Arbitration CAS 2008/A/1519 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & Fédération Internationale de Football Association (FIFA) & CAS 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & Fédération Internationale de Football Association (FIFA), award of 19 May 2009

Panel: Mr Michele Bernasconi (Switzerland), President; Prof. Ulrich Haas (Germany); Mr Jean-Jacques Bertrand (France)

Football
Contract of employment
Unilateral termination of the contract without just cause outside the Protected Period
Rationale of Art. 17 of the FIFA Regulations
Primacy to the contractual agreement in terms of stipulating the compensation for damages
Calculation of the damage according to the principle of the "positive interest"
Value of the services of a player
Obligation to mitigate the damage
Loss of a possible transfer fee as part of the damage
Law of the country concerned
Specificity of sport

1. **The purpose of Art. 17 of the FIFA Regulations is basically nothing else than to reinforce contractual stability. Other than article 14 and 15, it does *not* provide the legal basis for a party to freely terminate an existing contract at any time, prematurely, without just cause. Rather, the provision clarifies that a termination of a contract without just cause, even if this occurs outside of the Protected Period and following the appropriate notice period, remains a serious violation of the obligation to respect an existing contract and that a compensation will be due.**

2. **Art. 17 of the FIFA Regulations states the principle of the primacy of the contractual obligations concluded by a player and a club. To meet the requirements of Art. 17, the parties shall have provided in the contract how compensation for breach or unjustified termination shall be calculated. Whether such clauses are called "buy-out clauses", "indemnity" or "penalty clauses" or otherwise, is irrelevant. Legally, they correspond to liquidated damages provisions, at least so far as the real will of the parties to foresee in such clause the amount to be paid by the breaching party in the event of a breach and/or of a unilateral, premature termination of the employment contract is established.**

3. **When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party and shall be led by the principle of the so-called *positive interest* (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would**

have had if the contract was performed properly, without such contractual violation to occur. The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club.

4. **The value of the services of a player is only partially reflected in the remuneration due to him, since a club has to make also certain expenditures to obtain such services. In order to calculate the full amount of the value of the services lost, one shall therefore not simply take into consideration the amount of outstanding remuneration but also what a club would – under normal circumstances – have to spend on the (transfer) market to contract the services like the ones of the player. In the event of a breach by a player, a panel has therefore to analyze the amount necessary to acquire and keep the working force of the player.**

5. **Even though the FIFA Regulations do not mention this criterion explicitly, as in any situation where a party requests compensation for damages, the judging authority has also to consider that any injured party has the obligation to take reasonable steps to mitigate the effects and loss related to his or her damage. This obligation should not apply only to players when they are suffering for an unjustified termination by a club, but also to clubs that are claiming compensation for the damage caused by an unjustified termination by a player.**

6. **It is generally recognised that the loss of earnings (*lucrum cessans*) is a possible part of the damage caused through an unjustified termination of an employment agreement. Specifically, the loss of a possible transfer fee can be considered a compensable damage head if the usual conditions are met, i.e. in particular if between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit there is the necessary logical nexus.**

7. **The "law of the country concerned" is the law governing the employment relationship between the player and his former club, i.e. normally the law with which the dispute at stake has the closest connection. This will be under ordinary circumstances the law of the country of the club of which the employment contract has been breached or terminated, respectively. To apply instead of such governing law automatically Swiss law as being the law applicable "by default", would mean to possibly overlook the corrective influence that the "law of the country concerned" shall have.**

8. **The criterion of the specificity of sport is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. It follows from this that no compensation is possible for facts and circumstances that are clearly not compensable otherwise (e.g. lost chances).**

FC Shakhtar Donetsk ("Shakhtar Donetsk") is a football club with its registered office in Donetsk, Ukraine. It is a member of the Football Federation of Ukraine, itself affiliated to the Fédération Internationale de Football Association since 1992.

Mr Matuzalem Francelino da Silva (the "Player") is a professional football player. He was born on 10 June 1980 and is of Brazilian nationality. He currently plays with the club SS Lazio Spa, Rome, Italy on the basis of a loan agreement between the latter club and Real Zaragoza SAD.

Real Zaragoza SAD ("Real Zaragoza") is a football club with its registered office in Zaragoza, Spain. It is a member of the Real Federacion Española de Futbol, which has been affiliated to the Fédération Internationale de Football Association since 1904.

The Fédération Internationale de Football Association (FIFA) is the governing body of Football on worldwide level and has its registered office in Zurich, Switzerland.

Background Facts

A. The Contracts Signed With Regard To The Player's Transfer To Shakhtar Donetsk

During the 2003-2004-football season, Mr Matuzalem Francelino da Silva played as a professional for the Italian club Brescia Calcio Spa.

On 20 June 2004, the club Brescia Calcio Spa contractually accepted to transfer the Player to Shakhtar Donetsk for a sum of EUR 8,000,000, which was paid within the next ten days. According to the terms of the transfer agreement, the *"Parties acknowledge and recognise the Transfer fee is net and exclusive of any sum due and payable to third parties for any reason such as but not limited to taxes and solidarity mechanism provided by the FIFA Rules or national laws"*.

In relation with the Player's transfer, Shakhtar Donetsk contends that it incurred the following additional expenses:

> Agents fees of EUR 1,000,000 paid to the company A. and of EUR 2,750,000 paid to Mr F.;
>
> Contributions related to the solidarity mechanism paid to the Brazilian clubs Esporte Clube Vitória and Club Futebol Clube America, in the amount of EUR 151,012 and of EUR 70,080 respectively.

On 26 June 2004, Shakhtar Donetsk signed with the Player an employment contract. It was a fix-term agreement for five years, effective from 1 July 2004 until 1 July 2009. This document reads as follows, where relevant:

> *"**2.2.** Transfer of the **Football Player** to another club or a squad prior to expiration of the contract is supposed only with the consent of the **Club** and under condition of compensation the **Club's** expenses on the keeping and*

*training of the **Football Player**, cost of his rights, search of substitute and other costs in full measure. The size of indemnity is defined under the agreement between clubs. (…)*

***3.3.** During validity of the Contract, the **Club** undertakes:*

- *to follow the condition of payment to the **Football Player** according to the present Contract;*
- *(…)*
- *to create necessary conditions for development of the **Football Player**, including realization of training and development process under the direction of the qualified experts in premises, playgrounds, training camps, with appropriate sports equipment and the means;*
- *(…)*
- *to provide the **Football Player** with a habitation (two bedroom flat) and to take up payment of all municipal charges, except for the phone;*
- *to provide the **Football Player** and his family with all kinds of social insurance and obligatory personal insurance of his health and life on the basis of the established rules (conditions) of insurance;*
- *to put at the disposal of the **Football Player** the car with an estimated cost from 23.000 to 26.000 US dollars, bear all charges on service and maintenance, excluding fuel charges and other not stipulated in the car exploitation document.*
- *to pay to the **Football Player** and his family travel fee for 3 return air ticket en route Donetsk – Natal (Brazil) – Donetsk per annum.*
- *(…)*
- *in the case the Club receives a transfer offer in amount of 25,000,000 EUR or exceeding the some above the Club undertakes to arrange the transfer within the agreed period.*

(…)

***4.1.** Labor payment conditions of **the Football Player** are stipulated by the Parties in Appendix 1 to the present Contract.*

***4.2.** The administration of **Club**, as agreed with trainer's structure, may award the **Football Player** for achievement of successful (victorious) results. The sizes of bonuses are established in each concrete case, proceeding from productivity of the **Football Player** and a financial condition of **Club**. All bonuses are paid after victorious result of competitions.*

(…)

***6.3.** Prior to the contract term expiration, it may be terminated only on such bases:*

- *the agreement of the parties;*
- *coming a court verdict into force by which the Football Player is sentenced to imprisonment;*
- *under the initiative of the management of Club".*

Appendix 1 to the contract states notably the following:

> *"**Club** pays to the **Player** as remuneration the following amounts, including taxes and other obligatory payments: 96,925.00 (ninety six thousand nine hundred twenty five) EUR [monthly].*
>
> *At the moment of the present contract concluding the personal income tax rate constitutes 13%. In case the tax rate increases **the Club** will change the amounts of remuneration correspondingly".*

On 5 October 2006, the contract was amended *"to compensate **the Football Player** the cost of the apartment rent in Donetsk by adding monthly 1,500 (one thousand five hundred) EUR to the **Player's** salary (adjusted for taxes and other compulsory payments)".*

On 1 April 2007, the contract was amended again as follows:

> *"1. **The Club** pays **the Player** a salary in the following amounts before tax: 98,490 (ninety eight thousand four hundred and ninety) Euro monthly. Tax on personal income amounts 15%. In case the tax rate increases the **Club** will change the amounts of remuneration correspondingly. The **Player** will receive premiums and additional payments level with other members of the team.*
>
> *2. **The Club** shall compensate **the Player** the cost of the apartment rent in Donetsk by adding monthly 1533 (one thousand five hundred and thirty three) Euros to the **Player's** salary".*

On 1 April 2007 the parties also agreed, *"to eliminate Part 8 Clause 3.3 of the **Contract** relatively providing the **Player** with a habitation and taking up payment of municipal charges".*

The Player played as a central midfielder. During the 2006-07 season, he became the new captain of Shakhtar Donetsk's first team.

On 1 June 2007, the Italian club U.S. Città di Palermo Spa confirmed to Shakhtar Donetsk its interest for the Player and the fact that it was willing to pay a transfer fee of USD 7,000,000. Shakhtar Donetsk turned this offer down.

B. The Player's Termination Of The Contract With Shakhtar Donetsk

On 2 July 2007, the Player notified in writing Shakhtar Donetsk of the fact that he unilaterally terminated their contractual relationship with immediate effect and in accordance with article 17 of the FIFA Regulations for the Status and Transfer of Players (edition 2005) (the "FIFA Regulations"). In particular, he indicated that the notification was served within 15 days following the last game of the season in Ukraine and at the end of the so-called protected period.

It is undisputed that the Player unilaterally and prematurely terminated the contract without just cause or sporting just cause.

On 5 July 2007, Shakhtar Donetsk sent to the Player the following fax:

> *"(…) We would like to inform you that such possibility to terminate your Contract was excluded by clause 6.1 of your Contract. In other words, Clause 17 of FIFA Regulations can not be applied in this case since you have*

refused from termination possibility in your Contract. Thus, we deem that your contract with FC Shakhtar is still in force. If you start negotiating or signing with a new club, we will initiate disciplinary sanctions on the new club under para. 4.5 Clause 17 of FIFA Regulations.

Anyway, you can join a new club, if you pay a buyout in the amount of 25,000,000 EUR as it is stipulated in para.3.3 of your Contract. Please note, that if you sign a contract with a new club, it will be jointly responsible for paying the abovementioned 25,000,000 EUR.

We insist on your joining the training camp in Switzerland and observe the Club discipline (…)".

On 19 July 2007, the Player signed a new contract with the club Real Zaragoza. The main characteristics of this document can be summarised as follows:

- It is a fix-term agreement for three seasons, effective until 30 June 2010.
- The club Real Zaragoza agreed to pay to the Player a salary of EUR 10,000 fourteen times a year, a sign-on fee of EUR 860,000 per season and unspecified match bonuses.
- The Player committed himself to pay a compensation of EUR 6,000,000 to Real Zaragoza in the event he prematurely terminates the contract without the club's fault.

On 19 July 2007, Shakhtar Donetsk sent to the club Real Zaragoza the following fax:

"Under the clause 3.3 of Player's labour Contract, in case of a transfer the "buyout" amount due to FC Shakhtar will be EURO 25,000,000. According to Art. 17.2 of FIFA Rules "If a Professional is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment". So, we demand you to transfer this amount to the bank account that follows (…). If this amount is not transferred until July 23, 2007, we will bring this dispute before FIFA Dispute Resolution Chamber".

C. The Contracts Signed After 19 July 2007

With a contract dated 17 July 2008, Real Zaragoza transferred the Player on a temporary loan basis to the club SS Lazio Spa, Rome, Italy for the sporting season 2008/2009. It contains an option clause providing the Italian club with the right to make the transfer definitive. This agreement was signed by both clubs and by the Player. It specifies notably the following:

- The term for the exercise of the option clause is 15 May 2009 and the sum to be paid is EUR 13,000,000 plus the corresponding VAT or EUR 14,000,000 if the club SS Lazio Spa reached the UEFA Champions League during the 2008/2009 sporting season.
- *"In the event that the pending award of the Court of Arbitration for Sport decides that the indemnity to be paid to FC Shakhtar Donetsk by the player and collaterally by Real Zaragoza, should be higher than seven millions Euro (7,000,000 EURO), the amount indicated as for the payment for the option for the definitive acquisition of the federative rights of the player shall be raised in one million euro (1,000,000 EURO)(…)".*

- During the loan, Real Zaragoza shall not pay any sum to the Player, whose salary will be the object of a specific employment agreement between him and the Italian club.
- The loan is free of charge unless the club SS Lazio Spa reaches the UEFA Champions League during the 2008/2009 sporting season. In this case, the Italian Club must pay EUR 500,000 to Real Zaragoza.
- The Italian club committed itself to subscribe an insurance policy for accidents for the Player *"being Real Zaragoza SAD its beneficiary, and which shall cover the death and the complete and permanent invalidity, including the professional invalidity for the amount of the option for the definitive transfer of thirteen millions Euro (13,000,000 Euro). Equally, such insurance shall cover the partial off sick for an amount of three millions Euro (3,000,000 Euro), from which it has to be paid accordingly to the time of partial off sick he might be, and Real Zaragoza SAD could not make use the professional services of the Player".*
- *"In case that [SS Lazio Spa] does not exercise the option for the definitive acquisition of the federative rights of the Player, according to the terms of this contract, the Player must return, on the 1st of July 2009, to [Real Zaragoza SAD] (…). In case of non-fulfilment of this clause, an indemnity of twenty two millions five hundred thousand Euro (22,500,000 Euro) is established in favour of [Real Zaragoza SAD], that shall be paid by the Player to [Real Zaragoza SAD] (…)".*

On 22 July 2008, the Player signed an employment agreement with the club SS Lazio Spa valid from 22 July 2008 until 20 June 2011. Pursuant to this contract, the Player shall receive a fix remuneration of EUR 895,000 for the 2008/2009 season, of EUR 3,220,900 for the 2009/2010 season and of EUR 3,220,900 for the 2010/2011 season. The Player is also entitled to a variable remuneration apparently *"left to the parties"* to agree among themselves.

On 12 August 2008, Real Zaragoza and the Player entered into an employment agreement replacing the one signed on 19 July 2007. It is a fix-term agreement for three seasons, effective until 30 June 2011. The club Real Zaragoza agreed to pay to the Player a salary of EUR 10,000 fourteen times a year, a sign-on fee of EUR 2,180,000 per season and unspecified match bonuses. Additionally, the contract states that *"The parties agree that the termination of contract on the wish or the Player without the club's fault, will give the club the right to a compensation that is agreed in the amount of twenty two millions five hundred thousand Euro (22,500,000 Euro) in function to the circumstances of sporting order, the damage that is caused to the Club and further reasons of termination. This amount can be increased by the Club at each moment of the validity of this contract up to thirty five million Euro (35.000.000 Euro) by means of written notification to the Player, who as from the 1 July in which he will be notified - even with retroactive effect as from the beginning of the season in which it is exercised-, will receive 50% more as remuneration as provided for in the present contract (…)".*

D. The Proceedings Before The FIFA Dispute Resolution Chamber

On 25 July 2007, Shakhtar Donetsk initiated proceedings with the FIFA Dispute Resolution Chamber (DRC) to order the Player to pay in its favour an amount of EUR 25,000,000 and to hold Real Zaragoza jointly and severally liable for the payment of such compensation. Conversely, the Player

and Real Zaragoza asked the DRC to reject the claim and establish the amount of compensation at EUR 3,200,000.

With decision of 2 November 2007 (the "Appealed Decision"), the DRC concluded that Shakhtar Donetsk was entitled to the payment of EUR 6,800,000 notably on the following grounds:

- While it is undisputed that the contract between the Player and Shakhtar Donetsk was terminated outside the protected period established by the applicable regulations, the principle of *pacta sunt servanda* must still be observed in accordance with chapter IV of the FIFA Regulations. Therefore, given the unilateral and premature termination of the employment agreement by the Player, the latter committed a breach of contract and is therefore liable to pay compensation to Shakhtar Donetsk. On the basis of article 17 para. 2 of the FIFA Regulations, Real Zaragoza is jointly and severally responsible for the payment of compensation.
- In the view of its wording, the contractual clause 3.3 according to which *"in the case the Club receives a transfer offer in an amount of 25,000,000 EUR or exceeding the some above the Club undertakes to arrange the transfer within the agreed period"* cannot be interpreted as a penal clause applicable in case of a breach of contract by the Player.
- The DRC held that the remuneration under the contract between the Player and Shakhtar Donetsk and the remuneration between the Player and Real Zaragoza were similar and totalled approximately EUR 100,000 per month. As the Player was contractually bound to Shakhtar Donetsk for two more years, the latter is entitled to the payment of EUR 2,400,000, which reflects the *"remaining value of the player's employment contract with the Ukrainian club"* (para. 32 of the Appealed Decision).
- By terminating the labour contract two years before the contractual end, the Player did not allow Shakhtar Donetsk to amortize the fees and expenses paid for the acquisition of his services for a period of five years. The EUR 8,000,000 transfer compensation paid by Shakhtar Donetsk to the former club of the Player was amortised to 3/5. Thus, the non-amortised part of the compensation amounts to EUR 3,200,000 and must be paid to Shakhtar Donetsk, which did not provide satisfactory evidence of further financial damages suffered in connection with the Player's transfer.
- According to the applicable regulations, the contributions related to the solidarity mechanism were to be deducted by Shakhtar Donetsk from the total amount of compensation payable in connection with the transfer of the Player. *"Consequently, the amount of EUR 221,092 is deemed to be included in the transfer compensation of EUR 8,000,000"* (para. 34 of the Appealed Decision) and no financial compensation shall be granted to Shakhtar Donetsk with this regard.
- Shakhtar Donetsk did not establish the link between the alleged agent fees it incurred and the Player's transfer from Brescia Calcio Spa.
- With regard to the aspect relating to the "specificity of sport", the DRC *"was eager to point out that the player appears to have seriously offended the good faith of FC Shakhtar Donetsk. As*

previously stated, he accepted an increase in his financial entitlement shortly before the end of the season. He did not anyhow indicate to his club that he might wish to look for other employment opportunities or that certain issues had arisen that did not meet his expectations. Nevertheless, and despite knowing that the Ukrainian club was counting on his good services for another two years, he deliberately decided to leave the club and breach the existing contract" (para. 40 of the Appealed Decision). The DRC awarded to Shakhtar Donetsk a compensation of EUR 1,200,000 in this respect.

As a result, on 2 November 2007, the DRC decided the following:

"1. The claim of the Claimant, FC Shakhtar Donetsk, is partially accepted.

2. The player, Matuzalem Francelino da Silva, has to pay the amount of EUR 6,800,000 to FC Shakhtar Donetsk within 30 days of notification of the present decision.

3. If this amount is not paid within the aforementioned time limit, a 5% interest rate per annum as of the expiry of the said time limit will apply and the matter will be submitted to the FIFA Disciplinary Committee for its consideration and decision.

4. The club, Real Zaragoza SAD, is jointly and severally liable for the aforementioned payment.

5. Any further request filed by the Claimant is rejected.

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

7. According to article 61 para. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision (…)".

On 29 February 2008, the parties were notified of the Appealed Decision.

It is undisputed that, to date, neither Player nor Real Zaragoza has paid any compensation to Shakhtar Donetsk.

Proceedings Before The Court of Arbitration For Sport

A. Appeal Procedure CAS 2007/A/1519

On 19 March 2008, Shakhtar Donetsk filed a statement of appeal with the Court of Arbitration for Sport (CAS). It challenged the above-mentioned Appealed Decision, submitting the following request for relief:

"The Appellant request the Panel:

1.- To accept this appeal against the decision of the FIFA Dispute Resolution Chamber dated 2nd November 2007.

2.a) To adopt an award annulling the said decision and adopting a new one declaring that the Appellant is entitled to receive the amount of 25,000,000 Euro from the Respondents as per the provided and agreed contractual clause, for the breach of contract by Mr Matuzalem Francelino da Silva or alternatively,

2.b) and in any case to compensate the Appellant as per all the objective criteria of this dispute, according to article 17.1 of the FIFA Regulations for the Status and Transfer of Players which are:

- *4,788,431 Euro for non-amortized expenses.*
- *2,400,000 Euro for the remuneration of the player.*
- *5,000,000 Euro for the lucrum cessans.*
- *An amount for sports-related damage higher than the one considered by the DRC and that should be at least of 5,000,000 Euro.*

3.- To condemn the Respondents with a 5% interest rate per annum, from the moment Mr Matuzalem Francelino da Silva breached his contract, the 2nd of July 2007.

4.- To fix a sum of 40.000 CHF to be paid by the Respondents to the Appellant, to help the payment of its defence fees and costs.

5.- To condemn the Respondents to the payment of the whole CAS administration costs and the Arbitrators fees".

On 28 March 2008, Shakhtar Donetsk filed its appeal brief. This document contains a statement of the facts and legal arguments accompanied by supporting documents.

On 28 April 2008, the Player and Real Zaragoza filed a joint answer, with the following request for relief:

"In view of all the above factual and legal arguments, the Respondents hereby respectfully request the Panel:

1. *to reject the Appeal lodged by the Appellant;*
2. *to set aside the challenged DRC decision;*
3. *to establish that the amount of compensation due by the First Respondent to the Appellant is of EUR 2,363,760;*
4. *to condemn the Appellant to the payment of the legal expenses incurred by the Respondents;*
5. *to establish that the costs of this arbitration procedure will be borne by the Appellant.*

Subsidiarily, and only in the event that the above is rejected,

1. *to reject the Appeal lodged by the Appellant;*
2. *to set aside the challenged DRC decision;*
3. *to establish that the amount of compensation due by the First Respondent to the Appellant is of EUR 3,200,000;*
4. *to condemn the Appellant to the payment of the legal expenses incurred by the Respondents;*
5. *to establish that the costs of this arbitration procedure will be borne by the Appellant".*

B. Appeal Procedure CAS 2007/A/1520

On 20 March 2008, Mr Matuzalem Francelino da Silva and Real Zaragoza filed a joint statement of appeal with the CAS. They challenged the Appealed Decision, submitting a request for relief similar to the one presented in their above answer dated 28 April 2008, but with the following additional motion:

> *"(…) the CAS is respectfully requested:*
>
> *(…)*
>
> *3. to condemn the Respondent to the payment of the salary for June 2007 corresponding to EUR 98,490; (…)*
>
> *Subsidiarily, only in the event that the above is rejected,*
>
> *(…)*
>
> *3. to condemn the Respondent to the payment of the salary for June 2007 corresponding to EUR 98,490; (…)".*

On 28 March 2008, Mr Matuzalem Francelino da Silva and Real Zaragoza filed a joint appeal brief.

On 28 April 2008, FC Shakhtar Donetsk filed an answer, with a similar request for relief as the one filed in its statement of appeal lodged in the proceedings CAS 2007/A/1519, except that it increased the amount of its claim with regard to the "lucrum cessans" to EUR 5,203,300.30 and was of the opinion that the 5% interests shall start as of 5th July 2007.

C. The Answer of FIFA

On 17 Jun 2008, the FIFA filed an answer to the appeals lodged respectively by FC Shakhtar Donetsk (CAS 2007/A/1519) and by Mr Matuzalem Francelino da Silva and Real Zaragoza (CAS 2007/A/1520) with the following request for relief:

> *"5.1 In light of the above considerations, we insist that the decision passed by the Dispute Resolution Chamber in the matter at hand was fully justified. We therefore request that the present appeals be rejected and the decision taken by the Dispute Resolution Chamber on 2 November 2007 be confirmed in its entirety.*
>
> *5.2 Furthermore, all costs related to the present procedures as well as the legal expenses of FIFA shall be borne by the Appellants".*

D. The Hearing

A hearing was held on 18 September 2008 at the CAS headquarters in Lausanne. All the members of the Panel were present. At the outset of the hearing, the parties declared that they had no objection with regard to the composition of the Panel.

During the hearing, the parties made full oral submissions. No witness was called to testify.

During the hearing, the Panel requested the production and translation of the contracts signed after 19 July 2007.

In spite of the parties' agreement to keep the content of those documents confidential, Shakhtar Donetsk apparently informed the media and the public after the hearing about some of the characteristics of the contracts signed by the Player with Real Zaragoza and with SS Lazio Spa.

Subsequently, Shakhtar Donetsk expressed sincere regrets over its indiscretion. The Player and Real Zaragoza accepted Shakhtar Donetsk's apologies but asked the Panel to take the incident into account in the allocation of the arbitration costs and in the contribution granted to the parties.

The Panel fixed to the parties a deadline to comment on the documents filed after the hearing, which the parties did in a timely manner.

Finally, between 12 and 14 November 2008, the parties confirmed in writing that they did not have any objection in respect to their right to be heard and to be treated equally in these arbitration proceedings. They also affirmed that they were satisfied with the Panel drafting an award on the basis of what had been said and written, without any further exchange of submissions or a second hearing.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from articles 60 ff. of the FIFA Statutes and article R47 of the Code of Sport-related Arbitration (the "Code"). It is further confirmed by the order of procedure duly signed by the parties.

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

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

Applicable Law

4. Article R58 of the Code provides the following:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association

or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

5. Article 60 para. 2 of the FIFA Statutes provides *"[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

6. The Panel is of the opinion that the parties have not agreed on the application of any specific national law. It is comforted in its position by the fact that, in their respective submissions, the parties refer exclusively to FIFA's Regulations. As a result, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily.

7. The case at hand was submitted to the DRC after 1 July 2005, which is the date when the revised FIFA Regulations for Status and Transfer of Players (edition 2005) came into force. Pursuant to article 26 para. 1 and 2 of the said revised Regulations, the case shall be assessed according to this edition of the Regulations. This is not disputed and was expressly agreed by the parties at the hearing held on 18 September 2008.

Admissibility

8. The appeals were filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. They complied with all other requirements of article R48 of the Code, including the payment of the CAS Court office fees.

9. It follows that the appeals are admissible.

Joinder

10. As expressly mentioned in the order of procedure accepted by the parties, the appeal procedures CAS 2008/A/1519 and CAS 2008/A/1520 shall be conducted jointly as (a) both appeals raise the same issues and are directed against the same decision, (b) the parties are the same in both procedures, (c) the same Panel of Arbitrators is in charge of both cases and (d) all the parties have expressly agreed to the joinder.

Merits

A. The Issues

11. The main issues to be resolved by the Panel in deciding this dispute are the following:

- Is Shakhtar Donetsk entitled to any compensation?

- If so, what is the correct calculation of the compensation?
- Are there any reasons to adjust the compensation granted by the DRC?
- Is Real Zaragoza jointly and severally liable for the payment of the compensation?

B. Is Shakhtar Donetsk Entitled To Any Compensation?

12. As mentioned above, the Player terminated his contractual relationship with Shakhtar Donetsk on 2 July 2007. The Panel observes that the Player and his representative never tried to argue for the existence of any just cause or sporting just cause. Rather, it has remained undisputed that the Player terminated his contract with Shakhtar Donetsk unilaterally, prematurely and without just cause. With regard to this, the Panel is appreciative of the transparency adopted by the Player during this CAS procedure, as in many other disputes CAS panels have to deal with parties aiming at depicting the factual circumstances in a one-sided and biased manner.

13. In his termination notice to Shakhtar Donetsk, the Player stated that he was terminating his contract in accordance with article 17 of the FIFA Regulations.

14. Art. 17 of the FIFA Regulations 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.*
2. *Entitlement to compensation cannot be assigned to a third party. If a Professional is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.*
3. *In 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. This sanction shall be a restriction of four months on his eligibility to play in Official Matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following Season of the New Club. Unilateral breach without just cause or sporting just cause after the Protected Period will not result in sporting sanctions. Disciplinary measures may, however, be imposed outside of the Protected Period for failure to give due notice of termination (i.e. within fifteen days following the last*

match of the Season). The Protected Period starts again when, while renewing the contract, the duration of the previous contract is extended.

4. *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 Registration Periods.*

5. *Any person subject to the FIFA Statutes and FIFA regulations (club officials, players' agents, players etc.) who acts in a manner designed to induce a breach of contract between a Professional and a club in order to facilitate the transfer of the player shall be sanctioned. In light of the above considerations, we insist that the decision passed by the Dispute Resolution Chamber in the matter at hand was fully justified. We therefore request that the present appeals be rejected and the decision taken by the Dispute Resolution Chamber on 2 November 2007 be confirmed in its entirety".*

15. As one can see already in the title of the provision, article 17 deals with the *consequences* of a unilateral termination of a contract without any just cause: compensation and sporting sanctions. However, article 17 – other than article 14 and 15 – does *not* provide a legal basis for a unilateral termination of a contract between a professional player and a club.

16. Whether the Player wanted, by terminating his contract with Shakhtar Donetsk *"in accordance with article 17"*, to claim that he was entitled to do so or whether he wanted to openly declare that he was aware of the potential consequences of such action, is irrelevant. Art. 17 of the FIFA Regulations does not provide the legal basis for a party to freely terminate an existing contract at any time, prematurely, without just cause. Rather, the provision clarifies that a compensation will be due. Further, it states that disciplinary sanctions may be taken against a player only if the termination or breach occurs during the so-called Protected Period or, in the event the termination is given after the Protected Period, if the player failed to give due notice of termination (cf. Art. 17 para. 3 FIFA Regulations).

17. However, a termination of a contract without just cause, even if this occurs outside of the Protected Period and following the appropriate notice period, remains a serious violation of the obligation to respect an existing contract and does trigger the consequences set out in Art. 17 para. 1 FIFA Regulations. In other words, Art. 17 FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement at no price or at a given fix price.

18. In the present matter, because of the unilateral and premature termination of the contract, and because of the lack of any just cause as per article 14 or 15 of the FIFA Regulations, the Panel is satisfied that the termination of the Player of his contract with Shakhtar Donetsk does fall under the application of article 17 of the FIFA Regulations. Accordingly, the DRC was right in stating that the Player is liable to pay compensation to Shakhtar Donetsk.

C. If So, What Is The Correct Calculation Of The Compensation?

a) The Issue of Liquidated Damages / Buy-out Clauses

19. Article 17 para. 1 of the FIFA Regulations sets the principles and the method of calculation of the compensation due by a party because of a breach or a unilateral and premature termination of a contract.

20. First, the provision states the principle of the primacy of the contractual obligations concluded by a player and a club: *"… unless otherwise provided for in the contract …"*. The same principle is reiterated in Art. 17 para. 2 of the FIFA Regulations.

21. This should not come to a surprise for those that are aware of the history of the provision itself and of the rules that are valid in some countries: Indeed, the rationale of allowing the parties to establish in advance in their contract the amount to be paid by either party in the event of unilateral, premature termination without just cause is to recognize that in some countries players and clubs have not only the right but even the obligation to do so (while, one shall note, in some other countries they may be prohibited to do so).

22. Whether such clauses are called "buy-out clauses", "indemnity" or "penalty clauses" or otherwise, is irrelevant. To meet the requirements of Art. 17 para. 1 FIFA Regulations the parties shall have "provided otherwise", i.e. the parties shall have provided in the contract how compensation for breach or unjustified termination shall be calculated. Legally, such clauses correspond therefore to liquidated damages provisions[1], at least so far as the real will of the parties to foresee in such clause the amount to be paid by the breaching party in the event of a breach and/or of a unilateral, premature termination of the employment contract is established. Indeed, when FIFA and the relevant stakeholders were drafting the provision, it was recognized that such kind of penalties/liquidated damages may be validly agreed between the parties and, in such a case, it should not be up to the FIFA Regulations to deprive such a clause of its legal effect.

23. In the present matter it is disputed between the parties whether in the contract between Shakhtar Donetsk and Player an indemnity clause in the meaning described above has been agreed upon or not. As mentioned, Shakhtar Donetsk claims that the clause 3.3 of the contract is such a clause and argues that based on this clause 3.3 the Player committed himself to pay the sum of EUR 25,000,000 in case he was to leave prematurely Shakhtar Donetsk. The Player and the DRC disagree.

24. The relevant part of clause 3.3 of the employment contract between Player and Shakhtar Donetsk reads as follows: *"During the validity of the Contract, the Club undertakes – in the case the Club receives a transfer offer in amount of 25,000,000 EUR or exceeding the some* [recte: sum] *above the Club undertakes to arrange the transfer within the agreed period"*.

[1] CAS 2007/A/1358, N 87; CAS 2007/A/1359, N 90.

25. The Panel, after careful review of the evidence submitted, comes to the conclusion that clause 3.3 cannot be interpreted as a penalty/liquidated damages clause in the meaning of Art. 17 of the FIFA Regulations.

26. The Panel takes in consideration the wording itself of clause 3.3: in no terms the clause is addressing a situation of unilateral, premature termination, but rather a situation in which a transfer of the Player may take place. According to its wording the clause does indeed, as claimed by the Player, address an obligation of Shakhtar Donetsk to "let the Player go" by arranging a transfer within a certain period, provided Shakhtar Donetsk is offered a certain minimum transfer fee by a new club.

27. It is certainly true that the clause 3.3 somehow indicate a financial value of the Player and of his services respectively. But such value is used as a kind of *de minimis cap* to trigger an obligation of Shakhtar Donetsk to negotiate and conclude a transfer agreement with the interested new club. Therefore, by accepting such clause Shakhtar Donetsk has indicated that in any event for a transfer fee of at minimum EUR 25,000,000 it would be willing to renounce to the services of the Player.

28. The Panel is of the view that it is in the general interest of both players and clubs to set the bar for admitting the existence of a penalty/buy out-clause in the meaning of Art. 17 of the FIFA Regulations fairly high. Since by such a clause the parties move away from a quantification of the compensation on the basis of all the other elements specified in Art. 17, the parties are called to make sure that any clause to be included in an employment contract shall indicate that the sum specified is the one due as compensation in the event of a unilateral breach, respectively termination of the contract by either of the parties.

29. The Panel is not satisfied that behind the wording of clause 3.3 of the employment contract Shakhtar Donetsk and the Player wanted to agree on such a kind of clause. Therefore, and lacking the evidence of other contractual arrangements, the Panel concludes that in the present matter the parties did not "otherwise provide in the contract" for a sum to be paid by the Player in the event of his unilateral, premature termination of the agreement. Accordingly, the Panel has now to move on and verify how the compensation due by the Player must be calculated.

b) The Rationale of Art. 17 of the FIFA Regulations for the Calculation of Compensation

30. According to Art. 17 para. 1 of the FIFA Regulations, if the parties have not agreed on a specific amount in a way as described above, the compensation for a unilateral breach and a premature termination shall be calculated as follows:

With due consideration:

- For the law of the country concerned;

- Of the specificity of sport;
- And of any other objective criteria, including in particular:
  -- The *remuneration* and *other benefits* due to the player under the existing 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 the Protected Period* as defined under the "Definitions" chapter in the FIFA Regulations.

31. The task for the body assessing the entity of the compensation due is therefore to verify and analyze as carefully as possible all the elements above and take them in due consideration.

32. An appropriate application in the present matter of Art. 17 of the FIFA Regulations makes necessary for the Panel to recall the rationale of the rule, as debated also by the parties during the Hearing.

33. Art. 17 of the FIFA Regulations is part of chapter IV of the FIFA Regulations, i.e. of that part that deals with and try to foster the maintenance of contractual stability between professionals and clubs. Within the framework of the "reconstruction" of the FIFA and UEFA rules following the well-known *Bosman* decision[2], the concept of contractual stability was introduced to move forward and replace the former transfer fee system: accordingly, the pre-*Bosman* transfer fees due after the expiry of a contract have been replaced by compensations due for the breach or undue termination of an existing agreement[3].

34. Within such system of values, the provision contained in Art. 17 FIFA Regulations, i.e. the financial and the disciplinary consequences due under certain conditions in the event of a breach and a unilateral, premature termination respectively, plays in view of the Panel a central role. The purpose of Art. 17 is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player[4].

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[2] Cf. ECJ, Case C-415/93, *Bosman*, [1995] ECR I-4921.

[3] Cf. Statement IP/02/824 of 5 June 2002 of the then Competition Commissioner Mario Monti: *"FIFA has now adopted new rules which are agreed by FIFpro, the main players' Union and which follow the principles acceptable to the Commission. The new rules find a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships. It is now accepted that EU and national law applies to football, and it is also now understood that EU law is able to take into account the specificity of sport, and in particular to recognise that sport performs a very important social, integrating and cultural function. Football now has the legal stability it needs to go forward".*

[4] CAS 2005/A/876, p. 17: *"[…] it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' […]"*; CAS 2007/A/1358, N 90; CAS 2007/A/1359, N 92: *"[…] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability […]"*; confirmed in CAS 2008/A/1568, N 6.37.

35. This, because contractual stability is crucial for the well functioning of the international football. The principle *pacta sunt servanda* shall apply to all stakeholders, "small" and "big" clubs, unknown and top players, employees and employers, notwithstanding their importance, role or power.

36. 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.

37. The Panel wishes to highlight that Art. 17 FIFA Regulations speaks of a "compensation" (in the French version: "indemnité", in the Spanish version: "indemnización", in the German version "Entschädigung"). According to Art. 28 FIFA Regulations, the English text of the rules shall be the authoritative in the event of any discrepancy. The Panel finds comfort that the four mentioned versions are consistent and that in all languages the term used does refer to a "compensation", i.e. an amount to be paid in order to compensate the injured party for the damage suffered because of the breach or the premature termination of the contract.

38. As in almost all cases where a party is called to compensate another party for the damage caused, it is hardly possible for a party to predict in advance how big the damage and how much the compensation will be, provided no appropriate penalty clause has been negotiated and inserted in advance in the employment contract. Art. 17 FIFA Regulations, by focussing on the full compensation due to the injured party for the damage caused, makes impossible for instance for players and clubs to calculate in advance whether a transfer via unilateral and unjustified breach or an unjustified termination, respectively, would be more or less expensive than an "ordinary" transfer, with a transfer fee to be paid to the transferring club, or an ordinary termination, respectively.

39. When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof[5].

40. As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called *positive interest* (or "expectation

[5] STREIFF/VON KAENEL, *Arbeitsvertrag*, 6th ed., Zurich 2005, Art. 337d N 6 and N 8, and STAEHELIN A., *Zürcher Kommentar*, 4th ed., Zurich 2006, Art. 337d N 11 – both authors with further references; see also WYLER R., *Droit du travail*, 2nd ed., Bern 2008, p. 523.

interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur[6]. This principle is not entirely equal, but is similar to the praetorian concept of *in integrum restitutio*, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.

41. 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[7]. 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.

42. The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and any a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of the sport, as foreseen in Art. 17 para. 1 FIFA Regulations.

43. To conclude, the calculation of the compensation due under Art. 17 FIFA Regulations shall be diligent and there is no power for the judging authority to set the amount due in a fully arbitrary way. By asking the judging authorities, i.e. the competent FIFA bodies and, in the event of an appeal, the CAS, to duly consider a whole series of elements, including such a wide concept like "sport specificity", and asking the judging authority to even consider "any other objective criteria", the authors of Art. 17 FIFA Regulations achieved a balanced system according to which the judging body has on one side the duty to duly consider all the circumstances of the case and all the objective criteria available, and on the other side a considerable scope of

[6] Cf. CAS 2006/A/1061, N 40; see the decisions of the Swiss Federal Tribunal BGE 97 II 151, BGE 99 II 312; STREIFF/VON KAENEL, *op. cit.*, Art. 337b N 4 and Art. 337d N 4 and STAEHELIN A., *op. cit.*, Art. 337b N 7 and Art. 337d N 7 – both authors with further references; see also WYLER R., *op. cit.*, p. 522.

[7] Cf. CAS 2008/A/1453, 1469, N 9.4; CAS 2007/A/1298-1300, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see STREIFF/VON KAENEL, *op. cit.*, Art. 337d N 6, and STAEHELIN A., *op. cit.*, Art. 337d N 11 – both authors with further references; see also WYLER R., *op. cit.*, p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312 *et seq.*

discretion[8], so that any party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable. At the end, however, the calculation made by the judging authority shall be not only just and fair, but also transparent and comprehensible.

44. Against this background, the Panel comes now to the evaluation of the damage caused by the Player and to the calculation of the compensation due by him to Shakhtar Donetsk, and so to the review of the criteria that may or may not be relevant in the present case.

c) The Calculation of the Compensation

aa) The Remuneration Element

45. Through the unjustified termination of a player, a club like any other employer, loses the value of the services of the employee. In this case, the Panel wishes to make the following consideration to calculate such value.

46. One of the non-exclusive criteria mentioned in Art. 17 para. 1 of the FIFA Regulations is the remuneration and other benefits due to a player under the existing and the new contract. While the information on the remuneration under the existing contract may provide a first indication on the value of the services of the player for that employing club, the remuneration under the new contract may provide an indication not only on the value that the new club/clubs is/are giving to the player, but possibly also on the market value of the services of the player and the motive behind the decision of the player to breach or terminate prematurely the agreement[9].

47. In the present matter, based on the evidence submitted, the following can be noted:

48. The yearly remuneration, including the benefits due to the Player under his agreement with Shakhtar Donetsk was at the moment of the unilateral termination of approx. EUR 1,200,000. This corresponds to the findings of the DRC, has been accepted by Shakhtar Donetsk and no evidence produced leads the Panel to other conclusions.

49. The yearly remuneration paid to the Player by Real Zaragoza for the season 2007/2008 was of approx. EUR 1,000,000 plus bonuses.

50. As mentioned above, Real Zaragoza loaned the Player to the Italian Club SS Lazio in July 2008. The remuneration of the Player under his agreement with SS Lazio was of approx. EUR 895,000 for the first, and of approx. EUR 3,220,900 for each the second and the third season, each amount plus bonuses.

[8] Cf. CAS 2008/A/1453, 1469, N 9.4; CAS 2007/A/1298-1300, N 134; CAS 2006/A/1100, N 8.4.1.
[9] Cf. CAS 2008/A/1568, N 6.41 *et seq.*

51. While the Player was still in loan to SS Lazio, Real Zaragoza and the Player decided to extend their contractual relationship for one season, i.e. until the summer 2011, and agreed in a yearly retribution of approx. EUR 2,320,000, to be effective when the Player were to play again with Real Zaragoza.

52. The above shows that the Player, after leaving Shakhtar Donetsk, maintained in the football season 2007/2008 basically the same level of salary, but was able to raise his remuneration sensibly in the following seasons. To some extent, these facts can be interpreted as supporting the arguments raised by the Player that he did not leave Shakhtar Donetsk for economic reasons. This seems to the Panel to have some merit in relation with the first season, i.e. the season 2007/2008, played by the Player with Real Zaragoza and in accordance with his first contract with that club.

53. With regard to the season 2008/2009, i.e. the second season that was originally covered by the agreement of the Player with Shakhtar Donetsk, the Panel observes that pursuant to the contract of the Player with SS Lazio, the fix remuneration for that season was of EUR 895,000. However, and even though the Player was officially only loaned to SS Lazio for a period of one season, the employment contract between the Player and SS Lazio was already concluded for three seasons, with a substantially higher fix remuneration for the second and the third season: from EUR 895,000 to EUR 3,220,900 p.a., i.e. an amount that is almost four times the one of the first reason. The Panel notes that the Player, Real Zaragoza and SS Lazio were well aware of the risks of the pending litigation against Shakhtar Donetsk. Indeed, in the loan agreement between Real Zaragoza and SS Lazio the price for the option granted to SS Lazio and giving to this club the right to making the transfer of the Player definitive was made subject to the outcome of the present CAS proceedings.

54. Taking in consideration that on one side in the second employment contract concluded by the Player and Real Zaragoza the fix remuneration for the season 2008/2009 was put at EUR 2,320,000, and that on the other side over the three years the average fix remuneration of the Player under the contract with SS Lazio is of EUR 2,445,600 p.a., the Panel concludes that for the purposes of the calculation of the compensation under Art. 17 para. 1 FIFA Regulations, the fix yearly remuneration of the Player can be considered to have been of approx. EUR 1 mio. (plus bonuses) in the season 2007/2008, and of an average value of approx. EUR 2,445,600 (plus bonuses) in the season 2008/2009.

55. The Panel is of the view that the above-mentioned amounts show the value that third parties, including Real Zaragoza and the Player himself, gave to the services of the Player and also, through the explicit clause, to a potential breach of the new contract between the Player and Real Zaragoza. Therefore, it is appropriate to consider such figures as part of the calculation of the overall loss suffered by Shakhtar Donetsk.

56. However, the value of the services of a player is only partially reflected in the remuneration due to him, since a club has to make also certain expenditures to obtain such services. In order to

calculate the full amount of the value of the services lost, one has therefore not simply take into consideration the amount of outstanding remuneration but one shall take also in account what a club would – under normal circumstances – have to spend on the (transfer) market to contract the services like the ones of the Player.

bb) The Value of the Services

57. While the objective element of the non-amortized expenses will be handled later, the following shall be clarified: The value of the services of a player at a given point of time may be lower, higher or equal to the one when the player had started to play for a club. In the event of a breach by a player, a panel has therefore to analyze the amount necessary to acquire and keep the working force of the player. In doing so, the Panel only acknowledges economic reality in the world of football, i.e. that services provided by a player are traded and sought after on the market, are attributed an economic value and are – according to Art. 17 FIFA Regulations – worth legal protection. The Panel is eager to point out that the sole object of this approach are the services provided by a player and not the human being as such.

58. Against such a background, when a transfer of a player is realized on the basis of a valid transfer agreement between two clubs, the amount of the transfer fee is likely to represent the value in exchange of which the transferring club was willing to waive its rights as employer and to renounce to the services of the player. When there is no transfer agreement or where a transfer agreement remains unrealized because of the breach by the player, an amount offered and originally accepted by the club will probably be also fairly close to the value of the services of that player and serve therefore as an important indication for the value of the damage caused and to be compensated. Finally, where no offer was made by a third club, a "sign-on fee" and/or the fee that a fourth club offered to the new club to acquire the services of the player, may also be important indications for the value of the expenditures necessary to obtain the services of the player. In other words, an offer made by a third party is very likely to reflect or at least bring some additional information on the value that a third party (and possibly the market) is giving to the services of the player at stake[10].

59. Furthermore, the Panel notes that as mentioned above, on 17 July 2008, Real Zaragoza transferred the Player on a loan basis for one football season to SS Lazio. The loan agreement, signed by Real Zaragoza, the Player and SS Lazio contains an option clause providing the Italian club with the right to make the transfer definitive, by exercising the option before 15 May 2009 and paying a corresponding fee. This fee is set at EUR 13 mio. plus VAT, respectively at EUR 14 mio. plus VAT if SS Lazio reaches the UEFA Champions League during the 2008/2009 football season. The fee is further raised to EUR 14 mio. plus VAT and EUR 15 mio.

[10] Cf. CAS 2008/A/1448, N 7.4.5; CAS 2008/A/1453, 1469, N 9.7; TAS 2005/A/902, 903, N 133 *et seq.*; TAS 2004/A/791, N 73 and 81 *et seq.*; see also MEIER A., *At What Costs May a Football Player Breach his Contract?*, ASA Bull. 3/2008, p. 539.

respectively, if the present CAS proceedings ends with an award imposing the Player and Real Zaragoza to pay to Shakhtar Donetsk more than EUR 7 mio.

60. In the same loan agreement the parties have also agreed that an insurance policy against accidents of the Player must be put in place and that the coverage must be, for a case of total disablement of the Player, EUR 13 mio.

61. Against this background, the following calculation can be made: To obtain the services of the Player for a period of three years, SS Lazio has declared to be willing to pay an amount of between EUR 13 to 15 mio. plus an average yearly salary of EUR 2,445,600. On its side, Real Zaragoza has shown to be willing to renounce to the services of the Player on a definitive basis for such a fee of between EUR 13 to 15 mio., and to be willing to pay a yearly average fix salary of approx. EUR 1,880,000 (resulting from the salary paid in the season 2007/2008, i.e. approx. EUR 1 mio., and the one agreed for the seasons 2009/2010 and 2010/2011, i.e. approx. EUR 2,320,000 p.a.). Applying the average fee of EUR 14 mio., the yearly average costs for SS Lazio would be of approx. EUR 7,112,267 (resulting from adding the fee of EUR 14 mio. with the salaries over three years, i.e. approx. EUR 7,336,800, for an interim total of EUR 21,336,800 and thereafter divided by three, i.e. the number of the seasons) while those of Real Zaragoza would be approx. EUR 6,546,667 (resulting from adding the fee of EUR 14 mio. with the salaries over three years, i.e. EUR 5,640,000, for an interim total of EUR 19,640,000, and thereafter divided by three, i.e. the number of the seasons). In other words, these amounts can be used as an indication of the value of the services of the Player for SS Lazio and for Real Zaragoza, on a yearly basis.

62. As mentioned above, the Player had a valid contract with Shakhtar Donetsk with a remaining duration of two years. By applying the total costs of SS Lazio and Real Zaragoza to a period of two years, the value is of approx. EUR 14,224,534 and approx. EUR 13,093,334, respectively.

63. Finally, the Panel notes that the loan agreement between SS Lazio and Real Zaragoza, co-signed by the Player, foresees that in the event SS Lazio does not make use of its option right, the Player must return to Real Zaragoza. In the event of a breach of such return obligation, the Player shall pay to Real Zaragoza an indemnity of EUR 22,5 mio.

64. The loan agreement has been signed and concluded by the Player, Real Zaragoza and SS Lazio in relation with the football season 2008/2009, i.e. the last season that was originally covered by the agreement between the Player and Shakhtar Donetsk. It can therefore give an additional, objective indication on the economic value attributed to the services of the Player by two clubs and acknowledged by the Player himself. The Panel, however, is not satisfied that under the specific circumstances of this case, the fact that Real Zaragoza and the Player agreed on a penalty clause of EUR 22,5 mio. to be paid by the Player in the event of the breach of his contract with Real Zaragoza shall be taken into due consideration when calculating the value of the services of the Player and the amount of the damage suffered by Shakhtar Donetsk. Indeed, while in other circumstances one could possibly consider the amount of such a penalty clause

as a valid indicator of the value of the services of a player, in this case the Panel retains from the evidence submitted that the amount of EUR 22,5 has more a deterrent effect than an appreciation nature.

65. Finally, even though the FIFA Regulations do not mention this criterion explicitly, as in any situation where a party requests compensation for damages, the judging authority has also to consider that any injured party has the obligation to take reasonable steps to mitigate the effects and loss related to his or her damage. This well-recognized principle is confirmed by Art. 44 para. 1 of the Swiss Code of Obligations which states that a judge may reduce or completely deny any liability for damages if circumstances for which the injured party bears the responsibility have aggravated the damage[11].

66. CAS panels have admitted this, in particular in cases where it was the club that had terminated a contract without just cause. So it was recognised that a player has to make reasonable efforts to seek other employment possibilities and, in the event he finds a new club, the damage has to be reduced for the amount the player was able to earn elsewhere[12].

67. The Panel agrees that an injured party has the obligation to try to mitigate the damages he/she is suffering. The Panel observes, however, that this obligation should not apply only to players when they are suffering for an unjustified termination by a club, but also to clubs that are claiming compensation for the damage caused by an unjustified termination by a player. So for instance the club will have to take reasonable measures to find a replacement to the player and cannot simply lay back and claim at a later stage that it did not have enough players for that specific role. Also, the club has to find a replacement which is from a sporting and an economical point of view reasonable.

68. Where the injured party has not or not fully complied with the duty to mitigate the damages, the judging authority will, as mentioned, consider this and possibly reduce the amount due for compensation. When deciding on such a potential reduction, the judging authority will have a wide discretionary power to decide on the appropriate amount, taking into consideration the specific circumstances of the case and the responsibilities of both the parties[13].

69. In the present case, upon due consideration of all the evidence submitted, the Panel is not satisfied that Shakhtar Donetsk can be reproached for having failed to take reasonable steps to mitigate the damage. This does not imply, however, that the replacement costs claimed by Shakhtar Donetsk are automatically accepted as part of the damage suffered by the club. This issue will be handled separately, below.

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[11] The full, original French version of art. 44 para. 1 of the Swiss Code of Obligations reads: *"Le juge peut réduire les dommages-intérêts, ou même n'en point allouer, lorsque la partie lésée a consenti à la lésion ou lorsque des faits dont elle est responsable ont contribué à créer le dommage, à l'augmenter, ou qu'ils ont aggravé la situation du débiteur".*

[12] CAS 2006/A/1180, N 8.8.4; CAS 2006/A/1062, N 8.5.3; CAS 2006/A/1061, N 40 *et seq.*; CAS 2005/A/866, N 58 *et seq.*; CAS 2003/O/540, sec. V.3, with reference to art. 337b of the Swiss Code of Obligations; CAS 2003/O/535, sec. V.3.

[13] Cf. decisions of the Swiss Federal Tribunal BGE 127 III 453, 459; BGE 117 II 156, 159.

cc) Lost earnings: The Missed Transfer Fees

70. It is generally recognised that the loss of earnings (*lucrum cessans*) is a possible part of the damage caused through an unjustified termination of an employment agreement[14]. In particular, in the event of an unjustified termination by a player, the issue to be answered is whether the club has suffered a loss of profits. While some of such profits may be easy to determine, for instance if, because of the termination, the club has to pay a penalty to a sponsor, some other may be more difficult to establish.

71. Specifically, the Panel is aware of the criticism raised by some authors and by some other CAS panels against the possibility of considering as a part of the damage to be compensated by a player, the claim of his former club for the opportunity to receive a transfer fee that has gone lost because of the premature termination of the employment contract[15]. Indeed, whether losing a mere chance to achieve a transfer can be considered as being itself damage, is debatable[16], but the correct handling of the issue is straightforward: the loss of a possible transfer fee can be considered a compensable damage head if the usual conditions are met, i.e. in particular if between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit there is the necessary logical nexus.

72. One may take into consideration for instance whether an offer made by a third party was accepted or not by the original club and/or by the player, but the transfer finally failed because of the unjustified departure of the player to another club.

73. On the other side, to avoid any over-compensation, if a club will claim – and receive – compensation for a lost transfer fee, it will hardly be in position to claim additionally also the value of the services lost for the remaining duration of the agreement: would have the club transferred the player, it would have had the transfer fee, but not the services of the player any longer.

74. Therefore, as described above, third parties' offers may be relevant within the evaluation of the amount of the damage suffered by the abandoned club in two possible ways: first, such offers can provide important information on the value of the services of the player, and a panel shall take into consideration a third party good faith offer made to the club, as an additional element to assess the value of the services of the player; second, a loss of a transfer fee may or may not be a compensable damage head, depending on whether the club is in position to prove that the conditions to claim compensation of such a loss of profits are met, including in particular the logical nexus between the termination and the claimed damage.

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[14] TAS 2005/A/902, 903, N 136; diss. CAS 2007/A/1298-1300, N 141 *et seq*. For Swiss employment law see STREIFF/VON KAENEL, *op. cit.*, Art. 337b N 4 and Art. 337d N 4 and STAEHELIN A., *op. cit.*, Art. 337b N 7 and Art. 337d N 7 – both authors with further references; see also WYLER R., *op. cit.*, p. 522.

[15] Cf. against such a possibility: CAS 2007/A/1298-1300, N 141 *et seq.*; in favour: TAS 2005/A/902, 903, N 136.

[16] Cf. HAAS U., *Football Disputes between Players and Clubs before the CAS*, in BERNASCONI/RIGOZZI (eds), *Sport Governance, Football Disputes, Doping and CAS Arbitration: CAS & FSA/SAV Conference*, Lausanne 2008, at fn 156 et seq.

75. In the present matter the Panel notes that on 1 June 2007, the Italian club U.S. Città di Palermo confirmed to Shakhtar Donetsk its interest for the Player and the fact that it was willing to pay a transfer fee of USD 7 mio. Shakhtar Donetsk turned this offer down. For the above reasons the Panel is of the view that Real Zaragoza is wrong in stating that the offer made by the club U.S. Città di Palermo on 1 June 2007 cannot be taken into any consideration as Shakhtar Donetsk turned it down. Even admitting that under the present specific circumstances no direct damage was suffered by Shakhtar Donetsk because of a potential but never concretized transfer, the Panel, for the abovementioned reasons, will take such offer into due consideration as an additional element to establish the value of the services of the Player and the loss caused by the Player to Shakhtar Donetsk through the premature termination of his contract. At the same time, based on the specific circumstances of this case, the Panel is satisfied that Shakhtar Donetsk is not in position to claim the amount of USD 7 mio. as compensable loss of profits.

dd) Interim Conclusion

76. Considering the total value of the services of the Player expressed by SS Lazio and Real Zaragoza, the Panel concludes that the services of the Player had, for a remaining duration of two years, a value of between approx. EUR 14,224,534 and approx. EUR 13,093,334, respectively. The offer submitted by US Palermo (USD 7 mio.) does not correspond to an additional amount of lost profit, and does not provide compelling reasons to revise the above calculations.

77. Further, because of the termination of the contract Shakhtar Donetsk will actually not have to pay any salary more to the Player[17], so that the corresponding amount corresponds much more to saved expenses than to damage[18]. Therefore, to simply equalize the amount of salaries to be paid by the former club to the damage suffered by the same club is not what Art. 17 para. 1 of the FIFA Regulations asks the judging body to do and would deprive the compensation foreseen under Art. 17 of the FIFA Regulations of its meaning[19].

78. From the above-mentioned amounts one shall therefore deduct the salaries that Shakhtar Donetsk is no more obligated to pay to the Player for the same remaining duration of the contract, i.e. EUR 2.4 mio. (by multiplying the yearly salary of Shakhtar Donetsk of EUR 1.2 mio. by two), so that a first interim amount corresponds to a value of between approx. EUR 11,824,534 and EUR 10,693,334.

79. Finally, for the reasons set forth above, the Panel does not retain as relevant for the calculation of the compensation to Shakhtar Donetsk the fact that Real Zaragoza and the Player agreed on

[17] Cf. CAS 2006/A/1141, N 90.
[18] MEIER A., *op. cit.,* p. 537.
[19] CAS 2007/A/1358, N 101; CAS 2007/A/1359, N 104; diss. CAS 2007/A/1298-1300, N 151-152.

an indemnity amount of EUR 22,5 mio. to be paid by the Player in the event of unjustified termination.

d) The Fees And Expenses Paid Or Incurred By The Former Club

80. According to Art. 17 FIFA Regulations the amount of fees and expenses paid or incurred by the former club, and in particular those expenses made to obtain the services of the player, is an additional objective element that must be taken in consideration. Art. 17 para. 1 requires those expenses to be amortised over the whole term of the contract[20]. This, independently on whether the club - because of any applicable accounting rule - has amortized the expenditures in such a linear way or not.

81. In the present matter, the DRC has recognised the fee paid by Shakhtar Donetsk to the club of Brescia, i.e. EUR 8 mio. as being such a kind of expenses. The Panel agrees and shares also the calculation made in the Appealed Decision according to which such fee was to be amortised in accordance with Art. 17 FIFA Regulations over a period of five years, i.e. the entire contract period. Therefore, the non-amortised part of the transfer fee is equal to 2/5 of EUR 8 mio, i.e. EUR 3.2 mio.

82. The DRC refused to take into consideration as expenses the amount allegedly paid by Shakhtar Donetsk as solidarity contributions. The Panel concurs, because based on the FIFA Regulations Shakhtar Donetsk had the right to deduct such payments from the transfer fee due to the club of Brescia. If it did not do so, it was because of its own decision or of the contractual arrangements it entered into with the club of Brescia, respectively.

83. Shakhtar Donetsk has further claimed that payments made to some agents had to be considered as expenses as well. In general, payments to agents can be considered as being part of the costs incurred by a club in order to obtain the services of a player[21].

84. However, in the present matter, the Panel shares the view of the DRC on this point and considers that Shakhtar Donetsk was not able to convince the Panel that such payments were linked to the transfer of the Player or, at least, that the final financial burden of such payments, made by a company called Medco, has been taken by Shakhtar Donetsk.

85. As no other charges, fees, expenses have been submitted, the Panel will consider, when establishing the amount of the non-amortised fees and expenses, only the amount of EUR 3.2 mio. of the non-amortised transfer fee paid originally to Brescia Calcio. However, since in the present case the Panel was able to calculate the value of the lost services of the Player at the moment of the breach and on the basis of convincing evidence, and taking into consideration

[20] Cf. CAS 2006/A/1141, N 87 *et seq*.; TAS 2007/A/1314, N 23; CAS 2008/A/1448, N 7.4.5; ONGARO O., *The FIFA Players' Status Committee and the FIFA DRC*, in BERNASCONI/RIGOZZI (eds), *op. cit.*, at fn 28; HAAS U., *op. cit.*, at fn 148.
[21] Cf. TAS 2005/A/902, 903, N 118.

that within such value of the lost services the value of the fees to acquire such services has been incorporated, there is no reason to add to such value the amount of the non-amortized fees of Shakhtar Donetsk.

86. The issues relating to the expenses incurred by Shakhtar Donetsk in connection with the hiring of new players after and because of the departure of the Player will be discussed below.

e) Extra Replacement Costs

87. As mentioned above, the criteria listed in Art. 17 para. 1 FIFA Regulations are non-exclusive. Accordingly, a panel is called to examine whether in the concrete dispute there are any other objective criteria to be taken into consideration when assessing the amount of compensation due under Art. 17 para. 1 FIFA Regulations.

88. Among such additional objective criteria the question arises whether the expenses that a club incurs to replace a player that has left prematurely shall be considered.

89. In general, one will note that some replacement costs would arise in any event, i.e. after an ordinary expiry of an agreement same as upon a premature termination. This is the case for instance in relation with ordinary expenses for scouting services. Swiss jurisprudence in employment matters recognises for instance a claim for replacement costs where the employer had extra costs[22].

90. Further, in the event a club pays a transfer fee to a third party to obtain the services of a new player, the value of such fee is in principle the transfer of that new player. Therefore, in order to claim that fee, or part of it, as part of the compensation due by the player that had previously breached the contract, the club should be able to prove several factual elements. It would have for instance to prove that the new player was hired in substitution of the other player, which requires not only that the players are playing in more or less the same position on the pitch (e.g. it is hard to prove that a forward would substitute a goalkeeper or a defender), but also that the club decided to hire the new player because of the termination by the other player. The Panel is well aware that since clubs are transferring players basically during each transfer window, this second requirement will normally not be proven easily, but nevertheless it is the club that has the burden to prove such factual circumstances if it wishes to have those expenses by compensated by the "old" player. Furthermore, the club will be asked to prove that there is a link between the amount of the transfer fee paid for the new player and the premature termination by the other player. This will possibly be the case for a part of the fee if the club is able to determine that it had to raise the fee for instance in order to anticipate the transfer, because of the gap left by the other player, or if the club is entering a loan agreement on a temporary basis only for the purposes of filling the gap caused by the termination of the player.

[22] Cf. STREIFF/VON KAENEL, *op. cit.*, art. 337b N 4 and art. 337d N 6.

91. In the present matter, Shakhtar Donetsk has claimed that to replace the Player it had to hire on a urgent basis the player Nery Alberto Castillo and pay a transfer fee of EUR 20 mio.

92. The Panel is aware that the player Castillo is, similarly as the Player, a midfielder. However, beside this, Shakhtar Donetsk was not able to convince the Panel that the transfer of the player Castillo and the payments made for this transfer were linked to the gap left by the Player or that the costs of hiring the player Castillo have been somehow increased by the termination of the Player.

93. Against the above background, the Panel is of the view that it is appropriate not to consider the costs caused by the transfer of the player Castillo when assessing the compensation due to Shakhtar Donetsk.

f) Further Expenditures

94. The Panel comes now to the analysis of whether a club would be entitled to claim that the amount invested in the training of a player must be taken into consideration when assessing the compensation under Art. 17 para. 1 FIFA Regulations.

95. The FIFA Regulations have clarified indeed that training compensation in the meaning of Art. 20 and Annex 4 and compensation for breach/premature termination under Art. 17 of the FIFA Regulations are two different subjects and that there is no prejudicial effect of any training compensation, possibly due to the club in accordance with Art. 20 and Annex 4 of the FIFA Regulations, on the compensation due under Art. 17 para. 1. Indeed, Art. 1 para. 2 of Annex 4 foresees that the obligation to pay training compensation *"is without prejudice to any obligation to pay compensation for breach of contract"*.

96. However, whether or not in the event of an unjustified termination by a player a club will have a right to claim compensation on the basis of Art. 17 para. 1 and para. 2 and the new club will also be obliged, if the applicable conditions are met, to pay in addition training compensation on the basis of Art. 20 and Annex 4 of the FIFA Regulations, as stated by the FIFA Commentary to the same provision[23], is an issue that does not need to be answered here, for the following reasons.

97. In the present matter, the Panel is appreciative that Shakhtar Donetsk did not seek to "build up" fictive figures and has not submitted having made any particular investments on the training or formation of the Player that the Panel would need to take into consideration when assessing the compensation due by the Player. For these reasons, the Panel does not have to take account of any further investments in determining the level of compensation owed to Shakhtar Donetsk in application of Art. 17 para. 1 FIFA Regulations.

[23] Cf. FIFA Commentary on the FIFA Regulations, N 2 ad Annex 4, Art. 1; see also TAS 2005/A/902, 903, N 127 *et seq.*; ONGARO O., *op. cit.*, after fn 31; diss. CAS 2007/A/1298-1300, N 119 *et seq.*

g) The "Law of the Country Concerned"

98. As mentioned above, Art. 17 para. 1 of the FIFA Regulations asks the judging body to take into due consideration the law of the country concerned. The purpose of this is to make sure that any outcome, which the judging body will reach, shall somehow take into consideration any special aspect of the concerned local law. The law of the country concerned is the law governing the employment relationship between the player and his former club, i.e. normally the law with which the dispute at stake has the closest connection. This will be under ordinary circumstances the law of the country of the club of which the employment contract has been breached or terminated, respectively[24]. To apply instead of such governing law automatically Swiss law as being the law applicable "by default"[25], would mean to possibly overlook the corrective influence that the "law of the country concerned" shall have.

99. The fact that the law of the country concerned is the one of the country of the club, of which the employment contract has been breached or terminated, is confirmed in the Commentary to the FIFA Regulations published by FIFA itself. Commenting on Art. 17 para. 1 FIFA confirms that the provision is referring to the law of the country "where the club is domiciled"[26]. Further, when commenting on the scope of the Regulations, and on Art. 1 para. 2 in particular, FIFA namely states in connection with national regulations that "the associations shall provide for appropriate means to protect contractual stability, which is one of the fundamental principles on which the Regulations are based. The associations are, however, free to establish in which way this obligation has to be complied with, since the various principles outlined in para. 3b) are to be considered as a strong recommendation, i.e. every association is allowed to include the principles it deems necessary and appropriate for its own football system in order to reflect the particular needs of the country concerned"[27].

100. Therefore, the law of the country of the club of which the employment relationship is at stake has to be considered by the judging authority while it is assessing the amount of the compensation due under Art. 17 *para.* 1 of the FIFA Regulations. Depending on the content of the relevant law, such corrective influence may be in favour of the player, and diminish the compensation due to his former club, or in favour of the club, and lead to an increase of the compensation.

101. In the present matter, after review of all the submissions made and the evidence produced by the parties, the Panel is of the opinion that neither of the parties have submitted to the Panel any compelling legal arguments according to which a national law could have an effect on the calculation of the compensation due, nor have they specified in particular any arguments of Ukrainian (or of Swiss) law which – within the meaning of the criterion – should be taken into due consideration by the Panel.

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[24] Cf. CAS 2007/A/1298-1300, N 89.
[25] Cf. Art. R58 of the CAS Code and CAS 2005/A/893, N 7.5 *et seq*.
[26] FIFA Commentary on the FIFA Regulations, fn 74.
[27] FIFA Commentary on the FIFA Regulations, N 3 and 4 ad art. 1 para. 2.

102. For these reasons, the Panel concludes that it is not in position to take this criterion into due consideration.

h) Additional Objective Criteria

103. Following the requirements of Art. 17 FIFA Regulations the Panel comes now to examine whether there are other objective elements to consider when determining the level of the compensation due to Shakhtar Donetsk.

104. Such elements could be for instance the damage incurred by a club, which - because of the premature termination - is not any longer in the position to fulfil some obligations towards a third party, like a sponsor or an event organiser to whom the presence of the player was contractually warranted. Of course, it would be up to the club to prove the link between the damage suffered and the breach of the contract by the player.

105. However, in the present matter, Shakhtar Donetsk did not submit that it had suffered any particular additional damage because of the premature termination of the contract by the Player, so that the Panel does not have to take account of any such additional damages when assessing the compensation to be paid to Shakhtar Donetsk under Art. 17 para. 1 FIFA Regulations.

i) The Specificity of the Sport

aa) Sport Specificity in General

106. Sport, similarly to other aspects of social life, has an own specific character and nature and plays an own, important role in our society. This rather simple consideration has found an important confirmation in December 2000 in the European Council's Declaration on the specific characteristics of sport and its social function in Europe (the "Nice Declaration"), then for instance in the Independent European Sport Review[28], and recently in the White Paper on Sport[29] and the Lisbon Treaty of the European Union, which provides explicitly that the European Union *"shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function"*[30].

107. Similarly as for the criterion of the "law of the country concerned", the judging body has to take into due consideration the specific nature and needs of sport when assessing the circumstances of the dispute at stake, so to arrive to a solution which takes into reasonable

[28] IESR, edited by J. L. Arnaut and the UK EU Presidency, cf. para. 3.10 et seq.
[29] COM [2007] 391 final.
[30] Treaty of Lisbon, 2007/C 306/01, para. 124, revised Article 149.

account not only the interests of player and club[31] but, more broadly, those of the whole football community.

108. CAS has confirmed this latter, broad approach recently:

"The Panel considers that the specificity of the sport must obviously take the independent nature of the sport, the free movement of the players (cf. CAS 2007/A/1298, 1299 & 1300, no. 131 ff.) but also the football as a market, into consideration. In the Panel's view, the specificity of the sport does not conflict with the principle of contractual stability and the right of the injured party to be compensated for all the loss and damage incurred as a consequence of the other party's breach. This rule is valid whether the breach is by a player or a club. The criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football.

Therefore, when weighing the specificity of the sport a panel may consider the specific nature of damages that a breach by a player of his employment contract with a club may cause. In particular, a panel may consider that in the world of football, players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club. Taking into consideration all of the above, the asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player (cf. CAS 2005/A/902 & 903, no. 122 ff.; more restrictive CAS 2007/A/1298, 1299 & 1300, no. 120 ff.)"[32].

109. Based on this criterion, the judging body shall therefore assess the amount of compensation payable by a party under Art. 17 para. 1 of the FIFA Regulations keeping duly in mind that the dispute is taking place in the somehow special world of sport. In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case.

110. Taking into account the specific circumstances and the course of the events, a panel may consider, as guidance, also that under Swiss law (Art. 337c para. 3 and Art. 337d para. 1 of the Swiss Code of Obligations), a judging authority is allowed to grant a certain "special indemnity" to the employee, in the event of an unjustified termination by the employer, and to the employer, in the event of an unjustified termination by the employee. In "ordinary" employment law the employee is normally considered the weak party, and it is therefore understandable that such "special indemnity" is potentially much higher in the event of an unjustified termination by an employer than by an employee. However, professional football is a special sector, and the Panel considers that it may be often wrong to treat the players as being

[31] CAS 2007/A/1298-1300, N 131 *et seq.*
[32] CAS 2007/A/1358, N 104-105; CAS 2007/A/1359, N 107-108; confirmed in CAS 2008/A/1568, N 6.46 and 6.47.

the weak party *per se*. Much more, the specific circumstances of a case may lead a panel to increase the amount of the compensation, by letting itself inspire, *mutatis mutandis*, by the concept of fair and just indemnity foreseen in the Art. 337c para. 3 and Art. 337d para. 1 Swiss Code of Obligations, without applying the strict quantitative limits foreseen in such rules. However, it must be acknowledged that under ordinary circumstances any compensation based on the specificity of sport is limited as to its scope of application, since the concept serves only the purpose to verify the solution for compensation reached otherwise (N 154). It follows from this that the amount of damages that may be awarded on the basis of the specificity of sport is clearly subordinated in relation to the other compensable damage heads. In particular, the criteria is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. Furthermore, the element of the specificity of sport may not be misused to undermine the purpose of Art. 17 para. 1, i.e. to determine the amount necessary to put the injured party in the position that the same party would have had if the contract was performed properly (see N 86). In light of this the assessment of damages that are punitive in character is particularly sensitive. Finally, it follows from this that no compensation is possible for facts and circumstances that are clearly not compensable otherwise (e.g. lost chances, see N 116 et seq.).

111. Whether in the present case such an additional indemnity shall be granted to Shakhtar Donetsk, will be discussed below.

bb) The Time Remaining On The Existing Contract Up To A Maximum Of Five Years

112. One of the elements that concretize the concept of sport specificity is the issue about the remaining time of the contract that has been breached or terminated, respectively.

113. Art. 17 para. 1 FIFA Regulations requires the judging body to duly consider the duration of the employment relationship that has been breached or terminated, and in particular to consider the remaining time of such relationship. The rationale is easy to understand: It is criticisable to breach or terminate prematurely a contract. But even more criticisable is to breach an agreement, which is supposed to still have a substantial duration, as the other party had reason to believe and count on the continuation of the relationship.

114. The Panel observes that the Player terminated the agreement with Shakhtar Donetsk after three football seasons, with two more football seasons being part of the agreement.

115. The remaining time under the existing contract between Shakhtar Donetsk and the Player was therefore important, as two seasons out of five are a substantial period of time. The situation would have been different if the Player had just a few months of valid contract to serve.

116. Accordingly, the Panel will take into due consideration as an element to establish the amount of the compensation due by the Player that he terminated his agreement with Shakhtar Donetsk with two seasons still remaining under the agreement.

cc) Does The Contractual Breach Fall Within The Protected Period?

117. It is debatable, if another element that concretizes the concept of sport specificity is the issue about whether the breach or the termination of the contract did take place during or outside of the so-called "Protected Period".

118. In the chapter "Definitions" of the FIFA Regulations "Protected Period" is defined as "a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional"[33].

119. It is true that breaches and terminations within the Protected Period are considered a particular serious form of unlawful behaviour. It is for that reason that Art. 17 para. 3 to 5 provide in such cases for proportionate sporting sanctions to be applied to players, clubs or agents. However, it is an open issue whether the breach within a protected period may also be taken into account when assessing the compensation due, since the same facts and circumstances would possibly be taken into account twice by the judging body to the detriment of the player. In the present matter, the Panel notes that the Player, born on 10 June 1980, was 24 years old when he concluded the contract with Shakhtar Donetsk, i.e. on 26 June 2004. Accordingly, in this case the Protected Period is a period of three years or of three football seasons, whichever comes first, following the entry into force of the contract.

120. It has remained undisputed among the parties that the termination of the contract with Shakhtar Donetsk has been made by the Player upon expiry of the Protected Period applicable to him.

121. Accordingly, the Panel when establishing the compensation due to Shakhtar Donetsk will consider that the unilateral, premature termination occurred outside of the Protected Period, so that the compensation due by the Player shall not be increased on the basis of this particular criterion.

dd) The Status and the Behaviour of the Player

122. An additional and important element of sport specificity that must be taken into due consideration when establishing the compensation due in the event of breach or undue

[33] FIFA Regulations, Definitions, item no. 7.

termination is the behaviour and the status of the parties involved, with a particular attention to the behaviour of the party that did not respect the contractual obligations in place.

123. In the Appealed Decision, the DRC has considered as a penalising element of "sport specificity" the fact that the Player by accepting an increase of his salary on 1 April 2007 and deciding shortly afterwards to leave Shakhtar Donetsk has offended the good faith of the club. Also, DRC observed that the Player left the club without indicating in advance his wish to look for other employment opportunities.

124. The Panel shares to some extent the criticism expressed by the DRC about the behaviour of the Player. The Panel is indeed not satisfied that the reasons submitted by the Player and his representative can be accepted as full justifications of the Player's behaviour.

125. The Panel wishes, however, to add the following remarks as with regard to the Player's behaviour:

126. On the one side, against the Player, the Panel notes that the Player joined Shakhtar Donetsk in summer 2004, coming from a rather small Italian club, Brescia. After two seasons with Shakhtar Donetsk the Player became during the 2006/2007 season captain of the team and was elected also best player. This speaks in favour of a successful club career. Even accepting that the Player may have not decided to leave Shakhtar Donetsk for personal gain reasons, it remains that the Player left the club just a few weeks before the start of the qualifying rounds of a competition which is obviously very important to Shakhtar Donetsk, i.e. the UEFA Champions League.

127. The Panel will take the above into due consideration as an element to establish the value of the loss caused by the Player to Shakhtar Donetsk through the premature termination of his agreement.

128. On the other side, in favour of the Player, the Panel is not satisfied that the fact that the Player was playing in the central midfield of Shakhtar Donetsk does make his loss more critical, in sporting terms, than the loss of another member of the team. The Panel believes that in general it may be possible to consider whether a player in breach or terminating prematurely his contract was a player of the "core team" of the club or not. It is possible that the damage caused to a club by the breach or termination of a player that has hardly played in the precedent season and has mostly not be taken into consideration by the coach for playing matches, is of minor entity than the loss of a top player of the team. These considerations are also reflected in Art. 15 of the FIFA Regulations (right to terminate a contract for sporting just cause). The player's position on the pitch, however, does hardly influence the importance of that player for the club and therefore does usually not have an impact on the damage caused and the compensation to be paid, respectively.

D. Calculation of the Compensation

129. The calculation of the compensation contained in the Appealed Decision is easy to follow and the Panel recognises that the DRC has provided fairly detailed information to support it. However, during the present proceedings the Panel has been made available with additional information and evidence that is relevant for an appropriate calculation of the level of compensation due. Further, the Panel reaffirms, for the reasons mentioned above, that it does not feel itself bound by the internal "price list" of the DRC and that such guidelines are deviating from the mandate of Art. 17 FIFA Regulations to duly assess the full damage suffered by the injured party and determine the appropriate compensation of it.

130. Taking into due consideration all of the above, in line with the rationale and the spirit of Art. 17 para. 1 FIFA Regulations and having regard to the specificity of sport and to the applicability, subsidiarily, of Swiss law and in particular of Art. 99 para. 3 and 42 para. 2 of the Swiss Code of Obligations[34], according to which if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party to limit the damages, the Panel comes to the conclusion that the compensation to be granted to Shakhtar Donetsk has to be calculated as follows:

131. The Panel duly considers that:

(i) The Player and Shakhtar Donetsk did not agree in advance on an amount to be paid by the Player in the event of termination of the contract without just cause;

(ii) The value of lost services of the Player for Shakhtar Donetsk is (because of the remaining time of the contract of two football seasons) of between approx. EUR 14,224,534 and approx. EUR 13,093,334, respectively. Deducted the amount of salary expenses that Shakhtar Donetsk will not have to pay to the Player, the value is of approx. between EUR 11,824,534 and EUR 10,693,334;

(iii) The Panel is satisfied, taking into consideration all the elements of the dispute, that it is appropriate to fix the total amount of the value of lost services of the Player at EUR 11,258,934, i.e. in the middle between the mentioned maximum and minimum amount.

132. The Panel further duly considers that:

(i) The Player left Shakhtar Donetsk just a few weeks before the start of the qualification rounds of the UEFA Champions League, after the season in which he became captain of Shakhtar Donetsk and was also elected best player of the team;

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[34] Cf. Decision of the Swiss Federal Tribunal of 21 February 2008, in re *X c/ Association A. & SASP B.,* Case no. 4A 370/2007, consid. 5.6; see also Decision of the Swiss Federal Tribunal of 25 June 1992, in re *F. c/ H.*, publ. in BGE 118 II 312; TAS 2005/A/902, 903, N 107; TAS 2007/A/1314, N 27, with reference to art. 43 para. 1 of the Swiss Code of Obligations, granting to the judge the right to determine the compensation also taking into consideration the circumstances and the seriousness of the fault; see also CAS 2005/A/893; CAS 2008/A/1568, N 6.50, with reference to art. 42 of the Swiss Code of Obligations; TAS 2004/A/791, N 88, with reference to art. 42 para. 2 and 43 of the Swiss Code of Obligations; see also MEIER A., *op. cit.,* p. 538.

(ii) The exact entity of the damage caused by the above cannot be established and therefore the Panel is satisfied, taking into consideration all the elements of the dispute, that it is appropriate to set an additional indemnity amount equal to six months of salary paid by Shakhtar Donetsk, i.e. EUR 600,000.

133. Therefore, the compensation to be paid by Player to Shakhtar Donetsk equals to EUR 11,858,934 (resulting from the addition of the amount of EUR 11,258,934 and of EUR 600,000).

134. The Panel, following the submissions made by the parties and lacking precise information, was not able to consider in calculating the above compensation amount, any bonuses, tax charges or match premiums that may be foreseen in any of the contracts mentioned above.

135. Finally, with respect to the above mentioned amount of EUR 11,858,934, Shakhtar Donetsk has requested interest rate of 5% p.a., starting on 5 July 2007.

136. Under Swiss law, unless otherwise provided for in the contract, the legal interest due for late payment is of 5% p.a. (Art. 104 para. 1 of the Swiss Code of Obligations).

137. Regarding the *dies a quo* for the interest, the Panel is aware of some CAS jurisprudence according to which interest is due from the first day following the date on which the player is considered to be in breach of the employment contract[35]. Other panels granted late payment interests as from the expiry of a payment term determined in the decision appealed[36] or by the CAS panel[37]. Finally, other CAS panels have made the starting of the interest depending on the notification or reminder of the player by the club, following the ordinary rules of Swiss law (Art. 102 para. 1 of the Swiss Code of Obligations)[38].

138. The Panel first notes that the parties did not submit any FIFA rule to be applicable to determine the amount of late interest or the date from which such interest would be due. This is confirmed by CAS jurisprudence[39]. Second, the Panel observes that the claim regarding the compensation for premature termination without just cause is a claim arising from the employment relationship between the Player and Shakhtar Donetsk.

139. Since Swiss law, subsidiarily to FIFA rules, is applicable to the present dispute, the Panel shall point at Art. 339 para. 1 of the Swiss Code Obligations according to which all claims arising from the employment relationship shall become due upon its termination. Even an unlawful, premature termination does terminate the contractual relationship *ex nunc*. Therefore, as of the

[35] CAS 2007/A/1298-1300, N 157; CAS 2007/A/1358, N 112; CAS 2007/A/1359, N 115.
[36] CAS 2007/A/1205, N 8.3.6 and item 3 of the ruling; TAS 2005/A/902, 903, N 149; CAS 2006/A/1141, N 94 *et seq*.
[37] CAS 2008/A/1453, 1469, item 4 of the ruling.
[38] TAS 2007/A/1314, N 36 *et seq*.; see also CAS 2007/A/1210, N 72.
[39] TAS 2006/A/1082, 1104, N 108.

termination of the contract by the Player on 2 July 2007, the claim of Shakhtar Donetsk on compensation for premature termination without just cause became due.

140. As mentioned above, normally, under Swiss law, interest for late payment can be claimed if an obligation is due and the debtor has been reminded by the creditor (Art. 102 para. 1 Swiss Code of Obligations). However, according to Swiss jurisprudence and doctrine, in case of a claim for compensation for a premature, unjustified termination of an employment agreement, interests shall start to accrue immediately, i.e. as per the day of the termination of the agreement, without any reminder being necessary[40].

141. In the present matter the Panel notes that the Player terminated the contract on 2 July 2007. Interest would therefore, in accordance with Art. 77 of the Swiss Code of Obligations, start to accrue as per 3 July 2007. However, considering the prayers for relief of Shakhtar Donetsk, the interest of 5% on the sum of EUR 11,858,934 shall be due as from 5 July 2007.

E. Is Real Zaragoza Jointly And Severally Liable For The Payment Of The Compensation?

142. According to the Appealed decision, Real Zaragoza is jointly and severally liable for the payment of the compensation due to Shakhtar Donetsk.

143. According to Art. 17 para. 2 FIFA Regulations, the new club is indeed jointly and severally liable for the payment of the compensation, regardless of any involvement or inducement of the player to breach his contract[41].

144. Therefore, the Panel can uphold the position of the DRC in this regard and confirm the joint and several liability of Real Zaragoza towards Shakhtar Donetsk.

F. Is Shakhtar Donetsk Obliged To Pay The Requested Monthly Salary Of June 2007, Corresponding To EUR 98'490?

145. In his submissions to CAS the Player had originally asked Shakhtar Donetsk to be condemned to pay the salary of June 2007, i.e. EUR 98,940.

146. Based on the conclusions made by the parties and also on the information and evidence submitted during the proceedings, the Panel is satisfied that Shakhtar Donetsk paid the salary

[40] Decision of the Swiss Federal Tribunal of 4 May 2005, in re *X c/ Y,* Case no. 4C.67/2005, ARV 2005, p. 251, consid. 2; Decision of the Swiss Federal Tribunal of 29 March 2006, Case no. 4C.414/2005, consid. 6; decision of the Tribunal Cantonal du Canton de Vaud of 20 February 1980, JAR 1981, p. 168 *et seq.*, consid. IV, referring to art. 108 para. 1 of the Swiss Code of Obligations; STAEHELIN A., *op. cit.*, art. 339 N 12; STREIFF/VON KAENEL, *op. cit.*, art. 339 N 2; PORTMANN U., *Basler Kommentar*, art. 339 N 2, referring to art. 102 para. 2 of the Swiss Code of Obligations; WYLER R., *op. cit.*, at fn 2197. Also the panel in CAS 2006/A/1061, N 48, followed this jurisprudence.
[41] FIFA Commentary on the FIFA Regulations, fn 77.

of June 2007 to the Player. Accordingly, the Panel shall reject the respective claim raised by the Player.

G. Other Prayers For Relief

147. The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties to the Panel. Accordingly, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeals filed on 19 March 2008 by FC Shakhtar Donetsk and on 20 March 2008 by the player Matuzalem Francelino da Silva and Real Zaragoza SAD are partially upheld.

2. The decision of the FIFA DRC dated 2 November 2007 is partially reformed in the sense that Matuzalem Francelino da Silva is ordered to pay to FC Shakhtar Donetsk an amount of EUR 11,858,934, plus interest of 5% p.a. starting on 5 July 2007 until the effective date of payment.

3. Real Zaragoza SAD is jointly and severally liable for the payment of the aforementioned amount.

4. (…).

5. (…).

6. All other or further claims and counterclaims are dismissed.