Arbitration CAS 2014/A/3508 FC Lokomotiv v. Football Union of Russia (FUR) & FC Nika, award of 23 March 2015

Panel: Mr Stuart McInnes (United Kingdom), President; Mr Lucio Colantuoni (Italy); Mr Olivier Carrard (Switzerland)

Football
Transfer
Stay of the execution of the appealed decision
Admissibility of witness statements
Conditions to trigger a sell-on clause
Interpretation of a sell-on clause
Basis of calculation of the sell-on fee
Penalty

1. **It is consistent CAS jurisprudence that a decision of a financial nature issued by a private Swiss association (e.g. FIFA) is not enforceable while under appeal before the CAS. It may not, therefore, be stayed and an application in that respect – being moot – would in principle be dismissed. In such circumstances, the applicant might have to bear the consequential arbitration costs. However, where the challenged decision was rendered by a national football private association providing that its decisions *"come into force as of the day of its adoption"*, the request to stay execution of the challenged decision should be granted.**

2. **On the basis of CAS panel's competence to proceed *de novo* and based on the panel's discretion as mentioned in Article R57, para. 3 of the Code, a witness statement adduced by a party but not produced and not taken into account before the first instance authority might be admissible notably if it is the testimony of the former president of the club. According to Article R56 of the CAS Code, a witness statement already filed with the appeal brief supplemented with a handwritten note might be declared admissible especially where exceptional circumstances are self-evident i.e. an untrue claim of one party that the witness statement was not in the file before the first instance authority.**

3. **The use of a sell-on clause is a risk that the "old club" takes by accepting first a lower transfer fee, with the expectation of receiving an additional fee from the "new club" in the event the player will be subsequently transferred to a third club for a higher amount. It does not provide for a guarantee of an additional fee. It is indeed true that the idea of a sell-on clause is to share profit between two clubs where a potential higher transfer fee is obtained, but it cannot be accepted that a sell-on clause can only be triggered when the player is permanently transferred, with profit. Therefore, the only condition to be fulfilled in order for the sell-on clause to be triggered is the permanent**

transfer of the player to a third club whether or not a transfer fee is paid to the "new club".

4. In accordance with Article 18 par. 1 SCO, the judge or the arbitrator interpreting a contract governed by Swiss law must go beyond the mere terms of the contract in order to determine the real and common intention of the parties. In this respect, where in view of certain events and circumstances, it appears that a permanent transfer agreement between two clubs must in reality be considered as a simulated act concluded in order to conceal the existence of a loan agreement, the consequences are twofold. On the one hand, the permanent transfer agreement is without effect and, on the other hand, the loan agreement is deemed valid which means, under the circumstances, that the sell-on clause cannot be triggered.

5- Once a permanent transfer of the player has occurred, according to CAS jurisprudence, a sell-on fee is to be based on the amount actually received by a club for selling a player to a subsequent club and not on an indicative amount.

6. A penalty is not obliged to be paid by a club where the relevant conditions included in the applicable regulations of the national football private association are not fulfilled.

I. PARTIES

1. Closed Joint Stock Company Football Club Lokomotiv (hereinafter "FC Lokomotiv" or the "Appellant") is a Russian football club with its registered office in Moscow, Russia, which is affiliated to the Russian Football Association, which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Football Union of Russia (hereinafter "FUR" or the "First Respondent"), with its registered office in Moscow, Russia, is the Russian Football Association, which is affiliated to FIFA.

3. Closed Joint Stock Company Professional Football Club Nika (hereinafter "FC Nika" or the "Second Respondent") is a Russian football club, with its registered office in Moscow, Russia, which is affiliated to the Russian Football Association, which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence 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 submissions and evidence it considers necessary to explain its reasoning.

5. On 16 December 2005, FC Lokomotiv and FC Nika entered into an agreement for the permanent transfer of the Russian football player Denis Borisovich Glushakov (hereinafter the "Player") from FC Nika to FC Lokomotiv (hereinafter the "Transfer Contract").

6. The main relevant clauses of the Transfer Contract provide as follows:

- Clause 1: *The Parties determined the amount of compensation for training and enhancement of expertise of the Player to be USD 300.000, including 18% VAT, which FC Lokomotiv shall pay to FC Nika prior to February 20, 2006. The payment shall be made in rubles at the exchange rate as of the date of payment.*

- Clause 2: *FC Lokomotiv undertakes to pay FC Nika 15% of the amount received for the transfer of D.B. Glushakov from FC Lokomotiv to another football club* (hereinafter the "Sell-on Clause").

- Clause 3: *FC Lokomotiv shall pay FC Nika USD 250.000 in rubles at the exchange rate as of the date of payment in case if the Player included in the official protocols for 5 matches of the Russian Football Championship as a player representing FC Lokomotiv.*

- Clause 6: *The rights and obligations of the Parties not specified in the present Contract and their responsibilities are governed by the FUR Regulations on the Status and Transfer of Players and other regulatory documents.*

- Clause 10: *The present Contract shall enter into force on the date of its signing by both Parties and shall remain in force until complete fulfilment of contractual obligations by the parties.*

7. On 1 January 2006, FC Lokomotiv hired Mr. Slavoljub Muslin as the new head coach of the team. During the following 5 months, the Player did not make any appearances for the first team of FC Lokomotiv.

8. On 9 June 2006, FC Lokomotiv and FC SKA Rostov-on-Don (hereinafter "FC SKA") entered into an agreement for the transfer of the Player from FC Lokomotiv to FC SKA (hereinafter the "SKA Contract") without payment of a transfer fee.

9. On 18 October 2006, Mr. Slavoljub Muslin was terminated as head coach of FC Lokomotiv.

10. On 15 November 2006, the employment contract between FC SKA and the Player was terminated upon the Player's initiative.

11. On 16 November 2006, the Player entered into an employment contract with his former club, FC Lokomotiv.

12. On 28 February 2007, the Player was transferred on a loan basis from FC Lokomotiv to OGU PFC Zvezda.

13. On 1 December 2007, the Player returned to FC Lokomotiv on expiration of the loan agreement.

14. On 30 July and 25 August 2008, FC Lokomotiv paid FC Nika, in two instalments, the amount of USD 250.000 for the Player's appearance in official match protocols for five matches of the Russian Football Championship as a player representing FC Lokomotiv, in relation to Clause 3 of the Transfer Contract.

15. On 13 June 2013, FC Lokomotiv and FC Spartak entered into an agreement for the permanent transfer of the Player from FC Lokomotiv to FC Spartak (hereinafter the "Spartak Contract").

Clause 4 of the Spartak Contract stipulated the following:

FC Spartak shall pay to FC Lokomotiv a transfer fee for the transfer of the Player amounting to 8.000.000 (eight million) Euros (no VAT is applicable), which shall be paid to (transferred to the bank account of) FC Lokomotiv in Russian rubles at a rate of the Central Bank of Russia for the day of payment in two equal instalments as follows:

- *4.000.000 Euros – No later than 31 July 2013*
- *4.000.000 Euros – No later than 15 January 2014.*

16. On 25 June 2013, FC Nika addressed a letter to FC Lokomotiv asking FC Lokomotiv to pay the sell-on fee of 15% of the transfer fee received for the transfer of the Player from FC Lokomotiv to FC Spartak, in accordance with the Sell-on Clause.

17. On 5 August 2013, in absence of a response from FC Lokomotiv, FC Nika submitted a claim to the FUR Dispute Resolution Chamber (hereinafter the "FUR DRC") seeking payment of a sell-on fee of 15% of the transfer fee received by FC Lokomotiv for the transfer of the Player to FC Spartak.

B. Proceedings before the Football Union of Russia

18. On 22 August 2013, the FUR DRC issued a decision in which it decided as follows:

1. *To satisfy the application of CJSC Professional Football Club Nika, Moscow, about collection from CJSC FC Lokomotiv, Moscow, of a transfer fee part for the transfer of the professional football player Mr. D.B. Glushakov from CJSC FC Lokomotiv, Moscow, to OJSC FC Spartak, Moscow.*

2. *To oblige CJSC FC Lokomotiv, Moscow, to pay to CJSC PFC Nika, Moscow, the outstanding amount under the transfer contract amounting EUR 1.200.000 (One million two hundred thousand) at the rate of CB RF as of the payment date. The part of the mentioned sum amounting to EUR 600.000 (Six hundred thousand) shall be paid within 30 days after the decision becomes effective. The remaining part of*

the mentioned sum amounting to EUR 600.000 (Six hundred thousand) shall be paid within 30 days after the date of receiving by FC Lokomotiv of the last payment under the transfer contract between CJSC FC Lokomotiv, Moscow, and OJSC FC Spartak, Moscow.

3. *To oblige CJSC FC Lokomotiv, Moscow, to pay the penalty amounting to RUR 50.000 (Fifty thousand) in accordance with art. 17 of the Dispute Resolution Regulations of FUR.*

4. *This decision becomes effective according to the procedure stipulated in the article 50 of the Dispute Resolution regulations of FUR.*

19. On 2 October 2013, FC Lokomotiv filed an appeal with the FUR Player's Status Committee (hereinafter the "FUR PSC") against the FUR DRC decision dated 22 August 2013.

20. On 5 December 2013, the FUR PSC issued a decision based on, *inter alia*, the following grounds:

- *The Committee agrees with the Chamber that the right of FC Nika to receive the percentage of the transfer fee according to clause 2 of the Transfer Contract is realized at D.B. Glushakov's transfer from FC Lokomotiv to a third club only on permanent basis.*

- *The Committee agrees with the conclusion made by the Chamber that the transfer contract dated June 9, 2006, under which the Player transferred from FC Lokomotiv to FC SKA Rostov-on-Don without payment of compensation, does not terminate the obligations of FC Lokomotiv under clause 2 of the Transfer Contract (…) The circumstances listed above testify that the Player's transfer from FC Lokomotiv to FC SKA Rostov-on-Don is a transfer on a "loan" basis.*

- *Taking into account the actual circumstances of the case and the above arguments, the Committee agrees with the Chamber that the only transfer that falls under clause 2 of the Transfer Contract is the Player's transfer from FC Lokomotiv to FC Spartak.*

In the operative part, the FUR PSC decided as follows:

1. *To refuse satisfaction of the appeal made by FC Lokomotiv OJSC Moscow against the decision of the FUR Dispute Resolution Chamber No. 112-13 dated August 22, 2013.*

2. *To stay the Resolution of the Dispute Resolution Chamber No. 112-13 dated August 22, 2013 in force.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 20 February 2014, the Appellant filed its Statement of Appeal with the CAS Court Office against the decision of the FUR DRC, dated 22 August 2013, and the decision of the FUR PSC, dated 5 December 2013, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (hereinafter the "Code").

22. In its Statement of Appeal, the Appellant requested the appeal to be submitted to a Sole Arbitrator, or, in the event that the appeal was submitted to a Panel of three arbitrators, it

wished to nominate Mr. Efraim Barak, attorney-at-law, Tel Aviv, Israel, as arbitrator. Furthermore, the Appellant requested a stay of both the FUR DRC and FUR PSC decisions and an extension of 25 days, until 31 March 2014, to file its Appeal Brief.

23. On 4 March 2014, the CAS Court Office informed the parties that an appeal had been lodged and invited the Respondents to state their positions with respect to the Appellant's request for a 25-day extension to file its Appeal Brief and whether they agreed to the appointment of a Sole Arbitrator. The Appellant was invited to inform the CAS Court Office whether it maintained or withdrew its request for a stay of the appealed decisions.

24. On 6 March 2014, the Second Respondent informed the CAS Court Office that it agreed to an extension until 14 March 2014 for the Appellant to file its Appeal Brief and further that it agreed to the appointment of Mr. Efraim Barak as Sole Arbitrator but that in case the Appellant did not agree to such appointment, then the Second Respondent insisted on a three-member Panel.

25. On 7 March 2014, the First Respondent informed the CAS Court Office that it agreed to an extension until 21 March 2014 for the Appellant to file its Appeal Brief and that it agreed on the appointment of Mr. Efraim Barak as Sole Arbitrator but that in the event that the Appellant did not agree to such appointment, then the First Respondent insisted on a three-member Panel.

26. On 7 March 2014, the Appellant informed the CAS Court Office that it maintained its request for a stay of execution of the appealed decisions.

27. On 10 March 2014, the CAS Court Office informed the parties that the Appellant's request for an extension of the time limit to file its Appeal Brief remained suspended, pending submission to the President of the CAS Appeals Arbitration Division for a final decision.

28. On 13 March 2014, the Appellant informed the CAS Court Office that it objected to the nomination of Mr. Efraim Barak and requested the appeal be submitted to a Sole Arbitrator appointed by the Division President and/or in the event that it was decided that the dispute be submitted to a three-member Panel, the Appellant nominated Michael Gerlinger, attorney-at-law, Germany.

29. On 18 March 2014, the Appellant informed the CAS Court Office that its newly appointed attorney requested an amendment to the extension request, such that the Appeal Brief be filed by 14 April 2014.

30. On 19 March 2014, the Second Respondent informed the CAS Court Office that it did not agree to the Appellant's request for a further extension, but agreed that the time limit be finally extended to 21 March 2014.

31. On 21 March 2014, the CAS Court Office informed the parties on behalf of the President of the CAS Appeals Arbitration Division that the Appellant be granted an extension of time to file its Appeal Brief on or before 28 March 2014.

32. On 28 March 2014, the Appellant filed its Appeal Brief with the CAS Court Office in accordance with Article R51 of the Code. In its Appeal Brief, the Appellant submitted the following evidentiary matters and requests:

- *There should not be need for a hearing to be convened;*
- *To the extent a hearing may be convened, the Appellant may either call or rely on the written statement of Mr. Vladimir Korotkov;*
- *The Appellant requests the CAS to order the First Respondent to produce the audio recording and a transcript of the Player's oral evidence before the FUR PSC.*

33. On 9 April 2014, the CAS Court Office informed the parties that the case would be submitted to a Panel of three arbitrators and that Mr. Efraim Barak should be deemed the Appellant's nomination as arbitrator.

34. On 17 April 2014, the Second Respondent informed the CAS Court Office that the Respondents jointly nominated Mr. Olivier Carrard, attorney-at-law, Switzerland as an arbitrator.

35. On 23 April 2014, the Second Respondent requested a short extension of 7 days of the time limit to file its Answer until 19 May 2014.

36. On 25 April 2014, the Appellant informed the CAS Court Office that the extension requested by the Second Respondent should be denied.

37. On 29 April 2014, the CAS Court Office informed the parties that the Second Respondent was granted an extension until 16 May 2014 to file its Answer.

38. On 30 April 2014, the CAS Court Office informed the parties that Mr. Olivier Carrard had accepted his nomination as an arbitrator and that Mr. Efraim Barak accepted his nomination, but wished to respond to the Appellant's suggestion that he might be conflicted.

39. On 7 May 2014, the CAS Court Office informed the parties that Mr. Efraim Barak maintained he was fully impartial and independent, but that he would step down and withdraw from his appointment if the Appellant maintained its request after receipt of his letter.

40. On 12 May 2014, the Appellant informed the CAS Court Office that it maintained its request that Mr. Efraim Barak should step down and withdraw his appointment as an arbitrator.

41. On 13 May 2014, the Second Respondent filed its Answer with the CAS Court Office in accordance with Article R55 of the Code, submitting the following evidentiary matters and requests:

- *The Second Respondent relies on the witness statements provided before the FUR PSC by the Player and the former Appellant's President Mr. V.N. Filatov;*

- *The Panel could render its decision without a hearing based on the Parties' written submissions.*

42. On 14 May 2014, the CAS Court Office informed the parties that Mr. Efraim Barak had formally stepped down and withdrew confirmation of his appointment.

43. On 15 May 2014, the Second Respondent requested the CAS Court Office that the witness statement of Mr. Korotkov should not be admitted to the file pursuant to Article R57, par. 3 of the Code.

44. On 21 May 2014, the Appellant requested the CAS Court Office to schedule a hearing which it considered to be essential in the light of the submissions made by the parties to date. The Appellant also challenged the Second Respondent's attempts to rely on the witness statements of the Player and Mr. Filatov. The Appellant nominated Mr. Lucio Colantuoni, attorney-at-law, Italy, as an arbitrator.

45. On 23 May 2014, the Second Respondent requested that the Appellant's new, supplemented version of its Exhibit A-18 should be regarded as a new exhibit and that as such, it should be rendered inadmissible. It also maintained its request that Mr. Korotkov's statement should not be admitted to the file.

46. On 26 June 2014, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:

- Mr. Stuart McInnes, attorney-at-law in London, United Kingdom, as President;
- Mr. Lucio Colantuoni, attorney-at-law in Savona, Italy, and;
- Mr. Olivier Carrard, attorney-at-law in Geneva, Switzerland; as arbitrators.

47. On 17 July 2014, the CAS Court Office informed the parties that the Panel decided that a hearing would take place on 18 August 2014.

48. On 6 August 2014, the CAS Court Office informed the parties that the Panel had decided that the Appellant's request to stay execution of the appealed decisions was granted, to the extent that the appealed decisions are not enforceable pending the outcome of the appeal and indicated that the Panel's reasoning for such decision would be set out in the final award. Separately, with respect to any outstanding issues concerning the admission of exhibits and/or witness statements, the parties were advised, on behalf of the Panel, that a final decision on the admissibility of such documents would be addressed at the hearing.

49. On 18 August 2014, a hearing was held at the CAS headquarters in Lausanne, Switzerland. All the members of the Panel were present. At the outset of the hearing the parties confirmed that they had no objection to the constitution and composition of the Panel. Mr. Brent J. Nowicki, Legal Counsel to the CAS and Mr. Willem-Alexander Devlies, *Ad Hoc* Clerk, assisted the Panel at the hearing.

50. The following persons attended the hearing:

For the Appellant:

- Mr. Antonio Rigozzi, Counsel for the Appellant;
- Mr. William McAuliffe, Counsel for the Appellant;
- Mr. Eugene Krechetov, Legal Director of the Appellant.

For the Second Respondent:

- Mr. Georgi Gradev, Counsel for the Second Respondent;
- Mr. Mikhail Procopets, Counsel for the Second Respondent;
- Mr. Yury Zaitsev, Counsel for the Second Respondent.

51. At the hearing, the Panel heard detailed submissions of the counsels as well as evidence from the following witnesses:

- Mr. Vladimir Korotkov, Assistant to the President of the Appellant, accompanied by an interpreter;
- Mr. Denis Glushakov, the Player, accompanied by an interpreter and heard through video-conference, with the agreement of the Panel and pursuant to Article R44.2, par. 4 of the Code.

52. Before the hearing was concluded, the parties expressly stated that they were satisfied with how the hearing was conducted and that their right to be heard had been respected.

53. On 21 August 2014, the CAS Court Office, on behalf of the Panel, invited the Parties to clarify their position on the law applicable to this appeal.

54. On 22 August 2014, the Second Respondent informed the CAS Court Office about its position on the law applicable to this appeal. In particular, the Second Respondent submitted that, primarily, the FUR 2003 Regulations on the Status and Transfer of Players ("FUR RSTP 2003") and the FUR 2006 Competition Regulations are applicable and, subsidiarily, Russian law. Furthermore, it submitted that the applicable provisions under Russian law *"in particular with respect to the interpretation of contracts, 'null and void' contracts, fictitious and 'sham transactions' etc. materially do not differ from those under Swiss law"*.

55. On 2 September 2014, the Appellant informed the CAS Court Office about its position on the law applicable to this appeal. In particular, the Appellant submitted that *"primarily, the FUR Regulations and, subsidiarily, Russian law apply. Furthermore, the Appellant submitted that Swiss law is directly applicable to the so-called 'sham' transaction issue due to the fact that both Parties argued the case under Swiss law, which constitutes an implicit choice of law"*.

56. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

57. The following outline of the parties' submissions is illustrative only and does not necessarily comprise every contention put forward by the parties. The parties' submissions, in essence, may be summarized as follows:

A. FC Lokomotiv (Appellant)

58. The principal submission of FC Lokomotiv was that the only transfer that could trigger any basis for the Second Respondent's claim to a sell-on fee was the SKA Contract dated 9 June 2006 and not the Spartak Contract dated 13 June 2013, as the Player was transferred on a permanent basis to FC SKA and not on a loan basis as the FUR DRC and FUR PSC wrongly determined.

a) The SKA Contract was a permanent transfer

aa) The SKA Contract conditions denote a permanent transfer and not a loan

59. Appendix 4 of the FUR RSTP 2003 provides as follows:

- *Transfer Contract of the Player is the bilateral agreement signed by the football clubs or a football club and the sports school specifying the procedure, terms and conditions (including the payment of the Training Compensation, in case of the commutative contract) of the player transfer;*
- *Transfer Contract on Loan Basis is a three-party contract concluded by two professional football clubs and a player, which specifies the procedure, terms and conditions (including the payment of Training Compensation, in case of the commutative contract) of the player transfer;*
- *Loan of a Player is the transfer of the professional player bound by the valid labour agreement with the professional football club to another professional football club for the temporary participation in the competitions in order to play for this club on the following terms:*
  - *Availability of the labour agreement with the postponed validation date concluded by the player and the professional football club (which the player is leaving) and verifying the intention of the parties to resume the labour relations upon expiry of the term of playing for another club;*
  - *Reservation of the right to receive the Training Compensation by the professional football club, which used to be a party of the labour agreement the player used to have prior to his transfer.*

60. In the instant case, it was indisputable that there was no such trilateral agreement and there was no postponed labour agreement between the Player and FC Lokomotiv. The following features of the SKA Contract confirmed that it was not a loan:

- It is entitled "Transfer contract";
- It confirms the parties' agreement that there shall be no compensation paid; and
- It transfers the right to receive training compensation to the new club, i.e. FC SKA.

61. Moreover, in the SKA Contract, there was no reference to it being a loan, there was no limited temporary element and there was no expressed right of FC Lokomotiv for the return of the Player.

ab) That the SKA Contract was without compensation does not suggest that it was a loan

62. The reality is that such player movements are not uncommon in the world of football, in particular with players in Russia and it had been a common practice adopted by FC Lokomotiv. By way of example, the player Ivan Levenets was transferred to FC Lokomotiv in 2008 for USD 3 million, but the following year FC Lokomotiv terminated the employment agreement and released him.

63. It is not uncommon in the world of football for a new coach to arrive at a club and decide that certain players are surplus to his requirements. In such circumstances the club has no interest in keeping a player and/or to continue paying his salary. This was what happened at FC Lokomotiv, where the new coach Mr. Muslin did not call upon the services of the Player for 6 months.

64. Accordingly, the Player was transferred without compensation to FC SKA, where he would have better prospects of playing and developing his career. This was a decision taken in good faith by the Appellant and with the best interests of the Player in mind.

ac) The short time the Player spent with FC SKA does not suggest that it was a loan

65. The assertion in the appealed decisions that *"the short validity term of the labour contract between the Football Player and FC SKA Rostov-on-Don is a sign which would testify to the loan-basis nature of this deal"* was made in the absence of a copy of the relevant labour contract of the Player and FC SKA and was presumably based on an incorrect assumption that this was only for the remainder of the 2006 season.

66. However, it is clear from the Players' list of FC SKA that an employment contract was entered into by the Player and FC SKA with a term of nearly 18 months until the end of 2007. This fact was mentioned before the FUR PSC, but was simply ignored in the appealed decisions.

67. This illustrated that when the Player signed for FC SKA in June 2006, he had no intention to return to FC Lokomotiv in November 2006 and had committed himself to remain employed by FC SKA until the end of 2007. Furthermore, during the hearing before the FUR PSC, the Player gave oral evidence that FC SKA failed to pay his salary for several months prior to his unilateral termination in November 2006. This demonstrates that the player had good reason to remain with FC SKA for only a very short period of time and that he had just cause to unilaterally terminate his employment contract (which was confirmed by the fact that FC SKA had not sought to impose any sanction on the Player) and to seek a new employer in the capacity of a free agent.

ad) The Player rejoining FC Lokomotiv after he terminated his contract with FC SKA does not necessarily indicate that it was a loan

68. Quite apart from the fact that the clear evidence demonstrates that it was the Player who approached the Appellant in November 2006, requesting that it employ him and that the Appellant expressed its willingness to facilitate this request, there is nothing unusual about this chain of events.

69. The employment contract of the head coach, who had deemed the services of the Player surplus to the requirements in June 2006, had been terminated in October 2006 and there was a new head coach in place who was interested in the Player's services.

70. Accordingly, there is nothing unusual about the fact that the Player's previous club, under a new coaching structure, showed, in good faith, interest in rehiring the Player when he became a free agent. If anything, this is illustrative for the Appellant's good faith towards the Player and towards the development of his career.

ae) The absence of a transfer contract when the Player re-signed for FC Lokomotiv in November 2006 is irrelevant

71. Article 7 of the FUR RSTP 2003 provides as follows:

If a club that intends to conclude an employment contract with a player whose employment contract with another club has expired, or whose contract with another club has been terminated according to the order established by the law shall send to the former club of the player an offer regarding the conclusion of a transfer contract. The previous club of the player, if it is entitled to receive the training compensation for the player, shall execute the transfer contract within 10 days upon receiving the offer from another club in accordance with the rules specified by clause 6 of these regulations.

72. It is by no means demonstrable that, in circumstances where a player unilaterally (and justifiably) terminates his employment contract with a club and enters into a new employment contract with a new club as a free agent, that a transfer contract must be concluded. It is even less explicable how a determining body could hold that as it *"did not find such a transfer contract"* that there must have been a breach of (unspecified) regulatory norms suggesting that the SKA Contract was a loan.

73. Neither the FUR DRC nor FUR PSC saw fit to draw upon the clear wording of Article 22 of the FUR RSTP 2003 in this respect, which provides as follows:

In case of justifiable move of the player and signing of the labour agreement with the new club, any disagreements between the two clubs related to the amount of the training compensation and the term of its payment shall not affect the sports and professional activity of the player.

74. The applicability of this precise provision has already been considered by CAS in CAS 2011/A/2478, which confirms that a player can be registered in Russia without a transfer agreement. The fact that the Player was registered with FC Lokomotiv in November 2006

without any complaint from the registering body evidences that FC Lokomotiv had a valid reason to register the Player.

75. Even if the Appellant agreed with the FUR DRC and PSC, that the absence of a transfer contract for the alleged return of the Player from FC SKA to FC Lokomotiv somehow evidences the violation of regulation norms related to the transfer of football players, it is simply impossible and untenable for the FUR DRC/PSC to make a finding that this also indicates that the Player's movement to FC SKA in June 2006 was pursuant to a masked or hidden loan and not a permanent transfer. Even if it was a hidden loan and not a permanent transfer, there would still be a necessity to conclude a transfer agreement for the return of the Player to FC Lokomotiv in November 2006.

af) The loaned players limit conspiracy theory

76. The Appealed Decision sets out that *Clause 12.2 of the regulations of Russian football competitions among the teams of non-amateur football clubs of the first and second divisions stipulates that an application (preapplication) list of a first and second division club team can include not more than five players transferred to the club on a loan basis. Examination of application (pre-application) lists of FC SKA shows that as of the moment of additional application for the Player for FC SKA the whole limit for loaned players established by clause 12.2 of the regulations of Russian football competitions among the teams of non-amateur football clubs of the first and second divisions, had been exhausted. This circumstance is yet another proof of the motive of FC Lokomotiv and FC SKA to disguise the Player's loan as a transfer on permanent basis.*

77. Apart from the fact that there is no evidence that would support such conspiracy theory, it is entirely illogical to consider that FC Lokomotiv and FC SKA would set out to create such an elaborate plot of fraudulent documents merely to allow FC SKA to register one additional loan player and thereby circumvent the FUR regulations.

78. The theory lacks further credibility when to achieve its purpose, the Appellant would, for all intents and purposes, formally enter into documents which would preclude recovery of the services of the allegedly loaned Player and leave it entirely to the discretion of the loaning club to return him.

b) As the SKA Contract was a permanent transfer, the sell-on fee rights of FC Nika were extinguished

79. Both the decisions of the FUR DRC and FUR PSC implicitly acknowledged that the reason that the sell-on fee rights of FC Nika were not forfeited upon movement of the Player to FC SKA, was because both held that this movement was a loan and not a permanent transfer. The corollary to this line of reasoning is that, in the event that the movement of the Player to FC SKA was a permanent transfer, the sell-on fee entitlement would be extinguished.

80. As at the time of the Transfer Contract, when the Player joined FC Lokomotiv from FC Nika, FC Lokomotiv acquired all the rights (federative and economic) relating to the Player and pursuant to the Sell-on Clause, was obliged to pay FC Nika a percentage of any income that

could be earned by FC Lokomotiv for the further transfer of such rights. When the Player was permanently transferred from FC Lokomotiv to FC SKA, all the rights that FC Lokomotiv had acquired from FC Nika relating to the player disappeared.

81. Accordingly, when the Player was later hired by FC Lokomotiv as a free agent, the rights that FC Lokomotiv acquired were not in any way traceable to the rights that were acquired from FC Nika under the Transfer Contract.

c) Payment of USD 250.000 by FC Lokomotiv to FC Nika in 2008 does not support the claim for sell-on fee

82. It is not disputed that the Appellant made a payment of USD 250.000 to FC Nika in 2008, pursuant to Article 3 of the Transfer Contract, which provides that:

FC Lokomotiv shall pay FC Nika USD 250.000 in rubles in the exchange rate as of date of payment, if Glushakov D.B. is included in the official protocols for 5 matches of the Russian Football Championship as a player representing FC Lokomotiv.

83. The dispute resolution bodies concluded that by making the payment, FC Lokomotiv implicitly confirmed that the right to claim the sell-on fee had not become null and void after the Player's return from FC SKA.

84. FC Lokomotiv never alleged any nullity of the Transfer Contract and the fact that this payment was made, in no way means that FC Lokomotiv acknowledged its obligation to pay the sell-on fee following the Spartak Contract.

85. The FUR PSC was provided with a written explanation made by the former head of FC Lokomotiv, Mr. Vladimir Korotkov, which explained the reason why that amount was paid to FC Nika in 2008. In its finding, this explanation was not taken into consideration by the FUR PSC and Mr. Korotkov was not requested to give his testimony personally, notwithstanding that the FUR PSC was requested to order such testimony.

86. Mr. Korotkov had been proceeding under the misguided belief that, as soon as the Player was included in the protocols of 5 matches as defined in Article 3 of the Transfer Contract, the Appellant had to pay USD 250.000 to FC Nika. He was not aware of the consequences of the Player's transfer to FC SKA and thus failed to realise that the payment should not have been made.

87. However, even if the payment would have been made intentionally and consciously, it still would not mean that FC Lokomotiv remained obliged to pay 15% of any future transfer. The triggering event for the payment of the sell-on fee had already arisen when the Player was transferred to SKA.

d) The FUR PSC Decision is flawed

88. In its appeal before the FUR PSC, the Appellant made reference to the following facts that were not reflected in the FUR PSC decision:

- The Player and FC SKA entered into an employment agreement valid until the end of November 2007;

- FC Lokomotiv provided the FUR PSC with a written witness statement of Mr. Korotkov, former head of FC Lokomotiv, and requested the FUR PSC to invite Mr. Korotkov to give evidence at the hearing. However the FUR PSC ignored this request and no reference to Mr. Korotkov's evidence was reflected in the Decision.

89. During the FUR PSC hearing, the Player gave oral evidence in which he made the following relevant statements:

- That he agreed to be transferred to FC SKA, but only on the basis of a loan and until the end of the season 2006 (even though this contradicted the clear evidence that he signed until the end of 2007);

- That the salary and bonus system proposed by FC SKA were preferable to those paid by FC Lokomotiv;

- That by the time he terminated his employment agreement with FC SKA, it had not paid his salary for several months.

e) RUR 50.000 penalty imposed on FC Lokomotiv is not legitimate

90. At the conclusion of the FUR DRC Decision (which was confirmed in the PSC decision) it stated that *a penalty is imposed on CJSC FC Lokomotiv Moscow, under the decision of the Dispute Resolution Chamber of FUR to RUR 50.000 (fifty thousand) in accordance with art. 17 of the Dispute Resolution Regulations of FUR.*

91. Article 17 of the Dispute Resolution Regulations of FUR provides as follows:

If parties to the dispute do not take sufficient measures for cooperation with the Chamber or Committee, the Chamber or Committee, after sending the warning, may apply a penalty in amount from 10.000 to 100.000 rubles.

92. Firstly, it is indisputable that the required warning about insufficient cooperation had never been made to FC Lokomotiv. Secondly, no description of a violation by FC Lokomotiv can be found in either the FUR DRC decision or the FUR PSC decision.

93. FC Lokomotiv assumes that the penalty was applied as the FUR DRC/PSC decided that FC Lokomotiv did not provide the necessary documentation required by the FUR DRC/PSC.

However, FC Lokomotiv has never been ordered to produce any documents, although article 25 of the Dispute Resolution Regulations of the FUR provide as follows:

The Chamber and the Committee may order the parties or the third party, falling under the power of the Charter of the FUR and/or FUR Regulations, to present evidence that are in their possession and that are significant for settlement of the dispute.

94. Taking into account that (1) both decisions contain no mention of alleged insufficient cooperation by FC Lokomotiv and (2) both decisions contain no justification for the penalty imposed and (3) FC Lokomotiv has not previously been penalised for insufficient cooperation and the unjustified decision to penalise FC Lokomotiv for an action that has not even been described in the decision, breaches fundamental principles of law.

f) Payment provisions

95. In the event that the Panel is not convinced that the SKA Contract was a permanent transfer and that FC Lokomotiv has to pay the sell-on fee to FC Nika following the Spartak Contract, the Appellant draws the Panel's attention to a significant failure in the appealed decisions in that FC Nika would not be entitled to EUR 1.200.000.

96. In accordance with Article 9 of the Russian Federal Law of 10 December 2003 No. 173-FZ, all payments in a foreign currency between two Russian entities are forbidden by law. It is for this reason that the wording of Article 4 of the Spartak Contract is clear with respect to the payment provisions which provides as follows:

FC Spartak shall pay to FC Lokomotiv a transfer fee for the transfer of the Player amounting to 8.000.000 (eight million) Euros (no VAT is applicable), ***which shall be paid*** *to (transferred to the bank account of) FC Lokomotiv* ***in Russian rubles at a rate of the Central Bank of Russia for the day*** *of payment in two equal instalments as follows:*

- *4.000.000 Euros – No later than 31 July 2013*
- *4.000.000 Euros – No later than 15 January 2014 (emphasis added).*

97. Furthermore, the Sell-on Clause provide as follows:

FC Lokomotiv undertakes to pay FC Nika ***15% of the amount received*** *for the transfer of D.B. Glushakov from FC Lokomotiv to another football club* (emphasis added).

98. The following payments were received by FC Lokomotiv from FC Spartak:

- RUR 174.424.000 on 30 July 2013;
- RUR 180.827.600 on 13 January 2014;

Total: RUR 355.251.600.

99. Accordingly, the maximum amount that could hypothetically be payable to FC Nika in the event that the obligation to pay 15% of the amount received from the Player's transfer to FC Spartak could be proven, would be RUR 53.287.740 and not EUR 1.200.000 set out in the appealed decisions.

g) Requests for relief

100. The Appellant submitted the following requests for relief:

- *To uphold the present appeal against the Decision of the FUR PSC dated December 2013 #112-13/K and the Decision of the FUR DRC dated 22 August 2013 #112-13.*
- *To issue an award annulling the both said decisions and holding that:*
  - *The decision of the FUR DRC dated 22 August 2013 #112-13 to be annulled; and*
  - *FC Lokomotiv is not liable to pay to the FUR the penalty amounting to RUR 50.000 in accordance with Article 17 of the Dispute Resolution Regulations of the FUR;*
  - *FC Lokomotiv is not liable to pay to FC Nika any percentage of transfer fee received from FC Spartak-Moscow for the transfer of the player Denis Glushakov or any other amount of money*
  - *Or, alternatively (without prejudice and only in the case if the Panel decides that FC Lokomotiv is liable to pay FC Nika 15% from the transfer fee received from the transfer of Denis Glushakov to Fc Spartak-Moscow),*
  - *to declare that FC Lokomotiv is liable to pay to FC Nika 15% of the amount in Russian rubles that was received by FC Lokomotiv from FC Spartak-Moscow for the transfer of Denis Glushakov, but not 15% of the amount in Euros that was stipulated by the transfer contract between the Appellant and FC Spartak-Moscow as the basis for calculation of the amount to be paid.*
- *To condemn the Respondents to the payment of the whole CAS arbitration costs;*
- *To condemn the Respondents to pay the Appellant a fix sum of at least CHF 30.000 as a contribution towards the Appellant's legal fees and costs.*

B. Football Union of Russia (First Respondent)

101. The First Respondent failed to submit an Answer within the given time limit and did not participate in the proceedings.

C. FC Nika (Second Respondent)

102. The principal submission of the Second Respondent is that it is irrelevant to the present dispute if the transfer of the Player from FC Lokomotiv to FC SKA would qualify as a loan or a permanent transfer, because there was no transfer fee received by FC Lokomotiv for the transfer of the Player to FC SKA. Therefore, the second condition of the Sell-on Clause was not fulfilled. Only the transfer from FC Lokomotiv to FC Spartak triggered Clause 2 of the

Transfer Contract which obligated FC Lokomotiv to pay 15% of the transfer fee received, as it was a permanent transfer and a transfer fee was received.

103. The Appellant based its appeal on the erroneous assumption that both the FUR DRC and PSC Decisions *"suggested that the sell-on fee rights would be forfeited in the event that the SKA Contract was held to be a permanent transfer"* and thus dedicates its submissions to prove that the Player's move from the Appellant to FC SKA in 2006 was a permanent transfer and not a loan. However, neither the FUR DRC nor PSC Decision *"implicitly acknowledge"* such fact.

a) Did the transfer of the Player from FC Lokomotiv to FC SKA in June 2006 trigger FC Nika's entitlement to a sell-on fee?

104. The Second Respondent disagrees with the Appellant's submission that, the triggering event for payment of the sell-on fee arises only in case of a transfer of the Player to another club (which transfer occurred on entry into the SKA Contract), as this is not substantiated by any legal argument or tangible evidence (cf. the principle of the burden of proof). Accordingly, the Parties do not agree on the meaning of the Sell-on Clause.

105. Article 431 of the Civil Code of Russia is applicable when there is a dispute regarding the interpretation of a contractual clause and provides as follows:

While interpreting the terms of the contract, the court shall take into account the literal meaning of the words and expressions, contained in it. The literal meaning of the terms of the contract in case of its being vague shall be identified by way of comparison with the other terms and with the meaning of the contract as whole. If the rules, contained in the first part of the present article, do not make it possible to identify the content of the contract, the actual common will of the parties shall be found out with account for the purpose of the contract. All the corresponding circumstances, including the negotiations and the correspondence, preceding the conclusion of the contract, the habitual practices in the relationship between the parties, the customs of the business turnover and the subsequent behaviour of the parties shall be taken into account.

106. The same principles are constantly followed and applied in the CAS jurisprudence (cf. CAS 2005/A/896, par. 7.2.3, 7.2.4 and 7.2.6; CAS 2004/A/642, par. 26; CAS 2005/A/871, par. 4.30).

107. In view of the clear language of the Sell-on Clause, the Appellant's obligation to pay a sell-on fee to the Second Respondent for the Player depends on the following two cumulative conditions:

1) The Appellant transfers the Player to a third club on a definitive basis; and
2) The Appellant receives a transfer fee from a third club for the Player.

108. As to (1) above, the use of the words "transfer fee" clearly points to a permanent transfer (cf. CAS 2012/A/2733, par. 8.2). The Sell-on Clause does not apply to loans, which are only temporary transfers, but only final/definitive transfers. In fact, the words "transfer fee" used in the Sell-on Clause confirm the common understanding that only a future transfer, with profit, would trigger the Sell-on Clause (cf. CAS 2005/A/ 848, par. 57). This is not disputed

by the Appellant, which does not claim in the alternative that the Player's loan to PFC Zvezda in 2007 triggered the Sell-on Clause.

109. As to (2) above, the Second Respondent submits that the language of Clause 2, Clause 7 and the rationale of the Transfer Contract, makes it clear that the Parties' real intention was not to limit the risks and profit share arrangement to the first possible transfer of the Player to a third club, irrespective of whether the Appellant would receive a transfer fee or not. Should this have been the case, the Appellant would have theoretically been in a position to make a free transfer of the Player to a third club after only a single day (which it actually did on 9 June 2006), then transfer the Player back the following day (which it actually did on 16 November 2006), and prevent by this transfer the application of Clause 2 of the Transfer Contract. Such one-sided interpretation does not correspond with the clear language of Clauses 2 and 10 of the Transfer Contract and the Parties' real intention and does not merit support.

110. The Sell-on Clause should not be interpreted to apply to any and all subsequent transfers of the Player to a new club, as the Appellant states, but only to the first substantive transfer of the Player from the Appellant to another club, on a permanent basis and in exchange for a transfer fee. This first permanent transfer for value was irrefutably the Player's move from the Appellant to FC Spartak in 2013. Consequently, the triggering event for the sell-on fee did not occur with the SKA Contract, as the player moved to FC SKA *"without payment of compensation"*, i.e. the second triggering condition was not met.

b) Did the transfer of the player from FC Lokomotiv to FC SKA in June 2006 extinguish FC Nika's entitlement to a sell-on fee?

111. The Appellant seeks to impose on the Second Respondent, the terms of an agreement – i.e. the SKA Contract – to which the Second Respondent was not a party. The Appellant's allegation that the SKA Contract was a permanent transfer and not a loan, which thereby extinguished FC Nika's entitlement to the sell-on fee is irrelevant to the merits of the present case, whether the Player's transfer from the Appellant to FC SKA in June 2006 was on a definitive basis or a loan, as in both cases its entitlement to a sell-on fee did not terminate with the signature of the SKA Contract, which is *res inter alios acta*.

112. The Sell-on Clause requires the Panel's interpretation in accordance with the earlier mentioned principles. Where any doubt arises, the provisions of the Transfer Contract have to be interpreted *contra stipulatorem, i.e.* against the Appellant which drafted the Transfer Contract.

113. The Sell-on Clause clearly stipulates only two conditions. It does not stipulate a third condition which imposes any limit of time for the Player's transfer to a third club to take place. Clause 10 of the Transfer Contract, which corroborates the fact that the Parties agreed that the Sell-on Clause would be valid *"until complete fulfilment of contractual obligations by the Parties"*, makes it clear that the Second Respondent did not abrogate to the Appellant the decision when and how to terminate the Transfer Contract and/or FC Nika's rights regarding the additional amounts set forth in Clauses 2 and 3 of the Transfer Contract. There is nothing stipulated in Clause 2 of the Transfer Contract that FC Nika would forfeit its right to a sell-on fee in the

event of the Player being transferred to a third club without the payment of a transfer fee or in the event the Player and the Appellant would terminate their employment relationship.

114. The Transfer Contract does not empower the Appellant to enter into an agreement with a third club, such as FC SKA, which would prevent the Second Respondent from receiving a sell-on fee from the Appellant in the future. The Transfer Contract and the SKA Contract are independent contracts, which have no relation to each other, and the Transfer Contract was not and cannot be overridden by the SKA Contract. Any commitments made between the Player, the Appellant and FC SKA, without the express knowledge, participation and consent of the Second Respondent, are *res inter alios acta*, and not legally binding on the Second Respondent and do not affect its entitlement to a sell-on fee in accordance with the Sell-on Clause. This assertion is further corroborated by the clear and unequivocal language of Clause 10 of the Transfer Contract.

115. As to the purpose of the Sell-on Clause, it was nothing other than an agreement of the Parties to share potential future profit that the Appellant could make by permanently transferring the Player to a third club for a transfer fee (see for instance CAS 2005/A/896; CAS 2005/A/848, par. 57; CAS 2007/A/1219, par. 15; CAS 2010/A/2098, par. 67).

116. The Second Respondent would not objectively accept a reduction to less than six months of the previously unlimited period of time during which the Sell-on Clause was in force without compensation. Such was clearly not the Parties' intention, which is corroborated by the fact that, at the time of the Player's transfer to FC SKA in June 2006, the Appellant did not try to confirm with the Second Respondent that it considered its contractual obligations had been fully met. The Second Respondent was not informed by the Appellant of the negotiations, conclusion or existence of the SKA Contract at the relevant time. Conversely, the Second Respondent reacted immediately to the Player's transfer to FC Spartak by letter dated 25 June 2013 requesting payment of the sell-on fee.

117. The Appellant's contention that signature of the SKA Contract put an end to the Second Respondent's entitlement to a sell-on fee is not plausible and cannot be accepted. Notably, the Appellant did not adduce tangible evidence or refer to any contractual or statutory provision to corroborate its unfounded allegation.

118. Significantly on 30 July and 25 August 2008, i.e. after the return of the Player from FC SKA in November 2006, the Appellant paid the Second Respondent the amount of USD 250.000 pursuant to Clause 3 of the Transfer Contract, by means of which the Appellant irrefutably confirmed that the Transfer Contract was still in force.

119. In this regard, the Appellant did not ask Mr. Korotkov to be heard by the FUR PSC, nor did it file Mr. Korotkov's witness statement with the FUR PSC, contrary to what is maintained in the Appeal Brief. The Appellant did not adduce its Statement of Appeal to the PSC for obvious reasons. Likewise, as is evident from the correspondence exchanged between the Appellant and the PSC on 3 and 4 February 2014, there is no complaint made by the Appellant's legal director, that Mr. Korotkov's statement was not admitted on file or that he

was not heard by the FUR PSC. The arguments advanced by the Appellant based on Mr. Korotkov's new statement are inadmissible.

120. As to the admissibility of the Appellant's exhibit A-18 (the witness statement of Mr. Korotkov), *"the adducing of pre-existing evidence constitutes a clearly abusive or otherwise unacceptable procedural conduct by a party"* (cf. RIGOZZI A., CAS Code Commentary, article R57, point 4). Therefore, pursuant to Article R57, par. 3 of the Code, the Appellant is not entitled to submit new evidence to the CAS which was not presented during the proceedings before the FUR PSC.

121. The Second Respondent reiterates its position expressed in front of the FUR deciding organs that the SKA Contract was, in reality, a simulated contract. The Swiss Federal Tribunal defined the concept of simulation in the judgement ATF 123 IV 61 at cons. 5c/cc as follows: *"a simulation exists if both parties agree on the fact that the reciprocal declarations shall produce a legal effect, which does not correspond to their will, as they want whether to feign an agreement or to hide, by means of the apparent contract, the contract really wanted by the parties"* (cf. CAS 2011/A/2449, par. 84-86). The Second Respondent is of the opinion that the Appellant and FC SKA did not internally want to produce a permanent transfer of the Player, but wanted to execute a temporary transfer (i.e. a loan). In reality, the Appellant and FC SKA wanted to hide or mask the Player's loan with the purpose of circumventing the limit of loaning five players as laid down in Art. 12.2 of the 2006 FUR Competition Regulations.

122. The Second Respondent specifically draws the attention to the following circumstances:

- The Appellant's then head coach, Mr. Muslin, was not interested in the services of the Player in the first half of the 2006 season and, for this reason, the Appellant decided to allow the Player to play elsewhere in the second half of the 2006 season.

- During the 2006 season, FC SKA, a second division club at the time, was allowed by Article 12.2 of the FUR Competition Regulations to register only five loaned players but had already registered five loaned players with the FUR by June 2006, two of which were the Appellant's players.

- The Appellant's former President, Mr. Filatov, who signed the SKA Contract on behalf of FC Lokomotiv, provided a written statement to the FUR PSC that the Player was actually lent to FC SKA and not permanently transferred. He explained that, along with the SKA Contract, both clubs had signed a transfer agreement for the return of the Player at the end of his loan and that both clubs had to act in this way because of the limit on loaned players set forth in the 2006 FUR Competition Regulations.

- The Player testified during the hearing at the FUR PSC that his move to FC SKA was a free loan and not permanent transfer, valid until the end of the 2006 season, for the sole purpose to gain more playing experience. Otherwise, he would not have agreed to be transferred to a lower division club such as FC SKA.

- The Appellant announced on its official website (www.fclm.ru) that the Player was lent to FC SKA.

- The website Transfermarkt.de, also announced that the Player's move from FC Lokomotiv to FC SKA in June 2006 was a loan.

- There is no motivation for the Player to be transferred on a definitive basis from a Premier League Club to a second division club (i.e. two levels below the Appellant) such as FC SKA after only six months following his acquisition by the Appellant, which was the best club in Russia at the time.

- The SKA Contract was concluded without compensation, which is typical for a loan of a young player to a lower division team. The Appellant did not adduce evidence of any effort to find a new club for the Player during the summer transfer period of 2006 in exchange for a transfer fee. It sent the Player to FC SKA as soon as the summer transfer window in Russia opened.

- It is implausible that the Appellant would permanently transfer the Player only 6 months after it paid the Second Respondent the amount of USD 300.000 for the Player.

- The Player spent only the second half of the 2006 season with FC SKA before returning to the Appellant on 16 November 2006. In this respect, the Appellant does not furnish reliable tangible evidence proving that the employment contract between the Player and FC SKA was intended to be valid until 30 November 2007 and not only until the end of the 2006 season.

- The employment contract between the Player and FC SKA was terminated upon the Player's initiative and without any objection from FC SKA. There is no evidence on file that the Player unilaterally terminated his employment contract with FC SKA due to non-payment of wages, contrary to what is maintained by the Appellant.

- The Appellant reinstated the Player on the day after the termination of his employment contract with FC SKA, one month after it sacked Mr. Muslin, upon a request from the Appellant's new head coach.

- The Appellant and FC SKA signed a transfer agreement for the return of the Player in advance, on 9 June 2006, which was not deposited with the FUR, as Mr. Filatov testified before the FUR PSC.

- FC SKA never asked for training compensation from the Appellant, in accordance with Art. 18 and 19 FUR RSTP 2003 and the Appellant never paid any compensation to FC SKA after the return of the Player on 16 November 2006.

- In both his moves from the Appellant to FC SKA in 2006 and to PFC Zvezda in 2007, the latter transfer having been indisputably a loan, the Player's employment relationship

with the Appellant was terminated on the same legal grounds (i.e. Art. 77, par. 5 of the Labour Code of Russia).

123. The fact that the Player spent about 7 years with the Appellant after he returned from FC SKA proves that it had always been the Appellant's real intention not to transfer the Player permanently in June 2006, moreover, without compensation.

c) Is FC Nika entitled to receive a sell-on fee from FC Lokomotiv in connection with the Player's transfer to FC Spartak?

124. The Appellant does not dispute the Second Respondent's claim for a sell-on fee in connection with the Player's transfer from the Appellant to FC Spartak in 2013 in the event that the Appellant's arguments regarding the SKA Contract are rejected by the Panel.

125. Since the triggering event for the sell-on fee occurred for the first time with the Spartak Contract, the Second Respondent is entitled to receive a sell-on fee from the Appellant for the Player's permanent transfer to FC Spartak in 2013.

d) What is the due amount of the sell-on fee?

126. Based on Clause 4 of the Spartak Contract, the price paid by FC Spartak to the Appellant for the Player is EUR 8.000.000, payable in Russian rubles at the rate established by the Russian Central Bank. Therefore, this amount has to be read as the *"transfer fee received"*, as set out in the Sell-on Clause.

127. Pursuant to the Sell-on Clause and the legal principle of *pacta sunt servanda*, the Second Respondent is entitled to receive from the Appellant an amount equal to 15% of EUR 8.000.000, i.e. EUR 1.200.000, payable in Russian rubles at the rate established by the Russian Central Bank, as correctly adjudicated by the FUR DRC and FUR PSC.

e) Is there any reason to adjust the sell-on fee?

128. The Appellant submits that FC Nika would not be entitled to EUR 1.200.000, for it has allegedly received from FC Spartak only RUR 355.251.600 (approximately EUR 7.3 million at the date of the hearing).

129. Clause 4 of the Spartak Contract provides, *inter alia*, that *"the transfer fee shall be paid without any retention"*. If FC Spartak has indeed paid less than EUR 8.000.000 in RUR to the Appellant, this represents a clear breach of the Spartak Contract by FC Spartak and it is not only the Appellant's right but its obligation to pursue its rights and to claim the outstanding balance from FC Spartak. FC Spartak's breach of contract, if any, cannot be held to the detriment of the Second Respondent, who is not part of the Spartak Contract (*res inter alios acta*).

f) Requests for relief

130. The Second Respondent submitted the following requests for relief:

- *The CAS has no jurisdiction to rule on FC Lokomotiv's request to annul the decision issued by the FUR DRC on 22 August 2013;*
- *The appeal filed by FC Lokomotiv against the decision issued by the FUR PSC on 5 December 2013 is rejected to the extent that it concerns FC Nika;*
- *FC Lokomotiv shall bear the entire costs of this arbitration;*
- *FC Lokomotiv shall contribute to the legal and other costs incurred by FC Nika in the amount of CHF 50.000.*

V. ADMISSIBILITY

131. 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

132. The appeal by the Appellant was filed on 20 February 2014 within the deadline of 21 calendar days as of the day of receipt of the decision with grounds as set by Article 53(2) of the Dispute Resolution Regulations of the Football Union of Russia. The appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fees.

133. It follows that the appeal is admissible.

VI. JURISDICTION

134. Article R47 of the Code provides 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.

135. According to Article 53(1) of the Dispute Resolution Regulations of the Football Union of Russia, a decision of the FUR DRC may be appealed to the FUR PSC, which the Appellant effectively did. Therefore, the CAS has no jurisdiction to decide on the FUR DRC decision and the claim of the Appellant in this regard is rejected.

136. The jurisdiction of CAS, which is not disputed, derives from Article 53(2) Dispute Resolution Regulations of the Football Union of Russia, as it determines that a decision of the FUR PSC may only be appealed to the Court of Arbitration for Sport in Lausanne (Switzerland) within 21 calendar days as of the day of receipt of the decision with grounds.

137. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.

138. It follows that CAS has jurisdiction to decide on the present dispute arising out the appeal to the decision of the FUR PSC dated 5 December 2013 ("Appealed Decision").

VII. APPLICABLE LAW

139. Article R58 of the Code provides as follows:

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

140. The Panel notes that Clause 6 of the Transfer Contract between FC Lokomotiv and FC Nika stipulates the following:

The rights and obligations of the Parties not specified in present Contract and their responsibilities are governed by the FUR Regulations on the Status and Transfer of Players and by other regulatory documents.

141. The Appellant relied in its Appeal Brief on the FUR Regulations on the Status and Transfer of Players (2003 edition), the FUR Dispute Resolution Regulations and Russian law. The Second Respondent relied in its Answer, besides the aforementioned regulations and laws, furthermore on the FUR Competition Regulations (2006 edition) and Swiss law.

142. At the hearing, also the Appellant relied on Swiss law, which is allegedly similar to Russian law with regard to the principles of interpretation of contracts.

143. On 21 August 2014, the CAS Court Office invited the Parties to clarify their position on the law applicable to this appeal. In particular, the Parties were invited to clarify if the FUR Regulations, and subsidiarily, Russian law, apply to this appeal in accordance with Art. R58 of the Code, and if so, if the applicable provisions of Russian law (with respect to the interpretation of contracts, null and void contracts, fictious and sham transactions etc.) materially differ from the corresponding provisions under Swiss law.

144. The Appellant submitted that the FUR Regulations and subsidiarily Russian law are applicable to this appeal, however, Swiss law cannot be entirely ignored. Swiss law is directly applicable to the so-called sham transaction issue, since the Second Respondent relied entirely on Swiss law in this respect. The fact that both parties argued the case under Swiss law constitutes an implicit choice of law, which is permissible under Art. R58 of the Code and Art. 187(1) PILA.

145. The Second Respondent submitted that the FUR RSTP as well as the FUR Competition Regulations, primarily, and Russian law, subsidiarily, apply to the merits of the case and that the applicable provisions under Russian law do not materially differ from those of Swiss law.

146. On the basis of the foregoing, the Panel will apply, primarily, the FUR Regulations, and subsidiarily, Russian law. Nevertheless, with regard to the applicable provisions in relation to simulation/sham transactions, the Panel will rely upon Swiss law, due to the fact that both Parties relied upon Swiss law in their submissions and they both confirmed that the applicable provisions in Russian law do not materially differ from those in Swiss law.

VIII. PRELIMINARY ISSUES

A. Request for stay of execution of the Appealed Decision

147. In its Statement of Appeal, the Appellant requested that a stay of execution of the Appealed Decision be issued.

148. On 6 August 2014, the CAS Court Office informed the parties that the Panel had decided that the Appellant's request to stay execution of the Appealed Decision was granted, to the extent that the Appealed Decision was not enforceable pending the outcome of the appeal.

149. It is consistent CAS jurisprudence (cf. CAS 2003/O/453; CAS 2003/O/460; CAS 2003/O/486) that a decision of a financial nature issued by a private Swiss association (e.g. FIFA) is not enforceable while under appeal before the CAS. It may not, therefore, be stayed and an application in that respect – being moot – would in principle be dismissed. In such circumstances, the Applicant might have to bear the consequential arbitration costs.

150. However, the Panel notes that the Appealed Decision in the present dispute was rendered by the Player's Status Committee of the Football Union of Russia, a Russian private association. Furthermore, according to Article 63 of the FUR Dispute Resolution Regulations, a decision issued by the FUR PSC *"comes into force as of the day of its adoption"*.

151. Based on the foregoing and for the good sake of order, the Panel decided that the request to stay execution of the Appealed Decision was granted.

B. Request for production of audio recording and a transcript of the Player's oral evidence before the FUR PSC

152. In its Appeal Brief, the Appellant requested that the First Respondent be ordered to produce the audio recording and a transcript of the Player's oral evidence before the FUR PSC.

153. On 31 March 2014, the CAS Court Office requested the First Respondent to confirm if such audio recording and transcript existed and if so, whether it agrees to voluntarily produce such recording and transcript. The First Respondent never submitted an answer to this request.

154. At the hearing, the Appellant was asked if it still wanted the Panel to order such production. According to the Appellant, there exists a contradiction between what the Player stated before the FUR PSC and what is written in the Player's witness statement. Since the Player was going to be questioned as a witness at the hearing, the Appellant suggested it would defer the confirmation of its request until the end of the hearing.

155. The Panel notes that the Appellant did not confirm its request for the production of the audio recording and transcript of the Player's oral evidence before the FUR PSC. Therefore, the Panel decides not to order the request to the First Respondent and instead to decide on the case based on the evidence in existence before the Panel.

C. Challenge of the witness statement of Mr. Filatov

156. In its letter dated 21 May 2014, the Appellant challenged the witness statement of Mr. Filatov, former president of FC Lokomotiv, adduced by the Second Respondent. According to the Appellant, the FUR PSC required the Second Respondent to produce Mr. Filatov at the FUR PSC hearing for oral examination, but it failed to do so. Therefore, his statement was not taken into account by the FUR PSC in its decision and should accordingly not be taken into account by the Panel.

157. Article R57 of the Code determines, *inter alia,* as follows:

Par. 1: *The Panel has full power to review the facts and the law.*

Par. 3: *The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered.*

158. On the basis of the Panel's competence to proceed *de novo* and based on the Panel's discretion as mentioned in Article R57, par. 3 of the Code, the Panel decides that the witness statement of Mr. Filatov is admissible.

D. Challenge of the witness statement of Mr. Korotkov in Exhibit A-18 and its new supplemented version

159. In its Answer filed with the CAS Court Office on 13 May 2014, the Second Respondent requested that the witness statement of Mr. Korotkov in Exhibit A-18 should not be admitted to the file pursuant to Article R57 of the Code. According to the Second Respondent, the witness statement of Mr. Korotkov in Exhibit A-18 is new and was not in the file before the FUR PSC. Furthermore, Mr. Korotkov is a current employee of the Appellant and his statement is therefore not reliable.

160. At the hearing, the Appellant reminded the Panel that the relevant exhibit was filed on time together with the Appeal Brief and that evidence of the FUR PSC Secretary was provided, which confirms that the exhibit was on the file before the FUR PSC. Furthermore, the Appellant pointed out that many employees of parties have been witnesses, which is allowed in Swiss arbitration.

161. The Panel is of the opinion that the Appellant provided sufficient evidence that the witness statement of Mr. Korotkov in Exhibit A-18 was in the file before the FUR PSC, as confirmed by the FUR PSC Secretary. Moreover, Mr. Korotkov was called as a witness at the hearing and interrogated by both Appellant and Second Respondent. The Panel therefore declares the witness statement of Mr. Korotkov in Exhibit A-18 admissible.

162. In its letter of 23 May 2014, the Second Respondent requested that the new supplemented version of the Exhibit A-18, adduced by the Appellant after it already filed its Appeal Brief, should not be admitted to the file pursuant to Articles R29 and R56 of the Code. According to the Second Respondent, it was a new exhibit and no English translation was provided for the handwritten note.

163. The Panel observes that Article R29 of the Code determines, *inter alia,* as follows:

The Panel or, prior to the constitution of the Panel, the Division President may order that all documents submitted in languages other than that of the proceedings be filed together with a certified translation in the language of the proceedings.

164. The Panel notes that an English translation of the handwritten note was provided for in the Appellant's letter dated 21 May 2014. This argument is therefore rejected.

165. The Panel observes that Article R56 of the Code determines, *inter alia,* as follows:

Unless the parties agree otherwise or the President of the panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.

166. Firstly, the Panel notes that with regard to Exhibit A-18, it was already filed with the Appeal Brief. Secondly, with regard to the supplemented handwritten note, the Panel notes that, as argued correctly by the Appellant, that the exceptional circumstances at hand were self-evident, as the untrue claim of the Second Respondent that Exhibit A-18 was not in the file before the FUR PSC necessitated its provision.

167. On the basis of the foregoing, the Panel decides that the new supplemented version adduced by the Appellant is admissible.

IX. MERITS

A. The Panel's scope of review

168. Pursuant to Article R57 of the Code, the Panel has full power to review the facts and the law on appeal. This was also confirmed by the Parties at the hearing.

B. Main issues

169. The main issues to be resolved by the Panel are:

a) What are the conditions which must be fulfilled in order for the Sell-on Clause to be triggered?

b) Was the transfer of the Player from FC Lokomotiv to FC SKA in 2006 a permanent transfer or a loan and did it subsequently trigger the Sell-on Clause?

c) If it was a loan, does the transfer of the Player from FC Lokomotiv to FC Spartak in 2013 trigger the Sell-on Clause?

d) What, if any, amount is payable pursuant to the Sell-on Clause?

e) Is FC Lokomotiv obliged to pay the penalty of RUR 50.000 to the FUR?

a) What are the conditions which must be fulfilled in order for the Sell-on Clause to be triggered?

170. Clause 2 of the Transfer Contract provides as follows:

FC Lokomotiv undertakes to pay FC Nika 15% of the amount received for the transfer of the Player from FC Lokomotiv to another football club.

171. The Panel notes that the parties disagree on the interpretation of the Sell-on Clause as to what conditions must be fulfilled in order for the Sell-on Clause to be triggered.

172. According to the Appellant, the only condition to be fulfilled to trigger the Sell-on Clause is a permanent transfer of the Player to a third club, which happened by virtue of the SKA Contract. The transfer was without any compensation and therefore the amount of the sell-on fee due is zero.

173. According to the Second Respondent, the triggering of the Sell-on Clause was dependent upon two cumulative conditions: (1) the Appellant transfers the Player to a third club on a permanent basis, and (2) the Appellant receives a transfer fee from a third club for the transfer of the Player. In the present case, there was no transfer fee received following the SKA Contract, and therefore the Sell-on Clause was not triggered. The Second Respondent is of the opinion that both conditions were fulfilled for the first time with the transfer of the Player to FC Spartak, which triggered the Sell-on Clause.

174. The Panel observes that in the event that there is a dispute regarding the interpretation of a contractual clause, Article 431 of the Russian Civil Code is applicable, which provides as follows:

While interpreting the terms of the contract, the court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of the terms of the contract in case of its being vague shall be identified by way of comparison with the other terms and with the meaning of the contract as whole.

If the rules, contained in the first part of the present article, do not make it possible to identify the content of the contract, the actual common will of the parties shall be found out with account for the purpose of the contract. All the corresponding circumstances, including the negotiations and the correspondence, preceding the conclusion of the contract, the habitual practices in the relationship between the parties, the customs of the business turnover and the subsequent behaviour of the parties shall be taken into account.

175. The same principles are constantly followed and applied in existing CAS jurisprudence (CAS 2004/A/642; CAS 2005/A/871; CAS 2005/A/896; CAS 2010/A/2098).

176. The Panel notes that the actual common will of the Parties cannot be established by taking into account the literal meaning of the words of the Sell-on Clause. Therefore, the Panel shall take into account all the corresponding circumstances of the case, in particular, the customs of the business.

177. To agree on a sell-on clause, as the Parties did in the Transfer Contract, is a common practice in the world of professional football. In existing CAS jurisprudence, the CAS maintained the following position:

Clauses providing for such kind of ***risk-sharing*** *and of participation of a transferring club in possible,* ***uncertain gains*** *obtained by the new club in the event of a further transfer to a third club, are not uncommon in international transfer agreements of professional football players. The economic rationale of such clauses is, generally, that by agreeing into such arrangement, the transferring club accepts to receive, in a first place, a lower 'first' transfer fee, with the* ***expectation*** *of receiving an additional 'fee'* ***if*** *the recipient club will be able to transfer, with profit, the player to a third club (see for instance CAS 2005/A/896 Fulham v/ FC Metz* (CAS 2005/A/848) (emphasis added).

It is in particular often used in transfers like the one here at stake, involving a club of the level of the Appellant on one side and a club like the Respondent that is a member of a major league on the other side. Such transfers of a fairly unknown player from a 'small league' to a 'top league' club give a chance to the player's talents to be put in evidence and to increase accordingly his market value (CAS 2007/A/1219).

178. The Panel observes that the use of a sell-on clause is a risk that the 'old club' takes by accepting first a lower transfer fee, with the expectation of receiving an additional fee from the 'new club' in the event the player will be subsequently transferred to a third club for a higher amount. It does not provide for a guarantee of an additional fee.

179. It is indeed true that the idea of a sell-on clause is to share profit between two clubs where a potential higher transfer fee is obtained, but it cannot be accepted that a sell-on clause can only be triggered when the player is permanently transferred, with profit. After all, there is no guarantee that the player will be transferred to a third club for a higher amount than the transfer fee agreed upon between the first two clubs. It is possible that a player could be transferred for a lower fee or for no compensation, due to a long-term injury or lack of talent.

180. Adopting the above reasoning, the Panel does not agree with the Second Respondent that even if it was a permanent transfer, the Sell-on Clause would not have been triggered in the event that no transfer fee was received by the Appellant. The Panel finds that the only

condition to be fulfilled in order for the Sell-on Clause to be triggered is the permanent transfer of the Player to a third club. In this respect, the Panel agrees with the Appellant that, in the event that the transfer of the Player from FC Lokomotiv to FC SKA was a permanent transfer, FC Nika's entitlement to a sell-on fee would be extinguished.

b) Was the transfer of the Player from FC Lokomotiv to FC SKA in 2006 a permanent transfer or a loan and did it subsequently trigger the Sell-on Clause?

ba) The Panel notes that it is undisputed by the Parties that:

181. FC Lokomotiv paid an amount of USD 300.000 to FC Nika for the transfer of the Player from FC Nika to FC Lokomotiv.

182. FC Lokomotiv and FC SKA entered into an agreement, dated 9 June 2006, by which the Player was transferred from FC Lokomotiv to FC SKA without payment of a transfer fee.

183. On 15 November 2006, the employment contract between FC SKA and the Player was terminated upon the Player's initiative and on 16 November 2006, the Player entered into an employment contract with his former club FC Lokomotiv.

184. During the 2006 season, FC SKA, a second division club at the time, was allowed by Article 12.2 of the FUR Competition Regulations 2006 to register only five loaned players, but had already registered five loaned players with the FUR by June 2006, two of which were the Appellant's players.

185. In 2008, FC Lokomotiv paid FC Nika the amount of USD 250.000 in accordance with Clause 3 of the Transfer Contract.

bb) The Appellant argues the following:

186. The SKA Contract conditions denoted a permanent transfer and not a loan. There was no three-party contract between the clubs and the Player and there was no postponed labour agreement between the Player and FC Lokomotiv. Therefore it does not comply with the definitions of a loan transfer in Appendix 4 of the FUR RSTP 2003. The SKA Contract was entitled 'transfer contract', it confirmed the parties' agreement that there would be no compensation paid and it transferred the right to receive training compensation to the new club, i.e. FC SKA. Moreover, there was no reference to it being a loan, there was no limited temporary element and there was no expressed right of FC Lokomotiv for return of the Player.

187. FC SKA's players list (Exhibit A-10) shows that the Player and FC SKA had entered into an employment agreement valid until 30 November 2007. Furthermore, the Player's workbook (Exhibit A-12) stipulated that the Player's employment contract with FC Lokomotiv was terminated following the transfer to FC SKA and that the Player's employment contract with FC SKA was terminated upon the Player's initiative, not following expiry of the labour contract.

188. The payment of USD 250.000 to FC Nika in 2008 was, as explained by the witness Mr. Korotkov, an administrative error made in good faith by Mr. Korotkov, who was responsible for the order of this payment, as he was not aware of the consequences of the Player's transfer to FC SKA.

189. The transfer of the Player to FC SKA was a permanent transfer, which triggered the Sell-on Clause in the Transfer Contract. Therefore, since no transfer fee was received by FC Lokomotiv, FC Nika has no entitlement on a sell-on fee and as from this transfer, all FC Nika's rights are extinguished.

bc) The Second Respondent argues the following:

190. It is irrelevant if the transfer of the Player from FC Lokomotiv to FC SKA would qualify as a loan or a permanent transfer. The Sell-on Clause provides for two cumulative conditions: i) a permanent transfer to a third club and ii) a transfer fee from a third club. In this case, there was no transfer fee received by FC Lokomotiv and therefore, the second condition of the Sell-on Clause was not fulfilled and the transfer of the Player to FC SKA did not trigger the Sell-on Clause.

191. FC Nika's right to a sell-on fee was not extinguished with the SKA Contract. There is no legal provision, contract clause or tangible evidence adduced by the Appellant to corroborate this. FC Lokomotiv never sent a letter to FC Nika following the transfer of the Player to FC SKA to confirm that the Spartak Contract extinguished FC Nika's rights. The SKA Contract is not legally binding upon FC Nika but *res inter alios acta*, since it was made between FC Lokomotiv and FC SKA without express knowledge, participation and consent of FC Nika.

192. The payment of USD 250.000 in 2008 by FC Lokomotiv to FC Nika confirms that FC Lokomotiv recognised that the Transfer Contract was still in force after the transfer of the Player to FC SKA in 2006.

193. FC Lokomotiv simulated a permanent transfer to mask the loan of the Player with the purpose of circumventing the limit of five loaned players as laid down in Article 12.2 of the 2006 FUR Competition Regulations. That it was in fact a loan, was furthermore confirmed by i) the witness statement of FC Lokomotiv's former president Mr. Filatov, who also confirmed that FC Lokomotiv and FC SKA signed together with the SKA Contract an agreement for the free transfer of the Player back to FC Lokomotiv at the end of the season, ii) the witness statement of the Player, who stated he would never agree on a permanent transfer to a lower division club and that he was loaned to gain more experience with the security he would be transferred back at the end of the season, iii) the fact that the transfer was without compensation, while FC Lokomotiv paid FC Nika a transfer fee of USD 300.000 six months earlier.

bd) Findings of the Panel:

194. In the present dispute, the Panel notes that, notwithstanding the fact that the Player's transfer from FC Lokomotiv to FC SKA was formalised as a permanent transfer, there are certain

events and circumstances that indicate that the transfer was in reality a loan. These circumstances are:

- The fact that FC Lokomotiv and FC Nika agreed upon a sell-on clause in the Transfer Contract, indicates that both clubs had some idea of the true value of the Player;

- The Player was transferred to FC SKA in June 2006 without compensation, while in December 2005 FC Lokomotiv paid USD 300.000 to FC Nika for the transfer of the Player to FC Lokomotiv;

- FC Lokomotiv paid to FC Nika in 2008, i.e. two years after the alleged permanent transfer by which FC Nika's rights of the Transfer Contract were allegedly extinguished, the amount of USD 250.000 in accordance with the Transfer Contract;

- FC Lokomotiv clearly had a close relationship with FC SKA, since before the transfer of the Player, FC Lokomotiv had already loaned two players that season to FC SKA.

- The Player returned to FC Lokomotiv one day after termination of his employment agreement with FC SKA, without any consideration or negotiation by the Player or FC Lokomotiv.

195. Moreover, the Second Respondent argues that FC Lokomotiv consciously simulated the transfer of the Player to FC SKA as a permanent transfer, to circumvent the limited loaned players rule provided for by the FUR 2006 Competition Regulations.

196. In this respect, Article 18 par. 1 Swiss Code of Obligations (hereinafter "SCO") provides as follows:

When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.

197. In accordance with Article 18 par. 1 SCO, the judge or the arbitrator interpreting a contract governed by Swiss law must go beyond the mere terms of the contract in order to determine the real and common intention of the parties (Decision of the Swiss Federal Tribunal dated 20 August 2012, 4A_240/2012, published in: 31 ASA Bull. 100 (2013); ATF 131 III 288, para. 3.1).

198. According to the Swiss Federal Tribunal's long-standing case law, a simulated act is defined as follows (see for instance Decision of the Swiss Federal Tribunal dated 2 November 2012, in: SJ 2013 I p. 286):

On parle d'acte simulé au sens de l'art. 18 CO lorsque les deux parties sont d'accord que les effets juridiques correspondant au sens objectif de leur déclaration ne doivent pas se produire et qu'elles n'ont voulu créer que l'apparence d'un acte juridique à l'égard des tiers (ATF 123 IV 61 c. 5c/cc p. 68; 112 II 337 c. 4a p. 343; 97 II 201 c. 5 p. 207 et les arrêts cités).

That is to say in English (free translation):

Within the meaning of art. 18 SCO, a simulation exists when both parties agree that the legal effects corresponding to the objective meaning of their statement must not occur and that they only wanted to create the appearance of a legal act towards third parties (ATF 123 IV 61 c. 5c/cc p. 68; 112 II 337 c. 4a p. 343; 97 II 201 c. 5 p. 207 and the other quoted decisions).

199. When the parties have feigned to conclude a contract ("the simulated act") in order to conceal the existence of another ("the concealed act"), the situation is the following (P. Tercier, op. cit., N 589, p. 133):

- the simulated act is without effect;
- by contrast, the concealed act is valid (provided that it satisfies the conditions of validity).

200. In the present case, the Panel finds that FC Nika has proven that FC Lokomotiv and FC SKA entered into a permanent transfer agreement in order to conceal the existence of a loan agreement.

201. It follows that the permanent transfer agreement concluded between FC Lokomotiv and FC SKA must be considered as a simulated act. The consequences are twofold: on the one hand, the permanent transfer agreement is without effect and, one the other hand, the loan agreement is deemed valid.

202. In conclusion, the Panel considers that the transfer of the Player from FC Lokomotiv to FC SKA in 2006 was a loan and that it therefore did not trigger the Sell-on Clause.

c) If it was a loan, does the Spartak Contract trigger the Sell-on Clause in the Transfer Contract between FC Lokomotiv and FC Nika?

203. The Panel notes that it is undisputed by the parties that in the event that the transfer of the Player from FC Lokomotiv to FC SKA in 2006 was on a loan basis, the Sell-on Clause was only triggered for the first time with the permanent transfer of the Player from FC Lokomotiv to FC Spartak in 2013.

204. Considering that the Panel established that the transfer of the Player to FC SKA was a loan, and that the transfer of the Player to FC Spartak was the first permanent transfer, the Panel finds that the Sell-on Clause was triggered by the Spartak Contract and FC Nika is therefore entitled to receive a sell-on fee from FC Lokomotiv in accordance with the Sell-on Clause.

d) What, if any, amount is payable pursuant to the Sell-on Clause?

da) The Panel notes that it is undisputed by the Parties that:

205. According to the Sell-on Clause, FC Nika is entitled to receive 15% of the *amount received* by FC Lokomotiv from the transfer of the Player to a third club, i.e. FC Spartak.

206. Clause 4 of the Spartak Contract provides as follows:

FC Spartak undertakes to pay in favour of Fc Lokomotiv the transfer fee for the Player's transfer in the amount of 8.000.000 (Eight million) Euro (exempt from VAT) which shall be paid to (transferred to the settlement account of) FC Lokomotiv by FC Spartak in Russian rubles at the rate established by the Central Bank of the Russian Federation on the payment day in two equal instalments in the following order:

- *4.000.000,00 Euro: not later than July 31, 2013;*
- *4.000.000,00 Euro: not later than January 15, 2014.*

The transfer fee shall be paid without any retention. (…).

207. The following payments were received by FC Lokomotiv from FC Spartak:

- RUR 174.424.000 on 30 July 2013
- RUR 180.827.600 on 13 January 2014
- Total: RUR 355.251.600

db) The Appellant argues the following:

208. In accordance with Article 9 of the Russian Federal law of 10 December 2003 No. 173-FZ, all payments in a foreign currency between two Russian entities are forbidden by law. It is for this reason that Article 4 of the Spartak Contract stipulates that the 8 million Euros *shall be paid in Russian rubles at a rate of the Central Bank of Russia for the day of payment*.

209. Accordingly, the maximum amount that could hypothetically be payable to FC Nika in the event that the obligation to pay 15% of the transfer fee received from FC Spartak could be proven, would be RUR 53.287.740 and not EUR 1.200.000 set out in the Appealed Decision.

dc) The Second Respondent argues the following:

210. Clause 4 of the Spartak Contract provides, *inter alia*, that *the transfer fee shall be paid without any retention*. If FC Spartak had indeed paid less than EUR 8.000.000 in RUR to the Appellant, this would represent a clear breach of the Spartak Contract by FC Spartak and it is not only the Appellant's right but its obligation to pursue its rights and to claim the outstanding balance from FC Spartak. FC Spartak's breach of contract, if any, cannot be held to the detriment of the Second Respondent, who is not part of the Spartak Contract (*res inter alios acta*).

211. Moreover, the amount in RUR received at the time by FC Lokomotiv, was presumably equal to EUR 8.000.000. The same amount in RUR now, is worth less now in Euros due to the exchange rate.

de) Findings of the Panel:

212. The Panel considers that a sell-on fee is to be based on the amount actually received by a club for selling a player to a subsequent club and not on an indicative amount (see also CAS 2012/A/2875).

213. The Panel notes that the actual amounts received by FC Lokomotiv for the transfer of the Player to FC Spartak are RUR 174.424.000 on 30 July 2013 and RUR 180.827.600 on 13 January 2014, making a total amount of RUR 355.251.600.

214. Therefore, the Panel finds that the sell-on fee to be paid by FC Lokomotiv to FC Nika equals to 15% of RUR 355.251.600, being RUR 53.287.470, notwithstanding the potential difference in value created due to exchange rate fluctuations, which cannot be taken into account.

e) Is FC Lokomotiv obliged to pay the penalty of RUR 50.000 to the FUR?

ea) The Appellant argues the following:

215. At the conclusion of the FUR DRC Decision (which was confirmed in the FUR PSC Decision) it stated that FC Lokomotiv has to pay a penalty of RUR 50.000 in accordance with Article 17 of the FUR Dispute Resolution Regulations.

216. Article 17 of the Dispute Resolution Regulations of FUR provides as follows:

If parties to the dispute do not take sufficient measures for cooperation with the Chamber or Committee, the Chamber or Committee, after sending the warning, may apply a penalty in amount from 10.000 to 100.000 rubles.

217. Firstly, it is indisputable that the required warning about insufficient cooperation had never been made to FC Lokomotiv. Secondly, no description of a violation by FC Lokomotiv can be found in either the FUR DRC decision or the FUR PSC decision.

218. FC Lokomotiv assumes that the penalty was applied as the FUR DRC/PSC decided that FC Lokomotiv did not provide the necessary documentation required by the FUR DRC/PSC. However, FC Lokomotiv has never been ordered to produce any documents.

219. Taking into account that (i) both decisions contain no mention of alleged insufficient cooperation by FC Lokomotiv and (ii) both decisions contain no justification for the penalty imposed and (iii) FC Lokomotiv has not previously been penalised for insufficient cooperation and the unjustified decision to penalise FC Lokomotiv for an action that has not even been described in the decision, breaches fundamental principles of law.

eb) Findings of the Panel:

220. The Panel observes the following relevant parts of the Appealed Decision:

According to clause 7 of the Football Union of Russia Regulations on the Status and Transfer of Players approved by the FUR Executive Committee on February 20, 2003, a club that intends to conclude an employment contract with a player whose employment contract with another club has expired, or whose contract with another club has been terminated according to the order established by the law, shall send to the former club of the player, an offer regarding conclusion of a transfer contract. The former club of the player, if it has

the right to receive the training compensation for the player, shall within 10 days of the date of the club's offer, formalize the transfer contract in accordance with the rules established by clause 6 of these regulations.

On November 15, 2006 according to the entry in D.B. Glushakov's service record, ***the Player and FC SKA Rostov-on-Don terminated the employment contract at the employee's initiative****. This fact testifies that at D.B. Glushakov's transfer from FC SKA Rostov-on-Don to FC Lokomotiv, the latter should have sent to FC SKA Rostov-on-Don an offer regarding conclusion of a transfer contract. The Chamber and the Committee have not established either the existence of an offer by FC Lokomotiv regarding conclusion of a transfer contract, or a transfer contract itself. This circumstance testifies violation of regulation norms regarding player's transfers. In other words, the fact of actual acquisition by FC SKA Rostov-on-Don, of the rights to receive the training compensation is a matter of doubt. Moreover, sanctions for violation of clause 25 of the Football Union of Russia Regulations on the status and Transfer of Players approved by the FUR executive Committee on February 20, 2003, could be applied to the Player and FC Lokomotiv.*

Also, the Committee does not find any grounds for cancellation of the resolution made by the FUR Dispute Resolution chamber regarding levying of the penalty in the amount of 50,000.00 (Fifty thousand) rubles in accordance with clause 17 of the FUR Regulations of Dispute Resolution.

221. The Panel notes that the FUR PSC concluded that FC Lokomotiv violated Article 7 FUR RSTP 2003 by not sending an offer to FC SKA in relation to the transfer of the Player and by not signing a subsequent transfer contract and that it could have violated Article 25 of the FUR RSTP 2003. However, the FUR PSC did not clarify that those violations were the reason behind the imposed penalty.

222. Furthermore, the Panel notes that Article 17 of the FUR Dispute Resolution Regulations states that the FUR DRC or PSC can impose a penalty (1) if parties to the dispute do not take sufficient measures for cooperation with the Chamber or Committee (2) after sending a warning (3) in amount from 10.000 to 100.000 rubles.

223. Firstly, in relation to (1), the Panel observes that the Appealed Decision contains no reference to alleged insufficient cooperation by the Appellant. Secondly, in relation to (2), the Panel notes that according to the Appellant, no such warning had ever been notified to the Appellant, which is not contested by the First Respondent. Finally, in relation to (3), the Panel notes that the penalty of RUR 50.000 imposed by the FUR was unmotivated and arbitrary, since no explanation was given for the calculation of this amount, where it had a range between RUR 10.000 and RUR 100.000.

224. Therefore, the Panel finds that the Appellant is not obliged to pay the penalty imposed by the FUR.

X. CONCLUSION

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

a) The only relevant condition to be fulfilled in order for the sell-on Clause to be triggered is the permanent transfer of the Player to a third football club;

b) The transfer of the Player from FC Lokomotiv to FC SKA was in fact a loan and not a permanent transfer, and therefore it did not trigger the sell-on Clause;

c) The transfer of the player from FC Lokomotiv to FC Spartak was the first permanent transfer which triggered the sell-on Clause

d) FC Lokomotiv is obliged to pay FC Nika a sell-on fee in the amount of RUR 53.287.470.

e) FC Lokomotiv is not obliged to pay the penalty of RUR 50.000 imposed by the FUR

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by FC Lokomotiv on 20 February 2014 against the decision issued on 5 December 2013 by the Player's Status Committee of the Football Union of Russia is partially upheld.

2. The decision of the Player's Status Committee of the Football Union of Russia dated 5 December 2013 is set aside.

3. FC Lokomotiv is liable to pay FC Nika an amount of RUR 53.287.470, plus interest of 5% *p.a.* as of 30 days after the notification of the present award until the date of effective payment.

4. FC Lokomotiv does not have to pay RUR 50.000 to the Football Union of Russia as imposed by the Decision of the Player's Status Committee of the Football Union of Russia dated 5 December 2013.

5. (…).

6. (…).

7. All other motions or prayers for relief are dismissed.