 2012, the CAS Court Office drew the Parties' attention to the remark made by Mr Tomás Marqués on the "Arbitrator's acceptance and statement of independence": *"I currently perform the charge of Chairman of the UEFA Appeals Body"*.
39. Still on 28 March 2012, the Appellant challenged Mr Tomás Marqués' appointment as an arbitrator nominated by the First Respondent.
40. On 29 March 2012, Mr Tomás Marqués submitted, pursuant to Article R34 CAS Code, his written comments to the challenge to his nomination as arbitrator. He insisted that he was independent of each party and intended to remain so. However, Mr Tomás Marqués finally decided to resign his appointment as an arbitrator in the present case as he did not wish to create any problems for the ICAS Board or to be a factor or risk as a result of the challenge to his appointment.
41. On 2 April 2012, the First Respondent expressed its position to the Appellant's challenge of Mr Tomás Marqués as arbitrator and held that there was no valid reason for a challenge. The First Respondent expressed its surprise in respect of the arguments put forward by the Appellant since its nominated arbitrator, Mr Cruz Andrés, appeared to hold or at least held a very similar position as that invoked by the Appellant upon which it cast doubt on Mr Tomás Marqués' independence. Although the First Respondent made clear that it did not doubt the independence of Mr Cruz Andrés, based on all the arguments and in view of preserving fair and just proceedings, the First Respondent considered it appropriate that the Appellant nominate a new arbitrator for this case and should the Appellant refuse to nominate a new arbitrator, the First Respondent requested its communication to be considered as a challenge to the appointment of Mr Cruz Andrés. Furthermore, the First Respondent confirmed that it had no objection to the intervention of Real Zaragoza in the present proceeding and

- nominated Mr Ruggero Stincardini, Professor in Perugia, Italy, as arbitrator in the present proceedings.
42. On 3 April 2012, the Appellant objected to Real Zaragoza's request for intervention. Accordingly, the CAS Court Office informed the Parties that it would be for the Panel, once constituted, to decide on this issue.
43. On 4 April 2012, the Appellant withdrew its nomination of Mr Cruz as arbitrator and nominated Mr Stuart C. McInnes, attorney-at-law in London, United Kingdom as arbitrator for the Appellant.
44. On 12 April 2012, due to the Parties' agreement, the deadline for the First Respondent to file its answer was extended until 30 April 2012.
45. On 13 April 2012, the CAS Court Office informed the Parties that Mr Stincardini, arbitrator nominated by the First Respondent, had declined his nomination in view of the fact that he did not consider himself able to examine and to decide the present case in English. The First Respondent was requested to nominate a new arbitrator.
46. Still on 13 April 2012, the First Respondent nominated Mr José Juan Pintó, attorney-at-law in Barcelona, Spain as arbitrator.
47. On 16 April 2012, the CAS Court Office drew the attention of the Parties to the fact that Mr José Juan Pintó made the following remark on the "Arbitrator's acceptance and statement of independence": *"I have been appointed by FIFA more than two times during the last three years."*
48. On 17 April 2012, the Appellant informed the CAS Court Office that it did not have any objection to the appointment of Mr Pintó.
49. On 30 April 2012, the First Respondent filed its answer, with 16 exhibits and translations into English, whereby it requested CAS to decide the following:
- "1. To declare the Appellant's appeal inadmissible.*
- 2. Alternatively, to reject the Appellant's appeal in its entirety.*
- 3. Finally, to order the Appellant to bear all costs incurred in the present proceedings and to cover all the Respondent's legal expenses relating to the present proceedings."*
50. On 3 May 2012, the First Respondent's answer was transmitted to the Appellant for its attention and the Parties were invited to inform the CAS Court Office whether their

preference was for a hearing to be held in this matter or for the Panel to issue an award based on the Parties' written submissions.

51. On 3 May and 7 May 2012 respectively, the Appellant requested a hearing to be held and the First Respondent allowed the Panel to issue an award on the sole basis of the written submissions.
52. On 8 May 2012, the CAS Court Office informed the Parties that, in accordance with Article R57 of the CAS Code, it would be for the Panel, once constituted, to decide whether or not to hold a hearing.
53. On 14 May 2012, pursuant to article R54 of the CAS Code, and on behalf of the President of the CAS Appeal Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted by:
  - Mr Hendrik Willem Kesler, attorney-at-law in Enschede, the Netherlands, as President;
  - Mr Stuart C. McInnes, attorney-at-law in London, United Kingdom; and
  - Mr José Juan Pintó, attorney-at-law in Barcelona, Spain, as arbitrators.
54. On the same date, the file was transferred to the Panel.
55. On 23 May 2012, the Panel informed the Parties that its intention was to hold a hearing and that it would be available on 25 June or 12 July 2012.
56. On 25 May 2012, the Appellant confirmed its availability for a hearing on 12 July 2012 and indicated that it would not be available for a hearing on 25 June 2012.
57. Also on 25 May 2012, the First Respondent confirmed its availability for a hearing on 25 June 2012 and indicated that it would not be available for a hearing on 12 July 2012.
58. On 28 May 2012, Real Zaragoza informed the Panel that it had received no news as to its request for intervention in the present procedure.
59. On 30 May 2012, the Panel decided that Real Zaragoza should be joined as a party in these proceedings, both for legal reasons and *"because it is in the interest of all the parties and in particular of the Appellant that these proceedings advance as quickly and diligently as possible towards the Panel's resolution of the question on appeal of whether FIFA has the competence or not to entertain the claim made by the Appellant against [Real Zaragoza]"*. In reaching this conclusion, the Panel found it relevant that Real Zaragoza *"is the defending party in the claim filed by the Appellant in front of FIFA and also that the Appellant, [Real Zaragoza] and FIFA are all subject to the FIFA*

*Regulations providing that claims of such nature shall be resolved in the last instance in arbitration proceedings in front of the CAS".* The Panel considered that – for reasons of efficiency of this proceeding – Real Zaragoza was only authorized to file submissions limited to the question under appeal. Additionally, the Panel requested the Appellant to provide the reasons for its unavailability for a hearing on 25 June 2012. The Parties were further informed that in case such reason is justifiable, the hearing would proceed on 12 July 2012, unless it was strictly necessary that both Mr Villiger and Mr Cavaliero attend. Finally, the Panel invited Real Zaragoza to state whether it had any objection for a hearing to be held on 25 June 2012 or 12 July 2012 and if so, to provide the reasons for its unavailability.

60. On 4 June 2012, the Second Respondent confirmed its availability for a hearing on 12 July 2012 and indicated that it would not be available for a hearing on 25 June 2012.
61. On 5 June 2012, the CAS Court Office confirmed that a hearing would be held on 12 July 2012 at the CAS Headquarters in Lausanne, Switzerland. The Parties were invited to confirm the names of the persons that would attend the hearing.
62. On 8 June 2012, the Appellant informed the Panel of the persons that would attend the hearing.
63. Also on 8 June 2012, Real Zaragoza submitted its position, with 2 exhibits, in respect of the question under appeal, whereby it requested CAS to:  
  
*"upholding the [Appealed Decision], close the disciplinary proceedings brought against [Real Zaragoza] and abstain from adopting or enforcing any sanction which might go against the Insolvency Act in Spain as well as the Order from the [Zaragoza Commercial Court], dated 7 July 2011; in particular, refusing from ordering FIFA to enforce the Disciplinary Committee Decision dated 31 August 2010."*
64. On 12 June 2012, both the First Respondent and the Second Respondent informed the Panel of the persons that would attend the hearing.
65. On 25 June 2012, the CAS Court Office requested the Parties to sign and return a copy of the Order of Procedure that was attached to such correspondence.
66. Also on 25 June 2012, the CAS Court Office invited the Second Respondent to provide translations into English of the two exhibits filed together with its submission of 8 June 2012.
67. On 25, 26 and 26 June 2012 respectively, the Appellant, the First Respondent and the Second Respondent returned signed copies of the Order of Procedure.

## Tribunal Arbitral du Sport

## Court of Arbitration for Sport

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68. On 27 June 2012, the Second Respondent provided translations into English of the two exhibits filed together with its submission of 8 June 2012.
69. On 6 July 2012, the Appellant filed a new additional document allegedly proving that some of the ordinary creditors of Real Zaragoza were paid in full.
70. On 9 July 2012, the CAS Court Office forwarded the Appellant's correspondence of 6 July 2012 to the Respondents and indicated that if the Respondents wished to raise any objection against the admissibility, it would be for the Panel to decide at the hearing on 12 July 2012.
71. On 11 July 2012, the First and Second Respondent objected to the admissibility of the documents filed by the Appellant.
72. Accordingly, on same date, the CAS Court Office informed the parties that the issues raised would be decided upon at the hearing of 12 July 2012.
73. A hearing was held on 12 July 2012 in Lausanne, Switzerland. At the outset of the hearing, the Parties confirmed that they did not have any objection as to the constitution and composition of the Panel.
74. In addition to the Panel, Mr William Sternheimer, Counsel to the CAS, and Mr Dennis Koolgaard, *Ad hoc* clerk, the following persons attended the hearing:
  - a) For Shakhtar Donetsk:
    - 1) Mr Juan de Dios Crespo Pérez, Counsel;
    - 2) Mr José Agustín Amoros Martínez, Counsel;
    - 3) Mr Andrey Kharitonchuk, Head of Shakhtar Donetsk's Legal Department.
  - b) For FIFA:
    - 1) Mr Marc Cavaliero, Counsel;
    - 2) Ms Wilma Ritter, Counsel.
  - c) For Real Zaragoza:
    - 1) Mr Alfredo Garzón Vicente, Counsel;
    - 2) Mr Iñigo de Lacalle Baigorri, Counsel;
    - 3) Mr Javier Porquera Pérez, Representative of Real Zaragoza.
75. No witnesses or experts were heard. The Parties were afforded opportunity to present their case, submit their arguments and answer the questions posed by the Panel.



76. Before the hearing was concluded, all Parties confirmed that they did not have any objection with the procedure and that their right to be heard had been respected.
77. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the Parties, even if they have not been specifically summarized or referred to in the present award.

#### IV. SUBMISSIONS OF THE PARTIES

78. The following outline of the Parties' positions is illustrative only and does not necessarily encompass every contention put forward by the Parties. However, the Panel has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summaries.

##### A. THE APPELLANT'S SUBMISSION

79. The submission of Shakhtar Donetsk, in essence, may be summarised as follows:
- FIFA is an association registered under Swiss law and as such it enjoys a large degree of autonomy in its organisation and the regulation of the relationship with and between its members. The Statutes and regulations of such association become binding on a party as soon as such party acquires the status of member. The RFEF is affiliated to FIFA and therefore the RFEF has to comply with all the provisions of the FIFA Statutes and regulations and FIFA has to apply such provisions in its relationship with the RFEF. Members of FIFA must also comply with the decisions of FIFA bodies and decisions of CAS in appeal proceedings. Moreover, article 64 FIFA Statutes provides that member associations must ensure that their own members comply with the decisions passed by the CAS.
  - According to the Appellant, after previously having correctly requested the RFEF to deduct six points from Real Zaragoza's first team, it was informed on 19 October 2011 and 17 January 2012 by the RFEF that Real Zaragoza had initiated insolvency proceedings and that in the context thereof the Zaragoza Commercial Court ordered the RFEF to abstain from imposing any sanction on Real Zaragoza in connection with the debt vis-à-vis Shakhtar Donetsk, FIFA deviated from the correct path by closing the proceedings.
  - The Appellant finds it essential for FIFA to apply article 64 FIFA Disciplinary Code consistently in its relationship with any member, without any exception, in the interest of the proper governance of football and in order to maintain legal certainty. The relevant objectives of a (Swiss) association could not be achieved if (i) a third

state could implement national laws/orders forbidding a member of such association to comply with rules contained in the association's statutes and regulations (thereby directly affecting the relationship between the association and its members); and (ii) the association (FIFA) had to recognise the validity of such foreign laws/orders.

- Pursuant to Switzerland's Federal Code on Private International Law (hereinafter: "PILA") the relationship between FIFA (being a Swiss association) and its members is solely governed by the FIFA Statutes, the FIFA regulations and Swiss law and is not governed by any foreign law (be it Spanish or any other law). This is confirmed by article 62(2) FIFA Statutes which provides that the CAS shall apply Swiss law in addition to the primarily applicable provisions contained in the FIFA Statutes and regulations. Likewise, orders/judgments of foreign courts that are rendered in application of foreign laws cannot have an influence on the relationship between a Swiss association and its members. Contrary to the Appealed Decision, Spanish insolvency law or a decision of the Zaragoza Commercial Court applying such Spanish insolvency law, is not relevant with regard to the relationship between FIFA and the RFEF and certainly does not prevail over the application of the democratically established and legitimate rule of article 64 of the FIFA Disciplinary Code. Moreover, insolvency proceedings that are initiated after the issuance of the FIFA Disciplinary Committee Decision cannot have an influence on the enforcement of disciplinary sanctions pronounced a long time before the opening of such insolvency proceedings. Otherwise, the abusive behaviour of Real Zaragoza in delaying the enforcement of the 2009 CAS Award and the sanctions pronounced by the FIFA Disciplinary Committee Decision by asking for the opening of insolvency proceedings would be protected by FIFA.
- Considering the above, Shakhtar Donetsk contended that FIFA has the duty to strictly apply article 64(2) FIFA Disciplinary Code regardless of any provisions of the Spanish insolvency law or of any order of a Spanish state court and must pronounce an appropriate sanction against the RFEF should the association not immediately enforce the sanction previously pronounced by the FIFA Disciplinary Committee (deduction of six points). Such sanction to be pronounced against the RFEF could be a suspension or even an expulsion of the RFEF and all of its members from any and all FIFA competitions. FIFA already threatened such sanction in the FIFA Disciplinary Committee Decision and the letter of the secretariat to the FIFA Disciplinary Committee of 27 September 2011 and the Appellant urges FIFA not to back down from such threat, as "empty threats" lead only to non-compliance with important decisions.
- Further, even if it is assumed that FIFA cannot urge the RFEF to act contrary to an order of the Zaragoza Commercial Court, the Appealed Decision is still in violation of the FIFA statutes and regulations as the secretariat to the FIFA Disciplinary

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Committee had no competence to render such decision. A decision can only be issued by a body of the FIFA Disciplinary Committee as stated clearly in article 58(2) FIFA Statutes and not by the secretariat. The Appealed Decision was thus rendered by an incompetent "body" of FIFA and has to be revoked.

- Further and in addition, even under the assumption that (i) FIFA cannot urge the RFEF to act contrary to an order of a Spanish state court and (ii) the FIFA Disciplinary Committee as the competent body of FIFA had issued the Appealed Decision (both of which is not the case), the decision of FIFA not to enforce the sanctions pronounced earlier against Real Zaragoza, but to simply accept the *status quo* and to close the disciplinary proceedings is a breach of article 64(2) FIFA Disciplinary Code. Also considering FIFA's rigour in other cases in the past, FIFA at least has the duty to request the RFEF to do everything possible to work around the order of the Zaragoza Commercial Court and put itself into a position where it may comply with all provisions contained in the FIFA Statutes and regulations.
- Finally, even if the CAS were to reject all above-mentioned arguments, it would have to revoke the Appealed Decision since FIFA was not entitled to simply close the disciplinary proceedings as it would be tantamount to a huge injustice if Real Zaragoza, having clearly breached fundamental provisions of the FIFA Statutes and regulations, could persistently avoid getting disciplinary sanction of FIFA/RFEF simply due to the fact that it initiated insolvency proceedings, thereby achieving that certain creditors partially waived their claims and then returned like a phoenix from the ashes, still playing in the Spanish *Primera Division* as if nothing had happened. To avoid that, FIFA should have suspended the disciplinary proceedings against Real Zaragoza until further notice instead of completely closing the proceedings.
- Should the CAS decide that the RFEF cannot be forced to execute the FIFA Disciplinary Committee Decision, as it amounts to an action against the assets or Real Zaragoza, then CAS should order the FIFA Disciplinary Committee to open new proceedings against Real Zaragoza and that they should impose an indefinite transfer ban on Real Zaragoza. In this regard, the RFEF would not have to take any action against the assets of Real Zaragoza as it would only be prevented from spending money, and not by denying it any income.

## B. THE FIRST RESPONDENT'S SUBMISSION

80. The submission of FIFA, in essence, may be summarised as follows:

- Supplementary to its objection to the admissibility of the appeal, FIFA contended that the proceedings were closed by the secretariat to the FIFA Disciplinary Committee based on article 107(b) FIFA Disciplinary Code. FIFA became aware of the bankruptcy proceedings of Real Zaragoza on 17 June 2011, FIFA was however not in a position to take action, as appeal proceedings were pending with the CAS at that time. As CAS confirmed the FIFA Disciplinary Committee Decision, the secretariat had no alternative but to proceed with the execution of the 2009 CAS Award and on 27 September 2011 requested the RFEF to deduct six points from Real Zaragoza's first team.
- By the correspondence of 18 October 2011, FIFA was officially informed of the insolvency proceedings of Real Zaragoza, it was therefore evident and justified for FIFA that it was prevented under Spanish law from forcing Real Zaragoza to pay the amounts owed. It was also clear that Real Zaragoza could not pay, because the Zaragoza Commercial Court prevented it from doing so in an imperative act. The State, through its judicial bodies, was in fact not allowing the payment. Finally, according to FIFA it was also evident that the RFEF was prevented under Spanish law from imposing any sanction or adopting any measure against Real Zaragoza for non-payment of the amounts due to the Appellant. For FIFA it was then clear that the conditions established in article 107(b) FIFA Disciplinary Code were fulfilled and thus the closure of the proceedings at FIFA was completely justified.
- One of the main reasons for article 107(b) FIFA Disciplinary Code to be applied in the present matter is the fact that parties should be treated equally in similar situations. The likelihood that the Appellant would get a higher percentage of the amount determined by the 2009 CAS Award than other creditors participating in the bankruptcy proceedings as provided for by the relevant national law in the context of their claims against the debtor is high. This would lead to an unequal treatment of all the creditors of the club. It would not be correct for FIFA to sanction a club if the club cannot, in reality, due to a decision of an ordinary court, make any payments without the authorization of an administrator nominated by the court. There is clearly a *lis pendens* in favour of the Spanish Courts.
- Moreover, in this regard, FIFA points out that, if disciplinary proceedings would be continued under such circumstances, there is a risk that bankruptcy offences might be committed, if a debtor involved in bankruptcy proceedings is facing disciplinary

sanctions in case of non-compliance with the pertinent decision, which might eventually lead to sanctions of the applicable criminal law.

- The First Respondent contests the Appellant's submission that according to the FIFA regulations there is no possibility to take into account orders or decisions taken by foreign courts. The legislation of many countries provides for a compulsory jurisdiction of ordinary courts pertaining to different kinds of disputes involving issues of public interest; including bankruptcy proceedings. FIFA also points out that despite the fact that the FIFA Disciplinary Code regulates the issue of the enforcement on an exclusive basis in article 64 FIFA Disciplinary Code, it also contains a clear exemption for cases of bankruptcy and provided the discretion to close pending proceedings in case it is justified because of bankruptcy proceedings according to article 107(b) FIFA Disciplinary Code. It is clear that article 107(b) of the FIFA Disciplinary Code recognises orders taken by national courts, since only a national court can declare a club to be subject to administration or in bankruptcy proceedings. The reasons behind this exemption are quite logical; the legislation that regulates the bankruptcy proceedings is governed by public law, whereas association disciplinary proceedings are governed by civil law. The legal framework is not completely independent from national and international legal systems. The members of national associations, *i.e.* the clubs, are also legal entities that are subject to obligations in accordance with the national legislation of the countries where they are registered, in particular when such legislation is of imperative nature.
- Consequently, FIFA adheres to the position contained in the FIFA letter of 24 February 2012.
- Regarding the Appellant's argument that the secretariat to the FIFA Disciplinary Committee had no competence to render the decision of 24 February 2012, FIFA maintains that according to longstanding practice, the FIFA administration is entitled to inform the parties that FIFA is not in a position to intervene and/or to declare the pending proceedings closed.
- In respect of the Appellant's supplementary request for relief to sanction the RFEF as the association did not deduct the points of Real Zaragoza, the First Respondent draws the attention of the Panel to the wording of the operative part of the Declaration of Insolvency 0000207/2011 Section B of 7 July 2011, according to which the RFEF was prevented from taking any action, *a fortiori* to deduct any points from its affiliated club, Real Zaragoza.
- In respect of the Appellant's position that FIFA had the duty to request the RFEF to do everything possible to work around the order of the Zaragoza Commercial Court, FIFA contends that it is not the duty of FIFA to be involved directly or indirectly in

the national bankruptcy proceedings. The Appellant has the right to present objections to the Spanish Court if it disagrees with the orders taken. The same applies if the Appellant would consider that the bankruptcy was only an instrument to avoid the payment of its credit.

- In respect of the Appellant's consideration that FIFA should have requested the RFEF to expel Real Zaragoza from its leagues, FIFA contends that this sanction is neither established in the FIFA Disciplinary Code, nor in the FIFA Statutes.
- In respect of the Appellant's opinion that FIFA should suspend the disciplinary proceedings against Real Zaragoza and reopen them once the insolvency proceedings will be closed, the First Respondent claims that such request is against the order of the Spanish Court, since the objective of the insolvency proceedings is to preserve the assets of the Club. To suspend the disciplinary proceedings would contravene the principles applicable in insolvency proceedings and could lead to evident inequality of treatment between creditors and/or put the debtor's existence at risk.
- Finally, in respect of the Appellant's request that FIFA should open new proceedings against Real Zaragoza to impose an indefinite transfer ban on the club, the First Respondent holds that such measure would contravene the principle of *ne bis in idem*. In addition, since the proceedings became baseless, no further sanction or proceedings are appropriate. If the Appellant considers that Real Zaragoza misuses its assets, Shakhtar Donetsk should present this argument to the Spanish court through the means at its disposal stipulated in the national bankruptcy law.

### C. THE SECOND RESPONDENT'S SUBMISSION

81. The submission of Real Zaragoza, in essence, may be summarised as follows:

- Real Zaragoza aligns itself with the stance taken by the RFEF in its correspondence of 17 January 2012 and with the stance taken by FIFA in its answer dated 30 April 2012 and fully supports all the arguments contained in both documents.
- Real Zaragoza contends that the RFEF is of a hybrid legal nature: on the one hand it is a private entity with its own legal personality and enjoys sufficient autonomy and independency to regulate its activity; but, on the other hand, it also exercises public power of an administrative nature. Based on Spanish law, Real Zaragoza has the obligation to comply with Spanish law and shall respect and apply decisions and orders rendered by the Spanish Courts. Real Zaragoza is a "*Sociedad Anónima Deportiva – S.A.D.*" ("Sports Public Limited Company") under *Real Decreto 1251/1999, de Sociedades Anónimas Deportivas* ("Sports Public Limited Company

Act"). According to Real Zaragoza, as well as a football club, it is above all a Spanish company and is therefore bound to comply with the Spanish law.

- Real Zaragoza further submitted that because of its very critical economic and financial situation, it was legally obliged to file for bankruptcy and that such request was granted by the Zaragoza Commercial Court. The law governing the administration proceedings in Spain is the *Ley Concursal 22/2003* (hereinafter: the "Insolvency Act"). According to article 200 Insolvency Act "*Spanish Law shall determine the requirements, legal consequences, effects, development and termination of all the insolvency proceedings declared in Spain*". Consequently, according to Real Zaragoza, the present proceedings are not subject to Swiss or any other foreign law, but only to Spanish law.
- As a consequence of the aforementioned, Real Zaragoza contends that the Appellant's reasoning in its appeal brief that FIFA "*has the duty to apply Article 64(2) of the Disciplinary Code without considering Spanish insolvency law or a decision of the Commercial Court of Zaragoza*" is incorrect. Real Zaragoza poses the question how this Act can be ignored in the context that disciplinary proceedings were opened and later closed by FIFA, taking into account that this is against a Spanish club, which is nothing but a company involved in insolvency proceedings?
- Furthermore, the Second Respondent maintains that the Insolvency Act enjoys a legal status, whereas the RFEF Statutes and all federative regulations emanating from it have a regulatory status, entailing that the former is hierarchically superior to the latter. In case of a conflict between the Insolvency Act and the RFEF Regulations, the former will always prevail. This conforms to the principle of "*Lex Superior derogat Lex Inferior*" and due to the unique and exceptional nature of insolvency proceedings, of the principle "*Lex specialis derogat legi generali*".
- In accordance with article 49 Insolvency Act, given that the debt due to Shakhtar Donetsk dates from before the declaration of insolvency of the Second Respondent by the Spanish Court, those debts are integrated into the cumulative liabilities determined by those insolvency proceedings and that they may only be discharged as part of the insolvency proceedings, in accordance with their categorization, at the proper phase of said proceedings. In other words, the Appellant's debt shall not be paid before and preferentially over the remaining creditors of the Second Respondent.
- Based on article 55 Insolvency Act, Real Zaragoza contends that it is legally impossible for it to enforce the decision passed by the FIFA Disciplinary Committee, as this provision lays down that once the insolvency proceedings have been declared, judicial or extrajudicial enforcements against the assets of the insolvent may not be

initiated. The Appellant's argument that "*insolvency proceedings cannot possibly have an influence on the enforcement of disciplinary sanctions pronounced long time before the opening of such insolvency proceeding*" would violate article 55 Insolvency Act.

- Additionally, the Second Respondent informed the Panel that it has reached a settlement with its creditors and that such settlement was recognised by the Zaragoza Commercial Court on 9 May 2012. As a consequence, Shakhtar Donetsk must abide the aforementioned settlement.
- Finally, Real Zaragoza argues that in the event that the CAS, contrary to the submissions of FIFA, the RFEF and Real Zaragoza, will annul the Appealed Decision and order FIFA to proceed with the disciplinary proceedings against Real Zaragoza, such decision could never be enforced in Spain in consequence of the bilateral International Treaty between Spain and Switzerland and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the "New York Convention").

## V. DISCUSSION

### A. JURISDICTION

82. The jurisdiction of CAS, which is not disputed, derives from article 63(1) FIFA Statutes 2011 edition as it determines that "[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question" and article R47 of the CAS Code. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.
83. It follows that CAS has jurisdiction to decide on the present dispute.
84. Under article R57 of the CAS Code, the Panel has full power to review the facts and the law and it may issue a new decision that replaces the decision challenged.

### B. APPLICABLE LAW

85. 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."*

86. The Panel notes that article 62(2) FIFA Statutes stipulates the following:

*"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."*

87. The Parties agreed to the application of the various regulations of FIFA and subsidiary to the application of Swiss law. The Panel is therefore satisfied to accept the subsidiary application of Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

88. Shakhtar Donetsk and FIFA agreed to the subsidiary application of Swiss law only. However, Real Zaragoza relied principally on Spanish law in its submission. In accordance with article R58 CAS Code, the Panel finds it appropriate to apply Spanish law in the present dispute. The reason is that 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.

### C. ADMISSIBILITY

89. The appeal was filed within the deadline of 21 days set by article 63(1) FIFA Statutes. The appeal complied with all other requirements of article R48 of the CAS Code, including the payment of the CAS Court Office fees.

90. FIFA objects the admissibility of the appeal because it is of the opinion that FIFA's correspondence of 24 February 2012 was only a letter sent by the FIFA administration informing Shakhtar Donetsk that FIFA is not in a position to further proceed with the requested measure of execution due to the legal situation of Real Zaragoza. FIFA merely informed Shakhtar Donetsk of the fact that the proceedings against Real Zaragoza became baseless as the club entered into administration. Such letter cannot be considered a final decision passed by one of FIFA's legal bodies as is required by article R47 CAS Code and article 63(1) FIFA Statutes.

91. Article R47 CAS Code stipulates the following:

*"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so*

*provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sport-related body. (...)*"

92. Article 63 FIFA Statutes determines that:

*"1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.*

*2. Recourse may only be made to CAS after all the other internal channels have been exhausted."*

93. The Panel noted that the Swiss Federal Supreme Court established the following definition of a "decision":

*"[T]he decision is an act of individual sovereignty 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. The effects must be directly binding both with respect to the authority as to the party who receives the decision."*  
*(cf. ATF 101 Ia 73)*

94. According to CAS jurisprudence, a decision is a unilateral act sent to one or more determined recipients and is intended to produce legal effects.<sup>3</sup> Or in other words, *"an appealable decision of a sport association is normally a communication of the association directed to a party and based on an "animus decidendi", i.e. an intention of a body of the association to decide on the matter, being also only the mere decision on its competence (or non-competence)."*<sup>4</sup>

95. In addition, it is constant CAS jurisprudence that *"the form of a 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."*<sup>5</sup>

96. The Panel considered the wording used by the secretariat to the FIFA Disciplinary Committee in its letter of 24 February 2012, in particular the statement that *"[t]aking into account all the above mentioned circumstances and in view of the legal situation of [Real Zaragoza], we are not in a position to request to the [RFEF] to execute the decision taken by the FIFA Disciplinary Committee on 31 August 2010 against [Real*

<sup>3</sup> CAS 2004/A/659 Galatasaray SK v. FIFA & Club Regatas Vasco da Gama & F.J., §10

<sup>4</sup> CAS 2008/A/1633 FC Schalke 04 v. Confederação Brasileira de Futebol (CBF), §11; see also: M. BERNASCONI, 'When is a "decision" an appealable decision?', RIGOZZI/BERNASCONI (eds.), *The Proceedings before the Court of Arbitration for Sport*, Bern, 2007, p. 273.

<sup>5</sup> CAS 2005/A/899 FC Aris Thessaloniki v. FIFA & New Panionios N.F.C., §14; CAS 2007/A/1251 Aris FC v. FIFA, §4

*Zaragoza] and we declare the present proceedings, in respect to [Real Zaragoza], closed.”*

97. FIFA alleged in its submission that it was entitled to close the proceedings against Real Zaragoza on the basis of article 107(b) FIFA Disciplinary Code. As will be set out below together with the legal merits of the case, the Panel is of the opinion that FIFA has certain discretion to close proceedings if a party has entered into insolvency proceedings, but no obligation to do so. FIFA’s letter of 24 February 2011 not only informed the Appellant of the consequences of the fact that Real Zaragoza was in insolvency proceedings, but was indeed a decision in light of the discretion given to it.
98. Hence, FIFA intended to close the disciplinary proceedings against Real Zaragoza, which were opened on the request of Shakhtar Donetsk; FIFA thereby affected the legal situation of Real Zaragoza and Shakhtar Donetsk. The correspondence of the secretariat to the FIFA Disciplinary Committee of 24 February 2011 was directly binding on FIFA, Shakhtar Donetsk and Real Zaragoza, while there were no remaining internal remedies left for Shakhtar Donetsk against such decision.
99. Finally, as was held by another CAS Panel in *CAS 2007/A/1251* in respect of the FIFA Dispute Resolution Chamber and/or the FIFA Players’ Status Committee<sup>6</sup>, the Panel finds that any FIFA decision which is intended to be made on behalf of the FIFA Disciplinary Committee and which is formulated as a final decision must be deemed subject to an appeal in front of CAS. For the avoidance of doubt, this conclusion is without derogation to the question as to whether the secretariat had competence to close the proceedings on behalf of the FIFA Disciplinary Committee.
100. Consequently, since all the preconditions of article R47 CAS Code and article 63 FIFA Statutes have been complied with, the Panel finds that FIFA’s correspondence of 24 February 2012 is a final decision susceptible to an appeal to CAS. The appeal is therefore admissible.

## **VI. PRELIMINARY ISSUES**

### **A. ADMISSIBILITY OF THE LATE SUBMISSIONS**

101. On 6 July 2012, the Appellant submitted a judicial decision of the Zaragoza Commercial Court dated 27 June 2012, as notified to the parties in such proceedings on 2 July 2012. According to the Appellant, it appears from such “Statement of Accounts” that three of the ordinary creditors of Real Zaragoza have been paid the full credit owed to them, despite the bankruptcy proceedings initiated by Real Zaragoza. In the opinion

<sup>6</sup> *CAS 2007/A/1251 Arts FC v. FIFA*, §9

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of Shakhtar Donetsk, Real Zaragoza thus had the opportunity to pay creditors, but decided to give preferential treatment to creditors other than the Appellant.

102. The Appellant argues that such submission is admissible based on the fact that, although it was issued after the submission of the appeal brief, it is of paramount importance to this procedure, it therefore constitutes an exceptional circumstance under article R56 of the CAS Code.
103. On 10 July 2012, the First Respondent objected to the admissibility of the new document since parties are not authorised to supplement their submissions based on article R56 of the CAS Code. Furthermore, in FIFA's opinion the documents are not relevant for the case at stake.
104. On 11 July 2012, the Second Respondent objected to the new documents by arguing that the Appellant filed such documents in bad faith. Real Zaragoza alleged that the same counsel representing the Appellant, Mr Juan de Dios Crespo Pérez, also represented the three creditors mentioned by the Appellant. Mr Crespo Pérez must therefore have known the content of such document before 2 July 2012 and must have been aware that this extra judicial agreement was concluded before Real Zaragoza entered into administration. Real Zaragoza offered Shakhtar Donetsk a similar extra judicial agreement in order to avoid bankruptcy, but Shakhtar Donetsk dismissed such offer. The Second Respondent provided certain documents in respect of these contentions.
105. As announced in the letter of the CAS Court Office of 11 July 2012, the issue was discussed at the outset of the hearing on 12 July 2012.
106. The Panel notes that article R56 of the CAS Code stipulates the following:

*“Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.”*
107. Considering the documents submitted by the Parties in this respect and the discussion at the outset of the hearing, the Panel informed the Parties during the hearing that all the late submissions would remain in the file, but that no particular weight would be given to them. The Panel is convinced that the extra judicial agreement with the three creditors was reached before the commencement of the administration of Real Zaragoza. Real Zaragoza was therefore free to make an extra judicial offer to its creditors, who in turn were free to reject such offer, as Shakhtar Donetsk apparently did.

Whether certain other creditors of Real Zaragoza accepted such extra judicial offer is irrelevant for the present case.

**B. AMENDMENT OF REQUESTS FOR RELIEF IN APPEAL BRIEF**

108. FIFA alleged in its answer that Shakhtar Donetsk's requests for relief in the appeal brief vary significantly from the requests for relief in the statement of appeal. According to FIFA, pursuant to article R48.1 CAS Code, an appellant shall submit its requests for relief in the statement of appeal. The requests for relief in the appeal brief, insofar as they vary from the requests for relief in the statement of appeal, should therefore be disregarded.
109. During the hearing, the Appellant referred the Panel to article R56 of the CAS Code and contended that the wording of such provision speaks for itself.
110. The Panel noted that indeed article R48.1 CAS Code determines that an appellant shall file its requests for relief in the statement of appeal and considered the wording of article R56 CAS Code as paraphrased *supra*.
111. The Panel is of the opinion that since article R56 CAS Code determines that parties are not authorized to amend their requests after the submission of the appeal brief, this implies that parties are authorized to amend their requests for relief in the appeal brief.
112. The Panel feels itself comforted by and adheres to a previous CAS Award, where the Panel held that:

*"The Panel observes that the CAS Code does not prohibit the amendment in the appeal brief of the relief requested in the statement of appeal. Such a significant procedural limitation could be enforced only if it had been expressly foreseen by the CAS Code as it is the case, for instance, with regard to the submission of new arguments which are explicitly not allowed after the filing of the appeal brief and of the answer, except when agreed to by all parties (see article R56 of the CAS Code). Amendments to the original claims are very common in international arbitrations, as long as they are submitted within the time limit provided by the applicable regulations (see for instance articles 18 ff of the ICC Rules of Arbitration). Likewise, article R51 of the CAS Code allows the specification in the appeal brief of requests for evidentiary measures not contemplated in the statement of appeal."*<sup>7</sup>

113. The Panel furthermore noted that based on article R56 of the 2012 CAS Code this is even more so if this provision is compared to article R56 of the 2004 CAS Code which was applied in the above CAS Award. The provision in the 2012 CAS Code specifically

<sup>7</sup> CAS 2007/A/1434-1435 IOC & WADA v. FIS & Jürgen Pinter, §79.

determines that the amendment of requests is not authorized after the submission of the appeal brief, thereby leaving open the possibility to do so in the appeal brief, whereas the provision in the 2004 CAS Code does not specifically refer to amendment of requests.

114. Consequently, the Panel finds that the Appellant is not prevented by the CAS Code from amending its requests in the appeal brief and will accordingly consider the requests for relief as specified in the appeal brief.

## VII. LEGAL MERITS

### A. THE MAIN ISSUES

115. In view of the above, the main issues to be resolved by the Panel are:

- 1) Is the FIFA Disciplinary Committee in general entitled to declare disciplinary proceedings closed if a party enters into voluntary insolvency?
- 2) Was the FIFA Disciplinary Committee in this specific case entitled to declare the disciplinary proceedings against Real Zaragoza closed?
  - a. The status of the FIFA disciplinary proceedings against Real Zaragoza before the proceedings were closed by letter of 24 February 2012.
  - b. The status of the decisions rendered by the Zaragoza Commercial Court.
    - i. The suspensive effect of the Zaragoza Commercial Court decisions in respect of the deduction of six points of Real Zaragoza's first team.
    - ii. The suspensive effect of the Zaragoza Commercial Court decisions in respect of the period of grace of 90 days.
- 3) Should the FIFA Disciplinary Committee have suspended the disciplinary proceedings against Real Zaragoza?

***1. Is the FIFA Disciplinary Committee in general entitled to declare disciplinary proceedings closed if a party enters into voluntary insolvency proceedings?***

116. According to Shakhtar Donetsk, the RFEF is a member of FIFA, which is an association registered under Swiss law and as such enjoys a large degree of autonomy in its organisation and the regulation of the relationship with and between its members. Pursuant to article 13(1) FIFA Statutes members have certain obligations. Among other, they have "to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art. 62 par. 1 of the FIFA Statutes (...)." Article 64 FIFA Statutes provides that member associations must ensure that their own members "comply with the decisions passed by CAS". Sanctions for non-compliance with the above provisions are set out in article 64 FIFA Disciplinary Code.

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117. Shakhtar Donetsk finds it essential for FIFA to apply article 64 FIFA Disciplinary Code consistently in its relationship with any member without any exception, in the interest of the proper governance of football and in order to maintain legal certainty. The relevant objectives of a (Swiss) association could not be achieved if (i) a third state could implement national laws/orders forbidding a member of such association to comply with rules contained in the association's statutes and regulations (thereby directly affecting the relationship between the association and its members) and (ii) the association (FIFA) had to recognise the validity of such foreign laws/orders.
118. Pursuant to Switzerland's PILA, the relationship between FIFA (being a Swiss association) and its members is solely governed by the FIFA Statutes, the FIFA regulations and Swiss law and is not governed by any foreign law (be it Spanish or any other law). This is confirmed by article 62(2) FIFA Statutes which provides that the CAS shall apply Swiss law in addition to the primarily applicable provisions contained in the FIFA Statutes and regulations. Likewise, according to Shakhtar Donetsk, orders/judgments of foreign courts that were rendered in application of foreign laws cannot have an influence on the relationship between a Swiss association and its members. The existence of such a system would make it impossible for FIFA to successfully pursue its statutory objectives. Shakhtar Donetsk corroborated this statement with the following example: *"if a national insolvency court would issue an order that, to improve the insolvent club's profits, the club shall have the right to participate in any games, whether they are organised under the auspices of the federations and FIFA or whether they are organised by an emerging competitor of FIFA, and FIFA had to recognise such order..."*
119. According to the Appellant, the above assumption is further substantiated by a decision of the UEFA Appeal Body dated 30 July 2010, where it was held that an order of a Spanish Commercial Court forbidding the RFEF to revoke a license granted to a Spanish club to participate in the Europa League has no relevance when considering the legal relationship between the Spanish club and UEFA.
120. FIFA basically adduced that a proceeding before the FIFA Disciplinary Committee may be closed if a party declares bankruptcy. In this respect it referred to article 107(b) of the FIFA Disciplinary Code.
121. The objective of administration proceedings is to rescue a company and for this purpose governments have established two measures: the company's assets are protected and the company does not have control of payment. In this context, it would not be correct for FIFA to sanction a club if the club can, in reality and due to a decision of an ordinary court, not make any payments without the authorization of an administrator nominated by the court. There is clearly a *lis pendens* in favour of national courts.

122. FIFA contests the Appellant's argument, that according to the FIFA regulations there is no possibility to take into account orders or decisions taken by foreign courts. FIFA points out that despite the fact that the issue of the enforcement is regulated on an exclusive basis in article 64 FIFA Disciplinary Code, the FIFA Disciplinary Code also contains a clear exemption for cases of bankruptcy in article 107(b) FIFA Disciplinary Code.
123. FIFA argued that one of the main reasons in order for article 107(b) FIFA Disciplinary Code to be applied is the fact that parties should be treated equally in similar situations. A continuation of the proceedings would lead to an unequal treatment of all the creditors of the club.
124. According to FIFA it is clear that the FIFA Disciplinary Code, by article 107(b), recognises orders taken by national courts, since only a national court can declare a club under administration or in bankruptcy proceedings. The reasons behind this exemption are quite logical according to FIFA; the legislation that regulates bankruptcy proceedings is governed by public law, whereas association disciplinary proceedings are governed by civil law.
125. The legal framework is not completely independent from national and international legal systems. The members of national associations, *i.e.* the clubs, are also legal entities that are subject to obligations in accordance with the national legislation of the countries where they are registered, in particular when such legislation is of imperative nature.
126. Real Zaragoza aligned itself with the stance taken by the RFEF in its correspondence to FIFA of 17 January 2012 and with the position of FIFA set out above. It did not have any specific comments regarding the general possibility of the FIFA Disciplinary Committee to close the proceedings if a club is involved in insolvency proceedings. In its submission Real Zaragoza merely focussed on FIFA's discretion to close the proceedings in this specific matter, which will be set out in the following section.
127. The Panel notes that article 64(1) FIFA Disciplinary Code determines that sanctions will be imposed on:

*"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)"*



128. Article 107(b) FIFA Disciplinary Code reads as follows:

*“Proceedings may be closed if:*

- a) the parties reach an agreement;*
- b) a party declares bankruptcy;*
- c) they become baseless.*

129. Bearing in mind the positions of the Parties, the Panel adheres to the position of FIFA that article 107(b) is to be considered as an exception to the general application of article 64 FIFA Disciplinary Code. Based on article 107(b) FIFA Disciplinary Code, the FIFA Disciplinary Committee is in general entitled to close proceedings before it, if one of the involved parties enters into insolvency proceedings.

130. In this respect, orders of national courts can be relevant for FIFA in order to determine the exact status of an alleged insolvent club. The Panel therefore finds the position of Shakhtar Donetsk incorrect insofar as it contends that national orders/judgments cannot be taken into account by the FIFA Disciplinary Committee in deciding to close proceedings.

131. The Panel finds the jurisprudence cited by the Appellant not relevant as the present matter concerns disciplinary measures, whereas the cited decision concerned selection criteria to participate in a competition. As observed by FIFA, contrary to insolvency proceedings, selection criteria are solely regulated in the regulations of a sports governing body and are fully independent from any national legal system.

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.

133. The Panel finds that it is indeed important, as maintained by FIFA, to have a consistent approach towards parties involved in insolvency proceedings and that similar situations have to be treated equally. However, because article 107(b) FIFA Disciplinary Code leaves a discretion to the FIFA Disciplinary Committee, the particular circumstances of a case have to be taken into account in deciding whether or not to close the proceedings

in a particular case. Similar cases have to be treated similar, but dissimilar cases could be treated differently.

134. In light of the above, the Panel will proceed to resolve whether the FIFA Disciplinary Committee was entitled to close the proceedings against Real Zaragoza on a definitive basis under the circumstances of this specific case and whether it had the obligation to order the RFEF to deduct six points from Real Zaragoza's first team.

**2. Was the FIFA Disciplinary Committee in this specific case entitled to declare the disciplinary proceedings against Real Zaragoza closed?**

135. Before answering this question, the Panel finds it important to clearly separate the proceedings before the "sporting authorities" (FIFA DRC, FIFA Disciplinary Committee and CAS) from the proceedings before the "national authority" (Zaragoza Commercial Court).

**a) The status of the FIFA disciplinary proceedings against Real Zaragoza before the proceedings were closed by letter of 24 February 2012**

136. On 31 August 2010, the FIFA Disciplinary Committee rendered its decision (the FIFA Disciplinary Committee Decision) regarding Real Zaragoza's alleged "failure to comply with a decision passed by a FIFA body or CAS (Art. 64 of the FIFA Disciplinary Code)" and held, *inter alia*, that Real Zaragoza was "pronounced guilty of failing to comply with a decision of CAS in accordance with art. 64 of the FDC" and that if the payment was not made within a period of 90 days "Shakhtar Donetsk may demand in writing from FIFA that (...) six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship. Once Shakhtar Donetsk has filed [this request] (...) the points will be deducted automatically from the first team of [Real Zaragoza] without further formal decisions 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."
137. On 29 June 2011, CAS confirmed the FIFA Disciplinary Committee Decision in appeal (the 2011 CAS Award).
138. The Panel noted that no appeal was filed with the Swiss Federal Supreme Court by Real Zaragoza against the 2011 CAS Award, the FIFA Disciplinary Committee Decision therefore became final and binding in respect of Real Zaragoza.
139. By virtue of the FIFA Disciplinary Committee Decision, Real Zaragoza was granted a period of grace of 90 days to pay the due amounts. Because all involved parties appealed the FIFA Disciplinary Committee Decision with CAS, this period of 90 days

was suspended during the proceedings before CAS. Consequently, the period of 90 days granted to Real Zaragoza in the FIFA Disciplinary Committee Decision only commenced on the date the 2011 CAS Award was rendered, *i.e.* 29 June 2011.

140. On 27 September 2011 (after Shakhtar Donetsk assumed the period of grace of 90 days had elapsed), the secretariat to the FIFA Disciplinary Committee, following a request of Shakhtar Donetsk, asked the RFEF to execute the FIFA Disciplinary Committee Decision and to send proof that the six points had been deducted from Real Zaragoza's first team.

*b) The status of the decisions rendered by the Zaragoza Commercial Court*

*i. The suspensive effect of the Zaragoza Commercial Court decisions in respect of the deduction of six points of Real Zaragoza's first team*

141. On 13 June 2011, the Zaragoza Commercial Court declared Real Zaragoza to be in voluntary insolvency proceedings. In §20 of the operative part of the decision it is determined that *"if any sanction of any kind derived from internal regulations or the regulations of the bodies of which the insolvent is a member is imposed, this will be notified to this court for appropriate action."*
142. The Panel finds that the wording of this first decision of the Zaragoza Commercial Court does not strictly forbid the RFEF to impose sanctions on Real Zaragoza; it merely orders that if a sanction is imposed on Real Zaragoza this must be notified to the Zaragoza Commercial Court. This decision does therefore not prevent the RFEF to impose sanctions on Real Zaragoza during or after the insolvency proceedings.
143. The second decision of the Zaragoza Commercial Court dated 7 July 2011 ordered the RFEF *"to abstain from enforcing any sanction derived from possible non-payment of sums by [Real Zaragoza] to [Shakhtar Donetsk] or in general, as a consequence of the [FIFA Disciplinary Committee Decision] or the [2011 CAS Award] or any other ruling implementing or fulfilling any of the above, so that in future, and until [Real Zaragoza's] insolvency proceedings have concluded, it abstains from adopting any decision or imposing or enforcing any sanction of any kind derived from its internal regulations or the regulations of the bodies of which it is a member, including FIFA, in respect of the insolvent or its players as a consequence of the insolvency debt of this sporting body towards its players."*
144. The Panel understands that when confronted with this decision of the Zaragoza Commercial Court, the RFEF was in some kind of dilemma. On the one side FIFA ordered the RFEF to deduct six points of Real Zaragoza's first team; however, on the

other side the Zaragoza Commercial Court ordered the RFEF not to impose any sanction.

145. On 19 October 2011, the RFEF informed the secretariat to the FIFA Disciplinary Committee of the instructions received from the Zaragoza Commercial Court and that it was prevented from imposing any sanction on Real Zaragoza. The RFEF was thus apparently of the opinion that the order of the Zaragoza Commercial Court was to prevail over the instructions from FIFA. FIFA accepted this point of view and closed the proceedings on 24 February 2012.
146. The dispute between the Parties thus narrows down to the question whether FIFA, for the reasons set out above, was right in closing the proceedings on a permanent basis in the given circumstances and not to order the RFEF to deduct six points of Real Zaragoza's first team.
147. As mentioned above already, Shakhtar Donetsk is of the opinion that the decision of the Zaragoza Commercial Court is not relevant for the relationship between FIFA and the RFEF and does not prevail over the application of the democratically established and legitimate rule of article 64 of the FIFA Disciplinary Code.
148. In respect of the specific circumstances of the present matter, Shakhtar Donetsk put forward that the 2009 CAS Award deciding on the Appellant's claim vis-à-vis Real Zaragoza was rendered more than two years ago (19 May 2009) and the FIFA Disciplinary Committee Decision was rendered nearly one year before insolvency proceedings regarding Real Zaragoza were initiated in Spain (31 August 2010 – 13 June 2011). Insolvency proceedings that are initiated after the issuance of a decision against a club cannot possibly have an influence on the enforcement of disciplinary sanctions pronounced long before the opening of such insolvency proceedings with regard to the non-payment of debts, which in turn have been confirmed by the CAS ever earlier. Otherwise, the abusive behaviour of Real Zaragoza in delaying the enforcement of the 2009 CAS Award and the sanctions pronounced by the FIFA Disciplinary Decision by filing a futile appeal with the CAS and later asking for the opening of insolvency proceedings would be protected by FIFA. Such would lead to absolute judicial uncertainty and complete imbalance and injustice in the world of football.
149. Consequently, Shakhtar Donetsk finds that FIFA has the duty to strictly apply article 64(2) FIFA Disciplinary Code in the present case and must pronounce an appropriate sanction against the RFEF should the association not immediately enforce the sanction previously pronounced by the FIFA Disciplinary Committee (deduction of six points).
150. FIFA maintained that by RFEF's correspondence of 18 October 2011 it became evident and substantiated that Real Zaragoza was subject to bankruptcy proceedings and

contrary to the allegations of Shakhtar Donetsk, it is evident that FIFA is prevented under Spanish law from forcing Real Zaragoza to pay the amounts owed. It is clear that Real Zaragoza cannot pay because the Zaragoza Commercial Court prevents it from doing so in an imperative act. For FIFA it was then clear that the conditions established in article 107(b) FIFA Disciplinary Code were fulfilled and thus the closure of the proceedings at FIFA is completely justified.

151. FIFA further contended that it applied article 107(b) of the FIFA Disciplinary Code in the present case because of the fact that parties should be treated equally in similar situations. If FIFA had not closed the proceedings against Real Zaragoza, Shakhtar Donetsk were likely to have received a disproportionately higher percentage of the distribution than other creditors of Real Zaragoza and accordingly, this would lead to unequal treatment of all the creditors of the club.
152. As already mentioned above, Real Zaragoza, in general, aligned itself with the stance taken in the RFEF's correspondence to FIFA of 17 January 2012 and with the stance taken by FIFA in its answer.
153. In addition, Real Zaragoza contends that the RFEF is of a hybrid legal nature: on the one hand it is a private entity with its own legal personality and enjoys sufficient autonomy and independence to regulate its activity; but, on the other, it also exercises public power of an administrative nature. Since bankruptcy proceedings are solely governed by Spanish laws, the present proceedings are not subject to Swiss or any other foreign law, but only to Spanish law. According to Real Zaragoza this is the conduct and position that FIFA has recently adopted in relation to similar cases and it referred the Panel to a similar letter as the Appealed Decision of FIFA in an alleged similar case.
154. Furthermore, Real Zaragoza maintains that the Spanish Insolvency Act enjoys a legal status, whereas the RFEF Statutes and all federative regulations emanating from it, have a regulatory status, entailing that the former is hierarchically superior to the latter. In case of a conflict between the Insolvency Act and the RFEF Regulations, the former will always prevail. Likewise, the enforcement of a decision like the FIFA Disciplinary Committee Decision would have a truly severe economic impact on the club's financial situation that might greatly affect the club's ability to continue its business activity and would seriously undermine the remaining creditor's rights and legitimate aspirations to ever have their debts, satisfied in total or in part. According to Real Zaragoza, this is the reason why the Insolvency Act is mandatory and shall prevail over any other law or regulation prohibiting the imposition of any sanction on a company involved in insolvency proceedings.
155. The Panel is of the opinion that based on the exact wording of the decision of the Zaragoza Commercial Court, the RFEF is ordered to abstain from imposing any

sanction "(...) until [Real Zaragoza's] insolvency proceedings have concluded (...)". Thus, the ruling does not order the RFEF to abstain from imposing any sanction permanently; the order is limited in time. In other words, the decision of the Zaragoza Commercial Court is without prejudice to the enforceability of disciplinary measures after the insolvency proceedings have concluded.

156. The Panel finds that based on the second decision of the Zaragoza Commercial Court, the RFEF was at that moment not in a position to deduct six points from Real Zaragoza's first team as was ordered by FIFA. Accordingly, FIFA was correct in not insisting on the deduction of the six points from Real Zaragoza's first team, as this would indeed violate the mandatory order of the Zaragoza Commercial Court that in the present case prevails over the FIFA Disciplinary Committee Decision. However, the order of the Zaragoza Commercial Court did not prevent the RFEF from imposing any disciplinary measures on Real Zaragoza once the insolvency proceedings are concluded and it is therefore to be examined whether FIFA was right in closing the proceedings on a permanent basis when in reality the enforcement of the FIFA Disciplinary Committee Decision was only temporarily impossible for the RFEF.
157. The Panel noted that the FIFA Disciplinary Committee Decision became final and binding and that it was determined in such decision that "*the points will be deducted automatically from the first team of [Real Zaragoza] without further formal decisions having to be taken by the FIFA Disciplinary Committee*".
158. Based on this final and binding FIFA Disciplinary Committee Decision, no discretion was left to FIFA to deduct six points or not, the decision merely summoned FIFA to order the RFEF to deduct six points once two conditions were fulfilled; (1) when Shakhtar Donetsk makes such demand in writing (which it did); and (2) when Real Zaragoza did not pay within a period of grace of 90 days (which will be assessed below).
159. Assuming both conditions are fulfilled, the six points would normally have to be deducted. However, the temporary inability of the RFEF to impose such sanction based on the decisions of the Zaragoza Commercial Court prevents the enforcement of the FIFA Disciplinary Decision. As this is without derogation to the possible imposition of the disciplinary measures after the insolvency proceedings of Real Zaragoza have concluded, the Panel finds that the FIFA Disciplinary Committee was not in a position to permanently close the proceedings against Real Zaragoza in these specific circumstances.
160. As set out above, in applying article 107(b) FIFA Disciplinary Code, all circumstances of the case have to be taken into account in deciding to close the proceedings or not. The fact that FIFA apparently issued a similar letter as the Appealed Decision in respect

of an alleged similar case, neither excludes the possibility that the facts of that case might have been different, nor was the Panel provided with the facts of that case.

161. Consequently, the Panel concludes that even if the period of grace of 90 days would have elapsed and the disciplinary measures stipulated in the FIFA Disciplinary Committee Decision should normally have been imposed, because of the voluntary insolvency of Real Zaragoza, these measures could not be enforced as long as Real Zaragoza was under voluntary insolvency proceedings. The Appellant's request to order FIFA "to honour the request of the Appellant dated 27 September 2011 for the deduction of points from Real Zaragoza" must therefore be dismissed as no points could be deducted or other disciplinary measures could be taken by the RFEF at that time.
162. Subsequently, also the Appellant's requests for relief insofar as the Panel is requested to order FIFA to impose disciplinary measures on the RFEF must be dismissed. Not only because of the reason mentioned above but also because the RFEF is not a party to these proceedings before CAS.
163. Finally, since the Panel decided that FIFA could not permanently close the disciplinary proceedings against Real Zaragoza in the given circumstances, the Appealed Decision shall be overturned. The Appellant's arguments in respect of the competence of the secretariat to the FIFA Disciplinary Committee as opposed to the FIFA Disciplinary Committee itself to close proceedings no longer needs to be resolved by this Panel.
164. However, as mentioned above, one of the criteria for deduction of six points from Real Zaragoza's first team is the passing of the period of grace of 90 days. Whether such period had indeed elapsed will be assessed in the following paragraph.

*ii. The suspensive effect of the Zaragoza Commercial Court decisions in respect of the period of grace of 90 days*

165. On 13 June 2011, before the 2011 CAS Award was rendered (29 June 2011) and before FIFA ordered the RFEF to deduct six points from Real Zaragoza's first team (27 September 2011), the Zaragoza Commercial Court declared Real Zaragoza to be in voluntary insolvency proceedings.
166. On 16 June 2011, during the course of the proceedings leading to the 2011 CAS Award, Real Zaragoza informed CAS that Real Zaragoza was declared to be in insolvency proceedings by the Zaragoza Commercial Court. These documents, that were filed after the hearing in the CAS proceedings had already taken place (26 April 2011), were not admitted to the file since the requirements for filing new exhibits after the submission of

the appeal brief and of the answer of article R56 CAS Code, were not met. These documents were therefore not taken into account in the 2011 CAS Award.

167. On 29 June 2011, the CAS rendered the 2011 CAS Award, confirming the FIFA Disciplinary Committee Decision. The 90 days period of grace for Real Zaragoza to pay the due amounts to Shakhtar Donetsk would therefore normally commence from this date as the period of grace was suspended pending determination of the proceedings.
168. Since Real Zaragoza entered into insolvency proceedings and because Real Zaragoza's debt towards Shakhtar Donetsk dates from before the declaration of insolvency, the debt was integrated into the insolvent club's liabilities. From the moment Real Zaragoza entered in insolvency proceedings, it was no longer in a position to fully comply with the FIFA Disciplinary Committee Decision and to pay the due amounts within the period of 90 days granted to it in such decision. In voluntary insolvency proceedings, as correctly mentioned in FIFA's and Real Zaragoza's submissions, a "company" cannot pay without the authorization of an administrator nominated by the court. In the opinion of the Panel, the period of grace of 90 days for Real Zaragoza to pay the due amounts was therefore suspended from the moment it entered into voluntary insolvency proceedings, *i.e.* before the period of grace of 90 days even commenced.
169. On 27 September 2011, although FIFA was aware that Real Zaragoza was involved in insolvency proceedings<sup>8</sup>, FIFA found itself obliged by the 2011 CAS Award to proceed with the deduction of six points from Real Zaragoza's first team.
170. In doing so, FIFA did however not take into account the fact that Real Zaragoza was prevented by the Zaragoza Commercial Court to pay the amounts due because of the insolvency proceedings. As determined above, during insolvency proceedings a "company" is not in charge of its own finances. Since Real Zaragoza was not in a position to pay the amounts due, the period of grace of 90 days should therefore have been considered as suspended until Real Zaragoza's insolvency proceedings were concluded.
171. Although not directly disputed by the Parties, in the opinion of the Panel, FIFA erred in neglecting the insolvency proceedings of Real Zaragoza by requesting the RFEF on 27 September 2011 to execute the FIFA Disciplinary Decision and to send proof that the six points have been deducted from Real Zaragoza's first team, while being aware that Real Zaragoza was involved in voluntary insolvency proceedings.
172. It appears from the facts of the case that the second decision of the Zaragoza Commercial Court dated 7 July 2011 was only notified to FIFA by the RFEF on 19

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<sup>8</sup> Real Zaragoza's correspondence of 16 June 2011 was also forwarded to FIFA, a fact that was confirmed in FIFA's submission in the present proceedings.



October 2011. This decision could therefore not have been taken into account by the secretariat to the FIFA Disciplinary Committee in its request of 27 September 2011 to the RFEF. It was however this second decision of the Zaragoza Commercial Court that finally led the secretariat to the FIFA Disciplinary Committee to close the proceedings.

173. In the opinion of the Panel, this second decision of the Zaragoza Commercial Court does not influence the fact that Real Zaragoza was involved in insolvency proceedings and that the period of grace of 90 days to pay the due amounts was to be regarded as suspended from the day Real Zaragoza entered into insolvency proceedings.
174. Consequently, since the period of grace for Real Zaragoza to pay the due amounts was to be regarded as suspended, Shakhtar Donetsk was not yet entitled to *“demand in writing from FIFA that (...) six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship”*. Subsequently, the secretariat to the FIFA Disciplinary Committee should not have requested the RFEF to deduct six points from Real Zaragoza’s team.
175. As a supplementary request for relief, the Appellant requests the Panel to decide that the secretariat to the FIFA Disciplinary Committee should not have closed the proceedings against Real Zaragoza, but that it should have suspended the proceedings and is obliged to continue the proceedings once the voluntary insolvency proceedings of Real Zaragoza have concluded. The Panel will therefore continue to adjudicate this remaining issue below.

**3. *Should the FIFA Disciplinary Committee have suspended the disciplinary proceedings against Real Zaragoza?***

176. Shakhtar Donetsk argued in its appeal brief that even if the Panel were to reject all its primary arguments, the Panel must revoke the Appealed Decision since FIFA was not entitled to simply close the disciplinary proceedings which would operate as a huge injustice, if, having clearly breached fundamental provisions of the FIFA Statutes and regulations, Real Zaragoza could forever avoid sanction by FIFA/RFEF simply due to the fact that it initiated insolvency proceedings. To avoid such situation, FIFA should have suspended the disciplinary proceedings against Real Zaragoza until further notice but not completely closed them.
177. FIFA is of the opinion that the Appellant’s request to suspend the proceedings instead of closing them is against the system put in place by the Zaragoza Commercial Court since the objective of insolvency proceedings is that finally the club will become financially healthy. To suspend the disciplinary proceedings would contravene the principles applicable in insolvency proceedings, could lead to evident inequality of treatment between creditors and could finally put the debtor’s existence at risk.

178. FIFA also maintained that if a club is involved in insolvency proceedings, it is of the utmost importance that the disciplinary proceedings are stopped in order to avoid contradictory or conflicting decisions on the same subject matter, (*i.e.* the enforceability of a certain amount of money owed as a consequence of a legally binding decision) and, also, even more importantly, that the jurisdiction of FIFA ends in affairs which involve matters where the exclusive jurisdiction of the ordinary state courts is established, such as in matters pertaining to insolvency and bankruptcy law.
179. The Second Respondent argues that in the event that the CAS, contrary to the positions of FIFA, the RFEF and Real Zaragoza, would annul the Appealed Decision and would order FIFA to proceed with the disciplinary proceedings against Real Zaragoza, such decision could never be enforced in Spain based on the bilateral International Treaty between Spain and Switzerland and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the "New York Convention").
180. As concluded above, the Panel is not in a position to order FIFA to request the RFEF to deduct six points from Real Zaragoza's first team as requested by Shakhtar Donetsk and the Panel has decided that FIFA was wrong in closing the disciplinary proceedings against Real Zaragoza on a permanent basis.
181. The Panel finds that the principles applicable in insolvency proceedings would not be harmed had FIFA suspended the enforcement of the FIFA Disciplinary Committee Decision until the insolvency proceedings had concluded. The allegation of FIFA that it is of the utmost importance to avoid contradictory decisions and that therefore the disciplinary proceedings should be closed is not upheld. Since the proceedings were to be suspended, there was no risk of contradictory decisions during this period.
182. Real Zaragoza's argument that in case the Panel decided to order FIFA to proceed with the disciplinary proceedings against Real Zaragoza, such decision would not be enforceable based on the bilateral International Treaty between Spain and Switzerland or the New York Convention, does not hold. The Panel does not order FIFA to proceed with the enforcement of disciplinary measures in contradiction with the decisions of the Zaragoza Commercial Court, but orders FIFA to continue the disciplinary proceedings once the insolvency proceedings of Real Zaragoza have terminated. The Panel does not see why such decision would not be enforceable under the bilateral International Treaty between Spain and Switzerland or the New York Convention and neither does Real Zaragoza contend why this would be the case. In any event, this is not a matter to be adjudicated by this Panel.

183. Further the Panel is of the view that FIFA's argument that it cannot enforce disciplinary measures if the proceedings became baseless does not hold. The 2011 CAS Award made the FIFA Disciplinary Committee Decision final and binding and pursuant to that decision FIFA has no further discretion to decide whether or not to order the RFEF to deduct the six points from Real Zaragoza's first team once the two factual conditions for such disciplinary measure are complied with.
184. This does not mean that FIFA should automatically order the RFEF to deduct six points from Real Zaragoza's first team once the insolvency proceedings of Real Zaragoza have terminated. Instead, it means that the enforcement of the FIFA Disciplinary Committee Decision remains suspended until the insolvency proceedings of Real Zaragoza have been concluded and that such decision revives thereafter. Thus, the deduction of six points should only follow automatically *"without further formal decisions having to be taken by the FIFA Disciplinary Committee"* if the full amounts pronounced in the 2009 CAS Award due to Shakhtar Donetsk have not been paid within the final period of grace of 90 days, which period commences the day after the insolvency proceedings of Real Zaragoza have concluded.
185. Real Zaragoza submitted in its answer that on 9 May 2012 a settlement agreement was concluded with its creditors. A necessary majority of 53,33% of the creditors agreed with the settlement and accordingly the Zaragoza Commercial Court ratified such creditors' agreement. The judge of the Zaragoza Commercial Court ruled *"[t]hat I had to agree and therefore I agree to APPROVE the Agreement Proposal submitted by the insolvent [Real Zaragoza] which content is considered as reproduced [sic: ratified], suspending all effects of the Insolvency decree, without prejudice of the general obligations established for the debtor in Art. 42. It is considered finished the common stage of the Insolvency"*.
186. The Panel understands that all the suspensive effects of the insolvency proceedings are therefore lifted by the decision of the Zaragoza Commercial Court dated 9 May 2012 and that the 90 day period of grace commenced on that day.
187. Whether the deduction of six points from Real Zaragoza's first team or the other possible sanctions set out in the FIFA Disciplinary Committee Decision are finally to be imposed on Real Zaragoza are mere factual observations which cannot be adjudicated at the present stage by this Panel. As determined in the FIFA Disciplinary Committee Decision, *"[i]f payment is not made by this deadline. Shakhtar Donetsk may demand in writing from FIFA that (...) six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship"*.

## B. CONCLUSION

188. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

- 1) The secretariat to the FIFA Disciplinary Committee was not entitled to declare the disciplinary proceedings against Real Zaragoza closed.
- 2) The secretariat to the FIFA Disciplinary Committee should have suspended the disciplinary proceedings against Real Zaragoza until the insolvency proceedings of Real Zaragoza concluded.

## VIII. COSTS

189. Article R64.4 of the CAS Code provides as follows:

*"At the end of the proceedings, the CAS Court Office shall determine the final amount of the costs of the arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."*

190. Article R64.5 of the CAS Code provides as follows:

*"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

191. Having taken into account the outcome of the arbitration, in particular the fact that the Appellant's appeal has been partially upheld and considering that no witnesses were called to be heard by the Parties, the Panel finds it reasonable and fair that the First Respondent bears 80% and the Second Respondent 20% of the arbitration costs to be determined and notified to the Parties by separate communication from the Secretary General of CAS.

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192. Furthermore, pursuant to article R64.5 of the CAS Code, and in consideration of the outcome of the proceedings as well as the conduct and the financial resources of the Parties, the Panel rules that each party shall bear its own costs.

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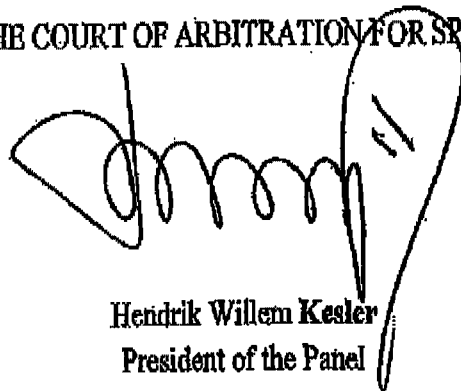
### ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 15 March 2012 by FC Shakhtar Donetsk against the Decision issued on 24 February 2012 by the secretariat to the FIFA Disciplinary Committee is partially upheld.
2. The Decision issued on 24 February 2012 by the secretariat to the FIFA Disciplinary Committee is overturned insofar as it declared the proceedings against Real Zaragoza S.A.D. closed.
3. The proceedings against Real Zaragoza S.A.D. are declared suspended and the proceedings shall be continued by FIFA, upon the request of Shakhtar Donetsk, once the insolvency proceedings of Real Zaragoza S.A.D. concluded.
4. The costs of the arbitration, to be determined and notified to the Parties by separate communication from the Secretary General of CAS, shall be borne for 80% by FIFA and for 20% by Real Zaragoza S.A.D.
5. Each party shall bear its own legal fees and other expenses incurred in connection with this procedure.
6. All other claims are dismissed.

Lausanne, on 15 October 2012

THE COURT OF ARBITRATION FOR SPORT



**Hendrik Willem Kesler**  
President of the Panel