



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2007/A/1264 FC Karpaty v/Football Federation of Ukraine & FC Metallist Kharkiv

ARBITRAL AWARD

issued by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Dr Ulrich Haas, Professor in Wiesbaden, Germany

in the arbitration between

FOOTBALL CLUB KARPATY, Lviv, Ukraine
represented by Mr Taras Hordiyenko, International Department Director and Mr Serhiy
Kulyavets, Legal Counsel

- Appellant -

and

FOOTBALL FEDERATION OF UKRAINE, Kyiv, Ukraine
represented by Ms Ganna Borydygova, Legal Advisor and Mr Denis Lutyuk, Legal Advisor

- first Respondent -

&

FOOTBALL CLUB METALIST KHARKIV, Kharkiv, Ukraine
represented by Mr Aleksey Alyokhin, General Director

- second Respondent -

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1. The Parties

- 1.1 The Appellant, FC KARPATY, (hereinafter also referred to as "the Appellant") is a professional football club in the city of Lviv in Ukraine. The Appellant is a member of the Professional Football League (hereinafter referred to as "PFL") and a member of the Football Federation of Ukraine.
- 1.2 The FOOTBALL FEDERATION OF UKRAINE, (hereinafter also referred to as "the FFU" or "the First Respondent") is the governing body for the sport of football in Ukraine. The FFU is a member of the Fédération Internationale de Football Association (hereinafter referred to as "FIFA"). The latter is an association established in accordance with Art. 60 of the Swiss Civil Code and has its seat in Zurich (Switzerland).²³
- 1.3 FC METALLIST KHARKIV, (hereinafter also referred to as "the Second Respondent") is a football club in the city of Kharkiv in Ukraine and a member of the PFL and the FFU.

2. The Relevant Facts

- 2.1 The Appellant maintains a team (hereinafter referred to as "Karpaty-1"), which takes part in competitions of the top playing category in Ukrainian football, the premier league. The Appellant had 22 players registered for participating in this competition.
- 2.2 The organiser of the premier league is the PFL. The latter acquired the right to organise and conduct the premier league for the 2006/2007 season by contract with the FFU. Said contract (hereinafter referred to as "the Cooperation Agreement") provides, inter alia:

"General provisions

5. Relations of the parties incidental to competitions' organization and conducting are governed by this agreement, Regulations of competitions in football of professional clubs of Ukraine and by the other FFU regulative documents.

The subject of the agreement

6. The subject of the agreement is as follows:

6.2 Organization and conduction of competition in football of professional clubs' teams.

Federation

10. Executes:

- general supervision and control over conducting of competitions;
- football justice

PFL

11. Acts on the grounds of its Statutes approved in duly order.

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12. Is under Federations' control and subordinate to it, submits its statutes' regulative documents and the schedule of competitions to Federation Executive Committee's approval

16. Organizes and conducts the competitions in football of professional clubs' teams (premier league championship, lower leagues' championships, ...), jointly with respective Federation's committees elaborates regulations and schedules of the competitions taking into account National teams' official and friendly matches ...".

- 2.3 16 teams play in the premier league. In parallel to said matches in the premier league, matches between the reserve teams of the respective clubs are also always taking place. Every premier league club is obliged to form such a reserve team and to participate in these matches. The results of these matches do not result in any competitive consequences (such as e.g. relegation or participation in international competitions). The sole aim of these matches is to enable reserve football players of the respective premier league clubs to gain some playing practice and to maintain their playing skills. The schedule of the reserve teams' matches is similar to the regular teams' schedule. The matches are usually played on the eve of the regular teams' competitions.
- 2.4 The Appellant also maintains a team in the third playing category, the so-called second league. The Appellant had 35 players registered for this team. The second league comprises two groups of 15 teams each. The schedules and competitions in the second league are independent from the premier league. Match days do not coincide. Furthermore, the return round in the second league begins later than in the premier league. Nevertheless, players registered for the second league can also play in the teams of the premier league (see Art. 21 Regulations of the competitions in football for professional football clubs' teams of Ukraine in 2006/2007 season - hereinafter referred to as the "Competition Regulations").
- 2.5 In performing its obligation under Art. 24 of the Competition Regulations the Appellant sent FC Metallist Kharkiv a letter on 13 March 2007 signed by the Director General Mr. Yefremov which - inter alia - reads as follows:
- "Football Club Karpaty is pleased to inform you that the match of the 19th football tournament championship of Ukraine between the major league teams Karpaty (Lviv) v FC Metallist (Kharkiv) will be held on 18 March in Lviv at Ukraine stadium. The match will start at 18:00 p.m. ... The match of the reserve teams will be held on 17 March in Lviv at SKA stadium ..."*
- 2.6 By letter dated 14 March 2007 the Appellant sent a letter to the President of the PFL which reads as follows:
- "In view of epidemic disease (acute adeno-virus infection) of 'Karpaty' team's 8 players ... And suspicion for the disease spreading among other team's players the leadership of Club of professional Football 'Karpaty' Ltd hereby solicits the 19th Round match of the Championship of Ukraine in football, 'Karpaty' v 'Metallist' to be postponed from March 18, 2007 to a later date."*
- 2.7 By letter of the same date, the PFL requested from the Appellant "medical conclusions from Lviv Regional Medical Exercises Dispensary" for the individual players who were ill. Said documents were sent to the PFL on 14 March 2007 already. The PFL then, through its competent organ, the PFL Bureau, allowed the Appellant's request and postponed the meeting scheduled for 18 March 2007.

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2.8 By letter of 15 March 2007 the Control and Disciplinary Committee of the FFU (hereinafter referred to as "the CDC FFU") notified the Appellant that it had, upon "protest" by FC Metallist Kharkiv, instituted a review of the decision by the PFL Bureau of 14 March 2007 and had suspended its decision. In the course of said review the CDC FFU sent a medical team to Lviv on 15 March 2007. Said team examined two sick players of Karpaty-1 and submitted a report to the CDC FFU on 16 March 2007.

2.9 On 16 March 2007 the CDC FFU decided, "to cancel Bureau of Professional Football League decision dated March 14, 2007 on the postponement of the matches ... from 17 March 2007 and 18 March 2007 respectively to a later date".

2.10 On 17 March 2007 the match between the two reserve teams of FC Karpaty and FC Metallist Kharkiv was held.

2.11 By letter of 18 March 2007 the Appellant filed an appeal with the Appeals Committee of the FFU (hereinafter referred to as "the AC FFU") against the decision of the CDC FFU. By letter of the same date, the Appellant sent the FFU a letter containing the following:

"Club of Professional Football 'Karpaty' hereby officially advise that due to mass disease of players and personal of the team causing all teams' trainings have been cancelled since March 14, 2007 and due to the Bureau of professional Football League Decision dated March 14, 2007, the match between 'Karpaty' Lviv and 'Metallist' Kharkiv teams shall not be held on March 18, 2007. Players and coaches of FC 'Karpaty' shall not come to the stadium ..."

2.12 The match between the regular premier league teams of the Appellant and FC Metallist Kharkiv, which had originally been scheduled for 18 March 2007 at 6.00 pm, did not take place.

2.13 By decision of 23 March 2007 the AC FFU confirmed the decision of the CDC FFU and found that the decision of the PFL Bureau taken on 14 March 2007 was "unfounded and invalid".

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3. The Proceedings

3.1 By letter dated 5 April 2007 the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS") against the decision of the AC FFU dated 23 March 2007. The appeal was directed against the FFU and FC Metallist Kharkiv.

3.2 By letter dated 13 April 2007 the CAS Court Office informed the Respondents of the appeal.

3.3 By letter dated 16 April 2007 the Appellant filed its Appeal Brief. In its Appeal Brief the Appellant requested the CAS – *inter alia* – "to keep FC Metallist out of the court deliberations as the Respondent because the damage to the legitimate rights and interests of FC Karpaty was done solely by the organs of the FFU".

3.4 By letter dated 23 April 2007 FC Metallist Kharkiv informed the CAS that, "we are ready to take part in considering the arbitration in the Court of Arbitration for Sport".

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- 3.5 By letter dated 8 May 2007 the FFU filed its Statement of Defence with the CAS Court Office.
- 3.6 By letter dated 14 May 2007 the Second Respondent sent a letter to the CAS Court Office asking, "whether FC Metallist is considered a defendant in this case" and whether "the representatives of the FC Metallist have a right to take part in the proceedings".
- 3.7 By letter dated 18 May 2007 the CAS Court Office inquired – *inter alia* - whether or not the Appellant intended in its Appeal Brief to withdraw the appeal against FC Metallist Kharkiv.
- 3.8 In response to the letter by the CAS Court Office dated 18 May 2007 the Appellant declared by letter dated 25 May 2007 that it "withdraws its appeal against FC Metallist."
- 3.9 By letter dated 25 May 2007 the CAS Court Office advised FC Metallist Kharkiv that the Appellant had withdrawn the appeal against it and that it would have to make an application under Art. R41 of the Code of Sports-related Arbitration (hereinafter referred to as "the Code") in order to participate in these proceedings as a party.
- 3.10 By letter dated 25 May 2007 the parties were informed of the formation of the Panel.
- 3.11 By letter dated 1 June 2007 the CAS Court Office asked FC Metallist Kharkiv to confirm its position with regard to whether or not it consented to no longer participating as a party to this arbitration.
- 3.12 By letter dated 5 June 2007 FC Metallist Kharkiv sent a letter to the CAS Court Office that reads – *inter alia* – as follows:
- "The position of FC Metallist is following. Our point of view is completely the same as FFU's and is presented in the documents performed to CAS before, so that we decided that there's no need of our representatives to take part in the court hearing. We are sure that our position will be objectively presented by FFU representatives."*
- 3.13 By letter dated 5 June 2007 the CAS Court Office, on behalf of the Sole Arbitrator, asked FC Metallist Kharkiv to clarify its letter of 5 June 2007. In this regard, the letter by the CAS Court Office reads as follows:
- "I understand that FC Metallist Kharkiv feels that its interests will be sufficiently represented by the Football Federation of Ukraine at the arbitral hearing. However, it is not clear, and I wish FC Metallist Kharkiv to clarify by return fax, whether it confirms that it no longer wishes to participate as a party in this arbitration procedure."*
- 3.14 The order of procedure issued by the CAS Court Office on behalf of the President was signed by all of the parties (including FC Metallist Kharkiv) on 7 June 2007.
- 3.15 On 7 June 2007 a hearing was held at the CAS premises in Lausanne. The Appellant was represented by its International Department Director, Mr Serhiy Kulyavets and the attorney-at-law, Mr Taras Hordiyenko. FFU was represented by its legal advisors Mrs Ganna Boryugova and Mr Denys Lutyuk. The club FC Metallist Kharkiv was not present at the hearing. At the hearing, Mr Stepan Sereda, Chief Physician at the Lviv

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Regional Medical, was called as a witness by the Appellant. At the conclusion of the hearing, the parties, after making submissions in support of their respective requests for relief, raised no objections regarding their right to be heard and confirmed that they had been treated equally in the arbitration proceedings.

3.16 On 8 June 2007 the operative part of the arbitral award rendered by the CAS was sent to the parties.

4. The Parties' Respective Requests for Relief and Basic Positions

The parties' requests and positions may be summarized as follows:

4.1 The Appellant

- 4.1.1 In its letter dated 16 April 2007 the Appellant requests the CAS – *inter alia* -
- to "cancel the decision of the Appeals Committee of the FFU" dated 23 March 2007 and "the decision of the Control and Disciplinary Committee" dated 16 March 2007 and
 - to "assign the Respondent to cover the legal proceeding expenses".

4.1.2 In support of its claims, the Appellant contends, *inter alia*, that:

- a) the PFL Bureau's decision to postpone the match was lawful. The reasons it gives in support are
- THAT the Appellant has been a victim of mass or epidemic disease. At an away match on 10 March 2007 one of Karpaty-1's players fell ill and infected a number of co-players on the flight back because he could not be isolated from the other team members. First, three players fell ill on 12 March 2007; on 13 March 2007 another three players were affected and on 14 March 2007 another player. On 15 March 2007 yet another four players from the team fell ill and one more player on each of 17 and 18 March 2007. Altogether therefore 12 out of Karpaty-1's 22 players had fallen ill up to and including 18 March 2007. The same diagnosis was made with all of the sick players, namely "acute adenovirus infection with manifestation of rhinopharyngotracheitis" and
 - THAT the mass disease gave the Appellant a right to have the match postponed; for it was not reasonable to expect the Appellant to put forward a team for the match day of 18 March 2007. Of the 22 players registered for the premier league, more than 50 % (namely 12) were ill, a further player was injured and another player was suspended. Moreover, the Appellant was also not able to replace the sick players with any of the 35 players, who were registered for the Karpaty-2 team because said players lacked training and playing practice. Furthermore, 25 players from Karpaty-2 had set off to Bulgaria on 17 March 2007 for a training camp, that had been planned and booked long beforehand. Therefore, a large proportion of said players were not even physically present on the match day (18 March 2007). Finally, Karpaty-2 was a team, whose playing strength was far less than that of Karpaty-1.

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- b) The Appellant further asserts that the decisions by the CDC FFU and the AC FFU were erroneous because
- the PFL Bureau (not the FFU) had exclusive competence to decide on any postponement of the match;
 - CDC FFU and AC FFU did not have the power to review decisions by the PFL Bureau and
 - in arriving at their decisions both the CDC FFU and the AC FFU had failed to observe the applicable rules, had breached the principle of a fair hearing and had failed to adequately assess the evidence submitted by the Appellant.

4.2 The First Respondent

- 4.2.1 In its Answer dated 8 May 2007 the First Respondent requests CAS
- "to dismiss the appeal in its entirety" and
 - "to order the Appellant to bear all the costs incurred by the Respondent FFU in the present procedure".
- 4.2.2 In support of its request, the First Respondent contends, *inter alia*:
- a) THAT there was not sufficient reason to postpone the match; for - despite the cases of illnesses - it was possible and reasonable for the Appellant to put forward a team for the match on 18 March 2007. After all, the Appellant had sufficient healthy (reserve) players from the team Karpaty-1 available. In addition the Appellant had had the opportunity of also using players from the Karpaty-2 team. The fact that it was possible for the Appellant to form a team was demonstrated, last but not least, by the fact that the Appellant did form a reserve team with 18 players to play against FC Metallist Kharkiv's reserve team on 17 March 2007;
 - b) THAT, insofar as the Appellant is pleading it had difficulty in forming a team for 18 March 2007, the Appellant - according to the First Respondent - is not worthy of protection because said difficulty was not only due to external circumstances, but rather also to the Appellant's conduct. For, immediately before the match, the latter sent 25 players from the Karpaty-2 team to Bulgaria for a training camp and in so doing very much contributed to the problem itself. However, the Appellant had to accept responsibility for this. For, it could easily have been able to take remedial measures by, for example, cancelling or rescheduling the training camp or by not sending certain players to the training camp until later. In addition, the Appellant confirmed the date for the match at a time (namely on 13 March 2007) when several players had already fallen ill and there must have been a suspicion that more players had already caught the illness. The Appellant, therefore, reacted belatedly and consequently did not do everything within its power to safeguard the interests also of the opposing team;
 - c) Finally, the First Respondent also points out THAT neither the CDC FFU nor the AC FFU breached the relevant substantive or procedural rules and regulations. In addition the CDC FFU had been in a much better position to assess the evidence submitted; for, unlike the PFL Bureau, it made its decision in a meeting, which all of the members physically attended, rather than by conference call.

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4.3 The Second Respondent

- 4.3.1 In its letter dated 14 May 2007 the Second Respondent requests CAS "to dismiss the appeal" by the Appellant.
- 4.3.2 In support of its request, the First Respondent contends, *inter alia*:
- a) THAT there have to be substantial grounds in order for the PFL Bureau to postpone the match scheduled for 18 March 2007, since the decision to postpone a match interferes quite considerably with the training schedule of a team and may put the club concerned in an unequal position towards its competitors;
 - b) THAT in the case at hand there were no valid grounds to postpone the match, since the only reason for such a postponement would be "force majeure". The illness of one or several players cannot be considered as "force majeure". This is particularly true in the case at hand, since the Appellant had plenty of healthy players from which it could form a team.
 - c) Finally, the Second Appellant is of the opinion THAT the CDC FFU and AC FFU made their decision in conformity with the applicable substantive and procedural provisions.

5. CAS Jurisdiction

- 5.1 Art. R27 of the Code provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement. *In casu* the jurisdiction of CAS is based on Art. 60 *seq* of the FIFA Statutes and Art. 3 clause 1.3 of the FFU Statutes. The latter provides:

"FFU is an Association Member of FIFA and UEFA and develops relations with them on grounds of mutual respect, absolute acknowledgement of their competence and jurisdiction. Consequently FFU along with its collective members, officials and footballers are obliged:

1.3 to lodge all disputes at the national level arising within the bounds of the FFU Statutes or other regulative documents to the independent and unprejudiced Court of Arbitration for Sport (CAS) as to the court of the last instance; to abstain from dispute solution in courts of general jurisdiction unless it is evidently prohibited by legislation."

- 5.2 The present case deals with a dispute "*within the bounds of the FFU Statutes*", since it concerns an appeal against a decision by the AC FFU or the CDC FFU. Also the personal sphere of application of Art. 3 clause 1.3 of the FFU Statutes is opened up for both the Appellant and the Second Respondent are "collective members" of the FFU.
- 5.3 In the present case the jurisdiction of the CAS is also confirmed by the fact that the parties signed the order of procedure issued on 7 June 2007. Finally, let it be noted that the parties in their correspondence with the CAS have at no time challenged the CAS's general jurisdiction.
- 5.4 The mission of the Panel follows from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code provides that the Panel may issue a new decision which replaces the

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decision challenged or may annul the decision and refer the case back to the previous instance.

6. Admissibility and Extent of Appeal

6.1 Art. 60 of the FIFA Statutes provides that the deadline for filing the appeal is 10 days from notification of the decision. The decision of the AC FFU dated 23 March 2007 was notified to the Appellant on 27 March 2007. The appeal with CAS against this decision was filed by the Appellant by letter dated 5 April 2007. Hence, the deadlines for filing the appeal have been met.

6.2 Originally the Appellant's appeal was directed against FFU as well as against FC Metallist Kharkiv. However, in its Appeal Brief dated 16 April 2007, the Appellant then withdrew its appeal against FC Metallist Kharkiv. The question arises as to whether a claimant/appellant in an arbitration matter can withdraw a request for arbitration without the consent of the respondent. The question must be decided here because in the present case the respondent did not consent to the withdrawal of the request for arbitration.

6.3 Whether the claimant in an arbitration matter requires the consent of the defendant to withdraw the request for arbitration depends on the applicable procedural law, so *in casu* Swiss law. The latter does not simply apply the provisions applicable to proceedings in the state courts to arbitration matters by analogy; for, unlike with a complaint before the state court, the complaint in arbitral proceedings can become pending before the claimant has supported his complaint with reasons (see Art. 181 Federal Code on Private International Law - hereinafter referred to as "the PIL"; see also Kaufmann-Kohler/Rigozzi, *Arbitrage International*, 2006, note 467). It therefore appears appropriate to draw a distinction. According to some commentators, a unilateral withdrawal of the complaint by the Claimant may no longer be possible once the full Statement of Claim has been filed with the arbitral tribunal (see Berger/Kellerhas, *Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz*, 2006, note 1437 *et. seq.*). This position would not be incompatible with the CAS appeals arbitration procedure, considering that the appeal brief, which is the main (and often unique) written submission filed by an appellant, is comparable to a statement of claim and that the respondent will carry out the great majority of its work on the case only after having received the appeal brief. In other words, a unilateral withdrawal of an appeal before the appeal brief is filed should not affect the situation of the respondent and is acceptable, while *a contrario* a withdrawal arising after the filing of the appeal brief could be subject to an objection of the respondent which may claim the reimbursement of costs incurred for its defence. However, the Panel does not need to express a detailed view on this last point, as in the present case, the Appellant withdrew the claim against FC Metallist Kharkiv when it submitted its Appeal Brief and therefore did so in good time, in any case. There was no need for the consent of the person affected in the present case.

7. Intervention

Even if there is a lawful withdrawal of the claim against FC Metallist Kharkiv, FC Metallist Kharkiv is to be involved in the present proceedings as a party. This follows

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from Art. R41.3 of the Code. According to this provision a party may intervene in a proceeding if it is bound by the arbitration agreement between the other parties and has filed an application with the CAS to this effect. *In casu* FC Metallist Kharkiv is bound by the same arbitration agreement as the other parties (see *supra*). Furthermore, FC Metallist Kharkiv was involved as a party in the initial proceedings before the CDC FFU and the AC FFU. In addition FC Metallist Kharkiv - after the CAS Court Office had drawn its attention to the possibility of an intervention pursuant to Art. R41.3 of the Code - confirmed several times in writing that it wished to take part in the proceedings (but not in the oral hearing) as a party, and the submission filed by FC Metallist Kharkiv, dated 14 May 2007, met the requirements as to form set out in Art. R41.3 of the Code. This is sufficient for an application within the meaning of Art. R41.3 of the Code. To sum up, the request for intervention by FC Metallist Kharkiv fulfilled all of the relevant criteria for acceptance by the Panel, and therefore FC Metallist Kharkiv was accepted as a party to the arbitration.

■

8. Applicable Law

8.1 Art. R58 of the Code provides that 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.

8.2 In the present case the parties are invoking the FFU Statutes, the Disciplinary Rules of the FFU (hereinafter referred to as "the DR") and the Competition Regulations. The aforementioned are therefore the applicable regulations within the meaning of Art. R58 of the Code. Since the parties have not otherwise chosen a governing law, Ukrainian law - as the law at the registered office (seat) of the FFU - applies subsidiarily to the present case insofar as the above-mentioned sports regulations do not contain a final and absolute regulation.

9. As to the Merits

9.1 The main issues to be resolved by the Panel in this matter are: ■

- a) Did the CDC FFU and the AC FFU have the power to review the decision by the PFL Bureau?
- b) Did the CDC FFU and the AC FFU respectively act lawfully when they set aside the decision by the PFL Bureau and refused to postpone the match?

9.2 Do the CDC FFU and the AC FFU have the power to review the decision by the PFL Bureau?

9.2.1 According to Art. 31 of the FFU Statutes the CDC FFU and the AC FFU are so-called "*football justice administration organs*" of the FFU. As between the two organs, the CDC FFU is subordinate to the AC FFU in terms of instances; for,

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according to Art. 33 (3) of the FFU Statutes, the AC FFU is entitled to consider appeals against the decisions taken by the CDC FFU.

- 9.2.2 The jurisdiction of the CDC FFU is more particularly regulated in Art. 27 DR. The translation of paragraph 2 of said provision that was submitted to the Panel reads as follows:

"CDC is considering the protests against FFU collective members' legal organs' decisions and the cases dealing FFU Statute and other regulative documents infringements and is controlling the observance of aforesaid statutory acts by all football subjects."

- 9.2.3 It is beyond dispute that the PFL Bureau is a "legal organ" of the PFL (see Art. 1 (2) Annex 4 to the Competition Regulations). Furthermore, the parties present at the oral hearing admitted that the PFL is a "collective member" of the FFU. Since, in the present case it is also beyond dispute that FC Metallist Kharkiv also filed a protest against a decision of the PFL Bureau, all of the conditions of Art. 27 (2) DR are fulfilled. In any event, it does not follow from Art. 27 DR that the CDC FFU only has jurisdiction in disciplinary matters, as alleged by the Appellant. It also cannot be inferred from the rest of the context that decisions made by the PFL Bureau in connection with the organisation of matches enjoy judicial immunity. Thus, although the Cooperation Agreement between the PFL and the FFU states that the PFL organizes and runs the premier league (see no. 16), the agreement also expressly stipulates that the FFU reserves the right to "general supervision and control over the conducting of the competition" and the "administration of football justice" (see no. 10). To sum up therefore, the CDC FFU has competence at first instance and the AC FFU has competence at second instance to review the decision by the PFL Bureau.

9.3 Lawfulness of the Decision by the CDC FFU and the AC FFU?

- 9.3.1 Insofar as the Appellant is basing the unlawfulness of the decisions by the FFU's "football justice administration organs" on a breach of the principle of a fair hearing, it cannot, in principle, be heard in these arbitration proceedings. Under Art. R57 of the Code, the Panel has full power to review the facts and the law of the case. However, if this is so, then breaches of the principle of a fair hearing are cured in the arbitration proceedings.

- 9.3.2 The possibility of postponing a match is stipulated in two provisions in the Competition Regulations. First, the translation of Art. 10 (8) of the Competition Regulations submitted to the Panel reads as follows:

"Bureau possesses the right to change the place and/or the date of the match in case of force majeure circumstances or in case National teams' international matches unplanned by international schedule are to be played"

In addition, Art. 14 (7) of the Competition Regulations reads:

"Bureau possesses the right to postpone the match in cases unprovided by Regulations."

- 9.3.3 The first question is what relationship do the two provisions have to each other. The significance of Art. 14 (7) of the Competition Regulations is only revealed when one looks at the other paragraphs of said provision. Art. 14 of the

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Competition Regulations governs the fixing of the match schedule for competition and the conditions when a team can claim an exception from said prescribed match schedule. Art. 14 (7) of the Competition Regulations provides that in cases where Art. 14 of the Competition Regulations does not provide any precaution the PFL Bureau has the right to postpone the match. However, the prerequisites for this to be admissible result solely from Art. 10 (8) of the Competition Regulations.

- 9.3.4 In the present case the question is therefore posed as to whether one of the prerequisites stipulated in Art. 10 (8) of the Competition Regulations is met. A possibility *in casu* is, at most, the justification of "force majeure". However, this term must be interpreted narrowly; for changes to the match schedule constitute a sensitive interference with the competition, which affects not only the interests of the club concerned, but also the interests of all of the teams taking part in the competition. A case of "force majeure" is therefore only given if the prevention is based on an event which could not be foreseen or prevented even exercising the utmost care that can be expected, whereby even just the slightest fault precludes there being a case of "force majeure".
- 9.3.5 The present case is already not a case of "force majeure" because the Appellant was not prevented to take part in the match on 18 March 2007.
- 9.3.5.1 The illnesses did not make it impossible to form a team for the match on 18 March 2007. Objectively, the Appellant had enough players available, who it could play in the match against FC Metallist Kharkiv. According to its own statement, 9 players from the Karpaty-1 team were not ill and were therefore able to play. It is irrelevant that - according to the Appellant - these players were "only" reserve players; after all, the whole point of a reserve player is that he replaces the regular player if the latter is prevented by - for example like here - illness. In addition the Appellant also had players from the Karpaty-2 team available for match play. The latter were moreover not prevented from playing by the fact that the match calendars between the premier league and the second league differ from one another.
- 9.3.5.2 The illnesses also did not make match play and training impossible. Although the Appellant has pleaded that, in view of Art. 38 of the Law of Ukraine on protection of the population from infectious diseases, it had to discontinue match play and training in order to prevent the disease from spreading further, there are doubts about this presentation of the facts because of the Appellant's own conduct. It put forward a reserve team which it let play against the Second Respondent's reserve team on 17 March 2007. But if such a match was possible on 17 March 2007, it is hardly understandable why the same thing was apparently impossible on 18 March 2007.
- 9.3.6 Furthermore, there is only a case of "force majeure" if the hindrance was based on a very exceptional circumstance, which cannot be attributed to the sphere of risk of either of the parties. It is beyond dispute that illnesses or injuries of individual athletes fall within the sphere of risk of the respective clubs. Resulting hindrances or difficulties in match play therefore have to be accepted by the club concerned as bad luck, but are not classified as a case of "force majeure". *In casu* the Appellant is claiming that the present case concerned an epidemic rather than individual cases of illness; and that such a circumstance lay outside its sphere of risk with the

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consequence that there was a case of "force majeure". Whether an employer being hit by several cases of illness is sufficient in order to be able to speak of there being an epidemic appears questionable. At any rate, in the Panel's opinion, in the present case the threshold for "normal" bad luck - which a club has to accept - to become a case of "force majeure" has not been exceeded. This is firstly because illnesses of the kind in question are - due to the weather - not unusual in the winter and spring. Secondly, the Appellant has not demonstrated to the Panel's satisfaction that the present case really was a mass phenomenon, i.e. one which affects the population as a whole with particular severity.

- 9.3.7 Finally, the Appellant can also not invoke the justification of "force majeure" because in the run-up to the meeting on 18 March 2007 it did not exercise the utmost care. The Appellant confirmed the match date to the Second Respondent despite the fact that at that time several players were already ill with the same symptoms and they had already been given the same diagnosis. There is also no justification for the fact that the Appellant formed a team for the reserve match on 17 March 2007, but did not form a team for the actual match on 18 March 2007. This is all the more so because any failure to play the reserve match does not entail any sporting consequences whatsoever - quite unlike any failure to play the premier league match. It must also be pointed out that the Appellant itself contributed considerably towards the situation being aggravated in that it sent 25 players to a training camp in Bulgaria on 17 March 2007. Even if the flights and accommodation were already booked for the players, the Appellant can reasonably be expected to keep back the necessary number of players (for the short term) in order to be able to form a team for the premier league match.
- 9.4 To sum up therefore, in the present case the Appellant was not prevented by any case of "force majeure". The CDC FFU and the AC FFU therefore were correct to set aside the decision by the PFL Bureau. Insofar as the Appellant is claiming that the CDC FFU did not make the decision with the requisite majority of votes, this - alleged - error was cured at the latest when said decision was confirmed by the AC FFU. The Appellant's action must therefore be dismissed.

10. Costs

10.1 Art. R64.4 of the Code provides:

"At the end of the proceedings, the Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."

10.2 Art. R64.5 of the Code provides:

"The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties."

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- 10.3 Having taken into account the outcome of the arbitration, in particular the fact that, in the present case, FC Karpaty's appeal has been dismissed, the Panel finds it reasonable that the Appellant should bear the costs of the arbitration, in an amount which will be notified by the CAS Court Office.
- 10.4 Furthermore, pursuant to Art. R64.5 of the Code, and in view of all the circumstances, the Panel is of the view that the Appellant should contribute to the legal costs and other expenses incurred by the First Respondent in the amount of CHF 2,000. The Second Respondent, which was not present at the hearing, should bear his own costs in connection with the arbitration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed at the Court of Arbitration for Sport by Football Club Karpaty on 5 April 2007, against the decision of the Appeals Committee of the Football Federation of Ukraine dated 23 March 2007, is dismissed.
2. The arbitration costs, to be determined and notified to the parties by the CAS Court Office, shall be borne by Football Club Karpaty.
3. Football Club Karpaty shall contribute to the legal and other costs incurred by the Football Federation of Ukraine, to the amount of CHF 2,000 (two thousand Swiss francs). Football Club Karpaty shall bear its own costs. Football Club Metallist Kharkiv shall bear its own costs.

Lausanne, 21 August 2007

The operative part of this award was notified to the parties on 8 June 2007.

THE COURT OF ARBITRATION FOR SPORT


Ulrich Haas
Sole Arbitrator