Arbitration CAS 2011/A/2462 FC Obolon Kyiv v. FC Kryvbas Kryvyi Rig, award of 17 January 2012

Panel: Mr Manfred Nan (The Netherlands), Sole Arbitrator

Football
Termination of an employment contract without just cause by a coaching team
Applicable law
Liability of the new club in connection with the consequences of the termination of an employment contract

1. **From Article R58 of the CAS Code it follows that the regulations of the appropriate federation always apply primarily. In principle, FIFA rules are also applicable insofar as evoked by the national football federation rules. However, the FIFA Regulations on the Status and Transfer of Players (RSTP) are not applicable to the merits of a contractual dispute between a coach and a football club since the RSTP provides that these regulations concern players, not coaches (or physicians). In addition, national law shall apply in the event the interpretation or construction of the rules and regulations of the national federation is required. However, if the content of a foreign law cannot be evidenced, where relevant, it is appropriate to decide a dispute according to the general rules of the *lex sportiva* and complementarily, to the rules of Swiss law.**

2. **In general, without an agreement the entitlement to compensation cannot be assigned to a third party. If no such agreement exists and if the applicable law contains no provision resulting in the liability of the new club to pay compensation to the former club should a coach or a physician have breached its contract with the latter, no compensation shall be due. As a general principle of law a claim against a third party should be allowed only as an exception, only if these is unlawful or an act *contra bonos mores.* The provisions of Swiss law related to damages caused by a conduct *contra bonos mores* cannot entitle the former club to compensation from the new club if the latter was in any event justified in believing that the coaches were not bound by a contract with the former club.**

FC Obolon Kyiv ("Obolon") is an Ukrainian professional football club currently playing in the Premier League, which is the highest football league in Ukraine. The Appellant is affiliated to the Football Federation of Ukraine (FFU), which in turn is a member of the Fédération Internationale de Football Association (FIFA).

FC Kryvbas Kryvyi Rig ("Kryvbas") is an Ukrainian professional football club currently playing in the Premier League, which is the highest football league in Ukraine. The Respondent is affiliated with the FFU, which in turn is a member of FIFA.

The circumstances stated below are a summary of the relevant facts, as established by the Sole Arbitrator on the basis of the parties' written submissions and of the extracts of the FFU file that were duly translated in English.

On 1 July 2008 Obolon concluded an employment contract with senior coach Y. ("the senior coach"), which employment contract was renewed on 13 July 2009, but was valid from 1 July 2009 with a fixed term till 30 June 2011.

On 1 July 2008 Obolon conducted employment contracts with the coaches G., S. and O. ("the assistant coaches"), and also with the physician V. ("the physician"), which employment contracts were renewed on 17 July 2009, but were valid from 1 July 2009 with a fixed term till 1 July 2010.

At the end of December 2009 the senior coach, the assistant coaches and the physician ("the coaching team") submitted letters of resignation to Obolon intending to terminate the employment contracts as from 1 January 2010, i.e. before expiry of the fixed term.

The English translation of the letter dated 24 December 2009 by the senior coach, which remains undisputed by the parties, reads as follows:

> *"Letter of resignation*
>
> *Please accept this formal notice of voluntary resignation from the occupied position, effective January 01, 2010 / Signature Y. /"*

The English translation of the letters dated 24 December 2009 (by S.), dated 25 December 2009 (by G.) and 28 December 2009 (by O.), which remain undisputed by the parties, reads as follows:

> *"Request*
>
> *I ask you to discharge me from the office since January 01, 2010 on my own request*
>
> */ Signature of the assistant coach /"*

The English translation of the letter dated 28 December 2009 V., which remain undisputed by the parties, reads as follows:

> *"Request*
>
> *I ask you to discharge me from the office since January 01, 2010 on my own request*
>
> */ Signature/"*

The mentioned resignation letters of the senior coach, the assistant coaches and the physician also contain some wording with a signature. The English translation of these wordings, which remain undisputed by the parties, reads as follows:

With regard to the senior coach:

"V.K.

To make since January 08, 2010 / Signature /"

With regard to the assistant coaches and the physician:

"V.K.

To make since December 31, 2009 / Signature /"

By Order no. 44-k dated 30 December 2009, Mr. O.I. Alimov – Vice-president of Obolon – discharged the assistant coaches and the physician *"from the office (…) since December 31, 2009"* at their own request ("article 38 of the Labour Code of Ukraine").

On 26 January 2010 the assistant coaches and the physician signed for receiving their work record card.

For reasons which are disputed in these proceedings, the senior coach, the assistant coaches and the physician assumed that their employment contracts with Obolon were terminated with mutual consent as from the beginning of January 2010.

By letter dated 5 February 2010 Obolon informed Kryvbas that the senior coach was still bound by the employment contract with Obolon, asking for compensation for breach of contract.

By letter of 10 February 2010, Obolon informed the President of the Premier League Association of Professional Football Clubs of Ukraine ("PL DC") about the fact that the senior coach failed to appear at his work place, would have signed a contract with Kryvbas, underlined the violation of the FFU regulations that would therefore be committed by Kryvbas and requested that the Premier League Discipline Committee urgently considered the issue of *"disqualification of Y. for the term of validity of the contract with FC Obolon and impose disciplinary sanctions on the FC Kryvbas, Kryvyi Rig"*.

By Decision no 16 of 10 March 2010, the PL DC decided *"[t]o declare the agreement between the FC "Obolon" Kyiv and Y. terminated unilaterally at the initiative of Y. since January 08, 2010"* and *"[t]o oblige FC "Obolon Kyiv, in the procedure stipulated by the labour laws of Ukraine, to formalize the dismissal of Y."*.

By Order no. 20/1-k dated 10 March 2010, the Vice-president of Obolon Mr. O.I. Alimov discharged the senior coach *"since January 08, 2010 (…) from the position of a senior coach of his own volition (art. 38 of Code of Laws on Labour of Ukraine). Grounds – letter of resignation of Y., Decision of the DC of the UPFCU "Premier League" dated March 10, 2010 (P.P. 1.3.-1.4.)"*.

After termination of the contracts with Obolon the senior coach, the assistant coaches and the physician concluded employment contracts with Kryvbas.

Obolon lodged further claims with the judicial organs of the FFU, firstly, before the Premier League Disciplinary Committee, secondly, before the Control Disciplinary Committee, thirdly, before the Appeals Committee ("Committee of Appeal"). In these proceedings Obolon requested – as far as

relevant - compensation from Kryvbas for breach of contract by the senior coach, the assistant coaches and the physician.

By decisions dated 19 April – 5 May 2011, the Committee of Appeal decided to reject the claims of Obolon.

The English translation of the relevant paragraphs of the decision of the Committee of Appeal – which remains undisputed by the parties – with regard to the senior coach read as follows:

> *"(…)*
>
> *Before the contract with FC Obolon expired, he submitted a letter of resignation (Article 38 of the Labour Code of Ukraine) to the management of the Club intending to terminate his labour relations starting from 01 January 2010. Vice President of the Club Mr. O.I. Alimov inscribed the letter with the instructions to document the resignation in a proper manner from 31 December 2009.*
>
> *Later the Club actually changed its attitude towards the resignation of Y. and regarded such termination of labour relations as unlawful unilateral cancellation of the contract ahead of its expiration.*
>
> *On his part, Y. was governed by the Vice President's consent to his resignation starting from 31 December 2009, as well as by the provisions of Art. 38 and 39 of the Labour Code of Ukraine, which, in his opinion, enabled him not to continue working for the Club starting from 01 January 2010.*
>
> *Later, Y. established new labour relations with FC Kryvbas.*
>
> *Under such conditions, FC Obolon requested to apply disciplinary sanctions to the former head coach and wanted FC Kryvbas to pay compensation.*
>
> *The appealed Decision of the FFU Control and Disciplinary Committee of 28 October 2010 declined the requests of FC Obolon (concerning disciplinary sanctions and the payment of compensation).*
>
> *(…) Having heard to the arguments of interested parties and having received additional information from such parties and the FFU provided at the relevant requests, the Appeals Committee arrived at the following.*
>
> ***1. Regarding the termination of labour relations with FC Obolon.***
>
> *The contents of the contract concluded between Y. and FC Obolon specifies that the head coach "enjoyed the rights in accordance with the legislation of Ukraine on employment" (cl. 1.5 of the contracts) and that "terms and conditions of the contract may be amended at any time subject to a mutual agreement between the parties" (cl. 1.11 of the contracts).*
>
> *Proceeding from the abovementioned provisions of the contract, provisions of Art. 38 and 39 of the Labour Code of Ukraine, taking into account the written instructions inscribed by Vice President Mr. Alimov on the employee's letter of resignation, the FFU AC finds no reason to consider that the termination of labour relations with Y. was not agreed upon by the Club.*
>
> *Under such conditions, there are no grounds for applying disciplinary sanctions to the abovementioned person.*
>
> ***2. Regarding the payment of compensation.***
>
> *Part 4 Art. 13 of the FFU Regulations on the Status and Transfer of Football Players (hereinafter the Regulations) stipulates that if a player signs a contract with a "new" club after the relations with the former club*

has been terminated, such new club should settle the issue with the former club regarding the payment of compensation for the player.

Review of provisions of the Regulations enables a conclusion that the issue refers to the compensation for the training of a player. At least, the calculation technique (Art. 22 of the Regulations) relates to the compensation for the training.

Under Art. 20 of the Regulations, a player is trained in the age of 12 to 23 years old. The compensation for the training of such player should be paid before the end of the season in which the player is 23.

These provisions of the Regulations define rather explicitly that the training of a player over 23 years old is regarded as such that cannot be obligatory in terms of paying compensation for it.

Under Part 1 Art. 5 of the Regulations, the status of coaches in part pertaining to contractual relations with the club is equated with the status of professional players. Furthermore, Article 5 equates the status of coaches with the status of players in part pertaining to contractual relations with the club. At the same time, the payment of compensation refers to mutual relations between two clubs, but no to contractual relations between a player (a coach) and a club.

Football practice also provides no evidence of paying compensation for the training of coaches.

According to the FFU Committee on the Status and Transfer of Football Players (letter of 26 April 2011), there are no known cases of paying such compensation in Ukrainian football.

Examples of the payment of compensation for the early termination of contracts and transfer of coaches cited by FC Obolon cannot be regarded by the FFU AC as proper evidence of the Club's position in the dispute.

Thus, first, examples involving Jose Mourinho, Dick Advocaat and Yuri Syomin refer to the payment of compensation "for the early termination of the contract and transfer", but in no way for the training. At the same time, FC Obolon in its appeal (pp. 2-3) refers to Art. 22 of the Regulations which pertains to the compensation for the training.

Secondly, the cited examples define the payment of compensation as a result of a certain compromise agreement.

Thirdly, the compensation for the transfer and/or the compensation for the early termination of the contract has no calculation technique, as opposed to the compensation for the training (Art. 22 of the Regulations). This means that in the event of even theoretical acceptance of FC Obolon's approach to this disputed issue, the exact amount of compensation "for the transfer and/or early termination of the contract" cannot be defined in any way other than by agreement of the clubs concerned. "Forced" definition of the amount of such compensation by the FFU CDC or AC would have no legal grounds under such circumstances".

The English translation of the relevant paragraphs of the decision of the Committee of Appeal – which remains undisputed by the parties – with regard to the assistant coaches and the physician read as follows:

"(…)

Before the contract of these persons with FC Obolon expired, all of them submitted letters of resignation (Article 38 of the Labour Code of Ukraine) to the management of the Club intending to terminate their labour relations starting from 01 January 2010. Vice President of the Club Mr. O.I. Alimov inscribed all these letters with the instructions to document the resignation of the said employees in a proper manner from 31 December 2009.

Later the Club actually changed its attitude towards the resignation of the said persons and regarded such termination of labour relations as unlawful unilateral cancellation of the contracts ahead of its expiration.

On their part, the coaches (…) were governed by the Vice President's consent to their resignation starting from 31 December 2009, as well as by the provisions of Art. 38 and 39 of the Labour Code of Ukraine, which, in their opinion, enabled them not to continue working for the Club starting from 01 January 2010.

Later, the said persons established new labour relations with FC Kryvbas.

Under such conditions, FC Obolon requested to apply disciplinary sanctions to former employees and wanted FC Kryvbas to pay compensation.

The dispute between the coaches, the physician and the Club also touched upon the underpayment of salaries by FC Obolon to all abovementioned persons during their employment with the Club.

The appealed Decision of the FFU Control and Disciplinary Committee of 12 August 2010 satisfied the requests of the coaches and the physician concerning the payment of their overdue salaries by the Club, whereas the requests of FC Obolon (concerning disciplinary sanctions and the payment of compensation) were declined.

(…) Having heard to the arguments of interested parties and having received additional information from such parties and the FFU provided at the relevant requests, the Appeals Committee arrived at the following.

1. Regarding the termination of labour relations with FC Obolon.

The contents of the contracts concluded between Messrs G., V., S., O. and FC Obolon specifies that they "enjoyed the rights in accordance with the legislation of Ukraine on employment" (cl. 1.5 of the contracts) and that "terms and conditions of the contracts may be amended at any time subject to a mutual agreement between the parties" (cl. 1.11 of the contracts).

Proceeding from the abovementioned provisions of the contracts, provisions of Art. 38 and 39 of the Labour Code of Ukraine, taking into account the written instructions inscribed by Vice President Mr. Alimov on the employees' letters of resignation, the FFU AC finds no reason to consider that the termination of labour relations with the said persons was not agreed upon by the Club.

Under such conditions, there are no grounds for applying disciplinary sanctions to the abovementioned persons. (…).

2. Regarding the arrears of salaries

The case files contain the Club's official data on total payments (salaries and incentives) made to Messrs G., V., S. and O. At the same time, these data explicitly demonstrate that it were the wages (position salaries) within the structure of the payments made which were less than those set for the abovementioned employees by the terms and conditions of their contracts. The representatives of the Club failed to provide a clear explanation in this respect. Thus, the Club, with its own documents, confirmed the existence of the arrears of wages payable to Messrs G., V., S. and O. Therefore, the FFU AC finds no reason for amending or cancelling the Decision of the CDC in this part.

3. Regarding the payment of compensation.

Part 4 Art. 13 of the FFU Regulations on the Status and Transfer of Football Players (hereinafter the Regulations) stipulates that if a player signs a contract with a "new" club after the relations with the former club has been terminated, such new club should settle the issue with the former club regarding the payment of compensation of the player.

Review of provisions of the Regulations enables a conclusion that the issue refers to the compensation for the training of a player. At least, the calculation technique (Art. 22 of the Regulations) relates to the compensation of the training. Under Art. 20 of the Regulations, a player is trained in the age of 12 to 23 years old. The compensation for the training of such player should be paid before the end of the season in which the player is 23.

These provisions of the Regulations define rather explicitly that the training of a player over 23 years old is regarded as such that cannot be obligatory in terms of paying compensation for it.

Under Part 1 Art. 5 of the Regulations, the status of coaches in part pertaining to contractual relations with the club is equated with the status of professional players.

The abovementioned provisions of the Regulations demonstrate the following:

1. *Article 5 does not pertain to the status of physicians and other employees (except for coaches) involved in football activities. Therefore, the provisions of Article 5 do not relate to V. in any way and thus make it impossible to apply the provisions of Part 4 Art. 13 and Art. 22 to him.*
2. *Article 5 equates the status of coaches with the status of players in part pertaining to contractual relations with the club. At the same time, the payment of compensation refers to mutual relations between two clubs, but not to contractual relations between a player (a coach) and a club.*

   Football practice also provides no evidence of paying compensation for the training of coaches and/or physicians.

   According to the FFU Committee on the Status and Transfer of Football Players (letter of 26 april 2011), there are no known cases of paying such compensation in Ukrainian football.

   Examples of the payment of compensation for the transfer of coaches cited by FC Obolon cannot be regarded by the FFU AC as proper evidence of the Club's position in the dispute.

   Thus, first, examples involving Jose Mourinho, Dick Advocaat and Yuri Syomin refer to the payment of compensation "for the early termination of the contract and transfer", but in no way for the training. At the same time, FC Obolon in its appeal (pp. 2-3) refers to Art. 22 of the Regulations which pertains to the compensation for the training.

   Secondly, the cited examples define the payment of compensation as a result of a certain compromise agreement.

   Thirdly, the compensation for the transfer and/or the compensation for the early termination of the contract has no calculation technique, as opposed to the compensation for the training (Art. 22 of the Regulations). This means that in the event of even theoretical acceptance of FC Obolon's approach to this disputed issue, the exact amount of compensation "for the transfer and/or early termination of the contract" cannot be defined in any way other than by agreement of the clubs concerned. "Forced" definition of the amount of such compensation by the FFU CDC or AC would have no legal grounds under such circumstances".

Based on the above mentioned reasons, the Committee of Appeal decided as follows:

a. with regard to the senior coach – as relevant:

   "(…)To decline the appeal lodged by FC Obolon against the Decision of the FFU CDC of 28 October 2010 on compensation settlements between FC Kryvbas and FC Obolon for Y., and to uphold the mentioned Decision of the FFU CDC (…)".

b. with regard to the assistant coaches and the physician – as relevant:

"(…)To decline the appeal lodged by FC Obolon against the Decision of the FFU CDC of 12 August 2010 on compensation settlements between FC Kryvbas and FC Obolon for Messrs. G., V., S. and O., as well as on making payments to the above persons under the contracts and to uphold the mentioned Decision of the FFU CDC (…)".

On 18 May 2011, the decisions of the Committee of Appeal dated 19 April – 5 May 2011 were notified to the parties.

By letter dated 26 May 2011, Obolon filed its Statement of Appeal against the decisions of the Committee of Appeal together with a request for a stay with the Court of Arbitration for Sport (CAS) in Lausanne, followed by an Appeal Brief dated 7 June 2011.

Even if duly invited to do so, Kryvbas filed neither any observations on the requested stay nor an Answer.

Obolon submitted the request that the dispute should be decided by a Sole Arbitrator. Kryvbas did not challenge this request, but tacitly agreed with this request.

By Order of 27 July 2011, the Deputy President of the CAS Appeals Arbitration Division dismissed Obolon's request for a stay.

On 4 August 2011, Mr Manfred Peter Nan, Attorney-at-Law in Arnhem, the Netherlands, was duly appointed as Sole Arbitrator by the Deputy President of the CAS Appeal's Arbitration Division.

On 11 August 2011, pursuant to Article R57 of the Code of Sports-related Arbitration ("the Code"), the Sole Arbitrator invited the FFU to provide the Sole Arbitrator with a copy of the complete files with regard to the appealed decisions.

On 11 August 2011, pursuant to Article R44.3 of the Code, applicable by reference of Article R57, the parties have been requested by the Sole Arbitrator, to file some legal provisions, which only Obolon did by letter dated 26 August 2011.

By letter dated 29 August 2011 the FFU provided CAS with the files in Russian and by letters dated 14 September 2011 and 31 October 2011 the FFU provided CAS with the English translation of some documents from the files.

By letter dated 27 September 2011 Obolon submitted some additional observations.

By letter dated 10 October 2011 the Sole Arbitrator informed the parties that the complete FFU file has not been translated into English whereas the Sole Arbitrator will consider only the documents from this file that have been duly translated. Therefore the Sole Arbitrator, pursuant to Article R29 of the Code, invited the parties to provide him with documents from the FFU file that has not yet been submitted together with an English translation, should they wish to rely on such a document. Furthermore the Sole Arbitrator informed the parties that Kryvbas did not submit any answer, but

that pursuant to Article R55 para. 2 and Article R57 para. 3 of the Code, the Sole Arbitrator decided to proceed with this arbitration and deliver an award.

By letter dated 17 October 2011 Obolon submitted its observations with exhibits.

By letter dated 17 October 2011 Kryvbas submitted its observations with exhibits and requested the Sole Arbitrator to "deny the complaint of the Appellant".

By letter dated 8 November 2011, Obolon filed an additional claim.

On 29 November 2011, the Sole Arbitrator issued an order dismissing Obolon's new claim.

On 9 December 2011, pursuant to Article R57 of the Code and after due consultation of both parties, the Sole Arbitrator decided that it was not necessary to hold a hearing and that he was sufficiently well informed to issue a decision on the basis of the written submissions. The Sole Arbitrator admitted Obolon's observations of 27 September and 17 October 2011 as well as Kryvbas' observations of 17 October 2011 in the CAS file together with the related exhibits in English and invited both parties to file some final observations strictly limited to some specific documents.

On 9 December 2011, the CAS Court Office issued, on behalf of the Sole Arbitrator, an Order of procedure which confirmed amongst others that CAS has jurisdiction to rule on this matter, that the applicable law would be determined in accordance with Article R58 of the Code and that no hearing would be held, the parties confirming that their right to be heard has been respected within the framework of the present procedure, accordingly confirming their satisfaction with the Sole Arbitrator drafting the award on the basis of the written submissions. Both parties signed and returned such Order of Procedure to the CAS Court Office.

By letters dated 15 December 2011 Obolon filed its final observations with new exhibits and an evidentiary request.

By letter dated 5 January 2011, the Sole Arbitrator, in application of Article R56 of the Code, accepted Obolon's observations dated 15 December 2011, but denied the acceptance of Obolon's new evidentiary request and/or new exhibits.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Article 51 of the FFU Statutes and Article R47 of the Code. Furthermore, CAS jurisdiction has not been contested by Kryvbas

which filed observations related to the merits of the case. CAS jurisdiction is furthermore confirmed by the signing of the Order of Procedure by both parties.

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

3. Pursuant to Article R57 of the Code, the Sole Arbitrator has full power to review the facts and the law. Therefore, the Sole Arbitrator has the power and the duty to examine the whole case and to decide whether the appealed decision is just and appropriate.

Admissibility of the appeal

4. The appeal was filed within the deadline provided by Article R49 of the Code, i.e. within 21 days after notification of the challenged decisions. Furthermore, it complied with all other requirements of Article R48 of the Code.

5. It follows that the appeal is admissible.

Applicable law

6. Article R58 of the Code reads 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".

7. A likewise approach can be found in Article 187 of the Swiss Private International Law Act of 1989 (PIL), which – inter alia – provides that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected".*

8. In the present matter, the parties have not agreed on the application of any particular law.

9. From Article R58 of the Code it follows that the regulations of the appropriate federation always apply. In the present case all parties are bound by the statutes and regulations of the FFU, which can thus be considered as the "applicable regulations" under R58 of the Code. As a result the Sole Arbitrator finds that the Regulations of the FFU are applicable. As the FFU is domiciled in Ukraine, the law of Ukraine is subsidiary applicable.

10. In principle FIFA rules are also applicable insofar as evoked by FFU rules. The Sole Arbitrator observes that according to Article 8 and Article 28 of the FFU Rules on the status and transfer of players, the FFU and its members are obliged to comply with FIFA statutes and regulations.

11. Obolon argues that the FIFA Regulations, especially the provisions of Articles 17, 18 and Article 1 of Annex 4 of the FIFA Regulations (with regard to contract stability), are applicable with regard to the entitlement of compensation and subsequently the calculation of the amount of compensation. Obolon does not substantiate its assumption that these provisions of the FIFA Regulations are applicable, but refers to Article 5 of the FFU Rules in which the status of the coaches in the contractual relationship with the club equates to the *"status of professional footballers (…) and the status of sport doctors and masseurs equivalent to the status of coaches"*.

12. However, the Sole Arbitrator concurs with recent decisions of CAS Panels in which is decided that the FIFA Regulations are not applicable to the merits of a contractual dispute between a coach and a football club, since Article 1 of the FIFA Regulations ("scope") provides that these regulations concern players, not coaches (or physicians), and since the provision equating players with coaches in Article 33 para. 4 of the 2001 FIFA Statutes no longer appears in the 2008 version of the FIFA Statutes (see CAS 2008/A/1464 & 1467, para. 68; CAS 2009/A/1758, para. 5.2.3 and 5.3.2).

13. As a consequence the Sole Arbitrator finds that in order to resolve this dispute, the rules and regulations of FFU shall govern primarily, whereby Ukrainian law shall apply in the event the interpretation or construction of the FFU rules and regulations is required.

14. However, the Sole Arbitrator notes that Ukrainian law is a foreign law, which content has to be evidenced. The Sole Arbitrator refers to Article 16 of Switzerland's Federal Code on Private International Law, which reads as follows:

    "IV. Establishment of foreign law

    1 The content of the applicable foreign law shall be established ex officio. The assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties.

    2 Swiss law shall apply if the content of the foreign law cannot be established".

15. On request of the Sole Arbitrator Obolon did file legal documents translated into English with regard to the applicable law on the interpretation of the contractual provisions under the FFU Regulations and Ukrainian law. Obolon submitted parts of the FFU Rules on the status and transfer of players (Articles 5,8,10,13,20,22,27,28), parts of the Ukrainian Labour Code (Articles 23,36,37,38,39), parts of the disciplinary rules of the FFU (Articles 51,52,89) and an extract on the procedure for handling labour disputes by the courts as amended by the Supreme Court of Ukraine.

16. Revising carefully these documents, the Sole Arbitrator noted that none of them contain any guideline or any article that may support or back up its interpretations as alleged by Obolon with regard to the liability of Kryvbas (as a third party) in connection with the consequences of a termination of an employment contract without just cause. Therefore, the Sole Arbitrator lacks the necessary evidence in order to rule on this case according to Ukrainian law with regard to the liability of Kryvbas (as a third party) in connection with the consequences of a termination of the contracts without just cause. In consequence, the Sole Arbitrator concurs with the

following reasoning in previous CAS cases: *"Since the current dispute requires the application of basic principles of interpretation of contracts, the Sole Arbitrator is of the opinion that appropriate applicable rules of interpretation to be implemented in this case should be the basic rules of lex sportiva, and finds furthermore that, since both the Romanian Law system and Swiss Law system are Civil Law systems and based on the presumption of equality of laws; Swiss law can be applied complementary in order to interpret the contractual clause"* (CAS 2009/A/1958). *"Due to this lack of evidence, the Sole Arbitrator is of the opinion that it is appropriate to decide the dispute according to the general rules of the Lex Sportiva and complementarily, to the rules of Swiss law (…). This approach is also conversant with Art. 16 par. 2 of the Swiss Statutes on Private International Law, which provides that Swiss law shall be applicable if the content of foreign law cannot be evidenced. Therefore, the rules and regulations RFF shall apply primarily, and the principles of Lex Sportiva and Swiss law shall apply complementarily"* (CAS 2008/A/1477 & 1567).

17. Accordingly, the Sole Arbitrator holds that the FFU rules and regulations shall apply primarily, Ukrainian law shall apply in the event the interpretation or construction of the FFU rules and regulations is required, and – if necessary - the principles of Lex Sportiva and Swiss law if relevant shall apply complementarily in conjunction with the liability of a third party in connection with the consequences of a termination without just cause.

Merits

18. The Sole Arbitrator notes that Obolon did not file a claim at CAS against the senior coach, the assistant coaches and/or the physician, but only against Kryvbas.

19. As a consequence, the Sole Arbitrator notes that the "absence" of the senior coach, the assistant coaches and the physician implies that no request can be entertained, or adjudication made, against the senior coach, the assistant coach and the physician. In other words, no adverse consequences can be drawn in this respect failing their participation in the arbitration. As a consequence the Sole Arbitrator dismisses Obolon's requests for relief regarding the arrears of salaries, if any, for lack of standing. This conclusion, however, does not imply that no request can be made against Kryvbas, which is a party to the arbitration, even though based on actions committed by "the coaching team". As a result, and for instance, a finding – if any – that the contract(s) between the senior coach, the assistant coaches and/or the physician and Obolon was/were breached by (one of) them without just cause would not lead to any sanction or other adverse consequence for the senior coach, the assistant coaches and/or the physician, but only to the evaluation of the effects on – and of a possible responsibility of – Kryvbas.

20. Therefore, the main questions to be considered by the Sole Arbitrator are the following:

    a) Is Kryvbas liable to pay compensation to Obolon, should the senior coach, the assistant coaches and/or the physician have breached their contracts with Obolon?

    b) If yes, did the senior coach, the assistant coaches and/or the physician breach their contracts with Obolon?

    c) If yes, what are the – financial – consequences?

A. Is Kryvbas liable to pay compensation to Obolon should the senior coach, the assistant coaches and/or the physician have breached their contracts with Obolon?

21. The Sole Arbitrator observes that Obolon argues that Kryvbas is obliged to pay Obolon compensation *"for the violation and the early termination by the coaching team of the employment contracts with FC Obolon and the subsequently illegal employment in FC Kryvbas"*, and refers to the FFU Rules (article 8, para-2.4- e, article 27 and article 28) in conjunction with the FIFA Regulations on the status and transfer of players (article 17 para 1, 2, 4, article 18 para 3 and article 1 para 2 of Annex 4).

22. The Sole Arbitrator recalls – as said in para 12 of this award – that the mentioned FIFA Regulations are not applicable, so that the question whether Kryvbas has to pay compensation to Obolon (should the coaches have breached their contracts) has to be determined on the basis of the applicable FFU Rules and Ukrainian Law.

23. The Sole Arbitrator acknowledges that – in general – without an agreement the entitlement to compensation cannot be assigned to a third party. The Sole Arbitrator establishes that no such agreement exists. Therefore the Sole Arbitrator pays attention to the question whether the FFU Rules or the Ukrainian Labour Code contain any provision resulting in a liability of the new club to pay compensation should a coach or a physician breach its contract with the old club.

24. On request of the Sole Arbitrator Obolon did file legal documents translated into English with regard to the applicable law on the interpretation of the contractual provisions under the FFU Regulations and Ukrainian law. Obolon submitted parts of the FFU Rules on the status and transfer of players (i.e. Articles 5, 8, 10, 13, 20, 22, 27, 28), parts of the Ukrainian Labour Code (i.e. Articles 23, 36, 37, 38, 39), parts of the disciplinary rules of the FFU (i.e. Articles 51, 52, 89) and an extract on the procedure for handling labour disputes by the courts as amended by the Supreme Court of Ukraine.

25. The Sole Arbitrator observes that Articles 20 and 22 of the FFU Rules provide for the entitlement to and calculation of training compensation between clubs. As these rules only refer to training compensation and not to compensation with regard to a breach of contract, these provisions are irrelevant (as Obolon acknowledged in its Appeal Brief).

26. Furthermore it is obvious to the Sole Arbitrator that Article 13 para 4 of the FFU Rules does not refer to liability of a new club because of a breach of contract, but obliges the new club to start talking with the former club about the training compensation within three days after signing a contract with a player who's contract has already ended.

27. Revising carefully these documents as submitted by Obolon, the Sole Arbitrator noted that none of them contain such a provision that entitles Obolon (the old club) to receive compensation payments from Kryvbas (the new club), because of alleged breaches of contract by the "coaching team".

28. As a consequence the Sole Arbitrator finds that the applicable Ukrainian rules and regulations do not constitute or create a liability of Kryvbas to pay compensation to Obolon only for the reason that Kryvbas concluded employment contracts with the coaches and the physician who allegedly breached their contracts with Obolon.

29. For the sake of completeness, the Sole Arbitrator observes that also – complementary – Swiss law does not recognize a general protection for contractual rights as such. These rights are protected only within the limits of Article 41 of the Swiss Federal Code of Obligations. This provision focuses on damages caused by conduct *contra bonos mores* and reads as follows: *"1. Whoever unlawfully causes damage to another, whether wilfully or negligently shall be liable for damages. 2. Equally liable for damage is any person who wilfully causes damage to another in violation of bonos mores"*.

30. Therefore, the Sole Arbitrator draws his attention to the question if Kryvbas could be obliged to pay compensation to Obolon because it had any involvement or inducement to the alleged breaches of contract. The Sole Arbitrator emphasizes that as a general principle of law a claim against a third party should be allowed only as an exception, only if these is unlawful or an act *contra bonos mores*. Taking advantage of a breach of contract is neither unlawful nor *contra bonos*, except in exceptional circumstances. Furthermore, with respect to inducing somebody to breach their contractual obligation, except in particular circumstances, such an act does not engage the liability of the person who induced the breach.

31. Obolon argues that *"immediately after unilateral early termination of contract on his own request, senior coach (…) went to work as coach to FC Kryvbas Kryvyi Rig (along with coaches)"*, but Obolon does not submit evidence that Kryvbas has acted in bad faith or has had any involvement or inducement to the alleged breaches of contract in such a way that it could constitute either an unlawful act or an act *contra bonos mores*.

32. Furthermore Obolon argues that it informed Kryvbas by letter dated 5 February 2010 that the senior coach was still under contract with Obolon. In this letter Obolon refers to a discussion at a meeting between Obolon and Kryvbas to arrange a settlement with regard to the amount of compensation for the termination of the contract between the senior coach and Obolon. Indeed, the *"Extract from Minutes of Meeting of the FFU Control and Disciplinary Committee, Kyiv October 28, 2010"* shows that Obolon and Kryvbas had a meeting in January 2010. The extract provides the following information: *"The General Director of FC Kryvbas Kryviy Rig Zatulko A.V. has confirmed that in January he had a meeting with Alimov O.I. on the possible transfer from FC Obolon Kyiv to FC Kryvbas Kryviy Rig of A. and D., except for this from the above it follows that FC Kryvbas Kryviy Rig having no information that Y. has no contract with FC Obolon Kyiv conducted negotiations regarding the payment of compensation for Y. but as soon as it became known, that Y. has no contract with FC Obolon Kyiv, and accordingly the club has no grounds for obtaining compensation for the transfer, FC Kryvbas Kryviy Rig has stopped the negotiations concerning the compensation payment for lack of grounds"*.

33. However, Obolon does not substantiate the discussion, nor does Obolon argue that Obolon and Kryvbas agreed upon an amount of compensation. On the contrary, the file discloses that Kryvbas did not agree and that Obolon informed the FFU by letter dated 10 February 2010

and asked for *"disqualification of Y. for the term of validity of the contract with the FC Obolon and impose disciplinary sanctions on the FC Kryvbas, Kryvyi Rig"*, which requests were denied.

34. The Sole Arbitrator notes that Obolon did not demonstrate that Kryvbas would have concluded employment contracts with the senior coach, the assistant coaches and/or the physician previous to the termination of the relationship between Obolon.

35. The Sole Arbitrator observes – on the contrary - that both the FFU Appeal Board (by decision dated 8 June 2010) and the FFU Control and Disciplinary Committee (by decision dated 28 October 2010) established that the employment contract between Kryvbas and the senior coach was concluded on 13 March 2010. Moreover, Obolon argues in its written submissions that the employment of the coaching team at Kryvbas followed the early termination of the contracts with Obolon. As a result, the Sole Arbitrator has no hesitation to believe that the employment contracts between the coaching team and Kryvbas are concluded after Mr. O.I. Alimov – Vice-president of Obolon – discharged the assistant coaches and the physician *"from the office (…) since December 31, 2009"* at their own request ("article 38 of the Labour Code of Ukraine") by Order no. 44-k dated 30 December 2009 and after discharging the senior coach by Order no. 20/-k dated 10 March 2010 *"since January 08, 2010 (…) from the position of a senior coach of his own volition (art. 38 of Code of Laws on Labour of Ukraine). Grounds – letter of resignation of Y., Decision of the DC of the UPFCU "Premier League" dated March 10, 2010 (P.P. 1.3.-1.4.)"*.

36. Therefore the Sole Arbitrator is of the opinion that Kryvbas was in any event justified in believing that the coaches and the physician were not bound by a contract with Obolon anymore at the time Kryvbas entered into contracts with them. Furthermore, there is no proof Kryvbas has acted in bad faith or has had any involvement or inducement to the alleged breaches of contract that could constitute an act *contra bonos mores*.

37. Finally, the Sole Arbitrator underlines that none of the cases mentioned by Obolon in support of its claim address a situation similar to the present case.

38. As a result the Sole Arbitrator comes to the conclusion that Kryvbas is in any event not liable to pay compensation to Obolon, should the senior coach, the assistant coaches and/or the physician have breached their contracts with Obolon.

39. As a consequence, the Sole Arbitrator does not need to assess whether the senior coach, the assistant coaches and/or the physician breached their contracts.

Conclusion

40. Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Sole Arbitrator finds that Kryvbas is not obliged to pay compensation to Obolon.

41. The Appeal is therefore dismissed.

The Court of Arbitration for Sport rules:

1. The Appeal filed on 7 June 2011 by FC Obolon Kyiv, against the decisions of the Committee of Appeal of the Ukrainian Football Federation dated 19 April – 5 May 2011 is dismissed.

(…)

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