



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2011/A/2653 FC Shakhtar Donetsk v. CPF Karpaty

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Hendrik Willem **Kesler**, attorney-at-law in Enschede, the Netherlands
Arbitrators: Mr Efraim **Barak**, attorney-at-law in Tel Aviv, Israel
Mr Michael **Geistlinger**, Professor in Salzburg, Austria

Ad hoc clerk: Mr Dennis **Koolaard**, Broek op Langedijk, the Netherlands

in the arbitration between

FC SHAKHTAR DONETSK, Donetsk, Ukraine

Represented by Mr Juan de Dios **Crespo Pérez**, attorney-at-law in Valencia, Spain, and Mr
Andrey **Kharitonchuk**, Head of FC Shakhtar Donetsk's Legal Department

-Appellant-

and

CPF KARPATY, Lviv, Ukraine

Represented by Mr Jorge **Ibarrola** and Mr Luca **Tettamanti**, attorneys-at-law in Lausanne,
Switzerland, and Mr Taras **Pankevych**, Head of CPF Karpaty's Legal Department

-Respondent-

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I. THE PARTIES

1. FC Shakhtar Donetsk (hereinafter: the "Appellant" or "Shakhtar") is a football club with its registered office in Donetsk, Ukraine. Shakhtar is registered with the Football Federation of Ukraine (hereinafter: "FFU"), which in turn is affiliated to the Fédération Internationale de Football Association (hereinafter: "FIFA").
2. CPF Karpaty (hereinafter: the "Respondent" or "Karpaty") is a football club with its registered office in Lviv, Ukraine. Karpaty is also registered with the FFU.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
4. On 17 June 2009, Shakhtar and Karpaty reached an agreement to transfer the player Mr Vasilyn Kobin from Karpaty to Shakhtar. In turn, Shakhtar paid approximately USD 3 million to Karpaty and loaned the players Mr Artyom Fedetsky and Mr Denis Kozhanov to Karpaty.
5. The dispute between the Parties centres on "*Contract No. 144A on the temporary transfer of the Player*" (hereinafter: the "Loan Agreement") that was concluded on 17 June 2009 between the Parties to loan Mr Artyom Fedetsky (hereinafter: the "Player") to Karpaty for the duration of two seasons, until 30 June 2011.
6. The Loan Agreement contains the following relevant provisions:
 - 1) *"The Transferring Club transfers on free of charge loan to the Receiving Club for the term from 17th June 2009 to 30th June 2011, the transfer, federative and competitive rights for the Player. The listed above rights for the Player shall be considered as transferred on loan to the Receiving Club from the moment of the Player's dismissal from FC Shakhtar.*
 - 2) *The Receiving Club for indefinite term buys from the Transferring Club 100% of economical rights for the Player for the transfer fee in the amount of 50 000 (fifty thousand) UAH [corresponding to approximately USD 6,200.00], including VAT. The given sum shall be paid to the Transferring Club's account till 15th July 2009 to the bank details indicated in the present Contract. At the moment of payment of 100% of economical rights for the Player, belonging to FC SHAKHTAR, will be passed to FC KARPATY's ownership, about which the parties shall compose a relevant act.*

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Ownership of 100% of economical rights for the Player means that FC SHAKHTAR shall have to make a single [sic] payment to FC KARPATY, as to the owner of 100% of economical rights for the Player, of the whole sum received from the Player's transfer to a third club, in case of such transfer execution. The given payment shall be made within 15 days from the moment of the funds transfer to FC SHAKHTAR's bank account from the third club.

Moreover, the parties have come to an agreement that FC SHAKHTAR does not have a right to sell, loan the rights for the Player without a written consent from FC KARPATY.

- 3) *The Parties have come to an agreement should FC KARPATY and the Player come to an agreement to extend the loan term, indicated in par. 1 of the present Contract, or to execute a complete transfer of the Player to FC KARPATY, FC SHAKHTAR will not make any obstacles to such consent of FC Karpaty and the Player and to the conclusion of the appropriate transfer contract on the free of charge basis.*
7. In June 2011, the Player signed a new employment contract with Shakhtar for the duration of five seasons.
8. By letter of 30 June 2011, Karpaty informed Shakhtar that it had reached an agreement with the Player to extend the loan period with one more season, until 30 June 2012. Enclosed to this letter was an "ADDITIONAL AGREEMENT No. 1 to CONTRACT No. 144A on temporary footballer transfer dated June 17, 2009". Karpaty and the Player already signed this enclosure and by this letter requested Shakhtar to extend the loan of the Player without any transfer fee being due. The letter also indicated that Karpaty had concluded a new employment contract with the Player.
9. Shakhtar answered that it was prepared to accept such extension, provided that certain amendments to the Loan Agreement were made, including the exclusion of the last abstract of article 2 and article 3 from the Loan Agreement as the Appellant was of the opinion that these provisions were contrary to the FIFA Regulations on the Status and Transfer of Players (hereinafter: the "FIFA Regulations"), as well as to the FFU Regulations on the Status and Transfer of Players (hereinafter: the "FFU Regulations").
10. More specifically, Shakhtar was of the opinion that the above-mentioned provisions of the Loan Agreement were contrary to article 10(3) of the FIFA Regulations as it determines that:

"The club that has accepted a player on a loan basis is not entitled to transfer him to a third club without the written authorisation of the club that released the player on a loan and the player concerned";

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as well as contrary to article 18bis:

"No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams".

11. Karpaty did not agree with the amendments proposed by Shakhtar and thus, at that time, no agreement was reached between the Parties on an extension of the Loan Agreement.

III. PROCEEDINGS BEFORE THE RELEVANT BODIES OF THE UKRAINIAN PREMIER LEAGUE AND THE FOOTBALL FEDERATION OF UKRAINE

12. On 11 July 2011, Karpaty filed a request to the Disciplinary Committee of the Ukrainian Premier League (hereinafter: the "Disciplinary Committee") to establish the *"prolongation of loan period indicated in i. 1 of the [Loan Agreement] till June 30, 2012, as the result of agreement between FC "Karpaty" and the Football player on such prolongation as i. 3 of the [Loan Agreement] states it"*. In addition, to establish *"Creation by FC "Shakhtar" of obstacles against the agreement between FC "Karpaty" and the Football player as i. 3 of the [Loan Agreement] states it"*.
13. On 18 July 2011, Shakhtar filed its answer and counterclaim with the Disciplinary Committee, whereby it requested the Committee to proclaim the last abstract of article 2, as well as article 3 of the Loan Agreement null and void.
14. On 20 July 2011, Shakhtar and Karpaty signed a revised *"Additional Agreement To CONTRACT No. 144A dated 17th June 2009 on temporary transfer of the Player"* (hereinafter: the "Additional Agreement"). The last abstract of article 2 and article 3 were not amended in this Additional Agreement, but according to the Appellant, the pressure of the mass media made Shakhtar to accept the further loan of the Player to Karpaty and subsequently seek for the invalidation of the aforementioned contractual provisions before the authorised bodies.
15. The Additional Agreement contains the following relevant provisions:
 - 7) *"For the term of the present Additional Agreement validity, Contract with FC Shakhtar (Donetsk) professional player No317T dated 7th June 2011, concluded between the Player and the Transferring Club, shall be terminated. The Player accepts and agrees with that his employment contract with the Transferring Club will be renewed in 3 working days after expiry of the term for the rights loan under the present Contract.*

(...)

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- 10) Conditions of Contract No. 144A dated 17th June 2009, which have not been amended by the present Additional Agreement, shall remain in force."*
16. Consequently, the dispute regarding the Player's registration was settled, but the dispute regarding Shakhtar's counterclaim to invalidate the last abstract of article 2 and article 3 of the Loan Agreement remained.
17. Although the Parties did not provide the Panel with the decision of the Disciplinary Committee of 26 August 2011, in their submissions both Parties hold that the Disciplinary Committee upheld Shakhtar's counterclaim.
18. On 2 September 2011, Karpaty filed an appeal against such decision with the Control and Disciplinary Committee of the Football Federation of Ukraine (hereinafter: the "Control and Disciplinary Committee") and requests it to *"[t]ake a new decision, to dismiss the claims of FC "Shakhtar" to declare paragraph 3 of the article 2 and article 3 of the [Loan Agreement] invalid"*.
19. On 22 September 2011, the Control and Disciplinary Committee decided to *"[c]ancel the Decision of Disciplinary Committee (...) "On disputable legal relationships which arose between FC "Karpaty" Lviv and FC "Shakhtar" and to "[d]ismiss the claims of FC "Shakhtar" to declare paragraph 3 of the article 2 and article 3 of the [Loan Agreement] invalid"*.
20. On a date not specifically mentioned by the Parties, Shakhtar filed an appeal against such decision with the Appeal Committee of the Football Federation of Ukraine (hereinafter: the "Appeal Committee").
21. On 23 November 2011, the Appeal Committee decided *"[t]o reject FC Shakhtar's statement of appeal, to remain unchanged the [Control and Disciplinary Committee] Decision dated 22nd September 2011" (hereinafter: the "Appealed Decision")*.
22. After summarising the subject of the matter and citing the relevant provisions, the Appeal Committee based its decision on the following grounds:
- *"According to FC "Shakhtar", the cited provisions restrict its "independence in transfer-related matters, its policies or the performance of the teams".*
 - *Nevertheless, the logic of the indicated provisions of the contract does not contradict [the logic of the] provisions of the FIFA and FFU documents.*
 - *For example, the last paragraph of clause 2 of the [Loan Agreement] restricts possibilities of FC "Shakhtar" to transfer A.A. Fedetskyi to [any] other club when the [Loan Agreement] made with FC "Karpaty" exists and its provisions are fulfilled. Such provision is completely understandable, corresponds the principle of*

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equality of the contract's parties and, according to the FFU's Appeal Committee, does not restrict the rights and interests of FC "Shakhtar" in any way.

- *With respect to clause 3 of the [Loan Agreement]: as has been indicated above, the clause, as the entire [Loan Agreement], arises from the agreement between the parties, but the agreement meets the interests of both clubs.*
- *With the same result, an agreement on unpaid transfer of A.A. Fedetskyi to FC "Karpaty" or his transfer with a small transfer amount may be a provision of both the contract and its clause. Such agreement would be also the result of declaration of intents of both parties.*
- *In general, the [Loan Agreement] made is the result of declaration of intents of FC "Shakhtar", its complete "independence in transfer-related matters, its policies or the performance of the teams".*
- *FC "Shakhtar" failed to prove the contrary.*
- *Under such circumstances and taking into account the disputed provisions of the [Loan Agreement], the FFU's Appeal Committee considers that there are no proofs, which can confirm the restriction of independence of FC "Shakhtar" in enforcement of its rights and interests when entering into and fulfilling the contract."*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 8 December 2011, Shakhtar filed a statement of appeal, with 5 exhibits and translations into English, with the Court of Arbitration of Sport (hereinafter: the "CAS"). In this submission the Appellant nominated Mr Efraim Barak, attorney-at-law in Tel Aviv, Israel, as arbitrator. Additionally, the Appellant requested for an extension until 15 January 2012 to file its appeal brief.
24. On 13 December 2011, the FFU was provided with a copy of the statement of appeal and was requested whether, pursuant to articles R54 and R41.3 of the CAS Code of Sports-related Arbitration (hereinafter: the "CAS Code"), it intended to participate as a party in the present arbitration. Furthermore, the FFU was requested to provide the CAS Court Office with an unmarked copy of the Appealed Decision.
25. On 20 December 2011, the Parties were informed that in the absence of an objection to the Appellant's request for an extension of its deadline to file its appeal brief, it was confirmed, on behalf of the Division President, that the deadline was extended until 15 January 2012.
26. On 23 December 2011, the Respondent requested for an extension of its deadline to nominate an arbitrator until 11 January 2012.

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27. On 23 December 2011, the FFU informed the CAS Court Office that it did not intend to participate as a party in the present arbitration and provided an unmarked copy of the Appealed Decision.
28. On 30 December 2011, the Parties were informed that in the absence of an objection to the Respondent's request for an extension of its deadline to nominate an arbitrator, it was confirmed that the deadline was extended until 11 January 2012.
29. On 11 January 2012, the Respondent provided the CAS Court office with a duly signed power of attorney and nominated Mr Michael Geistlinger, Professor in Salzburg, Austria, as arbitrator.
30. On 11 January 2012, the Appellant filed its appeal brief. This document contained a statement of the facts and legal arguments and was accompanied by 2 exhibits with translations into English. The Appellant challenged the Appealed Decision of the Appeal Committee of the FFU, submitting the following requests for relief:
 - 1) *"To accept this appeal against the decision of the FFU Appeals Committee dated 23rd of November 2011.*
 - 2) *To annul the decision of Football Federation of Ukraine Appeal Committee of 23.11.11.*
 - 3) *Proclaim null and void the last abstract of article 2 and the full article 3 of Contract #144A.*
 - 4) *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrator's fees.*
 - 5) *To fix a sum of 15,000 Euro to be paid by the Respondent to the Appellant to help the payment of its defense fees and costs."*
31. On 12 January 2012, the CAS Court Office forwarded the appeal brief to the Respondent.
32. On 25 January 2012, upon the Respondent's request, the CAS Court Office informed the Parties that pursuant to article R55 of the CAS Code, the deadline for the Respondent to file its answer was suspended until the payment by the Appellant of its share of the advance of costs.
33. On 27 January 2012, the Appellant paid its share of the advance of costs and consequently, pursuant to article R55 of the CAS Code, the Respondent was informed to submit its answer within 20 days of receipt of this letter by fax.

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34. On 1 February 2012, pursuant to article R54 of the CAS Code, and on behalf of the President of the CAS Appeal Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted by:
- Mr Hendrik Willem Kesler, attorney-at-law in Enschede, the Netherlands, as President;
 - Mr Efraim Barak, attorney-at-law in Tel Aviv, Israel; and
 - Mr Michael Geistlinger, Professor in Salzburg, Austria, as arbitrators.
35. Also on 1 February 2012, the file was transferred to the Panel.
36. On 16 February 2012, following the Parties' agreement, the Respondent's deadline to file its answer was extended until 21 February 2012.
37. On 21 February 2012, the Respondent filed its answer, with 22 exhibits and translations into English, whereby it requested CAS to decide the following:
- 1) *"The appeal filed by FC Shakhtar Donetsk is dismissed.*
 - 2) *FC Shakhtar Donetsk shall bear all the costs of this arbitration.*
 - 3) *FC Shakhtar Donetsk shall compensate FC Karpaty for the legal and other costs incurred in connection with this arbitration, in an amount to be determined at the discretion of the Panel but not less than CHF 40,000."*
38. On 22 February 2012, the Respondent's answer was transmitted for the Appellant's attention and the Parties were invited to inform the CAS Court Office, whether their preference was for a hearing to be held in this matter or for the Panel to issue an award based on the Parties' written submission.
39. On 29 February 2012, the Appellant requested the Panel to hold a hearing on the nearest possible date. The Appellant based the urgency on the fact that the football season in Ukraine finishes on 31 March 2012 and that if the dispute was not settled at the start of the next transfer period, this could possibly have a negative impact on further career opportunities of the Player.
40. On 1 March 2012, the Respondent informed the CAS Court Office that it did not consider it absolutely mandatory that a hearing be held in this matter.
41. On 2 March 2012, the Parties were informed that the Panel had decided to hold a hearing and that the Parties were convened to a hearing on 30 March 2012. The Parties were invited to inform the CAS Court Office of any impossibility to attend the hearing

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on such date and were requested to inform CAS of the persons that would attend the hearing.

42. Also on 2 March 2012, the Appellant confirmed its availability for a hearing on 30 March and informed the Panel of the persons that would attend the hearing.
43. On 7 March 2012, the Respondent informed the CAS Court Office of its impossibility to attend the hearing tentatively scheduled for 30 March 2012 because the Respondent's General Director, being one of the intended witnesses of the Respondent to testify at the hearing, had an important professional commitment on that day. Furthermore, contrary to the information provided by the Appellant, the season in Ukraine does not finalise on 31 March 2012, but on 31 May 2012.
44. On 8 March 2012, the Panel informed the Parties that it had decided to maintain the hearing scheduled for 30 March 2012 and offered the Respondent's General Director to be heard by tele- or videoconference. Additionally, the Respondent was requested to provide the CAS Court Office with the names of the persons that would attend the hearing by 14 March 2012.
45. On 14 March 2012, the Respondent informed the Panel of the persons that would attend the hearing.
46. On 27 March 2012, the Appellant returned a duly signed Order of Procedure.
47. On 3 April 2012, the Respondent returned a duly signed Order of Procedure.

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V. SUBMISSIONS OF THE PARTIES

48. The following outline of the Parties' positions is illustrative only and does not necessarily encompass every contention put forward by the Parties. However, the Panel has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summaries.

A. THE APPELLANT'S SUBMISSION

49. The submission of Shakhtar, in essence, may be summarised as follows:

- The Appellant submits that in addition to the FFU Regulations, the FIFA Regulations, and more specifically article 10(3) and 18bis are directly applicable to the present dispute.
- Article 18bis of the FIFA Regulations determines that it is prohibited for any other party to the contract or any third party to acquire a position to somehow control potential transfer transactions concerning the Player. It is clear that the last abstract of article 2 of the Loan Agreement enables Karpaty to control the potential transfer of the Player, as it is Karpaty that could ultimately decide to block a transfer of the Player that has been agreed upon by Shakhtar and another club.
- As the Player was loaned from Shakhtar to Karpaty, it is submitted that Shakhtar intended to recover the services of the Player at the end of the loan period. According to the last abstract of article 2 of the Loan Agreement, Karpaty is the party that has to give its consent to a potential transfer of the Player initiated by Shakhtar. This situation is exactly opposite from the situation as determined in article 10(3) of the FIFA Regulations, *i.e.* it should have been Shakhtar, having transferred the Player temporarily to Karpaty, that had to be able to finally decide to which club and for what price, if at all, it would transfer the Player, without being dependent of the consent of the other party to the Loan Agreement, Karpaty.
- Moreover, article 3 of the Loan Agreement contradicts article 10(3) of the FIFA Regulations since Shakhtar is obliged to consent with an extension of the loan period of the Player with Karpaty in the event that the Player and the latter club reach an agreement on this matter, *i.e.* Shakhtar would not be entitled to object such transfer.
- Finally, Shakhtar submits that no advantage, favour or profit for Shakhtar has driven the club to agree with the disputed provisions in the Loan Agreement with Karpaty.

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B. THE RESPONDENT'S SUBMISSION

50. The submission of Karpaty, in essence, may be summarised as follows:

- Article 8 of the FFU Regulations (edition 2010) is the direct consequence of the entry into force of article 18bis in the FIFA Regulations on 1 January 2008. There is no such rule in the FFU Regulations (edition 2007).
- The Appellant's contentions that the direct application of article 18bis should invalidate article 2(3) and article 3 of the Loan Agreement shall be rejected as the Loan Agreement is entered into by Shakhtar and Karpaty with their free and valid consent.
- FC Shakhtar was eager to conclude the Loan Agreement and to insert such type of clauses in order to register another player of Karpaty. Its intention was not only to loan the Player to Karpaty, but also to sell to the latter the 100% of the Player's "economic rights" for the amount of 50,000 UAH.
- The attempt of Shakhtar to invalidate the contractual provisions violates the prohibition of "*venire contra factum proprium*" doctrine as Shakhtar raised the alleged invalidity of the two clauses only two years after its signature, which constitutes a manifest abuse of rights. Shakhtar's bad faith is particularly blatant considering that it began to contest the validity of the litigious provision only when the Player significantly improved his performance while playing with Karpaty and with the Ukrainian national team.
- Irrespective of whether the FIFA Regulations are applicable, the contractual provisions are not contrary to article 10(3). A loan contract may contain a purchase option, which is common practise in the football world. The fact that Shakhtar consented to the insertion of such a purchase or loan extension option without any additional consideration may not invalidate such clause, as it is the fruit of the Parties' negotiations. Both the Control and Disciplinary Committee and the Appeal Committee of the FFU correctly appraised the rights of Karpaty and the existence of the purchase option in its favour.
- The scope and the true interpretation of article 8(11) FFU Regulations and article 18bis FIFA Regulations, whether or not applicable, is limited to employment contracts and does not cover transfer contracts. Therefore, it cannot be applied to the present Loan Agreement.
- With regard to article 18bis FIFA Regulations, whether applicable or not, its purpose is to prevent possible influence over employment or transfer related matters, of third parties which are not affiliated to FIFA. According to FIFA, it is not the sale itself of

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the economic rights that must be prevented; this practise becomes dangerous and violates the FIFA Regulation only when the third parties have influence over the football club or the player in employment or transfer matters. Therefore, article 18bis of the FIFA Regulations was not adopted to prevent agreements between two football clubs, which are considered as valid, according to the consistent jurisprudence of CAS, even when they refer to the transfer of economic rights.

- Finally, Karpaty notes that neither under article 8(11) of the FFU Regulations, nor under article 18bis of the FIFA Regulations, whether applicable or not, a contract such as the one envisaged, would be null and void. Article 18bis(2) of the FIFA Regulations reads “[t]he FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article”. Article 10 and 12 of the FIFA Disciplinary Code provide for a wide range of sanctions, however the nullity of the relevant clause of the affected contract is not contemplated therein.

VI. THE HEARING

51. A hearing was held on 30 March 2012 in Lausanne, Switzerland. At the outset of the hearing, the Parties declared not to have any objection as to the constitution and composition of the Panel.
52. In addition to the Panel, Mr William Sternheimer, Counsel to the CAS and Mr Dennis Koolaard, *Ad hoc* clerk, the following persons attended the hearing:
- a) For Shakhtar:
 - 1) Mr Juan de Dios Crespo Pérez, Counsel;
 - 2) Mr Andrey Kharitonchuk, Head of Shakhtar’s Legal Department.
 - b) For Karpaty:
 - 1) Mr Jorge Ibarrola, Counsel;
 - 2) Mr Taras Pankevych, Head of Karpaty’s Legal Department;
 - 3) Mr Oleksandr Nazzarenko, Interpreter.
53. During the hearing the Panel heard evidence of Mr Igor Dedyshyn, at present Mr Dedyshyn is the General Director of Karpaty, but at the time of conclusion of the Loan Agreement he was only involved in the drafting of the Loan Agreement but was not officially an employee of Karpaty. Mr Dedyshyn was called to be heard as a witness by the Respondent.
54. Mr Dedyshyn was heard by teleconference, with the agreement of the Panel pursuant to article R44.2 of the CAS Code and was invited by its President to tell the truth subject to the sanctions of perjury. Both Parties and the Panel had the opportunity to examine

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and cross-examine the witness. The Parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

55. Before the hearing was concluded both Parties expressly stated that they did not have any objection with the procedure and that their right to be heard had been respected.
56. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the Parties, even if they have not been specifically summarized or referred to in the present award.

VII. DISCUSSION

A. JURISDICTION

57. The jurisdiction of CAS, which is not disputed, derives from article 50 of the Statute of Football Federation of Ukraine as it determines that the *"FFU recognizes the exclusive competence of the Sports Arbitration Court (CAS) (Lausanne, Switzerland), which has an exclusive competence to consider all disputes in terms of FIFA and UEFA activities, and also appeals to decisions taken by FFU Appeal Committee, as a body of final instance (...)"* and article R47 of the CAS Code. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.
58. It follows that CAS has jurisdiction to decide on the present dispute.
59. Under article R57 of the CAS Code, the Panel has full power to review the facts and the law and it may issue a new decision which replaces the decision challenged.

B. APPLICABLE LAW

60. Article R58 of the CAS 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."

61. The Panel notes that article 12 of the Loan Agreement stipulates the following:

"Disputes and disagreements arisen from the present [Loan Agreement] shall be settled by means of negotiations between the parties. In case the parties have failed to reach an agreement, all disputes shall be decided in accordance with the Regulation [sic] of

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overall-Ukrainian football competitions and other normative acts of the Football Federation of Ukraine. The parties have a right to submit financial issues to the Economic Court in compliance with the applicable law of Ukraine”.

62. The Swiss Federal Tribunal recognized CAS as a true court of arbitration (*Judgment of the Swiss Federal Tribunal of 27 May 2003, 4P.267/2002, 4P.268/2002, 4P.269/2002, 4P.270/2002/ech*). The CAS has its seat in Lausanne, Switzerland, and neither the Appellant nor the Respondent is domiciled in Switzerland. Consequently, Chapter 12 of Switzerland's Federal Code on Private International Law (hereinafter: "PILA") is applicable.
63. With respect to the applicable substantive law, article 187(1) PILA provides that "[t]he arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected".
64. In addition, within the meaning of article 187(1) PILA, the rules of law chosen by the parties do not need to be national laws, but can be non-governmental regulations (P. LALIVE, J.-F. POUDRET, C. REYMOND, *Droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, pp. 399-400), such as in particular the rules and regulations of International Sport Federations. It is common for the CAS to primarily apply the various rules and regulations of such Federations (*TAS 92/80 Beeuwsaert c. FIBA* (Digest of CAS Awards I, p. 287, 292).
65. The application of the FFU Regulations is not in dispute between the Parties.
66. Consequently, the Panel is satisfied to apply the FFU Regulations and determines more specifically that the 2007 edition of the FFU Regulations is applicable to the substance of the present dispute as the Player was registered with the Respondent on 17 June 2009 and the 2010 edition of the FFU Regulations only entered into force on 19 July 2010. This conforms to the general principle of "*tempus regit actum*", according to which – as a general rule – the substantive aspects of a contract keep being governed by the law in force at the time when the contract was signed, while any claim should be brought and any dispute should be settled in accordance with the procedural rules in force at the time of the claim.¹
67. The Appellant contends that in addition to the FFU Regulations also Ukrainian Law is applicable to the present dispute.
68. Although the Respondent agrees that Ukrainian Law would in principle be the background legal system, it contends that it could only be applied subsidiary and may

¹ CAS 2004/A/653 *RCD Espanyol de Barcelona SAD v. Velez Sarsfield*, §44

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only fill a possible gap and not derogate from the FFU Regulations whenever the latter contains an explicit rule as in the present case.

69. The Panel is of the opinion that indeed Ukrainian Law is to be applied complementarily to the FFU Regulations should the need arise to fill a possible gap in the FFU Regulations. However, where the FFU Regulations conclusively regulate a legal question there is basically no scope for having recourse to Ukrainian Law and since the Parties have not relied upon the Ukrainian Law in their submissions it does not play a concrete role in the present matter, according to the Panel.
70. In addition to the application of the FFU Regulations, the Appellant also contends that the FIFA Regulations are directly applicable to the present dispute.
71. The impact of the fact that the Appealed Decision might be in contradiction with the FIFA Regulations is a decisive issue in this case. The application of the FIFA Regulations will therefore be discussed together with the legal merits below.

C. ADMISSIBILITY

72. The Panel is not informed of a specific deadline set by the Statutes or Regulations of the FFU to file an appeal with the CAS. However, the Panel notes that the statement of appeal was submitted within the deadline of twenty-one days as determined by article R49 CAS Code and that the Respondent did not object the admissibility of the present appeal. The appeal complied with all other requirements of article R48 of the CAS Code, including the payment of the CAS Court Office fees.
73. It follows that the appeal is admissible.

VIII. LEGAL MERITS

74. It is undisputed between the Parties that article 18bis FIFA Regulations on "*Third-party influence on clubs*" was introduced in the 2008 version of the FIFA Regulations.
75. The FFU implemented this provision in the 2010 version of the FFU Regulations that entered into force on 19 July 2010. Article 8(11) of the 2010 version of the FFU Regulations determines that "[t]he club shall not enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters, its independence, its policies or the performance of its teams".
76. The predecessor of the 2010 version of the FFU Regulations is the 2007 version of the FFU Regulations. The 2007 version of the FFU Regulations did not contain any provision dealing with "*Third-party influence on clubs*".

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77. The Loan Agreement was concluded on 17 June 2009. Accordingly, as already determined above, the Panel comes to the conclusion that the Loan Agreement was concluded at a time when the 2007 version of the FFU Regulations was in force, *i.e.* before the introduction of article 8(11) in the 2010 version of the FFU Regulations. The Loan Agreement is therefore governed by the 2007 version of the FFU Regulations.
78. However, as will be discussed below, Shakhtar maintains the position that the Additional Agreement that was concluded on 20 July 2011 is a newly concluded agreement and consequently shall be governed by the 2010 version of the FFU Regulations.

A. THE MAIN ISSUES

79. In view of the above, the main issues to be resolved by the Panel are:
- 1) Is the Additional Agreement to be considered as a new contract or as an extension of the Loan Agreement?
 - 2) Are the disputed contractual provisions contrary to the FFU Regulations?
 - 3) Are the FIFA Regulations directly applicable to the present matter?
 - 4) If the FIFA Regulations are applicable, are the disputed contractual provisions contrary to the FIFA Regulations?
- 1. Is the Additional Agreement to be considered as a new contract or as an extension of the Loan Agreement?*
80. Although not specifically mentioned in their submissions, during the hearing both Parties maintained different positions in respect of the status of the Additional Agreement. The status of the Additional Agreement is important to determine the regulations by which it is governed, *i.e.* whether the 2010 version of the FFU Regulations, including article 8(11), or the 2007 version of the FFU Regulations (without this article) is governing the Additional Agreement.
81. Shakhtar was of the opinion that the Additional Agreement should be regarded as a newly concluded agreement that replaced the Loan Agreement and not as a mere extension of the Loan Agreement. Because the Additional Agreement was signed in 2011, the Appellant held that the 2010 version of the FFU Regulations was applicable to it and that the last abstract of article 2 and article 3 of the Additional Agreement were contrary to article 8(11) of the 2010 version of the FFU Regulations.
82. Karpaty alleged that the Additional Agreement was only an extension of the Loan Agreement and that therefore it remained being governed by the 2007 version of the FFU Regulations. The counsel of Karpaty referred the Panel to article 10 of the Additional Agreement, according to which "[c]onditions of the [Loan Agreement]

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dated 17th June 2009, which have not been amended by the present Additional Agreement, shall remain in force”.

83. The Panel is of the opinion that the so-called Additional Agreement is to be regarded as an extension of the Loan Agreement and consequently remains being governed by the 2007 version of the FFU Regulations. Although certain amendments to the Loan Agreement were introduced in the Additional Agreement, the general content of the Loan Agreement remained in force. The Panel finds article 10 of the Additional Agreement indeed a strong indication that the intention of the Parties was to extend the Loan Agreement. Furthermore, the Panel is of the opinion that the title of the Additional Agreement (“*Additional Agreement to CONTRACT No 144A dated 17th June 2009 on temporary transfer of the Player*”) is another indication that the Parties did not intend to sign a new contract, but intended to conclude an extension of the Loan Agreement.
84. Shakhtar further argued that even if the Additional Agreement would be regarded as an extension of the Loan Agreement, still it would be subject to the 2010 version of the FFU Regulations. Shakhtar’s counsel argued that it cannot be said that certain provisions are legal just because they were enacted before they were against the law; these provisions are against the law and therefore they should be declared are invalid.
85. The Panel does not agree with this argument of the Appellant and refers to the principle of “*tempus regit actum*” mentioned *supra*.
86. Furthermore, even if the Panel would accept the scenario suggested by the Appellant, *i.e.* that the Additional Agreement is to be regarded as a new agreement, still this would not result in the consequences suggested by the Appellant. In such case, the situation would have been that as if two different agreements would exist side by side; the “new one” containing the terms that were clearly stipulated in the new agreement, and the previous one which would contain only the conditions that were not amended by the new agreement. These conditions, according to the parties’ mutual agreement, remained in force. Therefore, even based on this scenario, it is clear that the Parties agreed that the conditions stipulated in the last abstract of article 2 and in article 3 of the previous agreement remained in force. Here again, based on the principle of “*tempus regit actum*”, these articles remained valid.
87. Consequently, the Panel determines that the 2010 version of the FFU Regulations is not applicable and is not relevant for the present dispute.

2. Are the disputed contractual provisions contrary to the FFU Regulations?

88. The Panel notes that it is undisputed between the Parties that the last abstract of article 2 and article 3 of the Loan Agreement are not contrary to the 2007 version of the FFU Regulations.

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89. Even if the Panel would have come to the conclusion that the 2010 version of the FFU Regulations would be applicable to the Additional Agreement, the Panel is not satisfied that the last abstract of article 2 and article 3 of the Loan Agreement are contrary to the FFU Regulations.
90. The Panel considers the Loan Agreement to be part of an overall agreement between Shakhtar and Karpaty. As explained by the witness during the hearing, the transfer value of Mr Kobin was estimated at around USD 5 million. The Panel accepts the explanation of the Respondent that the transfer fee of Mr Kobin was reduced by Shakhtar to USD 3 million as, in addition to this amount, the Player and Mr Denis Kozhanov were loaned to Karpaty while Karpaty, instead of receiving more money, agreed to acquire the economic rights related to the Player. As the registration of the Player remained with Shakhtar, Karpaty was granted the control on the economic rights that were sold as part of the deal through the mechanism agreed in articles 2 and 3 of the Loan Agreement. This fact or procedure was actually not denied by the Appellant during the hearing.
91. The Panel is further satisfied to accept that the payment of Karpaty to Shakhtar in an amount of UAH 50.000 (corresponding to approximately USD 6,200.00) for "*100% of economical rights for the Player*" was only a symbolic amount, since according to the FFU Regulations free of charge transfers are prohibited, which again was not disputed at the hearing.
92. Both Parties confirmed that the Loan Agreement contained an unusual construction as explained above and was created because the Player only wanted to be transferred to Karpaty on a loan basis. This was explained by the argument that the Player wanted to play for Karpaty, but that he wanted to maintain the same (high) salary that he earned with Shakhtar and that Karpaty was not able to afford this. Since a definite transfer was therefore no longer an option, the construction in the Loan Agreement was created. Based on this construction, Shakhtar supplemented the salary that the Player earned with Karpaty so that the Player's total salary remained the same as during his registration with Shakhtar. The Parties also confirmed during the hearing that upon the conclusion of the Additional Agreement, Shakhtar no longer supplemented the salary paid to the Player, but that from that moment the salary was fully borne by Karpaty. From this explanation the Panel derives that at the moment of concluding the Loan Agreement, the Parties intended to include a unilateral option in the contract for Karpaty to attain the services of the Player on a definite basis or to extend the loan term if the Player gave his consent thereto.
93. Consequently, it cannot be said that Shakhtar entered into a contract which enabled Karpaty to "*acquire the ability to influence in employment and transfer-related matters, its independence, its policies or the performance of its teams*" as is prohibited by article 8(11) 2010 version of the FFU Regulations since Karpaty was entitled to exercise a unilateral option to attain the services of the Player on a definite basis. Shakhtar, by its

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free will and as a fruit of the negotiations between the Parties, transferred its rights in respect of the future registration of the Player to Karpaty as part of the specific structure of the deal. Only if Karpaty would not exercise such option, the registration rights would be retained by Shakhtar, although it must be noted that even if this would occur, any transfer fees obtained for such possible future transfer would be for Karpaty, since Karpaty would remain the owner of the economic rights of the Player, and not Shakhtar.

94. As argued by the Respondent, it is a general practise in the world of football that loan agreements contain a unilateral option for the receiving club to extend the loan or even come to a definite transfer of the player. If the receiving club properly exercises its unilateral option, with the consent of the Player who is a party to the loan agreement, the receiving club fulfils the suspended condition and the releasing club is considered to have agreed in advance to the final transfer and the release of the player.
95. Therefore, even if the 2010 version of the FFU Regulations would be applicable, the last abstract of article 2 and article 3 of the Loan Agreement would not violate article 8(11) of the FFU Regulations as such provision is not intended to limit the scope of negotiations between directly involved parties in concluding an agreement.

3. *Are the FIFA Regulations directly applicable to the present matter?*

96. The Appellant is of the opinion that the FIFA Regulations are directly applicable to the present dispute. According to article 1(3) of the FIFA Regulations, article 10(3) and 18bis contain provisions that are binding at national level and must be included without modification in the association's regulations. Therefore, the FIFA Regulations shall be applicable in addition to the FFU Regulations, despite the national nature of the dispute.
97. The Respondent disagrees with the application of the FIFA Regulations and refers to article 1(2) FIFA Regulations according to which "*[t]he transfer of players between clubs belonging to the same association is governed by specific regulations issued by the association concerned in accordance with article 1(3) below, which must be approved by FIFA (...)*". Since the present dispute involves two Ukrainian football clubs and concerns a transfer contract of a Ukrainian football player, the national nature of the transfer is clear and subsequently the FIFA Regulations are not applicable.
98. Additionally, according to the Respondent, the Appellant's argument on the direct application of article 18bis of the FIFA Regulations is untenable since article 18bis of the FIFA Regulations has been incorporated into article 8 of the FFU Regulations. Whether such provision was implemented correctly is irrelevant for the Respondent. It is consistent CAS jurisprudence that if a provision is implemented incorrectly, it would be for FIFA to complain about it and this should not be detrimental to clubs belonging to the FFU.

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99. The Panel is of the opinion that the FIFA Regulations are not applicable to a dispute regarding a purely domestic transfer, as the present one. This could only have been the case if the FIFA Regulations were somehow incorporated in the FFU Regulations or if the Parties would have reached an agreement to that extent in the Loan Agreement, but this is not the case.
100. The Panel feels itself comforted by the decision of a previous CAS Panel holding that the FIFA Regulations are obviously not applicable to clearly national transfers.² The Panel first referred to article 1(1) FIFA Regulations stipulating that “[t]hese regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations” and then the Panel concluded that “[t]he scope of application of the FIFA’s Regulations for the Status and Transfer of Players is therefore limited to transfers of players involved in relationships between clubs belonging to different national football federations. As expressly specified, they do not apply to transfers at national level”.
101. Similarly, in a dispute regarding jurisdiction a CAS Panel held that “CAS jurisprudence suggests that if the FIFA Statutes did compel the national federation or the league to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the Respondent had made provision for this right in its statutes or regulations”.³ The Panel is of the opinion that, by analogy, such ruling is relevant to the present matter. Although, according to article 1(3)(a) FIFA Regulations article 18bis is binding at national level and must be included without modification in the association’s regulations, the binding effect would only commence from the moment the national federation effectively incorporates such provision in its regulations.
102. Furthermore, if the FIFA Regulations would indeed have been applicable to the Loan Agreement, it is not for this Panel to determine that the FFU Regulations are not in conformity with the FIFA Regulations. A previous CAS Panel already determined in *CAS 2009/A/1889 Metalurg Zaporizhzhya v. Football Federation of Ukraine (FFU)* that it would have been for FIFA to conduct a disciplinary procedure against the FFU if it found that the FFU Regulations were not in conformity with the FIFA Regulations.
103. Irrespective of the above, the Panel observes that the FFU did not disregard its duty to correctly implement article 18bis FIFA Regulations in its own FFU Regulations, the FFU implemented the provision on “*Third-party influence on clubs*” on the first possible occasion, *i.e.* in the 2010 version of the FFU Regulations and there does not seem to be any inconsistency with the FIFA Regulations.
104. Since the Panel came to the conclusion that the FIFA Regulations are not applicable to the present dispute, it is no longer necessary for the Panel to answer the final question.

² *CAS 2009/A/1889 Metalurg Zaporizhzhya v. Football Federation of Ukraine (FFU)*, §129.

³ *CAS 2005/A/952 Ashley Cole v. FAFL*, §10.

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B. CONCLUSION

105. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:
- a. The Additional Agreement is to be considered as an extension of the Loan Agreement and not as a newly concluded agreement.
 - b. The Loan Agreement and the Additional Agreement are governed by the 2007 version of the FFU Regulations and not by the 2010 version of the FFU Regulations.
 - c. The challenged last abstract of article 2 and article 3 of the Loan Agreement are not contrary to the 2007 version of the FFU Regulations.
 - d. The FIFA Regulations are not applicable to the present dispute.

IX. COSTS

106. Article R64.4 of the CAS Code provides as follows:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the costs of the 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."

107. Article R64.5 of the CAS Code provides as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to 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."

108. Having taken into account the outcome of the arbitration, in particular the fact that the Appellant's appeal has been dismissed, the Panel finds it reasonable that the Appellant bears the costs of the Arbitration, in an amount that will be determined and notified by the CAS Court Office.

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109. Furthermore, pursuant to article R64.5 of the CAS Code, and in consideration of the outcome of the proceedings as well as of the conduct of the parties (especially in relation to the Appellant's request to "*have the hearing in the case on the nearest dates when the panel is available*"), the Panel rules that the Appellant shall bear its own costs and pay a contribution towards the Respondent's legal fees in the amount of CHF 4,000.

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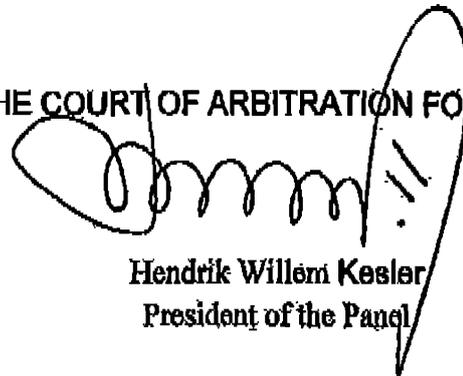
ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 8 December 2011 by FC Shakhtar Donetsk against the Decision issued on 23 November 2011 by the Appeals Committee of the Football Federation of Ukraine is dismissed.
2. The Decision issued on 23 November 2011 by the Appeals Committee of the Football Federation of Ukraine is confirmed.
3. The costs of this arbitration, to be determined and served on the Parties by the CAS Court Office, shall be borne by FC Shakhtar Donetsk.
4. As a contribution to the legal fees and other expenses incurred by CPF Karpaty in connection with these proceedings, FC Shakhtar Donetsk shall pay CHF 4.000 (four thousand Swiss Francs) to CPF Karpaty.
5. All other motions or prayers for relief are dismissed.

Lausanne, on 27 April 2012

THE COURT OF ARBITRATION FOR SPORT



Hendrik Willem Kesler
President of the Panel