



**Arbitration CAS 2013/A/3471 FC Dnipro v. Football Federation of Ukraine (FFU), award of 16 June 2014 (operative part of 24 March 2014)**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr François Klein (France); Mr Michele Bernasconi (Switzerland)

*Football*

*Disciplinary sanction imposed on a football club*

*Definition of “force majeure”*

*Force majeure and impossibility to get to the place where the match would be held*

1. “Force majeure” implies an objective (rather than a personal) impediment, beyond the control of the “obliged party”, that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible. Such notion, which corresponds to general definitions widely accepted, appears specifically embodied in a provision set by Ukrainian sporting regulations. Such definition is further to be narrowly interpreted, since, as an excuse, it represents an exception to one of the most basic obligations in the sporting system, i.e. the obligation to appear and compete at the dates and in the venues indicated in the calendar.
2. There is no force majeure when a departure on time would have allowed the landing in the place where the match would be held before the deterioration of the weather conditions. There is no force majeure if it was not absolutely impossible for the club’s team to get to the place where the match would be held, if other means were available but the club opted to fly, at a time when the risk of adverse meteorological conditions was known and the impossibility of the aircraft to land was caused by a late departure.

**1. BACKGROUND**

**1.1 The Parties**

1. FC Dnipro (“Dnipro” or the “Appellant”) is a football club, with seat in Dnipropetrovsk, Ukraine, affiliated to the Football Federation of Ukraine.
2. The Football Federation of Ukraine (“FFU” or the “Respondent”) is the national football association of Ukraine.

## 1.2 The Dispute between the Parties

3. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence given in the course of the proceedings<sup>1</sup>. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
4. On 30 October 2013, a football match between Dnipro and FC Chernomorets Odessa (“Odessa”), corresponding to the 1/8 final round of the Ukrainian Football Cup 2013/2014, was scheduled to take place in Odessa, Ukraine (the “Match”).
5. The Match, however, could not be played because Dnipro had not arrived to Odessa.
6. On 19 November 2013, Dnipro sent a letter to the Control and Disciplinary Committee of the FFU (the “C&D Committee”), indicating that its failure to reach Odessa for the Match was caused by adverse meteorological conditions. More specifically, Dnipro provided the following explanation :

*“Hereby we would like to inform you about the situation that led to the FC Dnipro non-appearance to the match Round of 16 of Ukraine Cup Chornomorets Odessa – Dnipro Dnipropetrovsk.*

*Dnipro team at 16:30 29-10-2013 according to previous schedule left from Dnipropetrovsk to Odessa for preparation to abovementioned match. Weather conditions in both cities for that moment allowed to make flight and landing in Odessa airport. But having passed most part of the way the plain got banned for landing because of weather conditions and team had to go back to Dnipropetrovsk by 18:10.*

*After coming back club’s management operatively considered another options to get Odessa by train or by bus but unfortunately both of them were unacceptable because of following reasons. The train Dnipropetrovsk – Odessa left that day at 19:28 and without tickets it was just impossible to resolve the task with trip of 40-people official delegation. The option with bus also was rejected because it was too dangerous to make a trip for such far distance between cities in poor visibility conditions without special police escort. Also police recommendations were taken to attention: they asked to refrain from trips by cars for far distance in those days in the dark.*

*Weather conditions in Odessa and then in Dnipropetrovsk didn’t allow to make a new flight, and it was decided to appoint it on 30-10-2013, 11:00. This decision was agreed with airline company Wind Rose which arranges charter flights of Dnipro team and with meteorological services abovementioned cities which assured us of the possibility to make the flight in this time.*

*But after coming to airport in appointed time the team couldn’t go in time again because of poor weather conditions. In the same we were constantly informed by airport’s meteorological service that the weather is improving gradually and very soon we will get permission to take off.*

*The taking off was rescheduled at first to 12:00 then to 13:00, and only at 14:15 the plane with Dnipro team could went to Odessa. But during the flight the weather in Odessa began to deteriorate sharply again, and captain*

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<sup>1</sup> The documents transmitted to the Panel and referred to in this award contain, in their unchallenged English translations, various misspellings: they are so many that the Panel could not underscore them with “sic” or otherwise.

*for the second time was banned from landing at the airport of Odessa. After several unsuccessful attempts to land the plane had to go back to Dnipropetrovsk were landed at 16:20. Neither weather conditions no remaining time before kick-off allowed to make further attempts to go to Odessa. FC Dnipro in the next future days will provide all documents from relevant Dnipropetrovsk and Odessa airports services which will confirm abovementioned facts”.*

7. On 21 November 2013, the C&D Committee issued a decision (the “C&D Committee Decision”) resolving:

*“2.1 For non-appearance of team Dnipro, Dnipropetrovsk at the match of 1/8 round of the Cup of Ukraine FC Chernomorets, Odessa – FC Dnipro, Dnipropetrovsk, which was to take place 30.10.2013 (in accordance to p. 2 Annex#2, Disciplinary Rules of FFU):*

*2.1.1 to exclude FC Dnipro, Dnipropetrovsk from Ukraine Cup series season 2013/2014,*

*2.1.2 to determine that FC Chernomorets, Odessa qualified to 1/4 round of the Cup of Ukraine season 2013/2014.*

*2.1.3 to oblige “Football Club Dnipro”, ltd. (Dnipropetrovsk) to transfer the compulsory financial contribution in the sum of 75 000 (seventy-five thousand) UAH to the account of FFU within ten days since this decision is received ...”.*

8. In support of its decision, the C&D Committee indicated the following “legal grounds”:

*“- FC Dnipro, Dnipropetrovsk did not take all the possible and necessary measures for the team of the club to arrive at the match of 1/8 round of the Cup of Ukraine Chernomorets-Dnipro. Thus, this match did not take place due to the fault of FC Dnipro.*

*- FC Chernomorets met all the requirements of the tournament Regulation to the home club, and ensured all-sided preparation for the match of 1/8 round of order and community safety inside and outside the stadium (in particular, they prevented the fights between the supporters of the opposing teams, irritated by the cancellation of the match, and other acts of violation).*

*- The cause of FC Dnipro, Dnipropetrovsk non-appearance at the match of 1/8 round of the Cup of Ukraine Chernomorets – Dnipro is not reasonable. Club had enough time to reach the place of the match by ground transport vehicle, but they did not use this opportunity”.*

9. On 4 December 2013, Dnipro filed an appeal with the Appeal Committee of the FFU (the “Appeal Committee”) to challenge the C&D Committee Decision.

10. On 19 December 2013, the Appeal Committee issued a decision (the “AC Decision”) dismissing the appeal and confirming the C&D Committee Decision.

11. The reasons supporting the AC Decision are the following:

*“On 30 of October of 2013 should have been played the 1/8 final Ukrainian Cup game Chernomorets Odessa – Dnipro Dnipropetrovsk.*

*FC Dnipro didn't arrive to the match.*

*FC Dnipro tried unsuccessfully to get Odessa twice by plain (the day before the game and on the match day).*

*FC Dnipro had two another ways to get Odessa but didn't use it.*

*The first one, by the train Dnipropetrovsk – Odessa but the club didn't have enough time to arrange tickets for the delegation and to depart. Nevertheless, the club didn't consider to take another train, Lugansk-Odessa, that arrives to Dnipropetrovsk at 21.20 and departs at 21.40, so the club had more than 3 hours to make a decision and to arrange the departure of the team by this train.*

*The second one, by bus is considered by FC Dnipro dangerous for the health and life of the members of the official delegation. FC Dnipro remarks that during the day of 30 of October of 2013 there were registered all over Ukraine 90 road accidents, that is substantially more than the average number of traffic accidents per day. Nevertheless, the visibility distance was between 200 and 500 meters, what is considered like a normal level for a safe traffic following traffic rules in circumstances of limited visibility. On 29 and 30 October of 2013 the regular buses transportation from Dnipropetrovsk to Odessa and from Odessa to Dnipropetrovsk was made according to the schedule properly. The number of accidents with victims for 30 of October of 2013 is not greater than the average dates and also is lower for the average number for the period from 25 of October to 9 of November 2013). It was not officially forbidden the land transportation.*

*FC Dnipro position doesn't contradict the conclusions made by CDC FFU and the circumstances of the issue confirm that the conclusions of CDC FFU are right. Besides, it's difficult to understand why did FC Dnipro consider that the weather conditions were dangerous to travel by bus but at the same time did decide to get Odessa by plain in the same conditions.*

*FC Dnipro didn't demonstrate neither the circumstances that preceded the fact of the non-attendance at the 1/8 final Ukrainian Cup game Chernomorets Odessa-Dnipro Dnipropetrovsk were really force majeure nor were legitimate. FC Dnipro had more than one opportunity to get Odessa by train or by bus and had enough time for it but didn't do everything possible to make the team participate in the Cup game. CDC FFU made right conclusions and made the decision according to the regulations.*

*That's why, there are no reasons to satisfy the requests of FC Dnipro, and the decision of CDC FFU of 21 of November of 2013 regarding the "Issue about non-attendance of FC Dnipro at the 1/8 final Ukrainian Cup game Chernomorets Odessa Dnipro Dnipropetrovsk that should have been played on 30.10.2013" must not be changed".*

## **2. THE ARBITRAL PROCEEDINGS**

### **2.1 The CAS Proceedings**

12. On 10 January 2014, the Appellant filed with the CAS, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), a statement of appeal, accompanied by 9 exhibits, against FFU to challenge the AC Decision.
13. The statement of appeal contained also an application for provisional measures, pursuant to Article R37 of the Code, seeking the stay of the AC Decision.
14. In a letter dated 20 January 2014, the Appellant appointed Mr François Klein as arbitrator.

15. In another letter of the same 20 January 2014, the Appellant informed the CAS Court Office that the statement of appeal had to be considered as the appeal brief under Article R51 of the Code.
16. On 3 February 2014, the Respondent filed its answer to the Appellant's application for the stay of the AC Decision, requesting its dismissal. The Respondent's answer contained also the appointment of Mr Michele Bernasconi as arbitrator.
17. On 18 February 2014, the President of the CAS Appeals Arbitration Division issued an Order on Request for a Provisional Measures as follows:
  - “1. *The application for provisional and conservatory measures filed by FC Dnipro in the matter CAS 2014/A/3471 FC Dnipro v. Football Federation of Ukraine is rejected.*
  2. *The costs of the present order shall be determined in the final award or in any other final disposition of this arbitration*”.
18. On 18 February 2014, the Respondent lodged with CAS its answer in accordance with Article R55 of the Code. The Respondent's answer had attached 4 exhibits.
19. In a letter dated 26 February 2014, the Respondent informed the CAS Court Office that in its opinion the Panel could render an award on the basis of the written submissions only.
20. On 28 February 2014, the Appellant advised the CAS Court Office that it “*considers absolutely necessary to maintain a hearing in order to hear all witnesses that were involved in this force majeure situation*”, since “*the oral testimony of the pilot, the private airline company representative, the local officers of the Ministry of Interior among others are crucial for a full and complete understanding of the case*”.
21. By communication dated 3 March 2014, the CAS Court Office informed the parties on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr François Klein and Mr Michele Bernasconi, arbitrators.
22. In a letter of 11 March 2014, the CAS Court Office invited the Appellant, on behalf of the Panel, to file, within a set deadline, “*the witness statements that it deems appropriate to sustain its appeal*”, and granted the Respondent a subsequent deadline to file its comments in their regard.
23. On 17 March 2014, the Appellant filed a written declaration of the airline company Dniproavia and a report relating to declarations of the “*Ministry of internal affairs traffic police department of Dnipropetrovsk region*”.
24. On 19 March 2014, Odessa filed with the CAS an application for intervention in this arbitration, pursuant to Article R41.3 of the Code.
25. On 20 March 2014, the Respondent filed its comments to the declarations submitted by the Appellant on 17 March 2014 and expressed its consent to the intervention of Odessa in the

arbitration.

26. On 20 March 2014, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (the “Order of Procedure”), which was accepted and countersigned by the Respondent.
27. With notifications issued on 24 March 2014, the CAS Court Office informed the parties that the Panel had decided to dismiss the application for intervention filed by Odessa and that it considered itself sufficiently well informed and had decided, pursuant to Article R57, second paragraph of the Code, to issue an award on the basis of the parties’ written submissions only.
28. On 24 March 2014, the Panel issued the operative part of the present award.

## 2.2 The Position of the Parties

29. The following outline of the parties’ positions is illustrative only and does not necessarily comprise every contention put forward by the parties. In any case, the Panel has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

### a. *The Position of the Appellant*

30. The relief “*on the merits*” sought by the Appellant, as specified in its statement of appeal, is the following<sup>2</sup>:
  - “5) *To cancel the decision rendered by the Appeal Committee of the FFU on December 19th, 2013 confirming the decision of the Control and Disciplinary Committee, excluding “FC DNIPRO” DNIPROPETROVSK of the Ukrainian Football Cup 2013/2014;*
  - 6) *To rule that due to force majeure circumstances, FC DNIPRO was prevented from participating to the 1/8 final of the Ukrainian Football Cup 2013/2014 against “FC CHERNOMORETS” ODESSA;*
  - 7) *To order the 1/8 final of the Ukrainian Football Cup 2013/2014 between “FC CHERNOMORETS” ODESSA and “FC DNIPRO” DNIPROPETROVSK to be replayed at a suitable date;*
  - 8) *To condemn the FFU to bear all costs related to the present arbitration procedure including a compensation of FC DNIPRO attorney’s fees in the amount of CHF 30.000.-”.*
31. In support of its request that the AC Decision be set aside, the Appellant, in essence, submits that its failure to appear and play the Match was caused by a “*force majeure*” event, constituted by the adverse meteorological conditions in Odessa: Dnipro “*made any possible effort to avoid this force majeure situation*” and to arrive to Odessa, but, notwithstanding its good faith (which was not

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<sup>2</sup> The remaining points (1-4) relate to the application for provisional measures considered by the President of the CAS Appeals Arbitration Division in his Order of 18 February 2014.

disputed before the FFU disciplinary bodies), was not able to arrive to Odessa.

32. The facts of the case, and the “*force majeure*” situation they created, are described by the Appellant as follows:

- i. “on October 29th, at 16:30 local time, in the city of Dnipropetrovsk, the team and the staff of FC DNIPRO took off in a charter flight destination Odessa. At the time when the plane left Dnipropetrovsk, both airports agreed that the meteorological conditions to fly to Odessa were good enough. Though, after 45 minutes in the air, Odessa airport informed the captain that it was not possible to land due to bad meteorological conditions and the plane returned to Dnipropetrovsk where it landed at 18:10”;
- ii. “the train from Dnipetrovsk to Odessa was leaving at 19:28 that evening of October the 29th and there was no sufficient time left to organise the trip by railway”;
- iii. “the local police “GAI” of the Ministry of Interior refused to authorise a possible trip to Odessa by bus and by night, due to poor visibility conditions and as it was impossible to secure the convoy with such a short notice and on that particular day”;
- iv. “for that reason, the only option was to postpone the trip to the next day, and the flight was newly scheduled at 11:00 am on October the 30th, 2013. This decision was taken following the advise of the private charter company “Rosa Vetrov” that was in permanent contact with Dnipropetrovsk and Odessa meteorological airport services”;
- v. “unfortunately, at the arrival of the team players and staff in Dnipropetrovsk on October the 30th, the airport authorities refused to give the permission to take off. Thus they informed the captain that weather conditions were improving and that in short the take off would be authorised. ... The flight was then initially scheduled at 12:00, then at 13:00, and again, the information received from the meteorological airport services were good mentioning that weather conditions were improving and that soon the captain would be authorised to fly. ... Finally, at 14:15, the captain received the green light to take off and the plane started its flight to Odessa”;
- vi. “while the plane was about to land in Odessa, the meteorological conditions turned suddenly to be very bad again and for the second time, the captain had to flight back to Dnipropetrovsk after the permission to land was denied by Odessa airport authorities. The plane finally landed at 16:10 at Dnipropetrovsk airport and it was then obvious that FC DNIPRO players and staff could not make it anymore and that they would not be able to attend the scheduled Cup game”;
- vii. “on November 19th, 2013, Mr Andrey Stetsenko, the General Director of FC DNIPRO wrote a detailed letter to the Control and Disciplinary Committee of the FFU asking the said authority to reschedule the said match for obvious reasons as FC DNIPRO could not attend the game against their will and for external reasons”.

**b. The Position of the Respondent**

33. The Respondent, in its answer of 18 February 2014, requested the CAS:

*“to reject all appeal requests of the Appellant, to dismiss the appeal in full and to condemn the FC “Dnipro” to bear all costs related to the present arbitration procedure including a compensation of the FFU attorney’s fees in*

*the amount of CHF 15.000”.*

34. In that regard, the Respondent submits that the dispute object of this arbitration is not whether Dnipro was in good faith (which is not questioned), but whether Dnipro had a *“justifiable excuse”* not to appear to the Match. The Respondent contends that no such justification existed. In particular, according to the FFU, no *“force majeure”*, as defined by the applicable Ukrainian regulations, could be invoked by the Appellant.
35. *“Force majeure”* implies the simultaneous satisfaction of the following conditions: (i) *“an irresistible and unpredictable force”*; (ii) the *“inability to predict and prevent such a force”*, (iii) a *“force, which does not depend on the will and actions of individuals and for legal entities”*. In the Respondent’s opinion, the occurrence of those conditions has to be denied, if the following circumstances are considered:
- i. according to the documents filed by the Appellant in this arbitration, *“the forecast for aerodrome in Odessa for the period from 29.10.2013 to 30.10.2013 assumed the presence of fog”*;
  - ii. *“nevertheless, the Appellant has chosen the mean of transportation which can be highly influenced by weather conditions. And if the presence of fog can be regarded as “force that does not depend on the will and actions of individuals and for legal entities”, it clearly could be predicted and the use of mean of transport other than the airplane could prevent the influence of such a force. The administration of the club could predict such circumstances and could avoid their negative influence before hand”*;
  - iii. when the aircraft taking Dnipro to Odessa could not land because of fog, a decision was taken to fly back to Dnipropetrovsk, while another airfield, open to operation, near Odessa could be chosen as an alternative;
  - iv. when taken back to Dnipropetrovsk the night of 29 October 2013, Dnipro did not opt for alternative means of transport, but still decided to fly again the day after. Indeed, other means of transport were available: train or bus to cover the distance (420 km) between Dnipropetrovsk and Odessa;
  - v. in summary, *“Dnipro could predict and prevent all circumstances connected with the negative impact of the weather conditions. ... Dnipro ... had several possible ways to get to Odessa ... and had plenty of time to do this in time, the club failed to take all feasible measures to ensure the participation”* in the Match. As a result, *“Dnipro had no justifiable excuses not to appear on the match”*.

### **3. LEGAL ANALYSIS**

#### **3.1 Jurisdiction**

36. CAS has jurisdiction to decide the present dispute between the parties.
37. In fact, the jurisdiction of CAS is not disputed by the parties, has been confirmed by the Order of Procedure, and is contemplated by Article 54.7 and Article 91 of the Disciplinary Code of the FFU.

### **3.2 The request for intervention filed by Odessa**

38. On 19 March 2014, Odessa filed with CAS an application for intervention in this arbitration, pursuant to Article R41.3 of the Code. On the same date, such application was forwarded to the parties, which were invited to state whether they agreed with it. On 20 March 2014, the Respondent confirmed that it agreed to the Odessa's application. The Appellant, on the other hand, did not file any reply to the CAS invitation.
39. Under Article R41.4 of the Code, setting the common provisions for joinder and intervention, applicable in CAS appeals arbitration proceedings pursuant to Article R54, last paragraph of the Code, provides that a party can intervene in the proceedings only if it is bound by the arbitration clause or if the other parties agree in writing. In addition, in accordance with Article R41.3 of the Code, intervention is possible only if the application is filed within 10 days after the arbitration has become known to the intervenor.
40. The Panel finds that the conditions for the intervention do not appear to be met in this case. Chiefly, failing an answer by Appellant to the CAS letter of 19 March 2014, no express consent in writing has been given by all parties to this arbitration. In addition, the outcome of the present procedure confirms that Odessa had no legitimate interest to participate in the arbitration. Therefore, the Panel decided not to allow the participation of Odessa.

### **3.3 Appeal Proceedings**

41. As these proceedings involve an appeal against a decision rendered by a national federation (i.e., the FFU), brought on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary dispute, in the meaning and for the purposes of the Code.

### **3.4 Admissibility**

42. The admissibility of the appeal is not challenged by the Respondent. No further internal recourse against the AC Decision is available to the Appellant within the structure of FFU. Accordingly, the appeal is admissible.

### **3.5 Scope of the Panel's Review**

43. According to Article R57 of the Code,

*“the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. ...”.*

### **3.6 Applicable Law**

44. The law applicable in the present arbitration is identified by the Panel in accordance with Article

R58 of the Code.

45. Pursuant to Article R58 of the Code, the Panel is required to 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”.*
46. In the present case the “*applicable regulations*” for the purposes of Article R58 of the Code are, indisputably, the FFU regulations, because the appeal is directed against a decision issued by FFU. Ukrainian law, being the law of the country of the body whose decision is challenged, applies subsidiarily to the merits of the dispute.

### 3.7 The Dispute

47. The object of these proceedings is the AC Decision, which confirmed the C&D Decision to hold Dnipro responsible for its not attendance at the Match and to impose on Dnipro the disciplinary consequences arising therefrom: on one side, the Appellant seeks the setting aside of the AC Decision, and maintains that its failure to appear at the Match is excused by a “*force majeure*” event; on the other side, the Respondent requests that the appeal be dismissed, as the conditions for the invocation of a “*force majeure*” event would not be met.
48. As a result of the parties’ submission, therefore, the main (indeed, the only) question in this arbitration is whether a “*force majeure*” event, which prevented Dnipro from reaching Odessa and play the Match at the scheduled time, occurred. In fact, there is no dispute between the parties as to the consequences to be drawn, should it be found that no “*force majeure*” occurred.
49. Preliminarily, the Panel notes that “*force majeure*” implies an objective (rather than a personal) impediment, beyond the control of the “obliged party”, that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible. Such notion, which corresponds to general definitions widely accepted (see, for instance, Article 7.1.7 of the Unidroit Principles of International Commercial Contracts, 2010), appears specifically embodied in a provision set by Ukrainian sporting regulations (the Regulation on nationwide competition of football clubs “Premier League”) referred to by the Respondent, and is not disputed by the Appellant.
50. In the Panel’s opinion, in addition, such definition is to be narrowly interpreted, since, as an excuse, it represents an exception to one of the most basic obligations in the sporting system, i.e. the obligation to appear and compete at the dates and in the venues indicated in the calendar.
51. In light of the foregoing, the Panel finds that the Appellant’s failure to appear at the Match is not excused by a “*force majeure*” event. More specifically, the Panel notes that no objective and unforeseeable impediment, that rendered impossible the Appellant’s transfer to Odessa, occurred.

52. In that respect the Panel remarks that:

- i. on 29 October 2013, i.e. the day before the Match, when Dnipro first attempted to fly to Odessa, as conceded by the Appellant (Report of the airline company Dniproavia – doc. 2 attached to the statement of appeal), the flight to Odessa was delayed (even though only slightly – and in any case could not be anticipated) because of a late arrival in Dnipropetrovsk of the aircraft in charge of taking the Appellant’s team to Odessa, and because of the unavailability of an alternative aircraft in Dnipropetrovsk. As a result, the aircraft with the team could take off only at 16:30, at a time when the weather conditions in Odessa were still good (see Report of Dniproavia submitted by the Appellant on 17 March 2024); indeed, only at 17:10 the aircraft’s captain was informed that the weather conditions in Odessa no longer allowed the landing. Therefore, a departure on time would have allowed the landing in Odessa before the deterioration of the weather conditions;
- ii. no indication is given as to why the aircraft returned to Dnipropetrovsk and why no alternative flight programme had been organized in order to allow the aircraft, in the event of bad weather conditions in Odessa, to land at another airport, near Odessa, open to operation in the afternoon/evening of 29 October 2013, from which Odessa could be easily reached by alternative transport means. The point is specifically mentioned in the AC Decision, but found no answer in this arbitration;
- iii. in the evening of 29 October 2013, the Appellant, once taken back to Dnipropetrovsk, decided to try again to fly the next day, while it had the possibility to use alternative means of transport – a train or a bus:
  - with respect to the train, the Appellant did not contradict in this arbitration the indications contained in the AC Decision as to the availability of a train 2 hours later than the one it alleged it could not manage to take;
  - with respect to the bus, the Panel notes that the police only stated that it did “not recommend the transportation [of the] team by bus” (doc. 4 attached to the statement of appeal), and did not prohibit it;
- v. on 30 October 2013, i.e. the day of the Match, when Dnipro attempted for a second time to fly to Odessa (again as conceded by the Appellant: Report of the airline company Dniproavia – doc. 2 attached to the statement of appeal), the aircraft to Odessa took off only at 14:15, while the Dnipropetrovsk’s airport had been in operation since 12:15, because it had arrived only at 13:16 and there was no other aircraft available in Dnipropetrovsk to take the team to Odessa. At 14:15 the weather conditions in Odessa were good (see Report of Dniproavia submitted by the Appellant on 17 March 2024). Therefore, an earlier departure, as soon as Dnipropetrovsk’s airport had been opened, would have allowed the landing in Odessa before the deterioration of the weather conditions;
- vi. again, also with respect to 30 October 2013, no indication is given as to why the aircraft returned to Dnipropetrovsk and why no alternative flight programme had been organized in order to allow the aircraft, in the event of bad weather conditions in Odessa, to land at another airport, near Odessa, open to operation, from which Odessa could be quickly reached.

53. In other words, the Panel notes that it was not absolutely impossible for the Appellant's team to get to Odessa: other means were available; the Appellant opted to fly, at a time when the risk of adverse meteorological conditions was known (as it certainly was on 29 October 2013); and still, the impossibility of the aircraft to land was caused by a late departure.
54. The above does not mean that the Appellant was not in good faith when it decided to fly to Odessa: the good faith of Appellant is not in issue for this litigation. It simply means that the Appellant took the risk of suffering the consequences of adverse meteorological conditions, and that it cannot be excused if the adverse meteorological conditions actually prevented it from attending the Match.
55. The Panel, therefore, concludes that no "*force majeure*" event occurred: the Appellant's failure to attend the Match was not justified, and triggers the (undisputed) consequences drawn in the decisions issued in that respect by the disciplinary bodies of the FFU.

### **3.8 Conclusion**

56. In light of the foregoing, the Panel holds that the appeal brought by Dnipro is to be dismissed and the AC Decision to be confirmed.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. The appeal filed on 10 January 2014 by FC Dnipro against the decision taken by the Appeal Committee of the Football Federation of Ukraine on 19 December 2013 is dismissed.
  2. The decision taken by the Appeal Committee of the Football Federation of Ukraine on 19 December 2013 is confirmed.
- (...)
5. All other motions or prayers for relief are dismissed.