Arbitration 2013/A/3165 FC Volyn v. Issa Ndoye, award of 14 January 2014

Panel: Prof. Petros Mavroidis (Greece), President; Mr Geraint Jones (United Kingdom); Mr Raymond Hack (South Africa)

Football
Termination of a contract of employment with just cause
Extension and computation of time limits under Article R32 of the CAS Code
Applicable law
Concept of just cause defined in Article 14 RSTP 2012
Non-payment or late payment of a player's salary
Counterclaim

1. **Article R32.2 of the CAS Code relates to the extension of time limits provided in the CAS Code, and not to the computation of time periods, which is the subject of Article R32.1 of the CAS Code. The time limit to file a statement of appeal starts to run the day after the notification of a decision in accordance with Articles R47 and R32.1 of the CAS Code.**

2. **If an employment agreement contains a choice of law clause, according to which the employment agreement shall be governed by a national law, but that this choice of law applies subject to limitations for some clauses which stipulate in particular that the regulations of FIFA are also applicable, the employment agreement itself expresses that, where they apply, the rules and regulations of FIFA are to take precedence over the national law. By voluntary and expressly submitting the employment dispute to the FIFA dispute-resolution mechanism and then to CAS, despite the option to proceed before the national association judiciary bodies, the parties subsequently deviated from the relevant provisions of the employment agreement, pursuant to which the national law is to apply, at least in the alternative, in addition to the rules and regulations of FIFA, as the FIFA Statutes provide a choice of law clause if an appeal against a final decision passed by FIFA's legal bodies is filed with the CAS. In this regard, Article 66 para. 2 of the FIFA Statutes provides that the CAS shall *"primarily apply the various regulations of FIFA and, additionally, Swiss Law"*. With this choice of law clause, the FIFA Statutes take into account an important characteristic of international sport. The latter is a global phenomenon which demands global uniform standards. Only if the same terms and conditions apply to everyone who participates in organised sport, are the integrity and equal opportunity of sporting competition guaranteed. Besides, the fact that the parties are bound by Art. 66 para. 2 of the FIFA Statutes also follows from the "capacity" of those involved, for all of the parties are - at least indirectly - affiliated to FIFA. It follows that they are not only bound by the rules and regulations of the respective national associations; rather, in their capacity as - indirect - members of the "FIFA family", the parties are also obliged to comply with FIFA's rules and regulations**

The application of Swiss law stipulated in Art. 66 para. 2 of the FIFA Statutes is however limited. It only applies in the alternative and, more particularly, if there is a gap in the FIFA regulations. However, where the FIFA regulations conclusively regulate a legal question there is basically no scope for having recourse to Swiss law.

3. **The concept of "just cause" is defined in Article 14 of the FIFA 2012 Regulations on the Status and Transfer of Players. It is to be established according to the merits of each particular case. Violation of the terms of an employment contract can justify the termination of a contract for just cause only if such violation persists over a long time or many violations are cumulated over a certain period of time, so that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.**

4. **According to well-established CAS jurisprudence, non-payment or late payment of a player's salary by his club may constitute "just cause" for terminating the employment contract. In this regard, the CAS specifies: *"the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the later non-payment, is irrelevant. The only relevant criteria is whether the breach of the obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee".***

5. **As it was found by other CAS panels, since the 2010 version of the CAS Code, it is no longer possible for respondents to file counterclaims. In other words, the subject-matter of any counterclaims must form part of an appeal against the decision at issue, meaning that the relevant deadlines are those that apply to appeals, as provided for by R49 of the Code.**

INTRODUCTION

This appeal is brought by FC Volyn ("the Appellant", "the Club", or "FC Volyn") against a decision of the FIFA Dispute Resolution Chamber (the "FIFA DRC") dated 16 November 2012 (the "Appealed Decision") ordering FC Volyn to pay to Mr Issa Ndoye (the "Respondent" or the "Player") a total of USD 794,000 following an alleged breach of the Player's employment agreement with FC Volyn.

I. THE PARTIES

A. FC Volyn

1. FC Volyn is a Ukrainian football club, affiliated with the Football Federation of Ukraine (FFU), which in turn is affiliated with the Fédération Internationale de Football Association (FIFA).

B. Mr Issa Ndoye

2. Mr Issa Ndoye is a Senegalese football player.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submission and evidence it considers necessary to explain its reasoning.

4. On 9 June 2009, the Player and the Club signed an employment agreement valid as from 1 July 2009 until 1 July 2012 (the "Employment Agreement").

5. An undated amendment to the Employment Agreement was also signed between the parties (the "Amendment") stipulating the same duration as the Employment Agreement, and in accordance with which the Player was to receive *inter alia* the following monies and fringe benefits:

   a. USD 15,000 as salary;
   b. USD 200,000 for the 2009-2010 season payable in July;
   c. USD 250,000 for the 2010-2011 season payable in July;
   d. USD 300,000 for the 2011-2012 season payable in July;
   e. Apartment, food, car;
   f. Three air tickets per season Kiev-Dakar.

6. Article 3.5.5 of the Employment Agreement *inter alia* stipulates that the Club is entitled to unilaterally decrease any payments due to the Player or to terminate the Employment Agreement if the Player does not fulfil or fulfils the provisions of the Employment Agreement in an improper or incomplete way.

7. Furthermore, Article 4.4 of the Employment Agreement stipulates, *inter alia*, that *"[i]f the player fails to arrive to the club in time or leaves the club without permission, the matter of his salary payment should be settled in accordance the current Ukrainian legislature, and any contact provisions referring to payments should be suspended for the period of his absence"*.

8. In addition, according to Article 7.3 of the Employment Agreement, the Player is subject to financial sanctions and no payments are to be executed, in the event that the Player arrives late or leaves the Club without authorisation or evades his duties in any other fashion.

9. On 18 January 2011, the Player, through his legal representative, put the Club in default of payment of the amount of USD 250,000 due in July 2010, as well as of his salary relating to October 2010 until January 2011, totalling USD 60,000. In said letter, the Player considered the Club's failure to pay his salaries to be a breach of contract. The Player requested the payment of USD 610,000. The Player further informed the Club that in accordance with Article 5 of the Amendment, he was at the Club's disposal to find an amicable solution to the Club's non-payment.

10. Despite the non-payment by the Club, the Player did not leave the Club and kept playing.

11. On 10 June 2011, the Player, through his legal representative, once again notified the Club of its failure to pay his salaries, which he considered to be a continued breach of contract by the Club resulting in the immediate termination of the Employment Agreement.

12. On 15 June 2011, the Player lodged a claim against the Club before the FIFA DRC maintaining that he terminated the Employment Agreement with just cause due to the Club's failure to remit his remuneration.

13. On 24 June 2011, the Club informed the Player that he was in default of his obligations in accordance with the Employment Agreement due to his failure to. The Player was given a seven-day time limit to return to the Club and fulfil his contractual obligations towards the Club.

14. On 15 July 2011 - during the pendency of the Player's claim against the Club with the FIFA DRC - the Club initiated disciplinary proceedings against the Player before the Disciplinary Committee of the Ukraine Football League (the "UFL DC") based, in principle, on the Player's continued absence from the Club.

15. On 29 July 2011, the UFL DC imposed a 6-month suspension on the Player based upon his continued absence with the Club.

16. Despite the UFL DC sanction, the Club contacted the Player on 28 November 2011 and invited him to training camp for the 2012 season. The Player, however, did not return.

17. On 16 November 2011, the FIFA DRA issued its decision as follows:

1. The claim of the Claimant, Issa Ndoye, is partially accepted.
2. The Respondent, FC Volyn, has to pay to the Claimant outstanding remuneration in the amount of USD 299,200 within 30 days as from the date of notification of this decision.
3. The Respondent has to pay to the Claimant compensation for breach of contract in the amount of USD 495,000 within 30 days as from the date of notification of this decision.

4. In the event that the amounts due to the Claimant are not paid by the Respondent within the stated time limits, 5% interest p.a. will fall due as of expiry of the aforementioned time limits and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.
5. Any further request filed by the Claimant is rejected.
6. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.

III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

18. On 8 May 2013, the Appellant filed its statement of appeal against the Appealed Decision before CAS.

19. On 20 May 2013, the Appellant filed its appeal brief.

20. On 13 June 2013, the Respondent filed his answer, together with a counterclaim.

21. On 18 June 2013, the CAS Court Office informed the parties *inter alia* the following:

> *"I note the Respondent states that the "appeal is not admissible as it was not filed within the deadline stipulated in the FIFA Statutes and CAS procedural rules" (see §2.1 of Answer). The Appellant is granted seven (7) days from receipt of this letter by DHL, to comment on the time limit to appeal and the time limit to file its appeal brief, pursuant to Article R49 and R51 of the CAS Code.*
>
> *Furthermore, I note that the Respondent is claiming additional outstanding payments by way of a counterclaim (see §2.3 of Answer). The parties are advised that the filing of counterclaims after 1 January 2010 has been considered by previous CAS Panels, including in the case CAS 2010/A/2108, where the Panel rejected the counterclaim filed by the respondent party in the following terms: "the Panel notes that the version of the Code, which entered into force on 1 January 2010, no longer contemplates the possibility for respondents to file counterclaims. In other words, the subject-matter of any counterclaims must form part of an appeal against the decision at issue, meaning that the relevant deadlines are those that apply to appeals, as provided for by R49 of the Code".*
>
> *The parties are further advised that Article R39 of the CAS Code is applicable to ordinary arbitration procedures only; for appeal cases, the relevant provision is Article R55 of the Code, which does not contemplate the filing of counterclaims.*
>
> *Notwithstanding the foregoing, please note that in accordance with Article R56 of the Code od Sports-related arbitration (the "Code"), 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 request 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".*

22. On 27 June 2013, the Appellant set forth its comments concerning the timeliness of its appeal. Moreover, the Appellant requested that the CAS obtain copies of the case files from FIFA and the FFU.

23. On 8 August 2013, the CAS Court Office invited FIFA and FFU to provide CAS with the relevant case files pursuant to Article R57 of the CAS Code of Sports-related Arbitration (the "CAS Code").

24. On 21 August 2013, FIFA provided CAS with a copy of the requested file. Two days later, on 23 August 2013, the FIFA file was forwarded to the parties.

25. On 24 September 2013, the CAS Court Office sent a second invitation to the FFU requesting the FFU file associated with this case.

26. On 25 September 2013, the Respondent pre-emptively objected to the Appellant's potential witnesses.

27. On 1 October 2013, the CAS Court Office informed the parties that the question of the admissibility of the witnesses would be dealt with on case-by-case basis at the hearing pursuant to Article R44.3 and 57 of the CAS Code.

28. The Appellant and Respondent signed the Order of Procedure on 7 and 8 October 2013, respectively.

IV. THE CONSTITUTION OF THE PANEL

29. On 16 July 2013, the CAS Court Office informed the parties that the Panel to hear the appeal had been constituted as follows: Prof. Petros C. Mavroidis, President of the Panel, Mr Geraint Jones, Barrister, nominated by the Appellant, and Mr Raymond Hack, attorney-at-law, arbitrator nominated by the Respondent.

30. On 2 October 2013, Mr Serge Vittoz was appointed as ad hoc clerk.

V. HEARING

31. On 10 October 2013, a hearing was duly held at the CAS Headquarters in Lausanne, Switzerland. All members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.

32. The following persons attended the hearing:

- For the Appellant: Mr Ralph Isenegger, Attorney-at-law in Geneva, Switzerland;
- For the Respondent: Mr Stéphane Ceccaldi, Attorney-at-law in Marseille, France.

33. Mr Brent J. Nowicki, Counsel to the CAS, and Mr Serge Vittoz, Attorney-at-law in Lausanne, Switzerland, *ad hoc* clerk, assisted the Panel at the hearing.

34. The Panel heard evidence from the following witnesses: Mr Vitaliy Kvartsyanyy, head coach of the Appellant; Mr Mykola Havryliuk, manager of the Appellant; and Mr Vitaliy

Goshkoberya, football player. The witnesses were cross-examined by the Parties and answered questions from the Panel.

35. The Parties were then afforded the opportunity to present their case, to submit their arguments, and to answer the questions asked by the Panel.

36. The Parties present explicitly agreed at the end of the hearing that their right to be heard and to be treated equally in these arbitration proceedings had been fully observed.

VI. POSITION OF THE PARTIES

37. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in what immediately follows.

A. FC Volyn

38. The Appellant made a number of submissions, in its statement of appeal, in its appeal brief, and at the hearing. These can be summarized as follows:

a. The Appeal was timely filed.

b. CAS shall primarily apply Ukrainian law, as provided in the Employment Agreement.

c. During the whole duration of the Employment Agreement, the Player always returned late from vacation. He therefore missed the most part of the training camps, which took place at the beginning and the middle of each season.

d. Each absence was duly registered by the Club as an "act of absence".

e. These absences were in breach of the Employment Contract.

f. The Player, as a goalkeeper and foreigner, had a very important place in the team. As the Player was also considered as the "star" of the team, the Club decided not to sanction him in the 2009-2010 season.

g. Due to the absence of sanctions in the 2009-2010 season, the Player had a feeling of impunity and permissiveness. Such conduct, in addition to rather obvious harm to the interests of the team and Club, provided negative example to the other players. That is why financial sanctions were imposed on the Player, as provided in the Employment Contract.

h. The Club was facing serious financial difficulties, as of October 2009.

i. At the end of the 2009-2010 season, the Player was informed by the Club, as all the members of the team, that he would receive his outstanding salaries when he returned to the Club for the pre-season training camp in June 2011.

j. As the Player did not return to the Club at all, the Club was forced to file a claim with the UFL DC in order to impose disciplinary sanctions on the Player.

k. The fact that disciplinary proceedings were initiated against the Player after the latter's termination of the Employment Agreement neither denies the fact that the Player breached the Employment Agreement nor relieves the Player from liability for such breaches.

l. The Player did not have just cause to terminate the Employment Agreement and shall therefore compensate the Appellant.

B. Mr Issa Ndoye

39. The Appellant made a number of submissions, in its Statement of Appeal, in its Appeal Brief, and at the Hearing. These can be summarized as follows:

a. The Appeal was filed late.

b. CAS shall primarily apply the various FIFA regulations and Swiss law, as they supersede Ukrainian law.

c. The Respondent terminated the Employment Agreement with just cause.

d. The Appellant's accusations against the Respondent are not seriously substantiated, and the Player's various late arrivals were due to the Appellant.

e. The FIFA DRC underestimated the compensation to be paid to the Respondent, in particular with regard to the criterion of the "specificity of sport". Therefore, the Player's counterclaim shall be upheld.

VII. THE PARTIES' REQUESTS FOR RELIEF

40. The Appellant's requests for relief are the following:

Based on the abovementioned, Volyn FC hereby asks the Court of Arbitration for Sports to satisfy the following claims:

1. *Reconsider the case and annul the Decision of the FIFA Dispute Resolution Chamber passed in Zurich, Switzerland, on 16 November 2012.*

2. *To consider the case and refuse to satisfy the claims of the Player, Mr. Issa Ndoye.*

3. To bind Mr. Issa Ndoye to pay all legal costs related to consideration of this case.

41. The Respondent's requests for relief are the following:

In light of the arguments presented herein, Mister ISSA NDOYE respectfully requests this Court:

1. Grant its motion and hold FC VOLYN LUTSK's appeal not admissible, and in any case, dismiss FC VOLYN's appeal.

2. Accordingly, confirm the decision issued on 16 November 2012 by the FIFA Dispute Resolution Chamber in so far it ordered FC VOLYN to pay to ISSA NDOYE outstanding remuneration in the amount USD 299,200 and a compensation for breach of contract in the amount of USD 495,000;

3. Uphold Respondent's counterclaim and order FC VOLYN to pay to Mister ISSA NDOYE within 30 days as from the date of notification of this decision additional compensation as follows:

Sport loss	*USD 259,065*
Non-pecuniary loss (moral damage)	*USD 77,499*
Economic loss	*USD 100,000*
Contractual benefits in kind	*USD 203,288.35*

4. The entire costs of proceedings shall be paid in full by Appellant and a procedural indemnity of 50,000 Swiss Francs shall be granted by the same to Mister NDOYE for irrecoverable costs incurred.

VIII. THE ADMISSIBILITY OF THE APPEAL AND CAS JURISDICTION

42. The admissibility of an appeal before CAS shall be examined in light of Article R47 of the CAS Code, which reads as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

43. The same general principle is gathered in Article 67.1 of the FIFA Statutes, which states that:

"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".

44. According to the Respondent, the Appellant did not meet the deadline to file its statement of appeal given that this deadline commences to run on the day of notification of the grounds of

the Appealed Decision, and not on the day after. The Respondent bases its argumentation on the fact that the computation of time periods of Article R32.1 of the CAS Code is not applicable with regard to the filing of the statement of appeal, in accordance with Article R32.2 of the CAS Code.

45. The Panel does not follow this reasoning. Indeed Article R32.2 of the CAS Code relates to the extension of time limits provided in the CAS Code, and not to the computation of time periods, which is the subject of Article R32.1 of the CAS Code.

46. Pursuant to Article R32 of the CAS Code:

> *"The time limits fixed under the present Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under the present Code are respected if the communications by the parties are sent before midnight on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification has been made, the time limit shall expire at the end of the first subsequent business day".*

47. The Panel therefore considers that the time limit to file a statement of appeal starts to run the day after the notification of a decision in accordance with Articles R47 and R32.1 of the CAS Code.

48. In the case at hand, the Appealed Decision, with grounds, was notified to the Appellant on 8 April 2013. Hence, the deadline of 21 days expired on 9 May 2013 at 24:00 with the consequence that the Appellant, with its letter dated 8 May 2013, timely filed its appeal.

49. The jurisdiction of the CAS to hear an appeal is examined in light of Article R47 of the Code, which reads as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to his appeal, in accordance with the statutes or regulations of the said sports-related body".*

50. The jurisdiction of the CAS to hear this dispute derives from Articles 66 and 67 of the FIFA Statutes and was confirmed by the parties when signing the Order of Procedure. The jurisdiction of the CAS in the present case was not disputed by the parties.

51. Under Article R57 of the CAS Code, the Panel has the full power to review the facts and the law and may issue a *de novo* decision superseding, partially or entirely, the appealed decision.

IX. APPLICABLE LAW

52. Article R58 of the CAS Code provides that 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.

53. In the present case, the parties have inserted several provisions in the Employment Contract with regard to the applicable law.

Clause 1.2:

"The present Contract is a fixed-date labour agreement and is concluded in accordance with Labour Code of Ukraine, the Ukrainian Law "On physical culture and sports", Order of the Cabinet of Ministers "On the order of the contract form of labour agreement", FIFA and UEFA legal documents, Regulations of the Ukrainian football competitions among the professional teams, the Club Statute and other applicable Ukrainian laws".

Clause 2.1:

"Labour relationship and mutual obligations between the Parties should be regulated by the present Contract, the current Ukrainian legislation, the Club Statute and Internal Code of labour conduct, Collective Agreement and other statutory documents of the Club, by FIFA, UEFA, FFU, PFLU legal documents, and, particularly by the FFU-PFLU Regulations".

Clause 7.1:

"The parties bear responsibility for the non-fulfilment or improper fulfilment of their obligations under the present Contract in accordance with the current Ukrainian legislature".

Clause 8.4:

"It is agreed upon that only Ukrainian legislation is applicable to the provisions of the present Contract".

54. There is a dispute between the parties with regard to the applicable law.

55. On the one hand, the Appellant considers that, in view of the above-mentioned clauses of the Employment Contract, Ukrainian law shall apply.

56. The Respondent, on the other hand, considers that CAS shall primarily apply the various FIFA Regulations and Swiss law, as the latter supersede Ukrainian law.

57. The Panel considers that the question of what law is applicable in the present arbitration shall be decided by the Panel in accordance with the provisions of Chapter 12 of the Swiss Private International Law Act (Swiss PIL), the Court of Arbitration for Sport being an international arbitral tribunal having its seat in Switzerland within the meaning of Article 176 of the Swiss PIL (cf. CAS 2005/A/983 & 984 marg. no. 61 and CAS 2006/A/1180).

58. According to Article 187 para.1 of the Swiss PIL, *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected".*

59. The wording of Article 187 para.1 of the Swiss PIL, which states that the parties may choose the 'rules of law' to be applied, does not limit the parties' choice to the designation of a particular national law. It is generally accepted in CAS practice, and agreed by academics and commentators that the parties may choose to subject the contract to a system of rules which is not the law of a State and that such a choice is consistent with Article 187 of the Swiss PIL (CAS 2005/A/983 & 984 marg. no. 64 et seq.; *see also* RIGOZZI A., L'arbitrage international en matière de sport, Basel 2005, marg. no. 1177; DUTOIT B., Droit international privé suisse, Basle 2005, p. 657; LALIVE/POUDRET/REYMOND, Le Droit de L'Arbitrage Interne et International en Suisse, Lausanne 1989, p. 392 et seq.; KARRER, in HONSELL/VOGT/SCHNYDER (publ.), Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht, Basel 1996, Art. 187, marg. no. 69 et seq.). The relevant statutes, rules or regulations of a sporting governing body may therefore be designated by the parties as the applicable rules of law for the purposes of Article 187 para.1 of the Swiss PIL (RIGOZZI A., L'arbitrage international en matière de sport, Basle 2005, marg. no. 1178 et seq.).

60. However, the parties' freedom to agree to a non-state law also has its limits, which derive from public policy. This results, not least, from the fact that even an arbitration court which has been authorized to decide *ex aequo et bono* is bound by these limits (cf DUTOIT B., Droit international privé suisse, Basle 2005, p. 658; CAS 2005/A/983 & 984 marg. no. 70). But it must hereby be taken into account that this extreme outer limit of the freedom of choice of law is not a matter of domestic Swiss law, or of a particular foreign public policy. Rather, the relevant criterion is an international or universal order public policy. The Swiss Federal Court specified this - for arbitral jurisdiction - more precisely in a decision (ATF 8 March 2006, 4P.278/2005 marg. no. 2.2.2), and stated that what was concerned were *"… basic values or values, which are still recognized, which according to the understanding of the law that prevails in Switzerland, should form the basis of every legal system"*. [*"… valeurs essentielles et largement reconnues qui, selon les conceptions juridiques prévalant en Suisse, devraient constituer le fondement de tout ordre juridique"*].

61. In the present case the "applicable regulations" for the purposes of Art. R58 of the Code are, indisputably, FIFA's regulations because the appeal (and the counterclaim) are directed against a decision by FIFA, which was passed applying FIFA's rules and regulations. More specifically, the regulations concerned - apart from the FIFA Statutes - are particularly the FIFA Regulations for the Status and Transfer of Players 2010 ("RSTP 2010"). Although the latter were replaced by the FIFA Regulations for the Status and Transfer of Players 2012 ("RSTP 2012") with effect from 1 December 2012 (*see* Art. 29 of the RSTP 2012), pursuant to Art. 26 para.1 of the RSTP 2012, all cases that "have been brought to FIFA" before the entry into force of the RSTP 2012 are to be decided according to the former rules, i.e. according to RSTP 2010. Since, in the present case, the Player instituted the action before the DRC on 27 June 2011, the "applicable regulations" for the purposes of Art. R58 of the Code are the RSTP 2010.

62. The Panel questions whether the parties - in addition to the regulations of FIFA - made a choice with regard to the applicable law. Such a choice of law could be found in the Employment Agreement.

63. Clauses 1.2, 2.1, 7.1, and 8.4 of the Employment Agreement contain a choice of law clause, according to which the Employment Agreement shall be governed by Ukrainian law. However, this choice of law applies subject to limitations for Clauses 1.2 and 2.1 of the Employment Agreement, which stipulate in particular that the regulations of FIFA are also applicable to the Employment Agreement. Therefore, the Employment Agreement itself expresses that, where they apply, the rules and regulations of FIFA are to take precedence over Ukrainian law.

64. With regard to the settlement of disputes, Clause 7.6 of the Employment Agreement reads as follows:

> *"The Parties declare that they accept the exclusive jurisdiction of FFU".*

65. Contrary to this particular clause, the parties submitted the case to FIFA - the Respondent by filing a claim before FIFA, and the Appellant by proceeding without reservation before FIFA.

66. This voluntary and express submission of an employment dispute to the FIFA dispute-resolution mechanism, despite the option to proceed before the FFU judiciary bodies, constitutes a choice by the parties for the dispute to be decided in accordance with the FIFA Statutes and Regulations.

67. What is now questionable is whether the parties subsequently deviated from the relevant provisions of the Employment Agreement, pursuant to which Ukrainian law is to apply, at least in the alternative, in addition to the rules and regulations of FIFA. This could have happened by submitting the present case to the CAS, as the FIFA Statutes provide a choice of law clause if an appeal against a final decision passed by FIFA's legal bodies is filed with the CAS. In this regard, Article 66 para.2 of the FIFA Statutes provides that the CAS shall *"primarily apply the various regulations of FIFA and, additionally, Swiss Law"*. With this choice of law clause, the FIFA Statutes take into account an important characteristic of international sport. The latter is a global phenomenon which demands global uniform standards. Only if the same terms and conditions apply to everyone who participates in organised sport, are the integrity and equal opportunity of sporting competition guaranteed. This need to ensure uniform legal standards as been previously described by CAS Panels (*see* CAS 2005/A/983 & 984 marg. no. 68):

> *"La formation arbitrale considère à cet égard que le sport est par nature un phénomène transcendant les frontières. Il est non seulement souhaitable, mais indispensable que les règles régissant le sport au niveau international aient un caractère uniforme et largement cohérent dans le monde entier. Pour en assurer un respect au niveau mondial, une telle réglementation ne doit pas être appliquée différemment d'un pays à l'autre, notamment en raison d'interférence entre droit étatique et réglementation sportive. Le principe de l'application universelle des règles de la FIFA … répond à des exigences de rationalité, de sécurité et de prévisibilité juridique".*

This can be translated as follows:

> *"The Panel considers in this respect that sport is by nature a phenomenon that transcends borders. It is not only desirable, but essential that the rules governing the sport at the international level have a uniform character, and be broadly consistent worldwide. To ensure compliance globally, such legislation should not be applied differently from one country to another, in particular due to interference between state law and sports regulations. The principle of universal application of FIFA rules ... meets the requirements of rationality, legal certainty and predictability".*

68. In the present case, the agreement on Ukrainian law in Clause 1.2, 2.1, 7.1, and 8.4 of the Employment Agreement is subject to the proviso that the regulations of FIFA take precedence. The latter provide that in the event that CAS has the competence to decide the case, the case is to be decided, in the alternative, according to Swiss law. Besides, the fact that the parties are bound by Art. 66 para. 2 of the FIFA Statutes also follows from the "capacity" of those involved, for all of the parties are - at least indirectly - affiliated to FIFA. It follows that they are not only bound by the rules and regulations of the respective national associations; rather, in their capacity as - indirect - members of the "FIFA family", the parties are also obliged to comply with FIFA's rules and regulations (RIEMER H. M., Berner Kommentar ad Art. 60-79 ZGB, marg. no. 511 and 515; cf. CAS 2004/A/574; CAS 2005/A/983 & 984 marg. no. 82). In addition the parties have also submitted to Art. 66 para.2 of the FIFA Statutes by having brought the dispute to the CAS in accordance with the provisions of Arts. 66 et. seq. of the FIFA Statutes and have therefore given one to understand that they wish to be bound by the rules of FIFA and of CAS.

69. The application of Swiss law stipulated in Art. 66 para. 2 of the FIFA Statutes is limited. The latter only applies in the alternative and, more particularly, if there is a gap in the FIFA regulations, in particular RSTP 2010. However, where the FIFA regulations conclusively regulate a legal question there is basically no scope for having recourse to Swiss law (*see* CAS 2005/A/983 & 984 marg. no. 93).

X. MERITS

70. The following refers to the substance of the parties' allegations and arguments without listing them exhaustively. In its discussion of the case and its findings on the merits, the Panel has nevertheless examined and taken into account all of the parties' allegations, arguments, and evidence on record, whether or not expressly referred to in what immediately follows.

71. The central issue to be determined in the present matter is which party was in breach of the Employment Agreement, and thus whether the Player unilaterally terminated the Employment Agreement without just cause or whether FC Volyn breached the Employment Agreement, entitling the Player to unilaterally terminate the contract with just cause.

72. In considering this question, it is important to note that it is undisputed that the Player terminated the Employment Agreement on 10 June 2013. As such, the burden of proof is on him to prove that he had just cause to do so.

A. The termination of the Employment Agreement

73. The Respondent considers that he had just cause to terminate the Employment Agreement as a result of his remuneration having remained unpaid by the Appellant since March 2011, and as the lump sum of USD 250,000 that had fallen due in July 2010 was also not paid.

74. The Appellant does not refute the Respondent's allegations that his remuneration as of March 2011 had remained outstanding. However, the Appellant submits that the Player had acted in violation of his contractual obligations due to his alleged repeated absence from training camps and failure to resume his duties at the club after his vacation in June 2011, thus justifying the lack of payment by the Club.

75. The Appellant also considers that the Player agreed that the outstanding monies due would be paid in June 2011, when the Player would return to the Club after his summer holidays.

B. Was the Employment Agreement terminated with just cause?

i. The Concept of "just cause" as defined in Article 14 RSTP 2012

76. As set forth above, the FIFA rules and regulations are primarily applicable to the case at hand.

77. Article 14 RSTP 2010 provides for the possibility of terminating a contract with just cause as follows:

> *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".*

78. The Commentary on the RSTP states the following with regard to the concept of *"just cause"*: *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally"* (RSTP Commentary, N2 to Article 14).

ii. The failure to pay part of the Player's salary

79. According to well-established CAS jurisprudence, non-payment or late payment of a player's salary by his club may constitute "just cause" for terminating the employment contract (*see* CAS 2006/A/1180; CAS 208/A/1589; Judgement 4C.240/2000 dated 2 February 2001). In this regard, the CAS specifies:

> *"*[…] *the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the later non-payment, is*

irrelevant. The only relevant criteria is whether the breach of the obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee" (CAS 2006/A/1180).

80. The RSTP Commentary takes the same line: to illustrate the concept of "just cause" it refers to the situation of a player who has not been paid his salary for more than three months, despite having informed his club of its default. In this case, the RSTP Commentary points out that: *"The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned"* (RST Commentary, N3 to Art. 14).

81. At the time of the termination of the Employment Agreement, *i.e.* on 10 June 2011, it is not disputed between the parties that the Appellant was late in paying the Player's remuneration as of March 2011, *i.e.* at least three months salary, as well as a lump sum of USD 250,000.

82. Therefore, in application of the above-mentioned jurisprudence, the Panel considers that the Respondent had in principle just cause to terminate the Employment Agreement.

83. In the appeal brief, the Appellant contends that some provisions of the Employment Agreement allowed it to decrease the Player's salary considering the latter absences and/or lateness to the training camps.

84. At the hearing, the Appellant acknowledged that after each of the Player's absence/lateness, the President, the Manager, and the Head Coach of the Club's had personal discussions with the Player, but that the latter was never sanctioned, in particular no financial sanction was imposed on the Player. As the Appellant never formally reacted to the Player's alleged breach of the Employment Agreement, the Panel considers that the arguments linked to these facts are irrelevant to decide the present matter.

85. Furthermore, the Appellant, as seen above, considers that the Player did not have just cause to terminate the Employment Agreement as the latter had agreed, in May 2011, to be paid the outstanding monies when he returned to the Club at the end of June 2011 (*i.e.* following their scheduled vacation).

86. The Panel shall therefore turn to the issue of whether or not the Player agreed to this payment schedule, taking into account that the Player firmly denies having agreed to such late payment.

87. Mr Vitaliy Goshkoberya, who was playing for the Appellant together with the Respondent at the time of the events, was heard as a witness at the hearing. Mr Goshkoberya confirmed that the players were informed, in May 2011, that their outstanding salaries would be paid when they would return from vacation, in June 2011.

88. When asked whether the players formally agreed to the proposed arrangements, or if they were put in a position where they did not have the choice, Mr Goshkoberya responded that they did not have any other option but to wait. Such testimony confirms that the players,

including the Respondent, were not given any choice in the matter, and such delayed payment was certainly not by agreement between the Club and its players.

89. Mr Goshkoberya's testimony is compelling, and the Panel therefore considers that there was no agreement between the Appellant and the Respondent with the regard to the late payment of the outstanding salaries.

90. In view of the above, the Panel concludes that the Player had just cause to terminate the Employment Agreement and shall, therefore, be compensated accordingly.

C. The compensation to be paid by the Appellant to the Respondent

91. In the Appealed Decision, the FIFA DRC determined that the amount of compensation payable by the Appellant to the Respondent had to be assessed in application of Article 17 para.1 RSTP 2010.

92. The FIFA DRC concluded that the Appellant was liable to pay to the Respondent the amount of USD 299,200 as outstanding remuneration and the amount of USD 495,000 as compensation for breach of contract.

93. Both parties contest these findings of the FIFA DRC.

i. The Appellant's position

94. The Appellant's position in this regard is the following:

> *"*[the FIFA DRC] *disregarded systematic heavy violations of the Contract by the Player, that had actually provoked emergence of dispute. Under such circumstances, the sum of compensation should be far less, because sufficient part of fault for termination of the Contract is laid on the Player".*

95. The Panel considers that the Appellant's position cannot be followed. Indeed, the Panel finds that the question whether the Player misbehaved during the period of the Employment Agreement is not relevant to determine the amount to be paid as compensation after the termination of the Employment Agreement. As the Panel determined that the Respondent had just cause to terminate the Employment Agreement following the Appellant's breach of contract, the criterion of Article 17 para.1 RSTP 2010 shall be applied, without any other consideration.

ii. The Respondent's position

96. In his answer, the Respondent filed a counterclaim, in the sense that the amount of the compensation to be paid by the Appellant be raised, including the following elements: sport loss, non-pecuniary loss (moral damages), economic loss, and contractual benefits in kind.

97. The Respondent confirmed his position in this regard at the hearing.

98. As already mentioned in the CAS Court Office's letter dated 18 June 2913, the Panel takes the view that the filing of counterclaims after 1 January 2010 has been considered by previous CAS Panels, including in the case CAS 2010/A/2108, wherein the Panel rejected the counterclaim filed by the respondent party in the following terms: *"the Panel notes that the version of the Code, which entered into force on 1 January 2010, no longer contemplates the possibility for respondents to file counterclaims. In other words, the subject-matter of any counterclaims must form part of an appeal against the decision at issue, meaning that the relevant deadlines are those that apply to appeals, as provided for by R49 of the Code".*

99. As the Respondent did not file any appeal against the Appealed Decision within the deadline provided by Article R49 of the Code, the Panel concludes that the Respondent's counterclaim is inadmissible.

100. In view of the above, both parties' positions concerning compensation are rejected by the Panel, as the Panel does not see any reason to depart from the amount established by the FIFA DRC in the Appealed Decision. The Appellant is therefore liable to pay to the Respondent the amount of USD 299,200 as outstanding remuneration and the amount of USD 495,000 as compensation for breach of contract.

XI. CONCLUSION

101. The time limit for the Appellant to file its appeal brief was duly respected, as it was filed in the 10-day time limit set forth in the applicable regulation. As provided for in Article 32 para. 1 of the CAS Code, the time limit starts to run the day after the notification of a decision under appeal.

102. In accordance with the terms of the Employment Agreement, and CAS jurisprudence in this regard, the FIFA rules and regulations shall primarily apply to the present case and, subsidiarily, Swiss law.

103. There is an agreement between the parties that, at the time of the termination of the Employment Agreement by the Respondent, outstanding salaries and other sums amounting to more than three monthly salaries, remained unpaid. As the Appellant did not demonstrate that it had valid reasons to withhold some of the Player's salaries, or that the Player agreed to postpone the payment of these monies, the Player had just cause to terminate the Employment Agreement.

104. The parties did not demonstrate that the amount of compensation to be paid by the Appellant to the Respondent following the termination of the Employment Agreement was incorrectly determined by the FIFA DRC in the Appealed Decision. Therefore, the FIFA DRC's position in this regard shall be confirmed.

105. The appeal filed by FC Volyn shall therefore be dismissed, and the counterclaim filed by the Player shall be declared inadmissible.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by FC Volyn on 8 May 2013 is dismissed.

2. The counterclaim filed by Mr Issa Ndoye on 11 June 2013 is inadmissible.

3. The decision of the FIFA DRC dated 16 November 2012 is confirmed.

4. (…).

5. (…).

6. All other requests are dismissed.