Arbitration CAS 2013/A/3097 Football Club Goverla v. Gibalyuk Mykola Mykolayovych, award of 10 November 2014

Panel: Prof. Petros Mavroidis (Greece), President; Mr Bernhard Heusler (Switzerland); Mr Christian Duve (Germany)

Football
Contract of employment
Burden of proof

The CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one, where CAS panels can intervene within the statutory limits. In other terms, in CAS arbitration any party wishing to prevail on a disputed issue must discharge its "burden of proof", i.e. it must meet the onus to substantiate its allegations and affirmatively prove the facts on which it relies with respect to that issue. This is what the maxim *"actori incumbit probatio"* amounts to. The CAS panel has no obligation to instruct the case *ex officio*, it is only empowered under Article R44.3 of the CAS Code to order further evidentiary proceedings if it deems it appropriate to supplement the presentations of the parties.

I. PARTIES

1. Football Club Goverla (hereinafter the "Club") is a football club with its registered office in the Transcarpathian region, Ukraine. It is a member of the Football Federation of Ukraine (hereinafter "FFU"), itself affiliated to the Fédération Internationale de Football Association (hereinafter "FIFA") since 1992.

2. Mr Gibalyuk Mykola Mykolayovych (hereinafter "the Player") is a professional football player. He was born on 21 May 1984 and is of Ukrainian nationality.

II. FACTUAL BACKGROUND

II.1 Background facts

3. The elements set out below are a summary of relevant facts emerging from the Parties' written pleadings. The summary does not comprise every contention put forward by the Parties. 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 only to the submissions and evidence

it considers necessary to explain its reasoning pertaining to the assessment of the jurisdiction of the CAS.

II.2 The contracts signed between the Parties

4. On 20 January 2010, the Parties entered into a labour agreement, with the registered number N° 169 (hereinafter the "Employment Contract N° 169"). The relevant characteristics of this document can be summarised as follows:

   - It is a fixed-term agreement for two years, effective from 20 January 2010 until 18 January 2012.
   - Among other things, the Club committed itself to pay to the Player a salary *"according to the staff schedule"*.
   - It was signed, on the one hand, by the Player and, on the other hand, by Mr Y.O. Doroshenko, in his capacity as the Club's President.
   - According to its Article 2.1, *"The labor (sic) relationship and mutual obligations of the Parties are regulated with the Statute, other regulations of the Club, this Contract, the regulations of the Ukrainian Football Championship for professional teams and the current legislation of Ukraine"*.
   - Pursuant to its Article 5.1, the *"Parties are responsible for the non-performance of [sic] improper performance their obligations, which are in the Contract, according to the Ukrainian laws in force"*.

5. On 10 April 2010, an "additional agreement" to the Employment Contract N° 169 was signed, whereby the Club *"undertakes the additional commitments to pay to the [Player] monthly wages at the rate of 5 000 c.u. in UAH equivalent according to the rate of the NBU"*. Pursuant to Article VII of the additional agreement, the *"Club is obliged to assign monthly 200 c.u. in UAH equivalent according to the rate of the NBU for the rent of a living-area"*. According to Article VIII of the same document, the *"Parties agreed about additional commitments from January to May 2010 the wage rate shall be 2 500 c.u., from 01 June to 31 December 2010 5 000 c.u. (major league), from 01 June 2010 to 01 June 2011 5000 c.u. (major league), from 01 January to 01 June 2011 7 – 10 000 c.u. (major league), from 01 June 2011 7-10 000 c.u. (first league with entrance to the premier League)"*. This additional agreement was signed by the Player, on the one hand, and by Mr Schits I.T., the Club's general director, on the other hand.

6. The Player claims that he had always complied with his contractual obligations as well as with the instructions given to him by the Club's representatives. In spite of this, the Club failed to pay him most of his dues. However and because his employer told him that it was absolutely determined to honour its debts under employment contract N° 169 and additional agreements, the Player accepted to extend his employment relationship with the Club for another year.

7. In this regard, the Player submits that, on 2 June 2012, he signed with the Club another employment contract, with the registered number N° 267 valid from 02 June 2012 until 30 June 2013 (hereinafter the "Employment Contract N° 267"). According to the Player, an additional agreement was also signed (by the Player and by Mr Schits I.T.) and, allegedly, contained the same financial terms as the additional agreement to the Employment Contract N° 169. None

of those documents have been submitted by the Parties. In his answer filed before the Court of Arbitration for Sport (hereinafter the "CAS"), the Player explained that the Club persistently refused to hand him a copy of these contracts, in spite of his repeated requests.

8. On its part, the Club confirms that it had indeed signed the Employment Contract N° 267 but that, for some unknown reason, the Player refused to sign its additional agreement.

9. With reference to the wages paid to the Player during the 2011/2012 season, the Club submitted the following document, filed as Exhibit 5 to its Appeal Brief (hereinafter "Exhibit 5"), with the following title *"Record about the [Player's] salary payment":*

Period	the date of payment	The Amount of payment in US dollars in UAH equivalent according to the rate of the NBU	Signature about reception
2011			
June		3500 + 1500	signature
July		3500 + 1500	Signature
August		3500 + 1500	Signature
September		3500 + 1500	Signature
October		3500 + 1500	Signature
November		3500	Signature
December		3500 + 1500	Signature
2012			
January		5000	Signature
February		4000 + 1000	Signature/signature
March		5000	Signature
April		4000 + 1000	Signature
May		2500 + 2500	Signature/signature
June		6000	

10. The above list of payments was not supported by any document or other clarification. The variation in the amounts allegedly paid to the Player was not explained either. Likewise, the Club did not file any document reflecting the wages paid to the Player for the 2010/2011 and 2012/2013 seasons.

II.3 Proceedings before the FFU Dispute Resolution Chamber

11. On 5 November 2012, the Player initiated proceedings with the FFU Dispute Resolution Chamber (hereinafter the "DRC") whereby he requested that the DRC orders the Club to pay in his favour a total amount of USD 201,300. The detail of the claimed amount is the following:

- Arrears of wages from 20 January 2010 until 18 January 2012	USD 101,900
- Arrears of wages from 01 July 2012 until 31 December 2012	USD 48,000
- Compensation for the early termination of the Employment Contract N° 267, without just cause	USD 48,000
- Lease payments for the apartment for 17 months	USD 3,400
Total	**USD 201,300**

12. With reference to the late payment of the wages, the Club rejected the Player's claim, arguing that it was not bound by the additional agreement to the Employment Contract N° 169, as that Contract had been signed by Mr Schits I.T., who was not entitled to act on behalf of the Club. The Club alleged that the additional agreement was in breach of its internal regulations as well as the labour laws of Ukraine. As regards the additional agreement to the Employment Contract N° 267, the Club contended that the Player had actually refused to sign it, without any explanation. Under these circumstances, the Club was of the opinion that the additional agreement to the Employment Contract N° 267 had never entered into force.

13. In a decision dated 19 December 2012, the DRC dismissed the Club's argument, according to which the Player's salary should be calculated exclusively using the "staff schedule" as provided under the Employment Contracts N° 169 and N° 267.

14. As regards the additional agreement to the Employment Contract N° 169, the DRC found that a) it complied with the applicable national legislation as well as with the FFU regulations and the Club failed to prove otherwise, b) the Club failed to establish that the Player received a copy of the "staff schedule", c) that the Player had no reason to doubt that Mr Schits I.T. – in his capacity as general director – had the powers to sign the additional agreement to the Employment Contract N° 169, d) at no moment the Player's attention was drawn to the fact that, in order to be valid, the additional agreement had to be ratified by the Club's authorized representative, e) the liability of the Club to pay the Player's wages according to the additional agreement was confirmed subsequently through conclusive acts, considering the *"footballer residence in club's team composition, appearance in team composition, lack of claims about validity of Additional agreement No. 1 to the Contract before the [Player] recourse to Chamber, and the main thing - the [Club] has provided records and the [Player] recognized his sign on them, about partial salary payment just with conditions stipulated by the Additional agreement No.1 to the Contract"*.

15. As to the outstanding salaries related to the additional agreement to the Employment Contract N° 169 and on the basis of the evidence filed by the Club itself, the DRC found that the unpaid wages *"for the period from 20 January 2010 till 31 December 2010"* amounted to USD 45,967 and *"for the period from January till December 2011"* to USD 51,967.

16. With reference to the Employment Contract N° 267, the DRC observed that the Club did not submit the additional agreement which the Player allegedly refused to sign. However, it noted that the Club *"presented to the Chamber a payroll record which confirmed the repayment to the [Player] for*

June 2012 a sum of USD 6,000 in UAH equivalent. Thus the mentioned document confirms that within the effective period of the contract No. 267 as of 02.06.2012 the [Player] was paid salary for June 2012". Considering that the Club submitted a document whereby it was established that it had accepted to pay to the Player USD 6,000 (actually the equivalent of this sum in UAH) for the month of June 2012, *i.e.* the first month of the Employment Contract N° 267, and taking into account that this document had been signed by the [Player], the DRC came to the conclusion *"that the club should fulfil its obligations according to the proposed by itself proposition on payments to be made to the [Player]. The Chamber notes that the mentioned facts confirm existence of the Additional agreement to the contract No. 267 as of 02.06.2012, which was not presented to the [Player] by the [Club] in breach of paragraph 7 and of Article 8 of FFU Regulations".*

17. Concerning the outstanding salaries related to the additional agreement to the Employment Contract N° 267 and on the basis of the evidence filed by the Club itself, the DRC observed that the Player only received his salary for the month of June 2012 and, as a consequence, found that the *"amount of the arrears for the period from July until November 2012 shall be USD 30.000".*

18. Concerning the Player's claim related to the payment of his lease, the DRC held that the Club *"does not contest the fact of payment to the [Player] sums for lease payments for the apartment in amount of USD 200 and presented a record for partial payment of these sums to the [Player] as confirmation. According to the presented record the payment of sums is confirmed for the period June-November 2011 and February-April 2012. The [Club] has not presented confirmation of payment of sums for other months. Therefore, taking into account the provisions of the contract as of 20.01.2010 (part 7 paragraph 3.3 Chapter 3) and Additional agreement No. 1 to the contract No. 169 as of 20.01.2010, the Chamber observes that the claims of the [Player] regarding repayment of the sums for lease payments for the apartment are subject to satisfaction for the period January-December 2010 in amount of USD 2400, for January-May 2011 in the amount of UAH 1000, and the total amount of USD 3400 in UAH equivalent according to the NBU exchange rate".*

19. Based on the foregoing, the DRC held that the Club had unilaterally terminated its employment relationship with the Player without just cause. It decided that the Club had to pay to the Player the amount of USD 35,000 as compensation. This amount corresponded to the salaries due for the six remaining months following the Club's unjustified breach of the Employment Contract N° 267.

20. As a result, on 19 December 2012, the DRC decided the following:

> *"THE CHAMBER DECIDED*
>
> 1. *To satisfy partially the application of the [Player]*
> 2. *To oblige the [Club] to repay to the [Player]*
>
> - *The arrears of wages for the period from 20 January 2010 till 18 January 2012 according to the contract No. 169 as of 20.01.2010 for the total amount of USD 96967,00 in UAH equivalent according to the exchange rate of the NBU;*
> - *The arrears for the apartment lease payments for the total amount of USD 3400,00 in UAH equivalent according to the exchange rate of the NBU.*

3. *To consider the contract concluded on 2 June 2012 between the [Parties] as early terminated due to a fault of the club without just cause during the protected period from the moment of entry into force of this decision.*
4. *To oblige the [Club] to repay to the [Player]*
   - *The arrears of wages for the period from 02 July 2012 till 31 December 2012 for the total amount of USD 30000,00 (…) in UAH equivalent according to the exchange rate of the NBU;*
   - *The compensation for the early termination of the contract No. 267 as of 02.06.2012 due to a fault of the club without just cause during the protected period in the amount of USD 35000,00 (…) in UAH equivalent according to the exchange rate of the NBU.*
5. *To oblige the [Club] to execute a respective order on dismissal of the [Player] and to return him the workbook in accordance with the provisions of the labour laws of Ukraine.*
6. *To dismiss the other claims of the [Player].*
7. *To dismiss the counter-claim of the [Club] on recognition of the Additional agreement No.1 to the Contract No. 169 as of 20.01.2010 as invalid.*
8. *To forward the case materials to the Control-disciplinary committee of the FFU in accordance with the paragraph 4 of Article 29 of the Regulations of the Dispute Resolution Chamber for application of respective administrative sanction towards the [Club] (…).*

The decision shall come into force after expire of the term for an appeal submission, if no appeal was submitted. In case of submission of an appeal the decision, if not revoked, shall come into force after consideration of the case by the Court of Arbitration for Sport.

The appeal against the decision of the Dispute Resolution Chamber of FFU shall be filed to the Court of Arbitration for Sport within 21 (twenty one) days from the date of receipt of the full text of the decision of the Dispute Resolution Chamber of FFU by the party".

21. On 1 February 2013, the Parties were notified of the decision issued by the DRC (hereinafter the "Appealed Decision").

III. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 21 February 2013, the Club filed its statement of appeal with the CAS.

23. On 28 February 2013, the CAS Court Office acknowledged receipt of the Club's statement of appeal, of its payment of the CAS Court Office fee and took note of the nomination of Mr Bernhard Heusler as arbitrator.

24. On 4 March 2013, the FFU confirmed to the CAS Court Office that it renounced its right to request its intervention in the present arbitration proceedings.

25. On the same day, the Club lodged its Appeal Brief, which contains a statement of the facts and legal arguments accompanied by supporting documents.

26. On 22 March 2013, the Player confirmed to the CAS Court Office that it had appointed Mr Christian Duve as arbitrator

27. On 16 April 2013, the CAS Court Office acknowledged receipt of the Player's answer filed on 12 April 2013 and invited the Parties to state on or before 23 April 2013 whether their preference was for a hearing to be held.

28. By fax-letters dated 17 and 23 April 2013, the Player, respectively the Club, confirmed to the CAS Court Office that they agreed to waive a hearing.

29. On 29 May 2013, the Club filed an application to stay the present proceedings as it had brought in the meantime another dispute before the FFU DRC, based on an alleged breach by the Player of the Employment Contracts N° 267.

30. The same day, the CAS Court Office invited the Player to file his comment on the Club's request of suspension, which he did on 5 June 2013.

31. On 12 June 2013, the CAS Court Office informed the Parties that the Panel to hear the case had been constituted as follows: Prof. Petros C. Mavroidis, President of the Panel, Mr Bernhard Heusler and Mr Christian Duve, arbitrators.

32. On 4 July 2013, the CAS Court Office advised the Parties that the Club's request for suspension had been granted and *"that this procedure is suspended until the [FFU] has rendered a final decision in the related matter"*.

33. On 2 October 2013, the Player sent to the CAS Court Office a copy of the Decision issued on 14 August 2013 by the FFU DRC, dismissing in full the Club's claims against him. Under these circumstances, the Player requested the present proceedings to be resumed.

34. On 19 December 2013, the CAS Court Office informed the Parties that the Panel decided to hold a hearing and invited them to confirm their availability for 17 February 2014.

35. On 27 December 2013, respectively on 1 April 2014, the Player and the Club confirmed that they deemed a hearing unnecessary. The Player also explained that he did not have the financial capacity to travel to Switzerland to attend the hearing.

36. On 9 April 2014, and on behalf of the Panel, the CAS Court Office sent the following letter to the Parties:

> *"I refer to the arbitral proceedings at hand and duly note that both parties do not wish to hold a hearing in the present matter.*
>
> *The Panel will therefore render an arbitral award solely based on the parties' respective written submissions. Before proceeding to the draft of the award, the parties are requested to answer to the following questions within* ***ten (10) days*** *upon receipt of this letter (by facsimile):*

Question 1

On page 5 of the Appeal Brief, it is stated:

"(...) the Appellant would like to stress that he has not provided to the Chamber any records about the Respondent's salary payments and there is no evidence in the case material that can prove contrary. (…) During the effective period of the contracts No. 169 and No. 267 the Respondent was not receiving the wages according to the Additional Agreement No. 1 to the Contracts No. 267. He was receiving wages only according to the provisions of the Contracts No. 169 and No. 267".

This statement leads to the following questions:

(a) What is the "staff schedule" for the years 2010 to 2012? The Appellant is requested to provide the Panel with a copy of these documents as well as their translation;
(b) The Appealed Decision enumerates the alleged payments made by the Club to the Player during the employment relationship. The list set out by the Chamber is inconsistent with the exhibit 5 to the Appeal Brief. The Appellant is invited to explain the difference;
(c) The Appellant is invited to establish the correlation between the "staff schedule" and the payments made according to exhibit 5 of the Appeal Brief.

Question 2

The Appellant is requested to provide the Panel with the relevant documents in relation with all payments, which were effectively made to the Player during the years 2010-2012.

Question 3

The Appealed Decision and exhibit 5 to the Appeal Brief indicate that some monthly wages were not paid. The parties are requested to explain the reasons for these non-payments.

Question 4

The parties are also requested to provide the Panel with a copy of the rental lease as well as its translation and explain on what contractual basis (e.g. the clause in the contract reflecting this obligation) the Club accepted to assume (some of) the costs related to the apartment provided to the Player and to provide the details of the payments made by the Club in relation to the lease.

In the same vein, the Appellant (only) is invited to explain why the Club paid some, but did not pay some other monthly rents?

Question 5

The Appellant is requested to provide the Panel with an official excerpt (as well as its translation) from the Ukrainian Commercial Register or a comparable document related to FC Goverla for the years 2010-2012".

37. On 18 April 2014, the Player answered to the questions n° 3 and 4 put to him by the Panel. He stated that he ignored the reasons behind the late payment of his wages and doubted that it was caused by the Club's fragile financial situation. As a matter of fact, his teammates had always been paid in a timely manner. He also explained that *"believing the words of the club's management that "the entire debt soon will be repaid" on the 02.06.2012 [he] signed a new employment contract number 267"*. With regard to the question 4, his claim is based on Article VII of the additional agreement to the Employment Contract N° 169. According to the Player, *"it is clear that the club should give [him] $ 200 monthly for rental properties. However for 17 (!) months the club didn't do it"*.

38. On 29 April and 10 June 2014, the Player and the Club respectively sent to the CAS Court Office a duly signed copy of the Order of Procedure. According to Article 9 of this document *"By signature of the present Order, the parties confirm their agreement that the Panel may decide this matter based on the parties' written submissions. The parties confirm that their right to be heard has been respected. Pursuant to Article R57 of the Code, the Panel considers itself to be sufficiently well informed to decide this matter without the need to hold a hearing"*.

39. On 5 June 2014 and because of the Club's failure to answer the questions of 9 April 2013 within the prescribed time limit, the Panel accepted to exceptionally readdress the questions to the Club. Consequently, the Club was requested yet again to provide its answer to the questions no later than 13 June 2014. In addition and within the same time limit, the Club was invited to provide the Panel with the following documents:

> *"a) the original payment slips corresponding to the table mentioned on page 10 of the Appealed Decision; and*
>
> *b) the original payment slips corresponding to the table mentioned on Annex 5 to the Appeal Brief"*.

The Club's attention was drawn to the fact that *"the Panel may infer an adverse impact on the [Club's] burden to substantiate the alleged facts if it fails once more to submit the requested information"*.

40. On 13 June 2014, the Club answered to the questions put to it as follows:

> *"**Answer to question 1***
>
> *(…)*
>
> *According to the Labour Contracts, signed between the [Club] and the [Player], the [Player] received his salary in amount determined in the staff schedule. When the hearing took place in DRC Football Federation of Ukraine, the [Player] insisted that he received his salary in amount determined in Additional Agreements to the Labour Contracts. As an evidence, the [Player] provided "a document" that "proved" that the Club did pay him salary according to the Additional Agreement. This "document" covers a period from June 2011 to June 2012. But there are no documents that show the effected payments in other period. So the [Player] submitted to the DRC his own calculation of arrears wages and the DRC accepted it as an evidence of effected payments.*
>
> *The [Club] stressed that this "document" was submitted to the DRC by the [Player] and the [Club] familiarized with this "document" after the DRC adopted a decision.*

Accordingly, the [Club] considers that the list set out by the Chamber is inconsistent with the exhibit 5 to the Appeal Brief because the DRC did not have documentary evidences of the payment and adopted the decision in reliance on the [Player's] testimony.

(…)

It is impossible to establish correlation between the staff schedule and Exhibit 5 because there were no payments under Exhibit 5.

Answer to the question 2

The [Club] cannot provide the Panel with the relevant documents in relation with all payments, which were effectively made to the [Player] during years 2010-2012 because the [Player] did not sign such documents.

At the same time, the [Club] notes that each month the salary was paid to the [Player] in amount according to the staff schedule. In case the salary hasn't been paid to the Player the Club would be fined by the tax administration (the Club is obliged to pay income duty on behalf of the Players every month).

Answer to the question 3

Monthly wages were not paid in the amount determined in exhibit 5 and/or mentioned in appealed decision, because the Club had no obligation to pay such amounts to the Player. Salary in amount determined in staff schedule was paid to the [Player].

Answer to the question 4

The [Club] has no copy of the rental lease. There were oral agreement between the Player and the Club, about the amount of cash that the Player shall receive each month for apartment rent.

Answer to question 5

Official experts from Ukrainian register is attached (…)".

41. Attached to its submissions of 13 June 2014, the Club filed the following exhibits:

- Staff schedules for the years 2010 to 2012 with their respective translation. Each staff schedule is a one page document, which contains a table with three columns. The first column identifies the position held by the Club's member (for instance, President, vice-president, General Director, professional players, etc.), the second column indicates the number of members for each position (for instance, 1 president, 37 professional players, etc.) and the third column provides the remuneration for each member. According to the staff schedules, the Players were entitled to a remuneration of 907 (the currency is not specified) in 2010 and of 2,000 in 2011 as well as in 2012.

- *"Extract from the unified state register of legal entities and individual entrepreneurs".* Two pages are absolutely illegible. On another page, dated 20 April 2012, it is stated that *"Name of the*

persons, who may act on behalf of the legal entity without power of attorney, with right of signing agreements, and existing of limitations for representation legal entity or natural persos (sic) Schits Ivan Tiborovich (after compulsory written agreement of the Club Council to enter into agreements, contracts and other transactions) (…)".

IV. SUBMISSIONS OF THE PARTIES

(i) The Appeal

42. The Club submitted the following requests for relief:

> *"1. To accept this Statement of Appeal for consideration;*
>
> *2. To annul the Dispute Resolution Chamber football Federation of Ukraine decision in case No. 26/11/2012 under application of footballer Gibalyuk M. M. against Limited Liability Company Football Club Goverla on non-fulfilment of obligations".*

43. The Club's submissions, in essence, may be summarized as follows:

- Whereas the Employment Contract N° 169 had been signed by the Club's President, the additional agreement to the Employment Contract N° 169 had been signed by the Club's General Director, Mr Schits I.T. Pursuant to the clear text of the Club's Charter, Mr Schits I.T. had no authority to sign any contract binding upon the Club. As a matter of fact, only the President could act on behalf of the Club without a power of attorney. In addition, a labour agreement with a professional Player could only enter into force once the Club's Council and President had approved it. These requirements were not met as regards the additional agreement to the Employment Contract N° 169, which is therefore null and void.

- Mr Schits I.T. signed the additional agreement to the Employment Contract N° 169 without being duly authorized, thereby breaching several Articles of the Labour Code of Ukraine.

- The DRC held that the liability of the Club to pay the Player's wages according to the additional agreement to the Employment Contract N° 169 was confirmed subsequently through conclusive acts. However, the conclusive acts consisting of *"footballer residence in club's team composition, appearance in team composition"* only prove the existence of the Employment Contract N° 169 and not of its additional agreement.

- Contrary to what is stated in the Appealed Decision, the Club has not *"provided to the Chamber any records about the [Player's] salary payments and there is no evidence in the case material that can prove contrary".*

- *"During the effective period of the Contracts No. 169 and No. 267 the [Player] was not receiving the wages according to the Additional Agreement No. 1 to the Contracts No. 169 and No. 267. He was receiving wages only according to the provisions of the Contracts No. 169 and No. 267".*

- For some unknown reasons, the Player refused to sign the additional agreement to the Employment Contract N° 267, which is therefore not binding upon the Parties. This explains why this additional agreement has never been filed, in compliance with Article 8 para. 3 of the FFU Regulations.

(ii) The Answer

44. The Player filed an answer, with the following requests for relief:

> *"(…) the [Player] REQUESTS:*
>
> *1. To refuse to the [Club] in satisfaction of the petition of appeal on the [Appeal Decision], in full.*
>
> *2. To confirm the [Appeal Decision]".*

45. The Player's submissions may, in essence, be summarized as follows:

- As soon as the Employment Contract N° 169 came into effect, the Player carried out correctly and extensively his contractual obligations, while the Club failed to pay most of his salaries and contributions towards his rent.

- The Employment Contracts N° 169 and N° 267 and their respective additional agreements have been validly signed by the Parties and are binding upon the Club. The Player was entitled to believe that Mr Schits I.T. was acting within his scope of competence. The fact that the latter exceeded his authority cannot be held against the Player, who does not have to bear the consequences of the Club's internal deficiencies.

- *"The Club does not also refer to any norm of the Labour Code of Ukraine, which would indicate that the Addendum N°1 to the Contract N° 169 is invalid (note: such norms in the aforesaid legal act simply do not exist".*

- *"The parties confirmed by their actions the validity both the Contract N° 169 and Addendum N° 1 to it: tenure of the [Player] in the team of the Club, his performances for the club in a part of the football team, absence of any claims from the side of the club regarding the validity of the Addendum N° 1* ***UNTIL*** *the moment of player's application to the Chamber, and what is most important -* ***the Club itself provided statements about the partial payment of wages to the [Player] according to the additional agreement N°1 to the Contract N°169, what indicates both the presence of financial obligations of the Club towards the [Player] according to the above Addendum, and about the validity of the Supplementary Agreement itself****"* (emphasis added by the Player in its answer).

- The DRC correctly held that the payment of USD 6,000 for the June 2012 salary was made in accordance with the financial terms described in the additional agreement to the Employment Contract N° 267. This payment establishes that the Club accepted to be bound by the said additional agreement.

- By refusing to hand copies of the contracts to the Player, the Club breached several

provisions of the Ukrainian law as well as of the FFU regulations.

V. APPLICABLE LAW

46. The case at hand was submitted to the CAS on 21 February 2013, hence before 1 March 2013, which is the date when the revised Code of Sports-related Arbitration (hereinafter "the Code") came into force. Hence, the 2012 edition of the Code is applicable (see Article R67 of the Code).

47. Article R58 of the Code provides the following:

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

48. According to Article 2.1 of the Employment Contract N° 169 *"The labor relationship and mutual obligations of the Parties are regulated with the Statute, other regulations of the Club, this Contract, the regulations of the Ukrainian Football Championship for professional teams and the current legislation of Ukraine"*. Pursuant to its Article 5.1 *"The Parties are responsible for the non-performance of [sic] improper performance their obligations, which are in the Contract, according to the Ukrainian laws in force"*.

49. Therefore, in the present case and with respect to the applicable substantive law, Ukrainian law is applicable in conjunction *"with the Statute, other regulations of the Club, this Contract"*.

VI. ADMISSIBILITY

50. The appeal is admissible as the Club submitted it within the deadline provided by Article R49 of the Code as well as by the Appealed Decision. It complies with all the other requirements set forth by Article R48 of the Code.

VII. JURISDICTION

51. The jurisdiction of CAS, which is not disputed, derives from Article 34 of the FFU DRC Regulations as well as Article R47 of the Code. It is further confirmed by the order of procedure duly signed by the Parties.

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

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

VIII. MERITS

54. The significance of the case lies in the fact that the Club challenges the findings of the Appealed Decision with very little reasoned arguments, made many contradictory submissions, failed to

address several decisive findings of fact put forward by the DRC, and, in general, adduced little evidence in support of its claim.

55. In addition, the Club systematically refused the pleas by the Panel to clarify its case. On two occasions, the Club confirmed that it deemed a hearing unnecessary (even when it was advised that the Panel had decided to hold one). Furthermore, it left unanswered the questions asked on behalf of the Panel on 9 April 2014. When the Club was given another chance to address the various issues raised by the Panel, it replied to the questions but only partially.

56. On a preliminary basis, the Panel points out that in CAS arbitration any party wishing to prevail on a disputed issue must discharge its "burden of proof", *i.e.* it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. This is what the maxim *"actori incumbit probatio"* amounts to. Indeed, Article R51 para. 1 of the Code provides that together *"[…] the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specifications of other evidence upon which he intends to rely. […]"*. It is manifest that the Panel has no obligation to instruct the case *ex officio*. Surely, Article R44.3 of the Code empowers the Panel to order further evidentiary proceedings if *"it deems it appropriate to supplement the presentations of the parties"*. The words have been carefully chosen. This provision allows Panels to order evidentiary proceedings in order to 'supplement' presentations by the parties. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one, where Panels can intervene within the statutory limits. In other terms, it is in principle the party wishing to establish some facts and persuade the arbitrators that must actively substantiate its allegations with convincing evidence. The Panel in fact, went out of its way and repeatedly requested from the Club to 'complete' its allegations, as discussed *supra*. Its pleas fell on deaf ears.

57. In addition, the present dispute is about a labour conflict. As the employer, the Club has (or at least should have) all the pertinent evidence in its hand: the contracts, the proof of payments, the explanations as regards the eventual late payments, the Player's eventual failure to carry out his obligations, witness statements related to the specific circumstances of the case, etc.

58. In the present matter, the majority of the Panel finds that the Club has not satisfied its burden of submitting clear and convincing proofs that the Appealed Decision was unfounded. On the contrary, the Club only offered contradictory evidence as well as vague remarks and explanations:

    a) Attached to its submissions of 13 June 2014, the Club filed an *"Extract from the unified state register of legal entities and individual entrepreneurs"*. According to this document dated 20 April 2012, Mr Schits I.T. was entitled *"to enter into agreements, contracts and other transactions"*. In spite of the Panel's request, the Club did not provide a similar extract for the years 2010 and 2011.

    In other words, it is not out of the question that Mr Schits I.T. had similar powers of representation in 2010, when he signed the additional agreement to the Employment Contract N° 169. This conclusion is sufficient to dismiss the Club's main argument, according to which the additional agreement was not validly signed on the Club's behalf.

b) In its Appeal Brief, the Club claims that the payment of the Player's wages was exclusively made in accordance with the "staff schedule". It declared that *"During the effective period of the Contracts No. 169 and No. 267 the [Player] was not receiving the wages according to the Additional Agreement No. 1 to the Contracts No. 169 and No. 267. He was receiving wages only according to the provisions of the Contracts No. 169 and No. 267"*.

However, and with reference to the wages paid to the Player during the 2011/2012 season, the Club submitted a document (Exhibit 5 to the Appeal Brief), with the following title *"Record about the [Player's] salary payment"*. None of the amounts mentioned in Exhibit 5 corresponds to the remuneration provided for in the staff schedule, as submitted by the Club on 13 June 2014.

When the Club was asked by the Panel *"to establish the correlation between the "staff schedule" and the payments made according to exhibit 5 of the Appeal Brief"*, it answered that *"It is impossible to establish correlation between the staff schedule and Exhibit 5 because there were no payments under Exhibit 5"*.

In other words, the Club is disputing its own evidence.

c) When the Club was asked by the Panel *"to provide (…) the relevant documents in relation with all payments, which were effectively made to the Player during the years 2010-2012",* the Club answered that it was unable to *"provide the Panel with the relevant documents in relation with all payments, which were effectively made to the [Player] during years 2010-2012 because the [Player] did not sign such documents"*.

This statement seems contradictory with the content of Exhibit 5. Not only does this document establish the fact that the payments were made upon the signature of the Player but there must be some kind of record of payments as, otherwise, the Panel does not see on what basis Exhibit 5 was drawn up.

In this regard, the Club has never explained how, concretely, the salary was paid to the Player. By bank transfer? By cash? If the former, why not simply provide a bank statement to this effect? If the latter, why was it so hard to get a receipt from the Player?

Finally, the fact that the Club was unable to *"provide (…) the relevant documents in relation with all payments"* made to the Player seems also inconsistent with its own evidence. On 13 June 2014, in its answer to the Panel's question, the Club also argued that *"each month the salary was paid to the [Player] in amount according to the staff schedule. In case the salary hasn't been paid to the Player the Club would be fined by the tax administration (the Club is obliged to pay income duty on behalf of the Players every month)"*. It appears that the Club could have easily gotten from the tax administration a summary of the payments made to the Player but failed to do so. It also failed to make plausible the likelihood of such a fine by the tax administration.

d) The Player started to work for the Club in January 2010. However, Exhibit 5 (entitled *"Record about the [Player's] salary payment"*) covers the salaries paid from June 2011 to June 2012. The reasons why this document only covers this period remains unanswered to date. In this

regard, the Club has not filed any record of payment for the months of January 2010 to May 2011. It merely declared that *"each month the salary was paid to the [Player] in amount according to the staff schedule"*.

e) The DRC as well as the Player claim that, within the framework of the proceedings before the previous instance, the Club *"has provided records and the [Player] recognized his sign on them, about partial salary payment just with conditions stipulated by the Additional agreement No. 1 to the Contract"*.

In its submissions, the Club contests that it had submitted documents to the DRC relating to the Player's wages. According to the Club, the records on which the DRC based its Appealed Decision were actually provided by the Player.

The Club is suggesting that the facts presented by the DRC are unreliable. It is not sufficient for the Club to simply make a statement for the Panel to accept that it is true. The Panel, based on objective criteria, must be convinced of the occurrence of alleged facts. *In casu*, the Club adduced no evidence at all. The Club's allegation could have been easily demonstrated, namely by requesting the production of the entire FFU file, which would have allowed to see how the said records were made available to the DRC.

The Club did not offer any evidence to support its allegations.

f) The Employment Contracts N° 169 and N° 267 do not provide for a contribution by the Club towards the payment of the Player's rent. Only the additional agreements do (see Article VII of the additional agreement to the Employment Contract N° 169).

When asked on what basis it *"accepted to assume (some of) the costs related to the apartment provided to the Player"*, the Cub answered *"There were oral agreement between the Player and the Club, about the amount of cash that the Player shall receive each month for apartment rent"*.

The Club failed to explain with whom the oral agreements took place, why it accepted to pay part of the lease and whether the Club's representative was empowered to act on the Club's behalf. According to its own evidence, only the Club's President could represent it without a power of attorney. The Club did not even offer any witness testimony to support its version of the facts.

g) The Club left many questions unanswered: Has the Player served the Club a formal notice to pay the outstanding amounts? Why has the Club not filed *"an official excerpt (as well as its translation) from the Ukrainian Commercial Register or a comparable document related to FC Goverla for the years"* 2010 and 2011, as requested by the Panel on 9 April and 5 June 2014? Etc…

59. In view of the foregoing, the majority of the Panel finds that the Club failed to provide sufficient evidence that would allow this Panel to reverse the Appealed Decision. Likewise, the Player did not put forward any evidence of further financial damages suffered by him in connection with the unilateral termination of the Employment Contracts N° 169 and 267 by the Club.

60. Under these circumstances, the majority of the Panel finds that the Appealed Decision must be confirmed in its entirety, without any modification.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 21 February 2013 by Football Club Goverla against the decision issued by the Dispute Resolution Chamber of the Football Federation of Ukraine on 19 December 2012 is dismissed.

2. The decision issued by the Dispute Resolution Chamber of the Football Federation of Ukraine on 19 December 2012 is confirmed.

(…)

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