Arbitration CAS 2013/A/3305 Ivanko Vitaly Mykolayovych v. FC Metallurg Donetsk, award of 4 July 2014

Panel: Mr András Gurovits (Switzerland), Sole arbitrator

Football
Termination of an employment contract without just cause by a player
Applicable law
Liability for damages under Ukrainian law
Inappropriate methods of calculation and proof of the damage

1. **If an appeal is not an appeal against a decision of a sport governing body rendered on the basis of its regulations and relating to the relationship between such sport governing body and a member, such as e.g. a disciplinary sanction, but is rather lodged against a decision in respect of a commercial dispute between two parties on the basis of a bilateral employment agreement, it is, thus, in essence a civil law action consisting of a contractual dispute and would be treated by the CAS as ordinary arbitration proceeding in the sense of Art. R38 et seq. of the Code had the dispute been directly brought before the CAS. To the extent it was an ordinary arbitration proceeding, Art. R45 of the Code would apply which provides that the dispute shall be decided by the rules of law chosen by the parties. Therefore, if the matter is a commercial dispute under an employment agreement, the dispute must be determined on the basis of the laws that the parties have chosen in the employment agreement.**

2. **Article 623 of the Civil Code of Ukraine provides a general rule according to which a party violating a contract can be held liable for the damage caused by such violations and that the party claiming the damage must prove the damage actually sustained.**

3. **A compensation for damages based on the remuneration and other payments that belong to the player under the employment contract refers to the cases where the contract is terminated due to the fault of the club. In case the employment contract is terminated by the player, the club is saving the salary of the player that would have become due until the expiry of the employment contract; such salary, therefore, cannot be the basis for the compensation that the player may have to pay to the club. It is also not appropriate to apply a formula that is designed as a training compensation payable by a new club to a former club in order to determine the amount of damages that the player may own to his former club as a result of his violation of the employment contract. Training compensation payable by a club and damages payable by a player for breach of contract are two distinct issues that must be dealt with differently. Instead, a party requesting compensation of damage as a result of breach of contract must prove that it actually sustained damage and that such damage is a result of the breach of contract. Relying on the findings of the challenged decision is not sufficient.**

I. THE PARTIES

1. Mr Vitaly Mikolayovych Ivanko (the "Appellant") is a citizen of Ukraine who had been engaged by the Respondent as a professional football player.

2. FC Metallurg Donetsk (the "Respondent") is a Ukrainian professional football club that plays in the Premier League of Ukraine.

II. FACTS

3. On 1 July 2012, the Appellant and the Respondent entered into an employment contract (the "Employment Contract") in accordance to which the Appellant was employed by the Respondent as football player for the period from 1 July 2012 to 30 June 2015. On 1 July 2012, the parties further entered into an agreement on disciplinary sanctions and bonuses (the "Bonus Agreement") (hereinafter collectively the "Agreement") providing for additional terms, including specific financial conditions and possible sanctions.

4. The Employment Agreement provided, inter alia, for the following

"6.1. The contract is valid from "01" July 2012 and up to "30" June 2015 […]

6.4 The contract may be prematurely terminated on the initiative of the Football Player according to Art. 39 of the Labor Code of Ukraine, only with good reasons, namely:

- disability of the Football player which prevents him from performing his professional duties under the Contract;

- violation by the Club of its obligations under this Contract".

5. On 19 March 2013, the Appellant's counsel sent a facsimile notice to the Respondent setting out that the salaries for December 2012, January 2013 and February 2013, plus USD 7'000 as a bonus having matured in September 2012 had not been paid yet and set a deadline for subsequent payment by the Respondent by 25 March 2013, 12.00 CET.

6. After having received a payment of USD 10'000, on 25 March 2013, the Appellant sent a facsimile letter to the Respondent claiming that an amount of USD 12'000 was still outstanding and terminated the Agreement with immediate effect. According to the facsimile confirmation report, this letter did not go through. The Appellant, therefore, resent the letter in the morning of 26 March 2013.

7. On the same day, i.e. on 26 March 2013, the Respondent effected payment to the Appellant of USD 5'067 and USD 7'094 and the Respondent, further, sent a letter to the Appellant's counsel explaining that the Respondent had paid all outstanding amounts and that the Agreement was still running until 30 June 2015.

8. On 3 April 2013, the Respondent sent another letter to the Appellant's counsel reminding the latter that the Appellant was still absent from the club, explaining that the Appellant's actions

may be deemed as a unilateral termination of the Contract, proposing that the Appellant come to the club by 5 April 2013 in order to solve the present dispute and pointing out that the Respondent had to address the dispute to the Dispute Resolution Chamber (the "DRC") of the Ukrainian Football Federation (the "FFU").

9. In the meantime, on 1 April 2013, the Respondent had filed its claim against the Appellant with the DRC of the FFU for early termination of the Agreement and requested compensation of USD 135'000. On 3 July 2013, the DRC of the FFU rendered its decision, which was notified to the parties on 2 August 2013 (the "Challenged Decision"). The DRC of the FFU held, inter alia, that the Appellant had terminated the Agreement without good reason and that the Appellant was to pay the Respondent a compensation for such unilateral early termination without good reason in the amount of USD 135'000.

10. On 17 July 2013, the Appellant entered into a playing contract with AEK Larnaca, Cyprus.

III. PROCEEDINGS BEFORE THE CAS

11. The Appellant filed its statement of appeal on 23 August 2013, pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"). He later filed his appeal brief on 2 September 2013, pursuant to Article R51 of the Code.

12. On 20 September 2013, the Respondent filed its "Statement of Defence" (i.e. answer) pursuant to Article R55 of the Code.

13. By letter dated 4 November 2013, the CAS Court Office, pursuant to the parties' agreement and Article R54 of the Code, confirmed that the President of the CAS Appeals Arbitration Division appointed Dr. András Gurovits as the Sole Arbitrator to preside over this appeal.

14. On 25 November 2013, the CAS Court Office informed the parties that the hearing had been scheduled to take place on 15 January 2014 at the CAS Court Office in Lausanne, Switzerland.

15. By letter dated 6 January 2014, the CAS Court Office sent the parties the order of procedure, which the Appellant signed and returned on 7 January 2014 and which the Respondent signed and returned on 10 January 2014.

16. On 15 January 2014, the hearing was held at the CAS Court Office in Lausanne, Switzerland. The Appellant was represented by his counsels Mr Gianpaolo Monteneri and Ms Anna Smirnova. The Respondent was represented by his counsel Mr Juan de Dios Crespo Pérez. Mr Brent J. Nowicki, Legal Counsel to the CAS, was present and assisted the Sole Arbitrator.

17. Following the hearing, the parties confirmed that their right to be heard had been respected.

18. By letters dated 16 January 2014 and 17 January 2014, following the conclusion of the hearing, the CAS Court Office sent a letter to the parties requesting the parties to comment on two specific topics under Ukrainian law. Both the Appellant and the Respondent provided their comments by letters dated 27 January 2014.

IV. THE PARTIES' SUBMISSIONS

19. In his appeal brief dated 2 September 2013, the Appellant submitted the following requests for relief:

"For the facts and legal arguments submitted and documented herewith, n accordance with Article R51 of the Code, the Sole Arbitrator or the Panel is respectfully requested:

1. to accept the present appeal against the Challenged Decision;

2. to set aside the Challenged Decision;

3. to establish that the Appellant shall not pay any amounts to the Respondent;

4. to establish that the Respondent has breached the contract with the Appellant without just cause during the protected period;

5. to establish that the Respondent shall pay to the Appellant the amount of USD 135,000 plus 5% interests from 26 March 2013 until effective date of payment;

6. to ban the Respondent from registering any players at national and international level for two consecutive registration periods; alternatively, to send the case back to the FFU DRC and/or to the Disciplinary Committee of the FFU in order for the Respondent to be sanctioned for the breach of contract according to the national and FIFA regulations;

7. to condemn the Respondent to the payment in the favour of the Appellant of the legal expenses incurred;

8. to establish that the costs of the arbitration procedure shall be borne by the Respondent".

20. The Appellant principally submits that:

a. The Agreement designates CAS as the competent body to solve this dispute under the Agreement.

b. From the beginning of the Agreement, the Respondent failed to effect, on time, payment of the salary due under the Agreement and continuously left the Appellant without remuneration despite numerous requests of the Appellant. As from December 2012, the Respondent ceased to make any payment to the Appellant without providing any explanation to the Appellant.

c. By letter dated 19 March 2013, the Appellant's counsel requested payment of the outstanding salary setting a deadline by 25 March 2013 for payment by the Respondent. As of 25 March 2013, the Appellant, having only received a portion of the outstanding amount, sent a facsimile notice of termination of the Agreement to the Respondent. The Respondent, however, had deliberately switched off its facsimile machine so that the Appellant's notice of termination could not go through on 25 March 2013 and could only be received by the Respondent after the announced deadline, namely on 26 March 2013 in

the morning.

d. The Respondent transferred the amounts that were still open under the Agreement on 26 March 2013 in the afternoon, i.e. after the Appellant had successfully submitted his notice of termination.

e. On 3 April 2013, the Respondent sent a letter to the Appellant proposing to settle the issue, without, however, having a real intention to settle as the Respondent had already, as of 28 March 2013, notified the Ukrainian Football Premier-League that the Appellant had arbitrarily left the club.

f. In the Challenged Decision, the DRC of the FFU ruled in favour of the Respondent and ordered that the Appellant pay compensation of damages to the Respondent without properly explaining the financial damage incurred by the Respondent.

g. Further, as the Respondent had constantly and grossly violated the Agreement by routinely paying the salary due under the Agreement late, the Appellant had a right to terminate the Agreement with just cause. As such, he is entitled to compensation for damages from the Respondent in the amount of USD 135'000.

h. As the Respondent breached the Agreement with the Appellant, sporting sanctions are also to be imposed on the Appellant.

21. In its answer dated 20 September 2013, the Respondent submitted that the CAS shall *"keep in force the decision of the FFU Dispute Resolution Chamber dated July 03, 2013"* and that *"All the costs and all the court costs should be borne by the Appellant"*.

22. The Respondent principally submits that:

a. The Appellant did not address numerous requests for payment by the Respondent and the entire correspondence between the Appellant and the Respondent consists of two letters only, i.e. the letter dated 19 March 2013 sent by the Appellant's counsel and the Appellant's letter dated 25 March 2013.

b. The Respondent did not switch off its facsimile machine on 25 March 2013 to prevent receipt of the Appellant's message, which is evidenced, e.g., by the fact that the Respondent received other facsimile messages on 25 March 2013.

c. The starting and key element of the present dispute is the fact that the Appellant was unwilling to continue his career with the Respondent and wanted to go to another club.

d. While clause 4.1.1 of the Employment Agreement provides payment conditions applicable under the Agreement, Order no. 1-K dated 1 January 2008 sets out different terms for payment. The Appellant was aware of and had signed such Order no. 1-K.

e. The Agreement was not the first contract which the Appellant and the Respondent entered into. The parties had previously entered into other agreements, i.e. a contract dated 27

March 2008 and a contract dated 9 April 2010.

f. Thus, since 2008 the Appellant was aware of the payment conditions of the Respondent.

g. When sending the letter of 19 March 2013, the Appellant did not specifically declare his intention to terminate the Agreement.

h. On 20 March 2013, the Respondent effected payment for the months January and February 2013; the salary for March 2013 was not yet due at that moment. On 26 March 2013, the Respondent effected payment of all other outstanding consideration of the Appellant, so that on 26 March 2013 the Respondent did not have any further outstanding financial obligation towards the Appellant.

i. This notwithstanding, the Appellant stopped to fulfil his contractual duties and therefore violated the Agreement.

j. For this reason, the Challenged Decision according to which the Appellant is obliged to pay compensation to the Respondent for breach of contract is accurate.

V. ADMISSIBILITY

23. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the Statutes or Regulations of the Federation, association or sports-related body concerned, or in a previous agreement, the time limit for the appeal shall be twenty one days from the receipt of the decision appealed against […]".

24. The Challenged Decision was adopted on 3 July 2013 and notified to the parties on 2 August 2013. Therefore, the 21-day period in accordance with Art. 49 of the CAS Code started running on 3 August 2013. As the statement of appeal was filed on 23 August 2013, it was lodged on time. Likewise, the appeal brief dated 2 September 2013 was submitted on time given that 1 September 2013 was a Sunday.

25. The Sole Arbitrator, therefore, holds that the appeal is admissible.

VI. JURISDICTION

26. According to Article R27 of the Code *"These Procedural Rules* [the ones of the Code] *apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal proceedings)".*

27. In the appeal brief and in the answer, both parties acknowledged that the CAS shall be competent to hear the present dispute on the basis of the relevant regulations of the FFU. The

Sole Arbitrator, therefore, concludes that when signing the Employment Contract which provides some references to the regulations of the FFU, albeit no express reference to the relevant provision referring disputes to the CAS, the parties had a mutual understanding that the relevant provisions of the FFU regulations shall be an integral part of the Agreement by means of reference and that the CAS shall have jurisdiction to determine, on appeal, disputes that may arise between them.

28. Further, even if one were to assume that no such mutual understanding had existed between the parties, by making their appearance in the present proceeding and by signing the order of procedure, the parties confirmed competence of the CAS.

29. The Sole Arbitrator finds, therefore, that the Agreement and the conduct of the parties provide that CAS has jurisdiction to hear the present dispute.

VII. APPLICABLE RULES OF LAW

30. Pursuant to Article R58 of the Code, the dispute must be decided *"according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

31. Clause 6.4 of the Employment Contract provides that Art. 39 of the Labour Code of Ukraine shall apply in case of early termination by the Appellant. Further, clause 5.1 of the Employment Contract provides that the parties *"are responsible for the failure or improper performance of their obligations under the Contract in accordance with the current legislation of Ukraine"*.

32. While the Appellant explains that the FIFA regulations shall be applicable in par with Ukrainian regulations and Ukrainian law (and that Swiss law shall apply complementarily in the event the relevant issue is not covered by these legal sources), the Respondent does not make any express statement regarding the applicable laws, but refers, in the context of the compensation for contract termination, to clause 4.1 of article of the FFU regulations on the status and transfer of players (the "FFU Regulations").

33. The Sole Arbitrator notes that the present appeal is not an appeal against a decision of a sport governing body rendered on the basis of its regulations and relating to the relationship between such sport governing body and a member, such as e.g. a disciplinary sanction, but is rather lodged against a decision in respect of a commercial dispute between two parties on the basis of a bilateral employment agreement. The dispute at hand is, thus, in essence a civil law action consisting of a contractual dispute and would be treated by the CAS as ordinary arbitration proceeding in the sense of Art. R38 et seq. of the Code had the dispute been directly brought before the CAS, instead as an appeal against the Challenged Decision rendered by the FFU. To the extent it was an ordinary arbitration proceeding, Art. R45 of the Code would apply which provides that the dispute shall be decided by the rules of law chosen by the parties, i.e. in according to which the law chosen by the parties shall not apply only "subsidiarily".

34. In light of the nature of the present matter (i.e. a commercial dispute under an employment agreement) and in light of the provisions under the Code in respect of the applicable laws, the Sole Arbitrator holds that the dispute at hand must be determined on the basis of the laws that the parties have chosen in the Agreement. As discussed above, the Employment Contract provides that the laws of Ukraine shall apply.

35. Considering the above, the Sole Arbitrator finds that the present matter is to be determined in accordance with the laws of Ukraine.

VIII. MERITS

a. The Question of Termination for "Good Reason" by the Appellant

36. The parties disagree as to whether or not the Appellant was entitled to terminate the Agreement for "good reason". The DRC of the FFU held that the Appellant had terminated without such "good reason".

37. Art. R51 para. 1 of the Code provides that an Appellant shall submit the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely in his appeal brief. Art R55 para. 1 of the Code provides a similar duty of a Respondent. This is in line with the generally accepted principle that each party must provide evidence for any fact which supports its notions. This means, in the case at hand, that the Appellant has the burden of proof in respect of the fact that he was entitled to terminate the Agreement notwithstanding its fixed term until the end of June 2015.

38. Clause 6.4 of the Employment Contract provides that the Appellant may prematurely terminate the Agreement in accordance with Art. 39 of the Labour Code of Ukraine only with "good reason", e.g. in case of violation by the Respondent of its obligations under the Agreement.

39. Article 39 of the Labour Code of Ukraine provides that an employee may prematurely terminate a fixed-term employment agreement, inter alia, in case of a violation of the agreement by the employer.

40. Clause 6.4 of the Employment Contract, thus, repeats, in essence, the basic principle provided in the Labour Code of Ukraine. In this context, the Sole Arbitrator holds that the Respondent's explanation provided in its 27 January 2014 submission according to which article 39 of the Labour Code only provides a right of early termination by the employee if the employee is no longer able to perform his duties due to his serious illness or disability, but not for good reasons, is unfounded and does not accurately reflect what is actually set out in article 39 of the Labour Code. Article 39 of the Labour Code rather allows an employee to terminate a fixed-term agreement if the employer violates the agreement.

41. In light of the above, the Appellant must prove that the Respondent violated the Agreement and that the Appellant was, thus, entitled to terminate the Agreement with good reasons.

42. The Appellant explains that in accordance with clause 4.1.1 of the Employment Contract, the

Respondent was obliged to pay the salary to the Appellant no less than two times per month, but that, in fact, the Respondent constantly paid the Appellant with delay. He further explains, inter alia, that (i) from the very beginning of the Agreement *"the Respondent failed to organize properly its financial affairs so that to be capable to timely and duly perform its obligations of an employer and transfer the due amounts of salary to the Appellant"*, (ii) the salaries were paid to the Appellant with delays, (iii) the *"Appellant was continuously left without remuneration for the performance of his employment obligations"*, (iv) the Respondent *"simply mobbed out the Appellant from the squad, caused him existential problems and financial hardship, doing its best in order to avoid continuation of their contractual relationship"*, (v) on *"multiple occasions the Appellant referred to the Respondent for clarification of the salary policies and asking for immediate payment of the amounts already due"* without, however, receiving any answer, (vi) the Appellant *"had no other choice than to undertake the firm steps against the Respondent calling the latter first to comply with the final deadline regarding the outstanding payments and comply with the Agreement"*, and (vii) *"in view of the respondent's failure to do so, the Appellant deemed reasonable to terminate the employment relationship with just cause"*.

43. The Respondent states in its answer that it has *"no objections to the chronology of the events stated in the brief of Appeal"*, and also during the hearing the Respondent did not state that the payment dates as outlined by the Appellant were inaccurate. The Respondent, however, disagrees with the Appellant's explanation that he had addressed numerous requests and "continuous recalls" to the Respondent; the correspondence addressed by the Appellant to the Respondent rather consisted of two letters only, i.e. of the letter of the Appellant's counsel dated 19 March 2013 and the letter of the Appellant dated 25 March 2013 by means of which he gave notice of termination. The letter dated 19 March 2013 did not imply the Appellant's intention to terminate the Agreement unilaterally; if the Appellant had the intention to terminate he should have unambiguously declared so. Moreover, the Respondent states that the Appellant had signed a document called Order No. 1-K which sets out a payment mechanism that deviates from clause 4.1.1 of the Employment Contract. As the Appellant had signed three contracts with the Respondent in total, the first one on 27 March 2008, the Appellant was familiar with the Respondent's payment mechanism as from the year 2008. During the past five years the Appellant, however, *"did not lay a single claim and did not make any comment on the order of calculation and payment of the salary"*.

44. The Sole Arbitrator notes that payments of the salary were, indeed, not made in accordance with clause 4.1.1 of the Employment Contract. He, however, also notes that the Respondent presented the so-called Order no. 1-K, which, in respect for the payment mechanism deviates from clause 4.1.1 of the Employment Contract and according to which payment of salary would be made for the current month until the end of the next month. The Respondent explains that this order no. 1-K was countersigned by the Appellant, and, indeed, the Sole Arbitrator notes that the signature page attached to the order no. 1-K bears, under number 88, the name of the Appellant, and the signature next to it corresponds to the signature of the Appellant contained in the Employment Contract.

45. During the hearing, the Appellant's counsel explained that the Appellant cannot remember whether he signed the order no. 1-K, and also explained that the signature may be the Appellant's signature. Together with his 27 January 2014 response, the Appellant, however, provided a "sworn declaration" relating to this order no. 1-K and providing, inter alia, that the

Appellant does not recall when and at what circumstances he could have signed that paper and further, that he doesnot recognize the signature on it as his own. However, in light of Art. R56 of the Code, and given that the Sole Arbitrator does not find an exceptional circumstances to accept just late evidence, this declaration shall not be admitted to the file. The issue that the order no. 1-K may provide different payment terms than the Employment Contract was known to the Appellant at an early stage of the dispute, and the Appellant has not even attempted to explain what exceptional circumstances pursuant to Art. R56 of the Code could allow him to present this declaration at such a late stage. The Sole Arbitrator does, therefore, not see any ground that would justify the admission of the sworn declaration submitted by the Appellant on 27 January 2013.

46. Order no. 1-K was, indeed, signed by the Appellant. On the other hand, the question comes up whether in the year 2008 - when the order no. 1-K was countersigned by the Appellant - the Appellant could validly sign any legal document given that he was, at that time, not even 16 years old. However, as will be shown below, this question may remain open in the case at hand.

47. Although the Appellant explains that the Respondent was constantly late in effecting the payments and that he had addressed numerous reminders to the Respondent, he failed to provide evidence that this was actually the case. It is rather to be noted that the Appellant sent only two letters to the Respondent, i.e. the 19 March 2013 letter (submitted by his counsel) and his termination notice dated 25 March 2013. If the Appellant, as he explains, constantly received the salary payments late, but did never object to such practice of the Respondent until 19 March 2013, as the evidence indicates, then he can be deemed, in good faith, to have accepted, at least tacitly, the payment mechanism applied by the Respondent.

48. Further, when sending his notice of 19 March 2013 requesting payment of the outstanding amount of USD 22'000 by 25 March 2013, the Appellant stated that should *"no payment be received by this date, we have no other choice than to start legal procedure against your club for breach of contract before all competent bodies. To this end, by means of the present correspondence we are officially putting your club in default of payment and in default of complying with its basic obligation as an employer"*. The Appellant, thus, pointed out that he would start legal proceedings against the Respondent should he not receive payment by 25 March 2013, but he did not indicate that he would immediately terminate the Agreement for breach by the Respondent should the latter not effect payment on by such date. The Sole Arbitrator holds that the notice of 19 March 2013 cannot be understood, by any employer acting in good faith, as a threat of termination.

49. Following receipt of the Appellant's 19 March 2013 letter, the Respondent paid USD 10'000 so that a balance of USD 12'000 was outstanding when the Appellant sent his notice of termination on 25 March 2013. This balance related to the February 2013 salary of USD 5'000 and, as the Appellant explained during the hearing, to his bonus entitlement of USD 7'000. Even if this amount was still outstanding when the Appellant sent his notice of termination, it is questionable whether, considering the entire context, this fact could be deemed as a good reason for an early termination of the fixed-term Agreement having a term of three years. On 25 March 2013, apart from USD 7'000 for his bonus, only the February 2013 salary remained unpaid which according to the order no. 1-K was not payable before 31 March 2013. But even if order no. 1-K was to be disregarded and, further, the Appellant was not to be deemed to having

accepted the payment mechanism applied by the Respondent (as discussed above), it is doubtful whether it would have been appropriate for the Appellant to give notice of termination on 25 March 2013, given that the outstanding amount was not significant, given that when sending his 19 March 2013 letter he had set the Respondent a payment period of a six days only, and further given that in his 19 March 2013 letter the Appellant had not indicated that he would terminate the Agreement should he not receive full payment by 25 March 2013.

50. This question must not, however, be further reviewed as Clause 5.2 of the Employment Contract provides that *"The Parties undertake to resolve all the disputes arising in the process of implementation of obligations under the Contract through negotiations and agreements. In case of non agreement between the Football player and the Club the final decision is made by the Sports Council of the Club, which may be appealed to the Disciplinary Committee of OPFK Ukraine Premier League, Control and Disciplinary Committee, the Appeal Committee of the Football Federation of Ukraine"*. In accordance with the Employment Contract, the parties have the obligation to at least try to settle any dispute they may have under the Agreement through negotiations before undertaking any further legal step. This is in line with article 39 of the Labour Code of Ukraine which provides in the last paragraph that disputes on early termination of an employment agreement shall be settled in accordance with general procedure established for resolution of employment disputes, a fact that the Appellant also recognized in his 27 January 2014 letter. Thus, pursuant to the Employment Contract and the law, it was not sufficient for the Appellant to simply terminate the fixed-term Agreement by unilateral notice. He should rather have undertaken further formal steps and attempted to settle the issue by negotiations first, prior to terminating the relationship and ceasing to provide his services to the Respondent.

51. Based on the evidence submitted one must conclude that the Appellant failed to comply with his duties. Instead of undertaking such further steps he elected to simply give unilateral notice of termination. He thereby violated the Agreement.

b. The Consequences of the Violation of the Agreement

52. Given that the Appellant had no right to terminate the Agreement, he is not entitled to claim any compensation for early termination of contract from the Respondent.

53. On the other hand, it is now to be determined whether the Respondent is entitled to compensation from the Appellant for the consequences of the latter's breach of the Agreement as set out in the Challenged Decision.

54. With respect to the burden of proof, it can be held that in accordance with the applicable principles of the Code, as well as under the laws of Ukraine set out above, the Respondent is to specify and give evidence for the damage it has possibly incurred as a result of the unilateral early termination by the Appellant of the Agreement.

55. This principle is also supported by the parties. The Appellant provides in his 27 January 2014 submission that under Ukrainian law *"should the Respondent claim for compensation of any damages it must prove the very fact of such damage incurred to it clearly and with evidence as well as to prove that such damage was expressly caused to it by the termination of the Employment Contract"*. And the Respondent,

in its 27 January 2014 submission, cites the Challenged Decision which provides, inter alia, that *"in case the Contract is terminated without a valid reason 'the Party at fault shall pay the compensation in compliance with the provisions of Section VII of Compensation for preparation of football players' regulations and, if not provided otherwise in the Contract, the compensation for the infringement of the Contract's terms shall be determined with proper consideration of the legislation of Ukraine, sports specifics and other objective criteria"* as well as that *"without doubt, as the compensation of the caused damage is demanded by the injured party, it is that party that shall provide sufficient grounds and corresponding evidence"*.

56. With regards to the pertaining rules under the laws of Ukraine in respect of the consequences of a violation of an agreement, the parties have, however, differing views. The Appellant refers to article 238 of the Labour Code of Ukraine. But this provision only covers claims by an employee against an employer (and not vice versa). The Respondent, on the other hand, explains that the laws of Ukraine do not provide any rule in this respect and that this question is only regulated in the regulations of the FFU.

57. The Sole Arbitrator, however, notes that article 623 of the Civil Code of Ukraine provides a general rule according to which a party violating a contract can be held liable for the damage caused by such violations and that the party claiming the damage must prove the damage actually sustained. This is in line with what is said, in principle, in the Challenged Decision, in accordance to which the Appellant was held liable for damages because he had unlawfully terminated the Agreement.

58. Therefore, as the Appellant violated the Agreement, the Respondent is, in principle, entitled to claim compensation of damages for breach of contract by the Appellant. On the other hand, the Respondent is to prove the damage it actually sustained and that such damage is the result of such breach.

59. With respect to the determination of the damage to be compensated by the Appellant, the Challenged Decision provides, inter alia: *"53. The Chamber notes that although for the calculation of compensation as one of the objective criteria there can serve 'remuneration and other payments that belong to the Football player under the current contract', the calculation provided proposed by the Claimant is not acceptable in this case due to the following: - As a result of early unilateral termination of the contract by the Football player, the Club will not be obliged to pay monthly payments to Ivanko V.M., over the next 27 months remaining until the end of the contract. Therefore, from an economic point of view it is illogical to determine the amount of compensation based on the amount that the Club vice versa should not pay to the Football player; - As it is clear from the meaning of par. 4.1 of Art. 10 of the FFU Regulations, such criterion for determination of the amount of compensation as 'remuneration and other payments that belong to the Football player under the current contract', refers to the cases where the contract is terminated due to the fault of the club and football player was deprived of the right to earn money by the end of the contract"*. The DRC of the FFU, thus, correctly explained that the Respondent was saving the salary of the Appellant that would have become due until expiry of the Agreement and that such salary, therefore, cannot be the basis for the compensation that the Appellant may have to pay to the Respondent.

60. The DRC of the FFU, therefore, chose another formula to compute the compensation. This formula is based on articles 20, 22 and 25 of the FFU Regulations: *"56. The Chamber, based on the criteria set forth in par. 4.1 of Art. 10 of the FFU regulations 'remuneration and expenses made or incurred*

by the former club (amortized for the period of the contract), considers acceptable and appropriate to set compensation for early termination of the contract, based on the amount of compensation for training the Football player, calculated in accordance with the FFU Regulations […] 57. Such approach, in the opinion of the Chamber, is the most reasonable in relation to young football players who were trained at the club for some considerable time. For the club, that trained such player, it is difficult to separate expenses just on this player and justify these expenses appropriately. In relations between the clubs while calculating the cost of training, that is, the cost of expenses that must be compensated to former club, the formula, introduced by Part 1 of Art. 22 of the FFU regulations, is used, which is based on the wages of such a professional football player, multiplied by the appropriate age factor. 58. Taking into account the provisions of Part 1 of Art. 20, Part 1 of Art. 22, Part 1 of Art. 25 of the FFU Regulations, based on 5 000 USD as an amount of monthly wages of the Football player and applying the age factor 5, the Chamber concludes that cost of compensation for training Ivanko V.M. is USD 300 000 USD".

61. Articles 20, 22 and 25 of the FFU Regulations considered by the DRC of the FFU when determining the damage of the Respondent to be compensated by the Appellant are, however, set out in Chapter VII of the FFU Regulations regarding compensation for preparation of football players. But such compensation is meant to be paid by a new club to the (former) club that educated the player. This is also confirmed in the Challenged Decision itself which provides that *"In relations between the clubs while calculating the cost of training, that is, the cost of expenses that must be compensated to former club, the formula introduced by Part 1 of Art. 22 of the FFU Regulations, is used"*.

62. This is the very purpose of training compensation, i.e. that it is to be paid by a new club as a compensation for training efforts by a former club, is also illustrated in Annexe 4 to the FIFA Regulations of the Status and Transfer of Players. Article 3 of such Annexe 4 provides: *"On registering as a professional for the first time, the club with which the player is registered is responsible for paying training compensation […] to every club that has […] contributed to his training. In case of subsequent transfers of such professional, training compensation will only be owed to his former club for the time he was effectively trained by that club"*. Such payment is not meant to be compensation for damage sustained; it is rather a matter of solidarity between the clubs and shall ensure that a former club that successfully trained a young player will receive a certain amount as an award for such education.

63. Against this background, it is not appropriate in the present case to apply a formula that is designed as a training compensation payable by a new club to a former club in order to determine the amount of damages that the Appellant may own to his former club as a result of his violation of the Agreement. Training compensation payable by a club and damages payable by a player for breach of contract are two distinct issues that must be dealt with differently. While it may be appropriate to apply certain generic criteria and standard factors to calculate a training compensation payable by one club to another, it is not appropriate to apply such criteria and factors to determine the damage that a party has sustained. It is, in particular, not appropriate to resort to such formula only because *"it is difficult to separate expenses just on this player and justify these expenses appropriately"* as is said in no. 57 of the Challenged Decision. As has been explained above, a party requesting compensation of damage as a result of breach of contract must rather prove that it actually sustained damage and that such damage is a result of the breach of contract.

64. The Sole Arbitrator, however, notes that the Respondent did neither describe the damage

incurred, nor did it provide any evidence that it has actually sustained such damage, nor that such damage would be the result of the violation by the Appellant of the Agreement. The Respondent did not even make any attempt to describe the damage allegedly sustained. The Respondent rather fully relies on the explanations given in the Challenged Decision. As, however, the calculation provided in the Challenged Decision is inappropriate to establish and determine the amount of damage to be possibly compensated by the Appellant as explained above, the assertion of the Respondent that it has sustained a damage in the amount of USD 135'000, or any other damage, remains unproven.

65. Consequently, the Appellant is not liable for paying any compensation for damages to the Respondent.

c. Conclusion

66. Based on all the above, the Sole Arbitrator finds that the Appellant breached the Agreement when he gave notice of termination and did not return to the Respondent. On the other hand, the Respondent did not prove that it has sustained any damage as a result of such breach by the Appellant.

67. In light of this outcome, the Sole Arbitrator holds that even if the CAS was competent to decide on disciplinary sanctions on the Respondent (a question which can be left open), the issue as to whether or not sanctions are to be imposed on the Respondent as requested by the Appellant is not to be reviewed any further as the Appellant, and not the Respondent, violated the Agreement.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of the Appellant, Ivanko Vitaly Mykolayovych, is partially upheld.

2. The arbitral award of the Dispute Resolution Chamber of the Football Federation of Ukraine is partially set aside and the Appellant is not obliged to pay any compensation for breach of contract to the Respondent.

3. (…).

4. (…).

5. All other and further claims for relief are dismissed.