Arbitration CAS 2009/A/1838 Association Kauno futbolo ir beisbolo klubas v. Iurii Priganiuk, award of 10 December 2009

Panel: Mr Martin Schimke (Germany), President; Mrs Alexandra Brilliantova (Russia); Mr Stephan Netzle (Switzerland)

Football
Termination of an employment contract
Form of the individual employment contract according to Swiss law
Consequences from the non-performance due to the fault of the employer
Termination of fixed-term contracts before the expiry of the agreed period
Obligation of the employer to obtain a work permit or a visa for the employer
Principle of ne iudex eat ultra petita

1. **According to Swiss law, the individual employment contract is a contract whereby the worker has the obligation to perform work in the employer's service for either a fixed or indefinite period of time, during which the employer owes him a wage. Unless the law otherwise provides, no special form is required for an individual employment contract.**

2. **According to Swiss law, if the work cannot be performed due to the fault of the employer or if, for other reasons, the employer fails to accept the performance of the work, he remains liable to pay the wages, without an obligation on the part of the employee to subsequently perform the work. Hence, the employee who remained at the disposal of the employer, without being allowed by the latter to perform his work, cannot be required to postpone the execution of his contractual activities, and if hired for a fixed date is entitled to his salary.**

3. **Fixed-term contracts cannot come to an end before the expiration of the agreed period unless there is a just cause for termination of the employment relationship or if the employer becomes insolvent. Such a just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship. The employer's failure to accept performance of the work does not, of itself, constitute just cause for the employee to terminate the employment relationship.**

4. **It is generally the employer's duty to take the necessary measures to obtain a work permit or a visa for an employee to enter and perform his professional activity in a particular country.**

5. **The power of a CAS panel to amend the amount decided upon by the FIFA Dispute Resolution Chamber is limited to the requests for relief submitted by the parties (*"ne iudex eat ultra petita"*). In this respect, even if the player claimed a higher amount as compensation before FIFA, and even if he is entitled to such an amount, the CAS panel**

cannot amend the amount if the player did not raise this claim again in the CAS proceedings and he failed to submit any counterclaim with respect to the amount granted in the decision appealed against.

Association Kauno futbolo ir beisbolo klubas is a football club with its registered office in Kaunas, Lithuania ("the Appellant"). It is a member of the Lithuanian Football Federation (LFF), itself affiliated to the Fédération Internationale de Football Association (FIFA) since 1923.

Mr Iurii Priganiuk ("the Player") is a professional football player. He was born on 23 October 1978 and is of Moldovan nationality.

On 20 December 2005, the Appellant and the Player signed a labour agreement, which contains a description of each party's respective obligations. It was a fixed-term contract for three years, effective from 20 December 2005 until 20 December 2008. Among other obligations, the Appellant agreed to pay to the Player a monthly salary of EUR 15,000 as well as *"two tickets of the route Edinburgh – Kishinev – Edinburgh"*.

Article V of the agreement provides a broad range of disciplinary measures that can be taken against the Player in case he violates his contractual obligations. Warnings and fines can be imposed upon the Player if he fails to attend a training session or an event organised by the Club. His disqualification can also be requested, should he not come to the Club for 6 days without a valid excuse.

Regarding the termination of the contract, articles IX.9 and IX.10 of the agreement state the following (as translated into English by the Appellant):

> *"9. If the Player decides to leave the Club unilaterally and without good reason prior to the validity end of the Contract or the term of the Player's inclusion into the Club, he shall pay to the Club the compensation amounting to salaries for the rest months until the validity term of the Contract.*
>
> *10. If the Player does not violate the requirements of the Club, and the Club wishes to terminate the Contract, the Club shall pay the compensation to the Player amounting to salaries for the rest months until the validity term of the Contract".*

Despite signing the contract, the Player has never trained nor played with the Appellant's team. According to the Player, this is exclusively due to the fact that the Appellant refused: a) to make the required arrangements for him to legally enter Lithuania in order to render his services; and b) to confirm the date and place where he was supposed to report for duty.

During the two weeks following signature of the contract, the Player's agent, Mr Nicolae Pirnau, had several phone conversations with the Appellant. The parties' versions of events differ as to what was exactly said during those conversations. On the one hand, the Player contends that he requested, without success, a formal invitation from the Appellant, which invitation was apparently necessary to be able to apply for a visa to enter Lithuania. On the other hand, it is the Appellant's case that it kept

telling the Player that Moldovan nationals do not need such an invitation to work in Lithuania and that it urged him to present himself as soon as possible to the club and to make his services available.

On 14 January 2006, during the Commonwealth Cup in Russia, the Player and his agent travelled to Moscow to meet the representatives of the Appellant. Both parties failed to present documentary evidence or witness testimony that would permit the Panel to determine the issues addressed during the meeting. However, the Appellant confirmed that, on that occasion, it reaffirmed that no formal invitation was necessary for the Player to legally enter Lithuania.

In January 2006, the Player and his agent complained about the situation to the President of the Football Association of Moldova, Mr Pavel Cebanu, who eventually brought the matter to the attention of his counterpart at the LFF. The latter allegedly promised that he would look into it and remedy it rapidly.

The Appellant claims that, on 15 February 2006, it filed a formal complaint before the LFF. However, it did not substantiate this assertion with any evidence. According to the Player, the said complaint was actually a response to questions raised by the LFF after the intervention of Mr Pavel Cebanu.

> *"On February 15, 2006, Player's representative called the Club with the questions why the Player was not playing for the Club and demanded to pay salary to the Player for 2 months"* (par. 8.11 of the appeal brief filed before the Court of Arbitration for Sport).

Meanwhile, and until February 2006, the Player attended training sessions with one of his former employers, FC Sheriff Tiraspol, a Moldovan club, without receiving any payments.

At an indeterminate time, the Player entered into a professional contract with Lokomotiv Nijnii Novgorod, a Russian club, which was disbanded at the end of 2006. The contract was effective from March to December 2006 and the Player's monthly salary was RUB 16,000, which, at the time, was equivalent to about EUR 500.-.

On 29 July 2007, the Player signed a new labour agreement with SKA Energia Khabarovsk, another Russian football club. The contract was effective from 29 July until 15 December 2007 and the monthly wage amounted to RUB 130,000 which, at the time, was equivalent to about EUR 5,000.-. Finally, between 21 July 2008 and 30 June 2009, the Player was hired by the Moldovan club, Tiligul Tiras, which paid him the equivalent of EUR 100 per month.

On 29 March 2006, the Player initiated proceedings with the FIFA Dispute Resolution Chamber (DRC) to order the Appellant to pay in his favour EUR 540,000, i.e. what he would have earned until the expiry of the contractual period (Three years x annual salary of EUR 180,000).

On 9 January 2009, the DRC issued a decision (the "Appealed Decision") which reads, in pertinent part:

> *"(…) the members of the Chamber took note of the fact that, on 14 January 2006 during the Commonwealth Cup in Russia, the Claimant and his agent had travelled to Moscow to apparently meet representatives of the Respondent, when the team played its first match of the season (…).*

19. *In this context, the members of the Chamber concluded that, given the aforementioned circumstances, it appears that the Claimant would not have met with representatives of the Respondent if it was not in an attempt to join the Respondent while it was present in Russia, a country which did not require any visa for nationals of Moldova. Furthermore, the Chamber deemed it rather unlikely that the Claimant, having signed a contract for a monthly salary particularly high for Lithuania or Moldova, would have subsequently decided not to join the Respondent in Lithuania.*

20. *In view of the above, the members of the Chamber deemed that while it appears that the Claimant had acted in good faith trying to fulfil his obligations arising from the contract, the Respondent had not reacted sufficiently and had not proposed any solutions so that the Claimant could initiate his training and playing with the team, even though this would have been one of the Respondent's obligations. Consequently, the Chamber deemed that it had to assume that soon after the Claimant and the Respondent signed the contract, the Respondent, for some reasons not known to the Chamber, had become uninterested in the services of the Claimant".*

In this context and on the basis of article 17 of the applicable FIFA Regulations for the Status and Transfer of Players, the DRC held that the Appellant terminated the contract with the Player unilaterally, prematurely and without just cause and concluded that the Player was entitled to the payment of EUR 200,000.-. It found that the said compensation was reasonable and justified, considering the overall circumstances of the case, in particular the fact that the contract had never been executed and that the Player's *"footballing career, at least at that stage, had not been put in jeopardy by the non-execution of the contract"* as he signed another labour agreement in February 2006.

As a result, on 9 January 2009, the DRC decided the following:

"1. The claim of the Claimant, Iurii Priganiuc, is partially accepted.

2. The Respondent, FBK Kaunas, has to pay to the Claimant, Iurii Priganiuc, the amount of EUR 200,000 ***within 30*** *days as from the date of notification of this decision.*

3. Any further claims lodged by the Claimant, Iurii Priganiuc, are rejected.

4. If this aforementioned sum is not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee so that the necessary disciplinary sanctions may be imposed.

5. The Claimant, Iurii Priganiuc, is directed to inform the Respondent, FBK Kaunas, immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

On 7 April 2009, the parties were notified of the Appealed Decision.

It is undisputed that, to date, the Appellant has not paid any compensation to the Player.

On 28 April 2009, the Appellant filed a statement of appeal and, on 8 May 2009, an appeal brief with the Court of Arbitration for Sport (the "CAS"). It challenged the Appealed Decision of the DRC, submitting the following request for relief:

"FBK asks the CAS, pursuant to R57 and 64.5:

(a) To accept this Appeal against the Decision;

(b) To replace the Decision of the FIFA DRC, and issue a new decision, which:

(i) Confirms that the FIFA DRC failed to assess the compensation payable in accordance with Article 17(1) of the FIFA Regulations, either adequately, or at all;

(ii) Confirms that in accordance with the proper application of Article 17(1) of the FIFA Regulations, for Respondent's breach of contract without just cause, the Respondent is liable for compensation payable to the Appellant;

(iii) Confirms that in accordance with the proper application of Article 17(1) of the FIFA Regulations, the Appellant is not liable for compensation payable to the Respondent;

(iv) Orders compensation to be paid by the Respondent to the Appellant in an amount to be decided by the CAS.

(v) Orders the Respondent to pay costs before CAS in an amount to be assessed by the CAS".

On 29 May 2009, the Player filed his answer, with only the following request for relief:

"We also consider that in the respect to the mentioned above, Kaunas should take care of all the costs related to their appeal, because the player have already paid and suffered enough from Kaunas's behavior".

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from articles 62 ff. of the FIFA Statutes and article R47 of the Code. It is further confirmed by the order of procedure duly signed by the parties.

2. It follows that the CAS has jurisdiction to decide on the present dispute.

3. Under article R57 of the Code, the Panel has full power to review the facts and the law.

Applicable law

4. Article R58 of the Code provides the following:

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

5. Pursuant to article 62 par. 2 of the FIFA Statutes *"[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.

5. Regarding the issue at stake, the Panel is of the opinion that the parties have not agreed on the application of any specific national law. Its position is supported by the fact that, in their respective submissions, the parties refer exclusively to FIFA's regulations. As a result, subject to the primacy of applicable FIFA regulations, Swiss Law shall apply complementarily.

6. The relevant contract at the basis of the present case was signed after 1 July 2005, which is the date when the revised FIFA Regulations on the Status and Transfer of Players (i.e. the 2005 edition) came into force (the "FIFA Regulations"). The case at hand was submitted to the FIFA DRC before 1 January 2008, which is the date when the amendments to the said FIFA Regulations came into force. Pursuant to article 26 par. 1 and 2 of the FIFA Regulations, the case shall be assessed according to the FIFA Regulations, notwithstanding the amended provisions.

Admissibility

7. The appeal was filed within the deadline provided by the FIFA Statutes and stated in the decisions issued by the FIFA DRC on 9 January 2009. It also complied with all the other requirements of article R48 of the Code.

8. It follows that the appeal is admissible.

Merits

9. Each party submits that the other party terminated the contractual relationship unilaterally, prematurely, and without just cause. The Appellant claims that the Player failed to fulfill any of his obligations arising from the agreement signed on 20 December 2005, whereas the Player alleges that the Appellant did not provide sufficient information or the necessary official documents to enable him to perform his duties.

10. Hence, the main issues to be resolved by the Panel in deciding this dispute are the following:

    A. Who failed to perform the contractual obligations?

    B. Is any compensation due and if so, what is its correct calculation?

A. Who failed to perform the contractual obligations?

a. In general

11. The individual employment contract is a contract whereby the worker has the obligation to perform work in the employer's service for either a fixed or indefinite period of time, during which the employer owes him a wage (Article 319 par. 1 of the Swiss Code of Obligations - "CO"). Unless the law otherwise provides, no special form is required for an individual employment contract (Article 320 par. 1 CO).

12. An employment relationship is characterized by the fact that one person will carry out work in return for a salary from the other. On one hand, the employee must personally perform the work contractually undertaken, unless otherwise agreed upon, or unless circumstances indicate otherwise (Article 321 CO). The employee must carefully perform the work assigned to him and loyally safeguard the employer's legitimate interests (Article 321 a par. 1 CO). He must in good faith observe the general directives and the specific instructions established by the employer in relation to the execution of the work and the conduct of workers (Article 321 d par. 2 CO).

13. On the other hand, the employer provides the work and is in a position of authority with regard to the worker. He determines the amount of work to be accomplished, supervises the work, and controls the worker's activities. In exchange for the services of the employee, the employer pays him the agreed wages.

14. Pursuant to article 324 par. 1 CO, if the work cannot be performed due to the fault of the employer or if, for other reasons, the employer fails to accept the performance of the work, he remains liable to pay the wages, without an obligation on the part of the employee to subsequently perform the work. Hence, for instance, the employee who remained at the disposal of the employer, without being allowed by the latter to perform his work, cannot be required to postpone the execution of his contractual activities (JAR 1985, 102). Likewise, the employee hired for a fixed date is entitled to his salary even if the employer has no work to give him and would like to postpone the beginning of the employment relationship (TERCIER/FAVRE, Les contrats spéciaux, 4ème édition, Genève, Zürich, Bâle 2009, p. 515, n. 3491).

14. Similarly, it is the employer's responsibility to apply for a work permit for a potential employee and/or to liaise with the competent authority to obtain or renew a work permit for its employee whose activity is subject to authorization (ATF 114 II 279 consid. 2d/bb; decision of the Swiss Federal Court of 14 December 2000, 4C.306/2000; TERCIER/FAVRE, op. cit., p. 515, n. 3491 and WYLER R., Droit du travail, 2ème édition, Berne 2008, p. 196). In any event, an employment contract is not void just because the employee does not have a valid authorization to work due to his citizenship status (ATF 122 III 110 consid. 4e p. 116; 114 II 279 consid. 2d, p. 284).

15. Article 324 CO is applicable only if the employee has established that he remained at the disposal of the employer during the time agreed and/or that he unsuccessfully offered his

services to the employer (Decisions of the Swiss federal Court of 7 June 2007, 4C.83/2007 and of 1 September 2005, 4C.230/2005; ATF 115 V 441).

16. However, if the employer discharges the employee of his obligations to perform work until the expiry of the contract, the latter is no longer required to offer his service while the employer remains liable to pay wages. The employee released from the obligation to work cannot be criticized for not having offered his services or remained at the disposal of his employer (Decisions of the Swiss federal Court of 2 April 2004, 4C.259/2003 and of 12 February 2002, 4C.331/2001, consid. 4c); ATF 118 II 139).

17. The duration of the contract is set by agreement between the parties. It is indefinite, except where a fixed term has been agreed by the parties or is dictated by the nature of the work. Fixed-term contracts terminate without requiring notice upon the expiry of the agreed period (Article 334 par. 1 CO) and are presumed without any trial period, as such a period shall be introduced and agreed upon by written agreement (FF 1984 II 620; RSJ 1999, 253, TERCIER/FAVRE, op. cit., p. 545, n. 3663; WYLER R., op. cit., p. 446).

18. Fixed-term contracts cannot come to an end before the expiration of the agreed period unless there is a just cause for termination of the employment relationship or if the employer becomes insolvent (ATF 110 II 167; WYLER R., op. cit. p. 436). According to article 14 of the FIFA Regulations, *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) in the case of just cause"*. Such a just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship (Article 337 par. 2 CO).

19. The employer's failure to accept performance of the work does not, of itself, constitute just cause for the employee to terminate the employment relationship. As a matter of fact, the employee's interests are sufficiently protected by article 324 par. 1 CO. In such a case, other circumstances are necessary to allow the employee to terminate the contract for just cause (ATF 116 II 142).

b. In particular

20. It is undisputed that the Player needed a visa and a work permit in order to render his services in Lithuania. However, the Appellant is of the opinion that the Player did not need an official invitation letter to enter Lithuania. In support of its position, the Appellant relies on the following documents:

a) a printout of a web page dated 31 May 2007 of the Consulate General of the Republic of Lithuania in New York (http://www.ltconsny.org/EN/Visas.htm), which it filed before the DRC as an attachment to its letter dated 1 June 2007.

This document reads, in pertinent part:

> *"**US citizens do not need visas to enter Lithuania as visitors** for stay up to 3 months within a 6-month period. Also, visitors from the listed countries require no visas. (…)*

> ***Visa applicants have to submit*** *(in person or through a proxy with power of attorney,* ***not by mail****) the following documents:*
>
> *(…) An official letter of invitation, issued or certified by the Migration Authorities of the Republic of Lithuania. No letter of invitation is required from citizens of*
>
> *(…) Republic of Moldova".*

A recent consultation of the same web page reveals a different content:

> *"US citizens do not need visas to enter Lithuania and other Schengen states as visitors for stay up to 3 months within a 6-month period counting from the first entry.*
>
> ***Schengen visa applicants have to submit in person the following documents:***
>
> *(…)*
>
> *3. An official letter of invitation, issued or certified by the migration authorities of the Republic of Lithuania. No letter of invitation is required from citizens of following countries for stay of up to 30 days:*
>
> *- (…) Moldova".*

b) *"Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Moldova regarding travelling of the citizens".*

It appears that this agreement was signed on 22 April 2005 and was valid for one year, renewable every year after that (Article 10).

According to article 1 par. 2 of this agreement *"The citizens of the Republic of Moldova, having the valid travelling documents (…) can enter the territory of the Republic of Lithuania, depart there from, pass it in transit or reside temporary therein without visas for up to 90 days, unless otherwise provided for in other agreements between the Republic of Lithuania and the Republic of Moldova".*

Article 5 par. 1 of the said agreement states that *"The diplomatic missions and consular authorities of the Republic of Lithuania issue the visas of the Republic of Lithuania for the citizens of the Republic of Moldova, including allowing them to stay in the Republic of Lithuania for up to 90 days within the period of 6 months, free of consular fees and without the requirement to submit the invitation".*

21. The Panel observes that the content of the printed web page submitted by the Appellant differs from the most recent web page, according to which Moldovan citizens need a letter of invitation for stays longer than 30 days. Furthermore, the document filed by the Appellant defines the visa requirements for people who enter Lithuania as visitors exclusively. There is no indication regarding whether foreign citizens are entitled to enter Lithuania and work there without an invitation letter, should the stay be longer or shorter than 30 days.

22. Likewise, the position of the Appellant is not supported by the agreement between Lithuania and Moldova, which concerns exclusively the *"travelling of the citizens"* (as opposed to the professional stay of aliens). As a matter of fact, article 1 par. 2 of the agreement expressly states that Moldovan citizens can *"enter the territory of the Republic of Lithuania, depart there from, pass it in transit or reside temporary therein without visas for up to 90 days"*. This provision does not seem to apply to the case of foreign workers who pursue gainful occupation in Lithuania for a period of several

years. In addition, article 5 of the said agreement interpreted *a contrario* implies that citizens of Moldova need to have an invitation letter, whenever the stay is longer than 90 days.

23. The Panel could not find any evidence in the documentation submitted by the Appellant indicating that an invitation letter is not required when a foreign (Moldovan) employee wishes to work in Lithuania. Moreover, the allegations of the Appellant are also inconsistent with the following elements:

- The Appellant does not challenge the fact that, in December 2005, it delivered an invitation letter for another Moldovan Player, Mr Ghenadie Olexici. It claims that the document was issued because there was no signed contract with Mr Olexici who *"was invited only for trial"*. This argument is not convincing and contradicts the Appellant's previously stated position, namely that a player from Moldova is entitled to perform his professional activities in Lithuania without an invitation letter for a period of up to three months. As a matter of fact, it is unlikely that Mr Olexici was to be trialled for a period longer than three months. Under such circumstances, the Appellant did not give any satisfactory explanation as to why Mr Olexici needed an invitation letter and the Player did not.
- The web page submitted by the Appellant (www.ltconsny.org/EN/Visas.htm) has a link to the *"Documents to be submitted for issuance of a temporary residence permit if the alien intends to take up employment in the Republic of Lithuania"* (http://www.ltconsny.org/EN/residence.htm#1). Among those documents, there are: a) an application form, which must indicate the name of the inviting employer as well as b) the *"permit to work in Lithuania and the letter from the employer ("tarpininkavimo raštas")"*.
- The same web page has another link to the Lithuanian Migration Department webpage (http://www.migracija.lt/index.php?12657589) which gives all sorts of *"information on invitation letter for alien to arrive for temporary stay in the republic of Lithuania"*. On this last page, nothing can be found to provide any form of justification confirming the position of the Appellant.

24. The invitation letter issued by the Appellant to Mr Ghenadie Olexici is a one-page standard document. It is obviously easy to fill in and does not require excessive administrative work. Hence, the Panel does not understand why the Appellant was so determined to refuse to issue such a document, which was persistently asked for by the Player, before, during and after signature of the contract. Even during the meeting in Moscow, the Appellant admittedly did not agree to hand out the said invitation letter. It appears that the Appellant adopted a very uncompromising position towards multiple attempts by its employee to obtain a document which should have been easy to deliver. The Appellant did not make any effort to settle the situation and its obstructive attitude seems not only disproportionate and rigid but also indicates that the Appellant was not inclined to begin or maintain a good fruitful employment relationship with the Player. From the moment the contract was signed, the Appellant never made any reasonable effort to obtain the Player's services. In particular, it has never taken the initiative to contact the Player or his agent in order to properly instruct him in regard to the execution of the contract. It was only on 15 February 2006, over a month after it played its first game of the season that the Appellant allegedly filed a formal complaint before the LFF. However, it did

not substantiate this assertion with any evidence. In this regard, the Panel remarks that the alleged complaint was made shortly after the President of the Football Association of Moldova, Mr Pavel Cebanu, brought the Player's situation to the attention of his counterpart at the LFF.

25. Finally, and as outlined above, it is generally the employer's duty to take the necessary measures to obtain a work permit or a visa for an employee to enter and perform his professional activity in a particular country. In the present case, the Appellant did not make any arrangements to assist or advise the Player regarding an appropriate work permit or other immigration matters. The Appellant alleges that employers in Lithuania do not need to liaise with the competent authority to facilitate the issuance of work permits for its employees whose activities are subject to authorization. Such a statement is made without any supporting evidence or justification and therefore must be disregarded without further consideration.

26. In contrast, the Player has established that after signature of the contract, he attempted to call the Appellant several times, travelled to Moscow to meet his employer and, in February 2006, requested from the latter payment of two months' salary and an explanation as to why he was not working. Therefore, the Player has established that he remained at the disposal of the Appellant and that he unsuccessfully tried to offer his services. The Panel shares the opinion expressed by the FIFA DRC in its Appealed Decision, namely that it is rather unlikely that the Player *"having signed a contract for a monthly salary particularly high for Lithuania or Moldova, would have subsequently decided not to join the Respondent in Lithuania"*. This is particularly true considering the less favourable terms of his subsequent contracts (Lokomotiv Nijnii Novgorod - monthly salary of EUR 500 from March to December 2006; SKA Energia Khabarovsk - monthly salary of EUR 5,000 from 29 July until 15 December 2007; Tiligul Tiras - monthly salary of EUR 100 from 21 July 2008 until 30 June 2009).

27. Firstly, based on the foregoing, it can be reasonably inferred from the Appellant's conduct that it never intended to accept the performance of the work by the Player. Secondly, the Appellant has never formally drawn the Player's attention to the fact that the contract dated 20 December 2005 was still in force and it has not imposed upon him any of the disciplinary measures provided for in article V of the labour agreement. An employer eager to cement the employment relationship would have warned the player that his failure to appear during team practices, or his eventual involvement with another club, was in breach of his contractual obligations and would have taken into consideration possible proceedings before the FIFA DRC or another tribunal to obtain a ruling with respect to the consequences of an alleged breach/termination of the contract or a claim for compensation and/or for sporting sanction against the Player and/or his new employers. The Appellant has taken none of the above measures, because he obviously considered the contract as terminated and acted as such.

28. Under such circumstances, and bearing in mind the conduct of the Appellant, the Player could not have been expected to remain at the disposal of his employer for an indefinite time. He was therefore entitled a) to consider that the Appellant terminated the employment contract, b) to initiate proceedings with the FIFA DRC, and c) to look for another job. In this regard, the subsequent signature of contracts by the Player with other clubs was obviously motivated by the necessity to earn a living and not by personal gain or other financial advantages. As a matter

of fact, the wages and other conditions of the said subsequent contracts were much less favourable compared to what was agreed by the parties on 20 December 2005.

29. Based on the above, and after careful analysis of the facts and evidence submitted to it by the Parties, the Panel must conclude that the Appellant terminated the contract dated 20 December 2005 unilaterally, prematurely and without just cause and must take responsibility for it. Even if one accepted that it was actually the Appellant who terminated the contract when he e.g. joined another club, it was the Respondent which wilfully gave the grounds for termination. Under these circumstances, the consequences of the termination would be the same (see e.g. CAS 2005/A/876, p. 16 f.).

B. Is any compensation due and if so, what is its correct calculation?

30. It is undisputed that the contract between the parties was valid and that it was a fixed-term agreement for three years (which could not come to an end before the expiration of the agreed period unless there was a just cause for termination of the employment relationship or if the employer became insolvent). No trial period was included in the employment contract.

31. In the present matter, because of the unilateral and premature termination of the contract, and because of the lack of any justifiable cause as per article 14 of the FIFA Regulations, the Panel is satisfied that the Appellant's termination of the contract with the Player does fall under the application of article 17 of the FIFA Regulations. Accordingly, the DRC was right in stating that the Appellant is liable to pay compensation to the Player.

32. Article 17 par. 1 and 2 of the FIFA Regulations read as follows:

"Article 17 Consequences of Terminating a Contract without Just Cause

The following provisions apply if a contract is terminated without just cause:

In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period.

Entitlement to compensation cannot be assigned to a third party. If a Professional is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties".

33. Article 17 par. 1 of the FIFA Regulations sets the principles and the method for calculation of the compensation due by a party because of a breach or a unilateral and premature termination of a contract. This provision states the principle of the primacy of the contractual obligations concluded by a player and a club: *"… unless otherwise provided for in the contract …"*. The same

principle is reiterated in article 17 par. 2 of the FIFA Regulations (CAS 2008/A/1519 & 1520, par. 66, p. 21).

34. In the present case, the question is whether the parties have *"provided otherwise"*. Indeed, according to article IX.10 of the labour agreement dated 20 December 2005, *"If the Player does not violate the requirements of the Club, and the Club wishes to terminate the Contract, the Club shall pay the compensation to the Player amounting to salaries for the rest months until the validity term of the Contract"*. This clause is primarily to be understood as a buy-out clause which entitles the Club to unilaterally terminate the labour agreement, against the will of the Player. However, whether article IX.10 is also directly applicable in cases of breach of the labour agreement by the employer, or the termination of the labour agreement by the employee as a result of the employer's actions, can be left open, since the consequences provided by law lead to the same result, namely an obligation on the employer to reimburse to the employee the agreed salaries which the latter would have earned until the agreed end of the labour contract.

Conclusion

35. For reasons which remain unclear , in its Appealed Decision, the DRC concluded that *"not the entire remaining contract value, but the amount of EUR 200,000 was to be considered reasonable and justified as compensation for breach of contract"*. The decision of the DRC seems to be arbitrary as it does not explain how it reached this conclusion. It also does not comply with article 17 par. 1 of the FIFA Regulations and disregards the fact that the parties did *"otherwise provide in the contract"* for a sum to be paid by the Appellant in the event of its unilateral termination of the agreement.

36. Although the Player claimed an amount of EUR 540,000 as compensation before FIFA, and is entitled to such an amount, he did not raise this claim again in this arbitration proceeding and failed to submit any counterclaim with respect to the amount granted in the Appealed Decision. It follows that the Panel is not in the position to amend the amount decided upon by the DRC because its power is limited to the Requests for Relief submitted by the Parties (*"ne iudex eat ultra petita"*). Likewise, the failure by the Appellant to raise the potential issue of "set off" in its Requests for Relief in these proceedings implies that the amount of damages awarded by the DRC cannot be reduced in this regard (see also CAS 2006/A/1061, para. 36). In any event, the Player has only claimed EUR 200 000 instead of the full salary to which he is entitled. As there is no evidence that the Player earned income from other sources which is greater than the difference (namely EUR 340 000) it would therefore not be necessary to "set off" any alternative income.

37. Based on the above-mentioned considerations, the Panel is of the opinion that there is no ground either to reduce or to increase the amount of the compensation awarded to the Player.

38. With regard to the interest and in the absence of a specific contractual clause, the Panel can only apply the legal interest due pursuant to article 104 CO. This article provides that the debtor, on notice to pay an amount of money, owes interest at the rate of 5 % per annum.

39. Regarding the *dies a quo* for the interest, the FIFA DRC ordered the Appellant to pay the financial compensation to the Player within 30 days of notification of its decision. The Panel does not see any reason to establish a different starting date.

40. It follows that the Appellant shall pay to the Player the amount of EUR 200,000 with interest at a rate of 5% as of 8 May 2009.

The Court of Arbitration for Sport rules:

1. The appeal of Association Kauno futbolo ir beisbolo klubas against the decision issued on 9 January 2009 by the FIFA Dispute Resolution Chamber is dismissed.

2. The decision issued on 9 January 2009 by the FIFA Dispute Resolution Chamber is confirmed.

3. Association Kauno futbolo ir beisbolo klubas is ordered to pay Mr Iurii Priganiuk the amount of EUR 200,000 (two hundred thousand Euros) with interest at a rate of 5% as of 8 May 2009.

4. (…).

5. (…).

6. All other or further claims are dismissed.