Arbitration CAS 2017/A/5101 FC Shakhtar Donetsk v. Luiz Adriano Souza da Silva, award of 1 November 2017

Panel: Mr Alexander McLin (Switzerland), Sole Arbitrator

Football
Contractual dispute
Invalidity of contractual penalties imposed in bad faith

Parties to a contract are bound by a duty to apply the penalties stipulated therein in good faith. Illegitimately imposed penalties shall not be recognised.

I. PARTIES

1. FC Shakhtar Donetsk (the "Club", or the "Appellant"), is a Ukrainian football club affiliated with the Football Federation of Ukraine, itself a member of FIFA (Fédération Internationale de Football Association, the international governing body for the sport of football).

2. Mr Luiz Adriano Souza da Silva, (the "Player" or the "Respondent") is a professional football player of Brazilian nationality.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. 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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 21 October 2010 the Player and the Club entered into an employment contract with a term beginning on 1 January 2011 and ending on 31 December 2015 (the "Contract"). The Contract included two annexes (respectively "Annex 1" and "Annex 2").

5. Annex 1 provided *inter alia* for the Player's monthly salary to be set at EUR 157,379 before taxes, the latter to be deducted prior to payment.

6. Annex 1 also provided as follows:

"On condition that the Player has a valid driving license (…) to place a car - Ford Focus (or a car of similar class) equipped hydro at the disposal of the Player".

7. Annex 1 further provided:

"In addition to the payments specified in clause 1 of this Appendix, the Club undertakes (…) [t]o cover the cost of six business class plane tickets for the Player per financial year (i.e. 01.07-30.06), flight Donetsk-Porto Alegre-Donetsk (with maximum 2 transit airports) based on the cost of a ticket of this class purchased in Ukraine (…). The unused compensation balance shall not be paid to the Player, nor shall it be carried forward to the following financial year".

8. Annex 2, titled *"List of Actions"*, contains a table indicating the *"percentage by which the Player's salary is reduced in a given month"*, for a first instance and a repeated instance of a number of *"actions"*. It includes among them *"6. Late arrival after leave"*, with a corresponding entry of *"50"*, referring to the applicable percentage for a first instance of this kind.

9. The Contract stipulates at Article 6.3:

"The Player is liable to damages under the current Ukrainian Legislation for any damage done to the Club by any action or inaction".

10. On 24 June 2015, while the Player was on leave in Brazil, the Club informed him that the Emirati club Al Ahli FC had made an offer for the Player's services, and that he was free to fly to London to undergo the necessary medical examinations. The Player responded the same day, stating that:

"I am sorry to inform you that I am not interested in accepting such transfer to Al Ahly FC and thus I am not available to accept it and I will not undergo the medical examinations".

11. On 25 June 2015, the Club wrote to the Player, noting his position regarding the transfer offer to Al Ahly FC, and instructing as follows:

"In this regard, I urge you to join our team in Going, Austria not later than tomorrow, 26 June 2015. Otherwise the Club will have no choice but to enforce the disciplinary measures stipulated in Appendix# 2 to your Employment Contract".

12. On 29 June 2015, the Club sent another letter to the Player, informing him of the Club's right to deduct 50% of his June 2015 salary, namely EUR 66,666, in light of his failure to appear in Going at the specified date and providing him with a three-day deadline to submit written explanations for his absence.

13. The same day, the Player wrote to the Club explaining that his wife had undergone surgery on 22 June 2015, and that her recovery required his presence. He provided relevant medical certificates, and informed the Club that he would only be able to join training on 4 July 2015.

He also noted that he had already had a discussion with the Club's technical director, Mr Lucescu, as he was leaving Ukraine on 6 June 2015, informing him that he would need to return *"after the date stipulated by the club because [he] had many commitments to be solved in Brazil"*.

14. On 1 July 2015, football club AC Milan wrote to the Club informing them that they would be contacting the Player with a view toward negotiating a potential contract as of 1 January 2016.

15. According to the Appellant, on the following day AC Milan offered EUR 8,000,000 for the immediate transfer of the Player.

16. This resulted in a transfer agreement concluded on 2 July 2016. It was signed by the Club, the Player and AC Milan, and included a clause terminating the Contract.

17. On 13 July 2015, the General Director of the Club took a formal decision to penalize the Player in the amount of EUR 78,689.50 (EUR 66,666 net of tax), representing 50% of his June 2015 salary for not joining the training session of the Club in Going. The decision also included a deduction of EUR 10,000 *"for failure to return the office car"*.

18. On 20 August 2015, the Player wrote to the Club stating that that the final payment received by the Player in the amount of EUR 57,663.49 was insufficient in that it did not include the Player's full June 2015 salary, a claimed reimbursement for six flights, or the salary corresponding to 2 days of July 2015.

19. On 3 September 2015, the Club responded, explaining the deductions made to the June 2015 salary that corresponded to the penalty for late arrival to training, the deduction associated with the non-return of the car, and the fact that the requests for flight reimbursements were not accepted due the fact that they were late. It stated that the two days of July 2015 salary would be paid shortly.

20. On 8 September 2015, the Club paid the Player EUR 6,000 corresponding to two days of salary for July 2015.

21. On 3 December 2015, the Player lodged a claim before FIFA against the Club, claiming outstanding remuneration totalling EUR 113,320.49. Specifically, he claimed:

    - EUR 84,203.18 for outstanding salary during the period between 1 June 2015 and 2 July 2015, plus 5% interest *p.a.* on this amount as from the due dates;

    - EUR 29,117.31 as reimbursement of the air tickets purchased by the Player, plus 5% interest *p.a.* on this amount as from the due date.

22. In addition, he requested the payment of procedural costs by the Club, as well as the reimbursement of his legal fees.

23. On 15 December 2016 the FIFA Dispute Resolution Chamber ("DRC") found as follows (the "DRC Decision"):

"1. The claim of the Claimant, Luiz Adriano Souza da Silva, is partially accepted.

2. The Respondent, FC Shakhtar Donetsk, has to pay the Claimant, within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of EUR 77,917.50 plus 5% interest p.a. until the date of effective payment as follows:

a) 5% p.a. as of 2 July 2015 on the amount of EUR 75,337;
b) 5% p.a. as of 2 August 2015 on the amount of EUR 2,580.50.

3. The Respondent has to pay to the Claimant, within 30 days as from the date of notification of this decision, the amount of Brazilian Real (BRL) 111,781.37 plus 5% interest p.a. on said amount as from 3 December 2015 until the date of effective payment.

4. In the event that the amounts due to the Claimant in accordance with the above-mentioned numbers 2. and 3. are not paid by the Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

5. Any further claim lodged by the Claimant is rejected.

6. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittances are to be made and to notify the Dispute Resolution Chamber of every payment received".

24. The reasoned DRC Decision was notified to the parties on 30 March 2017.

25. The DRC Decision was based on the applicability of the FIFA Regulations on the Status and Transfer of Players ("RSTP"), 2015 edition.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 26 April 2017, the CAS Court Office confirmed receipt of Appellant's statement of appeal, filed (electronically) on 19 April 2017 and by courier on 20 April 2017 in keeping with R48 of the Code of Sports-related Arbitration (the "Code"), to the parties. It informed them of deadlines applicable under the Code with respect to the submission of an appeal brief, as well as expressing a position on the language of arbitration and noting the Appellant's request for a Sole Arbitrator. Responsibilities as to costs of arbitration were also outlined.

27. On the same day, the CAS Court Office also wrote to FIFA to advise it of the proceedings and inquire whether it wished to join as a party to the proceedings, and to request a copy of the DRC Decision.

28. On 27 April 2017, the CAS Court Office wrote to the parties noting the Appellant's request for a 10-day extension to file its appeal brief.

29. On 28 April 2017, the Respondent replied, requesting additional information as to the date of filing of the statement of appeal, and objecting to the Appellant's extension request to file its appeal brief.

30. On 1 May 2017, the CAS Court Office invited the Appellant to comment on the timeliness of the filing of its statement of appeal, and communicated the decision of the Deputy President of the CAS Appeals Arbitration Division to grant the Appellant an extension until 10 May 2017 for the filing of its appeal brief.

31. On 4 May 2017, FIFA responded to the CAS, stating that it did not intend to join the proceedings as a party. It provided a copy of the DRC Decision. The CAS Court Office acknowledged receipt the following day.

32. Also on 4 May 2017, with respect to the timeliness of filing of its statement of appeal, the Appellant provided courier receipts along with statements from the courier company stating that the receipts were genuine. These were forwarded to the parties the following day by the CAS Court Office.

33. On 5 May 2017, the Respondent notified the CAS Court Office of his agreement to English as the language of arbitration. This letter was shared with the parties on 8 May 2017 by the CAS Court Office.

34. On 8 May 2017, the Respondent notified the CAS Court Office of its agreement with the appointment of a Sole Arbitrator. This letter was shared with the parties the following day by the CAS Court Office.

35. On 12 May 2017, the CAS Court Office acknowledged receipt of the Appellant's appeal brief, filed on 10 May 2017, and shared it with the parties, granting the Respondent a 20-day deadline to submit an answer. A copy of the appeal brief was also shared with FIFA.

36. On 24 May 2017, the CAS Court Office informed the parties of the appointment of Mr Alexander McLin as Sole Arbitrator.

37. On 8 June 2017, the CAS Court Office shared the Respondent's answer with the parties, which had been filed on 5 June 2017. It enquired whether the parties preferred an oral hearing to be held.

38. On 14 June 2017, the Appellant wrote to the CAS Court Office stating that it considered that a hearing was necessary. This was notified to the Respondent the same day.

39. Also on 14 June 2017, the Respondent stated that he would not object to a hearing if this were the Appellant's preference, although the Appellant should bear any related costs in the event

the Appellant's claims were ultimately rejected. This was notified to the parties the following day.

40. On 4 July 2017, the CAS Court Office informed the parties that the Sole Arbitrator, having examined the parties' submissions and having considered their positions on the holding of a hearing, considered himself sufficiently informed to decide the case without holding a hearing.

41. On 14 July 2017, the CAS Court Office sent the parties the Order of Procedure for their signature.

42. On 17 July 2017, the Respondent returned the signed Order of Procedure, which was notified to the parties on 18 July 2017.

43. On 21 July 2017, the Appellant returned the signed Order of Procedure, which was notified to the parties the same day by the CAS Court Office. By the signature of the Order of Procedure, the parties expressly confirmed their agreement that the Sole Arbitrator may decide this matter based on their written submissions and that their right to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

44. The Appellant's submissions, in essence, may be summarized as follows:

- By 2015, the Player had become a valuable asset for the Club. During the 2015 summer transfer window, the Club had two options: (1) sell the Player for a considerable transfer fee, or (2) keep the player until the expiry of the Contract on 31 December 2015, with a view to qualifying in the UEFA Champions' League Group Stage and 1/16 round. Once it became clear that the Player would not go to Al Ahly FC and since there was no other offer on the table, his immediate return to training was essential. As had he intended to stay in Brazil beyond the scheduled date of 25 June 2015, the Player should have obtained permission from the Club in advance. The Player's reasons, later provided, that his presence in Brazil was necessary due to his wife's recovery from surgery, are *"an excuse for staying in Brazil without further financial sanctions applied by the Club"*.

- The contractual provision providing for a financial penalty is valid and was applied correctly. The procedural rights of the Player were respected, as he was informed twice about the Club's *"intent to discount Player's salary should he fail to demonstrate a good reason for absence"*. As the reasons given by the Player for his absence were not accepted by the Club, the *"imposition of the salary discount (fine) on the Player was justified"*.

- Unlike the determination made by the DRC, the fine was proportionate given that while the Player was expected to arrive at the training camp in Going *"on 22-25 June 2015"* but did not arrive in Austria before 2 July 2015, he missed at least eight days, for which he was punished by an additional seven days' salary (given that the Club deducted a half-

month, or 15 days, of the Player's salary). The FIFA DRC erred in determining that the Club's decision was taken on 29 June 2015, when in fact it was not made until 13 July 2015. If the DRC considered the fine to be excessive, it could modify it, but not eliminate it entirely.

- Regarding the deduction applied to the Player's receivables corresponding to the allegedly unreturned car, the club was entitled under Article 6.3 of the Contract, as well as under Article 136 of the Ukrainian Labour Code, to make the deduction. The Club is not in a position to provide more evidence concerning the proof of a *"negative fact"*, *i.e.* the non-return of the car. In such a case, the Player had an obligation to cooperate, and the *"indirect evidence"* provided by the Club should suffice. The indirect evidence is that (a) the Player never requested the return of the car after May 2014 (when he claims to have returned the keys to the Club's interpreter); (b) numerous requests to the Player in order to clarify where the car was located were not answered by the Player, and (c) no Club employees saw the car after May 2014.

- With respect to the non-reimbursement of air tickets, the literal interpretation of the relevant contractual clauses only allows reimbursement if the request for such is made before the end of the corresponding financial year. Seeing as the requests came after termination of the Contract and referred to trips taken in the 2013/14 and 2014/15 financial years, they were no longer eligible for reimbursement.

45. The Appellant makes the following requests for relief:

"The Appellant herein respectfully requests the CAS to issue new decision, which replaces the decision of FIFA DRC of 30th April 2017 as follows:

1. *To reduce the amount due to the Player as unpaid salary for June and July 2015 to the amount of 3,024 EUR;*

   or as alternative, if the Panel finds the salary discount (fine) imposed against the Player disproportional and excessive:

   To reduce the amount due to the Player as unpaid salary for June and July 2015 to the amount of 33,864 EUR.

2. *To decide that the Respondent pays all the costs of the arbitration proceedings"*.

B. The Respondent

46. The Respondent's submissions, in essence, may be summarized as follows:

- The relevant context is one in which the Appellant had only one objective, which was to trade the Player and maximize the transfer fee to be obtained as a result. This explains why the Player was not asked to return to training earlier than he was.

- The unreasonable deadline given to the Player to return to Austria for training was retaliatory in nature, taking into account the Player's refusal to accept the offer from Al Ahly FC and the fact that the Player's legitimate explanations for remaining in Brazil were not taken into account by the Appellant. The resulting deduction was unjustifiable, arbitrary and disproportionate.

- The Player could not have known in advance of the complications that would occur during his wife's medical procedure, as they were of an unexpected nature.

- The fact that the decision to deduct 50% of the Player's June salary was made after the transfer agreement with AC Milan was finalized is evidence of bad faith on the part of the Appellant, who had an opportunity to negotiate compensation for any such penalties in the context of the transfer to AC Milan. The fact that the Appellant did not raise the issue before the transfer meant that the Player agreed to the terms of the transfer under the assumption that he would receive his entire contractual June compensation without deductions.

- Likewise, the Player could not have suspected a deduction with respect to the car, as the issue was not raised until 3 September 2015, after a deduction had already been made, and two months after his transfer to AC Milan. Claims that the Appellant's representative sought to contact the Player regarding this subject for almost a year are untrue and unsubstantiated.

- The nature of the evidence that the Player has in order to prove that the car is in the Appellant's possession is also of an *"indirect"* nature, as he maintains that the car key were delivered to the Appellant's interpreter in May 2014. Such evidence is in essence the following:

  - The Player had acquired two of his own cars in 2013 and did not need the one provided by the club;

  - Having left the country to go to Italy, it was not reasonable for the Player to take the car with him considering that he owned two other cars;

  - The car keys were returned at a time of armed conflict in the Donetsk region. Given that the Club's stadium was bombarded, it is not unreasonable to consider that the car may have also been a target of attacks;

  - The Player did not request the return of the car after May 2014 because he did not need it, in light of his ownership of two other cars;

  - Since the issue of the car did not come up between the parties even months after the Player's transfer to Italy, in good faith one must assume that the subject was closed for both of them.

- The accusations of the Appellant are that the Player caused intentional damage. The Appellant has failed to prove this, and there was no reason for the Player to do so. Moreover, there was no investigation by the Appellant, and no contact with the police in this respect.

- Regarding the air tickets, the so-called *"literal interpretation"* of the contract is completely inaccurate and contrary to good faith. There is no provision establishing a time limit on the presenting of *"relevant financial documents"* for the reimbursement of air tickets. The limitation is solely on the amount of tickets available in a given year, *i.e.* there is no obligation for the Club to reimburse a sum superior to that corresponding to six air tickets in a given year.

- Under Article 1 para. 3(b) RSTP and related jurisprudence, *"agreements must be respected by the parties in good faith"*. The only plausible interpretation is one which permits the reimbursement of the claimed tickets, especially given that the amount of the reimbursement (EUR 29,117.31) had been agreed during a meeting between the Club's CEO, its interpreter and the Player's agent.

- The Appellant is estopped from claiming, on the one hand, that the Player's request for reimbursement is manifestly late if submitted after termination of the Contract, when the Appellant itself finds that it can unilaterally apply a discount to the Player's salary by means of a decision that is itself *ex post* termination of the Contract.

- In the absence of a contractual time limit for submitting reimbursement requests, the provision in Article 25 para. 5 RSTP should normally apply, namely two years since the event having given rise to the dispute. However the fact that the Player's June 2015 salary was not paid until 22 July 2015 shows that financial matters related to the Contract were still under discussion by the parties after termination.

47. The Respondent makes the following requests for relief:

"the Respondent would like to gently request the Sole Arbitrator:

a) to receive the present Statement of Defence, due to its timeliness;

b) in the event that a hearing is designated on the present matter, to allow, if the Respondent confirms its convenience and possibility, the hearing of the witness indicated by the Respondent in this Statement of Defence;

c) to fully reject FC Shakhtar Donetsk's appeal due to all the reasons presented in this Statement of Defence, completely upholding the decision passed by the FIFA DRC on the matter.

(…)

In any case, taking into account the reasons above exposed, the Respondent requests to the Sole Arbitrator to grant it an award for costs, imposing to the Appellant the duty of paying the total costs of this arbitration.

(…)

In the remote event that the Sole Arbitrator decides to order the Respondent to pay part of the costs and/or contribution in favor of the Appellant, we would like to ask him to, when assessing the proportion in which the costs shall be distributed and the dimension of the eventual contribution in favor of the Appellant, consider the position of the parties and the Appellant's behavior towards the Respondent since the time of the facts".

V. JURISDICTION

48. 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 if the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

49. Article 58.1 of the FIFA Statutes grants the Club a right of appeal to CAS from a decision of the DRC. In addition, the Parties have both signed the Order of Procedure, expressly consenting thereby to CAS jurisdiction.

50. The CAS, therefore, has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

51. Art. 58.1 of the FIFA Statutes (2016) states:

Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.

52. Art. 58.2 of the FIFA Statutes (2016) states:

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

53. The Parties received the DRC decision from FIFA on 30 March 2017.

54. The Appellant submitted his Statement of Appeal on 19 April 2017.

55. The appeal is therefore admissible.

VII. APPLICABLE LAW

56. Article 187(1) of the Swiss Private International Law Act provides as follows:

The arbitral tribunal shall decide on the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

57. Article R58 of the Code provides more specifically as follows:

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

58. Article 1.2. of the Contract provides as follows:

The present Contract is a special form of a labour agreement and is regulated by the law of Ukraine and - to the extent compatible with Ukraine law - is subject to the FIFA regulations governing the status and transfer of players and to Swiss law.

59. The manner in which a combination of rules of law and regulations should be applied in the context of a given dispute has been the subject of numerous CAS cases (see *e.g.* CAS 2013/A/3401, CAS 2013/A/3383-3385, and CAS 2014/A/3742). In his analysis of these decisions, Ulrich Haas concludes that following agreement on CAS as the court of arbitration, Article 58 of the Code, implicitly agreed to by the parties, *"takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. 58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. 58 of the CAS Code, the "applicable regulations" always primarily apply, regardless of the will of the parties"* (HAAS U., *Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law*, CAS Bulletin 2015/2, p. 17).

60. Applying this hierarchy to the present matter, the FIFA Statutes and Regulations are applicable first and principally, and are subject to Swiss law with respect to their interpretation and application where they seek to set uniform standards internationally. Ukrainian law more generally is to be considered as applicable subsidiarily.

61. The applicable regulations in this matter are the RSTP, 2015 edition.

VIII. MERITS

62. The three questions to be addressed are (a) whether the Club was entitled to make the deduction to the Player's June salary on the basis of his late arrival at the training camp in Austria; (b) whether the Club was entitled to deduct EUR 10,000 in connection with the car that it states was not returned, and (c) whether the Club was entitled to deny reimbursement of the travel costs claimed by the Player under the Contract because they were *"manifestly late"*.

(a) The deductions associated with late arrival to training

63. Neither party questions whether the Club had the right to make deductions under the Contract with respect to the *"actions"* listed therein in Annex 2. The question is rather whether, in the particular circumstances during which negotiations were occurring with third party clubs interested in contracting the Player's services, the Player had an obligation to return by a certain date. Secondarily, in the event such an obligation existed, the questions are whether the Player met such obligations, and in the event he did not, whether the financial penalties were contractually sound and proportionate under the circumstances.

64. The particular circumstances were those in which the Club was seeking to maximise returns from the transfer the Player, whose success on the pitch had made him a valuable asset. The Player contends this was the Club's only objective, whereas the Club maintains that this was only one of two possibilities, and that in the event a transfer could not be secured, the second option was to ensure that he contributed to the success of the team on the pitch for the remainder of his Contract.

65. While the Player was under Contract with the Club, both parties had to abide by their respective obligations. While the Player was entitled to a certain amount of leave to return to his home country (as evidenced also by the contractual clause providing for the reimbursement of six return flight tickets per financial year between Donetsk to Porto Alegre), he was bound to do so within times that were permissible and would not cause him to miss training or matches, as per the Club's instructions. The Club, on the other hand, had to provide the Player with his contractual leave, and both parties had a duty to fulfil their contractual obligations in good faith.

66. Within this contractual context, both parties were seemingly seeking to maximise potential future benefits associated with a potential transfer of the Player to another club. While this reality did not absolve either party of fulfilling their duties towards one another under the Contract, it is relevant to the context of the dispute in that both parties could be reasonably expected (by each other) to be seeking to negotiate with third parties at the relevant times.

67. The offer from Al Ahly FC and the Player's refusal to accept such offer are indicative of the nature of the negotiations happening among the parties at the time, as is the 1 July 2015 letter from AC Milan to the Appellant informing of the Italian club's intent to begin negotiations with the Player.

68. In determining the legitimacy of the deductions made by the Club, a few factors are relevant: (a) whether the deadline granted by the Club to the Player was realistic and reasonable with respect to his return to training, (b) whether the Player's reasons for remaining in Brazil were legitimate and communicated appropriately to the Club, and (c) the timing and nature of the decision made to deduct a penalty fee from the Player's salary.

69. The Player contends that the Club's request that he returned to training within one day was retaliatory in nature, given that he had not agreed to sign with Al Ahly FC. The Club rather asserts that to the extent that he could not be signed to another club in a lucrative transfer, his presence was needed on the pitch as a valuable member of the squad, and that this was the motivation for having him return to Europe the day after he informed the Club of his refusal to join Al Ahly FC.

70. While the Club may well have had a legitimate incentive to have the Player return to training as soon as possible, two elements appear somewhat at odds with reason. First, the one-day deadline to get from Porto Alegre, Brazil to Going, Austria seems extremely short when taking into account the necessary travel time and relative time change during travel. Moreover, the Contract included an obligation to minimize the cost of travel through the purchase of air tickets at potentially preferred Club rates, and purchased in Ukraine. As there is no evidence that a corresponding air ticket was booked for the Player, the Player would have had to receive the letter from the Club, made arrangements for ticketing in Ukraine the same day despite the time difference (or borne the risk of additional costs), ensured availability on flights to an airport sufficiently close to Going (with likely at least one stopover), and made it all the way from the destination airport to the training Club before the end of the following day.

71. Second, given the nature of the exchange that had just occurred between the Player and the Club (regarding the offer and refusal to go to Al Ahly FC), it might have been appropriate to inquire as to the potential for negotiations with other clubs at that point. It would have also been appropriate, if the Club needed the Player back so soon, to make arrangements to book him the necessary ticket. Finally, once the Club invoked the contractual penalty and the Player provided reasons, together with a medical certificate concerning his wife's procedure, by the communicated deadline, the Player could reasonably assume that (i) he had either met the burden of providing the necessary written explanations to avoid a penalty, or (ii) that the Club may come back to him with explanations as to why it did not consider the reason he provided to be legitimate.

72. Finally, it is noteworthy that the Club ultimately took the disciplinary decision after the Player's transfer to AC Milan had been finalised. The issue of the penalty apparently not having arisen during the negotiations, the Player could reasonably assume that his explanations had been accepted, and that his salary for the month of June would be free of deductions.

73. While the penalties for late return to practice were indeed agreed contractually, the Club had a duty to apply them in good faith. Under the circumstances, it appears as if the deadline that was set for the return of the Player to training was unrealistic and unreasonable at best, and, at worst, intentionally determined so as to allow the Club to invoke the penalty provision knowing that

it would be very difficult for the Player to comply with it. To determine whether or not this was in retaliation for the Player's refusal to sign with Al Ahly FC would be to speculate.

74. Given the significance of the contractual provision allowing for a very substantial monetary penalty, the Club had the duty to ensure that the Player could reasonably meet the deadlines that it set. As a result, the Sole Arbitrator finds that the deduction to the Player's salary associated with his alleged late return to training was illegitimate given the circumstances and the manner in which the Annex 2 provision was applied. There is therefore no need to analyse further the degree of its proportionality.

(b) The deductions associated with the *"non-return"* of the car

75. Similar considerations apply to the issue of the deductions associated with the alleged non-return of the car. The Club has failed to substantiate the manner in which its employee sought to recover the car after the moment the Player claims to have returned the keys to the Club's interpreter.

76. As is the case with the deductions associated with the alleged late return to training *supra*, it is difficult to understand why, had the Club been acting in good faith, this issue was not raised in the context of negotiations with AC Milan. Indeed, this provided the ideal opportunity to address any outstanding financial differences between the parties and to dispose of them in the relevant agreements.

77. The Player does not appear to have had the opportunity to provide his position on the car's value, let alone its whereabouts, before a corresponding amount of EUR 10,000 was deducted from his last salary payment. The evidence he provides as to the ownership of two other vehicles supports the fact that he had no need for the car and had no reason to keep possession of it.

78. As a result, the Sole Arbitrator finds that the Club did not have a legitimate basis to make the deduction associated with the alleged non-return of the car.

(c) The refusal to reimburse travel costs

79. The Appellant alleges that the requests for reimbursement of travel cost were too tardy to be honoured, ostensibly based on a limitation in the contractual language. The applicable portion of the contract reads as follows:

> *"To cover the cost of six business class plane tickets for the Player per financial year (i.e. 01.07-30.06), flight Donetsk-Porto Alegre-Donetsk (with maximum 2 transit airports) based on the cost of ticket of this class purchased in Ukraine including corporate discounts offer to the Club by air companies.*
>
> *(…)*
>
> *The cost of the ticket shall be reimbursed to the Player on submission of relevant financial documents (invoice copies, tickets with tariffs).*

The above-mentioned compensation amount can be used by the Player to purchase different class and destination plane tickets and any other passenger, cargo, animal air transportations services. The unused compensation balance shall not be paid to the Player, nor shall it be carried forward to the following financial year".

80. The contractual language does clearly contain a limitation. That limitation, however, is that any credit available for travel used within a financial year cannot be carried forward to another year if unused. In other words, if the Player only returns to Brazil four times in a given financial year, he cannot be reimbursed for eight trips the following year on the basis that he did not use the credit available for six trips the first year.

81. What the contractual language clearly does not contain, however, is a limitation on when expenses for travel within a given year can be claimed. If the limitation is contained as a matter of policy elsewhere than in the contract, the Appellant has not produced a relevant document or other evidence that would indicate that the Player was, might have or should have been aware of such a policy.

82. As a result of the foregoing, the Sole Arbitrator does not see a basis upon which to deny the Player the reimbursement of his travel costs, or to change the decision of the FIFA DRC.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by FC Shakhtar Donetsk on 19 April 2017 against the decision issued by the FIFA Dispute Resolution Chamber on 15 December 2016 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 15 December 2016 is confirmed.

3. (…).

4. (…).

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