Arbitration CAS 2016/A/4731 Marko Livaja v. FC Rubin Kazan, award of 26 June 2017

Panel: Mr Michael Gerlinger (Germany), Sole Arbitrator

Football
Compensation during an agreement to suspend an employment contract while on loan
Interpretation of a contractual provision according to Russian law

If legal texts – such as laws and contracts – are unclear or ambiguous, the need to interpretation arises. Interpretation describes the process of determining a provision's objective sense and meaning. The interpretation of a contract is a hermeneutic process in which the true meaning of the text is to be assessed. The starting point of any interpretation of a provision, naturally, is its wording. For this, the wording both forms the object as well as the instrument of legal interpretation. Thus, the approach of literal interpretation of a provision, in principle, has primacy over other methods of interpretation. If the parties' true and mutually agreed intention cannot be identified by a literal interpretation, *e.g.* if the wording proves to be unclear or ambiguous, one should seek an objective interpretation. For doing so, the parties' declarations and actions shall be understood in the way the other party could and in good faith should have understood them. These principles can be derived from Russian civil law as well.

I. PARTIES

1. Mr Marko Livaja ("the Appellant" or "the Player") is a professional football player of Croatian nationality. He currently plays for the Spanish club UD Las Palmas.

2. FC Rubin Kazan ("the Respondent" or "the Club") is a Russian football club currently participating in the Russian Football Premier League. The Respondent is affiliated with the Football Union of Russia ("FUR") which, in turn, is a member of the Fédération Internationale de Football Association ("FIFA").

II. FACTUAL BACKGROUND

3. The background facts stated herein are a summary of the main relevant facts, as established on the basis of the Parties' written submissions and of the evidence examined in the course of the proceedings. Additional facts will be set out, where material, in connection with the discussion of the Parties' factual and legal submissions. This background is set out for the sole purpose of providing a synopsis of the matter in dispute.

4. On 19 May 2014, the Parties concluded an employment contract ("the Contract"), valid from 1 July 2014 until 31 May 2019. Annex 1 to the Contract regulated the remuneration of the Player ("the Annex"). Both the Contract and the Annex established the legal framework under which the Player provided his services as a professional football player to the Club.

5. Following negotiations between the Parties and the Italian football club FC Empoli ("Empoli") in August 2015, the Player was transferred on loan from the Club to Empoli with effect from 28 August 2015. Furthermore, the Parties signed a suspension agreement for the duration of the loan from 28 August 2015 until 30 June 2016 ("the Suspension Agreement"). The Suspension Agreement stated, *inter alia,* as follows:

> *"4. During the loan period in FC Empoli, namely from 28 August 2015 till 30 June 2016, the Club pays the Player an unconditional compensation in the amount of 500 000 (Five hundred thousand) Euro and a conditional compensation in the amount of 300 000 (Three hundred thousand) Euro on the following conditions:*
>
> - *The unconditional compensation in the amount of 500 000 (Five hundred thousand) Euro is paid to the Player in four instalments: 150 000 (One hundred fifty thousand) Euro until 15 October 2015; 150 000 (One hundred fifty thousand) Euro until 15 November 2015; 100 000 (One hundred thousand) Euro until 15 December 2015 and 100 000 (One hundred thousand) Euro until 31 July 2016.*
>
> - *The payment of the conditional compensation is caused by the fact that FC Empoli intends to partially compensate FC Rubin expenses on Player's allowance during the loan period, in other words, the conditional compensation to the Player directly depends on receiving by FC Rubin of the payment from FC Empoli for Player's loan;*
>
> - *The conditional compensation is paid in the following way: 100 000 (One hundred thousand) Euro not earlier than 15 October 2015 in case the first instalment is received from FC Empoli in accordance with clause 4.1 of the transfer (on loan) agreement between the Club, the Player and FC Empoli from 28 August 2015; 100 000 (One hundred thousand) Euro not earlier than 15 November 2015 in case the second instalment is received from FC Empoli in accordance with the abovementioned contract; 100 000 (One hundred thousand) Euro not earlier than 15 December 2015 in case the third instalment is received from FC Empoli in accordance with the abovementioned contract*
>
> *(…)*
>
> *The abovementioned amounts of conditional compensation payments towards the Player are net and, providing that abovementioned conditions are fulfilled, have to be paid to the Player by the Club in full after the Club deducts all tax and fiscal payments in accordance with the law of Russian Federation, in rubles at the currency rate of the Central bank of Russian Federation on the date of the actual payment".*

6. By letter to the General Director of the Club, Mr Ilgis Fakhriev, dated 2 February 2016, the Player put the Club in default, stating as follows:

"In accordance with my valid and binding employment contract signed between me and FC Rubin Kazan on 19 May 2014, the club undertook an obligation to pay me monthly salary, compensations of flights and apartment rent in the amounts established by the employment contract and annex 1 to it. Also during the loan period to FC Empoli in accordance with my agreement on employment contract suspension dated 28 August 2015 FC Rubin is obliged to pay me unconditional and conditional compensations.

Breaching the undertaken obligations, the club did not provide me payments since September 2015, meaning that the delay of payment is more than two months. This puts me in a difficult financial situation.

I am kindly asking you to take care of the overdue amounts due to me by the club as soon as possible and pay me in full all due amounts in accordance with the employment contract and annex 1 to it and also with the agreement on employment contract suspension as well as interest for overdue payment at the rate of 1/300 of the refinancing rate of the Central Bank of Russia per each day of delay.

In case FC Rubin Kazan continues to breach my employment contract and annex 1 to it as well as the agreement on employment contract suspension, I will be forced to claim the Dispute Resolution Chamber of RFU".

7. On 5 February 2016, the Club performed a payment to the Player's bank account in Roubles equivalent to EUR 152,381.99 as part of the conditional compensation.

8. Without having received the rest of outstanding payments from the Club, the Player lodged a claim against the Club with the FUR Dispute Resolution Chamber ("FUR DRC") on 19 February 2016.

9. On 29 February 2016 and 23 March 2016, the Club performed further partial payments to the Player's bank account in Roubles which where equivalent to EUR 285,715.29 (gross) and EUR 106,597.87 (gross). These payments equalled EUR 200,000 (net) and EUR 74,618.27 (net), respectively.

10. In support of his claim before the FUR DRC the Player, *inter alia,* stated that the Club did not make full payment of the unconditional and conditional compensations pursuant to the Suspension Agreement. He held that both the unconditional and conditional compensations are "net" and therefore have to be paid to the Player after the Club deducts all tax and fiscal payments in accordance with the law of the Russian Federation. With its payments in Roubles equivalent to EUR 200,000 and EUR 74,618.27 on 29 February 2016 and on 23 March 2016, the Club has started to perform its obligations in respect of a "net" remuneration, thus recognising its responsibility to pay the amount "net".

11. In the Player's opinion, the Parties agreed that all amounts are to be paid "net", making up a total sum of EUR 800,000 in net payments. The Player supposed that the provisions in clause 4 of the Suspension Agreement, which establish the order of payment of the EUR 300,000 conditional compensation as "net", also refer to the EUR 500,000 in unconditional compensation. Furthermore, the Player claimed that in 2015 he was a tax resident of the

Russian federation and, as such, the taxation on his personal income must have been 13%. As the Club violated the deadlines for payment, the income taxation increased from 13% to 30% which must be borne by the Club as it would be in breach of its obligations.

12. Thus, the Player asked the FUR DRC:

> *"1. To oblige the Club to pay the Player the debt in the amount of 125 000 Euro "net";*
>
> *2. To oblige the Club to pay the Player the remaining part of the unconditional compensation in the amount of 100 000 Euro;*
>
> *3. To oblige the Club to pay the Player the remaining part of the conditional compensation in the amount of 150 000 Euro;*
>
> *4. To oblige the Club to pay the Player the interest for the delay of payments in accordance with article 236 Labor Code of Russia for the period from 15 October 2015 until the date of effective payment;*
>
> *5. To consider the violations by the Club of the conditions of the Contract, Annex 1 and the Agreement serious;*
>
> *6. Due to the serious breach by the Club of the conditions of the Contract and the absence of any guilty actions from the Player's side, to terminate the Contract and to oblige the Club to pay the Player compensation;*
>
> *7. To apply to the Club a ban for the registration of the new players as a provisional measure until the debt to the Player is paid".*

13. In its reply, the Club acknowledged the Player's claim for payment in the amount of EUR 5,306.36. The Club did not agree with the Player's position that all mentioned amounts in the Suspension Agreement are considered "net". Rather, only the amounts of conditional compensation were specifically stated as "net". Other amounts by default include tax on personal income. The club incurred that it made payments of unconditional compensation in the total amount of EUR 392,312 on 29 February 2016 and 23 March 2016 and of conditional compensation of EUR 152,381, hence, there was a due amount of 7,687.84 (regarding unconditional compensation) and an overpayment of 2,831.48 (regarding conditional compensation). The Club notes that, in 2015, the Player was not a tax resident of the Russian federation as he was less than 183 calendar days on the territory of the Russian federation. Thus, an income Tax of 30 % must have been applied to the amounts of unconditional payment.

14. The FUR DRC considered, after having affirmed its competence, that the Parties have suspended the Contract, including its Annex, by concluding the Suspension Agreement for the duration of the loan of the Player to Empoli. Thus, the FUR DRC did not accept the argument of the player, that the unconditional compensation should also be paid "net" pursuant to the rules set out in the Annex.

15. Furthermore, the FUR DRC analysed the Suspension Agreement and noted that the Parties had agreed that the Player was to receive payments of unconditional compensation equivalent to EUR 500,000 and of conditional compensation equivalent to EUR 300,000 subject to Empoli paying the Club the agreed transfer amount for the loan of the Player. Furthermore, it is stated explicitly in the Suspension Agreement that the payment of the conditional compensation is "net", but this is not stated explicitly in the same agreement regarding the unconditional compensation.

16. The FUR DRC decided that it follows from the documentation produced that the Club paid unconditional compensation to the Player on 29 February 2016 in the amount of 23,707,086 Roubles (including tax on personal income) and on 23 March 2016 in the amount of 8,116,361 Roubles, 80 Kopek (including tax on personal income), which was equal to EUR 285,715.29 and EUR 106,597.87 respectively. Therefore, the Club made two payments of unconditional compensation in the amount of EUR 392,312.16 (including tax on personal income) which leads to a due amount of unconditional compensation of EUR 7,687.84. This is because at the time of the FUR DRC decision the deadline of EUR 400,000 out of the EUR 500,000 in total unconditional compensation was met.

17. Besides, the FUR DRC ruled on the basis of the produced documents, that the Club made payment of conditional compensation in the amount of 12 923 535 Roubles which equals EUR 152,381.48. Thus, the overpaid amount of conditional payment was EUR 2.381,48.

18. In view of this, the FUR DRC came to the conclusion that the debt of the Club to the Player in regard to unconditional compensation equals EUR 5,306.36 (EUR 7,687.84 due minus EUR 2,381.48 overpaid).

19. As the Player's Contract with the Club was suspended for his time with Empoli, the FUR DRC did not find grounds for establishing just cause for the termination of the Contract by the Player. Furthermore, the Player did not provide proof that he had given the Club sufficient notice to terminate the Contract in accordance with the regulations of the FUR.

20. On 5 April 2016, the FUR DRC rendered its Decision as follows:

> *"1. To partially uphold the claim of the professional football player Livaja M. against MAI "FC Rubin" Kazan.*
>
> *2. To oblige MAI "FC Rubin" Kazan to pay to the professional football player Livaja M. a debt in the part of the unconditional compensation established by the suspension agreement, in the amount of 5 306,36 (Five thousand three hundred six) Euro 36 eurocents within 14 (fourteen) working days after the decision comes into force.*
>
> *3. To oblige MAI "FC Rubin" Kazan to pay to the professional football player Livaja M. the interest for the delay of compensation payments, calculated as 1/300 of the refinancing rate of the Central bank of Russia (until 31 December 2015 inclusive) and in the amount of key interest rate of the Central bank of Russia (as of 01 January 2016) for each day of the delay, starting from the day when the relevant payments must have been made and until the day of actual payment, inclusive.*

4. To dismiss without hearing on merits the claim of the football player Livaja M. in the part with the request to consider the serious breach of contract committed by MAI "FC Rubin" Kazan.

5. To dismiss the claim of the professional football player Livaja M. in other parts.

6. To oblige MAI "FC Rubin" Kazan to pay to the FUR a fee for hearing the case by the Chamber in the amount of 50 000 (Fifty thousand) rubles within 30 (thirty) days from the decision coming into force in accordance with article 31 of FUR Regulations on dispute resolution.

7. The present decision comes into force as provided by article 50 of FUR Regulations on dispute resolution. The present decision can be appealed in accordance with FUR Regulations on dispute resolution".

21. On 19 May 2016, the Club performed a further payment to the Player equivalent to EUR 152,999.70 as conditional compensation under the Suspension Agreement.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. The following paragraphs are set out for the sole purpose of providing a summary of the main procedural steps before the Court of Arbitration for Sport ("CAS"). This outline does not purport to present all procedural steps that occurred during the given proceedings.

23. On 27 July 2016, the Appellant filed a Statement of Appeal with the CAS in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration ("the CAS Code") against the Decision rendered by the FUR DRC on 5 April 2016.

24. In accordance with Article R51 of the CAS Code, the Appellant filed his Appeal brief on 25 August 2016.

25. By letter dated 13 September 2016 the CAS Court Office informed the Parties that Dr Michael Gerlinger had been appointed as Sole Arbitrator by the Division President in accordance with Article R54 of the CAS-Code. The Parties did not raise any objections as to the appointment of the Sole Arbitrator.

26. On 26 September 2016, the Parties were informed that the Respondent did not meet the 20-day deadline to file its Answer to the Appeal brief.

27. On 3 October 2016, the Appellant confirmed his request, as already noted in his Appeal brief, to issue an award based solely on the written submissions.

28. On 11 October 2016, the CAS Court Office informed the Parties of receipt of the Appellant's payment of his share of the advance of costs for the procedure.

29. On 28 October 2016, the CAS Court Office provided the Parties with the Order of Procedure, according to which the Sole Arbitrator considered himself sufficiently well informed to decide

the case at hand without the need to hold a hearing. Thus, the Sole Arbitrator may decide this matter based on the Parties' written submissions.

30. With letter dated 15 November 2016, the Respondent provided the CAS Court Office with an amended Order of Procedure. The Respondent requested to be granted a new deadline to file its Answer, since it failed to comply with the first deadline due to a change of legal counsel. Furthermore, the Respondent disagreed with the decision to decide the matter based on the Parties written submissions. In case CAS would not grant the right to file written submissions, the Respondent requested an oral hearing.

31. On 1 December 2016, the Appellant objected the Respondent's request to be granted a new deadline to file its Answer.

32. On 7 December 2016, the CAS Court Office informed the Parties that the Sole Arbitrator, in the view of the Appellant's objections, had decided to deny the Respondent's request to file a written Answer. However, in accordance with Article R57 para. 2 of the CAS Code, the Sole Arbitrator had decided to allow the Respondent to defend its case during an oral hearing on 17 January 2017. During such hearing, the Respondent may contest the Appellant's factual allegations and raise legal arguments to defend its case, but not to call witnesses or experts, neither to adduce any further evidence.

33. On 11 December 2016, the Appellant expressed his preference for granting the Respondent the right to file a written Answer instead of conducting a hearing.

34. On 15 December 2016, the CAS Court Office informed the Parties that the Sole Arbitrator, in view of the exchanged positions, suggests to proceed with (i) either the Respondent being allowed to file a written Answer, however without producing any evidence (including witnesses/experts) or (ii), in order to save costs, to hold an oral hearing by teleconference.

35. On 21 December 2016, in the light of the positions and preferences submitted by the Parties, the Sole Arbitrator decided as follows: the Respondent is granted a time limit until 31 January 2017 to file its Answer; upon receipt of the Answer, the Appellant will be granted a 14-day time limit to file his reply; upon receipt of the reply, the Respondent will be given a 14-day time limit to file its rejoinder.

36. On 31 January 2017, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

37. On 26 February 2017, the Appellant filed his reply in accordance with Article R57 of the CAS Code.

38. On 22 March 2017, the Respondent filed its rejoinder in accordance with Article R57 of the CAS Code.

39. On 12 April 2017, the Parties duly signed and returned the Order of Procedure, thus conforming, *inter alia,* their agreement that the case should be decided on the basis of the written submissions and that their right to be hear had been duly respected.

IV. THE PARTIES' SUBMISSIONS

40. The following summaries of the Parties' positions are only roughly illustrative and do not purport to include every contention put forward by the Parties. However, the Sole Arbitrator has carefully considered and taken into account all of the submissions and evidence filed by the Parties, even if there is no specific reference to such submissions or evidence in the following outline.

41. In his Appeal brief of 27 July 2016, the Appellant requested the following reliefs from the CAS:

> *"1. To fully accept the present Appeal.*
>
> *2. To partially set aside the decision passed by the Dispute Resolution Chamber of the Football Union of Russia 030-16 on 5 April 2016;*
>
> *3. As consequence, to condemn Municipal Autonomous Institution Football Club "Rubin" to pay in favour of Mr. Marko Livaja, in addition to the amount of EUR 5 306,36/- as decided by the aforesaid appealed Decision, the further amount of EUR 120 000.00/- (One hundred twenty thousand Euros only), plus the relevant interests to be calculated pursuant to Article 236 of the Labor Code of Russia starting from the date when the relevant payment should have been made until the date of effective payment;*
>
> *4. For the effect of the above, to state that the Respondent shall be condemned to pay any and all costs of the present arbitrational proceedings, including, without limitation, attorney`s fee as well as any eventual further costs and expenses for witnesses and experts. In this respect, the Appellant reserves the right to provide the Panel with all the relevant documentation and/or invoices attesting the incurred amounts.*
>
> *Alternatively*
>
> *5. Only if request in par. 3 is rejected, to condemn Municipal Autonomous Institution Football Club "Rubin" to pay in favour of Mr. Marko Livaja the difference between 13% and 30% tax on personal income, e.g. EUR 68,000.00/- (Sixty eight thousand Euros only), plus the relevant interests to be calculated pursuant to article 236 of the Labor Code of Russia starting from the date when the relevant payment should have been made until the date of effective payment;*
>
> *6. For the effect of the above, to state that the Respondent shall be condemned to pay any and all costs of the present arbitrational proceedings, including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts. In this respect, the Appellant reserves the right to provide the Panel with all relevant documentation and/or invoices attesting the incurred amounts".*

42. In support of this requests for relief, the Appellant essentially submitted as follows:

- Both the unconditional and conditional compensations set in the Suspension Agreement are "net" and therefore have to be paid to the Player by the Club after the Club deducts

all tax and fiscal payments in accordance with the law of the Russian Federation. Therefore, the amounts of unconditional and conditional compensations set in the Suspension Agreement are exactly equal to EUR 800,000 "net" in total.

- The Parties did not intend to divert from their practice, according to which the Player received payments as "net" amounts, *e.g.* salary payments of EUR 100,000 net per month. The Player did agree to a EUR 800,000 salary by the Club for 10 months, and thus to a decrease in salary of EUR 200,000, since for the time he was loaned to Empoli he was not part of the Club's main team and the loan to Empoli was a good possibility to get practice in the Italian Serie A.

- It follows from the meaning of the Suspension Agreement that the Parties only intended to switch the contractual basis of the net payments from the Contract and its Annex, which were suspended for the time of the loan, to the Suspension Agreement. However, the parties did not mean to change the modalities of payment from net to gross. The Club was fully aware of this fact.

- There was no special reference to the unconditional compensation set in the Suspension Agreement due to its direct connection with the "net" remuneration of the Contract and Annex 1. Perhaps a missing reference to net payments was due to a technical error.

- The uncertainty in compensation clauses of the Suspension Agreement should the interpreted in the Player's favor in accordance with the principle *in dubio contra stipulatorem*. According to CAS jurisprudence, an ambiguous term of contract shall be interpreted against the party which has included the clause or which prepared the contract.

- By making payments in Rubles at the exchange rate of the central bank of Russia on 29 February 2016 and 23 March 2016 which equaled to EUR 200,000 and EUR 74,618.27, the Club recognized that all amounts were meant to be net. The fact that the payments were considered net is confirmed by the Club's statement in the FUR DRC proceedings according to which *"FC Rubin has partially paid the debt in the amount of 200 000 (two hundred thousand) Euro"*.

- Furthermore, if the unconditional payments should have been taxed at all, it should have been taxed at 13% only and not at 30%. This follows from the Player being a tax resident of the Russian Federation. During 2015, the year of agreed payments, he spent 214 days on Russian territory, thus exceeding the 183 days necessary to be considered a tax resident after Article 224 of the Tax Code of Russia.

- By making payments in 2016 instead of 2015, the Club violated the Suspension Agreement which lead to a higher taxation at 30%. A change in taxation contradicts the agreement of the Parties and their on-going practice of monetary relations.

- Besides, the Club already acted as a Respondent in CAS 2016/A/4699, in proceedings which are exactly the same as the present ones. In the quoted case, the Sole Arbitrator upheld the appeal by another professional football player against a FUR DRC decision

and condemned the Club to net payments. Further, the Club had to pay interest in accordance with Article 236 Labor Code of Russia due to the delay of payments which was also decided by Sole Arbitrator in the quoted case.

43. In its Answer of 31 January 2017, the Respondent filed the following requests for relief:

> *"I. The appeal filed by Marco Livaja is dismissed;*
>
> *II. The decision n. 030/16 issued by the FUR DRC on 5 April 2016 is confirmed;*
>
> *III. Marco Livaja shall bear all the costs of this arbitration procedure;*
>
> *IV. Marco Livaja shall compensate Municipal Autonomous Institution Football Club "Rubin" for the legal and other costs incurred in connection with this arbitration procedure in an amount to be determined at the discretion of the Panel".*

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

- The challenged decision by the FUR DRC is correct, grounded and consistent with the factual circumstances of the case and true will of the Parties. Pursuant to clause 4 of the Suspension Agreement the deadline expired for the payment of the unconditional compensation in the amount of EUR 400,000 and for the conditional compensation in the amount of EUR 150,000. As specified in the Suspension Agreement only the amounts of conditional compensation were stated as "net". Other amounts, such as the unconditional compensation, include tax on personal income and must be considered as "gross".

- In this regard, the wording of the Suspension Agreement is clear. Thus, it is the Player's burden of proof to demonstrate that the Parties actually agreed to anything else than the agreement in written form.

- The Parties were perfectly aware that the terms of payments foreseen in the Suspension Agreement would overcome those provided in the Contract. As the Contract was suspended, the Parties were aware that they needed to specify new payment terms. They did so in Clause 4 of the Suspension Agreement, which specified that only conditional compensation would be paid net while unconditional compensation would be paid gross.

- In this regard, the Club made net payment of conditional compensation of EUR 152,381 on 5 February 2016, which resulted in an overpayment of EUR 2,381.00. However, unconditional payments were made gross and the Club withheld 30% income taxes for the Russian revenue agency. This applies for the payments on 29 February 2016 (EUR 285,714.29 gross, withholding EUR 85,714.29 taxes, resulting in EUR 200,000 net) and on 23 March 2016 (EUR 106,597.87 gross, withholding EUR 31,979.36 taxes, resulting in EUR 74,618.27 net).

- There is no uncertainty in the payment clauses of the Suspension Agreement, Thus, the Appellant's argument as to the principle *in dubio contra stipulatorem* is groundless. Rather, it

speaks for itself that the clause only referred to the conditional compensation being net, but not the other parts of compensation. This does not result in a contractual loophole or the need for interpretation under Russian law, since the Suspension Agreements wording is sufficient in itself and provides enough clarity.

- When paying the Player in Rubles, the Club solely complied with Russian Labour Law. This is not an indication of the Club implicitly recognizing that the unconditional compensation would be net. Rather, the Club performed payments according to the exchange rate of the central bank of Russia to make sure that the Player would receive an amount corresponding to EUR 400,000 gross.

- Further, there was no incorrect taxation as to personal income of the Player. The Club correctly applied a tax rate of 30% to the Player's personal income, as he spent less than 183 days on the territory of the Russian federation in 2015, which is the relevant taxation period. The player at most spent 132 days in Russia during the months of March, April, May, July and August 2015 before he was loaned to Empoli.

V. JURISDICTION OF THE CAS

45. Article R47 of the CAS Code states as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if 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".*

46. Furthermore, the Appellant submits that jurisdiction of the CAS derives from Article 47 of the FUR Statutes, which provides:

> *"In accordance with the relevant provisions of the FIFA, UEFA and FUR Statutes any appeal against final and legally binding decisions of the FIFA, UEFA and FUR can be lodged to CAS. The present Court of Arbitration for Sport however does not accept appeals for the categories of cases established by FIFA, UEFA and FUR or for the decisions taken by the independent and accordingly established Russian arbitral court as set in Article 45 of the present Statute".*

47. The Sole Arbitrator notes that the jurisdiction of the CAS follows from the cited provisions of both the CAS Code and the FUR Statutes. Article 47 of the FUR Statutes provides an explicit reference regarding a direct appeal against final FUR DRC decisions to CAS, as in the case at hand. Additionally, jurisdiction of the CAS is not contested by the Parties. It is furthermore confirmed by the Parties' signatures in the Order of Procedure.

VI. ADMISSIBILITY OF THE APPEAL

48. Article 53 par. 2 of the FUR Regulations on Dispute Resolution provides:

> *"The decisions of the PSC, or the decision of the DRC which was issued on the matters set in subpar. B, c, d, f, h of par. 1 of Article 13 of the Regulations can only be appealed to the Court of Arbitration for Sport (Tribunal Arbitral du Sport) in Lausanne, Switzerland within 21 (twenty-one) calendar days from the moment the parties have received the grounds of the decision of PSC or DRC".*

49. Article R49 of the CAS Code provides:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against (…)".*

50. The FUR DRC decision of 5 April 2016 was duly notified to the Appellant with grounds on 7 July 2016. The Appellant filed his Statement of Appeal on 27 July 2016, *i.e.* within the statutory time limit set forth in Article 53 of the FUR Regulations on Dispute Resolution and with CAS as the competent appeals body. Furthermore, the Statement of Appeal and the Appeal brief complied with all requirements set forth by Articles R48 and R51 of the CAS Code, which is not disputed. It follows that the Appeal is admissible.

51. Thus, under Art. R57 of the Code, the Sole Arbitrator has full power to review the facts and the law and may issue a *de novo* decision superseding, partially or entirely, the appealed decision by the FUR DRC.

VII. APPLICABLE LAW

52. Article R58 of the CAS Code provides 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".*

53. In his Appeal brief, the Appellant maintained that the present dispute should be *"decided in accordance with the relevant and applicable football regulations, if any, and, in addition, by Russian law".* This contention was not disputed by the Respondent. In their submissions, both Parties relied on FUR Regulations as well as principles of contractual interpretation pursuant to Russian labor law and Russian tax law.

54. According to the preamble to the Suspension Agreement, the Parties agreed that *"their rights and obligations are governed by the valid until 31 May 2019 employment contract from 19 May 2014 (…) the labor legislation of Russian Federation and other laws and regulations of Russian Federation, organizational and other documents and regulations of the Club, relevant regulations of RFU, FIFA, UEFA and RPFL".*

55. Although it is ambiguous in its wording, such a provision is to be qualified as an autonomous choice of law by the Parties under Article R58 of the CAS Code. Besides, the Parties

themselves referred to principles of Russian law in order to interpret the Suspension Agreement's payment clauses, which form the essential matter in dispute. Given both the contractual provision as to the applicable law in the Suspension Agreement as well as the Parties' submissions, the Sole Arbitrator notes that the Parties seem to have agreed on the application of Russian law should the need arise.

56. This application is in accordance with Article R58 of the CAS Code, since the Parties, both being subject to FUR Regulations, are in dispute about contractual provisions and payments. The subsidiary application of Russian law follows from the need to interpret these contractual provisions. Questions of interpretation methods are not governed by football regulations, but rather the applicable national law, *i.e.* Russian law. The application of Russian law additionally follows from the need to decide on questions of tax law, which, as such, are also not addressed by federation statutes.

VIII. MERITS OF THE APPEAL

57. Given the undisputed facts of the dispute, which were outlined supra II., the Sole Arbitrator identifies the main issues to be resolved as:

1. Was the unconditional compensation under the Suspension Agreement to be paid net to the Player (infra par. 58 et seq.)?

2. And, secondly, which taxation rate was to be applied to the payments under the Suspension Agreement (infra par. 81 et seq.)?

1. The payment regime regarding the unconditional compensation

58. In order to answer the question whether the Parties indeed concluded an agreement according to which both the conditional *and* the unconditional compensation are to be paid net, the Sole Arbitrator wishes to recall basic principles of legal interpretation.

59. If legal texts – such as laws and contracts – are unclear or ambiguous, the need to interpretation arises. Interpretation describes the process of determining a provision's objective sense and meaning. The interpretation of a contract is a hermeneutic process in which the true meaning of the text is to be assessed.

60. The starting point of any interpretation of a provision, naturally, is its wording. For this, the wording both forms the object as well as the instrument of legal interpretation. Thus, the approach of literal interpretation of a provision, in principle, has primacy over other methods of interpretation.

61. If the Parties' true and mutually agreed intention cannot be identified by a literal interpretation, *e.g.* if the wording proves to be unclear or ambiguous, one should seek an objective interpretation. For doing so, the Parties' declarations and actions shall be understood in the way the other Party could and in good faith should have understood them.

62. Concurringly, these principles can be derived from Russian civil law as well. According to Article 431 of the Civil Code of Russia, the court takes into account the literal meaning of the words and expressions contained in the contract. The literal meaning of any provision of the contract in the event of uncertainty is defined by comparison with the other terms and meaning of the whole contract. Only if the literal approach does not allow to determine the content of the contract the real common will of the Parties must be clarified by taking into account the purpose of the contract.

63. Initially, the Sole Arbitrator recalls that according to the Suspension Agreement *"the abovementioned amounts of conditional compensation payments towards the Player are net and, providing that abovementioned conditions are fulfilled, have to be paid to the Player by the Club in full after the Club deducts all tax and fiscal payments in accordance with the law of Russian Federation, in rubles at the currency rate of the Central bank of Russian Federation on the date of the actual payment"*.

64. While it is explicitly stated in the Suspension Agreement that the conditional compensation in the total amount of EUR 300,000 is to be paid net, a corresponding wording is not inserted with regard to unconditional payments. This clause in Section 4 para. 3 of the Suspension Agreement, referring solely to the payment plan for conditional payments, only states conditional payments to be net and after the Club deducts all tax and fiscal payments.

65. The Sole Arbitrator further notes, that according to Section 4 para. 1 of the Suspension Agreement *"The Parties agreed that during the loan period in FC Empoli the Club does not pay the Player any salary, remuneration, compensations, bonuses or any other payments in accordance with the Contract and Annex 1 to it"*. It follows from the unambiguous wording of this clause that the Contract and its Annex were to be suspended which also included a suspension of payments and the modalities of payments.

66. Hence, the Appellant's reference to the Contract and its Annex with which the Appellant seeks to argue for net payments being also due under the Suspension Agreement, must be rejected.

67. As they were suspended, both the Contract and its Annex cannot constitute any payment regime or give indication of a payment regime for the payments – or taxation of payments – owed during the loan period. Rather, the focus has to be laid on the wording of Section 4 of the Suspension Agreement itself in order to derive the Parties' true and mutually agreed intention.

68. The Sole Arbitrator emphasizes the clear drafting of the payments clause which separates the payments to be either conditional or unconditional. It appears, that the separation between these two types of compensations occurred willful. This is because the conditional payments clause refers to the condition of the Club actually receiving loan payments from Empoli to trigger the Club's obligation, *i.e.* it refers to circumstances which are situated outside of the contractual relationship between the Club and the Player. This is not the case for unconditional compensation. The latter was due to the Player disregarding the fact of actual loan payments from Empoli to the Club.

69. It follows from the willful separation between conditional compensation on the one hand, which shall be net, and unconditional compensation on the other hand, for which no taxation issues were addressed, that one cannot draw the conclusion that the Parties intended to agree on net payments for *each* type of compensation.

70. Rather, the Parties' intention to isolate the types of compensations from each other suggests that different types of compensations underlie different types of taxation, *i.e.* net payments for conditional compensation and gross payments for unconditional compensation. This also follows *a contrario* from the fact that a specific regulation agreed upon by the Parties – *i.e.* the fact of net payments – would be meaningless, if the same regulation was desired for the unregulated type of compensation as well. If this would have been the intention, the Parties would have specifically included – *quod non* – the unconditional compensation as well.

71. In this regard, the Appellant's argument that all payments were meant to be net and the witness statements presented in support of this argument, have to be rejected. It would have been the Player's burden of proof to demonstrate that the Parties actually agreed to anything else than the agreement in written form.

72. Firstly, it cannot be concluded from the statement of Mr. Makhmutov, a former finance director with the Club, that each payment with regard to the Player was to be net and was discussed as such during the negotiations that lead to the Suspension Agreement.

73. Mr. Makhmutov's statement solely gave an overall reference to the payment methods in favor of foreign players. The payment methods which where common for undetermined foreign players, however, do not necessarily apply to the Appellant as well.

74. Further, the statement by Mrs. Elizarova solely confirmed the part she took in the negotiations for the loan of the Player to Empoli and the fact that net payments were discussed during these negotiations. However, it does not necessarily follow from the generic discussion of net payments, that the Parties actually agreed on net payments for each of the compensations due to the Player *in casu*.

75. Additionally, the Sole Arbitrator finds there is no reason to apply, as the Appellant alleges, the principle of *in dubio contra stipulatorem*. According to this principle, uncertainties and ambiguous wording within a contract shall be interpreted against the party who drafted such contract.

76. As pointed out before, the wording of the clause is clear with regard to net payments being solely applied to conditional compensation. In contrast, the lack of such a provision regarding the unconditional payments speaks for itself. As there is no uncertainty in the wording, one cannot assume a contractual loophole which would bring up a possible need to interpretation under the principle of in *dubio contra stipulatorem*.

77. For the same reason, the Appellant's reference to CAS jurisprudence according to which ambiguous terms of contract shall be interpreted against the party which has included the clause, must be rejected. This jurisprudence, which, in principle, deserves approval, is only applicable in cases where contracts actually contain ambiguous terms. As pointed out, the clear

separation between the types of compensations and their respective taxation does not produce such ambiguous terms. Since it becomes clear from a grammatical and literal interpretation of the Suspension Agreement that solely conditional compensation would be net, there is no further need for any logic or *contra stipulatorem* interpretation to the contrary.

78. Furthermore, the Appellant's reference to CAS jurisprudence in the case CAS 2016/A/4699, with which the Appellant seeks to establish *res judicata* for the present proceedings, cannot be upheld. Contrary to the Appellant's arguments, the outcome of the cited case cannot be transferred to the present proceedings *mutatis mutandis*.

79. For once, the Sole Arbitrator in CAS 2016/A/4699 was provided with additional proof such as an e-mail by the Club, in which the Club implicitly recognized net payments, and the Player's remuneration paid by the loaning club (*id.* this was the Spanish club FC Las Palmas). Similar pieces of evidence, which could give the Sole Arbitrator sufficient reason to assume that the Parties' true intention was to deviate from the written payment clauses, were not produced in the given proceedings.

80. Thus, the Club's gross payments on 29 February 2016 (EUR 285,714.29 gross, withholding EUR 85,714.29 taxes, resulting in EUR 200,000 net) and on 23 March 2016 (EUR 106,597.87 gross, withholding EUR 31,979.36 taxes, resulting in EUR 74,618.27 net) were, in principle, in accordance with the Suspension Agreements payments clause for unconditional compensation, leading to an overdue amount of the unconditional compensation of EUR 7,687.84. This lead to a total overdue amount of EUR 5,306.36 (EUR 7,687.84 minus overpayment of EUR 2,381.00 on conditional compensation), as it was acknowledged by the Club and decided by the FUR DRC.

2. The taxation rate applicable to the unconditional compensation

81. However, while the unconditional payments were performed gross, the Club withheld 30% income taxes for the Russian revenue agency. With his alternative request for relief, the Player contested this taxation rate. Rather, a taxation rate of 13% should have been applied, since the Player was a tax resident of the Russian Federation.

82. The Sole Arbitrator notes that according to Article 207 para. 2 of the Tax Code of Russia a person is considered to be a tax resident of Russia if the person spends not less than 183 calendar days of the taxation year (12 consecutive months) within the territory of the Russian Federation. This period is not interrupted if the person leaves the Russian Federation for a short (less than six months) medical treatment or training/education. For tax residents, a personal income tax of 13% applies pursuant to Article 224 of the Tax Code of the Russian Federation, while a 30% tax rate applies to non-residents.

83. The Sole Arbitrator recalls that the Club withheld 30% income tax for its gross payments of unconditional compensation. The Club is of the opinion that the Player spent a maximum of 132 days in Russia during the months of March, April, May, July and August 2015 before he was loaned to Empoli.

84. With his alternative request for relief, which the Sole Arbitrator is obliged to decide about, since the main request was rejected, the Appellant claims for the difference between the taxation rate of 30% withheld by the Club and the taxation rate of 13%. This amounts to EUR 68,000 since at the time of the dispute the deadline expired for payments of unconditional compensation in the amount of EUR 400,000 of which 30% equal EUR 120,000 and 13% equal EUR 52,000.

85. According to the substantiations brought forward by the Player, the latter spent 214 days on the territory of the Russian Federation in 2015, which was the year of the agreed payments. Thus, he exceeded the 183 days necessary to be considered a tax resident pursuant to Article 224 of the Tax Code of Russia.

86. The Sole Arbitrator notes that this issue is a question of facts rather than a question of law, since the relevant criterion of 183 days spent in Russia during a fiscal year can be proven by factual circumstances. In this regard, the Sole Arbitrator is satisfied with the arguments raised by the Player, pursuant to which he spent time in Russia from 11 January 2015 until 31 May 2015 and from 17 June 2015 until 28 August 2015, which amounts to a total of 214 days within the fiscal year 2015.

87. The Sole Arbitrator notes that this is in line with constant CAS jurisprudence pursuant to which a reasonable level of certainty needs to be established in order for a fact to be considered proven (cf. RIGOZZI/QUINN, Evidentiary Issues before CAS, 2014, p. 26 *et seq.*). By listing the months and days he spent within the Russian federation in the year 2015, the Player complied with this burden of proof, since the Sole Arbitrator deems it more likely to assume that the Player actually stayed in Russia for the mentioned periods than to assume the Club's version of a shorter stay. The Club's submission with which it simply opposes the Player's version, however, is not substantial.

88. Since it is more likely that the Player has met the required 183-day stay within Russia to be considered a tax resident pursuant to Article 207 para. 2 of the Tax Code of Russia, the amounts payable during the year 2015, *i.e.* EUR 400,000 out of the total gross unconditional compensation, should have been taxed at 13%.

89. As this outcome is already established by applying Article 207 para. 2 of the Tax Code of Russia there is no occasion for the Sole Arbitrator to decide on the subordinate question of whether the Player falls under the category of a *"highly qualified specialist"* pursuant to Article 224 para. 3 of the Tax Code of Russia, whose personal income would be taxed at 13% as well.

90. Therefore, if the relevant amounts of gross unconditional compensation would have been paid in 2015, a 13% tax rate would have been applied. The delay in payments, performed by the Club on 29 February 2016 and on 23 March 2016 resulted in a higher taxation of 30%, as in 2016 the Player was not considered a tax resident of Russia anymore.

91. In light of the fact that the delay of payments, which were due on 15 October 2015, 15 November 2015 and 15 December 2015, is exclusively attributable to the Club, the Sole

Arbitrator rules that the Club shall bear the damages it caused to the Player, which are the amounts of additional taxation, *i.e.* the difference between 13% and 30% on EUR 400,000.

92. Finally, the Sole Arbitrator finds that the outstanding amount of EUR 68,000 owed to the Player is subject to an interest rate to be calculated pursuant to Article 236 of the Russian Labour Code. The calculation shall start from the date when the relevant payment should have been made, *i.e.* from 15 December 2015 according to Section 4 of the Suspension Agreement until the date of effective payment.

IX. CONCLUSION

93. Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Sole Arbitrator finds that the FUR DRC was correct in its interpretation of the unconditional compensation being a gross amount.

94. However, the Appellant's alternative request for relief is founded insofar, as the gross amount payable under unconditional compensation for the year 2015 was subject to a 13% tax on personal income rather than a 30% tax on personal income.

95. The Appeal is therefore partially upheld. All other and further motions and requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed on 27 July 2016 by Marko Livaja against the Decision rendered by the FUR DRC on 5 April 2016 is partially upheld.

2. FC Rubin Kazan is ordered to pay to Marko Livaja an additional amount of EUR 68,000 (sixty-eight thousand Euro) subject to interest to be calculated pursuant to Article 236 of the Labor Code of Russia as from 15 December 2015 until the date of effective payment.

3. (…).

4. (…).

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