CAS 2013/A/3204 **FC Vorskla v. Pavlov Mykola Petrovych**

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Fabio **Iudica**, attorney at law, Milan, Italy
Arbitrators: Mr. Aliaksandr **Danilevich**, attorney at law, Minsk, Belarus
Mr. Ian S. **Forrester** QC, attorney at law, Brussels, Belgium

In the arbitration between

FC VORSKLA, Poltava, Ukraine
Represented by Mrs. Iuliia **Verteletska**, attorney at law, Poltava, Ukraine and Mr. Stephan **Netzle**, attorney at law, Zurich, Switzerland.

Appellant

and

Mr. PAVLOV MYKOLA PETROVYCH, Mariupol, Ukraine

Respondent

I. THE PARTIES

1. **FC VORSKLA** (hereinafter the "Appellant" or the "Club") is a professional Football Club located in Poltava, Ukraine and registered with the Ukrainian Football Federation (hereinafter "FFU"), which in turn is affiliated to the Fédération Internationale de Football Association (FIFA).

2. **Mr. PAVLOV MYKOLA PETROVYCH** (hereinafter the "Respondent" or the "Coach") is a Ukrainian professional coach and was Head Coach of the Club at all relevant times.

II. FACTUAL BACKROUND

3. The background facts stated below are a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the proceedings. The Panel has also taken into consideration facts that emerged from the examination carried out by the Dispute Resolution Chamber of the FFU (hereinafter the "FFU DRC"). While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award to the submissions and evidence it considers necessary to explain its reasoning only.

4. On 31 December 2010, the parties agreed to terminate an employment contract concluded on 31 December 2009, by entering into a new Employment Agreement (hereinafter the "Employment Agreement") by which the Club employed the Respondent as the Head Coach of its professional football team for the period from 1 January 2011 until 31 December 2015.

5. The provisions regarding the Respondent's salary were contained in two different addenda to the said Employment Agreement, respectively the *Addendum n.1* and the *Additional Agreement*.

6. In the paragraph 1 of ***Addendum n. 1*** it was established that "*the Club shall pay to the Head Coach for implementation of his professional obligations under this Contract the wages in the rate of 6.065 (six thousand and sixty five) cu in hryvnya equivalent (1 cu = 1 USD at the day of settling according to the exchange rate of the National Bank of Ukraine), including the taxes and obligatory payments*".

7. Under the paragraph 1 of ***Additional Agreement*** the parties further established that "*the Club shall pay to the head coach for implementation of his professional obligations under this contract the surcharge in the rate of 36.700 (thirty six thousand seven hundred) cu (1cu = 1 USD). The rate of the surcharge changes for increase yearly starting from 2012 by 100.000 (one hundred thousand) cu (1 cu = 1 USD). The additional agreement shall come into force on 01.01.2011 and shall expire on 31.12.2015.*"

8. With regard to the "***Changes and termination of the Contract***", paragraph 6 of the said Employment Agreement set forth, *inter alia*, the following provisions:

termination of the contract and his employment record book. The Respondent alleges that his request was refused. Such requests had been previously made by the Respondent, always without obtaining any response.

15. From May 2012, news concerning the new employment relationship between the Respondent and FC Illichivets Mariupol began circulating media outlets and the Internet.

16. Based upon the information in the file, the Respondent was employed by FC Illichivets Mariupol as the Head Coach and as the consultant of FC Illichivets Mariupol's President on issues regarding FC Illichivets Mariupol's development as of 1 June 2012. Such was confirmed by the order n. 38-2 (dated 1 June 2012) filed by FC Illichivets Mariupol to the Premier League - Union of Professional Football Clubs of Ukraine.

17. On 10 July 2012, the Club submitted to the Premier League - Union of Professional Football Clubs of Ukraine an application letter presenting the official representatives for the season 2012/2013 indicating Mr. Yevtushenko V.A. (and not the Respondent) as the head coach.

18. On 11 July 2012, the Club submitted to the Premier League – Union of Professional Football Clubs of Ukraine an additional application letter with the names of the official representatives for the season 2012/2013 confirming that Mr. Yevtushenko V.A. was the Senior Coach of the Club.

19. As indicated by the fact-finding carried out by the FFU DRC on 19 July 2012 and on 15 August 2012, the Respondent turned again to the management of the Club requiring a copy of the order on the early termination of the Employment Agreement and his employment record book but, again, had no success.

III. PROCEEDINGS BEFORE THE FFU DRC

20. In consideration of the facts set out above, on 14 January 2013, the Respondent filed an application with the FFU DRC.

21. In particular, with a letter dated 27 February 2013, the Respondent submitted his final request to the FFU DRC to recognize the Employment Agreement concluded with the Club on 31 December 2010 as being terminated early on 1 June 2012 on the basis of paragraph 1 of Art. 36 of the Labour Code of Ukraine without any compensation and to oblige the Club to issue him his employment record book with the relevant records therein.

22. In essence, the Respondent founded his claim on the fact that, in his view, an agreement on the early termination of the Employment Agreement dated 31 December 2010 was orally concluded between the parties in May 2012 and was confirmed by all the subsequent events (as detailed above in paragraphs from 10 to 14).

23. The Club submitted its objections and requested that the FFU DRC to reject the Respondent's claims and also to declare that the termination of the Employment Agreement of 31 December 2010 on the Respondent's initiative was without just cause

"6.1 The changes of terms and conditions of the contract can be made anytime by mutual agreement of the Parties. The written changes and addendum to this Contract, signed by the Parties and registered in Ukrainian Professional Football league are the integral part of this Contract. The Changes made unilaterally are not allowed".

"6.2 In case when on the exptration date of the contract (paragraph 1.4) at least one of the parties doesn't consider it to be necessary to extend its validity, the Contract expires in accordance with paragraph 2 of the Article 36 of the Labor Code of Ukraine".

"6.3 The Contract shall be early terminated on the Head Coach's initiative in accordance with the Article 39 of the Labor Code of Ukraine for valid reasons only, namely:

- *disability of the Head Coach that prevents him to fulfill his professional obligations under this Contract;*
- *gross violation of its liabilities under this Contract by the Club".*

"6.4 The Head Coach who early terminated labor relationship without any grounds shall be penalized in accordance with the Regulations of FFU and shall be laid claim to recover damages to the Club, connected with breach of his professional obligations by the Head Coach".

9. According to the Respondent, between January and May 2012, after receiving an offer from the Ukrainian Club FC Illichivets Mariupol, the Respondent sought permission from the management of the Club to negotiate with FC Illichivets Mariupol. It is the Respondent's understanding that the Club gave both the Respondent and FC Illichivets Mariupol oral consent to discuss an employment opportunity.

10. The Respondent also claims that in May 2012, a meeting took place between him, the President of the Club, and the Honorary President of the Club during which the parties reached an oral agreement regarding early termination of the Employment Agreement.

11. The Respondent understood from these circumstances that the management of the Club approved of the early termination of the employment relationship between the Respondent and the Club.

12. The Respondent alleges that on 1 June 2012, he attended at the Club at which time the Club accepted to take back the keys of the residence in which he was living, the car provided to him, and the bank card to which the wages were transferred. The Respondent's corporate phone was also cut off. According to the Respondent, he interpreted such facts as confirmation of the agreement concerning the early consensual termination of his employment contract.

13. The Respondent also alleges that a farewell dinner took place on 1 June 2012, and claims that on that occasion the management of the Club and the Club's President thanked the Respondent, wishing him further successes in his career.

14. On 6 August 2012, according to the Respondent, he went to the office of the General Director of the Club, Mr. Yavorsky, requesting a copy of the order on the early

termination of the contract and his employment record book. The Respondent alleges that his request was refused. Such requests had been previously made by the Respondent, always without obtaining any response.

15. From May 2012, news concerning the new employment relationship between the Respondent and FC Illichivets Mariupol began circulating media outlets and the Internet.

16. Based upon the information in the file, the Respondent was employed by FC Illichivets Mariupol as the Head Coach and as the consultant of FC Illichivets Mariupol's President on issues regarding FC Illichivets Mariupol's development as of 1 June 2012. Such was confirmed by the order n. 38-2 (dated 1 June 2012) filed by FC Illichivets Mariupol to the Premier League Union of Professional Football Clubs of Ukraine.

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from the effective date of the decision of the FFU DRC and, for this reason, to oblige the Respondent to pay a compensation fee in the amount of USD 3,000,000 (USD 2.750.000 for the breach of the Employment Agreement and USD 250,000 for moral damage) according to paragraph 4 of Article 10 of FFU Regulations on Status and Transfer of the Players.

24. In its arguments, the Club denies having consented to the early termination of the Employment Agreement and denies having violated its contractual obligations. For this reason, the fact that the Respondent unilaterally left the Club to sign a new employment agreement with FC Illichivets Mariupol (on 1 June 2012) has to be considered as a breach of the contract signed between the Club and the Respondent (on 31 December 2010) on the initiative of the Respondent only, without valid reason.

25. On 3 April 2013, the FFU DRC rendered its decision, the pertinent part of which reads as follows:

"The chamber decided:

- *TO **DENY** the claims of Pavlov M.P. to recognize the Contract n.2 of 31.12.2010 between him and LLC FC Vorskla Poltava, to be terminated on 01.06.2012 on the basis of paragraph 1 of the Article 36 of the Labour Code of Ukraine (by consent of the Parties) without any compensatory payments and oblige the Club to give him his employment record book with a respective record.*

- *TO **MEET** counter claims of LLC FC Vorskla Poltava to recognize the Contract n. 2 of 31.12.2010 between Pavlov M.P. and the Club, to be terminated at Pavlov M.P.'s initiative without legitimate reasons and the compensation must be paid by Pavlov M.P. in favour of the Club PARTIALLY.*

- *To consider the Contract n. 2 of 31.12.2010 between the Head Coach Pavlov Mykola Petrovych and LLC FC Vorskla Poltava to be early terminated through the fault of Pavlov M.P. without legitimate reasons.*

- *To oblige Pavlov M.P to pay compensation for early termination of the Contract through his fault without legitimate reasons in favour of LLC FC Vorskla Poltava in the rate of **200.000,00 (two hundred thousand) US dollars.** The compensation is to be paid in hryvnya, national currency of Ukraine in accordance with the official exchange rate of the National Bank of Ukraine at the date of settling. The payment shall be carried out within 5 (five) months from the date this resolution comes into force.*

- *TO DENY other part of the counter claims of LLC FC Vorskla Poltava".*

26. The relevant sections of the Appealed Decision can be summarized as follows:

➢ With regard to the time of termination of the Employment Agreement "*The Chamber came to the only possible conclusion that the actual contractual obligations (employment relationships) between Pavlov M.P. and FC Vorskla were terminated on*

June 1, 2012" considering that on the same day "*Pavlov M.P. resigned the position at FC Vorskla*" and "*was hired by the FC Illichivets as coach and assistant of the president of FC Illichivets on the issues related with the development of the football club*".

- In accordance with the provisions under the Labour Code of Ukraine, the FFU Regulations on the Status and Transfer of the Players, the Order N. 23/1994 of the Ministry of Labour of Ukraine, the decision N.9/1992 of The Plenary Session of the Supreme Court of Ukraine as well as the jurisprudence of the FIFA bodies of justice, the FFU DRC acknowledged that the Employment Contract was unilaterally terminated by initiative of the Respondent since no written agreement was never reached by the parties on the early termination of such Contract (as, on the contrary, required by the mentioned regulations and jurisprudence).

- By excluding the existence of a valid reason at the basis of the unilateral termination of the Employment Agreement on the initiative of the Respondent (since none of the valid reasons set in such agreement on early termination were met) the FFU DRC – within the scope of Article 10 of the FFU Regulations on the Status and Transfer of the Players and Article 17 of the FIFA Regulations on the Status and Transfer of the Players – established that the Appellant "*has the undeniable right to compensation for Mr. Pavlov M.P. breach of the principle of contractual stability*".

- With the purpose to determine the **amount of compensation due to the Appellant** the FFU DRC took into consideration the provisions under paragraph 2 of Article 9 of the mentioned FFU Regulations which establishes that "*In case of breach of contract ... the club shall pay the other party payroll for the period remaining until the expiration of the contract*".

- Therefore, taking into account the economic provisions under the Employment Agreement between the Appellant and the Respondent, the FFU DRC noted that they are set out in two different documents, respectively named "*Addendum N.1*" and "*Additional Agreement*".

- In the evaluation of the "*Additional Agreement*", however, the FFU DRC "*notes that even in correspondence with the provisions of paragraph 4.2 of the Contract, the amount specified therein may be considered as certain financial terms of cooperation between the Parties*" although "*The agreement in itself does not expressly determine the period for such amounts are paid: month, year, day, etc. Therefore, it is impossible to calculate precisely the amount and the time of its increase*" and, in this sense, "*The Chamber believes that is it is the FC Vorskla which, according to the regulatory documents, is to prove the determining the amount of compensation, failed to substantiate its proper evidence and in appropriate manner*".

- For these reasons, "*Without denying the identity of these proofs as evidence in the case, the Chamber does not have sufficient reason to believe the Agreement of December 31, 2010* [the "*Additional Agreement*"] *to be admissible evidence that can undoubtedly justify compensation and leave it out of attention*".

- The only document, therefore, which was taken into account by the FFU DRC in determining the amount of the compensation due to the Appellant was the "*Appendix n.1*" which drove the FFU DRC – under the light of the "*basic criteria of the salary remaining until the end of the term of the Contract*" – to calculate the compensation payable to the Club as follows: "*6.065.00 dollars X 43 months remaining until the end of the Contract (from 01.06.2012 till 31.12.2015) = 260.795.00 (two hundred sixty thousand seven hundred and ninety-five) U.S. dollars*".

- The total amount of 260,795.00 USD was then reduced by the FFU DRC to the definitive sum of 200,000.00 USD in view of the following mitigating circumstances evaluated in favour of the Respondent and against the Appellant:

  - the relevant contribution given by the Respondent to the "*significant progress of FC "Vorskla;*
  - the relevant "*support and cooperation with the authority of the football jurisdiction*" given by the Coach in the case at stake;
  - the delay of the Club's response;
  - the absence of wilful misconduct in the behaviour of the Respondent.

- **In denying the foundation of any moral damages suffered by the Appellant** (claimed in the amount of 250,000 USD) as a result of the termination of the Employment Agreement with no valid reason on the initiative of the Respondent, the FFU DRC came to the conclusion that "*requiring compensation of moral damages the Club not only didn't confirm the fact of non-property losses that occurred due to the humiliation of business reputation of the FC "Vorskla" caused by the actions of Pavlov M.P. and his committed actions aimed at reducing the prestige or trust in the activities of the Club, and did not submit to Chamber the calculation of the claimed amount of compensation*".

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 6 June 2013, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter the "CAS") against the Respondent and the FFU with respect to the FFU DRC's decision dated 3 April 2013. The Club appointed Mr. Aliaksandr Danilevich as arbitrator.

28. On 7 June 2013, the Appellant filed its Appeal Brief together with 10 exhibits submitting the following requests for relief:

    a. "*Accept the appeal for consideration*".

    b. "*Cancel the decision of the Dispute Resolution Chamber of the FFU of 03.04.2013 in the part of the compensation to the FC "Vorskla" by Pavlov M.P. for early termination of the Contract without a valid reason through his fault*".

    c. "*Oblige Pavlov M.P. to pay to FC "Vorskla" compensation for early termination of the Contract of the Head coach without a valid reason in the amount of 3,000,000 (three million) U.S. dollars*".

29. By letter dated 14 June 2013, the CAS advised the Respondent and FFU to submit – pursuant to R55 of the Code of Sports-related Arbitration (hereinafter referred to as "the Code") – their Answers within twenty (20) days upon receiving the communication and to express, within three (3) days, any objection on the language of the proceeding (English) chosen by the Appellant.

30. By letter dated 1 July 2013, having observed that the Respondents had failed to appoint their arbitrators within the granted deadline and that they raised no objections to the Appellant's selection of the English language, the CAS advised the parties that the President of the CAS Appeals Arbitration Division, or his Deputy, would proceed with the appointment *in lieu* of the Respondents and that the CAS proceeding would be conducted in English.

31. On 4 July 2013, the FFU filed its Defense Statement with the CAS requesting to be either excluded as a respondent in the present case or for the claims against it to be dismissed since

    "*the claim requests, expressed by the Appellant in the Appeal petition, deals purely with the decision of the DRC as the body authorized to judge the dispute between the parties involved. No the DRC's actions as a separate legal body neither the actions of the representatives of the DRC are not the subject of the initial disagreements between the parties - the Football club Vorskla and Mr. Pavlov Mykola Petrovych*".

32. On 8 July 2013, the Appellant informed the CAS that it "*has no objection to the exclusion from the lists of the Defendants the Dispute Resolution Chamber of the Football Federation of Ukraine*".

33. On 9 July 2013, the FFU was therefore formally dismissed from the proceedings.

34. By letter dated 17 July 2013, the CAS informed the parties that the Respondent had failed to submit his Answer within the granted deadline and, by this, the Respondent would have to bear the consequences provided for under R56 of the Code unless the President of the Panel would order otherwise. In the same letter, the CAS required the parties to communicate whether they would prefer a hearing to be held in this matter or for the Panel to issue an award based solely on the parties' written submissions.

35. On 23 July 2013, the Appellant informed the CAS Court Office that it preferred to have a hearing in this appeal. The Respondent did not state its position.

36. By letter dated 15 August 2013, the CAS informed the parties that the Panel appointed to decide the case was constituted as follows:

    - Mr. Fabio **Iudica**, attorney at law, Milan, Italy (President);

    - Mr. Aliaksandr **Danilevich**, attorney at law, Minsk, Belarus (Arbitrator appointed by the Appellant);

- Mr. Ian S. **Forrester** QC, attorney at law, Brussels, Belgium (Arbitrator appointed, on behalf of the Respondent, by the Deputy President of the CAS Appeals Arbitration Division).

37. On 16 August 2013, the Respondent informed the CAS that he had failed to file his Answer in this appeal within the granted deadline because he had been abroad in the Ukraine, and only received the CAS Court Office correspondence at a later stage. In this context, the Respondent requested the CAS to be granted a new term to file his defensive arguments.

38. By letter dated 23 August 2013, the CAS asked the Appellant whether it would agree with a late submission of the Answer. On 27 August 2013, the Appellant agreed on a new deadline for Respondent to file his Answer.

39. On 10 September 2013, the Respondent filed his Answer requesting that the CAS "*dismiss the claims of FC "Vorskla" in full*" and to "*revoke the decision of the Chamber for Resolution of Disputes of FFU dd. April 3, 2013 in the case N° 58/01/2012*".

40. On 20 September 2013, the CAS informed the parties that the Panel had decided to hold a hearing in the present procedure on 16 October 2013 at the CAS Court Office in Lausanne, Switzerland. At the hearing, the Appellant was represented by its legal counsels Mrs. Iuliia Verteletska and Mr. Stephan Netzle, and was assisted by the qualified translator Mr. Alexandro Ponomarev. The Appellant did not call any witnesses. The Respondent attended by telephone, without counsel, and called two witnesses: Mr. Krasnoperov (a player of FC Vorskla) and Mr. Yevtushenko V.A. (a coach who has replaced the Respondent at FC Vorskla). Upon consent of the Respondent, Mr. Ponomarev assisted the Appellant and his witnesses with translation.

41. The witness testimony can be summarized as follows:

- Mr. Krasnoperov confirmed to be present at the dinner, held in June 2012, in which the Respondent was greeted and thanked for his service by the management of FC Vorskla.
- Mr. Yevtushenko confirmed to be effectively hired by the Appellant as a Head Coach in substitution of the Respondent but – since the employment agreement between the Club and the Respondent was still in force – at the time of his presentation to the press he was announced as the "Senior Coach".

V. JURISDICTION, APPLICABLE LAW AND ADMISSIBILITY

A. Jurisdiction

42. Article R47 of the Procedural Rules of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body."

43. The Appellant relies on Article 34 of the FFU as conferring jurisdiction to the CAS, which is also confirmed by the Appealed Decision. It provides, in part, as follows:

> *"Article 34. Appeal*
>
> *1. Appeal against the decision of the DRC of the FFU can be submitted to the International Arbitration Court for Sports Matters (CAS, Lausanne, Switzerland). In the event of formation of All-Ukrainian Sport Arbitration, the parties shall exhaust all internal ways of dispute settlement before bringing the matter to CAS."*

44. The jurisdiction of the CAS is not contested by the Respondent and was confirmed by the parties in their participation at the hearing.

45. Accordingly, the jurisdiction of the CAS over this Appeal is both clear and undisputed.

B. Applicable Law

46. Chapter 12 of the Article 176 of the Swiss Private International Law Act (PIL Act) governs this arbitration as the *lex arbitri*. With respect to the applicable law, Article 187, para. 1, of the PIL Act provides that:

> *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected."*

47. In line with this rule, Article R58 of the Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarly, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

48. In application of the above provisions, the Panel shall determine which regulations and laws the parties chose to govern their dispute.

49. In this regard, the Employment Agreement provides that:

- *"This Contract is a fixed-term Employment Contract concluded in accordance with the requirements of the Articles 23, 23-1, 23-2, 23-3 of the Ukraine Law "On Physical Culture and Sport", Articles 21, 23-24, 36, 40, 97, 103 of the Labor Code of Ukraine, Decree of the Cabinet of Ministers of Ukraine "On the procedure of the application of contractual forms of employment contract", the Regulations of All-Ukrainian football contest among the teams of the clubs of "Premier League – Union of Professional Football Clubs of Ukraine"...*

Regulations of the Football Federation of Ukraine on the status and transfer of football players" (point 1.2).

- *"The Parties bear responsibility for failure to perform or undue performance of their obligations under this Contract in accordance with the current Ukrainian Legislation"* (point 5.1).
- any eventual dispute arising from the said Employment Agreement will be decided by *"the respective authorities of Premier League of Ukraine, the Football Federation of Ukraine, the UEFA and FIFA"* (point 5.3).
- *"the Head Coach who early terminated labor relationships without any grounds shall be penalized in accordance with the Regulations of FFU"* (point 6.4).

50. Therefore, it is undisputed that the Panel, in deciding on the case at stake, has to primarily apply the above-mentioned FFU Regulations, as well as current Ukrainian legislation.

51. Furthermore, since the parties submitted their dispute to the jurisdiction of the FFU DRC and then to the CAS, the Panel has the power to apply FIFA Regulations.

C. **Admissibility**

52. Pursuant to Article R49 of the Code *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

53. In this regard, Article 34 of the Regulations of the FFU DRC provides, in part, as follows:

"Article 34. Appeal

2. The period of appeal submission starts from the day of receiving the full decision of DRC of the FFU by the party. This period is 21 days".

54. This provision complements the Appealed Decision wherein it was noted that an Appeal against the decision could be lodged to the CAS within 21 days from the moment of receiving the full text of Resolution of the FFU DRC by the Party.

55. The Appealed Decision was served to the parties on 24 May 2013. The Appellant then filed its Statement of Appeal on 6 June 2013. Such filing was within the 21-day deadline established under the above-mentioned regulations. The appeal is, therefore, admissible.

56. As for the Respondent, however, it is noted in his Answer that he seeks to challenge the Appealed Decision, and requests the following: *"to revoke the decision of the Chamber for resolution of disputes of FFU dd. April 3, 2013".* Given the simplicity of the statement, it was unclear to the Panel whether the Respondent indeed sought to seek a

counter-claim/counter-appeal in this appeal. Consequently, the Panel sought confirmation from the Respondent during the hearing on this point, wherein the Panel concluded that the Respondent objected to the Appealed Decision, and wished for the Panel to reduce the amount of money he owed under the Appealed Decision.

57. The Panel notes that the CAS jurisprudence provides that, "*under the current CAS rules, a party, dissatisfied with a decision rendered by a sports body or entity, is obliged to file an appeal within the applicable deadline and cannot wait to see whether the same decision is challenged by another party before filing an appeal*" (CAS 2010/A/2098).

58. Moreover, "*It is ... clear that [t]he possibility to submit a counter appeal within the framework of an already existing appeal is a procedural right which does not exists per se unless it is clearly granted under the Regulations or the Code governing the proceedings. Therefore, the amendment of the Code, by abolishing the previous existing possibility to submit a counterclaim, was enough in order to bring about the result embodied in the abovementioned intention, i.e. that under the 2010 edition of the Code* [as under the subsequent version of the Code released on 2013 and applicable at the case stake] *it is not any longer possible to submit a counterclaim at the late stage of the filing of the Answer to an Appeal*" (CAS 2010/A/2193).

59. For these reasons the counter-claim/counter-appeal submitted by the Respondent with his Answer, as well as the "*informal wish*" – orally expressed at the hearing by the Respondent – to obtain a reduction of the compensation established in the decision of the FFU DRC is not admissible.

VI. MERITS

A. Submissions of the Parties

60. The following overview is a summary of the main positions of the parties and does not comprise each and every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by Appellant and Respondent, even if no explicit reference has been made in what follows. The parties' written submissions, their verbal submissions at the hearing, documentary evidence and the content of the Appealed Decision were all taken into consideration.

➢ The Club's Appeal

61. With its Appeal, Club challenges the Appealed Decision as follows:

- *whereby the Chamber limited the compensation due to the Appellant for the early termination, without valid reason, of the Employment Agreement (at the time in force between the Club and the Coach) on initiative of the Respondent to the amount of 200.000 USD (while the Club required a sum of 2.750.000 USD);*

- *whereby the Chamber rejected the request of relief submitted by the Club with respect to the moral damages allegedly suffered by the Club for the said breach of contract and required by FC Vorskla in the amount of 250.000 USD.*

62. For this purpose, the Appellant recalled the different regulations under which the right of compensation related to the early termination of contract with no valid reason on initiative of one of the parties is provided, including Article 10 paragraph 4.1 of the FFU Regulations on the Status of Players and, Article 17 of the FIFA Regulations on the Status and Transfer of Players. The Appellant also drew attention to point 6.4 of the Employment Agreement between the parties on the basis that it is the Club's conviction that the compensation which it is entitled to receive should consist of the amount of the salary due by the Club to the Respondent for the period between the breach of the contract and the natural expiry of the Employment Agreement. The Appellant focuses its arguments on presenting its view on how to correctly calculate the salary payable to 31 December 2015 (as provided under the "*Appendix n.1*" and the "*Additional Agreement*" of the Employment Agreement).

63. In that sense the Appellant affirms that:

- "*Appendix n.1 to the contract ... indicates that the monthly salary of the Head Coach is 6.065 U.S. dollars including taxes and mandatory payments*".

- The amount of 36,700 U.S. dollars set forth under the Additional Agreement is to be understood as a "*monthly surcharge to the salary of the Head Coach. The same Agreement states that from 2012 this amount will be increased by 100,000 (one hundred thousand) U.S. dollars*".

64. On the basis of the above assumptions, the Appellant contends that:

- "*The total amount of the surcharge to the salary in 2011 was 440,400 U.S. dollars at the rate of 36,700 U.S. dollars per month*";

- "*In 2012, the annual amount was 540,400 U.S. dollars at the rate of 45,033.33 U.S. dollars per month*";

- "*In 2013, it was to be 640,400 U.S. dollars at the rate of 53,366.66 U.S. dollars*[per month]";

- "*In 2014 - 740,400 U.S. dollars at the rate of 61,700 U.S. dollars per month, in 2015 - 840,400 U.S. dollars at the rate of 70,033.33 U.S. dollars per month*"

65. With respect to the above mentioned calculation, the Appellant comes to the total amount of 2.751.433,31 USD as follows:

- 5.000 USD [6.065 USD] * 43 months (01.06.2012 – 31.12.2015) = 215.000 USD +
- 45.033,33 USD * 7 months (01.06.2012 – 31.12.2012) = 315.233,31 USD +
- 53.366,67 USD * 12 months (01.01.2013 – 31.12.2013) = 640.400,00 USD +
- 61.700 USD * 12 months (01.01.2014 – 31.12.2014) = 740.400,00 USD +

- 70.033,33 USD * 12 months (01.01.2015 – 31.12.2015) – 840.400,00 USD

66. Regarding the alleged moral damage linked to the breach of contract by the Respondent, the Appellant contends that the consequences suffered by the Club for the early termination of the Employment Agreement on the initiative of the Respondent consisted of the following:

- loss of a "*positive atmosphere in the team, cohesion, discipline, confidence in the coach*" which led the Club to obtain important sports successes in the previous period under the coaching of the Respondent;

- need to "*hastily seek a candidate for acting head coach position*";

- decrease of the prestige of the Club and loss of confidence in the fans since the Club is now in a "*fight for survival position*" in the Ukrainian Premier League.

➢ **The Coach's Answer**

67. In his Answer, the Respondent argues that the Employment Agreement was terminated by mutual consent of the parties – with the consequence that the Club, contrary to what is established by the FFU DRC, is not entitled to receive any compensation on the basis of the oral agreement reached by him (the Coach), Mr. Babaev O.M. (President of the Club), and Zhevago K.V (Honorary President of the Club) in May 2012.

68. This circumstance is confirmed, in the Respondent's view, by the fact that:

- On 1 June 2012 the Club, "*guided by the agreement reached*", withdrew the keys of the official residence in which the Coach was living, the car provided to him, and the bank card to which the wages were transferred, as well as his corporate phone was cut off.

- During the same day a farewell dinner took place and in that occasion the management of the Club and its President greeted and thanked him for the job done.

- On 10 July 2012, FC Vorskla hired Mr. Yevtushenko as the new Head Coach of the Club.

69. For the above, the Respondent not only requires to CAS "*to dismiss the claims of FC Vorskla in full*" but also submits a counter-claim/counter-appeal asking the Court "*to revoke the decision of the Chamber for resolution of disputes of FFU dd. April 3, 2013*". As set forth above, this counter-claim/counter-appeal, as already established by the Panel, is inadmissible.

B. Legal Analysis

➢ **On the Definition of the "*Thema Decidendum*" of the Present Appeal**

70. Considering that:

- *"A CAS Panel is bound to observe the limit of the parties' motions... the arbitral nature of CAS proceedings obliges the Panel to decide all claims submitted, but at the same time prevents the Panel from granting more than what the parties are actually asking for"* (CAS 2008/A/1644);

- the counter-claims/counter-appeals of the Respondent are inadmissible and, therefore, the only valid requests are those filed by the Appellant through which FC Vorskla requires to the Panel to "*Cancel the decision of the Dispute Resolution Chamber of the FFU of 03.04.2013 in the part of the compensation to the FC "Vorskla" by Pavlov M.P. for early termination of the Contract without a valid reason through his fault*" and to "*Oblige Pavlov M.P. to pay to FC "Vorskla" compensation for early termination of the Contract of the Head Coach without a valid reason in the amount of 3,000,000 (three million) U.S. dollars* [2,750,000 USD for the early termination of the Employment Contract with no valid reason on initiative of the Coach and 250,000 USD for the connected moral damages]",

therefore the decision rendered by the FFU DRC has a *res iudicata status* with regard to:

- the assessment that the Employment Agreement signed between the parties on 31 December 2010 is early terminated without valid reason on the initiative of the Respondent on 1 June 2012;

- the portion of 200,000 USD [out of the 2,750,000 USD required by the Club] attributed to FC Vorskla as compensation for the said early termination of the Employment Agreement.

71. In consideration of the above, therefore the Panel is therefore required to decide only upon the following matters:

- whether, and to what extent the Club is entitled (within the claimed sum of 2,750,000 USD) to receive from the Respondent, for the early termination of the Employment Agreement, **higher compensation** than the compensation established by the FFU DRC (200,000 USD);

- whether, and to what extent, the Club is entitled (within the claimed sum of 250,000 USD) to receive from the Respondent, for the early termination of the Employment Agreement, a compensation for the **moral damage** allegedly suffered by FC Vorskla because of the said termination.

➢ **<u>On the Compensation for the Early Termination of the Employment Contract</u>**

72. Both the FFU DRC in its decision and the Club in its Appeal Brief correctly ground the right of compensation due to a party for the early termination of an employment agreement without valid reason on initiative of the other party on paragraph 4.1 of Article 10 of the FFU Regulations on the Status and Transfer of Players which –

repeating paragraph 1 of Article 17 of FIFA Regulations on the Status and Transfer of Players – states that:

"In all cases, the party in breach shall pay compensation. Subject to provisions of article VII of the Regulations "Player Training Compensation" and unless otherwise provided for in a contract, compensation for the breach of a contract's terms and conditions shall be calculated with due consideration for the laws of Ukraine, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefit due to a player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by a former club (depreciated over the term of a contract) and whether the contractual breach falls within a protected period".

73. It is evident from the above provision that the criteria established for the calculation of the compensation are wide, and the deciding body has discretion in assessing and determining the relevant amount on the basis of the specified criteria as well as any other objective criteria (CAS 2012/A/2698).

74. Therefore, with regard to the calculation of the compensation, the regulation imposing on the Panel an obligation of "case by case" evaluation for the particular dispute in hand.

75. Consequently, it is clear that although a party has a right to obtain compensation for the breach of a contract without valid reason by the other party, the calculation of the relevant amount of compensation differs in accordance with the factual peculiarities of each situation.

76. The amount of remuneration still due to a party under a breached contract is only one criterion amongst several that the Panel may take into consideration in determining the amount of the compensation owed. As that particular criterion only functions as a parameter for the calculation of compensation, the compensation to be awarded does not necessarily and/or automatically consist of the exact total amount of the remuneration still due (as claimed by the Appellant).

77. Considering the above, the duty of the Panel is to evaluate all the possible specific criteria to determine fair compensation in relation to the early termination of the Employment Agreement at the initiative of the Respondent.

78. In determining the quantum of the compensation due to the Club, the Panel has taken into account the following relevant factors that emerged from the documents and the proceedings of the Appeal:

- The Panel notes that although the Club has requested compensation of 3,000,000 USD, it did not demonstrate any interest in maintaining the employment relationship with the Respondent and did not, for example, initiate judicial proceedings against him;

- from the moment at which the Respondent left the Club (May 2012), and the news of a potential employment agreement between the Respondent and FC Illichivets Mariupol began to be published on the internet, the Club did not issue anything like a formal warning to the Respondent calling on him to respect the Employment Agreement;

- the Club never informed the Respondent even informally of its intention to maintain the employment relationship, despite the Respondent attending at the Club's headquarters to meet its representatives several times (1 June, 19 July, 6 and 15 August 2012);

- at no point did the Club object to the Respondent's presentation of the events that he used to justify his understanding of the mutual agreement on early termination of the Employment Agreement including, for instance, the withdrawal of the keys of the flat in which he was living, the corporate car, the corporate phone, the bank cards, as well as the farewell dinner on 1 June 2012 (confirmed at the hearing by the Player Mr. Krasnoperov O.V.);

- the Club never brought an independent action against the Respondent, but merely submitted its request for relief by way of a counter-claim in the case before the FFU DRC which was filed, 6 months later (on 14 January 2013) by the Respondent by which stage the club had already hired a new head coach (Mr. Yevtushenko V.A.) in the meantime;

- a letter dated 2 August 2012 sent by the Club's President to the President of FC Illichivets Mariupol, a copy and translation of which was provided to the Panel on 11 October 2013 seems to indicate the Club's position. That letter states:

  "Dear Vladimir Semyonovich [president of FC Illichivets Mariupol]!
  The Honorary President of the Football Club Vorskla in a personal conversation
  with you named the compensatory amount for the early termination of contract between FC Vorskla and head coach Pavlov Mykola Petrovych (3 000 000 (three million) U.S.Dollars) in early June 2012. We have received neither oral answer, nor letter of reply to the offer of the Honorary President of the club until now. Vladimir Semyonovich, you are kindly requested to inform us of your decision on the matter in the soonest possible time.
  Best regards,
  President of FC Vorskla"

  This confirms that the Club wished to obtain payment from FC Illichivets Mariupol for the transfer of the Respondent, rather than as compensation for any misconduct by the Respondent.

- The Panel considers that it is well-established that in the event of the transfer of a player or a coach, any disagreement over compensation due should not hinder the employment possibilities of that player or coach. Yet the withholding of the Respondent's employment book was apparently done for just this reason. It is particularly noteworthy that the letter mentioned above

was sent to the President of FC Illichivets Mariupol to demand a sum of money as compensation for the transfer, with no mention being made of any supposed misconduct by the Respondent.

- Regarding the Respondent, all of the events presented by him (as already indicated at paragraphs 10, 11, 12 and 13 above), prove the absence of wilful misconduct by the Respondent in considering the Employment Agreement terminated by mutual consent and therefore should count as mitigating circumstances.

79. In view of the above, the Panel finds that the compensation due to the Club should be set at the minimum amount possible, i.e. in the sum of 200,000 USD granted to the Club by the Appealed Decision and already fitted with the *res iudicata* status. If the Respondent had presented an admissible counter-claim / counter-appeal within the permitted timeframe, the Panel would have had the opportunity of considering the merits of the award of the 200,000 USD. As he did not, the Panel is not competent to consider the claim he might have made.

80. The argument on the calculation of the remuneration due to the Respondent until the end of the Employment Agreement (as under the "*Addendum n. 1*" and the "*Additional Agreement*") provided by the Appellant in its Appeal Brief has to be considered completely irrelevant.

- **<u>On the Moral Damage</u>**

81. With respect to the moral damage claimed (in the amount of 250,000 USD) by the Appellant for the early termination of the Employment Agreement with the Respondent on the initiative of the latter, the Panel agrees with the definition of the damage as expressed by the FFU DRC in the Appealed Decision.

82. In accordance with paragraph 3 of the Resolution n. 4 of the Plenary Session of the Supreme Court of Ukraine (on judicial practice in case of compensation of moral damage), in fact,

"The moral damage to a legal body [as a Football Club] *shall mean non property losses that occurred due to the humiliation of their reputation, infringe on the trade name, trade mark, industrial brand, disclosure of trade secrets, as well as actions directed at reducing the prestige or trust in their activities".*

83. The Panel notes that the said "non-property losses" arising from an unlawful act (or omission) cannot be considered in *re ipsa*. On the contrary, according to the principle of the burden of proof (which is a basic principle in every legal system), the party who claims compensation for a damage bears the burden of proving its allegations. In other words, any party deriving a right from an alleged fact shall carry the burden of proof (cf. Article 12.3 of the "FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber" and, *inter alia*, CAS 2009/A/1810 & 1811).

84. The Appellant has failed to discharge its burden of proof to demonstrate non-property losses

85. The Club presented a list of negative consequences allegedly deriving from the departure of the Respondent (loss of a positive atmosphere in the team, cohesion, discipline, confidence in the coach, troubles in finding a new coach, decrease of prestige of the Club, loss of confidence in the fans) without either providing any factual evidence of such consequences or proving the causal connection between those alleged events and the Respondent's violation.

86. In light of the above considerations, the Panel dismisses the Club's request for compensation of 250,000 USD for the alleged moral damage suffered in relation to the breach of the Employment Agreement on initiative of the Respondent.

C. Conclusion

87. Based on the foregoing, and after taking into due consideration all the evidence produced and all the arguments submitted by the parties, the Panel finds that:

- the assessment, made in the Appealed Decision, that the Employment Agreement signed between the parties on 31 December 2010 was terminated early without valid reason on the initiative of the Respondent is confirmed.

- the portion of 200,000 USD attributed by the Appealed Decision to FC Vorskla as compensation for the early termination of the Employment Agreement is confirmed.

- the amount of compensation awarded by the FFU DRC in its Appealed Decision is confirmed.

88. Consequently, the Panel confirms the Appealed Decision in full. Any and all other requests and prayers for relief are dismissed.

VII. COSTS

89. Article R64.4 of the CAS Code provides the following:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fee of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, 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".

90. Article R64.5 of the CAS Code reads 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 complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties".

91. Having taken into account the outcome of the arbitration, in particular the fact that the Appellant's appeal has been dismissed, the Panel orders that the Appellant bear the entire costs of the arbitration, in an amount to be determined and served to the parties by the CAS Court Office.

92. Furthermore, pursuant to the same Article of the CAS Code, and in consideration of the outcome of the proceedings, the Panel rules that the Club shall bear its own costs, however without paying any contribution towards the Respondent's legal fees, who was not represented by counsel.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 6 June 2013 by FC Vorskla against the Appealed Decision issued on 3 April 2013 by the FFU DRC is dismissed.

2. The counterclaim filed by Mr. Pavlov Mykola Petrovych is inadmissible.

3. The decision issued on 3 April 2013 by the FFU DRC is confirmed.

4. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office in a separate letter, shall be borne in their entirety by FC Vorskla.

5. Each party shall bear their own costs.

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

Seat of arbitration: Lausanne, Switzerland

Date: 17 January 2014

THE COURT OF ARBITRATION FOR SPORT

Mr. Fabio Iudica
President of the Panel