



Arbitration CAS 2012/A/2707 AS Nancy-Lorraine v. FC Dynamo Kyiv, award of 12 October 2012

Panel: Mr José Juan Pintó Sala (Spain), President; Mr François Klein (France); Mr Michele Bernasconi (Switzerland)

Football

Transfer and solidarity contribution

Limits in the power of review of CAS acting as appeal court

Deduction of the amount corresponding to the solidarity mechanism from the transfer compensation

Training compensation according to the FIFA RSTP

Payment of the transfer price and additionally of the solidarity contribution based on contractual agreement between the two clubs

- 1. The CAS acting as appeal court cannot review and decide in the appeal proceedings on a claim on which the FIFA DRC, acting as a first instance body, did not decide because the competence to do so was ascribed and corresponds to the FIFA PSC.**
- 2. In accordance with the FIFA RSTP, the amount corresponding to the solidarity mechanism shall be mandatorily deducted by the new club from the transfer compensation, not being the clubs entitled to derogate the aforementioned compulsory rule. Therefore, the parties were not permitted to determine that the amount of transfer compensation amounted to a sum net without deduction of the solidarity contribution, which made the FIFA DRC consider that Nancy already received from Dynamo the solidarity contribution relating to the relevant transfer of the Player.**
- 3. According to article 21 FIFA RSTP, if a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his previous club and (ii) pursuant to article 1 of Annex 5 of the FIFA RSTP, this compensation is quantified in 5% of any compensation, with the exception of training compensation, paid to the former club, this amount to be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in the player's his training and education over the years. In a case where a player was transferred from one club to another before the expiry of his contract, so in accordance with the FIFA RSTP, the solidarity contribution shall accrue.**
- 4. On the occasion of a player's transfer, the former club and the new club certainly cannot deviate from the FIFA RSTP provisions on solidarity contribution in issues affecting third parties, like the amount to be received by the training clubs as solidarity contribution (5% of the transfer compensation), or the party which shall**

make the relevant payments to the beneficiaries of such contribution (the new club). However, there is no legal obstacle which prevents the clubs from agreeing that the new club, apart from paying the transfer price, additionally bears the solidarity contribution. In fact, some CAS precedents confirm this position.

I. THE PARTIES

1. SASP AS Nancy-Lorraine (hereinafter “Nancy” or the “Appellant”) is a professional football club with its seat in Nancy (France), affiliated to the French Football Federation (hereinafter the “FFF”).
2. Football Club Dynamo Kyiv Ltd. (hereinafter “Dynamo” or the “Respondent”) is a professional football club with its seat in Kiev (Ukraine), affiliated to the Ukrainian Football Federation.

II. THE FACTS

3. A summary of the background facts giving rise to the present dispute will be developed based on the parties’ submissions and the evidence taken. Additional factual background may also be mentioned in the legal considerations of the present award. The Panel has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings, but will refer in its award only to the submissions and evidence it considers necessary to explain its reasoning.

II.1 THE AGREEMENTS SIGNED BY THE PARTIES. THE EVENTS GIVING RISE TO THE DISPUTE

4. On 17 July 2007, Dynamo, the company Newport Management Ltd (hereinafter the “Firm”) and Nancy signed an agreement (hereinafter the “Agreement”), drafted in English and Russian, ruling the transfer of the rights of the football player P. (hereinafter the “Player”), at that time playing for Nancy, for a fixed price of EUR 4.000.000 net, payable in several instalments.
5. In accordance with Clause 3 of the Agreement, some additional bonus payments were to be made in favour of Nancy in case the following events took place:

“3.1 The parties have also agreed that the Firm shall pay to the Club additional bonus payments as follows:

- a) in case Dynamo qualifies to the round of 1/8 finals of the UEFA Champions League of 2007/2008 the Club shall be additionally paid 375 000 (three hundred seventy five thousand) Euros within 15 banking days from the moment of such qualification;*

- b) *in case Dynamo qualifies to the round of 1/4 finals of the UEFA Champions League of 2007/2008 the Club shall be additionally paid 500 000 (five hundred thousand) Euros within 15 banking days from the moment of such qualification;*
- c) *in case Dynamo wins the final first place (title of the Champions of Ukraine) among the teams of the premier division of the season of 2007/2008, the Club shall be additionally paid 750 000 (seven hundred and fifty thousand) Euros within 15 banking days from the moment of completion of this season.*
- 3.2 *In case of a subsequent transfer of the player from Dynamo to any third club, the Club shall have the right to receive 20% (twenty percent) of the difference between the transfer fee received by the Firm under such transfer and actual expenses of the Firm related to the Player. Hereby the Firm shall be obliged to pay such additional payment in favour of the Club within 15 banking days from the moment of receipt of the transfer fee under such subsequent transfer.*
- 3.3 *Besides, the Firm assumes an obligation to pay 5% (five percents) of the amount of the transfer fee, i.e. 200 000 Euros, personally to the Player, by means of inclusion of this amount into a single payment for signing by the Player of the contract with the Firm”.*
6. On 18 July 2007 (i.e. the day after the signature of the Agreement), Dynamo and Nancy signed a “Protocole d’accord convention financière de mutation” (hereinafter the “Convention”), drafted in French, also referring to the transfer of the Player. This Convention reads in the pertinent part as follows:
- “Il est convenu entre le FC DYNAMO DE KIEV et la SASP NANCY LORRAINE concernant la mutation définitive du joueur [P.] du club SASP NANCY LORRAINE au club FC DYNAMO DE KIEV et sous la condition expresse que le club SASP NANCY LORRAINE et le joueur [P.] résilie amiablement le contrat qui les lie, que:*
1. *Le club DYNAMO DE KIEV versera au club de la SASP NANCY LORRAINE concernant la mutation définitive principale de 4.000.000 euros (quatre millions d’euros) hors taxes payable selon les échéances suivantes:*
 - *2.000.000 euros (deux millions d’euros) à la signature*
 - *500.000 euros (cinq cent mille euros) au 01/10/2007*
 - *500.000 euros (cinq cent mille euros) au 01/02/2008*
 - *1.000.000 euros (un million d’euros) au 01/06/2008*
 2. *Le club DYNAMO DE KIEV verse au club Entente SOTRAC OUAHAM, club affilié à la Fédération Sénégalaise de Football, une indemnité de 5% (cinq pourcent) du montant de l’indemnité de mutation principale et complémentaire du joueur [P.] du club SASP NANCY LORRAINE au club DYNAMO de KIEV due en vertu d’une convention de partenariat en date du 4 janvier 2002 entre le club SASP NANCY LORRAINE et le club Entente SOTRAC OUAHAM. Cette indemnité sera versée par le club DYNAMO de KIEV dans les délais prévus à la présente convention.*

3. *Le club DYNAMO DE KIEV prend à sa charge l'indemnité de solidarité de 5% prévue à l'annexe du règlement FIFA en complément de l'indemnité de mutation définitive principale et complémentaire du joueur [P.].*
 4. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 20% (vingt pourcent) de la plus value hors taxes réalisée en cas de mutation du joueur [P.] du club DYNAMO DE KIEV vers un autre club, indemnité payable dans les 15 jours qui suivront la mutation du joueur.*
 5. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 375.000 euros (trois cent soixante quinze mille euros) hors taxe si le club DYNAMO DE KIEV sa qualifié lors de la saison 2007/08 pour les 16èmes de finale de la Ligue des Champions (matches suivants le 3ème tour préliminaire), payable dans les 15 jours qui suivront la qualification.*
 6. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 500.000 euros (cinq cents mille euros) hors taxe si le club DYNAMO DE KIEV sa qualifie lors de la saison 2007/2008 pour les 8ème de finale de la Ligue des Champions payable dans les 15 jours qui suivront la qualification.*
 7. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 750.000 euros (sept cent cinquante mille euros) hors taxe si le club DYNAMO DE KIEV termine premier du championnat d'Ukraine à l'issue soit de la saison 2007/2008, soit de la saison 2008/2009 payable dans les 15 jours qui suivront la fin du championnat de la saison où le club DYNAMO DE KIEV termine premier.*
- (...)
10. *Pour l'interprétation de la présente convention, les parties conviennent de se référer au texte en langue française”.*

The above-mentioned provisions can be informally translated into English as follows:

“FC DYNAMO DE KIEV and SASP NANCY LORRAINE have agreed on the definitive transfer of the player [P.] from the club SASP NANCY LORRAINE to the club FC DYNAMO DE KIEV under the express condition that the player and DYNAMO DE KIEV reach an agreement and that the club SASP NANCY LORRAINE and the player [P.] amicably terminate their contract, as follows:

1. *The Club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a principal transfer compensation of 4.000.000 euros (four million euros) taxes excluded in accordance with the following instalments:*
 - *2.000.000 euros (two million euros) at the signature*
 - *500.000 euros (half million euros) on 01/10/2007*
 - *500.000 euros (half million euros) on 01/02/2008*
 - *1.000.000 euros (one million euros) on 01/06/2008.*

2. *The club DYNAMO de KIEV pay to the club Entente SOTRAC OUAHAM, affiliated to the Senegalese Football Federation, a compensation of 5% (five percent) of the principal and complementary transfer indemnity of the Player [P.] from the club SASP NANCY LORRAINE to the club DYNAMO de KIEV, due in virtue of a partnership agreement dated January 4, 2002 signed between SASP NANCY LORRAINE and the club Entente SOTRAC OUAHAM. This compensation will be paid by the club DYNAMO de KIEV within the terms foreseen in the present agreement.*
 3. *The club DYNAMO de KIEV will be in charge of the 5% solidarity mechanism stipulated in annex 5 of FIFA regulations complementarily to the principal and complementary compensation for the transfer of the player [P.].*
 4. *The club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a complementary transfer compensation of 20% (twenty per cent) on the benefit, taxes excluded, obtained in case the club DYNAMO de KIEV transfers the player [P.] to a third club, this compensation to be paid within 15 days following the player's transfer.*
 5. *The club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a complementary transfer compensation of 375.000 euros (Three hundred seventy five thousand euros) taxes excluded in case the club DYNAMO de KIEV qualifies in the season 2007/08 to the 1/16 finals round of the UEFA Champions League (matches after the 3rd preliminary round), this compensation to be paid within 15 days following the qualification.*
 6. *The club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a complementary transfer compensation of 500.000 euros (half million euros) taxes excluded if the club DYNAMO de KIEV qualifies during the season 2007/2008 to the 1/8 finals round of the UEFA Champions League, this amount to be paid within 15 days following the qualification.*
 7. *The club DYNAMO de KIEV will pay to SASP NANCY LORRAINE a complementary transfer compensation of 750.000 euros (seven hundred fifty thousand euros) taxes excluded if the club DYNAMO de KIEV ends the Ukrainian Championship in first place whether in the season 2007/2008 or in the season 2008/2009, this sum to be paid within 15 days after the end of the championship.*
- (...)
10. *For the interpretation of the present agreement, the parties agree to refer to the French version”.*
7. On 19 July 2007, Nancy sent a letter to Dynamo and the Firm providing its bank details for the execution of the payments arising out of the transfer of the Player.
 8. The Firm made the relevant payments of the fixed price of EUR 4.000.000, as well as of an additional bonus of EUR 375.000, to Nancy.
 9. On 30 November 2007, Nancy sent a letter to Dynamo, in which it requested the payment of amounts corresponding to (i) the solidarity mechanism deriving from the Player's transfer and (ii) the compensation due to the Senegalese club Entente Sotrac Ouakam.
 10. On 5 December 2007, Dynamo responded to Nancy's previous letter stating, among other issues, that:

“(...) our club fully adheres to the reached agreements, which were confirmed by appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreement dated 18 July 2007 concerning the transfer of the player, [P.], from AS Nancy to FC Dynamo and fulfils its obligations with regard to the mentioned transfer according to the agreed schedule (...)

With regard to the requested additional payments we adhere to the following positions:

5% - ESO Ouakam

We are ready to make payment in favour of ESO Ouakam (5% of the principal and additional amounts), however by the present time we have not received a letter request (with international banks details) from the mentioned club, approved by the AS Nancy. And accordingly, that did not allow us to fulfill, so far, our obligation toward the Senegalese club.

Solidarity contribution

According to our position, all payments made (to be made) in favour of AS Nancy include all necessary payments according to the FIFA Regulations for the Status and Transfer of Players, and our obligation for additional payment of the solidarity contribution implies that our club did not deduct 5% of the solidarity contribution from the transfer fee (as we would have to do according to the FIFA Regulations), but would pay the contribution in favour of the other training clubs (excluding AS Nancy, which receives all the principal amount as well as additional amounts) at its own cost.

Otherwise as you know, we would have to deduct, accordingly, 5% from all the fees paid (as FIFA Regulations for the Status and Transfer of Players require) in order to direct them to cover solidarity contributions due to other training clubs.

We suppose that this is exactly the position which reflects the agreements reached by the parties during their negotiations for the transfer of the player [P.] from AS Nancy to FC Dynamo and we once again declare our readiness to fulfil our undertaken obligations.

We hope that you share our stated position and request your assistance in obtaining appropriate letter-request from ESO Oukam in order to fulfil our obligations towards the given club”.

11. On 11 August 2008, the Senegalese club Union Sportive Ouakam authorised in writing Nancy to receive the amounts arising out of article 2 of the Convention.
12. On 4 November 2008, Nancy sent a new request for payment to Dynamo, which in the pertinent part reads as follows:

“We have already sent to your club several letters and given lots of phone calls that remain unsuccessful.

This is the reason why we sum the Dynamo Kyiv to pay the amount of 371.875,00 concerning what follows:

- 218.750,00€ (article 2 of the protocol of agreement: 4.375.000€ × 5%)
- 153,125,00€ (5% for the solidarity contribution mechanism, see the attached board already sent to you several times) (...)

You will find a letter from the US Ouakam that allows the SASP NANCY LORRAINE to collect the 5% of the indemnity transfer. Then, this can't be an excuse not to pay us anymore”.

13. On 17 November 2008, Dynamo answered to Nancy's previous communication stating again the following:

"(...) our club fully adheres to the agreements, which were confirmed by the appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreements dated 18 July 2007 (...)

Concerning the additional payments requested by your club, we hold the following position:

5% - ESO Ouakam

As we already informed you earlier, we were ready to make payment in favour of Entente Sotrac Ouakam (5% of the transfer fee), could not do that since we did not have/receive appropriate letter request from the given Guinean club, indicating international banking details for the payment.

In enclosure to your recent letter, received by us on 13 November 2008, we received a letter from Union Sportive Ouakam, in which the Guinean club authorized your club to receive the additional payment (5%) as per the agreement between FC Dynamo Kyiv and AS Nancy Lorraine. However, we would like to remind you that the mentioned obligation refers to 5% payment in favour of Entente Sotrac Ouakam, and not in favour of Union Sportive de Ouakam, the letter from which you have provided to us. Therefore, in order to avoid any potential conflict situations, we will not be able to execute this payment in favour of your club, until the moment of clarification of relations between the club of Union Sportive de Ouakam and the club Entente Sotrac Ouakam, which, from formal point of view, are totally different clubs for us.

Solidarity contribution

In relation to your stated request for solidarity contribution payment, we would like to remind you once again that all payments executed in favour of AS Nancy included all necessary payments according to the FIFA Regulation on the Status and Transfer of Players. And our obligation for additional payment of the solidarity contribution refers to payment at our cost in favour of the third clubs (and not to AS Nancy, which receives all transfer fee and the additional payment), which contributed to the development of the player.

Otherwise, as you know, we would have to deduct, accordingly, 5% from all the fees paid (as FIFA Regulations for the Status and Transfer of Players require) in order to direct them then for solidarity contributions due to all appropriate training clubs.

We believe that this is exactly the position which reflects the agreement reached by the parties during their negotiations for the transfer of the Player [P.] from AS Nancy to FC Dynamo".

14. On 9 January 2009, the Secretary General of the Senegalese Football Federation confirmed that "Entente Sotrac Ouakam" had changed its name into "Union Sportive de Ouakam".
15. On 17 March 2009, Nancy claimed again to Dynamo the amounts of EUR 218.750 and EUR 153.125 allegedly owed by the latter in accordance with articles 2 and 3 of the Convention, granting a final deadline (26 March 2009) for Dynamo to make the corresponding payments.

II.2 THE PROCEEDINGS BEFORE FIFA

16. On 15 April 2009, Nancy finally decided to start proceedings before FIFA against Dynamo, requesting the payment of certain amounts based on articles 2, 3 and 7 of the Convention.

The present proceedings and the decision appealed hereto only refer to the amounts deriving from articles 2 and 3 of the Convention.

17. On 11 August 2009, Dynamo sent a letter to Nancy, in which it was mentioned again that:

“(..) our club fully adheres to the agreements, which were confirmed by the appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreements dated 18 July 2007 (...)

Besides, we would like to thank you for provision of the needed official documents (confirmation letters) in relation to the 5% payment for Union Sportive de Ouakam, with which we shall eventually be able to execute this payment in the nearest time.

With regard to your stated claim for solidarity contribution payment, we would like to remind you once again that all payments made earlier in favour of AS Nancy included all necessary solidarity contributions according to the FIFA Regulations. And our obligation for additional payments of the solidarity contribution refers to payment at our cost in favour of the third clubs which also trained the player (and not AS Nancy that received all transfer fee and additional payments.) [...]”.

18. On 27 August 2009, Nancy refused the option of settlement proposed by Dynamo in the referred letter of 11 August and claimed again for the amounts due under articles 2, 3 and 7 of the Convention.

19. On 22 September 2009, Dynamo sent a new letter to Nancy, in which it proposed an amicable solution to their disputes in the following terms:

“We would like to advise you once again that we do not fully share your stated position in relation to the additional payments under the transfer of the player [P.].

At the same time, in order to settle this matter, we would like to reconfirm our will to reach a compromised solution of the present issue. Thus, in relation of the additional payment under the transfer of [P.] to our club (concerning the final 1st position in the Championship of Ukraine 2009), in spite some controversies in the documents concerning this issue and further to you preliminary agreements with Mr Isenegger, we would propose the following option of possible settlement of the present matter:

- *50% of the mentioned additional payment would be transferred in favour of AS Nancy in the period from 15 November until 5 December 2009;*
- *The rest 50% of the mentioned additional payment would be transferred after termination of the next season.*

We suppose that the above proposal is a reasonable compromised solution of the present disputable situation, which will help us to settle the present issue”.

20. On 28 September 2009, Nancy responded to this last proposal of Dynamo as follows:

“(...) We do agree with the settlement proposed by the FC DYNAMO KIEV concerning the payment modalities, that it is to say 50% of the payment before 5th December 2009, and the balance right after the end of the next season (2009-2010), and this before September 1st, 2010.

However, we would like the FC DYNAMO KIEV to precise the amount of the global debt to SASP NANCY LORRAINE is 1.192.320,24 € (1.185.625€ + 6.695,24€ for the FIFA's procedure committed)".

21. On 29 October 2009, Mr Ralph Isenegger, on behalf of Dynamo, sent an email to Nancy in which among other issues, it requested Nancy's written confirmation on the last payment schedule offered by Dynamo.
22. On 6 November 2009, Nancy replied to Dynamo in the following terms:

"(...) Nous vous confirmons:

1) Dossier «Commission du statut du joueur de la FIFA»

La SASP NANCY LORRAINE accorde un délai de paiement au FC DYNAMO KIEV sur l'indemnité complémentaire de 750.000 euros (article 7) et le FC DYNAMO KIEV s'engage à payer cette somme en 2 échéances comme suit:

- 375.000€ avant le 5/12/2009
- 375.000€ avant le 30/06/2010

Le FC DYNAMO KIEV s'engage à payer à la SASP NANCY LORRAINE l'intégralité des 5% dus initialement au club de OUAJAKAM (article 2), c'est-à-dire 256.250 €, et ce avant le 05/12/2009.

Le FC DYNAMO KIEV s'engage à payer la somme de 3.347,63 (5000 CHF) correspondant au frais de procédure FIFA engagés par la SASP NANCY LORRAINE.

Pour mémoire: intérêts de retard que nous vous réclamons en cas de non respect de cet accord.

Conclusion: échéancier:

- 634.597, 62 € avant le 05/12/2009
- 375.000,00 € avant le 30/06/2010.

Compte tenu de l'ancienneté de notre créance et de la longueur des procédures FIFA, nous refusons à ce jour votre demande de suspension de la procédure.

Nous ne suspendrons notre procédure qu'à la réception d'un courrier officiel du FC DYNAMO KIEV nous confirmant les dates et les montants indiqués dans ce courrier, confirmant ainsi notre accord sur les montants et les modalités de paiement, et après réception de la première échéance du 5 décembre 2009.

2) Dossier «Chambre de Résolution des litiges de la FIFA»

Nous réitérons notre demande conformément à l'article 3 de notre protocole que nous vous adressons une nouvelle fois.

Nous maintenons notre demande en paiement total de la somme de 179.375€ dus au titre de la solidarité, ainsi que les 3.347,62 € (5000 CHF) correspondant au frais de procédure de la FIFA engagés par la SASP Nancy".

The above-mentioned paragraphs can be informally translated into English as follows:

“(…) We hereby confirm:

1) File «FIFA Players’ Status Committee»

SASP NANCY LORRAINE agrees to extend the term of payment to FC DYNAMO KIEV with regard to the complementary compensation of 750.000 euro (article 7) and FC DYNAMO KIEV undertakes to pay this amount in accordance with the following instalments:

- 375.000 euro before 5/12/2009*
- 375.000 euro before 30/06/2010*

FC DYNAMO KIEV undertakes to pay to SASP NANCY LORRAINE the total 5% initially due to the club OUKAM (article 2), which amounts € 256.250 euro, before 05/12/2009.

FC DYNAMO KIEV commits itself to pay the amount of 3.347,63 (5000 CHF) corresponding to expenses incurred by SASP NANCY LORRAINE in the proceedings before FIFA.

For the record: delay interest will be claimed in case this agreement is not respected.

Conclusion: instalments:

- 634.597,62 € before 05/12/2009*
- 375.000,00 € before 30/06/2010*

Taking into account the seniority of our credit and the length of the proceedings before FIFA, we nowadays refuse your request to suspend the proceedings.

We will only suspend the proceedings after the receipt of an official letter from FC DYNAMO KIEV confirming the dates and amounts foreseen in this letter, thus confirming our agreement with regard to the amounts and the form of payment, and after the receipt of the first instalment on December 5, 2009.

2) File «FIFA Dispute Resolution Chamber»

We reiterate our claim pursuant to article 3 of our protocol, which we address to you once again.

We maintain our claim for the payment of the total amount of 179.375€ due with regard to the solidarity mechanism, as well as for the payment 3.347,62 € (5000 CHF) corresponding to the expenses incurred by SASP Nancy during the FIFA proceedings”.

23. On 19 November 2009, Dynamo, by means of Mr Isenegger, reacted to such new proposal of Nancy as follows:

“(…) Sans reconnaissance de droit aucune, et uniquement dans le but de trouver une solution amiable à ce litige, le club de Kiev serait prêt à accepter l’ensemble des points figurant sous le chiffre 1, du courrier du 6 novembre 2009 adressé par votre Président, Monsieur Jacques ROUSSELOT.

Toutefois cet accord suppose l’abandon de vos prétentions sous le point 2 dudit courrier, dans la mesure où l’indemnité de transfert payé par le club ukrainien couvre et inclut le montant dû au titre de solidarité, comme c’est le cas habituellement, dans tous les transferts internationaux.

J’attire votre attention sur le fait qu’il existe une contradiction manifeste entre les documents signés en français et ceux signés en russe et anglais, et que, selon moi, l’issue du litige porté à la FIFA est très incertaine.

Dans l'attente de votre confirmation au sujet de à ce qui précède, je vous prie de recevoir, chère Madame, l'expression de mes sentiments les meilleures”.

The above-mentioned paragraphs can be informally translated into English as follows:

“(..) Without recognising any right and solely for the purpose of finding an amicable solution to this dispute, the club from Kiev would be ready to accept all the points foreseen under number 1 of your letter dated November 6th, 2009 sent to us by your president Mr Jacques ROUSSELOT.

Nevertheless, this agreement implies the withdrawal of your claims under point 2 of the referred letter, insofar as the transfer compensation paid by the Ukrainian Club covers and includes the amount due with regard to the solidarity mechanism, as usual in all international transfers.

I draw your attention to the fact that there is a clear contradiction between the documents signed in French and those signed in Russian and English, and that, in my opinion, the result of the dispute before FIFA is very uncertain.

I look forward for your confirmation of what is mentioned above. Kind regards,”

24. On 8 January 2010, Nancy sent a letter to the French Football Federation stating the following:

“Le Dynamo de Kiev (par l’intermédiaire de leur avocat Maître ISENEGGER) nous a proposé entretemps de nous régler en 2 échéances les sommes qui nous étaient dues:

- *1^{ère} échéance au 15/11/2009*
- *2^{ème} échéance avant le 30/06/2010*

Ils nous ont ensuite fait savoir qu’ils nous régleraient les sommes qu’à la condition que nous renoncions à notre droit à l’indemnité de solidarité (confère: demande de saisine de la Chambre des Résolutions de la FIFA, copie courrier du 10/07/2009).

Ce que nous avons évidemment refusé.

Nous vous remercions d’intercéder auprès FIFA pour le suivi de notre demande, le non paiement de notre créance qui s’élève à 1.006.250 euros (...).”

The above-mentioned letter can be informally translated into English as follows:

“Dynamo de Kiev (through its lawyer Mr ISENNEGER) has proposed us to pay the outstanding amounts in two instalments:

- *1st instalment, on 15/11/2009*
- *2nd instalment before 30/06/2010*

Dynamo de Kiev let us know that they will pay these amounts only if we renounce to our right to solidarity indemnity (cfr. claim before the FIFA Dispute Resolution Chamber, copy of the letter dated 10/07/2009).

We obviously refused such proposal.

We would be grateful if you intercede before FIFA for the follow-up of our claim. The sum of our credit raises up to 1.006.250 euros (...)”.

25. On 22 February 2010, Nancy sent two different letters to the FFF. In one of them, (i) it referred to the claims based on articles 2 and 7 of the Convention dealt with by the FIFA Player Status Committee (hereinafter the “FIFA PSC”); (ii) it complained about the absence of news in such proceedings; and (iii) claimed the FFF to request to the FIFA PSC that Dynamo was ordered to pay the amounts due under the mentioned articles 2 and 7. In the other letter, Nancy referred to its claim filed before the FIFA Dispute Resolution Chamber (hereinafter the “FIFA DRC”) based on article 3 of the Convention, and claimed the FFF to request to the FIFA DRC that Dynamo was ordered to pay the amounts due in such concept.

26. On 1 March 2010, Dynamo sent a communication to Nancy in the following relevant terms:

“La présente fait suite aux diverses discussions qui se sont tenues la semaine passée concernant le joueur [P].

La proposition exprimée par le club FC DYNAMO KIEV, proposition qui semble à même de mettre fin au litige, est la suivante:

Dès réception d’une facture de l’AS NANCY LORRAINE, versement dans les 5 jours ouvrables de EUR 375.000 (trois cent soixante-quinze mille euros) et versement de ce qui est dû au club africain, à savoir EUR 256’250 (deux cent cinquante six mille deux cents cinquante euros)

La deuxième tranche de EUR 375.000 sera ensuite versée à l’AS NANCY LORRAINE, toujours sous réception d’une facture, le 1^{er} juillet 2010 au plus tard”.

The above-mentioned paragraphs can be informally translated into English as follows:

“Reference is made to the various discussions held last week concerning the player [P].

The proposal expressed by the club FC DYNAMO KIEV, that seems to put the present dispute to an end, is the following:

Payment of EUR 375.000 (three hundred seventy five thousand euro) and payment of the sum due to the African club, EUR 256’250 (two hundred fifty six thousand and two hundred fifty euro), within the 5 working days from receipt of an invoice from AS NANCY LORRAINE,

The second instalment of EUR 375.000 will be immediately paid to AS NANCY LORRAINE after the receipt of an invoice, at the latest on July 1st 2010”.

27. In the meantime, Dynamo opposed to the claim filed by Nancy in FIFA by means of written submissions dated 26 March and 22 June 2010.

28. On 16 November 2010, the Single Judge of the FIFA PSC decided to partially accept Nancy’s claim based on article 7 of the Convention, and ordered Dynamo to pay the amount of EUR 750.000 plus interest. This decision was appealed by Dynamo before the CAS, this appeal having been dismissed in the CAS award dated 4 April 2012 rendered in the file CAS 2011/A/2557.

29. On 24 November 2010, Nancy sent a letter to FIFA (object: *affaire Nancy c/ Dynamo, Joueur [P.]*, *Décision de la Commission du Statut du Joueur du 16/11/2010*) stating that in the FIFA PSC Decision of 16 November 2010, no mention was made to the claim of EUR 256.250 brought by Nancy on the basis of article 2 of the Convention, and requested FIFA to confirm that Dynamo had to pay this amount. This letter, in the pertinent part, reads as follows:

“Nous tenons à remercier la FIFA et la Commission du Statut du Joueur pour sa décision rendue le 16 novembre dernier (reçu par fax le 23/11/2010) dans l’affaire [P.] ASNL/KIEV qui condamne Kiev à nous payer la somme de 750.000 € (augmenté des intérêts de retard) et la somme de 5.000 CHF.

Cependant, notre demande concernait également l’indemnité complémentaire prévue par l’article 2 du protocole pour un montant de 256.250 € (voir notre courrier du 10/07/09 ci-joint), indemnité qui n’a jamais été contestée par Kiev. Or cette indemnité n’est pas mentionnée dans la décision.

Nous vous serions reconnaissant de bien vouloir confirmer que Kiev doit bien nous payer également cette indemnité”.

These paragraphs may be informally translated into English as follows:

“We would like to thank FIFA and the Players’ Status Committee for its decision rendered on 16 November (received by fax on 23/03/2010) related to the affair [P.] ASNL/ KIEV, which orders Kiev to pay the amount of 750.000 € (plus default interests) and the sum of 5.000 CHF.

Nevertheless, our claim also included the additional compensation foreseen in clause 2 of the protocol for an amount of 256.250€ (see our mail dated 10/07/09 attached hereto), compensation that has never been challenged by Dynamo, This compensation is not mentioned in the decision.

We would really appreciate that you confirm that Dynamo shall also pay this compensation to us”.

30. On 30 November 2010, Nancy sent a new letter to FIFA (again concerning the affair *Nancy c/ Dynamo, Joueur [P.]*, *Décision de la Commission de l’Statut du Joueur du 16/11/2010*) asking for information about the claim filed on the basis of article 2 of the Convention, in the following relevant terms:

“Notre service comptable, en l’absence de notre Secrétaire Général a reçu un appel de vos services concernant notre demande du 24 novembre dernier.

On nous a indiqué que les 256.250 € d’indemnités complémentaires de mutation prévue par l’article 2 de notre protocole feraient l’objet d’une autre commission dont la décision devrait être rendue avant le 31/12/2010.

Nous sommes étonnés, en effet, l’indemnité de 256.250 € correspond à une indemnité de mutation qui doit, à notre avis, être jugée par la Commission du Statut du Joueur et qui fait partie de notre demande total de 1.006.250 €.

Nous craignons qu’il s’agisse d’une confusion avec notre autre demande pour 179.375 € concernant l’indemnité de solidarité qui nous revient, et qui est due en complément de l’indemnité de mutation conformément à l’article 3 du protocole et qui a fait l’objet de la saisie de la Chambre de Résolution des Litiges (copie jointe) qui va statuer prochainement.

Nous vous serions obligés de bien vouloir nous préciser que les 256.250 € devront bien nous être payés par Kiev avec les 750.000 € ou seront bien jugés par une autre commission”.

These paragraphs may be informally translated into English as follows:

“Our accounting department, in the absence of our General Secretary, has received a call from your representatives in relation to our claim dated 24 November.

We were told that the amount of € 256.250 related to the additional compensations provided by article 2 of our protocole would be dealt with by another commission and the decision should be rendered before 31/12/2012.

We are indeed amazed because the amount of € 256.250 which corresponds to the transfer compensation should be dealt with, in our opinion, by the Players’ Status Committee since it is part of our total claim of € 1.006.250.

We are afraid that there is a misunderstanding with our claim of € 179.375 related to the solidarity mechanism which is due in addition to the transfer compensation in accordance with clause 3 of the protocole and that is dealt with by the Dispute Resolution Chamber (see copy attached) which will render a decision soon.

We are thus obliged to kindly request you to state that Dynamo shall pay to us the sum of € 256.350 with the amount of € 750.000 or if the aforementioned will be decided by another commission”.

31. On 7 December 2010, the FIFA DRC issued a decision (hereinafter, the “Decision”) rejecting Nancy’s claim based on article 3 of the Convention. The operative part of this Decision reads as follows:

- “1. The claim of the Claimant, AS Nancy Lorraine, is rejected.*
- 2. The final amount of costs of the proceedings amounts to CHF 25.000, of which CHF 5000 have already been paid by the Claimant, AS Nancy Lorraine. Consequently, the amount of CHF 20.000 is to be paid by the Claimant, AS-Nancy Lorraine, within 30 days as of notification of the present decision (...).”*

32. In the Decision, the FIFA DRC sustains that the Convention novated the Agreement and acknowledges that in accordance with article 3 of such Convention, Dynamo was responsible for the distribution of the solidarity contribution. However, in accordance with the FIFA Regulations on the Status and Transfer of Players (hereinafter the “FIFA RSTP”), the amount corresponding to the solidarity mechanism shall be mandatorily deducted by the new club from the transfer compensation, given that clubs are unable to derogate from the aforementioned compulsory rule. Therefore, the parties to the dispute at stake were not permitted to determine that the amount of transfer compensation amounted to a sum net without deduction of the solidarity contribution. Having the above-mentioned in mind, the FIFA DRC considered that Nancy already received from Dynamo the solidarity contribution relating to the relevant transfer of the Player, so its claim under article 3 of the Convention was to be rejected.

II.3 THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

33. On 23 January 2012, Nancy decided to appeal the Decision before the CAS and thus filed a Statement of Appeal with the following request for relief:

- *D'accepter notre déclaration d'appel et, conformément à l'article 54 du Code arbitral de faire examiner notre appel par trois arbitres dont nous vous demandons de nommer M. François Klein comme l'arbitre de l'appelant.*
- *D'annuler la décision rendue par la Chambre de Résolution des Litiges.*
- *De condamner le Football club Dynamo de Kiev au paiement des sommes dues à savoir:*
 - a) *Notre demande sur l'article 2 du protocole d'accord du 18/07/2007 pour un montant de 256.250€ plus intérêts et frais divers.*
 - b) *Notre demande sur l'article 3 du protocole d'accord su 18/07/2007 pour un montant de 175.375 € plus intérêts et frais divers.*

This request for relief can be informally translated into English as follows:

- *To accept our statement of appeal and, pursuant to article 54 of the CAS Code, to have our appeal decided by three arbitrators, among which we request to appoint Mr François Klein as the Appellant's arbitrator.*
- *To annul the decision issued by the Dispute Resolution Chamber.*
- *To order Football Club Dynamo Kiev to pay the following amounts:*
 - a) *€ 256.250 plus interests and expenses in accordance with our claim based on article 2 of the "protocole d'accord" dated 18/07/2007.*
 - b) *€ 175.375 plus interests and expenses in accordance with our claim based on article 3 of the "protocole d'accord" dated 18/07/2007.*

34. On 3 February 2012, Nancy filed its Appeal Brief before the CAS, in which it requested the CAS:

- *de réformer la décision prise par la Chambre de résolution des litiges.*
- *de condamner le FC DYNAMO DE KIEV à rembourser à la SASP AS NANCY LORRAINE l'indemnité que celle-ci a versée au club Entente SOTRAC OUAKAM, soit 256.250€ outre les intérêts moratoires.*
- *de condamner le FC DYNAMO DE KIEV à verser à la SASP AS NANCY LORRAINE la part devant lui revenir de l'indemnité de solidarité soit la somme de 179.375 €, outre les intérêts moratoires.*
- *de condamner le FC DYNAMO DE KIEV aux entiers dépens et aux frais de procédure.*

The above-mentioned pleadings can be informally translated into English as follows:

- *to revoke the decision issued by the Dispute Resolution Chamber.*

- *to order Football Club Dynamo Kiev to reimburse to SASP AS NANCY LORRAINE the compensation that the latter paid to the club Entente SOTRAC OUAKAM, that is € 256.250 plus default interests.*
 - *to order Football Club Dynamo Kiev to pay SASP AS NANCY LORRAINE the amount of € 179.375 corresponding to the relevant part of the solidarity compensation, plus default interests.*
 - *to order Football Club Dynamo Kiev to cover all the expenses and the proceedings' costs.*
35. The Panel dealing with this case is composed by Mr José Juan Pintó Sala (President), Mr François Klein (arbitrator appointed by the Appellant) and Mr Michele Bernasconi (arbitrator appointed by the Respondent). None of the parties raised any objection as to the constitution of the Panel.
36. The language of the proceedings was set to English, in accordance with the Order on Language rendered by the CAS on 24 February 2012.
37. On 19 March 2012, Dynamo filed its answer to the appeal and counterclaim, with the following preliminary and principal prayers for relief:

Preliminary relief:

1. *An order that the case CAS 2011/A/2557 be consolidated with the present case.*
2. *An order that AS Nancy Lorraine produce all contractual documents between this club and Mr [P.], in particular his employment agreement, including any extension or renewals, and the transfer agreement.*

Principal relief:

3. *An order that the appeal filed by AS Nancy Lorraine is dismissed.*
4. *An order that AS Nancy Lorraine pays all costs of and occasioned by the arbitration as well as legal and other costs incurred by FC Dynamo Kyiv.*
5. *Any other opposite conclusions of AS Nancy Lorraine be dismissed.*

Counterclaim:

6. *An order that AS Nancy Lorraine reimburse the amount of 375.000 euros to FC Dynamo Kyiv, as well as 5% interest per year on the said amount starting 19 September 2007.*
7. *An order that AS Nancy Lorraine pays all costs of and occasioned by the arbitration as well as legal and other costs incurred by FC Dynamo Kyiv.*
8. *Any other or opposite conclusion of AS Nancy Lorraine be dismissed.*

38. On 21 March 2012, Nancy objected Dynamo's request to consolidate the present proceedings with the CAS proceedings 2011/A/2557.
39. On 22 March 2012, the CAS decided not to consolidate the aforementioned proceedings.
40. On 26 March 2012, the Respondent, in light of Nancy's refusal to the consolidation of proceedings and the CAS decision in this respect, requested the Panel to:
 - *grant a deadline to the parties to supplement exceptionally their submissions of the first case CAS 2011/A/2557 in application of article R56 of the Code, once the present proceedings CAS 2012/A/2707 is complete; alternatively, to authorise that all procedural acts (notably the appeal brief and the response) of the present case CAS 2012/A/2707 be produced in the case CAS 2011/A/2557;*
 - *order the witnesses' statements made during the hearing of 25 January 2012, be produced in the case CAS 2012/A/2707; alternatively that both Mr Ralph Isenegger and Mr Gérard Parentin be convoked again as witnesses to the hearing to be fixed by the CAS in the case at hand;*
 - *that the statements of the witnesses that will be heard in the case CAS 2012/A/2707 be produced in the case CAS 2011/A/2557.*
41. On 28 March 2012, the Appellant communicated to the CAS, among other issues, that it had no objection for the CAS to consult all the acts contained within the files of the case CAS 2011/A/2557 and to hear again the parties' witnesses.
42. On 3 April 2012, the CAS, among other issues, (i) confirmed that no consolidation of proceedings would take place, (ii) mentioned that the Panel noted that the Appellant had agreed that the Panel may consult the submissions and exhibits and hear the parties' witnesses in the case CAS 2011/A/2557, (iii) ordered Nancy to produce all contractual documents between it and the Player, in particular the employment agreement, including any extensions or renewals, and the transfer agreement, and (iv) reminded Dynamo that pursuant to article 55 of the CAS Code, no counterclaims are allowed in the CAS appeal procedure and thus, that Dynamo's counterclaim was considered to be inadmissible.
43. On 10 April 2012, Nancy produced certain documentation in accordance with the request made by the CAS in the referred letter of 3 April 2012.
44. The hearing in the present case took place in Lausanne on 4 July 2012. The Panel was assisted by Mr William Sternheimer, CAS Counsel, and Mr Jordi López Batet, *ad-hoc* clerk.
45. At the beginning of the hearing, the parties' counsel made their respective opening statements, after which the witness Mr Gerard Parentin was cross-examined and finally the parties' respective counsel made their closing statements in which, among other issues and at the Panel's request, they specifically argued on (i) the FIFA DRC (and subsequently CAS) jurisdiction to know about the claim arising out of article 2 of the Convention; (ii) the counterclaim filed by Dynamo; and (iii) the meaning and extent of the expression "*en complément*" in article 3 of the Convention. It shall also be mentioned that at the hearing, the

Panel, in light of the parties' agreement on it, authorized the Respondent to file witness statements for the Player and Mr Milan Calesan (witnesses proposed by the Respondent who failed to attend to the hearing) within a given deadline, and granted the Appellant the possibility of commenting on these statements when filed. Notwithstanding this, the Respondent eventually did not file such witness statements.

46. Both at the beginning and at the end of the hearing, the parties expressly declared that they were satisfied with the way in which the proceedings had been conducted.

III. SUMMARY OF THE PARTIES' POSITIONS

III.1 NANCY

47. The Convention signed on 18 July 2007 novated the Agreement signed the day before. After the signature of the Agreement (which was not consistent with article 18bis of the FIFA RSTP given the intervention of a third party in it), Dynamo and Nancy kept on negotiating certain aspects of the transaction, which finally led to the execution of the Convention.
48. As regards the negotiations held after the signature of the Agreement, both parties assumed new commitments which were reflected in the Convention. Among them, Dynamo assumed the obligations foreseen under articles 2 and 3 of the Convention, and Nancy assumed the obligation to pay to the Player the sum of EUR 200.000 which in accordance with the Agreement, was to be paid by Dynamo.
49. The Convention's provisions are clear and reveal the will of the parties intending to modify certain terms of the Agreement.
50. Dynamo has expressly acknowledged in the crossed correspondence exchanged with Nancy that it was bound by the Convention.
51. Dynamo cannot validly contend not to pay the amounts claimed that its President signed the Convention in the understanding that its terms were identical to the ones in the Agreement, or that its President did not speak or understand French, the language of the Convention. The Convention evidently is not a mere translation into French of the Agreement, the structure of both documents is different, and some of their terms are diverse as well. In any case, no evidence accrediting such issues as well as potential vices of consent has been brought by Dynamo to the proceedings.
52. Dynamo has also accepted the Convention's validity by (i) offering to Nancy several proposals to reach an amicable solution to its dispute with Nancy, which involved concepts and terms only existing in the Convention, and (ii) paying the sum of EUR 375.000 to Nancy in accordance with clause 5 of the referred Convention.
53. Pursuant to article 2 of the Convention, Dynamo committed itself to pay a compensation that Nancy owed to Entente Sotrac Ouakam. Nevertheless, given that Dynamo did not fulfil said

obligation, Nancy had to pay to such club the referred compensation. Therefore, Dynamo shall reimburse to Nancy the sum it paid to Entente Sotrac Ouakam (nowadays Union Sportive Ouakam). This claim, initially filed before the FIFA PSC even if FIFA afterwards considered that it was of the competence of the FIFA DRC, has never been waived by Nancy, as it appears from the Decision. CAS should then decide on this claim in the present proceedings.

54. In article 3 of the Convention, Dynamo assumed the obligation to pay to Nancy, in addition to the transfer compensation, the corresponding sum of the solidarity mechanism. This clause is valid as there is no provision within FIFA Regulations that prohibits an agreement of this kind, and thus shall apply.

III.2 DYNAMO

55. Dynamo cannot be obliged to pay the amounts claimed in these proceedings, as it did not validly consent to and accept the obligations on which the referred claim is based.
56. The parties reached an agreement on the transfer of the Player on 17 July 2007 and signed the relevant contract ruling such agreement (i.e. the Agreement). The day after, Nancy requested to sign a new document in French (the Convention), which apparently contained the same terms of the transaction foreseen in the Agreement, but with no reference to the Firm. Nancy grounded such request in the fact that for such agreement to be endorsed by the French Football League, it would be advisable to purge it from any reference to the Firm. Dynamo agreed to sign the Convention in the understanding and trust that the terms of the transfer of the Player were identical to the ones foreseen in the Agreement. However, at the end it came out that the terms of the Convention were different.
57. This implies that the consent given by Dynamo's President in the Convention shall be considered not only invalid but also inexistent, as Dynamo did never want to assume new commitments beyond the Agreement, which is the only contract validly binding the parties.
58. The president of Dynamo, who signed the Convention, could not notice the difference between the Agreement and the Convention since he does not speak French and Dynamo's legal counsel in such transaction, Mr Ralph Isenegger, was not with him when said Convention was signed. There were many not immediately perceptible differences between those documents, unfavourable to Dynamo's interest, which were not drawn to the attention of Dynamo's President by Nancy.
59. Dynamo had no intention to amend, extinguish or novate the Agreement by signing the Convention. In fact, Dynamo had no reason to do so since all the elements of the transaction were already agreed and included in the Agreement signed the day before. No further negotiations on the transaction took place after the Agreement, and no other agreement was expected. In addition, no reference to the replacement of one contract for the other was included in the Convention.

60. Contrary to what Nancy holds, Dynamo paid the sum of EUR 200.000 to the Player as provided in clause 3.3 of the Agreement. Dynamo ignores why Nancy has also paid an amount of EUR 200.000 to the Player as "*prime exceptionnelle du contrat*" since the Convention itself does not even refer to such a "*prime*". There is thus no reciprocal concession in the execution of the Convention, being all the changes of such Convention with respect to the Agreement unfavourable for Dynamo.
61. The alleged necessity of amending the Agreement for its compliance with article 18bis FIFA RSTP cannot be admitted, as at the moment of the execution of the Convention, such provision was not still in force.
62. Pursuant to article 116 of the Swiss Code of Obligations, the novation of a contract cannot be presumed, and the party invoking said novation shall prove it, which Nancy failed to do in these proceedings.
63. Any amendment as to the substance of the Agreement as regards the financial contributions should have been endorsed by the Firm, which was a party to the Agreement.
64. Nancy cannot validly contend that the Agreement was extinguished or replaced by the Convention as it received the payment of the sums provided in the Agreement from the Firm, which was a party to the Agreement but not to the Convention.
65. The Convention was drafted by the Appellant, so any doubt regarding its interpretation shall be held against it.
66. Dynamo's statements in several letters concerning its acknowledgment of being bound by the terms of the Agreement and the Convention were made in the understanding that the terms of both documents were identical.
67. The efforts and offers made by Dynamo to find an amicable solution to the dispute in the cross correspondence with Nancy cannot be regarded as an acceptance of liabilities of any kind.
68. In any case, the Convention is still invalid as Dynamo's obligation under article 3 of the Convention of assuming the payment of the 5% solidarity mechanism complementarily to the compensation for the transfer of the Player infringes the mandatory obligation under the FIFA RSTP of deducting the solidarity contribution from the transfer price for its distribution among the beneficiaries of this contribution.
69. Dynamo unduly paid to Nancy the amount of EUR 375.000 for having qualified for the 1/16 finals of the UEFA Champions League, a round which did not exist, and thus requests the reimbursement of the referred sum paid without any ground.

IV. LEGAL CONSIDERATIONS

IV.1 CAS JURISDICTION

70. The jurisdiction of the CAS to decide on the present case arises out of Articles 62 and 63 of the FIFA Statutes and Article R47 of the CAS Code. In addition, CAS jurisdiction has been expressly accepted by the parties, which both signed the Order of Procedure of the present case.
71. Therefore, the Panel considers that CAS is competent to decide on this case.

IV.2 APPLICABLE LAW

72. Article R58 of the CAS reads as follows:

“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”.

73. Article 62.2 of the FIFA Statutes states the following:

“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

74. In accordance with these provisions, the Panel understands that the present dispute shall be resolved according to the FIFA Regulations and, additionally, Swiss Law.

IV.3 ABOUT THE DISPUTE SUBMITTED TO THE PANEL BY THE PARTIES

IV.3.1. The object of the dispute

75. According to the parties' written submissions and the arguments raised by them in the hearing, the object of the dispute may be briefly summarized as follows: the Appellant considers that the Decision shall be revoked as it understands that the Respondent owes and shall pay to Nancy the amounts arising out of articles 2 and 3 of the Convention, while the Respondent requests that the appeal be dismissed for the reasons which are summarized in paras. 55 and seq. of the present award.
76. The Panel reminds that Dynamo's counterclaim (reimbursement of EUR 375.000, a claim which, by the way, was not submitted in the FIFA proceedings) in these procedure is inadmissible for the reasons already explained in the letter of the CAS to the parties dated 3 April 2012.

IV.3.2. The contractual situation: the Agreement and the Convention

77. The Panel shall start its considerations by analyzing the general contractual framework existing among the parties in order to determine the terms ruling the relationship between Dynamo and Nancy.
78. After examining the submissions and pieces of evidence brought to the present proceedings, the Panel, in the abovementioned respect, is of the opinion that:
- a) Dynamo and Nancy entered into two different contracts, one of them signed on 17 July 2007 (the Agreement) and the other signed the day after (the Convention), both with the same general object or purpose: the transfer of the Player from Nancy to Dynamo.
 - b) Even if the fixed price of the transaction was the same in both contracts, the Agreement differed from the Convention in other aspects or terms of the referred transaction, some of which are part of the discussion in the present proceedings. Among these differences, the Panel highlights the following:
 - In the Convention (article 2), Dynamo commits itself to pay an amount to Entente Sotrac Ouakam deriving from a collaboration agreement between this club and Nancy. This issue was not mentioned or dealt with in Agreement.
 - The Convention (article 3) specifically rules on the solidarity mechanism payment, while no reference to this matter is made in the Agreement.
 - The payment obligation foreseen in clause 3.3 of the Agreement (obligation of the Firm to pay 5% of the amount of the transfer fee, i.e. EUR 200.000, personally to the Player) does not exist in the Convention.
 - In the Agreement, a bonus payment of EUR 375.000 in favour of Nancy is foreseen in case Dynamo achieves the 1/8 finals round in the 2007/2008 UEFA Champions League (article 3.1), while in the Convention this bonus payment, for the same milestone, is raised up to EUR 500.000 (article 6).
 - The Convention also includes a bonus payment of EUR 375.000 in favour of Nancy in case Dynamo qualifies to the 1/16 finals round in the 2007/2008 UEFA Champions League (article 5), which does not exist in the Agreement.
 - In the Agreement (article 3.1), a bonus payment of EUR 750.000 only accrued in case Dynamo won the Ukrainian championship in the season 2007/2008, while in accordance with the Convention (article 7), such payment became due in case Dynamo won the Ukrainian championship in the season 2007/2008 or in the season 2008/2009.
 - c) The approach made by the FIFA DRC to the contractual situation (the Convention novated the Agreement) is, in the Panel's opinion, inaccurate. It is indeed true that two different documents ruling the same general transaction were signed on 17 and 18 July 2007. However, in the Panel's view, this does not necessarily mean that one contract replaces the other. In fact, in the Panel's opinion, from a strictly legal point of view this replacement is not at all feasible in the present case, mainly for two reasons:

- Because the parties to the Agreement (Dynamo, the Firm and Nancy) are not the same than the ones in the Convention (Dynamo and Nancy), and it is not possible to novate (whether to modify or to extinguish) a contract, in this case the Agreement, unless all the parties to such contract consent to it. In the present case, it has not been proven that the Firm consented to novate the Agreement.
 - Because the parties own conduct precisely reveals that such a “general replacement of contracts” did not take place. On the contrary, the parties expressly recognised the validity and existence of both contracts. For instance:
 - All the payments deriving from the transfer of the Player were made by the Firm, which is not a party to the Convention. Nancy accepted to receive the money from the Firm and did not complain about it.
 - Nancy, in its letter of 19 July 2007, sent its bank details for payment of the amounts arising out of the transfer of the Player both to Dynamo and to the Firm, which is not a party to the Convention.
 - Dynamo recognised the existence of both contracts in the correspondence exchanged with Nancy.
 - The parties did not include in the Convention a clause stating that the Convention replaced and left the Agreement without effect, when they could have easily done so.
- d) Therefore, the Panel, far from considering that the Convention substituted the Agreement, is satisfied that in the present case, both the Agreement and the Convention co-exist and shall interact and be applied complementarily to the relationship between Dynamo and Nancy.

79. Taking the above mentioned considerations in mind, the Panel will address the issues and claims submitted by the parties in the present proceedings and decide on them.

IV.3.3. The claim of Nancy based on article 2 of the Convention

80. The Panel notes that Nancy firstly contends in its appeal that Dynamo should be ordered to pay the amounts arising out of article 2 of the Convention, which reads as follows:

“Le club DYNAMO DE KIEV verse au club Entente SOTRAC OUAHAM, club affilié à la Fédération Sénégalaise de Football, une indemnité de 5% (cinq pourcent) du montant de l’indemnité de mutation principale et complémentaire du joueur [P.] du club SASP NANCY LORRAINE au club DYNAMO de KIEV due en vertu d’une convention de partenariat en date du 4 janvier 2002 entre le club SASP NANCY LORRAINE et le club Entente SOTRAC OUAHAM. Cette indemnité sera versée par le club DYNAMO de KIEV dans les délais prévus à la présente convention”.

81. In this respect, the Panel, after having examined the CAS file, the FIFA file of reference and the Decision itself, considers that this claim based on article 2 of the Convention is not admissible in the present appeal proceedings, for the reasons explained below.

82. The Panel is aware that Nancy initially filed within FIFA a claim comprising three different requests, respectively based on articles 2, 3 and 7 of the Convention.

83. The knowledge and decision of each of these three requests was conferred to the corresponding FIFA deciding body in accordance with articles 22 to 24 of the FIFA RSTP. Concretely, the claims based on articles 2 and 7 of the Convention were ascribed to the FIFA PSC, while the claim based on article 3 of the Convention (which has to do with the solidarity mechanism) was ascribed to the FIFA DRC pursuant to articles 24.1 and 22.d) of the FIFA RSTP.
84. The aforementioned procedural situation was perfectly known by the parties to the present proceedings. References to these separate proceedings respectively followed before the FIFA PSC and the FIFA DRC are constantly made in their correspondence (*ad exemplum*, the letters of Nancy dated 6 November 2009, 8 January 2010, 22 February 2010, 24 November 2010 and 30 November 2010).
85. In accordance with the mentioned split or distribution of Nancy's claims among the different FIFA deciding bodies, the FIFA DRC, in its Decision, neither analyzed nor decided on the claim of Nancy based on article 2 of the Convention. It only refers to the issue related to the solidarity mechanism clause, i.e. article 3 of the Convention, but not to the remaining claims based on articles 2 and 7 of the Convention, which were to be examined by the FIFA PSC.
86. In line with the above mentioned, the FIFA DRC, when it examined its own competence in the dispute, only refers to the matter of the solidarity mechanism. Consideration 2 in page 9 of the Decision so reveals (emphasis added by the Panel):

“Subsequently, the members of the Chamber referred to art. 3 par. 1 of the Procedural Rules and confirmed that in accordance with art. 24 par. 1 in combination with art. 22 d) of the Regulations on the Status and Transfer of Players (edition 2010), the Dispute Resolution Chamber shall adjudicate on disputes relating to the solidarity mechanism between clubs belonging to different associations. As a consequence, the Dispute Resolution Chamber confirmed that it was the competent body to decide on the present litigation involving a French club as well as a Ukrainian club and concerning the distribution of the solidarity contribution claimed by the Claimant [...]”.

87. Nancy has argued in the present proceedings that the claim arising out of article 2 of the Convention was initially filed before the FIFA PSC, and that FIFA considered that it was of the competence of the FIFA DRC, so it thus expected that this claim was resolved by such FIFA body. However, the Panel has found no evidence in the file concerning this alleged decision of FIFA of submitting such claim to the knowledge of the FIFA DRC. On the contrary, the letters of Nancy to FIFA dated 24 and 30 November seem to reveal the contrary. In the first letter, Nancy requests FIFA, in the frame of the FIFA PSC Decision of 16 November 2010, for a confirmation about the obligation of Dynamo to also pay the amounts arising out of article 2 of the Convention. In the second letter, Nancy expressly recognises that this claim based on article 2 of the Convention is to be decided by the FIFA PSC. This letter, in pertinent part, reads as follows (emphasis added by the Panel):

“On nous a indiqué que les 256.250 € d'indemnités complémentaires de mutation prévue par l'article 2 de notre protocole feraient l'objet d'une autre commission dont la décision devrait être rendue avant le 31/12/2010.

Nous sommes étonnés, en effet, l'indemnité de 256.250 € correspond à une indemnité de mutation qui doit, à notre avis, être jugée par la Commission du Statut du Joueur et qui fait partie de notre demande total de 1.006.250 €.

Nous craignons qu'il s'agisse d'une confusion avec notre autre demande pour 179.375 € concernant l'indemnité de solidarité qui nous revient, et qui est due en complément de l'indemnité de mutation conformément à l'article 3 du protocole et qui a fait l'objet de la saisie de la Chambre de Résolution des Litiges (copie jointe) qui va statuer prochainement.

Nous vous serions obligés de bien vouloir nous préciser que les 256.250 € devront bien nous être payés par Kiev avec les 750.000 € ou seront bien jugés par une autre commission”.

88. Taking the above mentioned into account, the CAS, which acts as appeal Court in the present case, cannot review and decide in these proceedings on a claim (the one based on article 2 of the Convention) on which the FIFA DRC, the first instance body in the case at stake, did not decide as the competence to do so was ascribed and corresponds to the FIFA PSC.
89. Therefore, the claim of EUR 256.250 plus interest based on article 2 of the Convention is not admitted in the present proceedings.
90. It is though made clear by the Panel that the inadmissibility of such claim in these proceedings does not imply in any way a prejudgement on its potential success or failure on the merits, this to be decided in the corresponding procedure.

IV.3.4. The claim of Nancy based on article 3 of the Convention

91. The second claim of Nancy in the present proceedings is founded in Dynamo's commitment under article 3 of the Convention, which reads as follows:

“Le club DYNAMO DE KIEV prend à sa charge l'indemnité de solidarité de 5% prévue à l'annexe du règlement FIFA en complément de l'indemnité de mutation définitive principale et complémentaire du joueur [P.]”.
92. Nancy holds that Dynamo shall honour the obligation it assumed in article 3 of the Convention, and dissents from the Decision's considerations concerning the purported inability of the clubs to agree on the allocation of the financial burden of the solidarity mechanism.
93. On the other hand Dynamo opposes to Nancy's claim basically for two reasons:
 - a) The obligation on which Nancy grounds its claim is only foreseen in the Convention, which was never validly consented by Dynamo. In the Agreement, which is the only binding document between the parties, no reference is made to additional payments of solidarity contribution. Therefore the payments executed by Dynamo in favour of Nancy included all necessary payments according to the FIFA RSTP, and no further disbursements of solidarity contribution are to be made by Dynamo.

- b) In any case, as mentioned by the FIFA DRC in the Decision, the obligation under article 3 of such Convention is invalid since it is contrary to the FIFA RSTP mandatory provisions on solidarity mechanism, which imposes that the solidarity contribution is deducted from the transfer price.
94. In light of the above mentioned the Panel shall firstly underline that:
- a) Indeed, the wording of article 3 of the Convention clearly establishes that Dynamo shall bear with the solidarity indemnity complementarily (“*en complément*”) to the transfer compensation.
- b) In the Agreement there is no reference to an obligation of Dynamo to pay the solidarity contribution arising out of the transfer of the Player “*en complément de l’indemnité de mutation définitive principale et complémentaire*”. This commitment only exists in article 3 of the Convention.
- c) Therefore there is a significant difference between the Agreement and the Convention in the regulation of the solidarity contribution and its effects in the case at hand.
95. This being said, prior to analyzing if this agreement is permitted or not in accordance with the provisions of the FIFA RSTP, the Panel, given the challenge raised on it by the Respondent, shall address the issue of the validity and binding nature of the Convention itself (which is contested by the Respondent for an alleged lack of valid consent of its part) and its prevalence or not, in the matter of the solidarity contribution, with respect to the Agreement.
96. After analyzing the facts occurred and the evidence produced by the parties, the Panel has noted that:
- a) It is undeniable that (i) Dynamo signed the Convention, (ii) the Convention was signed after the Agreement and (iii) the Convention stipulates that Dynamo is in charge of the 5% solidarity mechanism complementarily to the compensation for the transfer of the Player.
- b) The Convention was “*lu et approuvé*” (“read and approved”) by Dynamo’s President, Mr Igor Surkis, as it is hand-written in the Convention itself next to Mr Surkis’ signature.
- This, and the correspondence exchanged by the parties in the months following the transfer of the Player, in the Panel’s view, reveals that Dynamo agreed on the terms of the Convention, as no convincing evidence has been brought by Dynamo to contest the existence and the validity of the consent expressed by its President in the Convention.
- In the present case, the fact (i) that Mr Surkis was alone or accompanied by Mr Isenegger at the signature of the Convention (which was disputed among the parties), or (ii) that Mr Surkis is fluent in French or not, or (iii) that the Convention was not called “contract” or “complement to contract” but “*Protocole d’accord convention financière de mutation*”, or (iv) that the obligations under article 3 of the Convention were not specifically highlighted in the Convention, does not make any difference and shall not lead to a different conclusion. The relevant issue is that Dynamo’s President anyway signed the Convention, he freely expressed his consent without (at least proven) vices

of any kind. He could have legitimately rejected to sign the Convention if he did not understand its content or if he did not accept any of its terms, but he did not. Mr Surkis, before signing the Convention, had the opportunity to read it or to have it read by a person of his trust. After doing so, he could have decided not to sign the Convention if he had had some concerns on the document's content, but this was apparently not the case, as Mr Surkis signed the Convention.

Therefore, the Panel can only conclude that Mr Surkis was conscious of and assumed what he was signing.

- c) It is not reasonable to believe, as Dynamo suggests, that Dynamo's President agreed on signing the Convention only in the understanding that the Convention's terms were identical to the ones foreseen in the Agreement, and that, as regards of it and given that such contractual terms were eventually different, his consent to the Convention shall be deemed as not expressed or as invalid. A quick comparison of the structure and content of both documents is enough for any average person (and especially for the President of a football club, probably used to execute transfers of players) to find out that (i) their terms are quite different and (ii) the Convention is not a mere translation into French of the Agreement only without the intervention of the Firm.

In any case, the wording of article 3 of the Convention is clear and the clause itself was easily recognisable within the body of the whole Convention, composed only of two pages.

- d) Dynamo has expressly acknowledged the existence and effects of the Convention in the correspondence exchanged with Nancy. The letters of Dynamo dated 5 December 2007 and 17 November 2008 are clear in this respect (*our club fully adheres to the reached agreements, which were confirmed by appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreement dated 18 July 2007 concerning the transfer of the player, [P.], from AS Nancy to FC Dynamo and fulfils its obligations with regard to the mentioned transfer according to the agreed schedule (...)*)
- e) In some letters of Dynamo (i.e. those of 5 December 2007 and 17 November 2008), as well as in others, reference is also made to the amounts due by Dynamo to the Senegalese club Entente Sotrac Ouakam, which is a matter only ruled in the Convention (article 2).
- f) There are many differences in the terms of the transaction between the Agreement and the Convention (cf. section 78 of this award for details). This makes the Panel believe that Dynamo and Nancy, after signing the Agreement, re-negotiated some of the terms of the transfer of the Player, and reflected in the Convention the result of such negotiations and exchange of considerations between them.

97. The referred considerations lead the Panel to understand that Dynamo validly assumed and accepted the obligations deriving from the Convention, and in particular the obligation of payment under article 3 of the Convention. Dynamo (i) indeed signed the Convention, (ii) did it after and in spite of having previously signed the Agreement, (iii) repeatedly referred and "adhered" to the Convention in the correspondence exchanged with Nancy and (iv) no alleged vice or inexistence of consent has been proven.

98. On the basis of the foregoing, the Panel considers that the Convention is valid, and that concerning the solidarity contribution issues it should prevail (provided that article 3 of the Convention is deemed valid in light of the FIFA RSTP, which will be treated below in this award) over the Agreement signed the day before which, contrary to the Convention, did not rule on this issue.
99. Therefore the Panel shall dismiss the Respondent's opposition to the payment of the amount arising out of article 3 of the Convention based on the purported invalidity of the Convention.
100. This being said, the Panel shall analyze the grounds argued by the first instance deciding body (to which the Respondent also adheres) not to accept Nancy's claim based on article 3 of the Convention.
101. The FIFA DRC basically holds the dismissal of Nancy's claim in the fact that in accordance with the FIFA RSTP, the amount corresponding to the solidarity mechanism shall be mandatorily deducted by the new club from the transfer compensation, not being the clubs entitled to derogate the aforementioned compulsory rule. Therefore, the parties were not permitted to determine that the amount of transfer compensation amounted to a sum net without deduction of the solidarity contribution, which made the FIFA DRC consider that Nancy already received from Dynamo the solidarity contribution relating to the relevant transfer of the Player.
102. The Panel shall firstly underline in this respect that (i) according to article 21 FIFA RSTP, if a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his previous club and (ii) pursuant to article 1 of Annex 5 of the FIFA RSTP, this compensation is quantified in 5% of any compensation, with the exception of training compensation, paid to the former club, this amount to be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in the player's his training and education over the years.
103. In the present case, the Player was transferred from Nancy to Dynamo before the expiry of his contract, so in accordance with the FIFA RSTP, the solidarity contribution shall accrue. However it shall be also regarded again that the parties agreed in article 3 of the Convention that Dynamo would bear the solidarity contribution "*en complement de l'indemnité de mutation définitive principale et complémentaire du joueur*".
104. The Panel, after analyzing the provisions of the FIFA RSTP on the solidarity mechanism, understands that article 3 of the Convention is not contrary to those provisions.
105. The Panel considers that on the occasion of a player's transfer, the former club and the new club certainly cannot deviate from the FIFA RSTP provisions on solidarity contribution in issues affecting third parties, like the amount to be received by the training clubs as solidarity contribution (5% of the transfer compensation), or the party which shall make the relevant payments to the beneficiaries of such contribution (the new club).

106. However, in the Panel's view, there is no legal obstacle which prevents the clubs from agreeing (as the parties did in the case at stake) that the new club, apart from paying the transfer price, additionally bears the solidarity contribution.
107. In fact, some CAS precedents confirm this position. The awards in the cases CAS 2009/A/1773 & 1774 *Borussia Mönchengladbach v. Asociación Atlética Argentinos Juniors* or CAS 2008/A/1544 *RCD Mallorca v. Al Arabi* state in the pertinent part that the FIFA RSTP foresee the following principles on solidarity contribution (emphasis added by the Panel):
- (i) *It is the new club that has the obligation to pay the solidarity contribution to the club(s) entitled to it.*
 - (ii) *Towards third parties, i.e. the clubs entitled to the solidarity contribution, the obligation to pay the contribution remains with the new club, even if there are internal arrangements between the new club and the transferring club.*
 - (iii) *The transferring club and the new club are free to agree on a shift of the final, financial burden of the solidarity contribution and, in particular, to agree on a rule regarding any reimbursement due or not.*
108. In addition, in the award of the case CAS 2008/A/1544 *RCD Mallorca v. Al Arabi* it is expressly mentioned that:
- Furthermore, neither the 2005 FIFA Regulations nor other FIFA rules do prohibit the parties on such an internal arrangement [...]*
- Therefore, upon analysis of the aforementioned provisions, the Panel concludes that neither the relevant provisions of the FIFA Regulations nor those of Swiss Law forbid the parties to stipulate who will carry the financial burden of the solidarity contribution".* (emphasis added by the Panel).
109. In the Panel's view, Dynamo and Nancy, within their respective contractual freedom, specifically agreed in the Convention on the allocation of the financial burden of solidarity indemnity ("*DYNAMO DE KIEV prend à sa charge l'indemnité de solidarité de 5% prévue à l'annexe du règlement FIFA en complément de l'indemnité de mutation définitive*"), being this agreement valid and binding in the Panel's opinion. It is to be mentioned that this agreement was also somehow confirmed by the subsequent behaviour of the parties, as in the payments of the fixed transfer price of EUR 4.000.000 and of the bonus of EUR 375.000, no deduction was made in concept of solidarity contribution.
110. Therefore the Panel considers that in accordance with article 3 of the Convention, the Respondent shall be ordered to pay to Nancy the amount of EUR 179.375 claimed by the Appellant (70% of 5% of EUR 5.125.000), plus interest, which in accordance with articles 102 and 104 of the Swiss Code des Obligations, shall be fixed in 5% per annum from 27 March 2009, date on which Dynamo is to be considered in default given that Nancy, in its letter of 17 March 2009, granted Dynamo a final term to pay the amount due under article 3 of the Convention expiring on 26 March 2009.

IV.3.5. Conclusion

111. In summary, the Panel concludes that Respondent has to pay to the Appellant an amount of EUR 179.375 plus 5% p.a. since 27 March 2009 until the date of effective payment.
112. The Appellant has not requested the Panel to state that it shall not pay any costs at all related to the proceedings in front of the FIFA Players' Status Committee. Nor has Appellant argued that the determination of the costs in the Decision was not in line with the applicable procedural rules, i.e. the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. Further, the outcome of the present proceedings does not justify, in view of the Panel, that the cost determination of the FIFA DRC should be set aside or amended. Accordingly, the relevant item of the Decision shall remain untouched by the present Award.
113. The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by SASP AS Nancy-Lorraine is partially upheld.
2. The item 1 of the decision of the FIFA Dispute Resolution Chamber dated 7 December 2010 is amended as follows: FC Dynamo Kyiv is ordered to pay to SASP AS Nancy-Lorraine the amount of EUR 179.375 plus 5 % interest *per annum* from 27 March 2009.
3. The counterclaim filed by FC Dynamo Kyiv on 19 March 2012 is inadmissible.
4. (...).
5. (...).
6. All other motions and/or prayers for relief are rejected.