Arbitration CAS 2017/A/4935 FC Shakhtar Donetsk v. Olexandr Vladimirovich Zinchenko, FC UFA & Fédération Internationale de Football Association (FIFA), award of 26 October 2017

Panel: Mr Mark Hovell (United Kingdom), President; Mr Juan Pablo Arriagada (Chile); Mr Manfred Nan (The Netherlands)

Football
Termination of an employment contract without just cause by the player
Admissibility of evidence only adduced at CAS level
Scope of the appeal proceedings
Calculation of the compensation for damages
Content of the factor "Any other objective criteria" in Article 17 RSTP
Swiss principle of positive interest
Sporting sanctions under Articles 17.3 and 17.4 RSTP

1. **Article R57(3) of the Code of Sports-related Arbitration (CAS Code) provides CAS panels with discretion as to whether or not allow evidence adduced for the first time during the appeal to CAS even if it was available before the hearing in the first instance. CAS jurisprudence shows a trend to allow such evidence, unless there was an element of bad faith by the party now looking to advance that evidence. *E.g.* evidence only known to a party to FIFA DRC proceedings after the investigatory phase of the FIFA DRC (but before the FIFA DRC sat to take its decision) may be admitted to the subsequent CAS proceedings even if theoretically, it could have already been adduced at the time of the FIFA proceedings, albeit after the investigatory phase of the FIFA DRC; this is even more the case if the party submitting the evidence to CAS had made other unsolicited submissions to FIFA after the closing date of the investigatory phase, but had been told that it should not have and that the submission might not even be considered.**

2. **In reviewing a case in full, a CAS panel cannot go beyond the scope of the previous litigation, but is limited to the issues arising from the challenged decision. New claims advanced in appeal, hitherto not claimed in the previous litigation, are in principle inadmissible. However, claims that could, for legitimate reasons, not have been advanced in the previous litigation, but were likely to have been claimed in the absence of such legitimate reasons at that time, do fall under the *de novo* competence of CAS panels and should hence be considered as admissible. Furthermore, in particular in cases involving a breach of an employment contract between a player and a club, which have been first dealt with at FIFA and are appealed to CAS, CAS will often have more up to date information regarding the player's career post-termination than would have been available to FIFA. It is therefore CAS jurisprudence that the most accurate information is to be taken into account, as part of the *de novo* process. Accordingly, even a claim that goes beyond the scope and the amount of the previous litigation may**

be granted provided the basic claim has not changed between FIFA and CAS.

3. **When considering the question of how to calculate compensation for the breach of a playing contract by a player without just cause, none of the calculation methods so far developed by CAS jurisprudence should be used over another. Rather, each case should be dealt with on its own merits, *i.e.* on a case by case basis, and each CAS panel should be free to find the appropriate method, always applying Article 17 of the Regulations on the Status and Transfer of Players (RSTP), to find the correct solution for that case.**

4. **Whereas there is no reference to replacement costs, lost transfer fees or lost opportunities in Article 17 RSTP itself, CAS panels have determined that these fall within the "any other objective criteria" factor as referred to in Article 17. The factor "any other objective criteria" is not limited, but includes the salaries under the old and new player contracts, the time left on the old contract, the unamortised transfer and other fees paid for the player by the old club and whether the breach occurred within the protected period or not.**

5. **The Swiss principle of the positive interest method may be summarized as follows: if a player terminates his contract with his old club and joins a new club, then, using this method, the old club must be restored to the position it was in prior to the breach. As such, a virtual replacement player needs to be found for the old club.**

6. **Despite the wording "shall" in both Article 17.3 and Article 17.4 RSTP, CAS panels have interpreted "shall" as "may", arguing that rules and regulations have to be interpreted in accordance with their real meaning, and that this was also true in relation with the statutes and regulations of an association. Furthermore it is stable, consistent practice of FIFA, and of the DRC in particular, to decide on a case by case basis whether to sanction a player or not, and not to apply automatically a sanction as per Article 17.3 RSTP.**

I. PARTIES

1. FC Shakhtar Donetsk ("Shakhtar" or the "Appellant") is a football club with its registered office in Donetsk, Ukraine. Shakhtar is currently competing in the Ukrainian Premier League. It is a member of the Football Federation of Ukraine (the "FFU"), which in turn is affiliated to Fédération Internationale de Football Association.

2. Olexandr Vladimirovich Zinchenko (the "Player" or the "First Respondent") is a Ukrainian professional footballer currently playing for Manchester City FC in England.

3. FC UFA ("Ufa" or the "Second Respondent") is a football club with its registered office in Ufa, Russia. Ufa is currently competing in the Russian Premier League. It is a member of the Russian

Football Union (the "RFU"), which in turn is affiliated to Fédération Internationale de Football Association.

4. Fédération Internationale de Football Association ("FIFA" or the "Third Respondent") is the governing body of world football and has its registered office in Zurich, Switzerland.

II. FACTUAL BACKGROUND

A. Facts of the case

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Panel refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

6. On 1 February 2010, the Player, born on 15 December 1996, joined Shakhtar as a youth player.

7. On 14 March 2013, the Player entered into a two-year professional employment contract (the "Contract") with Shakhtar, valid as from 15 July 2013 until 30 June 2015. On the same date, the Player and Shakhtar also concluded three appendices to the Contract.

8. Appendix 1 of the Contract stated that the Player's monthly remuneration from 15 July 2013 until 30 June 2014 would be UAH 4,000 per month. The Player's monthly remuneration from 1 July 2014 until 30 June 2015 would be UAH 5,000 per month.

9. Article 7.2 of the Contract stated as follows:

> *"7.2. The Contract terminates its validity.*
>
> *1) on expiry;*
>
> *2) by the parties mutual agreement;*
>
> *3) in case of a permanent transfer of the Player to the new club on his consent.*
>
> *4) in case of unilateral termination of the Contract".*

10. Article 7.3 of the Contract stated as follows:

> *"7.3. If a Party of the contract has breached the Contract without just cause, which led to the termination of the contract unilaterally, the violating party shall pay the other party compensation that is calculated as follows:*

7.3.1. If the Club is a party in breach of the Contract, the Club shall pay to the Player compensation calculated under the FIFA Regulations for the Status and Transfer of Players binding at the moment of this contract signing;

7.3.2. If the Player is a party in breach of the Contract, the Player shall pay to the Club compensation calculated under the FIFA Regulations for the Status and Transfer of Players binding at the moment of this contract signing".

11. Article 7.4 of the Contract stated as follows:

"7.4. Just causes for unilateral termination of the Contract:

7.4.1. for the Player:

A) mentioned in art 7.6 hereinafter.

7.4.2. for the Club:

A) if the Player systematically (three times or more) fails to fulfil his obligations under the present Contract, including the performance of the actions from which the Player is to abstain under the present Contract;

B) mentioned in art 7.6 hereinafter;

C) if authorized body impose sports sanctions, which suspend the Player for the period of over 2 (two) months.

D) Deliberately reduced effort / level of play in the course of training sessions, matches".

12. Article 7.6 of the Contract stated, in relevant part, as follows:

"[…] In a case during this Contract validity the Player is seriously injured in or out of the pitch or develop any health condition, which reasonably make it unable the Player's further sportive career in the Club, the parties agree to terminate this contract with immediate effect".

13. In September 2013 and in April 2014, several agents, allegedly on behalf of the Player, attempted to negotiate with Shakhtar on the extension of the Player's Contract. This culminated in suggestion that Shakhtar enter into a new contract with the Player for either 2 years (paying USD 5,000 per month for the first year, USD 7,500 per month for the final year and paying his agent, Mr. Yury Gavrilov (the "Player's Agent"), USD 200,000) or for 3 years (where the monthly salary each year would be USD 5,000, then USD 7,000 and finally USD 9,000, with USD 300,000 for the Player's Agent). According to Shakhtar, it refused to extend the Player's Contract, because it did not want to offer the Player an exceptionally high salary in comparison to the Player's teammates.

14. On 20 June 2014, the Player's mother wrote to Shakhtar stating that she had decided to leave Ukraine with the Player, due to the military actions in the Donbass region. Shakhtar did not respond to this letter.

15. On 1 July 2014, Shakhtar moved its headquarters to Poltava for safety reasons. It did not appear to notify the Player or his mother of this fact.

16. On 3 July 2014, the Player unilaterally terminated the Contract by sending a letter to Shakhtar. The letter reads as follows:

> *"I Zinchenko A.V. hereby terminate my employment contract (contract) unilaterally as from 03.07.2014 par. 4 point 2 art. 7, which is caused by my parents move to new place of residence (par: a) par. 2 art. 19 FIFA Regulations (on status and transfer) in the other country Russia for reason of military operations within the territory of Donetsk region and for reason of safe living impossibility".*

17. Upon terminating the Contract, the Player began training with Russian club, Rubin Kazan in July 2014. However, the Player was never registered with Rubin Kazan.

18. On 21 July 2014, Shakhtar wrote to Rubin Kazan, informing the club that Shakhtar still held a valid employment contract with the Player.

19. On 5 August 2014, Shakhtar wrote to the Player, the Player's Agent and Rubin Kazan, informing them that it considered the move of the Player's parents to be an invalid reason for the unilateral termination of the Contract. Shakhtar also requested that the Player return to the club by 11 August 2014, and should the Player not return, Shakhtar would consider that the Player had unilaterally terminated the Contract without just cause.

20. On 8 August 2014, the Player's Agent informed Shakhtar that between 17 July and 27 July 2014, the Player was with Rubin Kazan, and that Rubin Kazan was ready to negotiate with Shakhtar over the transfer of the Player.

21. On 14 October 2014, Shakhtar wrote to Rubin Kazan, informing the club of its intention to file a claim before the FIFA Dispute Resolution Chamber (the "FIFA DRC") as soon as the Player's international transfer certificate ("ITC") was requested.

22. On 24 October 2014, Ufa wrote to Shakhtar, requesting an update as to the Player's contractual situation and enquiring as to the possibility of initiating negotiations over the transfer of the Player.

23. On 27 October 2014, Shakhtar wrote to Ufa, notifying that club that it had a valid employment contract with the Player, but that the Player has been absent from the club without leave.

24. On 21 January 2015, Ufa wrote to Shakhtar indicating its position that the Player had terminated the Contract with just cause on 3 July 2014 and that as a result, Ufa had offered the Player an employment contract (the "Ufa Contract"). Ufa, referring to both the training provided to the Player by Shakhtar and the breach of the Contract, also offered Shakhtar EUR 100,000 *"in exchange for a waiver of any legal wrangling of the Player".*

25. On 22 January 2015, Shakhtar wrote to Ufa asserting that the Player had terminated the Contract without just cause and urged Ufa to refuse from engaging the Player's services. Shakhtar indicated that, otherwise, it would file a claim before the FIFA DRC against Ufa as soon as the Player's ITC was requested.

26. On 1 February 2015, the Player and Ufa concluded the Ufa Contract, valid as from 1 February 2015 until 15 December 2018. Under the Ufa Contract, the Player was entitled to receive a monthly salary of RUB 150,000, excluding bonuses and other benefits.

27. On 10 February 2015, the RFU requested the Player's ITC from the FFU for the Player's transfer from Shakhtar to Ufa.

28. On 13 February 2015, Shakhtar wrote to the FFU rejecting the RFU's request for the Player's ITC. The FFU subsequently rejected the request for the Player's ITC, and the RFU submitted a request for the provisional registration of the Player before FIFA.

29. On 4 March 2015, the Single Judge of the FIFA Players' Status Committee rendered a decision, deciding that the Player could be provisionally registered with Ufa as from 6 March 2015.

30. On or around 7 July 2016, the Player transferred from Ufa to the English club, Manchester City for a fixed fee of EUR 2,000,000 plus a potential EUR 500,000 in contingent add-ons.

B. Proceedings before FIFA

31. On 23 March 2015, Shakhtar filed a claim before FIFA against Ufa and the Player, requesting compensation for what Shakhtar alleged was a breach of the Contract.

32. On 16 September 2015, FIFA informed the parties that the investigation phase of the matter had been concluded and that no further submissions from the parties would be admitted to the file.

33. On 19 October 2015, Shakhtar submitted unsolicited correspondence to FIFA.

34. On 21 October 2015, FIFA informed the parties that it would be for the FIFA DRC to decide whether or not it would take Shakhtar's unsolicited correspondence into account.

35. On 18 August 2016, the FIFA DRC rendered a decision (the "Appealed Decision") as follows:

> *"1. The claim of the Claimant, FC Shakhtar Donetsk, is partially accepted.*
>
> *2. The Respondent 1, Olexandr Vladimirovich Zinchenko, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of Ukrainian hryvnia (UAH) 232,000, plus 5% interest p.a. on said amount as from 23 March 2015 until the date of effective payment.*

3. In the event that the amount due to the Claimant in accordance with the abovementioned number 2. is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

4. The Respondent 2, FC Ufa, is jointly and severally liable for the payment of the amount in accordance with the abovementioned number 2.

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

6. The Claimant is directed to inform the Respondent 1 and the Respondent 2 immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

36. On 19 December 2016, FIFA sent the grounds of the Appealed Decision to Shakhtar, the Player and Ufa.

III. PROCEEDINGS BEFORE THE CAS

37. On 9 January 2017, pursuant to Article R47 and Article R48 of the Code of Sports-related Arbitration (the "CAS Code"), Shakhtar filed a Statement of Appeal against the Player, Ufa and FIFA at the Court of Arbitration for Sport (the "CAS"). The Statement of Appeal contained the following requests for relief:

"1. To grant an extension of time of 15 days to file the appeal brief.

2. To accept this appeal against the Decision rendered by the FIFA DRC.

3. To adopt an award varying the Decision:

a. determining that the Player terminated the Employment Contract without just cause further to artide 17 of the FIFA RSTP;

b. where an appropriate amount of compensation be paid jointly and severally by both the First and Second Respondents where the amount awarded by the FIFA DRC is not satisfactory;

c. that the First Respondent unilaterally breached the Employment Contract within the protected period and a sporting sanction consisting of a four-month restriction on playing in official matches be imposed;

d. that the Second Respondent is banned from registering any new players, either nationally or internationally, for two registration periods;

e. requiring the Respondents to pay the applicable 5% interest on the amounts owed.

4. Independently of the decision to be issued, the Appellant requests the Panel:

a. to fix a sum of 25,000 CHF to be paid jointly by the First and Second Respondent to the Appellant, to help the payment of its legal fees and costs.

b. To condemn the First and Second Respondent to the payment of the whole CAS administration costs and the Arbitrators fees".

38. Additionally, in its Statement of Appeal, Shakhtar nominated Mr. Juan Pablo Arriagada Aljaro, Attorney-at-law, Santiago, Chile as its arbitrator in the matter at hand.

39. On 19 January 2017, the Player and Ufa wrote to the CAS Court Office, nominating Mr. Manfred Peter Nan, Attorney-at-law, Arnhem, The Netherlands as their arbitrator in the matter at hand. FIFA did not object to such nomination.

40. On 7 February 2017, pursuant to Article R51 of the CAS Code, Shakhtar filed its Appeal Brief with the CAS Court Office. The Appeal Brief contained the following requests for relief:

"1. To accept this appeal against the Decision rendered by the FIFA DRC.

2. To adopt an award:

a. varying the amount of compensation payable by the First and Second Respondent to:

i. the amount of the transfer fee obtained by Ufa for the Player in the amount of €2,000,000.00; or

ii. in the alternative, €850,000.00, the amount previously requested before the FIFA DRC; or

iii. in the further alternative, €500,000.00; or

iv. €100,000.00.

b. returning the case to FIFA requiring the Third Respondent to apply a sanction:

i. on the Player by prohibiting him to play in official matches for four months; and

ii. on Ufa with a registration ban for two consecutive registration periods.

3. Independently of the type of the decision to be issued, the Appellant requests the Panel:

a. to fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant to contribute to the payment of his legal fees and costs; and

b. to condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees".

41. On 7 March 2017, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

President:	Mr. Mark Andrew Hovell, Solicitor, Manchester, England
Arbitrators:	Mr. Juan Pablo Arriagada Aljaro, Attorney-at-law, Santiago, Chile
	Mr. Manfred Peter Nan, Attorney-at-law, Arnhem, The Netherlands.

42. On 13 March 2017, pursuant to Article R55 of the CAS Code, FIFA filed its Answer, which contained the following requests for relief:

> *"1. In light of the above considerations, we insist that the decision passed by the DRC was fully justified. We therefore request that the present appeal be rejected and the decision taken by the DRC on 8 August 2016 be confirmed in its entirety.*
>
> *2. Furthermore, all costs related to the present procedure as well as the legal expenses of FIFA shall be borne by the Appellant".*

43. On 24 March 2017, pursuant to Article R55 of the CAS Code, the Player and Ufa filed a joint Answer, which contained the following requests for relief:

> *"1. To dismiss the appeal filed by FC Shakhtar Donetsk against Mr. Olexandr Vladimirovich Zinchenko and FC UFA with regard to the decision passed on 18 August 2016 by the FIFA Dispute Resolution Chamber.*
>
> *2. To confirm the decision passed on 18 August 2016 by the FIFA Dispute Resolution Chamber.*
>
> *3. To order FC Shakhtar Donetsk to bear all the costs incurred with the present procedure.*
>
> *4. To order FC Shakhtar Donetsk to pay Mr. Olexandr Vladimirovich Zinchenko a contribution towards his legal and other costs in the amount of CHF 20,000.*
>
> *5. To order FC Shakhtar Donetsk to pay FC UFA a contribution towards its legal and other costs in the amount of CHF 20,000".*

44. On 28 March 2017, the CAS Court Office wrote to the Parties, inviting them to indicate whether they preferred a hearing to be held in this matter. On the same day Shakhtar wrote to the CAS Court Office, indicating that it wished for a hearing to be held

45. On 30 March 2017, the Player and Ufa wrote to the CAS Court Office, indicating that they did not wish for a hearing to be held. FIFA later took the same position.

46. On 31 March 2017, the CAS Court Office wrote to the Parties informing them of the Panel's decision that a hearing would be held on this matter.

47. On 7 April 2017, the CAS Court Office wrote to the Parties informing them that the Player and Ufa requested, *inter alia*, that a number of Shakhtar's exhibits be deemed inadmissible as they were not produced by Shakhtar during the proceeding before the FIFA DRC. Additionally, they requested the Panel to order a copy of the audio file from CAS 2014/A/3686 be provided to them. This latter request was denied on the grounds of confidentiality between CAS procedures.

48. On 10 April 2017, Shakhtar wrote to the CAS Court Office, submitting that its new exhibits should be admissible, as, *inter alia*, these exhibits did not exist at the time Shakhtar filed its statement of claim with the FIFA Players' Status Committee.

49. On 18 April 2017, the CAS Court Office wrote to the Parties informing them that the Panel had decided to allow the exhibits in dispute to the CAS file and treat them as admissible.

50. On 19 April 2017, the CAS Court Office wrote to the Parties informing them that the Panel had convened a hearing for this matter for 5 July 2017.

51. On 24 April 2017, the CAS Court Office sent the Order of Procedure to the Parties. The Player and Ufa duly signed and returned the Order of Procedure the same day.

52. On 2 May 2017, Shakhtar and FIFA independently returned their signed Orders of Procedure to the CAS Court Office.

53. A hearing was held on 5 July 2017 at the CAS premises in Lausanne, Switzerland. The parties did not raise any objection as to the composition of the Panel. The Panel was assisted by Mr. Antonio de Quesada, CAS Counsel. The following persons attended the hearing:

i.	For Shakhtar:	Messrs. Juan de Dios Crespo Pérez and Paolo Torchetti – external counsel; Mr. Andrey Kharitonchuk, Head of Legal Department; and Mr. Sergei Palkin, General Director;
ii.	For the Player and Ufa:	Messrs. Yuri Zaytsev and Georgi Gradev – external counsel; and;
iii.	For FIFA:	Ms. Leticia de Bergia and Mr. Pascal Martens – internal counsel.

54. Mr. Andrey Gromov appeared as a witness for Shakhtar and Mr. Wil Van Megen appeared as an expert witness for the Player and Ufa, both via the telephone. In addition, Mr. Palkin spoke on behalf of Shakhtar. All were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses and party representative. The Parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. The hearing was then closed and the Panel reserved its detailed decision to this written Award.

55. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration

proceedings. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

IV. THE PARTIES' SUBMISSIONS

56. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel however, has carefully considered all the submissions made and evidence advanced by the Parties, even if no explicit reference is made in what immediately follows.

A. Shakhtar's Submissions

57. In summary, Shakhtar submitted the following in support of its Appeal.

i. Valuation of compensation

58. The compensation should be calculated in accordance with the FIFA RSTP and to the extent that there are any gaps, Swiss law. In support of its position, Shakhtar cited CAS 2007/A/1298-1300).

59. Shakhtar requested that the Panel vary the amount of compensation in the Appealed Decision due to Shakhtar by the Player and Ufa to the following:

> *"a. the transfer fee obtained by Ufa for the Player in the amount of €2,000,000.00; or*
>
> *b. in the alternative €850,000.00; or*
>
> *c. in the further alternative €500,000.00; or*
>
> *d. €100,000.00".*

1) Quantum of Claim

60. In its initial claim made on 23 March 2015, Shakhtar requested compensation before the FIFA DRC in the amount of EUR 850,000. In the Appealed Decision, Shakhtar was awarded UAH 232,000, which it submitted converted to approximately EUR 7,890.

61. On 23 March 2015, the Player was transferred from Ufa to Manchester City for a reported EUR 2,000,000. In light of this, Shakhtar submitted that the appropriate amount of compensation owed to it was now EUR 2,000,000, and further submitted that it was not limited to the amount of compensation initially requested before the FIFA DRC. Ultimately it was advancing the same claim it had before FIFA, but was asking for more. There was nothing in the Code or in CAS jurisprudence that stopped this.

62. However, should the CAS issue an award limiting the relief to that initially sought by Shakhtar before the FIFA DRC, Shakhtar requested that the CAS issue an award ordering the Player and Ufa to pay EUR 850,000 in compensation.

2) FIFA RSTP and the applicable law regarding valuation

63. Article 17.1 of the FIFA RSTP states as follows:

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

64. Shakhtar submitted that the purpose of Article 17 *"is to reinforce contractual stability, to strengthen the principle of 'pacta sunt servanda' in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations"*. In support of its position, Shakhtar referenced CAS 2008/A/1644.

65. Article 17 has traditionally been applied in a manner that has been appropriate in the circumstances of each particular case. The CAS has exercised wide discretion in calculating compensation. In support of its position, Shakhtar cited CAS 2008/A/1519-20, CAS 2008/A/1453-1469, and CAS 2006/A/1100. Historically, there have been three methods for which to calculate compensation under Article 17: the "residual value" of the contract, the "positive-interest" approach, and the "replacement player" methodology. Shakhtar submitted that the "positive interest" approach, i.e. to make Shakhtar whole as if the Player honoured his commitment with the club and did not unilaterally terminate the Contract without just cause, is the appropriate method for the calculation of compensation in the present matter. In support of its position, Shakhtar cited CAS 2008/A/1519-1520.

66. With respect to the type of amounts that may be recognised as a loss that must be compensated, Shakhtar submitted that it is generally recognised that the loss of earnings is a possible part of the damage caused by a unilateral termination of an employment contract without just cause. In support of its position, Shakhtar cited TAS 2005/A/902 and TAS 2005/A/903. Shakhtar further submitted that under the Swiss law of tort, the concept of loss and damage applies equally to damages and loss that are the result of a breach of contract pursuant to Article 99.3 of the Swiss Code of Obligations ("CO"), which states that *"In other respects, the provisions governing liability in tort apply 'mutatis mutandis' to a breach of contract"*.

3) The compensable loss

67. Further, the compensable loss it suffered, and which must be paid jointly and severally by the Player and Ufa, is the lost transfer fee that the breach of contract and the Player's subsequent behaviour caused.

68. Shakhtar submitted that *"when assessing the quantum of compensation in a case where there is a breach of contract without just cause the trier of fact must look to the entirety of the circumstances of the case including the degree of fault"*. In support of its position, Shakhtar cited TAS 2005/A/902 and TAS 2005/A/903. This approach is consistent with Swiss law - Articles 42 and 43.1 CO support this position.

69. Therefore, the compensation should be calculated on the basis of the loss of the eventual transfer fee that was caused by the Player, considering the following circumstances: the specificity of sport; the behaviour of the Player and the Player's Agent as an aggravating circumstance; the role of Ufa as an "intermediary club"; and the behaviour of Shakhtar.

a. Specificity of sport

70. Shakhtar cited CAS 2008/A/1519-1520 in support of its contention that the loss of a possible transfer fee can be considered compensable damage, particularly if there is a logical nexus between an unjustified termination of an agreement and the lost opportunity to realise a certain profit.

71. Shakhtar submitted that *"the specificity of sport, in relation to the transfer market and how clubs earn income, requires that players are viewed as assets"*. Further, it submitted it is a widely held view that the specificity of sport includes the global transfer market and player values. In support of this position, Shakhtar cited CAS 2007/A/1358 and CAS 2008/A/1568 as well as referred to previous jurisprudence in which Shakhtar submitted the CAS has applied a lost transfer fee in the calculation of compensation.

72. There exists *"two concrete possible transfers that were sabotaged by the Player and his agent, the fee paid by City in the amount of €2,000,000.00, and in the alternative the negotiation of the release of the Player between Shakhtar and Rubin that was in the neighbourhood of €500,000.00, and in the further alternative €100,000.00 …"*. Shakhtar submitted that *"these figures represent an objective and concrete valuation of the Player"*. At the hearing, Shakhtar stated that Rubin were looking to act "properly" by offering Shakhtar EUR 500,000 for the Player, before the Player's Agent moved him again to Ufa. This was clear evidence of his value at that time. Evidence was given by Mr. Palkin, Shakhtar's General Director, that the offer was made and this was confirmed by Mr. Gromov, who was advising Rubin's President at the time.

73. Shakhtar submitted that there is a nexus between the Player's unilateral termination of the Contract and the causation of damage suffered by Shakhtar from the loss of a potential transfer fee.

74. The investment into training and the realities of the transfer market are two factors relating to the specificity of sport. Shakhtar submitted that these factors exist in the present matter. The Player first joined Shakhtar's academy as a 13-year-old and the club invested in the Player's development. The Player developed into a talented youth international and in 2016, became the youngest player to score for the senior Ukraine national team. The benefits of developing a talented young player within its academy has escaped Shakhtar as a result of the Player unilaterally breaching the Contract without just cause. Shakhtar submitted that these are aggravating factors which must be taken into account in assessing the compensation payable.

b. The behaviour of the Player and the Player's Agent

75. Shakhtar submitted that the behaviour of the party that breached the contract with regards to the specificity of sport must be analysed. In support of its position, Shakhtar cited CAS 2008/A/1519-20.

76. Shakhtar noted the Player's position that he terminated the Contract due to the military hostilities in the Ukraine and his parents wishing to relocate to Russia. However, Shakhtar argued that the Player's position must be viewed within the context of the Player's Agent offering Shakhtar the opportunity to sign the Player to a new contract. The Player's Agent made the offer to extend the Contract on 14 May 2014, less than two months before the Player unilaterally terminated the Contract. The duration of the new contract was for two or three years. In the latter case, if the Player and Shakhtar had agreed to a new contract, it would have covered the period when the Player signed with Manchester City. Shakhtar submitted that *"This timing aspect, regarding City, Ufa, or Rubin, implies that it would have overlapped during that time period, demonstrates the connection between the breach and the lost compensation"*.

77. Shakhtar submitted that it was *"a happy coincidence"* for the Player that the military hostilities began shortly after Shakhtar rejected the unrealistic offer from the Player's Agent. The welfare of the players were not in danger, but the Player, through his Agent, used the hostilities as an excuse to opportunistically terminate the Contract. It was the Player's intention to get out of the Contract all along, and this was not a justifiable reason to terminate a contract. Rather, it is an aggravating factor when considering the calculation of compensation. Shakhtar cited Article 32.1 CO in support of its position that the Player is responsible for the actions of his agent.

78. Shakhtar noted that at the time the Player unilaterally terminated the Contract, he was seventeen years old and wished to move to Russia from the Ukraine. Article 19 of the FIFA RSTP prohibits the transfer of minors, and Shakhtar submitted that it is suspicious that the Player was not immediately registered by a Russian club under Article 19(2)(a), which permits the international transfers of minor players where the player's parents move to a country in which the new club is located for reasons not linked to football. The Player stated that the move to Russia was the military situation in the Ukraine, i.e. a reason not linked to football. Shakhtar submitted that the real reason for the Player unilaterally terminating the Contract *"was to find the Player first team football and a pay raise"*. It was not only suspicious, but telling of the Player's true intentions that he was only registered with Ufa after his eighteenth birthday.

c. The role of Ufa as an "intermediary club"

79. That the Player joined Ufa was not a coincidence, as the Player's Agent *"has deep links to this club"*. Shakhtar submitted that the Player's Agent *"was attempting to intentionally orchestrate the transfer of the Player to a large European club through Ufa"*. The Player's Agent, himself a former footballer, was born in Ufa and currently represents at least four players who play for Ufa. At the hearing, Shakhtar went further, alleging that Ufa had acted as a "bridge" club for Manchester City.

80. Shakhtar further submitted that Ufa's offer of EUR 100,000 on 21 January 2015 was made *"for the purposes of securing the Player in order to execute a profitable transfer with a large European club, as Ufa and the Agent were publicly shopping his services and speaking to the media about it shortly thereafter"*.

d. The behaviour of Shakhtar

81. Shakhtar submitted that its own behaviour should be considered in the assessment of the considerations raised under Article 17 of the FIFA RSTP.

82. Shakhtar submitted that its refusal of the contract offer received from the Player's Agent on 14 April 2014 was reasonable, as the entire budget for the U19 team's salaries was just USD 73,000 for the 2013/14 season. The contract offer received from the Player's Agent stipulated monthly wages for the Player, then seventeen years old, between USD 5,000 and USD 9,000 plus a fee of USD 200,000 for the Player's Agent.

83. It continuously expressed the desire to have the Player return to the club and provided a number of pieces of correspondence with the Player, the Player's Agent, Ufa, and Rubin Kazan in support of its position. Shakhtar submitted that it *"engaged in amicable settlement negotiations with Rubin to attempt to conclude this matter"* and attempted to negotiate with Rubin Kazan over the transfer of the Player.

84. Had the Player acted in good faith and expressed his concern with the political situation in the Ukraine, it is more than likely that Shakhtar would have taken the Player's concern seriously and worked to find an amicable solution. In support of its position, Shakhtar submitted that in July 2014, when the Player terminated the Contract, six other Shakhtar players refused to return to the Ukraine, citing safety concerns. Shakhtar immediately addressed the situation by explaining to the players that the club was moving its facilities to a safe location and that the players would not be near the conflict. Each of the six players returned to the club, honouring their contractual obligations, and subsequently, Shakhtar agreed to transfer or loan four of the six players in accordance with their wishes. The other two players, at the time Shakhtar's Appeal Brief was filed, continued to play for Shakhtar without incident.

85. In conclusion, Shakhtar submitted that EUR 8,000 does not maintain contractual stability – the Panel should increase the amount of compensation accordingly.

ii. The protected period and applicable sanctions

86. Shakhtar submitted that the FIFA DRC erred in refusing to impose sanctions on either the Player or Ufa. It was uncontested that the Player unilaterally terminated the Contract without just cause and that this occurred during the protected period. Article 17.3 and 17.4 of the FIFA RSTP are clear in that it requires that sporting sanctions be imposed in the case of a player is found to be in breach of contract during the protected period, and further, in the case of a club found to be inducing a breach of contract during the protected period.

87. Shakhtar submitted that FIFA has a duty to impose sporting sanctions, yet it did not address the issue of sanctions, and Shakhtar submitted that the literal wording of Article 17 requires that the sanction be automatically applied, and if it is not, exceptional circumstances must be cited to avoid the applicability of this sanction.

88. Should the Panel adopt the principle that the applicable sanctions contained in Article 17 of the FIFA RSTP are to be imposed only in exceptional circumstances, Shakhtar submitted that *"there are a sufficient number of aggravating circumstances to impose the sanctions as requested"*.

89. For the reasons listed above, Shakhtar submitted that the Player should receive a four-month ban on playing in official matches, and further, that Ufa should be banned from registering new players for two consecutive registration periods.

B. The Player's and Ufa's Joint Submissions

90. In summary, the Player and Ufa submitted the following in support of their defence.

i. Compensation for breach of contract

1) The principle of positive interest

91. The Player and Ufa submitted that Article 17.1 of the FIFA RSTP *"requires the Panel to first verify whether there is any provision in the Shakhtar Contract that does address the consequences of a unilateral termination/breach of the Shakhtar Contract by the First Respondent"*. In support of this position, the Player and Ufa cited CAS 2006/A/1152, CAS 2008/A/1519 & 1520, and CAS 2009/A/1909.

92. Article 7.3 of the Contract does address the consequences of a unilateral breach. The Panel should apply Article 7.3.2 in determining the compensation owed to Shakhtar as a result of the Player breaching the Contract, rather than the principle of "positive interest", which is not expressly designated by the Parties in Article 7.3 of the Contract. Additionally, the principle of positive interest has no legal basis in Article 17 of the FIFA RSTP.

93. The real intent of the parties *"was to have the compensation for breach of contract in case of unilateral termination of the Shakhtar Contract without just cause by either party calculated based only on the criteria stipulated in the RSTP, derogating from the rules and principles of any national law (be it Ukrainian or Swiss law, both of which are mentioned in Clause 8.3 of the Shakhtar Contract). In fact, Clause 7.3 of the Shakhtar Contract is to be considered as the parties' own lex specialis, in principle prevailing over other, more general*

clauses, contained in the Shakhtar Contract or other, more general, sources of legal obligations for the parties, including, but not limited to, Clause 8.3 of the Shakhtar Contract and Art. 57 par. 2 of the FIFA Statutes (lex specialis derogate legi generali), with the consequence that the Panel is prevented from applying any rules or principles of national law (such as Ukrainian law, Swiss law and the principle of positive interest) in determining the compensation due to the Appellant".

94. The Player and Ufa submitted that it is illogical that Shakhtar would conclude that the Parties have decided to derogate from the application of Ukrainian law, but not Swiss law. If the Parties had intended to do so, then this would have been explicitly stipulated in Article 7.3 of the Contract. Further, since the revision of the CAS Code in 2013, Swiss law only now applies "subsidiarily". Article 17 of the FIFA RSTP is clear, there are no gaps that need to be filled by Swiss law.

95. To further support its position that the principle of positive interest should not apply to the present proceedings, the Player and Ufa cited several pieces of CAS jurisprudence, most prominently CAS 2007/A/1298, 1299 & 1300, in addition to a report written by the head of legal at FIFPro, which he was examined upon during the hearing.

2) The calculation of compensation

96. The Player and Ufa submitted that the appropriate calculation of compensation for the Player's breach of the Contract should take into account the Player's remuneration under both the Contract and the contract the Player signed with Ufa, for a period equating to the time remaining under the Contract.

97. The Player and Ufa submitted the time remaining on the Contract was 12 months (i.e. until 30 June 2015) and the Player would have received UAH 60,000 during this period under the Contract (i.e. 12 months x UAH 5,000 per month). Under the contract the Player signed with Ufa (i.e. from 1 February 2015 until 30 June 2015), the Player would have received UAH 168,300 (i.e. 5 months x UAH 33,660 per month). The total compensation owed to Shakhtar therefore, is UAH 114,150 (i.e. [UAH 60,000 + UAH 168,300] / 2).

98. While the appropriate compensation is UAH 114,150, the Player and Ufa acknowledged that because they did not challenge the Appealed Decision, the Panel is precluded from granting Shakhtar a compensation amount of less than UAH 232,000. Consequently, the Player and Ufa submitted that the Appealed Decision should be confirmed by the Panel.

3) Shakhtar's claim for EUR 2,000,000

99. The Player and Ufa submitted that neither Article 7.3.2 of the Contract nor Article 17.1 of the FIFA RSTP provide any legal basis for a claim for compensation based on the loss of an eventual transfer fee. Even if the Panel decides to apply Swiss law and the principle of positive interest, Shakhtar would still not have any legal basis to claim compensation based on the loss of an eventual transfer fee. The Player and Ufa cited TAS 2007/A/1314 in support of this position.

100. The Player and Ufa submitted that the Player terminated the Contract on 3 July 2014 and Shakhtar filed its claim for EUR 2,000,000 for the first time before the CAS on 7 February 2017, i.e. more than two years after the event giving rise to the dispute occurred. Therefore, Shakhtar's claim for EUR 2,000,000 is time-barred and inadmissible.

101. The transfer of the Player to Manchester City occurred one year after the original expiration date of the Contract, i.e. 30 June 2015. Furthermore, Shakhtar did not provide the CAS with any evidence that it had received an offer from Manchester City in respect of the Player's transfer. Therefore, Shakhtar has not established *"the necessary logical nexus between the unjustified termination of the Shakhtar Contract and a lost opportunity to realize a certain profit by transferring the First Respondent to Manchester City FC for a transfer fee"*.

102. As there are many variables, in particular the Player's performance and the experience he gained with Ufa, that influenced the Player's value, there is no reason to think that Shakhtar could have otherwise been able to sell the Player for EUR 2,000,000 during the 2015 winter transfer window.

4) Shakhtar's claim for EUR 850,000

103. The Player and Ufa submitted that Shakhtar's original claim for EUR 850,000 before FIFA was based on the alleged transfer fee paid for another seventeen-year-old player who was transferred from Russia in 2010. That player's specific circumstances are unknown, as Shakhtar did not provide any evidence. There is no logical nexus between that player's transfer and the Player's breach of contract, which occurred four years later. The Player and Ufa submitted that Shakhtar has since renounced that claim, but still claim EUR 850,000 based on the Player's transfer to Manchester City in July 2016. The Player and Ufa further submitted that because this is a brand new claim which was not raised before FIFA, it should be dismissed.

5) Shakhtar's claim for EUR 500,000

104. The Player and Ufa submitted that Shakhtar's claim for EUR 500,000 *"falls outside of the scope of the present appeal and has thus to be rejected by the Panel without further consideration"*. Shakhtar failed to submit a single piece of evidence proving that Shakhtar and Rubin Kazan were ready to conclude a deal for the transfer of the Player for EUR 500,000. To the contrary, the evidence provided by Shakhtar clearly shows that the two clubs were never close to any deal, let alone a deal worth EUR 500,000.

105. The only pieces of evidence Shakhtar submitted as relates to its claim for EUR 500,000 are the testimonies of Mr. Vadim Shabliy and Mr. Andrey Gromov. Neither testimony states that Rubin Kazan was ready to pay Shakhtar EUR 500,000. There were merely "without prejudice" discussions.

6) Shakhtar's claim for EUR 100,000

106. Ufa's offer to pay Shakhtar EUR 100,000 on 21 January 2015 *"was for the final settlement of all (financial) claims from the Appellant against the First and Second Respondents, including, but not limited to, claims for compensation for breach of contract and training compensation"*. Shakhtar rejected this offer on 22 January 2015.

107. On 18 August 2016, the FIFA DRC directed Ufa to pay Shakhtar EUR 142,500 plus interest for training compensation. This amount was paid on 22 November 2016. As the amount Ufa had already paid to Shakhtar was more than its original offer of EUR 100,000, to award Shakhtar an additional EUR 100,000 would be tantamount to unjust enrichment.

7) Specificity of sport

108. The Player and Ufa rejected Shakhtar's position that the specificity of sport doctrine allows for compensation to be increased on this basis. Rather, the specificity of sport doctrine is an element to be taken into consideration to decrease the compensation to be paid in accordance with Article 17.1 of the FIFA RSTP.

109. In conclusion, the Player and Ufa rejected Shakhtar's arguments as to the elements of the specificity of sport doctrines.

8) Shakhtar's behaviour

110. At the hearing, they explained how the Player had been dropped from the U19 team, as he refused to sign a contract extension with Shakhtar on similar, low terms. His counter-offer by the Player's Agent was rejected. The Player was side-lined for 6 months, playing only in 1 Champions League game. Despite the Player's mother notifying the club of her concerns, no one responded to her or even told her that the club was moving its headquarters. This was the context behind the Player's termination.

111. It was 9 months after that Shakhtar made a claim at FIFA. It was clear that it placed no value on the Player's services, following the jurisprudence in CAS 2014/A/3642 and CAS 2015/A/4352 they should have nothing to be compensated for.

ii. Sporting sanctions

112. The Player and Ufa argued that Shakhtar's request that sporting sanctions be imposed upon them should be rejected due to lack of standing to sue. In support of this position, the Player and Ufa cited several pieces of CAS jurisprudence.

113. Additionally, the Player and Ufa submitted that Shakhtar has not proven the existence of extraordinary circumstances that would require the imposition of sporting sanctions, and further, that the parties to the Contract freely determined the consequences of its unjustified

breach in Article 7.3. As Shakhtar did not contractually reserve the right to request the imposition of sporting sanctions, it tacitly renounced such right.

C. FIFA's Submissions

114. In summary, FIFA submitted the following in support of its defence.

i. The Appealed Decision

115. FIFA submitted that the FIFA DRC's conclusion that the Player had prematurely terminated the Contract without just cause is undisputed within the scope of the present procedure, and therefore does not need to be further addressed by the Panel. The FIFA DRC found that the political situation in the Ukraine was not, by itself, sufficient grounds to justify the Player's premature termination of the Contract. FIFA submitted that this is not contested by Shakhtar. Rather, Shakhtar is merely challenging the consequences of the Player's breach, namely the amount of compensation awarded to Shakhtar and the fact that the FIFA DRC did not impose sporting sanctions on either the Player or UFA.

ii. Compensation for breach of contract

116. The FIFA DRC was in compliance with Article 17.1 of the FIFA RSTP when calculating the compensation due to Shakhtar. When it calculated the compensation due to Shakhtar as a result of the Player breaching the Contract without just cause, it first took into consideration that the Contract contains, in Article 7.3.1 and 7.3.2., clauses regarding the consequences of a unilateral termination without just cause by either of the Parties. These clauses refer to the FIFA RSTP, which the FIFA DRC interpreted as a reference to Article 17 of the FIFA RSTP. FIFA submitted that the FIFA DRC, *"using its scope of discretion",* calculated the compensation for breach of contract in light of Article 17.

117. The FIFA DRC took into account the Player's remuneration due under the Contract, starting from the date of the breach until the original expiry of the Contract. Between July 2014 and June 2015, the Player was due UAH 60,000. The FIFA DRC then compared this amount against the remuneration the Player would receive with his new club, Ufa. The FIFA DRC found that the Player was due to receive UAH 403,920 between July 2014 and June 2015.

118. The FIFA DRC then averaged the two remuneration figures and established that the Player's average remuneration at the time the breach of the Contract occurred amounted to UAH 232,000. FIFA submitted that *"this figure is based on the only objective elements it had at its disposal to assess the extent of the Respondent's damage resulting from the breach of contract without just cause by the player".*

119. FIFA submitted that Shakhtar's allegations regarding the Player's value, i.e. the amount of EUR 850,000, was not corroborated by any evidence whatsoever. As a result the FIFA DRC decided to award Shakhtar the amount of UAH 232,000 as compensation, plus 5% interest *p.a.* on said

amount. Additionally, the FIFA DRC held Ufa jointly and severally liable for the payment of compensation.

120. FIFA submitted that Shakhtar's arguments in respect of its claim for an increased amount of compensation were merely based on allegations and speculation and were not supported by objective evidence. While FIFA agreed that the Player's value has increased since leaving Shakhtar, it submitted that *"the question which needs to be answered here is whether the Appellant can successfully demonstrate, based on objective elements, that the player's current value was already the same at the time he breached the contract with the Appellant and whether, as a consequence, this would be the extent of the Appellant's damage resulting from the said breach"*.

121. FIFA noted Shakhtar's argument that the compensation should be calculated on the basis of the loss of the eventual transfer fee that was caused by the Player, considering the following circumstances: the specificity of sport; the behaviour of the Player and the Player's Agent as an aggravating circumstance; the role of Ufa as an "intermediary club"; and the behaviour of Shakhtar. However, FIFA rejected this argument.

122. As to the specificity of sport, FIFA submitted that Shakhtar *"relies on the fact that it allegedly lost a chance to transfer the player for the amount of EUR 2,000,000 (the amount which Manchester City paid to the second Respondent for the transfer of the player in summer 2016, i.e. two years after the breach of contract), alternatively EUR 500,000 (the amount which, allegedly, Rubin Kazan had offered to pay to the Appellant for the transfer of the player in summer 2014)"*.

123. FIFA submitted that it is unreasonable to expect that Shakhtar would have successfully transferred the Player for the amount of EUR 2,000,000 at the time of the breach in July 2014. The Player was only transferred to Manchester City for that amount two years later, when the Contract between the Player and Shakhtar would have expired. Additionally, Shakhtar has not presented any evidence to support the existence of the alleged offer made by Rubin Kazan in the amount of EUR 500,000. As Shakhtar has not discharged its burden of proof, this allegation must be rejected.

124. FIFA also rejected Shakhtar's argument that Ufa's offer of EUR 100,000 should be taken into consideration. Shakhtar rejected the offer, and *"thus it cannot be established that this specific amount is to be considered as a proper and objective reflection of the player's value at time of breach"*. Shakhtar also failed to mention that it had already been awarded training compensation pursuant to a decision rendered by the FIFA DRC, on 18 August 2016. This decision had become final and binding and was an award in the amount of EUR 142,500 plus interest.

125. FIFA submitted that in accordance with Article 17.1 of the FIFA RSTP, *"training compensation, which is a specific mechanism aiming at rewarding club's investment in player's education and training, is to be deemed as separate from the compensation for breach of contract. Consequently, the Appellant cannot, under the wide concept of the specificity of sport, include the fact that it invested in the training and development of the player"*.

126. As to the alleged behaviour of the Player and the Player's Agent, FIFA submitted that these allegations are not corroborated by any evidence, and as such, cannot be taken seriously.

127. FIFA noted Shakhtar's position as relates to its own behaviour in this matter. However, FIFA submitted that Shakhtar's refusal to accept the Player's offer for an extension of the Contract is contradictory to Shakhtar's position. That Shakhtar simultaneously submitted that the Player's offer was not commensurate with the valuation of a 17-year-old player who was eligible to play for the U-19 team for another two years while also valuing the player at EUR 2,000,000 is untenable. FIFA further submitted that *"… to assert, repeatedly, that the player's offer was not reasonable, while saying that it would have been willing to accommodate the player had he approached the situation in good faith is not at all credible"*.

iii. Sporting sanctions

128. FIFA noted Shakhtar's argument that the FIFA DRC erred in refusing to impose sanctions on either the Player or Ufa. However, FIFA rejected these arguments.

129. FIFA submitted that no rule of law, either in the FIFA RSTP or elsewhere, allows Shakhtar to request that a sanction be pronounced. Further, FIFA submitted that *"a third party like the club victim of the breach of contract has no legally protected interest and therefore no standing to require that a sanction be imposed upon the player and/or the new club that hired the player"*. In support of its position, FIFA cited CAS 2014/A/3707.

130. Should the Panel not follow FIFA's reasoning, FIFA submitted that, in any case, Shakhtar's argument regarding the imposition of sporting sanctions must be rejected. Article 17.3 of the FIFA RSTP provides a competent decision-making body, such as the FIFA DRC, with *"the power, but by no means the obligation to impose a sporting sanction on a player found to be in breach of contrat without just cause during the protected period"*. FIFA submitted that the FIFA DRC has free discretion on whether to impose the sporting sanctions provided for under Article 17.3 depending on the specific circumstances of each particular case. The FIFA DRC is permitted to *"decide not to impose such sporting sanctions if it deems that, in view of the specific situation given in the case at stake and the considerable impact of the relevant sporting sanctions, the imposition of such sanctions would be excessive and inappropriate"*. In support of its position, FIFA cited CAS 2007/A/1359.

131. As applied to the Appealed Decision, FIFA submitted that the FIFA DRC properly took into account the specific circumstances of the matter and refrained from imposing a sporting sanction on the Player. In particular, the FIFA DRC took into account that the Player was a minor at the time he breached the Contract in addition to taking into account, *"to a certain extent"*, the political situation in the Ukraine.

132. Similarly, FIFA submitted that the FIFA DRC was correct in refraining from imposing a sporting sanction on Ufa. FIFA cited Article 17.4 of the FIFA RSTP, which states, in relevant part:

> *"[…] It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach"*.

133. FIFA submitted that *"in other words, a club which has signed a professional who terminated his previous contract without just cause will have to prove that it did not induce the player to breach the said contract"*. FIFA further submitted that Ufa discharged that burden of proof.

134. For the reasons listed above, FIFA submitted that none of Shakhtar's arguments can be sustained. As a result, the conclusion reached by the FIFA DRC must be fully confirmed.

V. JURISDICTION OF THE CAS

135. Article R47 of the CAS Code provides as follows:

> *"An appeal against a 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 him prior to the appeal, in accordance with the Statutes or regulations of that body"*.

136. The jurisdiction of the CAS, which is anyway not disputed by the Parties, derives from Article 67(1) of the FIFA Statutes (2015 edition) as it determines that:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"*.

137. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

138. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

139. The Statement of Appeal, which was filed on 9 January 2017, complied with the requirements of Articles R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

140. It follows that the Appeal is admissible.

141. The Player and Ufa objected to certain press articles, pages from Wikipedia, a written statement from Mr. Gromov and some correspondence between Shakhtar and Manchester City, all of which Shakhtar had exhibited to its Appeal Brief. The basis of their objection was that none of these had been filed before the FIFA DRC and had not been taken into consideration by it. They referred to Article R57(3) of the CAS Code and to CAS 2013/A/3286-3294 and CAS 2015/A/4220 and alleged bad faith on Shakhtar's behalf.

142. Shakhtar responded by saying that this information had not been available before the investigatory phase at FIFA had closed.

143. The Panel noted that the majority of the exhibits related to the Player's subsequent move to Manchester City. That move occurred after the investigatory phase at FIFA had closed, but before the FIFA DRC sat to take the Appealed Decision. However, some of the evidence (such as the correspondence with Manchester City) was after the hearing date. Further, Shakhtar had already made an unsolicited submission to the FIFA DRC after the investigatory phase had closed, but before it sat to take the Appealed Decision.

144. The Panel notes that Article R57(3) of the CAS Code provides it with a discretion. The Panel can allow such evidence even if it was available before the FIFA DRC hearing. The jurisprudence cited by the Player and Ufa and in this area in general, shows a trend to allow such evidence, unless there was an element of bad faith by the party now looking to advance that evidence.

145. The Panel saw no such bad faith in the case at hand and the exhibits were deemed admissible. The Player's move to Manchester City was a month before the FIFA DRC hearing and 10 months after the investigatory phase was declared closed. It was not clear that Shakhtar knew about the transfer at the date the FIFA DRC sat. Whilst Shakhtar had made an unsolicited submission between those dates, it was not made clear to Shakhtar whether or not the FIFA DRC would take such submissions into account.

146. The Panel also suspects that if Shakhtar had been aware of the information around the Manchester City transfer, it would have put the same before the FIFA DRC, as it only acts to increase the amount being claimed by it.

147. With regard to Mr. Gromov's statement. Whilst one might not have been provided to the FIFA DRC, the CAS procedure offers a full hearing and pursuant to Article R51 of the CAS Code, an appellant can either provide a brief summary of any witness' testimony or a written statement. This too was deemed admissible by the Panel.

VII. APPLICABLE LAW

148. Article R58 of the CAS Code provides the following:

> *"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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

149. Shakhtar submitted that the applicable laws governing this matter are the 2012 edition of the FIFA RSTP and related FIFA regulations. The FIFA DRC erred in applying the 2014 edition of the FIFA RSTP in the Appealed Decision. However, as Article 17 of the FIFA RSTP is identical in both the 2012 and 2014 editions of the FIFA RSTP, Shakhtar did not challenge the Appealed Decision on this basis.

150. As Shakhtar's claim before the FIFA DRC was filed on 23 March 2015, Shakhtar submitted that the 2014 edition of the FIFA Statutes are applicable, as the 2015 edition only came into force as of 1 April 2015.

151. Shakhtar submitted that, Swiss law will apply when any legal aspect is not covered by the aforementioned FIFA regulations, subsidiarily. In support of this position, Shakhtar cited Article 66(2) of the FIFA Statutes and Article R58 of the CAS Code.

152. Shakhtar submitted that Ukrainian law is not applicable to this matter. Shakhtar noted the Contract, which states as follows:

> *"8.3. The present Contract shall be governed by and construed and interpreted in accordance with the FIFA Regulations on the Status and Transfer of Players and to Swiss law and to the extent compatible with law of Ukraine".*

153. Despite Article 8.3 of the Contract referring to Ukrainian law, Shakhtar submitted that Article 7.3.2 of the Contract is clear in that if the Player unilaterally terminates the Contract, compensation shall be calculated in accordance with Article 17 of the FIFA RSTP. Further, Article 7.3.2 does not identify any applicable national law as relates to the issue of compensation.

154. Shakhtar submitted that since Ukrainian law was specifically referenced in Article 8.3 of the Contract, if the parties had intended Ukrainian law to apply to the issue of compensation, it would have been explicitly referred to in Article 7.3.2 of the Contract as well.

155. The Player and Ufa agreed that the FIFA Regulations (the FIFA RSTP, edition 2014) should apply on a primary basis. Although the choice of law clause in the Contract referred to such regulations *"and"* Swiss law, and Article 57(2) of the FIFA Statutes refers to *"additionally"* Swiss law, Article R58 of the CAS Code (which was changed in 2013) is clear – Swiss law only applies *"subsidiarily"*. They further agreed that Ukrainian law was not relevant in the case at hand.

156. FIFA did not make any specific submissions on the applicable law.

157. Ultimately, the Panel notes that there was a general agreement between the Parties that the various regulations and statutes of FIFA would apply, with Swiss law applying on a subsidiary basis. The Panel shares this view.

VIII. LEGAL DISCUSSION

A. Scope of review

158. The Panel notes that Shakhtar's claim before the FIFA DRC was for EUR 850,000, yet before the CAS it was now for EUR 2,000,000. The Player and Ufa objected to this, submitting that there are some general limits to the Panel's full power of review. In support of this position, the Player and Ufa cited CAS 2007/A/1396 & 1402, CAS 2012/A/2874, CAS 2013/A/3314, CAS 2014/A/3640, and CAS 2015/A/4122.

159. The Player and Ufa cited CAS 2012/A/2874, which said that *"the scope of the appeal is limited to the issues arising from the Appealed Decision, i.e. amended claims may not go beyond the scope and the amount of the previous litigation. Hence, any new claim, which was not submitted to the DRC and for which there is no legitimate reason not to have been advanced in the previous litigation, should be rejected by the Panel as inadmissible"*.

160. The Player and Ufa submitted that, pursuant to Article 8 of the Swiss Civil Code, Shakhtar bears the burden to prove that these new claims for compensation could, for legitimate reasons, not have been advanced to the FIFA DRC, but were likely to have been claimed in the absence of such legitimate reasons at that time, and should therefore be considered admissible by virtue of falling under the Panel's *de novo* power.

161. The Player and Ufa submitted that, *inter alia*, Shakhtar failed to meet this burden, as it could have submitted evidence to support these new claims for compensation before the FIFA DRC issued the Appealed Decision on 18 August 2016. The Player and Ufa recognise that FIFA informed the parties that the investigation phase of the proceedings was concluded on 16 September 2015, but pointed out that Shakhtar sent unsolicited correspondence to FIFA at multiple instances after 16 September 2015. Therefore, there was nothing preventing Shakhtar from submitting pieces of the evidence it only now submitted to the CAS to FIFA prior to 18 August 2016. Additionally, regarding the evidence Shakhtar gathered after 18 August 2016, the Player and Ufa submitted that had Shakhtar exercised due diligence, Shakhtar would have been able to gather and submit this evidence to FIFA prior to 18 August 2016.

162. In support of its position, Shakhtar cited Article 182 of the Swiss Federal Code on Private International Law ("PILA").

163. Shakhtar submitted that Article 182 of the PILA requires an analysis of the applicable FIFA Regulations and the CAS Code. Shakhtar cited CAS 2008/A/1644 as an example of how the CAS has interpreted the application and limitations imposed by Article R57 of the CAS Code. Shakhtar submitted that should the CAS increase the amount of compensation awarded, as Shakhtar requested, the CAS would not be in violation of the *"ne eat iudex ultra petita partium"* principle (*"ultra petita"*) as it manifests itself in Article R57 of the CAS Code. The applicable limitation imposed by Article R57 of the CAS Code is the relief that is requested before the CAS and not what was initially requested before a FIFA body.

164. Following a discussion of Article R57 of the CAS Code and relevant portions of the FIFA Statutes and the FIFA Disciplinary Code ("FIFA DC"), Shakhtar submitted that *"there is no FIFA regulation specifying that the CAS does not have the ability to issue an award that grants something that the FIFA DRC did not, or that was not requested at that time"*. Shakhtar further submitted that the CAS issuing an award in excess of the amount requested before the FIFA DRC would not violate the PILA either. In support, Shakhtar submitted that *"FIFA judicial bodies are not arbitral tribunals but are considered to be dispute resolution bodies"*.

165. FIFA submitted that Shakhtar's claim for compensation in the amount of EUR 2,000,000 is inadmissible. FIFA cited CAS 2012/A/2874 and CAS 2015/A/3993 in support of its position that a request made in front of the CAS, which was not made in front of the FIFA DRC must

be declared inadmissible, as it goes beyond the scope and the amount in dispute in the previous litigation that resulted in the Appealed Decision.

166. The Panel notes these counter arguments. The basic claim by Shakhtar is that the Player has breached the Contract without just cause, so it wants to be compensated. The Panel notes that the basic claim has not changed between FIFA and CAS. That said, the quantum of the claim has changed.

167. This is not perhaps as new an issue as the parties make out. In cases involving a breach of the employment contract between a player and a club, they are first dealt with at FIFA and then some are appealed and later considered by the CAS. Often, if it is the club that has breached without just cause, an issue to be considered by both FIFA and then CAS is the player's mitigation. Often the CAS will have more up to date information regarding the player's career post-termination than would have been available to FIFA. The jurisprudence is that the most accurate information is taken into account, as part of the *de novo* process and often the player's compensation is reduced. The case at hand is the mirror opposite. Further information has come to hand for the Panel to consider that increases the claim, rather than decreases it.

168. The Panel notes that in the case cited by Shakhtar (CAS 2012/A/2874) there was a breach of the employment contract between a player and a club. The Panel in that case allowed an increase in the basic claim for compensation, as it was able to see that an event that triggered a bonus had been satisfied by the time the appeal was heard at CAS, when it had not been so triggered by the time the matter was heard at FIFA.

169. The restrictions on the Appellant in the case at hand would be if it sought to make a fresh claim before the CAS, but the Panel is satisfied that the basic claim is simply for compensation for breach of contract and has not changed since that was made at FIFA.

170. The further issue is whether under Article R57.3 of the CAS Code, the Panel should disallow any new evidence that has been advanced to CAS and was not advanced at FIFA in support of this basic claim. In the case at hand, the Panel had taken the decision to allow this evidence to the CAS file (see para. 141 *et seq.* above). This decision was based on the fact that while the move of the Player may have been known to Shakhtar before it received the Appealed Decision and, in theory, it could have written to FIFA to alert it of this fact, the investigatory phase had been closed by this stage. Shakhtar had, as the Player and Ufa pointed out, made other unsolicited submissions to FIFA after that closing date, but had been told that it should not have and that the submission might not even be considered; the Panel has no information as to what public information was/was not available to Shakhtar at that time – the Player and Ufa state that it should have carried out further due diligence, but then provide the Panel with no examples of what it could/should have done. Finally, the Panel sees no bad faith or malice on the part of Shakhtar – if it had the information regarding the Manchester City move, it surely would have advanced it to FIFA, there would be no advantage in holding that back for use at a possible appeal to the CAS.

B. Merits

171. The Panel observes that the main issues to be resolved are:

a) How to calculate the compensation for the breach of the Contract; and

b) Whether to apply sporting sanctions or not.

172. On the face of it, the issues are limited in the matter at hand, however, the question of how to calculate compensation for the breach of a playing contract by a player without just cause has been the basis of many legal conferences and academic papers over the years.

173. The relevant provision of the FIFA RSTP in this regard is Article 17 para. 1, which reads as follows:

"Article 17 Consequences of Terminating a Contract without Just Cause

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

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

174. The Panel notes the positions of the parties here. The Player and Ufa brought the evidence from FIFPro supporting the point of view taken by CAS 2007/A/1298-1300 (i.e. that the balance of the remuneration of the Player from the Contract should be the basis of compensation for Shakhtar – the "residual value" method). FIFA supported its Appealed Decision, which took the average of the salaries of the Player under the Contract and the Ufa Contract; while Shakhtar advanced the Swiss law "positive interest" position as seen from the CAS 2008/A/1519-1520 point of view, whereby the injured club should be put back in the position it would have been if not for the breach of contract. Shakhtar also noted that CAS panels have a wide discretion in such matters whether to follow the positive interest method, the method applied in CAS 2007/A/1298-1300, or, indeed, to look at actual losses suffered by the injured club (the "replacement value" method, as Shakhtar labelled it) and apply the method applied in CAS 2010/A/2145-2147.

175. In this regard, the Panel refers to the case CAS 2008/A/1519-1520 which examines the purpose of Article 17 of the FIFA RSTP, noting the following:

"82. The deterrent effect of art. 17 FIFA Regulations shall be achieved through the impending risk for a party to incur disciplinary sanctions, if some conditions are met (cf. art. 17 para. 3 to 5 FIFA Regulations), and, in any event, the risk to have to pay a compensation for the damage caused by the breach or the unjustified

termination. In other words, both players and club are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of art. 17 FIFA Regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in para. 1 of said article that, based on the circumstances of the single case, the panel will consider appropriate to apply".

176. The CAS panel in the case CAS 2008/A/1519-1520 went on further to consider how to deal with this non-exclusive list of criteria:

"The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence. Already for this reason, this Panel does not feel itself bound by the alleged existence of an internal "list" established, apparently – on the basis of what the parties have exposed during the hearing – by some members of the FIFA DRC in order to help the DRC to set some fix, standard amounts when compensation is due. First, it has remained undisputed among the parties that such a "list" is not part of any official FIFA rule or regulation and that it does not have any binding nature. Furthermore, should the DRC have applied in the past such "list", secretly or openly, to establish the amount of compensation in the meaning of art. 17 para. 1 of the FIFA Regulations, this would have been in deviation of the clear mandate given to the judging authority by art. 17 para. 1 FIFA Regulation itself, i.e. to establish on a case-by-case basis the prejudice suffered by a party in case of an unjustified breach or termination of contract, with due consideration of all elements of the case including all the non-exclusive criteria mentioned in art. 17 para. 1 of the FIFA Regulations".

177. The Panel notes that, should the parties have decided not to include some form of liquidated damages clause in the Contract, there are many factors that it is to consider under Article 17, such as the law of the country concerned, the specificity of sport and any other objective criteria. That latter factor is not limited, but includes the salaries under the old and new player contracts, the time left on the old contract, the unamortised transfer and other fees paid for the player by the old club and whether the breach occurred within the protected period or not.

178. There is no reference to replacement costs, lost transfer fees or lost opportunities in Article 17 itself, but the Panel notes that other CAS panels (in cases such as CAS 2008/A/1519-1520, CAS 2009/A/1880 & 1881, to name a few) have determined that this is within *"any other objective criteria",* as referred to in Article 17. For lost transfer fees, these are not ruled out in those cases but a "logical nexus" is required.

179. However, where the transfer value comes into play is when the positive interest method is utilised as it was in the case CAS 2008/A/1519-1520. A simple summary of this method is that if a player terminates his contract with his old club and joins a new club, then, using the Swiss principle of positive interest, the old club must be restored to the position it was in prior to the breach. As such, a virtual replacement player needs to be found for the old club. If the player is worth EUR 5m at the time of the breach to sign a 5 year contract with a new club, then the transfer fee for his virtual replacement would be EUR 5m too. If his salary at the new club is EUR 1m pa, then this is what the old club would have to pay the virtual replacement player. If there were two years left on the old contract, then the cost (or value of the services) of the virtual replacement player would be 2 x EUR 1m, for the transfer fee to acquire him, add 2 x

EUR 1m to pay his salaries, but deduct what the old club saves by not having to pay the salaries of the actual player (say EUR 1m over 2 years), giving compensation of EUR 3m.

180. The position taken by CAS 2007/A/1298-1300 for this same example is simple. The compensation is the player's remaining salary on his old contract for the 2 years, so in this example, EUR 1m. There is no need to consider any unamortised transfer fees paid by Shakhtar, as the Player was a youth player for whom no transfer fee was paid.

181. The issues for the Panel are (a) is it obliged to follow one method or another; and (b) if so, which one?

182. The position of Shakhtar is clear. The Panel has a wide discretion, but it submits it should be following the positive interest, case CAS 2008/A/1519-1520 methodology, and should take into account the value Manchester City placed on the Player. If not that, then, in the alternative, the value of a like player (EUR 850,000); in the further alternatives, the amounts Rubin (EUR 500,000) or Ufa (100,000) were willing to pay Shakhtar for the Player, to establish the acquisition value of the Player and the compensation Shakhtar claimed.

183. The position of FIFA is equally clear, apply Article 17 as it is. The only relevant criteria are the Player's salaries under the Contract and the Ufa Contract. Average these and this is the compensation.

184. Finally, the position of the Player and Ufa is to follow the FIFPro/the method applied by CAS 2007/A/1298-1300. The balance of his remuneration under the Contract would be correct, but as they have not appealed the Appealed Decision and counterclaims are not allowed, their position is just to dismiss the Appeal and confirm the Appealed Decision.

185. At the hearing, Mr. Van Megen, from FIFPro attended by telephone to answer questions regarding his written report. In a nutshell, the report expressed the opinion that the FIFA RSTP must respect EU law and that the positive interest method contravened EU law, so should not be applied by the CAS. Rather, the method applied by CAS 2007/A/1298-1300 should prevail every time.

186. This was explored by the Panel at the hearing by considering a couple of theoretical examples. The first was a player that signed a 5 year contract with the old club on EUR 1m p.a. No fee had been paid for him. He played the first season without issue, but a new manager came in who only played him as a reserve, perhaps in the odd cup game, but without triggering sporting just cause. This went on for 2 seasons. He wanted to go out on loan, but no club wanted him at that level of wages. The old club couldn't transfer him either. The wages were an issue. The best offer was another club that would take him on loan, but only pay 50% of the wages. After the 3rd season, the player had enough and walked out on the old club. There was no argument that this was a termination by the player without just cause.

187. Following the method applied by CAS 2007/A/1298-1300, the compensation would be his wages for the last 2 years of his old contract i.e. EUR 2m. However, following the positive interest method, the virtual replacement would be free to bring in (as the old club tried, but

couldn't sell him, so he had no transfer value); the virtual replacement's wages would be EUR 500,000 a year (what the other club were willing to pay); yet the old club would save EUR 2m of wages. In total, why would any compensation be payable to the old club?

188. The Panel asked whether this player would be happy with the method applied by CAS 2007/A/1298-1300 being applied. Probably not.

189. When the Panel asked what EU laws were being broken, Mr. Van Megen submitted that the positive interest method took into account the potential transfer for bringing in a virtual replacement player. This was a barrier to his freedom of movement, in accordance with Article 3(2) of the Treaty on European Union.

190. The Panel worked through the above example again, but in the second case the only difference was that the old club had paid a transfer fee of EUR 20m for the player. That would be amortised over the life of his 5 year contract at EUR 4m a year. So when he terminates without just cause after 3 years, there would be EUR 8m of unamortised transfer fees to be added to the compensation, regardless of the methodology used. The Panel and Mr. Van Megen agreed that this would be equally likely to be seen as an EU law issue and would act as a barrier to his movement to another club.

191. Ultimately, the Panel was simply not convinced that one method should be used over another. Each case should be dealt with on its own merits (as the CAS panel in CAS 2008/A/1519-1520 noted, "on a case by case" basis) and each CAS Panel should be free to find the appropriate method, always applying Article 17 of the RSTP, to find the correct solution for that case.

a) Compensation for the breach of the Contract

192. The Panel notes that the Parties did not provide within the Contract for some form of liquidated damages clause, so it will consider Article 17 and all objective criteria put forward to it by the Parties. This includes the terms of the Contract and the Ufa Contract, the Player's time at Rubin, Ufa and Manchester City, the specificity of sport and the protected period. No transfer fee was paid by Shakhtar for the Player, nor have any of the Parties sought to advance that Ukrainian law is relevant.

193. In the case at hand, the Panel notes that Manchester City transfer fee was paid well after the Contract would have expired in any event. The Panel notes that Shakhtar offered an extension of the Contract on low financial terms to the Player, which he rejected. The Player's Agent went to another extreme with the counteroffer. There was no evidence that the Parties attempted to negotiate further from those extremes, so it is the Panel's view that the Contract would have ran its course and expired, allowing the Player to move abroad for free (ignoring the training compensation that has been accounted for and paid). As such, the Manchester City transfer is of no relevance to the case at hand.

194. The Panel was not impressed by Shakhtar's linkage of the Player's value to another player allegedly worth EUR 850,000 (reference was made to a transfer fee paid for another seventeen-year-old player who was transferred from Russia in 2010) as no details of their respective

contractual or other circumstances were made available to the Panel, let alone the relevance to the case at hand. The Panel were also not convinced that Rubin had offered EUR 500,000 for the Player. There may have been discussions, but at the hearing, it was made clear these were never finalised. The offer from Ufa was clearly for training compensation as well as to end any dispute between the parties. Ufa paid far in excess of this sum for training compensation alone.

195. All in all, the Panel does not deem this case to be one that requires solving using the positive interest principle in the case CAS 2008/A/1519-1520 method. There is sufficient information to apply the stated objectives in Article 17, without searching for other objective criteria and inventing virtual replacements for the U19 team at Shakhtar.

196. Like the FIFA DRC, the Panel is able to look at the terms of the Contract and the Ufa Contract. Perhaps an averaging of these two contracts would have looked at the actual monies paid under both (as the Ufa Contract started sometime after the termination date of the Contract, as Ufa had to wait for the Player's ITC) and then a lesser sum would have been awarded, but the Panel considers that the methodology applied by FIFA is reasonable and in line with Article 17 in the case at hand and shall not recalculate the compensation, as there was no request by the Player or Ufa to reduce it by way of an appeal against the Appealed Decision.

197. The Panel did also consider the elements advanced by Shakhtar with regards to the specificity of sport criterion, referred to in Article 17. These were in principle the investment and training that Shakhtar had provided, the behaviour of the Player and his agent, the role of Ufa as an intermediary or "bridge" club and the good behaviour of Shakhtar itself.

198. The Panel determined that the specificity of sport criteria was of no assistance to Shakhtar in the case at hand. It had already been rewarded for the investment and training in the Player through the training compensation and solidarity contribution mechanisms; the Player's behaviour was that he terminated the Contract without just cause. In addition to spending a period of time without a job, waiting for a club to sign him and for that club to obtain an ITC, he has been ordered (now by this Panel) to pay compensation to Shakhtar; the behaviour of the Player's Agent is not a matter for the Panel, as he is not a party to the case at hand; and the behaviour of Shakhtar was not perhaps as it had painted it in its written submissions. At the hearing the Player informed the Panel that he had been side lined once he refused to an extension of the Contract, stripped of the U19 captaincy and made to train alone. These allegations were not denied by Shakhtar. Finally, the Player did terminate during the protected period, but this factor alone was not enough, in the Panel's opinion taken in the round with all these other factors, to invoke an element of compensation for the breach, under the specificity of sport.

199. The Panel determined to dismiss the argument of the Player and Ufa that Shakhtar placed no value on the Player's services and that CAS 2014/A/3642 should be applied. Shakhtar did offer the Player a contract extension, but it was insufficient to retain the Player. The case cited by the Player and Ufa is quite different, as the club in that case asked the player to take a pay cut or even to leave. When he wouldn't he was subjected to training on his own. When he walked out of that contract, the CAS panel was able to say that the club placed no value on his services, so awarded zero compensation. It is not a parallel case factually to the case at hand.

200. In conclusion, the Panel confirms the compensation awarded by the FIFA DRC in the Appealed Decision.

b) Sporting sanctions

201. The Panel notes that the FIFA DRC dismissed Shakhtar's request that it issued sporting sanctions upon the Player and Ufa when *"establishing that any further claims lodged by Shakhtar are rejected"*.

202. The Panel notes that the breach of the Player was within the protected period. The term 'Protected Period' is defined as follows in no. 7 of the definitions of the FIFA RSTP:

> *"Protected period: a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional"*.

203. Additionally, the Panel notes that Article 17.3 of the FIFA RSTP states that *"[i]n addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period"*.

204. Further, the Panel notes that, pursuant to Article 17.4 of the FIFA RSTP, Ufa, as a club *"signing a professional who has terminated his contract without just cause"* shall also be liable to sporting sanctions, if it was found to have induced the Player's breach:

> *"In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of the exception and the provisional measures stipulated in article 6 paragraph 1 of these regulations in order to register players at an earlier stage"*.

205. And, for completeness, Article 2(3) of the FIFA Commentary on Article 17 of the FIFA RSTP determines the following:

> *"A club that breaches a contract with a player during the protected period risks being prohibited from registering new players, either domestically or internationally, for two registration periods following the contractual breach"*.

206. Despite the wording "shall" in both these Regulations, FIFA pointed to a line of CAS jurisprudence which started with CAS 2007/A/1359 where CAS panels have interpreted "shall" as "may". Further, the wording in the FIFA Commentary is softer. The Panel notes the following from that case:

"55. It follows from a literal interpretation of the said provision that it is a duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: "shall" is obviously different from "may"; consequently, if the intention of the FIFA Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word "may" and not "shall". Accordingly, based on the wording of art. 17 para. 3 of the FIFA Regulations, a sporting sanction should have been imposed.

56. However this Panel considers that rules and regulations have to be interpreted in accordance with their real meaning. This is true also in relation with the statutes and the regulations of an association. Of course, if the wording of a provision is clear, one needs clear and strong arguments to deviate from it.

57. During the hearing, FIFA observed that it is stable, consistent practice of FIFA and of the DRC in particular, to decide on a case by case basis whether to sanction a player or not. Even though it is fair to say that the circumstances behind the decisions filed by FIFA to demonstrate such practice differ from case to case, the Panel is satisfied that there is a well-accepted and consistent practice of the DRC not to apply automatically a sanction as per art. 17 para. 3 of the FIFA Regulations. The Panel is therefore inclined to follow such an interpretation of the rationale of art. 17 para. 3 of the FIFA Regulations which may be considered contrary to the literal interpretation, but appears to be consolidated practice and represents the real meaning of the provision as it is interpreted, executed and followed within FIFA. It is indeed noteworthy that a sporting sanction, by which the Player was suspended from playing for two years, was imposed of the Player within the ambit of FFA disciplinary proceedings".

207. The Panel sees no reason to depart from this flexible approach and notes that, in the case at hand, it is being applied to a player, as well as a club. That said, the Panel was also convinced that Ufa did not induce the Player to breach the Contract, so would not fall under Article 17.4 of the FIFA RSTP, in any event. Finally, the Panel suspects that the FIFA DRC had some sympathy for a young player, whose family decided to leave a troubled area in the Ukraine. Certainly, the Player could have done more to talk to Shakhtar and explain his concerns, rather than just leaving. While his mother did write a letter, the Player could have enquired what steps the club intended to take to ensure his safety (as other players did) or could have asked to go elsewhere on loan, etc. However, as he did not, he has been found to have breached the Contract without just cause and ordered (both by FIFA and confirmed in this Award) to pay Shakhtar compensation. To ban him from footballing activities for 4 months seems unnecessary to the Panel, as it apparently did to the FIFA DRC.

208. Finally, the Panel did not have to deal with any issues as to Shakhtar's standing to ask the Panel to issue sporting sanctions, as FIFA, at the hearing, confirmed that this was a matter that the Panel was competent to deal with, as opposed to being limited to determining whether to return the issue to the FIFA DRC or not.

C. Conclusion

209. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel finds that:

- The Appeal of Shakhtar is to be dismissed in its entirety; and

- The Appealed Decision is to be confirmed.

210. All further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by FC Shakhtar Donetsk on 9 January 2017 against the Decision of the FIFA Dispute Resolution Chamber of 18 August 2016 is dismissed.

2. The Decision of the FIFA Dispute Resolution Chamber of 18 August 2016 is confirmed.

(…)

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